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## OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE

3 November 2008



A comparative submission  
prepared for

**PROFESSOR  
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UN Secretary-General's  
Special Representative on  
Business & Human Rights

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## EXECUTIVE SUMMARY

This submission is prepared by Oxford Pro Bono Publico (OPBP) to inform the mandate of Professor John Ruggie, the Special Representative of the United Nations' Secretary-General (SRSG) on business and human rights.

The SRSG has been asked at various stages of his mandate to further explore the obstacles victims of corporate human rights abuse face in accessing justice and obtaining remediation through domestic legal systems either in their own countries where the business operations and human rights abuse takes place ('host states') or in the countries in which the alleged offending transnational corporation ('TNC') is registered or incorporated ('home states'). In particular, it has been suggested that knowledge of obstacles facing victims in accessing formal state mechanisms would help to show whether states are adequately fulfilling their duties under international human rights law to protect against human rights abuse by corporations, which includes the need to redress the abuse. This inquiry is especially important given that access to remedy, including judicial mechanisms, is one of the three core principles in the conceptual and policy framework for business and human rights presented to the Human Rights Council in June 2008.

In pursuance of this mandate, the OPBP research project considers these obstacles in relation to specific jurisdictions, which, to the best of our knowledge, provides an analysis unparalleled in both detail and scale. It is an ambitious project, covering 13 separate jurisdictions: Australia, Canada, the Democratic Republic of Congo (DRC), the European Union, France, Germany, India, Malaysia, the People's Republic of China, Russia, South Africa, the United Kingdom and the United States. The selection of jurisdictions seeks to provide an accurate approximation of world practice, by striking a balance between developed and developing countries. It also seeks to provide insight into rapidly developing countries and emerging economic powers by including the countries of China, India and Russia, jurisdictions in which, for the first time, domestic corporations are looking abroad for new investment opportunities.

The primary focus of the project is on access to justice in TNC home states for victims of corporate human rights abuse in host states. However, a secondary focus of the project, especially in relation to developing countries such as the DRC, is the ability of claimants to obtain redress in their own state. The analysis in both cases entails a consideration of the potential causes of action as well as the potential obstacles such claims may face.

The analysis provided in this submission demonstrates that transnational litigation for corporate human rights abuse is by no means straightforward. There is no uniform approach or standard adopted by states in regulating and adjudicating human rights abuse by TNCs abroad or for providing redress to those adversely affected by such abuse. There is a dearth of specialised legislation that both adjudicates corporate human rights abuse abroad and provides victims specific causes of action against TNCs for their violation of such rights.

Nevertheless, in jurisdictions such as Australia, France, the US and the UK, litigants have, with varying degrees of success, begun to use existing doctrines of criminal and civil law, including tort, contract and consumer protection, as mechanisms for holding corporations domiciled or resident in their jurisdictions liable for human rights abuses committed abroad. In each of the jurisdictions studied in this submission, similar possibilities exist, even if they have yet to be put to such use. Existing criminal and civil laws do not directly refer to human rights and do not generally have extraterritorial operation. This markedly affects all human rights litigation undertaken against TNCs, since the law on which general (as opposed to specialised) causes of action are based is not intended to address the many idiosyncratic issues that arise with respect to transnational human rights litigation.

In each particular case the availability and effectiveness of any remedy will turn on the substance and facts of the actions or omissions of the TNC and its agents, rather than on whether or not there has been a violation of a human right. Because of this, it is almost impossible to provide a generalised account of the obstacles facing victims of corporate human rights abuses; each particular cause of action will have its own obstacles: different tests to be satisfied, different rules affecting jurisdiction and different burdens of proof.

Australia illustrates well the intricacies and vagaries of domestic remedies for claimants seeking redress for corporate human rights abuse. Tort claims for environmental damage caused to land outside of Australia, which have as their gravamen title to that foreign land, will not be heard in some Australian jurisdictions because of a particular common law rule of jurisdiction. On the other hand, claims based purely on personal injury, such as in the asbestos related claims brought by South African victims in the UK against Cape Industries, are not affected by this rule. However, victims bringing such claims may face further obstacles such as the legislative restrictions on the recovery of damages imposed by Australian limitation statutes.

The fact that generalisations are difficult to reach posed substantial difficulties to researchers working to identify the relevant *obstacles* faced by non-national victims in each jurisdiction. The starting point of any effective and comprehensive inquiry will be the consideration of the factual circumstances of the particular case. Such facts will determine both the causes of action available to a claimant and tease out the potential obstacles they might face.

That said, when viewed collectively, the research from the various jurisdictions identifies some congenital obstacles that will typically be faced by claimants. These obstacles can be classified as substantive, procedural and practical.

The first is the non-extraterritorial application of laws. Generally speaking, causes of action—whether criminal or civil—are not intended to operate outside of the state in which they are established. This fact poses a serious obstacle. In addition, claimants have to contend with the varying conflict of laws rules of each home state in order to establish the jurisdiction of the home state courts over the claim. In the jurisdictions surveyed there are generally at least two requirements for the case to proceed to be heard on its merits. First, claimants must establish jurisdiction over the TNC's conduct abroad. Secondly, there is the matter of the availability of a possible course of action. This will depend on the domestic rules of private international law for the given jurisdiction, and in the case of France, Germany and the UK, the relevant European regulations. While there are variations across

the jurisdictions, it can be said that in most circumstances and jurisdictions, cases will be heard provided the corporation is domiciled within the jurisdiction. Even if jurisdiction over the dispute is established, it is quite likely that the law of the host state will be found to be the applicable law. Where foreign law (of the host state) applies to the dispute, it is that system of law that will provide the available causes of action to victims.

Even where claimants establish jurisdiction and identify an available cause of action under the relevant applicable law (whether that of the host state or home state), their claim may be challenged on the grounds that the home state is not the appropriate forum (the doctrine of *forum non conveniens*). The extent to which this poses an obstacle to human rights victims bringing tort claims varies from jurisdiction to jurisdiction. For example, whereas in the US, the concept of *forum non conveniens* may pose a significant obstacle to litigation, as evidenced in the Bhopal litigation brought by India in the US, there is no such concept in Germany.

A further notable obstacle across the jurisdictions surveyed is that of establishing jurisdiction over a parent TNC for the acts of one of its subsidiaries and vice versa. Most TNCs today conduct their businesses abroad through the incorporation of foreign subsidiaries. Prospective claimants may wish not only to sue those foreign subsidiaries but also the parent companies. In both circumstances, the separate legal personality of corporations may constitute an insurmountable barrier to bringing claims in home states against parent TNCs. All of the jurisdictions reviewed recognise separate legal personality for corporations. Therefore, the material question becomes whether or not the claimants can effectively pierce the corporate veil and satisfy his or her claim. Across the jurisdictions the tests to be satisfied in order to pierce the corporate veil are fairly onerous. As such, the principle of separate legal personality presents a difficult, if not insurmountable, obstacle in situations in which the parent company has incorporated subsidiaries to carry on its overseas operations.

Even putting aside the significant substantive and procedural obstacles facing potential claimants, it might often be the practical difficulties that provide the greatest disincentive to bringing claims in TNC home states or in particular jurisdictions. As seen in the DRC, India and Malaysia, these problems might relate to the political stability of a TNC's home state, the ability of its legal system to cope with large and complex claims, or considerable delays in judicial proceedings. Further, one set of facts might give rise to several claims in several different jurisdictions against separate parent TNCs who operate in a joint-venture. The separate criminal and civil claims arising from the use of forced labour in the construction of the Yandana pipeline in Burma, against Total in France and Unocal in the US, illustrates this problem. That one incidence of corporate human rights abuse can give rise to several claims, in several different jurisdictions against separate parent TNCs highlights the complexities and potential difficulties victims may face in obtaining redress.

Similarly, the costs involved in bringing claims serve as a formidable obstacle. In most jurisdictions legal aid for nationals is limited and, in some cases (such as the UK) it is not available for cases governed by foreign law. The availability of lawyers acting pro bono or pursuant to conditional fee agreements (such as in the US and UK respectively) significantly reduces the cost burden for victims. In these situations, the lack of legal aid need not necessarily act as an insurmountable obstacle to justice. However, in most cases costs will be prohibitively expensive and constitute a formidable obstacle to victims bringing claims in TNC home states.

For the victims of abuse, it may be difficult to access information or the requisite legal knowledge and expertise to investigate potential causes of actions in foreign jurisdictions. Once potential causes of action against TNCs are identified in the relevant jurisdiction, victims may face a broad range of obstacles in bringing claims, including those substantive and procedural obstacles arising under private international law and the domestic law of the home state as well as more practical obstacles such as the cost of litigation, the logistics of bringing a claim in a foreign country and access to information. The combination of these factors all but rule out the likelihood of victims obtaining adequate and prompt compensation in the home states of TNCs.

While victims have ultimately obtained redress in several cases, a review of the 13 jurisdictions reveals that not one case has been finally determined in favour of non-national litigants. All cases in which complainants have received compensation have resulted from out of court settlements, even in some circumstances where claims ultimately failed. For example, significant out of court settlements were reached in *Doe v Unocal* in the US, in a criminal action brought against Total in France, *Lubbe and Others v Cape Plc* in the UK and *Dagi v BHP* in Australia. In the case of *Lubbe v Cape Plc*, novel settlement trusts have been established and approved by the courts, which will grant compensation to existing and future claimants. Yet these cases are very rare.

Furthermore, that claimants receive compensation may often be the result of adverse publicity and public pressure or a commercially driven decision of the corporation, rather than the threat of a successful claim in the courts of the home state. The practice of pursuing out of court settlements before disputes are finally determined, while benefiting the victims in the particular case, impacts upon the development of jurisprudence and precedent. As a litigation strategy, out of court settlement prevents the development of a settled body of law, which may pave the way for more victims to bring claims against corporations for human rights abuse. The remaining uncertainty as to whether claimants will actually obtain final judgment in such cases may operate as an obstacle or disincentive to potential claimants initiating actions or, at the least, provide incentive for other claimants to settle out of court, rather than risking adverse findings.

The results in this submission paint a bleak picture. Victims of corporate human rights abuse in host states face significant, if not insurmountable, obstacles to bringing claims against TNCs in their home states. In fact, the research identifies many obstacles facing victims of corporate abuse occurring *both* within and outside the jurisdictions examined. This raises serious questions as to whether states are adequately fulfilling their duties under international human rights law to protect against human rights abuse by corporations, which includes the need to deter such abuse and provide redress. While this may provide individuals with recourse against their state before international and regional human rights bodies for the failure to regulate and adjudicate corporations within its jurisdiction, it provides little help to would-be claimants in their attempt to obtain a remedy against the corporation itself. To accomplish this, the only path will be found in domestic law.

Simply put, more needs to be done to ensure that victims of corporate human rights abuse have effective avenues to obtain justice in both host states and TNC home states. At the very least this submission provides a comprehensive taxonomy of the options available to claimants and the obstacles such claimants face across a broad range of jurisdictions. It is

hoped that this information might inform policy debates on how to better achieve justice and provide redress to victims of corporate human rights abuse, wherever the abuse occurs.

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# INTRODUCTION

— Jennifer Robinson\* —

## 1. HUMAN RIGHTS ABUSE BY TRANSNATIONAL CORPORATIONS

Transnational corporations ('TNCs') play a central role in the world economy. TNCs dominate major industries, their influence stretching into all sectors of society. The impact their operations can have on human rights cannot be understated. While TNCs have the ability to promote economic development and enhance enjoyment of human rights, there is also no doubt that TNCs can and do perpetrate human rights abuses.<sup>1</sup> As a result of the scope of their operations, victims around the globe have been subjected to the harmful actions of TNCs, suffering death, serious physical injury, adverse health affects, and damage to their income, their land, their culture and their livelihoods.

TNCs can mistreat and abuse their workforce in breach of international labour standards and domestic labour laws.<sup>2</sup> They can threaten the lives of workers and communities surrounding investment projects by failing to adhere to safety and environmental regulations, compromising the rights of those individuals to life, health and an adequate standard of living. The 1984 Bhopal gas leak disaster in India is but one example of such corporate human rights abuses, in which up to 15,000 were killed and over 200,000 injured.<sup>3</sup> Further, the activity of corporations operating in developing countries can cause significant environmental damage, jeopardizing the right to health and self-determination, and threatening minority rights, as evidenced by BHP's operations in Papua New Guinea,<sup>4</sup> Cambior's activities in Guyana,<sup>5</sup> and Shell's activities in Nigeria.<sup>6</sup>

Perhaps more worryingly, TNCs enlist the services of dictatorial regimes in the provision of security for their commercial interests. This results in accusations of complicity in the perpetration of wholesale human rights abuses against civilians in host states. For example, Unocal and Total were accused of complicity in employing forced labour in Burma.<sup>7</sup> Talisman was accused of complicity in an armed campaign of ethnic cleansing undertaken in the Sudan that led to the large-scale displacement of populations, extrajudicial killings of civilians, and the mass commission of crimes such as torture and rape.<sup>8</sup> It must be said that

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<sup>1</sup> For an excellent overview, see S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart, Oxford 2004) 1–4.

<sup>2</sup> See, for example, Human Rights Watch, *Enron Corporation: Corporate Complicity in Human Rights Violations* (HRW, New York 1999).

<sup>3</sup> The Bhopal disaster and corporate accountability for the deaths and injuries caused by the gas leak in India is discussed further in the India report, at pp 153–58.

<sup>4</sup> *Dagi and Ors v The Broken Hill Proprietary Company Ltd (No 2)* [1997] 1 VR 428 (VSC), discussed below in the Australia report.

<sup>5</sup> *Recherches Internationales Québec v. Cambior Inc* [1998] QJ no 2554 (Quebec Superior Ct), discussed below in the Canada report at pp 40–41.

<sup>6</sup> See J Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment' (1997) 15 Boston University International Law Journal 261.

<sup>7</sup> *Doe v Unocal*, discussed further below in the section on the US at pp 294–97. See also the criminal action brought against Total in the French courts in the France report at pp 125–26.

<sup>8</sup> *Presbyterian Church of Sudan v Talisman Energy* 244 F Supp 2d 289 (SDNY 2004), discussed further in the Canada report at p 33.

such accusations are not isolated. Similar claims have arisen all over the world, including those against Exxon in Aceh, Indonesia,<sup>9</sup> Freeport McMoran in West Papua, Indonesia,<sup>10</sup> Rio Tinto in Papua New Guinea,<sup>11</sup> and Shell and Chevron in Nigeria.<sup>12</sup> The pattern which emerges from these cases indicates that corporate human rights abuses often—but not always—occur in developing nations states which ‘host’ TNC operations (‘host states’), beyond the territorial and jurisdictional reach of the states in which TNCs are based (‘home states’).

The frequency and scale with which human rights are violated by corporations operating in developing countries is made all the more grave by the notable absence of effective systems for imposing legally accountability. Examples where victims have been able to obtain redress against corporations are rare. Claimants face challenging issues of access to justice and barriers to having their claims heard, all but ruling out the likelihood of them obtaining adequate and prompt compensation.

## **2. SEEKING JUSTICE FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE**

In the face of such challenges, it is incumbent upon policymakers to reflect on the ability of victims to obtain justice, and examine how, to what extent and in which jurisdictions TNCs can be made legally accountable for violations of internationally recognised human rights.

At the outset, it must be understood that corporations are not subject to binding human rights obligations contained in international treaties. Such obligations adhere only to the states that sign them. As such, treaties impose only ‘indirect’ responsibilities on corporations. This means that for victims of corporate human rights abuse to obtain redress they must seek justice within a domestic legal system. Faced with this reality, victims typically bring their claims in one of two fora: the courts of the host state where the violations occur or the courts of the home state of the TNC. This submission seeks to analyse and reflect on the ability of victims to bring their claims in the latter forum: the courts of TNC home states.

## **3. SEEKING JUSTICE IN HOST STATES FOR LOCAL VICTIMS**

As mentioned above, corporations are not subject to international human rights obligations. Rather, such obligations commit states to regulate and control the operations of TNCs resident or domiciled within their jurisdiction, protecting individuals by providing redress to nationals whose human rights are adversely affected by their operations. The duty of states to give effect to human rights as between private parties, otherwise known as ‘horizontal’ application, is confirmed by international and regional human rights jurisprudence. The Committee on Economic, Social and Cultural Rights, or ‘CESCR’, has consistently maintained that to fulfil their duty, states must regulate corporations within their jurisdiction, adjudicating on corporate liability for human rights violations.<sup>13</sup> Consonant with this

<sup>9</sup> *Doe v Exxon Mobil Corp*, 393 F Supp 2d 20 (DDC, 2005).

<sup>10</sup> *Beanal v Freeport McMoran Inc* 197 F 3d 161 (5<sup>th</sup> Cir 1999).

<sup>11</sup> *Sarei v Rio Tinto Plc* 221 F Supp 2d 1116 (CD Cal 2002).

<sup>12</sup> *Wiwa v Royal Dutch Petroleum* 226 F 3d 88 (2d Cir 2000) and *Bowoto v Chevron Texaco Corp* 312 F Supp 2d 1229 (ND Cal 2004).

<sup>13</sup> See for example, Committee on Economic Social and Cultural Rights (CESCR) ‘General Comment 18: The Right to Work’, UN Doc E/C.12/GC/18 (2005) [35] which provides that the duty to protect includes the duty to ‘...regulate the activities

obligation, international and regional bodies have concluded that a state's failure to regulate companies *within* its jurisdiction, be they local or transnational corporations, can amount to a violation of the state's international human rights obligations.<sup>14</sup> Individuals therefore have a cause of action against the state for failing to take appropriate measures to safeguard their rights. Important as this may be, it provides little help to would-be claimants in their attempt to obtain a remedy against the corporation itself. To accomplish this, the only path to obtain effective redress will be found in domestic law.

In many countries domestic social and environmental laws, such as legislation regulating labour and employment, anti-discrimination, sexual harassment, occupational health and safety, consumer protection, environmental protection and protection of culturally significant areas, impose domestic human rights responsibilities on corporations. Criminal laws exist in some states to punish and deter certain forms of egregious corporate behaviour, for example, the creation of crimes such as corporate manslaughter for deaths caused by gross corporate negligence. To the extent that they are applicable between private parties, national bills of rights may also be relevant. While such corporate accountability standards exist and are regularly enforced in developed nations, it is often the case that greater standards of behaviour are demanded of TNCs in developed countries compared to developing countries.<sup>15</sup> The result is that victims of corporate human rights abuse by TNCs in developing states are often left without avenues for justice or compensation.

The Special Representative of the Secretary-General of the United Nations ('SRSG') has noted that 'at the domestic level some governments may be unable to take effective action on their own, whether or not the requisite will is present'.<sup>16</sup> The pressure on states to attract foreign investment combined with the economic power of TNCs relative to the states in which they operate often prevent the establishment and operation of effective systems of domestic corporate accountability. In some cases states may even protect TNCs from being held accountable. By way of example, Papua New Guinea ('PNG') took steps to shield BHP from potential liability for the environmental damage caused by its operations in the OK Tedi river basin. In that case, the PNG government enacted legislation to make it a criminal offence for PNG citizens to seek compensation against BHP in a foreign court.<sup>17</sup> Furthermore, lawyers acting for the villagers in the claim before the Australian courts were harassed and denied access to their clients in PNG.<sup>18</sup>

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of...corporations so as to prevent them from violating the right to work of others'. See also CESCR 'The Right to the Highest Attainable Standard of Health' UN Doc E/C.12/2000/4 (2000), 11, 15, which provides that the "the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries" would violate the right to health.

<sup>14</sup> See *ibid.* Cases within each of the regional systems confirm this approach: see *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights Series C No 79 (31 August 2001) and *Social and Economic Action Center v Nigeria* Comm 155/96, Case No ACHPR/COMM/A044/1. Decisions of the European Court of Human Rights demonstrate that the failure of states to properly implement and apply nuisance laws, zoning laws and environmental regulations against corporations can violate civil and political rights such as the right to respect for one's home and to private and family life. See, for example, *Lopez Ostra v Spain* (1995) 20 EHRR 277 (failure to regulate fumes from a waste treatment plant violated Article 8); *Hatton and Others v United Kingdom* [2003] ECHR 338 (8 July 2003) (failure to sufficiently regulate noise levels of night flights from Heathrow violated Article 8); *Oneryildiz v Turkey* [2004] ECHR 657 (30 November 2004) (Turkey violated the right to life for failing to have adequate regulatory measures and supervision of a trash tip that led to an explosion).

<sup>15</sup> See discussion in Joseph (n 1) 11.

<sup>16</sup> J Ruggie, 'Business and Human Rights: The Evolving Agenda' (2007) 101 Am J Int Law 819.

<sup>17</sup> See Compensation (Prohibition of Foreign Legal Proceedings) Act 1995 (PNG), cited in Joseph (n 1) 5. For a discussion of the claim brought in Australia against BHP, see the Australia report.

<sup>18</sup> See discussion in N Low, B Gleeson, 'Situating Justice in the Environment: The Case of BHP at the OK Tedi Mine' (1998) 30 (3) *Antipode* 201, 201-226.



In cases where state military forces provide security to TNC operations and both the state and the TNC are implicated in the abuse, it may be futile and even dangerous for victims to bring claims or to seek prosecution of the corporations. To add to this difficulty, developing states may have underdeveloped legal systems and lack the technical and legal expertise to properly regulate corporate activity.<sup>19</sup> The Kilwa trial in the Democratic Republic Congo ('DRC'), discussed later in this submission, demonstrates the difficulties posed by both of these issues. The trial involved the attempted prosecution of a TNC, and actual prosecution of its agents for their role in providing logistical support for an operation which resulted in the illegal detention, torture, and summary execution of a number of civilians by members of the armed forces. During the course of the trial, international and domestic human rights organisations were threatened with violence. Despite the fact the claim was prosecuted with the assistance of United Nations investigators and under intensive monitoring by international non-governmental organisations ('NGOs'), systemic intimidation, under-resourcing and corruption within the Congolese judicial system meant that the defendants were acquitted and, consequently, the victims denied justice.

State complicity in abuse and concerns for the integrity of judicial processes and the physical safety of victims aside, the judicial system in host states may otherwise be an ineffective or an undesirable forum for claims involving corporate human rights abuse. In many cases, the legal and judicial system of the host state may simply be unable to cope with the type of large and complex claims such litigation can entail. The claims arising from the Bhopal tragedy in India provide a poignant example of this. The Indian government brought a claim before the US courts on behalf of the victims against the US parent company, Union Carbide, for the damage caused to Indian citizens by the Bhopal gas leak in India. In its submissions before the US courts, the Indian government argued that its own judicial system was not the appropriate forum for the claim precisely because the Indian judiciary was incapable of dealing with the issues raised by the tragedy.<sup>20</sup> Ultimately, the court rejected this argument and as a result declined to hear the matter, which led to fresh proceedings being brought in India. In the course of the Indian litigation the submissions of the government were unfortunately confirmed: the trial was plagued by severe delays and concerns over the adequacy of compensation awarded to victims.<sup>21</sup>

As these examples demonstrate, domestic courts of developing host states cannot always be relied upon to provide legally accountable for corporate human rights abuses or to provide victims with justice and redress. In many host states, victims have no available cause of action, or face insurmountable obstacles to bringing their claims. Because of this, there has been an increasing tendency of victims to instead seek justice in the courts of the home states of TNCs.

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<sup>19</sup> Joseph (n 1) 5.

<sup>20</sup> See *In Re Union Carbide Corp Gas Plant Disaster at Bhopal* 634 F Supp 842 (SDNY 1986), 846–48 and further discussion at pp 153–58, below, in the India report. While the motivation for the Indian government's submission in this regard may have been — in part — based on strategic concerns (to ensure Union Carbide waived any limitation period defence). It nevertheless demonstrates the point.

<sup>21</sup> See *MC Mehta v Union of India* (1987) 1 SCC 395; (1989) 1 SCC 674; *Union Carbide Corporation v Union of India* (1989) 3 SCC 38 and discussion at pp 153–58, below, of the India report.

#### 4. SEEKING JUSTICE FOR NON-NATIONALS IN HOME STATES OF TNCs

As noted above, corporate human rights abuse often occurs in the territory of host states, beyond the home state's jurisdiction. This renders TNC operations in the developing world 'difficult regulatory targets'<sup>22</sup> and poses significant obstacles to justice for victims of human rights abuse. As Seidl-Hohenveldern observed in 1987, '...*de lege lata* most States will be able to deal with the activities of [TNCs] *only in as much as these activities are exercised within their own territory*'.<sup>23</sup> (emphasis added) This statement, although perhaps not technically correct, demonstrates a common misconception. States do, in fact, have the jurisdictional competency to regulate the activities of their own corporations operating abroad; but they have generally refrained from doing so. This practice, coupled with the inability or unwillingness of host states to act creates a regulatory lacunae, termed by some as an 'accountability gap' in which TNCs are able to evade legal accountability for their actions.<sup>24</sup> In many cases, this gap leaves victims of corporate human rights abuse in developing states without justice and without access to effective remedies.

To bridge the accountability gap, the issue that arises is the extent to which accountability for TNC operations in host states can be imposed extraterritorially. Or, put another way, the extent to which home states are capable of regulating the operations of TNCs abroad.

As the SRSR noted in a recent overview of his work to date, current guidance from the Committees suggests that while international human rights treaties do not require States to exercise extraterritorial jurisdiction over corporate abuse, States are nonetheless free to do so.<sup>25</sup> Based on this conclusion, the Committees have begun to encourage home states to pay greater attention to preventing TNCs registered in their jurisdiction from committing human rights violations abroad. The Committee on Economic, Social and Cultural Rights ('CESCR') has suggested that State-parties should take steps to 'prevent their own citizens and companies' from violating rights in other countries.<sup>26</sup> The Committee on the Elimination of Racial Discrimination ('CERD') has noted 'with concern' reports of adverse impacts on the rights of indigenous peoples in host states from the activities of TNCs registered in Canada. The CERD encouraged the state party Canada to 'take appropriate legislative or administrative measures' to prevent such acts, further recommending that the state explore ways to hold such corporations 'accountable'.<sup>27</sup> The CERD has made similar comments with regards to the United States.<sup>28</sup>

Given that states *can* regulate the overseas operations of their corporations, the issue then become the extent to which home states impose such regulation and, consequently, the extent to which non-nationals are able to seek justice and redress against TNCs in their home states for human rights abuse committed abroad.

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<sup>22</sup> There is a wealth of literature addressing this point. For example, see discussion in B Stephens, 'The Amoralism of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law 45, 58–60.

<sup>23</sup> I Seidl-Hohenveldern, *Corporations in and under International Law* (Grotius, Cambridge 1987) 12.

<sup>24</sup> See Stephens (n 22).

<sup>25</sup> See Ruggie (n 16) 829–30.

<sup>26</sup> Committee on Economic Social and Cultural Rights, 'The Right to Water, General Comment No 15' (26 November 2002) UN Doc E/C.12/2002/11 [33].

<sup>27</sup> 'Concluding Observations for Canada' (25 May 2007) UN Doc CERD/C/CAN/CO/18, p 4 para 17.

<sup>28</sup> 'Concluding Observations for the United States of America' (8 May 2008) UN Doc CERD/C/USA/CO/6, p 10 para 30.

Commentators have noted that states have generally been reluctant to regulate the operations of their TNCs abroad due to the perception that such regulation places their TNCs at a competitive disadvantage compared to TNCs registered in other countries. Litigants have nevertheless begun to pursue alternative means for holding TNCs liable in the courts of their developed home states for human rights abuses in host states.<sup>29</sup> In jurisdictions such as Australia, the UK and the US, creative litigants have begun to make use of civil claims such as tort, contract and consumer protection to bring claims against TNCs.

However, as noted by the SRSG, at ‘...national levels, there is enormous diversity in the scope and content of corporate legal responsibilities regarding human rights’.<sup>30</sup> There is no uniform approach or standard adopted by states in regulating and adjudicating the operations of TNCs abroad or for providing redress to those adversely affected by such operations. For the victims of abuse, it may be difficult to access information or the requisite legal knowledge and expertise to investigate potential causes of actions in foreign jurisdictions may be lacking. Once potential causes of action against TNCs are identified, victims may face a broad range of obstacles in bringing claims, including those substantive and procedural obstacles arising under the relevant law as well as more pragmatic obstacles such as the cost of litigation and access to information. As this submission will demonstrate, transnational litigation for corporate human rights abuse is by no means straightforward.

## **5. OXFORD PRO BONO PUBLICO PROJECT: OBSTACLES TO JUSTICE FOR NON-NATIONALS IN TNC HOME STATES**

The SRSG has been asked at various stages of his mandate to further explore the obstacles victims of corporate human rights abuse face in accessing justice and obtaining remediation through domestic legal systems either in their own countries where the business operations and human rights abuse takes place (host states) or in the countries in which the alleged offending corporation is registered or incorporated (home states). In particular, it has been suggested that knowledge of obstacles facing victims in accessing formal state mechanisms would help to show whether states are adequately fulfilling their duties under international human rights law to protect against human rights abuse by corporations, which includes the obligation to punish and redress violations of human rights.

In pursuance of this mandate, the OPBP research project seeks to consider these obstacles in relation to specific jurisdictions, which, to the best of our knowledge, provides an analysis unparalleled in both detail and scale. It is an ambitious project, covering 13 separate jurisdictions: Australia, Canada, the Democratic Republic of Congo, the European Union, France, Germany, India, Malaysia, the Peoples’ Republic of China, Russia, South Africa, the United Kingdom and the United States. The selection of jurisdictions seeks to provide an accurate approximation of world practice, by striking a balance between developed and developing countries. It also seeks to provide insight into rapidly developing countries and emerging economic powers by including the countries of China, India and Russia, jurisdictions in which, for the first time, domestic corporations are looking abroad for new investment opportunities.

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<sup>29</sup> Joseph (n 1) 12.

<sup>30</sup> UNHRC, ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises’ (9 February 2007) UN Doc A/HRC/4/035 [34].

The primary focus of the project is on access to justice in TNC home states for victims of corporate human rights abuse in host states. However, a secondary focus of the project, especially in relation to developing countries such as the DRC, is the ability of claimants to obtain redress in their own state. The analysis in both cases entails a consideration of the potential causes of action as well as the potential obstacles such claims may face.

## 6. RESEARCH QUESTIONS

Each of the following questions will be addressed in separate reports on each of the selected jurisdictions.

- Are there available causes of action for victims to obtain redress from corporate human rights abuses committed abroad?
- What civil, criminal or administrative causes of action exist and what remedies are provided?
- Where victims might have a cause of action, what substantive, procedural and practical hurdles may still prevent them from accessing formal legal mechanisms and obtaining redress? In particular:
  - o What procedural obstacles might prevent a case from proceeding? Procedural obstacles might include, *inter alia*, issues of standing for non-nationals, statutes of limitation, jurisdictional challenges such as *forum non conveniens*, parent-subsidiary liability and piercing the corporate veil.
  - o Where claimants have a strong case under the core elements of a cause of action, what substantive obstacles might convince the forum to refuse to further consider the case? For instance, is the forum likely to consider the political question / interest and act of state doctrines?
  - o Is there a history of either the home state or host states entering *amicus* briefs in opposition to or in support of such actions? What about industry groups?
  - o Is legal aid available to all claimants? If so, in what situations and under what circumstances is it available? Is legal aid likely to be adequate?
  - o Apart from legal costs, what formal costs are involved in commencing an action (for example, court fees)?
  - o Is witness protection available?

- o Are there any legal obstacles to enforcing judgments, for example, if the defendant or plaintiff resides in another jurisdiction?
  
- o Are there any other non-legal obstacles facing claimants, for example, intrinsic weaknesses in the judicial system?

Each jurisdiction report also includes a case study which illustrates how the various obstacles identified above have affected claims brought by victims of corporate human rights abuse. In many of the jurisdictions considered there have not, as yet, been any reported cases of non-nationals bringing claims against TNCs registered in that particular jurisdiction for abuses occurring abroad. Instead, cases were selected in which host-state nationals had brought claims against corporations. While not involving victims from abroad, these case studies provide insight into the potential causes of action and the ability of each jurisdiction to provide justice and redress in response to corporate human rights abuse. Non-nationals will face the same obstacles faced by local claimants, in addition to the complications that arise due to the fact the violations have occurred outside of the jurisdiction.

The SRSG has noted the need for a ‘systematic mapping’ and ‘comprehensive country-by-country study not only of the direct applicability of international law, but also of a range of relevant national measures: constitutional protections of human rights, legislative provisions, administrative mechanisms, and case law’ as it relates to corporations and corporate human rights abuse.<sup>31</sup> Through this submission, a consideration of precisely these issues in 13 separate jurisdictions, OPBP hopes to contribute to this systematic mapping process.

The results paint a bleak picture. Victims of corporate human rights abuse in host states face significant, if not insurmountable, obstacles to bringing claims against TNCs in their home states. In fact, the research identifies many obstacles facing victims of corporate abuse occurring *both* within and outside the jurisdictions examined. This raises serious questions as to whether states are adequately fulfilling their duties under international human rights law to protect against human rights abuse by corporations. As this submission will demonstrate, more needs to be done to ensure that victims of corporate human rights abuse have effective avenues through which to obtain justice for the harm caused, both at home and in TNC home states.

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<sup>31</sup> UNHRC (n 29) [34].

# AUSTRALIA

— Jonathan Bonnitcha and Tolga R Yalkin\* —

## 1. BACKGROUND

Australia is a dualist jurisdiction and as such its international human rights obligations must be incorporated by legislative act before they become part of Australian domestic law.

As Australia has neither a constitutional bill of rights, nor a systematic pattern of incorporating the provisions of international human rights treaties which it has ratified into domestic law, the mechanisms for holding Australian corporations liable for human rights abuses committed outside Australia are limited. To the extent that possibilities do exist for holding Australian corporations liable in such circumstances, they rely on a diffuse collection of legal instruments and common law principles, many of which are not formulated in the language or context of human rights.

In practice, the causes of action most likely to be effective against an Australian company are those that can be grounded in either contract or tort law. In cases of the most egregious human rights violations, a private criminal action under universal jurisdiction for crimes against humanity may also be effective.

A handful of large transnational corporations ('TNCs'), and a greater number of medium and small size TNCs, are incorporated in Australia. Of the large TNCs based in Australia, the most significant for the purposes of this submission, are companies that primarily exploit natural resources. These include Australia's largest company, BHP Billiton, and Australia's fourth largest company, Rio Tinto.

## 2. CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST TNCs

### A. Civil Law

#### i. Contract and Tort

Both the Australian law of contract and tort provide a potential route for claimants to seek redress for wrongs committed against them by Australian corporations overseas. It is convenient to consider these two areas of law together for two reasons. First, they both share similar characteristics (such as requirements for service, recognition and enforcement, etc). Second, under some circumstances putative claims can be framed either in terms of breach of contract or tort (e.g. in employment-related claims).

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As regards both tort and contract, there are a number of hurdles that any potential claimant would have to overcome. These include: (i) effecting service; (ii) resisting a claim of *forum non conveniens*; and (iii) formulating an effective claim. In relation to tort in particular, which tends to be more restrictive, there are a two additional barriers: (iv) the *Moçambique* rule; (v) the civil liabilities act limitations and modifications. Finally, it will become convenient to consider the potential for recognition and enforcement of both judgments rendered by an Australian court in overseas jurisdictions, and judgments rendered in overseas jurisdictions in Australia.

All things considered it seems that both tort and contract provide a relatively convenient way for claimants to obtain redress from Australian companies operating overseas. This is confirmed by the actual practice of foreign litigants in bringing actions in Australia. The barriers to bringing an action are minimal. The more difficult challenges being the ability of a claimant to satisfy the court that there has been a breach of contract, negligence, trespass, etc.

### **i. Service Requirements**

As with many jurisdictions, Australian law imposes certain requirements in relation to serving a defendant. When looking exclusively at Australian companies, this does not seem to be problematic, as they will undoubtedly be 'present' within the jurisdiction thus satisfying one of the common law bases for jurisdiction.

The traditional test for 'presence' of a corporation was laid down by Holland J in his decision in *National Commercial Bank v Wimborne*.<sup>32</sup> Presence is established where:

- (1) The company is represented in the territory of the forum by an agent who has authority to make binding contracts with persons in the territory;
- (2) The business is conducted at some fixed and definite place in the territory; and
- (3) The business has been conducted in the territory for a sufficiently substantial period of time.

It is important to keep in mind that under the common law rules of service the court has no jurisdiction should the corporation 'close up shop and skip town'.<sup>33</sup>

Presently, the Corporations Act 2001 (Cth) requires companies to be registered with the Australian Securities and Investments Commission pursuant to s 601CA and specifically allows service on this registered agent pursuant to s 109X. Thus, there does not seem to be any difficulty in serving an Australian company with originating process to bring a claim either in contract or tort.

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<sup>32</sup> [1979] 11 NSWLR 156 (NSWSC) 165.

<sup>33</sup> *Queensland v Property Nominees Pty Ltd* (1982) 6 ACLR 739 (QSC) 745–46.

## ii. Exercise of Jurisdiction in Tort

Even if jurisdiction is established by effective service, if the claim is brought in tort the claimant may have to resist a plea from the defendant seeking a discretionary non-exercise of jurisdiction by the court or *forum non conveniens*. The authoritative Australian test for *forum non conveniens* was set down in the decision of *Voth v Manildra Flour Mills Pty Ltd.*<sup>34</sup> At its core, the test provides that if a claimant has regularly invoked the jurisdiction of an Australian court, such that the court is properly seised (as detailed above), the Australian court will hear the matter unless:

- (1) There is a more appropriate overseas forum where the matter should be heard; and
- (2) The Australian court is *a clearly inappropriate forum* in which to hear the matter.

This position should be contrasted with that of other common law jurisdictions, such as England, Canada and the United States. These jurisdictions have developed the doctrine of *forum non conveniens* in a way that is generally more generous to defendants. Thus, vis-à-vis other jurisdictions, Australia's doctrine of *forum non conveniens* poses less of a barrier to justice to would-be claimants because an Australian court will be less likely to stay proceedings.

## ii. Successful Claim

The success of any claim, be it in contract or tort, will depend on satisfying the particular principles of law relevant to that claim. It is both beyond the scope of this paper and not within reason to consider the substantive principles of law determining liability for breach of contract or for attracting tortious liability. Suffice to say that the Australian principle for establishing tortious and contractual liability are not anomalous when compared to other like jurisdictions.

## iii. Moçambique Rule

Potential claimants should also be aware that additional problems may arise in relation to enforcing their right in tort. One example of such problems is the *Moçambique* rule.

This common law rule provides that an Australian court cannot entertain a 'claim...[that] essentially concerns rights, whether possessory or proprietary, to or over foreign land in the sense that those rights are the *foundation* or *gravamen* of the claim.'<sup>35</sup> (emphasis added)

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<sup>34</sup> (1990) 171 CLR 538 (HCA).

<sup>35</sup> *Dagi v The Broken Hill Proprietary Company Ltd (No 2)* [1997] 1 VR 428 (VSC).



In the leading case in this area, *Dagi v BHP*,<sup>36</sup> the court held that claims grounded on trespass and nuisance in relation to foreign land were not actionable. The application of the *Moçambique* rule, which prevents the court from adjudicating on title to foreign land or on 'local actions',<sup>37</sup> depends critically on the characterisation of the offence. To the extent that the court characterises the claim as one which 'essentially concerns' such rights, it may not consider itself competent to adjudicate.

This could provide a potential barrier to claimants, notably in circumstances in which the claimant is arguing that the foreign company has polluted land or water, and caused subsequent harm to the inhabitants.

However, the *Moçambique* rule in Australia, like other common law principles in jurisdictions around the world, has been the subject of statutory regulation. In Australia, the extent of such legislating has been limited to statutory abrogation in New South Wales ('NSW'). Strictly speaking, the rule remains intact as regards the other states and territories of the Commonwealth where abrogation has not occurred. However, there is a theoretical argument that by operation of the cross vesting legislation enacted in all Australian jurisdictions, abrogation is not limited to just NSW. This is because of the fact that abrogation of the rule is equivalent to the granting of jurisdiction—it enlarges the jurisdiction of the court to hear certain matters. By doing so, it falls within the subject matter of the cross-vesting legislation of the states. Because of this Davies concludes:

It is difficult to see the basis on which the cross-vesting legislation now permits a court to adjudicate on the title to land outside the State but within Australia, while not also allowing an interstate court to hear a claim for trespass to land.<sup>38</sup>

His conclusion is supported by operation of s 4 of each State's and each Territory's respective cross-vesting acts, whereby their respective Supreme Courts are vested with the jurisdiction of fellow State and Territory Supreme Courts.<sup>39</sup> Thus, when the jurisdiction of the NSW Supreme Court was expanded through the effective abolishment of the *Moçambique* rule by the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW), the jurisdiction of the supreme courts of the other States and Territories correspondingly expanded by s 4 of their respective cross-vesting acts. There is, however, one exception to this. The Australian Capital Territory ('ACT') has expressly retained the foreign title rule by statute. By expressly retaining the title rule, the ACT legislative assembly expressly overruled the prior grant of jurisdiction from the NSW Supreme Court. On this basis Davies concludes that the ACT would remain the exception. Until the other state and territories do the same, it would seem their courts retain jurisdiction to hear claims which violate both the local actions rule and the title rule. Therefore, the Supreme Court of Victoria, which has no equivalent legislation to that of the ACT, would be vested with the jurisdiction which the NSW Supreme Court currently enjoys by virtue of the *Jurisdiction of Courts (Foreign Land) Act* 1989 (NSW).

On the basis of this argument, we are left with the following rubric regarding the application of the *Moçambique* rule:

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<sup>36</sup> Ibid.

<sup>37</sup> Cf. *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).

<sup>38</sup> Davies, *The Ok Tedi 'River and the Local Actions Rule: A Solution* (1998) 72 ALJ 786.

<sup>39</sup> Ibid.

	ACT	Vic	WA	NSW	Qld	NT	Tas	SA
<i>Moçambique</i> Rule	✗	✓	✓	✓	✓	✓	✓	✓

Independently of the theoretical considerations above, the *Moçambique* rule is unlikely to manifest as a practical barrier in any case brought before Australian Courts. This because: (a) for the rule to be enlivened, the claim must be one concerning title to foreign land, and (b) in reaching to its decision, the court in question must characterise the claim as one relating to foreign title. Both these requirements must be cumulatively met for the rule to have any application. The difficulty of achieving this is demonstrated by the marked absence of cases in which the *Moçambique* rule figures prominently. Nevertheless, to increase certainty in ensuring that a claim is heard a claimant should, where possible, bring his or her claim in NSW where express abrogation of the rule has occurred or at the very least in any other jurisdiction other than the ACT. Thus, all things considered, the *Moçambique* rule does not provide a substantial barrier because (i) it is unlikely to arise and be applied in practice, and (ii) its application can be entirely avoided by brining the action to an appropriate forum.

#### iv. Acts affecting Civil Liability

Any claimant contemplating litigation in an Australian jurisdiction must take into consideration the increasing role played by acts reforming civil liability law.<sup>40</sup> The limitations on damages that these acts impose are their most relevant components, and should be kept in mind when considering the effectiveness of any litigation.

State	General damages	Economic loss	Discount rate	Exemplary, Punitive or aggravated damages
New South Wales	Severity of injury must be 15% of the worst case scenario and Maximum cap on general damages is \$350,000	Three times average weekly earnings	5%	Abrogated

<sup>40</sup> Cf. Civil Law (Wrongs) Act 2002 (ACT), Civil Liability Act 2002 (NSW), Civil Liability Act 2002 (Tas), Civil Liability Act 2002 (WA), Personal Injuries Proceedings Act 2002 (Qld), Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic), Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA). In South Australia, there existed an act regulating tortious liability — the Civil Liability Act 1936 (SA) — and as such the Wrong Amendment Act (SA) merely added to this.

<b>South Australia</b>	Minimum 7 days impairment (or no compensation) and maximum cap on general damages of \$240,000	Maximum cap on damages for economic loss of \$2,200,000	5%	Abrogated
<b>Queensland</b>	Not specified	Three times average weekly earnings	5%	Abrogated
<b>Victoria</b>	Maximum cap on general damages of \$371,380	Three times average weekly earnings	5%	Not abrogated
<b>Tasmania</b>	No threshold, no cap	No threshold, no cap	5%	Not abrogated
<b>Western Australia</b>	Minimum threshold of \$12,000	Three times average weekly earnings	Not mentioned	Not abrogated
<b>ACT</b>	No threshold, no cap	Three times average weekly earnings	Not mentioned	Abrogated

Potential claimants should also be aware that these acts affect the ability to claim costs, and the ability to recover for purely psychiatric injury. The acts do impose some very relevant limitations to the ability of claimants to gain recompense. However, the limitations would only become relevant if the award to the foreign claimants was sufficiently generous. Thus, although it cannot be said that the acts impose a barrier to justice, they do create ceiling amounts for the award of reasonable damages in certain circumstances.

## **B. Recognition and Enforcement**

Recognition and enforcement, as in any jurisdiction, requires a consideration of two distinct scenarios:

- (1) Recognition and enforcement in overseas jurisdictions of judgments given by an Australian court; and
- (2) Recognition and enforcement in Australia of judgments given by a foreign court.

These two elements directly affect the ability of a claimant to obtain justice in the Australian courts. The first question goes directly to the heart of the value of an Australian judgment in the hand of a judgment creditor. The second goes to the ability to circumvent the obstacle of bringing an action in Australia itself, instead seeking only recognition and enforcement of a foreign judgment in Australia. Ultimately, the provisions for recognition and enforcement of foreign judgments in Australia, like other common law jurisdictions, provide a significant

advantage to claimants who have been awarded compensation in overseas judgments providing the jurisdictional requirements of private international law are satisfied.

As regards (1), a comprehensive examination of the recognition and enforcement of judgments rendered by an Australian court in overseas jurisdictions is entirely beyond the scope of this paper. To say the least, foreign practices are idiosyncratic. Some jurisdictions, such as Russia, contain an absolute prohibition on the recognition of any foreign judgments in their courts. A comprehensive examination would necessarily require the examination of the domestic laws of recognition and enforcement for every relevant jurisdiction, as opposed to an examination of Australian law itself.

That said, in relation to such a mammoth task there is one piece of legislation that bears mentioning: the Foreign Judgments (Reciprocal Enforcement) Act 1991 (Cth). This Act forms a component of an international system for recognition and enforcement, whereby foreign jurisdictions give relatively automatic recognition and enforcement (where necessary) to judgments rendered by each other's courts. Admittedly, such 'automatic recognition' is subject to post-registration challenges on limited basis. But it should be kept in mind that the Australian Governor General only certifies jurisdictions as entitled to recognition after he or she is satisfied that the foreign jurisdiction offers *reciprocal* recognition and enforcement to Australian judgments. Thus, it could be assumed that in relation to the countries to which the benefit of registration is extended, the basis for recognition and enforcement substantially mimics the principles for recognition and enforcement of Australian judgments, to be discussed in the following paragraphs. A definitive list of the countries in which Australian judgments are entitled to recognition and enforcement by registration are listed in the Appendix.<sup>41</sup>

As regards (2), namely recognition and enforcement in Australia of judgments given by a foreign court, an Australian court will recognise a foreign judgment either:

- (1) According to the relevant common law principles of private international law;  
or
- (2) By registration under the provisions the Foreign Judgments Act 1991 (Cth).

As already mentioned above, the Foreign Judgments Act 1991 (Cth) mimics the common law principles for recognition and enforcement. Thus, this submission will first examine the common law principles for recognition and enforcement, then turn to the specific provisions of the Act. It must be kept in mind that the relevance of the grounds for recognition and the exceptions to recognition will be contingent on the particular facts surrounding the foreign judgment. Thus, it is hard to say whether the Australian regime is 'good' or 'bad' for claimants. However, what can be said is that it is consistent, in that it provides distilled legal principles that are well established and have a history of relatively reliable application by Australian courts. Thus, the best advice that could be given to any claimant considering seeking an order from a foreign court to ultimately enforce in Australia is that he or she be

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<sup>41</sup> See pp 30–31, below.

fully aware of the requirements that the judgment would have to satisfy in order to be entitled to such recognition and enforcement.

For an Australian court to lend its authority to recognition or enforcement, it must be satisfied that jurisdiction was exercised by the foreign court 'in the international sense.'<sup>42</sup> The originating court will have been exercising international jurisdiction according to Australian law where either the defendant was present within the jurisdiction at the time at which originating process was initiated or where the defendant submitted to the jurisdiction of the court. In relation to corporations, presence requires that the corporation be carrying on a business (a) at a fixed location, and (b) for a sufficiently substantial period of time.<sup>43</sup> Such a determination is ultimately a question of fact.

Turning to the question of submission, the lodging of a claim<sup>44</sup> or contractual submission<sup>45</sup> will constitute a valid submission to jurisdiction. However, in relation to contractual submission, the consent to jurisdiction must be express and it is not sufficient that the parties have selected the court of origin's law as governing their relationship.<sup>46</sup> In relation to the lodging of a claim, the position prior to 1991 was that the contesting of jurisdiction constituted an acknowledgement of jurisdiction, and thus valid submission,<sup>47</sup> but this position has been abandoned by the enactment of s 11 of the Foreign Judgments Act 1991 (Cth).

Additionally, for judgments to be recognised or enforced in Australia, they must be final and conclusive and not subject to appeal as of right,<sup>48</sup> and must generally be an order for a fixed and definite sum.<sup>49</sup> Some Australian courts, notably the New South Wales and Queensland Supreme Courts, have shown an increasing willingness to enforce non-money equitable orders.<sup>50</sup> This will rarely be relevant in the context of foreign claimants and TNCs.

A number of defences exist at common law to resist recognition or enforcement. They include:

- (1) The fraud exception;
- (2) Denial of natural or substantial justice;
- (3) Public policy objections;
- (4) Penal (criminal) or revenue judgments; and

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<sup>42</sup> *Schisby v Westenholz* (1870) LR 6 QB 155 159 (QB).

<sup>43</sup> *Adams v Cape Industries* [1990] Ch 433 (CA Civ).

<sup>44</sup> *Eisenberg v Joseph* [2001] NSWSC 1062.

<sup>45</sup> *Boele v Norsemeter Holdings AS* [2002] NSWCA 363.

<sup>46</sup> *Dundee Ltd v Gilman & Co (Australia) Pty Ltd* (1968) 70 SR (NSW) 219 (NSWCA).

<sup>47</sup> *Henry v Geoprosco International* [1976] QB 726 (CA).

<sup>48</sup> *Nouvion v Freeman* (1889) 15 App Cas 1 (HL).

<sup>49</sup> *Sadler v Robins* (1808) 70 ER 948; *Eisenberg* (n 14).

<sup>50</sup> *White v Verkouille* (1989) 2 Qld R 191 (QSC); *Davis v Turning Property Pty Ltd* [2005] NSWSC 742.

(5) Anti-trust judgments.

Fraud constitutes one of the most obvious exceptions to recognition and enforcement. In principle, there can be no disagreement that an Australian court would not contenance the lending of its authority to recognition of a decision, which had been procured by fraud. The difficulty lies in defining and limiting this concept, and as such has troubled the courts of the common law world for some time. In recent decades the fraud exception has undergone transition in the Australian common law. The decided cases seem to oscillate between allowing the fraud exception to apply in situations in which the claimant knew of the facts on which he would base his allegations of fraud on the one hand, and restricting its application in such situations on the other. In the leading case of *Syal v Heyward*<sup>51</sup> the court held that the fraud exception applied even in circumstances where the judgment creditor had knowledge and did not raise the matter in the originating proceedings. Despite some hiccups,<sup>52</sup> for the purposes of Australian<sup>53</sup> and English law<sup>54</sup> there is no obligation upon judgment debtors to raise the relevant facts in the originating proceedings. As such, to take advantage of the fraud exception in the forum, it is totally unnecessary to demonstrate that new facts have arisen since the originating judgment was rendered.<sup>55</sup> All the judgment debtor must plead is that the foreign court was misled into coming to the wrong decision by evidence which was false irrespective of whether or not the defendant could have raised the issue at the time of the initial trial.<sup>56</sup>

A second exception provided by the common law rules is denial of natural justice or substantial justice. A denial of natural justice can come in the form of a failure to give adequate notice of proceedings,<sup>57</sup> or a gross failure of a trial judge in the foreign jurisdiction to consider relevant evidence.<sup>58</sup> A denial of substantial justice may be found where a decision has been based on a substantially unfair law.<sup>59</sup>

The third common law exception is that of public policy. This is a notoriously confusing area of private international law. However, there are a few principles which bear to be mentioned. As regards the Australian common law, the courts will not find the recognition or enforcement of a foreign judgment as contrary to public policy merely because it represents a different position than that of Australian domestic law.<sup>60</sup> Recognition must be fundamentally offensive to the forum's sense of justice and morality.<sup>61</sup>

Additionally, as with most other jurisdictions, the Australian common law would not countenance the enforcement of penal or revenue judgments<sup>62</sup> even where to do so resembles a private contractual arrangement—the court will look behind the transaction to

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<sup>51</sup> [1948] 2 KB 443 (CA).

<sup>52</sup> *Keele v Findley* (1990) 21 NSWLR 445 (NSWSC).

<sup>53</sup> *Yoon v Song* (2000) 158 FLR 295 (NSWSC).

<sup>54</sup> *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL).

<sup>55</sup> *Yoon* (n 23).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Boele* (n 15).

<sup>58</sup> *Adams* (n 13).

<sup>59</sup> *Gray v Formosa* [1962] 3 All ER 419 (CA).

<sup>60</sup> *De Santis v Russo* [2001] QSC 65, (2001) 27 Fam LR 414.

<sup>61</sup> *Boardwalk Regency Corp v Maalouf* (1992) 6 OR (3d) 737 (CA Ontario) (Canada).

<sup>62</sup> *Huntington v Attrill* [1893] AC 150 (PC).

determine its character.<sup>63</sup> However, where the judgment contains both a penal and compensatory element, the court will sever the penal element and recognise and enforce only the compensatory elements.<sup>64</sup> It is highly unlikely that this exception would ever be relevant to the claims this submission considers.

Finally, in a similar—but less exorbitant—manner to what is the case in South Africa under the Protection of Business Act of 1978, s 9 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth) provides the Commonwealth Attorney General with the power to prevent the enforcement of a foreign anti-trust judgment where (a) to do so is necessary for the protection of Australian national interests, or (b) the assumption of jurisdiction by the foreign court was contrary to international law or inconsistent with international comity or international practice. It might be said that the likelihood of a foreign claimant who has been the subject of human rights violations obtaining a remedy in relation to anti-trust proceedings is quite slim.

As mentioned above, the Foreign Judgments Act 1991 (Cth) substantially follows the thread of the common law. Where the court from which a foreign judgment originates is listed in the appendix contained at the end of this submission, registration is the sole mechanism for the recognition and enforcement of such judgments.<sup>65</sup> S 5 of the Act provides that the Governor General, when satisfied that sufficient reciprocity of enforcement of Australian judgments in a foreign jurisdiction exists, may extend the benefit of registration under the Act to judgments obtained in that foreign jurisdiction.

The difference between common law recognition and enforcement and registration lies in the presumption of validity. Upon registration the Australian court presumes that the judgment has satisfied all of the common law requirements for jurisdiction and that none of the defences apply.

According to the Act, the judgment creditor must register his or her judgment within 6 years of its issue,<sup>66</sup> and the judgment debtor must be given notice and has fourteen days to seek to have registration set aside.<sup>67</sup> S 7 provides that registration must be set aside if any of the common law bases for jurisdiction are not satisfied. However, an additional basis of jurisdiction is provided, previously unknown to the common law: residence.<sup>68</sup> As was demonstrated in the case of *Hunt v BP Exploration Co (Libya)*,<sup>69</sup> the Act offers significant procedural advantages, as there is no need to proceed to judgment or to serve originating process. All that must be done by the judgment debtor is to have the judgment registered and wait.

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<sup>63</sup> *United States v Inkley* [1989] QB 255 (CA Civ).

<sup>64</sup> *Raulin v Fisher* [1911] 2 KB 93 (KB).

<sup>65</sup> Foreign Judgments Act 1991 (Cth) s 10.

<sup>66</sup> *Ibid* s 6(1).

<sup>67</sup> *Ibid* s 6(4).

<sup>68</sup> *Ibid* s 7(3)(a)(iv).

<sup>69</sup> 492 F Supp 885 (ND Tex 1980) (United States).

### C. Piercing the Corporate Veil in Civil Cases

In practice, piercing the corporate veil in a civil case would become an issue if a subsidiary corporation was insufficiently capitalized to meet a judgment award and recourse was required to the funds of a parent company.

The starting position from the perspective of Australian law is that every corporation has separate legal personality and that the debts of a corporation cannot be attributed to its shareholders. Cases where this veil of incorporation has been pierced are very rare, and difficult to rationalize in principled way. Drawing conclusions from the decided cases is further complicated by the fact that in many cases where the corporate veil has been pierced it has often been in relation to related companies under circumstances that can be confined to the facts of the specific obligation or benefit for which the veil was pierced.<sup>70</sup> For this reason a claimant should be advised that the corporate veil provides a formidable obstacle to attaching civil liability to parent companies.

There are four main categories of cases where the corporate veil has been pierced:

- (1) Where a relationship of *agency* has been established;
- (2) Where a sufficient degree of *control* is exercised by one company over another in the context of a corporate group;
- (3) Where a the corporation has been used as a mere 'sham' or 'cloak' for fraud;  
and
- (4) Where the Corporations Act 2001 provides for an exception in the case of:
  - The *de facto* director provisions contained in s 9;
  - the insolvent trading provisions contained in s 588.

Unfortunately, it might be said that in the case of Australian companies operating overseas, the satisfaction of one of the established categories for piercing the corporate veil would be rare. As such, separate legal personality provides a considerable constraint on the ability of foreign claimants to gain recompense from Australian companies, where the Australian company has set up a subsidiary to do its business overseas.

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<sup>70</sup> *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 3 All ER 462 (CA Civ).



### iii. Agency

A claimant may be able to establish the liability of a parent company by satisfying the court that the subsidiary company acted as the parent's agent. Technically, the establishment of liability in this way is not a piercing of the corporate veil at all; it is merely the establishing of a *de facto* agency relationship between two legal persons that allows the debts and profits of the agent to be attributed to the principal. In a corporate context an agency relationship will be established between related corporations when:

- (1) The profits of the subsidiary were treated as profits of the parent company;
- (2) The persons conducting the business were appointed by the parent company;
- (3) The parent company was the head and brain of the trading venture;
- (4) The parent company decided what should be done and what capital should be embarked on;
- (5) The parent company made the profits by its skill and direction; and
- (6) The parent company was in effectual and constant control.<sup>71</sup>

### iv. Corporate Groups

A second category of piercing cases deals with corporate groups. In this area Australian law is stricter than the English common law from which it has evolved. Something more must be established than merely the exercise of corporate control by one company over another.<sup>72</sup> At the bare minimum, the separate legal entities must operate, both internally and externally, as a single unit. Even then, there is still very little likelihood of piercing the corporate veil without some additional element.

### v. Sham for Fraud

The final common law category of cases where the corporate veil has been pierced is fraud, such as where a corporation is set up precisely to avoid a pre-existing legal obligation.<sup>73</sup> In circumstances where it can be proven that a corporation is an instrument of fraud one might most reliably draw the conclusion that the courts will pierce the corporate veil. However, establishing fraud at common law is exceedingly difficult. The doctrine has been developed

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<sup>71</sup> *Smith, Stone and Knight, Ltd v Lord Mayor, Aldermen and Citizens of Birmingham* [1939] 4 All ER 116 (KB).

<sup>72</sup> *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 (NSWCA).

<sup>73</sup> *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935 (CA).

in cases where subsidiaries were used to avoid pre-existing legal obligations. Fraud will be particularly difficult to show in cases where liability is grounded in tort.

#### **vi. De Facto Director**

Australian law also allows a parent or related company to be identified as a *de facto* director. S 9(b)(ii) of the Corporations Act 2001 provides that a person or corporation, not officially appointed a director, will be treated as a director in fact if ‘...the directors of the company or body are accustomed to act in accordance with the person’s instructions or wishes.’

This is not strictly a case of piercing the corporate veil. Identifying a parent or related company does not automatically make them liable for the debts of the company that has committed the human rights violation. It must additionally be shown that the parent or related company, in its capacity as shadow director, breached its director’s duties of good faith or care, diligence and skill. If this is proven it may be possible in such circumstances to pin liability on the parent company.

#### **vii. Insolvent Trading Provisions**

Should the corporation against which the claimant is bringing an action become insolvent ss 588G, 588H, and 588V of the Corporations Act 2001 may prove relevant. It should be noted, however, that their application would be limited to cases of insolvency.

S 588G provides that a director can be made personally liable if he or she has allowed the company to trade whilst insolvent. Strictly speaking, this is an exception to limited liability. If a director has not acted reasonably, then he or she will be civilly liable. Additionally, if the director’s conduct was accompanied by dishonesty, such as intention to defraud or deceive, then he or she will be liable for criminal penalties. S 588H provides a number of defences which are available to a director in such circumstances, and include ‘belief on reasonable ground’ or the fact that the director did not partake in the running of the company at the relevant time due to illness.

In addition to pinning liability directly to directors, s 588V provides that a holding company can be held liable if it allows a subsidiary company to trade whilst insolvent. Broadly speaking, if it was reasonable for the holding company to assume that the company was trading whilst insolvent, the holding company may be held liable for the debts of its subsidiary.

As a concluding statement, it is worth emphasising again the rarity of successful piercings of the corporate veil. A parent company that has made enquiries and received reasonably sound legal advice will be able to structure its corporate group in a way that risk of the parent company shouldering liability is virtually eliminated. As such, separate legal personality provides a considerable obstacle to foreign claimants working for subsidiaries.

## D. Other Claims in Civil Law

### i. Discrimination Law

Australian law provides strong legal protection from discrimination in the workplace on the grounds of religion, race and sex to employees, by operation of a number of different statutes.<sup>74</sup> It also provides some protection for other fundamental rights of workers.<sup>75</sup> However, none of these statutes have extraterritorial reach.

### viii. Corporate Conduct

In the event that a corporation has a corporate code of conduct, a claimant could argue that the corporation's breaches of human rights contrary to its code constitute an action 'that is misleading or deceptive or is likely to mislead or deceive.' Actions of a similar type to enforce corporate human rights standards have been brought in overseas jurisdictions,<sup>76</sup> but have not been attempted in Australia. The advantage of this sort of action is that it does not raise any extraterritoriality problems; the offence could be alleged by any person in Australia who claims that the corporation has engaged in misleading or deceptive conduct, even if the human rights standards occurred outside the territorial jurisdiction of Australia. The most likely obstacle to this claim is the degree of specificity with which the code of conduct is formulated. The onus is on the claimant to prove that the statement would 'cause [persons] to believe what is false.'<sup>77</sup> This would be difficult if the code of conduct were general, vague or merely aspirational.

There is also a narrower basis for a similar claim. A claimant could argue that a corporate code of conduct, which asserted that a corporation would not commit human rights abuses in the production of a product, could be incorporated as a term in the contract for the sale of those goods in Australia. The rules for incorporation of contractual terms in Australia are complex and fact specific. However, a general code of corporate responsibility is unlikely to form part of a contract for the purchase of goods from that corporation in Australia. Even if a corporate code were incorporated, there would also be problems of privity if the alleged human rights violations were committed by a subsidiary or sub-contractor, rather than the corporation making the final sale. Ultimately, such actions would not provide substantial redress to claimants, as legally their success is questionable. Moreover, they also rely on the participation of a third party, usually a consumer.

### ix. Consumer Protection Remedies

The Trade Practices Act 1974 (Cth) is a statute directly applicable to corporations, designed to protect consumers. The remedies available for misleading and deceptive conduct reflect that fact. They are limited to:

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<sup>74</sup> For example, the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth)

<sup>75</sup> For example, the right to strike in the Workplace Relations Act 1996 (Cth)

<sup>76</sup> See generally *Nike, Inc v Kasky* 593 US 654 (US SC 2003).

<sup>77</sup> *The Laws of Australia* (Law Book Co, Sydney) 6.4.6; *Weitman v Katies Ltd* (1977) 29 FLR 336 (FCA).

- (1) Injunctions restraining making the conduct;
- (2) Damages suffered by the person affected by the misleading conduct; and
- (3) Correction.

This sort of litigation may be a politically useful strategy, but it will not enable any form of remedy for the abuses of human rights abroad. Similar to the considerations echoed above, such remedies rely on the participation of a third party in Australia.

## B. Criminal Law

### i. Capacity

According to Australian law, a corporation has criminal capacity and as such may be held liable for any criminal acts it commits. In relation to establishing corporate criminal liability two main problems exist. The first is driving home liability to parent companies in situations in which the subsidiaries have committed the criminal acts. The second is the presumption against the extraterritorial application of criminal statutes. Because of these two substantial hurdles, and the egregious nature of most criminal charges, it is unlikely that a claimant would be provided with substantial remedy via the criminal law.

Most systems of criminal law generally require the establishment of two constituent elements necessary to justify the imposition of criminal liability: *actus reus* (the criminal act) and *mens rea* (the criminal intent). The Commonwealth has enacted legislation in the form of the Commonwealth Criminal Code giving detailed descriptions of the content of these elements in the context of corporations. S 12.2 of the Code contains the definition for the *actus reus* required for a corporation to commit an offence:

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.<sup>78</sup>

The definition is clear: a corporation can only be held criminally liable for its own acts. Thus, at the outset it might be stressed that in the context of establishing criminal liability, piercing the corporate veil to drive home liability to a parent company is not possible. Establishing the *actus reus* will turn on whether the particular employee, agent or officer of a particular body corporate was acting within their actual or apparent authority in their position in that

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<sup>78</sup> Cf. Criminal Code Act 1995 (Cth) part 2.5, div 12, s 12.2.

particular body corporate. In general, this strict attribution requirement would prevent an Australian parent company or related company being held liable for the potentially criminal acts committed by subsidiaries overseas. Because the incorporation of local subsidiaries in foreign jurisdictions is a common commercial practice, this would represent a serious obstacle to holding an Australian parent company liable for human rights abuses committed by its subsidiary companies outside the jurisdiction. Tempting as it may be to apply, by analogy, cases dealing with piercing the corporate veil in civil cases such an extension would be questionable as criminal and civil liability are not commensurate.

The rules for establishing the required *mens rea* for corporate criminal conduct are complex, but focus on the controlling mind of the corporation. The Criminal Code explains that:

If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.<sup>79</sup>

S 12.3(2)(c) establishes the broadest fault element, where a corporation could be held responsible for criminal acts committed by its employees or agents if its corporate culture 'directed, encouraged or tolerated' the action. Ultimately then, in relation to criminal acts committed by subsidiary companies, for a parent company to be liable either:

- (1) The subsidiary must have been acting as the holding company's agent; or
- (2) The criminal act must have been committed by a director of the parent company acting within authority as laid out in s 12.2.

Such factual circumstances are highly unlikely to obtain in real life situations, aside from the strict requirements of the *mens rea* component, and as such it would be unwise to advise a claimant that he or she would be able to successfully attach criminal liability.

Additionally, the presumption of the non-extraterritorial application of criminal statutes would pose a formidable hurdle for any claimant to overcome. This issue will be addressed directly below.

## **ii. Extraterritoriality and Offences**

Both the Australian Commonwealth and the States have the power to enact criminal laws of extraterritorial operation. However, the almost universally accepted presumption is that the extraterritorial scope of a criminal law must be express. Similar to other jurisdictions, in practice the number of substantive offences for which Australian law has imposed extraterritorial liability is limited. They mostly concern acts committed against Australian

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<sup>79</sup> Ibid part 2.5, div 12, s 12.3(1).

interests abroad (such as military personnel) or acts committed in the air, or at sea and specific individual criminal offences (such as the Crimes (Child Sex Tourism) Amendment Act 1994 (Cth)).

### **iii. International Law as a Basis for Criminal Action**

Customary international law plays an important role in the ongoing development of the common law. However, to be of any direct legal relevance principles of customary international law must be received into the Australian common law before they are capable of providing a legal basis upon which to found an action. In Australia wholesale incorporation of international law into domestic law is notably absent. As such, in criminal cases before an Australian court it would be unwise for a claimant to rely directly on the application of human rights norms on the basis that such norms have achieved customary international law. There are, however, particular principles of international law for which the Commonwealth Parliament has provided jurisdiction. The Australian common law recognises universal jurisdiction for war crimes and crimes against humanity. In some areas this universal jurisdiction has been codified in Australian legislation.

By way of example, the Crimes (Torture) Act 1988 (Cth) criminalises torture, defined in concordance with the Torture Convention,<sup>80</sup> wherever it occurs in the world. This Act does not cover the lesser standard of 'cruel, inhuman or degrading treatment or punishment' and, furthermore, is limited to torture committed by those acting as or on behalf of states. As such, the Crimes (Torture) Act 1988 would only provide a means of proceeding against a corporation that commits torture while acting '...at the instigation, or with the consent or acquiescence, of a public official or person acting in an official capacity.'<sup>81</sup> It would not allow recourse against a corporation that tortures individuals in the course of its private operations.

Various other offences have also been added to the small list of international crimes for which extraterritorial jurisdiction applies under Australian law. These are unlikely to assist in prosecution for human rights violations by corporations, as they either require the act to be perpetrated by official or quasi-official entities or of such an egregious nature that the commission by a corporation is so highly improbably such that we can safely dismiss them as a relevant consideration.

### **iv. Sanctions**

Corporate criminal liability cannot result in a custodial sentence, as a corporation is not a natural person. The only sanction available for corporate criminal liability is a fine levied on the corporation. Such a fine would be payable to the state and not to the victims of any human rights abuse that formed part of the criminal conduct.

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<sup>80</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112.

<sup>81</sup> S 6(1)(a)(ii).

## C. Administrative Law

Administrative law in Australia allows for decisions by public bodies to be made the subject of judicial review. Corporations, being private as opposed to public bodies, cannot normally have their decisions reviewed under Australian administrative law. Unlike the preliminary test for permitting judicial review in the UK, Australian law looks to the public or private legal form of the body, not the nature of its functions. For this reason, the actions of a non-government owned corporation cannot be reviewed under administrative law standards in Australia, simply by virtue of the fact that the body in question is a non-government owned corporation.<sup>82</sup> The only exception to this principle is the entitlement of claimants to a 'procedural fairness' review of the decision making of 'domestic bodies'—sporting clubs and the like - which are open to the general public.<sup>83</sup> It is clear that corporations do not fall within this category of actors. As such, it can safely be said that judicial review is unlikely to provide for a substantial ground of redress against the class of corporations being here considered.

## 3. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS

### D. Political Question and Act of State Doctrines

Australian law provides that Australian and foreign acts of state are non-justiciable. Domestic acts of state are 'prerogative acts of foreign policy performed by the crown.' Foreign acts of state encompass a far wider range of activities which arise from the exercise of governmental powers.<sup>84</sup> However, it can unequivocally be said that this doctrine would not restrict a court's ability to adjudicate on the conduct of an Australian corporation, in violation of Australian domestic law.

### E. Private Criminal Action

There is a general right for private persons to bring criminal charges, subject to the procedural requirement of seeking leave from the relevant state Supreme Court. However, in the case of war crimes, the permission of the Attorney General is required to bring an action forth.

### F. Statute of Limitations

The limitation periods in Australia for various actions generally hover around the 6-year mark. That means that an individual will be able to maintain a claim in Australia, or an Australian state, for approximately six years after the date on which the cause of action accrues. However, care must be taken in making a decision of when to bring an action, as the periods vary from state-to-state or territory-to-territory. Details are listed below.

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<sup>82</sup> *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, (2003) 216 CLR 277.

<sup>83</sup> *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242 (HCA).

<sup>84</sup> *A-G (UK) v Heinemann Publishers Pty Ltd* (1988) 165 CLR 30 (HCA) 40

## i. Torts (Personal Injury)

This covers common law claims, and excludes claims under the *Motor Accidents Compensation Act 1999* and *Motor Accidents Act 1988*. It would be voluminous to describe all of the limitation periods for all Australian jurisdictions; therefore this part of the submission will focus instead on New South Wales' limitation periods.

Because of the introduction of various legislative instruments in NSW different limitation periods apply for different time periods. This is an experience shared in other Australian states and territories.

If the accident occurred before 1 September 1990 the limitation period is 6 years from the date when the cause of action accrues.<sup>85</sup>

If the accident occurred on or after 1 September 1990 but before 6 December 2002 the limitation period is 3 years from the date when the cause of action occurs.<sup>86</sup> However, in cases of 'latent injury' (i.e. injuries that remain undetected) the limitation period is 3 years from the time at which the individual becomes aware of the injury.<sup>87</sup>

If the accident occurred on or after 6 December 2002 the limitation period extends to the first to expire of:

(i) 3 years from the date when the cause of action is discoverable;<sup>88</sup> or

(ii) 12 years from the time when the act or omission causing injury or death occurred.<sup>89</sup>

It is also of note that the running of the limitation period is not suspended until a minor reaches 18 years if the minor has a capable parent or guardian.<sup>90</sup> It is also worth noting that the exception for latent injuries does not exist post 5 December 2002.

The Commonwealth limitation periods exactly mirror those of NSW.

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<sup>85</sup> Limitation Act 1969 (NSW) s 14.

<sup>86</sup> Ibid s 18A.

<sup>87</sup> Ibid ss 60I, 60F, 60G and Schedule 5.

<sup>88</sup> Ibid s 50C(1)(a).

<sup>89</sup> Ibid s 50C(1)(b).

<sup>90</sup> Ibid ss50F(2)(a) and 50A(2).



## ii. Torts (excluding Personal Injury)

The limitation period in relation to torts that do not concern a personal injury suffered by the claimant has not been the subject of rampant statutory modification. Thus, quite simply, the limitation period runs for 6 years from the date when the cause of action accrues.<sup>91</sup>

## iii. Breach of Contract

For actions arising before 1 January 1971 in breach of contract there is no statutory limitation period.

For actions arising thereafter but before 24 April 1980, the limitation period is 6 years from the date on which the cause of action accrues.<sup>92</sup> Additionally, from 24 April 1980 individuals can apply for relief under the Contracts Review Act 1980:

- (1) Within 2 years of the date of the contract;
- (2) Within 3 months before or 2 years after the time for performance of the contract; or
- (3) During the pendency of a maintainable proceeding arising out of or in relation to the contract.<sup>93</sup>

Broadly speaking, should the court be satisfied that application of the limitation period is unfair, it will lift the strictures imposed by the Acts.

## iv. Trade Practices Act

On or after 26 July 2001, the limitation period for claiming under the TPA is 6 years.<sup>94</sup> However, this period is suspended while the person is under a disability.<sup>95</sup> As mentioned earlier in this report, from a substantive perspective the TPA is unlikely to prove helpful to claimants.

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<sup>91</sup> Ibid s 14(1)(b).

<sup>92</sup> Ibid ss 14(1)(a) and 14A.

<sup>93</sup> Contracts Review Act 1980 (NSW) s16.

<sup>94</sup> Trade Practices Act 1976 (Cth) s 82(2), 87(1CA).

<sup>95</sup> Limitation Act 1969 (NSW) ss 11(3), 52(1)(d).

## G. Assessment of Legal System

By any standard the Australian legal system is effective. The judiciary is regarded as independent. Cases are heard relatively promptly. Judgments are enforceable and backed by effective enforcement mechanisms.

## H. Legal Aid

Legal aid might provide some, but not substantial, assistance to a foreign claimant seeking to bring a claim against an Australian company. It is highly unlikely that in such litigation any legal aid provided by the state would be sufficient. The formal institutions of legal aid in Australia are geared towards providing assistance to defendants in criminal cases and parties who meet strict means testing requirements in narrow classes of civil cases. As such, the Australian regimes do not contemplate the huge costs associated with civil litigation against transnational corporations.

That said, the NSW regime, which is typical of most Australian legal aid regimes, does provide that legal aid may be awarded for human rights cases where that case 'has a significant wider public interest or is of overwhelming importance to the client or raises significant human rights issues.'<sup>96</sup>

It should be noted that a party must still meet the means test and merit test requirements to be eligible for a discretionary grant of legal aid under this criteria.

The commonwealth system of legal aid is limited almost exclusively to family law matters governed by federal law.<sup>97</sup>

In conclusion, a foreign claimant seeking to bring a successful action against an Australian corporation operating overseas would be unlikely to find sufficient financial support from state legal aid.

## I. Cost of Actions

The cost, in court fees, of initiating an action in Australia varies from jurisdiction. The amount, generally in the order of hundreds of dollars, is dwarfed by the potential cost of legal representation.

Often, at the end of litigation the court will make a costs order against the unsuccessful litigant. However, it should be kept in mind that

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<sup>96</sup> Legal Aid Service of New South Wales, 'Policies in brief' <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=659>> accessed 5 March 2008.

<sup>97</sup> National Legal Aid, 'A New National Policy for Legal Aid in Australia' <[http://www.nla.aust.net.au/res/File/PDFs/nla\\_policy-11-07.pdf](http://www.nla.aust.net.au/res/File/PDFs/nla_policy-11-07.pdf)> accessed 5 March 2008.

- (1) Granting such an order is at the discretion of the court, and
- (2) Will not necessarily reflect fees actually paid.

In relation to the second point, the court will impose a costs order for the amount that it thinks is reasonable having regard to the litigation that was conducted, as opposed to the actual fees expended. This has the possibility of both protecting and hindering potential litigants. It means that when one litigates against large corporations it is unlikely that, should one be unsuccessful, any costs order granted will be commensurate with the actual legal fees of the corporation. However, it also means that in litigation which is unlikely to be pecuniary successful, lawyers entering into contingency fee arrangements will be unlikely to expend huge amounts of time and effort fearful of not eventually being awarded their outlay.

This discretion is far less likely to be exercised favourably from the claimant's perspective when he or she is acting solely in his or her own commercial interest as opposed to the greater public interest.

## **J. Contingency Fee Arrangements**

Contingency fee arrangements are not a solid foundation for funding access to justice for foreign litigants. Unlike other jurisdictions, such as the United States, agreements that entitle a lawyer to a proportion of proceeds of the outcome of successful litigation are prohibited.<sup>98</sup> However, 'conditional costs agreements' are allowed, whereby the lawyer agrees to act on behalf of the client on the understanding that if the outcome of the litigation is in the client's favour, the lawyer will be entitled to his or her fees.<sup>99</sup> Uplift fees, or an additional bonus entitled to the solicitor on a successful outcome is limited to 25% of the total legal costs.<sup>100</sup>

## **K. Witness Protection**

The Australian Federal Police operate the national witness protection program in Australia. All Australian states operate complimentary programs. The discretion to offer assistance under these programmes lies with the relevant police authorities. The programmes seek to protect those 'who are perceived to be in danger by reason of their testimony.'<sup>101</sup>

Because the nature of witness protection involves creating new identities for vulnerable witnesses, little specific information is publicly available about the operation of witness protection in Australia. The fact that there have been very few cases where witnesses in Australia have been the subject of serious violence or targeted killings, suggests that this is unlikely to be a relevant issue for those seeking to testify in cases of corporate extraterritorial human rights accountability.

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<sup>98</sup> For example see Legal Professions Act 2001 (NSW) s 325.

<sup>99</sup> Ibid s 323.

<sup>100</sup> Ibid s 324.

<sup>101</sup> Witness Protection Act 1994 (Cth).

## L. Amicus Brief Involvement

Australian law provides the court with a discretion to allow an *amicus curiae* to appear in any given case. In practice, there is neither a regular practice of *amicii* applying for leave to appear, nor has leave been regularly granted when *amicii* do apply. There is, however, a trend towards increasing willingness of courts to grant *amicus* status. *Amicus* status will be granted only if the amicus would assist the court in being properly informed in material relevant to reaching its decision.<sup>102</sup> An interest in the outcome of the case is an insufficient consideration on its own to grant such status.

## 4. CASE STUDY: OK TEDI CASE

*BHP sued in tort for polluting Ok Tedi River prejudicing the plaintiffs' enjoyment of their land and waters. Motion to dismiss denied. Parties ultimately settled.*

The case of *Dagi and Ors v The Broken Hill Proprietary Company Ltd (No 2)*<sup>103</sup> in the Victorian Supreme Court provides a poignant example of the barriers potential claimants have in asserting claims in transnational environmental litigation against Australian corporations in Australia.

The Broken Hill Proprietary Company ('BHP') undertook significant mining in the Ok Tedi River region of Papua New Guinea. The mining tailings were dumped into the river without any adequate precaution being taken. It is estimated that at its height 80 million tons of tailings were being dumped into the river per year. The tailings are harmful both to human beings and the fish in the river and resulted in a copper concentration thirty times the standard level. This practice carried on for a period of twenty years.

As a result, the health, property and livelihood of downstream riparian dwellers were considerably prejudiced. Eventually, a class action lawsuit was brought in the Victorian courts. The case in Victoria was dismissed on the ground that the Victorian court was not entitled to 'entertain a claim which essentially concerns rights, whether possessory or proprietary, to or over foreign land in the sense that those rights are the foundation or gravamen of the claim.'<sup>104</sup>

Subsequently, BHP faced increasing public pressure to pay out the claim, both on the broad grounds of fairness and due to its dubious complicity in attempting to have the PNG criminal law amended to prevent suits being brought in Australia. It is highly likely that despite the fact that the claimants received financial compensation for BHP's wrongs, the amount would have been substantially higher had the success of an Australian action constituted a real possibility.

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<sup>102</sup> *Levy v State of Victoria* (1997) 189 CLR 579 (HCA).

<sup>103</sup> *Dagi v BHP* (n 4).

<sup>104</sup> *Ibid* 428.

## **5. CONCLUSION**

As Australia has neither a constitutional bill of rights, nor a systematic pattern of incorporating the provisions of international human rights treaties which it has ratified into domestic law, the mechanisms for holding Australian corporations liable for human rights abuses committed outside Australia are limited. To the extent that possibilities do exist for holding Australian corporations liable in such circumstances, they rely on a diffuse collection of legal instruments and common law principles, many of which are not formulated in the language or context of human rights.

The most effective cause of action will depend on the particular human right violated and the circumstances surrounding the violation. In practice, the causes of action most likely to be effective against an Australian company are those that can be grounded in either contract or tort law.

## **6. APPENDIX: LIST OF COURTS WITH EXPEDITED RECOGNITION PROCESSES UNDER THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1991 (CTH)**

(i)	New Zealand a. Court of Appeal b. High Court	(xiii)	Grenada a. Supreme Court (consisting of the: Court of Appeal; High Court)		High Court (Saint Christopher Circuit) d. High Court (Nevis Circuit)
(ii)	Province of Alberta, Canada a. Supreme Court of Canada b. Court of Appeal of Alberta c. Court of Queen's Bench of Alberta	(xiv)	Hong Kong Special Administrative Region of the People's Republic of China a. The Court of Final Appeal b. High Court (consisting of the: Court of Appeal; Court of First Instance)	(xxvi)	St Vincent and the Grenadines a. Eastern Caribbean Supreme Court (consisting of the: b. Court of Appeal, High Court)
(iii)	Bahamas, The Commonwealth of the a. Court of Appeal b. Supreme Court	(xv)	Israel, State of a. Supreme Court b. District Courts c. Moslem Religious Courts d. Druze Religious Courts	(xxvii)	Seychelles, Republic of Court of Appeal a. Supreme Court
(iv)	Province of British Columbia, Canada a. Supreme Court of Canada b. Court of Appeal of British Columbia c. Supreme Court of British Columbia	(xvi)	Italy (Italian Republic) a. <i>Corte Suprema di Cassazione</i> b. <i>Corte di Assise</i> c. <i>Corte d'Appello</i> d. <i>Tribunale</i>	(xxviii)	Singapore, Republic of a. Privy Council: in respect of orders made on appeals from the Singapore Supreme Court and filed with the Court of Appeal of Singapore b. Supreme Court of Singapore (consisting of the: Court of Appeal; High Court)
(v)	British Virgin Islands a. Eastern Caribbean Supreme Court	(xvii)	Japan a. Supreme Court b. High Courts c. District Courts d. Family Courts	(xxix)	Solomon Islands a. Court of Appeal b. High Court
(vi)	Cayman Islands a. Grand Court	(xviii)	Korea, Republic of a. Supreme Court b. Appellate Courts c. District Courts d. Family Court e. Patent Court f. Administrative Court	(xxx)	Sri Lanka a. Supreme Court b. Court of Appeal c. High Court d. District Court
(vii)	Dominica, Commonwealth of a. Eastern Caribbean Supreme Court b. Court of Appeal c. High Court of Justice	(xix)	Malawi a. High Court b. Supreme Court	(xxxi)	Switzerland a. <i>Bundesgericht</i> b. <i>Kantonale Obere Gerichte</i> c. <i>Handelsgerichte</i>
(viii)	Falkland Islands a. Court of Appeal b. Supreme Court	(xx)	Province of Manitoba, Canada a. Court of the Queen's Bench of Manitoba	(xxxii)	Taiwan a. Supreme Court b. High Courts c. District Courts
(ix)	Fiji, Republic of a. Supreme Court b. Court of Appeal c. High Court	(xxi)	Montserrat a. Privy Council b. Eastern Caribbean Court of Appeal c. High Court of Montserrat	(xxxiii)	Tonga a. Court of Appeal b. Supreme Court
(x)	France (French Republic) a. <i>Cour de Cassation</i> b. <i>Cours d'Appel</i> c. <i>Tribunaux de grand instance</i> d. <i>Tribunaux de commerce</i> e. <i>Cours d'assise</i> f. <i>Tribunaux correctionnels</i>	(xxii)	Papua New Guinea a. Supreme Court of Justice National Court of Justice	(xxxiv)	Tuvalu a. Court of Appeal b. High Court
(xi)	Germany, Federal Republic of a. <i>Bundesgerichtshof</i> b. <i>Oberlandesgerichte</i> c. <i>Bayerische Oberste Landesgericht</i> d. <i>Landgerichte</i>	(xxiii)	Poland, Republic of Supreme Court a. Commercial Courts b. Courts of Appeal c. Provincial Courts	(xxxv)	United Kingdom, The House of Lords a. Supreme Court of England and Wales b. Supreme Court of Judicature of Northern Ireland c. Court of Session d. Western Samoa e. Court of Appeal
(xii)	Gibraltar a. Court of Appeal b. Supreme Court	(xxiv)	St Helena a. Supreme Court	(xxxvi)	Supreme Court of Western Samoa
		(xxv)	St Kitts and Nevis, Federation of a. Privy Council b. Eastern Caribbean Court of Appeal		



# CANADA

— Grégoire C N Webber\* —

## 1. EXECUTIVE SUMMARY

The state of Canadian law with respect to corporate social responsibility, and extraterritorial corporate social responsibility in particular, is generally recognised to be insufficient. Few options are available to non-nationals seeking to pursue Canadian corporations in Canada for wrongs committed abroad, excepting general principles of private international law. The instances of extraterritorial criminal responsibility are narrowly provided for, and are clouded with doubt as to whether they apply to corporate activity. As a result, Canadian corporations have been forced to defend their actions before American courts in actions having no connection with the United States.

## 2. BACKGROUND

Canada is a federal jurisdiction. Quebec is the only province in Canada which is a civil law jurisdiction in private law matters; the other nine provinces are common law jurisdictions. Federal law is primarily of the common law tradition, although there are ongoing efforts to harmonise both legal traditions in federal legislation.<sup>105</sup> This country report will focus on Ontario common law, Quebec civil law, and federal law. Both the provincial legislatures and the Parliament of Canada are constitutionally empowered to create corporations.<sup>106</sup>

As for the relation between international law and Canadian domestic law, Canada is a dualist jurisdiction. Although the Government of Canada has the authority to bind the State internationally, the incorporation of treaties into domestic law is undertaken by the legislative authority vested with the affected constitutional jurisdiction.<sup>107</sup> In addition to this mode of formal reception, the Supreme Court of Canada has relied, albeit not consistently, on international law to interpret domestic legislation.<sup>108</sup>

The Canadian Charter of Rights and Freedoms<sup>109</sup> guarantees a number of constitutional rights and freedoms, some of which are available only to 'citizens of Canada'. The Charter applies explicitly to the governments and legislatures of Canada,<sup>110</sup> but not to private action unless government action or control is sufficiently present. Provinces have established

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<sup>105</sup> See eg Federal Law—Civil Law Harmonization Act, No. 1 2001 c 4 (Canada).

<sup>106</sup> See *Citizens Insurance v Parsons* (1881) 7 AC 96 (PC).

<sup>107</sup> *Labour Conventions Case* [1937] AC 326 (PC).

<sup>108</sup> See *Baker v Canada* [1999] 2 SCR 817; *Pushpanathan v Canada* [1998] 1 SCR 982.

<sup>109</sup> Being Part 1 of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982 (UK) 1982 c 11.

<sup>110</sup> Canadian Charter, s. 32. See also *RWDSU v. Dolphin Delivery Ltd.*[1986] 2 SCR 573.



human rights codes—including Quebec’s Charter of Human Rights and Freedoms<sup>111</sup> and Ontario’s Human Rights Code,<sup>112</sup> which apply to both public and private action.

It is generally recognised that the existing state of Canadian law is insufficient in matters of corporate social responsibility. Following actions by Talisman Inc., a Canadian corporation accused of human rights abuses including genocide and sued in American courts,<sup>113</sup> the parliamentary Standing Committee on Foreign Affairs and International Trade of the House of Commons, issued a report expressing concern ‘...that Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples’.<sup>114</sup> Among other recommendations, it called on the Government of Canada to ‘[e]stablish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and / or human rights violations associated with the activities of Canadian mining companies’.<sup>115</sup>

In response to the Report of the Standing Committee, the Canadian Government held a series of national roundtables in order to discuss issues of corporate social responsibility in the mining, oil and gas sectors and their operations in developing countries.<sup>116</sup> The roundtables were concluded in 2006 and no legislative action has been taken since then.

It is generally recognised that Canada has not legislated extraterritorially to the extent permitted by international law,<sup>117</sup> despite the constitutional authority to do so.<sup>118</sup> The presumption is that Canadian (federal or provincial) law applies only within the jurisdiction of the enacting legislature (Canada-wide, province-wide), unless stated explicitly otherwise. The absence of Canadian tools for pursuing Canadian corporations operating abroad has resulted in Canadian corporations being brought before the courts of the United States under the Alien Tort Claims Act.<sup>119</sup> American courts have refused to decline jurisdiction in favour of Canadian courts, relying on the absence of applicable Canadian law.<sup>120</sup> With this background in mind, the existing possibilities under Canadian law for human rights litigation against TNCs due to their conduct in host states are explored further below.

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<sup>111</sup> RSQ c C-12 (Quebec).

<sup>112</sup> RSO 1990 c H 19 (Ontario).

<sup>113</sup> See *Presbyterian Church of Sudan v Talisman Energy Inc* 224 F Supp 2d 289 (SDNY 2004).

<sup>114</sup> Standing Committee on Foreign Affairs and International Trade, Fourteenth Report, 38th Parliament, 1st Session, 2.

<sup>115</sup> Standing Committee on Foreign Affairs and International Trade, Fourteenth Report, 38th Parliament, 1st Session, 4.

<sup>116</sup> See Department of Foreign Affairs and International Trade, ‘The National Roundtables on Corporate Social Responsibility’ <[http://geo.international.gc.ca/cip-pic/current\\_discussions/csr-roundtables-en.aspx](http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx)> accessed 24 April 2008.

<sup>117</sup> See C Forcese, *Memorandum: Response To PDAC Opinion On Extraterritorial Regulation* (2006) 2.

<sup>118</sup> See Statute of Westminster 1931 (UK) s 3. The ability of provinces to do so is less obvious, given the textual qualifier ‘in the province’ associated with many of the provincial heads of jurisdiction in the Constitution: see PW Hogg, *Constitutional Law of Canada* (Carswell Toronto 2007) 13–14. If the subject matter has a ‘meaningful connection to the enacting province’, it is not considered to be extraterritorial.

<sup>119</sup> 28 USC § 1350.

<sup>120</sup> *Presbyterian Church* (n 9) 337.

### 3. CAUSES OF ACTION AND REMEDIES AVAILABLE TO NON-NATIONALS

#### A. Civil Law

The private international law of contract and tort in Canada presents some obstacles for foreign nationals seeking to sue Canadian transnational corporations in Canada for wrongs committed abroad.

The Supreme Court of Canada has identified the standard of a 'real and substantial connection' as the standard to ground the jurisdiction of a Canadian court.<sup>121</sup> This connection may be established 'between the subject-matter of the action and the territory where the action is brought', 'between the jurisdiction and the wrongdoing', 'between the damages suffered and the jurisdiction', 'between the defendant and the forum province', 'with the transaction or the parties', and 'with the action'.<sup>122</sup> As a general proposition, it is accepted that jurisdiction is established when the defendant is domiciled in the Canadian forum.<sup>123</sup>

Both the provincial legislatures and the Parliament of Canada are constitutionally empowered to create corporations.<sup>124</sup> A corporation is generally regarded in law as having the capacity, rights, and powers of a natural person.<sup>125</sup> The domicile of a corporation is the place of its head office.<sup>126</sup> According to the Government of Canada, 'if the defendant is a Canadian corporation incorporated under the laws of Canada, the Canadian court located in the jurisdiction of the defendant would be competent' and the 'plaintiff does not need to be a Canadian resident or citizen'.<sup>127</sup>

#### i. Piercing the Corporate Veil

Under Canadian law, legal persons are distinct from their members: their acts bind only themselves, except as provided by law.<sup>128</sup> A corporate subsidiary, even when wholly owned, will not be an *alter ego* of its parent company unless it is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability.<sup>129</sup> However, in seeking to pierce the corporate veil, Quebec civil law provides that in no case may 'a legal person set up juridical personality against a person in good faith if it is set up to dissemble

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<sup>121</sup> *Morguard Investments v De Savoye* [1990] 3 SCR 1077.

<sup>122</sup> *Ibid.*

<sup>123</sup> See Civil Code of Quebec LQ 1991 c 64 (Quebec) (CCQ) art 3134.

<sup>124</sup> See *Citizens Insurance v Parsons* (1881) 7 AC 96 (PC).

<sup>125</sup> See Canadian Business Corporations Act, RSC 1985 c C-44, s 15(1); Quebec Companies Act RSQ c C-38 s123.29; CCQ (n 19) art 301.

<sup>126</sup> CCQ (n 19) art 307; Quebec Companies Act (n 21) s135.

<sup>127</sup> Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, Mining In Developing Countries – Corporate Social Responsibility.

<sup>128</sup> See Canadian Business Corporations Act (n 21) s 45(1); Quebec Companies Act (n 21) s 41; CCQ (n 19) art 309.

<sup>129</sup> *Transamerica Life Insurance Company of Canada v. Canada Life Assurance Company* (1995) 46 CPC (3d) 110 (Ontario Court General Division).

fraud, abuse of right, or contravention of a rule of public order'.<sup>130</sup> Ontario common law provides for similar exceptions.

## ii. Grounding Jurisdiction

In tort (common law) or extra-contractual obligations (civil law), the Ontario and Quebec legislatures have established rules that provide the grounds for jurisdiction. In Ontario, the governing norm is Rule 17.02 of the Ontario Rules of Civil Procedure,<sup>131</sup> which provides for service of a defendant outside of Ontario on the basis, *inter alia*, (a) of a tort committed in Ontario and (b) of damage sustained in Ontario arising from a tort wherever committed. The Ontario Court of Appeal has determined that service is but a preliminary ground for jurisdiction, and does not 'by itself confer jurisdiction' on an Ontario court.<sup>132</sup> In addition to service, a court must establish that it has a 'real and substantial connection' to the dispute.

In Quebec, the governing norm is Civil Code of Quebec ('CCQ')<sup>133</sup> art 3148, which provides that jurisdiction is grounded where the defendant has his domicile or his residence in Quebec; the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec; a fault was committed in Quebec; damage was suffered in Quebec; an injurious act occurred in Quebec; or the defendant submits to its jurisdiction. In contrast to Ontario law, this is a sufficient ground for jurisdiction in Quebec law.<sup>134</sup> Indeed, the Supreme Court of Canada has sanctioned all of the relevant private international law provisions of the Civil Code of Quebec as consistent with the requirement of a real and substantial connection.<sup>135</sup>

In contractual disputes, contrary to tort or extra-contractual obligations actions, the connections between a contract and a forum are primarily legal, not territorial. Both Quebec and Ontario law provide that a court's jurisdiction may be grounded if one of the obligations of the contract must be performed in the jurisdiction of the court.<sup>136</sup>

Quebec and Ontario law provide for other, exceptional possibilities. Under Quebec law, even if a Quebec court has no jurisdiction, it may hear the dispute if there is a 'sufficient connection with Quebec' and where 'proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required'.<sup>137</sup> In Ontario, service of a defendant outside Ontario not satisfying the established statutory grounds may be made with leave of the court, relying on the same grounds as are relevant under Quebec law.<sup>138</sup>

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<sup>130</sup> CCQ (n 19) art 317.

<sup>131</sup> RRO 1990 Reg 194 (Ontario).

<sup>132</sup> *Muscutt v Courcelles* (2002) 60 OR (3d) 320 (Ont CA).

<sup>133</sup> N 19.

<sup>134</sup> See *Spar Aerospace Ltd v American Mobile Satellite* [2002] 4 SCR 205.

<sup>135</sup> *Ibid.*

<sup>136</sup> See CCQ (n 19) art 3148 and Ontario Rules of Court, rule 17.02.

<sup>137</sup> CCQ (n 19) art. 3136.

<sup>138</sup> Ontario Rules of Civil Procedure (n 27) rule 17.03.

### iii. Choice of Law Issues

In matters of tort (common law) or extra-contractual obligation (civil law), the choice of law is generally determined according to the *lex loci delicti*; that is, the ‘the law of the country where the injurious act occurred’.<sup>139</sup> Quebec law provides an exception where both ‘the person who committed the injurious act and the victim have their domiciles or residences in the same country’, at which time the law of that country is applicable.<sup>140</sup> An overriding exception—of limited application—provides that ‘...if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country’, then the latter should apply.<sup>141</sup>

In contractual matters, absent a valid choice of law clause, the contract will be governed by the law of the country with which the contract has the ‘closest connection’.<sup>142</sup> Among the factors outlined by the Supreme Court of Canada in determining this connection are the national character of a corporation and the place where its principal place of business is situated.<sup>143</sup> In a contract of employment, however, absent a choice of law clause, Quebec law provides that the applicable law is the ‘law of the country where the worker habitually carries on his work or the law of the country where his employer has his domicile or establishment is, in the same circumstances, applicable to the contract of employment’.<sup>144</sup>

### iv. Reception and Enforcement of Foreign Judgments in Canada

The starting position in Quebec is that foreign judgments will be recognised and enforced, unless one of six exceptions is satisfied, including inconsistency with public order and contravention of fundamental principles of procedure.<sup>145</sup> However, in ‘personal actions of a patrimonial nature’, the jurisdiction of a foreign court is recognised only

- (1) If the defendant was domiciled in the country where the decision was rendered;
- (2) If the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
- (3) If a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;
- (4) If the obligations arising from a contract were to be performed in that country;

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<sup>139</sup> CCQ (n 19) art 3126.

<sup>140</sup> CCQ (n 19) art 3126.

<sup>141</sup> CCQ (n 19) art 3082.

<sup>142</sup> See CCQ (n 19) art 3112; *Imperial Life Assurance v Colmenares* [1967] SCR 443 (‘closest and most substantial connection’).

<sup>143</sup> *Imperial Life Assurance v Colmenares* [1967] SCR 443.

<sup>144</sup> CCQ (n 19) art 3118.

<sup>145</sup> CCQ (n 19) art 3155.

(5) If the parties submitted to the foreign authority; **or**

(6) If the defendant has recognised the jurisdiction of the court in question.<sup>146</sup>

In the common law provinces, unless displaced by statute, the same ‘real and substantial connection’ standard that applies to ground domestic jurisdiction applies to determine if a foreign judgment should be recognised and enforced.<sup>147</sup> The common law exceptions to recognition include public order, natural justice, and fraud.

## **B. Criminal Law**

The power to create criminal laws is exclusively federal.<sup>148</sup>

### **i. Corporate Criminal Responsibility**

To establish criminal *mens rea*, Canadian law developed an ‘identification theory’, resting on a ‘directing mind and will’ doctrine to attribute criminal fault to a corporation. This identification theory provided that if a senior representative of the corporation acted (a) within the field of operation assigned to him, (b) was not totally in fraud of the corporation, and (c) was by design or result partly for the benefit of the company. In such a case, then the crime committed by him or her is deemed the crime of the corporation in Canadian law.<sup>149</sup>

In 2003, Parliament clarified corporate criminal responsibility by introducing amendments to the Criminal Code.<sup>150</sup> A corporation now assumes criminal responsibility if a senior officer (including representatives with an important role in corporate policy development and managers of the corporation’s activities), with the intent at least in part to benefit the corporation and acting within the scope of his or her authority, (a) is personally a party to the offence; (b) directed one or more employees to commit an offence, or (c) knowing that an employee of the corporation is or is about to be a party to the offence, failed to take all reasonable measures to prevent that person from becoming a party to the offence. Among the possible criminal offences to which a corporation could be held liable are bribing a foreign public official<sup>151</sup> and crimes against humanity or war crimes under the Crimes Against Humanity and War Crimes Act,<sup>152</sup> reviewed below.

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<sup>146</sup> CCQ (n 19) art 3168.

<sup>147</sup> *Beals v Saldanha* [2003] 3 SCR 416.

<sup>148</sup> Constitution Act 1867 (UK) s 91(27).

<sup>149</sup> *Canadian Dredge & Dock v The Queen* [1985] 1 SCR 662.

<sup>150</sup> Criminal Code RSC 1985 c C-46, ss22.1–22.2.

<sup>151</sup> Corruption of Foreign Public Officials Act 1998 c 34 s3.

<sup>152</sup> 2000 c 24.

## ii. Corporate Sentencing

The *Criminal Code* provides that a guilty corporation will be fined in lieu of any imprisonment in an amount 'that is in the discretion of the court'.<sup>153</sup> It should be noted that the *Criminal Code* provides, in addition to the criminal responsibility of the corporation, for the individual criminal responsibility of senior officers of a corporation if they: are responsible for aiding or abetting a person to commit an offence; counselled a person to be a party to an offence; or were accessories after the fact to an offence.<sup>154</sup>

## iii. Extraterritorial Criminal Responsibility

As a general proposition, Canadian criminal law extends only to Canadian borders.<sup>155</sup> Exceptions are explicitly stated, as in the case of crimes committed on board a ship, by means of a Canadian registered ship, hostage taking, terrorism, and sexual offences against children.<sup>156</sup> However, where a crime has a 'real and substantial link' to Canada, the Supreme Court has ruled that Canadian criminal law applies even absent explicit statutory authority for extraterritorial application.<sup>157</sup>

Some matters, such as the offence of torture, are explicitly awarded extraterritorial application, such that a Canadian court may prosecute the offender if the victim or offender is a Canadian or if the offender is subsequently present in Canada.<sup>158</sup>

Under the Crimes Against Humanity and War Crimes Act,<sup>159</sup> persons (including corporations) may be charged for genocide, crimes against humanity, and war crimes committed inside or outside Canada. The Act allows for superiors to be held criminally liable for failing to prevent or to report the commission of these crimes by persons under their effective authority and control. However, according to the Government of Canada, it is unclear whether the relevant crimes 'can, as a matter of international law, be committed by corporations', given that the Act's 'definitions of war crimes, crimes against humanity and genocide refer to their international law definitions'.<sup>160</sup>

In addition to legislative references to international law and extraterritorial application of domestic law, the Canadian Charter provides that any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, '...it constituted an offence under Canadian *or international law or was criminal according to the general principles of law recognised by the community of nations*' (emphasis added). The potentiality of this delimitation of the right has not been explored in practice; but it would presumably allow for the prosecution of a corporation in Canada for the violation of international law.

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<sup>153</sup> Criminal Code (n 45) s 735(1), unless the offence is a summary conviction offence, at which point the maximum is \$100,000CAN.

<sup>154</sup> Criminal Code (n 45) ss 21–23.

<sup>155</sup> See Criminal Code (n 45) s 6(2); *R v Finta* [1994] 1 SCR 701.

<sup>156</sup> See eg Criminal Code (n 45) s 7.

<sup>157</sup> *Libman v The Queen* [1985] 2 SCR 178.

<sup>158</sup> Criminal Code (n 45) ss 7(3.7), 269.1.

<sup>159</sup> N 48.

<sup>160</sup> N 23.

#### iv. The Special Economic Measures Act

The Special Economic Measures Act<sup>161</sup> is said by some to have the potential to sanction companies that commit human rights violations abroad. It allows the Cabinet, for the purpose of implementing a decision, resolution or recommendation of an international organisation of states or association of states of which Canada is a member, to take economic measures against a foreign State if called upon to do so by the international organisation or association. However, the Act has been interpreted by the Government of Canada as not allowing for such measures unless explicitly called upon by an international body.<sup>162</sup>

### 4. OBSTACLES OR BARRIERS TO ACCESS TO JUSTICE

#### A. Issues of Standing for Non-Canadian Nationals before Canadian Courts

Neither Quebec law nor Ontario law generally distinguishes standing as between nationals and non-nationals of Canada. Quebec law requires that '[w]hoever brings an action at law . . . must have sufficient interest therein'.<sup>163</sup> A similar requirement obtains in common law Canada. No further requirement is established for non-nationals regarding the law of standing.

#### B. Political Question and Act of State Doctrines

There is no general political questions doctrine, the Supreme Court having ruled that each question of law is justiciable.<sup>164</sup> Parliament has interceded and provided general immunity to foreign States and their governments in Canadian courts.<sup>165</sup> However, this immunity does not extend to 'proceedings that relate to any commercial activity of the foreign state'.<sup>166</sup>

#### C. Declining Jurisdiction: *Forum Non Conveniens*

There is some debate as to the proper exercise of the *forum non conveniens* principle. In the common law provinces, the courts generally decline jurisdiction on the basis that there is another forum better suited according to the standard of a 'real and substantial connection'.<sup>167</sup> However, recent Supreme Court of Canada case law interpreting the *Civil Code of Quebec* has insisted on the exceptional nature of declining jurisdiction, which would suggest that the existence of a better suited forum would not lead an appropriate suited Canadian forum to decline jurisdiction.<sup>168</sup>

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<sup>161</sup> 1992 c 17 (Canada).

<sup>162</sup> Forcese (n 13) 19.

<sup>163</sup> Code of Civil Procedure RSQ c C-25 (Quebec) s55.

<sup>164</sup> See *Operation Dismantle v The Queen* [1985] 1 SCR 441.

<sup>165</sup> State Immunity Act RSC 1985 c S-18.

<sup>166</sup> *Ibid* s 5.

<sup>167</sup> See *Amchem Products Inc v BC* [1993] 1 SCR 897.

<sup>168</sup> *Spar* (n 30), reading CCQ (n 19) art 3135.

In determining whether to decline jurisdiction, the Supreme Court has identified the following factors: the residence of the parties and the witnesses and experts, the location of the evidence, the applicable law, the enforcement of the judgement, and, ultimately, the interests of justice.<sup>169</sup>

#### D. Statutes of Limitation

In Quebec, the question of limitations is settled by the law that applies to the substance of the litigation.<sup>170</sup> In Ontario, the question of limitation is similarly treated.<sup>171</sup> An action in contract or tort is must be exercised, with some exceptions, before two years since the claims accrued.<sup>172</sup>

#### E. Assessment of Legal System

The Canadian legal system is effective, albeit expensive for litigants.

#### F. Legal Aid

Legal aid is primarily available for criminal defendants. In civil matters, the conditions for accessing legal aid are considerably narrower. In Ontario,<sup>173</sup> legal aid is provided 'in the areas of criminal law, family law, clinic law and mental health law'<sup>174</sup> and in other narrow areas, including refugee and immigration law. While there is no explicit statutory requirement that claimants be citizens, and while the governing statute refers to the prospect of non-residents of Ontario applying for legal aid, read in context this reference to non-residents likely extends only to residents of other parts of Canada.<sup>175</sup>

In Quebec,<sup>176</sup> legal aid in civil matters is available primarily to those persons receiving assistance under one of the programs set out in the Act respecting Income Support, Employment Assistance and Social Solidarity,<sup>177</sup> thereby effectively denying legal aid to non-citizens of Canada and, for the most part, non-residents of Quebec. As with Ontario, legal aid is not available for all areas of law, and focuses primarily on family matters, youth protection, the representation of young offenders, the prosecution of a criminal act, benefit claims related to income support or employment assistance, automobile insurance, unemployment insurance, and workman's compensation.

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<sup>169</sup> Ibid.

<sup>170</sup> CCQ (n 19) art 3131.

<sup>171</sup> See *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon* [1994] 3 SCR 1022.

<sup>172</sup> Limitations Act 2002 SO 2002 c24 (Ontario).

<sup>173</sup> Legal Aid Services Act, 1998 SO 1998 c 26 (Ontario). See also 'Legal Aid Ontario – Aide Juridique Ontario' <[www.legalaid.on.ca](http://www.legalaid.on.ca)> accessed 24 April 2008.

<sup>174</sup> Legal Aid Services Act (n 69) s13.

<sup>175</sup> Ibid s24(2). But cf. Ibid s 58, which implies non-residents reside in another Canadian provinces.

<sup>176</sup> Legal Aid Act, RSQ c A-14 (Quebec).

<sup>177</sup> RSQ c S-32.001 (Quebec).



## G. Cost of Actions

The awarding of costs at the end of litigation is at the discretion of the court. As a general proposition, the losing party pays costs to the winning party.<sup>178</sup> In Quebec, costs are awarded following the 'Tariff of Court Costs'.<sup>179</sup> In Ontario, costs are generally awarded on a party-party basis.

## H. Contingency Fee Arrangements

Contingent fee agreements are available in all Canadian provinces, subject to different regulatory frameworks.<sup>180</sup>

## I. Witness Protection

Parliament has enacted a witness protection program for criminal matters, and similar programs are available for prosecutions administered in Ontario and Quebec.<sup>181</sup>

## J. Amicus Brief Involvement

In cases involving questions of public interest, a court will often grant status to interveners who may submit written argument and be granted the right to make oral argument.

## K. Private Prosecution

Canadian law allows for private prosecutions, although the Attorney General has the authority to enter a stay.<sup>182</sup>

## 5. CASE STUDY: RECHERCHES INTERNATIONALES QUÉBEC V CAMBIOR INC

In Canada, only one civil lawsuit related to human rights violations has been brought against a multinational company. In *Recherches Internationales Québec v. Cambior Inc.*,<sup>183</sup> Cambior Inc. was sued in Quebec Superior Court for environmental damage associated with its joint venture gold-mining operations in Guyana. The claimants comprised 23,000 victims suing in

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<sup>178</sup> See Code of Civil Procedure RSQ c C-25 (Quebec) art 477.

<sup>179</sup> See Justice Québec, 'Tariff of Court Costs' <<http://www.justice.gouv.qc.ca/english/publications/generale/tarifs-a.htm>> accessed 24 April 2008.

<sup>180</sup> For an overview, see Ministry of the Attorney-General, 'Ministry of the Attorney General — Appendix 3 — Contingency Fees in Canadian Jurisdictions' <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/App3a.asp>> accessed 24 April 2008.

<sup>181</sup> Witness Protection Program Act 1996 c 15 (Canada).

<sup>182</sup> Criminal Code (n 45) s 579.

<sup>183</sup> [1998] QJ no 2554 (Quebec Superior Ct).

a class action for \$69,000,000CAN in damages; they were assisted in their claim by an organisation called '*Recherches Internationales Québec*'.

### *Overview of the Factual History*

The Superior Court called it '[o]ne of the worst environmental catastrophes in gold mining history'.<sup>184</sup> The dam of a treatment plant of a gold mine ruptured, resulting in approximately 2.3 billion litres of contaminated liquid spilling into two rivers in Guyana in 1995.<sup>185</sup> The mine was owned by Omai Gold Mines Limited, a Guyanese corporation, 65% of whose shares were owned by Cambior.<sup>186</sup> The Government of Guyana was also a shareholder.<sup>187</sup>

Cambior filed a motion with the court, alleging an absence of jurisdiction or, in the alternative, inviting the court to decline jurisdiction on the grounds that the courts of Guyana were a more convenient forum.

### *Conclusions of the Court*

The Superior Court concluded that it had jurisdiction. Relying on the provisions of the Civil Code of Quebec,<sup>188</sup> the fact that Cambior Inc. was domiciled in Quebec was sufficient to ground the court's jurisdiction. However, giving the preliminary motion on jurisdiction, the court did not explore in full the corporate relationship between Cambior Inc. and Omai Gold Mines Limited.

The Superior Court also concluded that the courts of Guyana were competent to hear the case.<sup>189</sup> It declined to exercise jurisdiction because

...neither the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences.<sup>190</sup>

In coming to this conclusion, the court was careful to note that 'Guyana's judicial system would provide the victims with a fair and impartial hearing', rejecting the claim that 'the

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<sup>184</sup> Ibid [1].

<sup>185</sup> Ibid [1].

<sup>186</sup> Ibid [2].

<sup>187</sup> Ibid [18].

<sup>188</sup> CCQ (n 19) arts 3134, 3138.

<sup>189</sup> Ibid [29].

<sup>190</sup> Ibid [9].

administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana'.<sup>191</sup>

## **6. CONCLUSION**

The law of Canada regarding corporate social responsibility for acts committed by Canadian corporations extraterritorially is currently insufficient. Both the framework of the legal sources and the little experience to date in attempting to apply this law indicate that the parliamentary Standing Committee on Foreign Affairs and International Trade of the House of Commons was correct in its conclusion that more needs to be done to allow non-nationals to sue in Canada for acts committed by Canadian corporations abroad.

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<sup>191</sup> Ibid [12].

# DEMOCRATIC REPUBLIC OF CONGO

— Malcolm Birdling and Nicolas Croquet\* —

## 1. EXECUTIVE SUMMARY

The law of the Democratic Republic of Congo ('DRC') contains actionable human rights protections in both the national Constitution and under ordinary law. Some of these protections are extended to non-nationals, although a number are solely for the benefit of DRC nationals. The DRC is also party to most key international and regional human rights instruments, all of which are, arguably, domestically actionable before DRC courts. However, to the best of our knowledge no such judicial action has been undertaken in the DRC. Criminal prosecutions against individuals for human rights violations are possible under DRC law, even where the violations occurred outside DRC territory. It is unclear whether non-natural persons have criminal capacity under DRC law, but it is clear that even if capacity were established, DRC courts would be unable to try a legal person for activities which occurred outside the jurisdiction of the DRC.

Foreign judgments are enforceable by DRC courts under certain conditions. The institutional problems with the DRC courts highlighted in this report would almost certainly provide good grounds for resisting the enforcement of a judgment rendered by a DRC court in other jurisdictions.

Despite the existence of the above procedures 'on paper', the reality is claims are extremely difficult to bring in practice. Costs are prohibitive, official legal aid non-existent, and corruption and intimidation are rife. The case study of the recent trial of agents of a foreign corporation for human rights abuses in the DRC demonstrates how these obstacles create formidable barriers which could not be surmounted even by a claim prosecuted with the assistance of United Nations investigators and intensive monitoring and support by numerous NGOs.

## 2. BACKGROUND AND INTRODUCTION

The Democratic Republic of Congo ('DRC') is a unitary (albeit administratively decentralized) Republic. Its internal juridical life is regulated by a written constitution, promulgated on 18 February 2006. Its legal system is based on the civil law tradition and the 1804 Napoleonic Civil Code.<sup>192</sup> Its written law has been shaped mainly on the Belgian law model due to the legal impact of Belgian colonisation.<sup>193</sup> Alongside its body of written law (created through the

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<sup>192</sup> D Zongwe, F Butedi and C Phebe, *The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview* (Globalex - Hauser Global Law School Program, NYU School of Law 2007) <[http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo.htm](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo.htm)> accessed 24 April 2008.

<sup>193</sup> Ibid; JH Crabb, *The Legal System of Congo-Kinshasa* (The Michie Company, Charlottesville 1970) 83.

adoption of codes, decrees and special legislation), DRC law has also been characterised by the local anchoring of customs, especially in matters relating to the law of wills, succession and family.<sup>194</sup>

While rich in natural resources, notably copper, diamonds, cobalt and coltan, ongoing fighting and massive human rights violations are a continuing feature of life in the DRC.<sup>195</sup> The presence of these resources is such that numerous foreign transnational corporations ('TNCs') operate within the DRC—primarily in the mining industry. Foreign TNCs are the dominant force in this industry, although there are a number of DRC-domiciled corporations which are active in mining as well.<sup>196</sup>

Systemic intimidation, under-resourcing and corruption within the judicial system mean that at present the domestic courts of the DRC cannot be regarded as effective fora for the resolution of human rights abuses.<sup>197</sup> Transparency International encapsulated the situation in its 2007 Report, stating that the non-functioning of the courts was '... one of the fundamental factors preventing the normal functioning of the Congolese State and its protections against abuses of power'.<sup>198</sup>

The situation is such that the DRC justice system provides almost no avenues of redress or protection for DRC nationals. Therefore, the prospects for claims brought by non-nationals are bleak.

The situation is such, in fact, that we have been unable to determine with certainty whether laws cited in this report are effectively enforced in the DRC. Up-to-date legal materials from the DRC are difficult to locate, making research on this jurisdiction troublesome. This is due in part to the fact that few Government agencies have set up a website containing electronic resources and that knowledge of legal resources tends in practice to be the privilege of local practising lawyers.<sup>199</sup> As well as presenting a barrier to potential claimants, this makes external analysis of the DRC system difficult. As such, this chapter attempts to give a realistic picture of the prospects of litigating in the DRC, but is not able to provide a comprehensive exposition of the juridical basis for such claims.

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<sup>194</sup> Ordinance-Law on Judicial Organisation and Competence, art 110.

<sup>195</sup> See UNSC 'Twenty-Fourth Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo' (14 November 2007) UN Doc S/2007/671.

<sup>196</sup> See the countries of domicile column in the list of companies and individuals implicated in the illegal expropriation of resources from the DRC listed in Annex I of UNSC (Committee of Experts) 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (23 October 2003) UN Doc S/2003/1027. See generally A-M Papaioannou, 'The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses' in O De Schutter (ed) *Transnational Corporations and Human Rights* (Hart, Oxford 2006) 263 ff.

<sup>197</sup> J Kippenberg 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War' (2005) 17(1(A)) Human Rights Watch 42.

<sup>198</sup> Transparency International, *Système national d'intégrité: République démocratique du Congo 2007* (2007) 56 ( 'C'est une des causes fondamentales ayant handicapé le fonctionnement normal de l'Etat congolais et de sa protection contre les abus de pouvoir par les gouvernants et la sauvegarde de l'intérêt général et de la chose publique.').

<sup>199</sup> Zongwe, Butedi and Phebe ([n](#) 1).

### 3. AVAILABLE CAUSES OF ACTION

#### A. Human Rights Protections in International Law

As the DRC inherited the monist tradition from Belgian law during colonisation, international law arguably has direct effect in DRC domestic law.<sup>200</sup> This would be of considerable significance for the purposes of this report, since the DRC has ratified a number of key human rights instruments, including the African Charter on Human and Peoples' Rights; the International Covenant on Civil and Political Rights; the Convention Against Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the United Nations Convention on the Rights of the Child (and the Optional Protocol on the Involvement of Children in Armed Conflict); the Convention against Torture and Other Cruel Inhuman and Degrading Treatment; and the Rome Statute of the International Criminal Court.

Practically, however, DRC courts 'have been reluctant to rely on international law in the absence of implementing legislation', and there is no precedent for the direct domestic application of customary international law.<sup>201</sup> Consequently, this is not a promising source of authority for a domestic claim.

#### B. Human Rights Protections in the DRC Constitution

Title II of the DRC Constitution provides a number of human rights guarantees. However, while art 11 of the Constitution recognises that all human beings are born free and equal in dignity and rights,<sup>202</sup> the political rights provided in Chapter I of Title II of the Constitution apply only to Congolese citizens, unless otherwise provided by law.<sup>203</sup> Chapter I of Title II provides a set of civil and political rights, including guarantees of equality before the law and non-discrimination; prohibitions against slavery and other means of cruel, inhuman or degrading punishments and forced labour; the right to life; the ability to petition public officers; protections for home and private life; freedom of expression, peaceful protest, peaceful meeting and thought, conscience and religion; a set of criminal process rights; and specific provisions dealing with the advancement of women and the elimination of sexual violence.

Aliens legally present in the DRC have a more limited set of constitutional protections: the first is a guarantee of protection of their property and persons under conditions specified by laws or treaties,<sup>204</sup> while the second is the extension of the same rights which Congolese

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<sup>200</sup> Constitution de la République Démocratique du Congo (2006) art 153.

<sup>201</sup> WW Burke-White 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden J Int Law* 557, 583; 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo' International Center for Transitional Justice Occasional Paper (October 2004) 21.

<sup>202</sup> 'Tous les êtres humains naissent libres et égaux en dignité et en droits'.

<sup>203</sup> DRC Constitution (n 9) art 11 ('[t]outefois, la jouissance des droits politiques est reconnue aux seuls Congolais, sauf exceptions établies par la loi').

<sup>204</sup> Ibid art 32 ('Tout étranger qui se trouve légalement sur le territoire national jouit de la protection accordée aux personnes et à leurs biens dans les conditions déterminées par les traités et les lois. Il est tenu de se conformer aux lois et règlements de la République').

nationals enjoy (with the exception of ‘the political rights’), subject to the principle of reciprocity.<sup>205</sup>

Chapter II of Title II provides for social, economic and cultural rights, including the rights to: private property (subject to lawful expropriation on payment of adequate compensation), work, free association, strike, culture, health and food safety, and to marry and found a family. Specific articles deal with the rights of children (including education) and of the elderly and disabled people.

Chapter III of Title II deals with collective rights, most notably rights to peace and safety and a healthy environment.

These rights are binding both on the state and on private individuals,<sup>206</sup> and a set of core rights are non-derogable, even in times of war or public emergency: the right to life; the prohibition of torture, inhumane, cruel and degrading treatment; prohibition of slavery and servitude; the principle of legality of offences and sentences; the rights to a defence and to a remedy; the prohibition of imprisonment for non-payment of debts; and freedom of thought, conscience and religion.<sup>207</sup>

### C. Relevant Private Law

Customary law is still a common element in DRC law. If the relevant legal instrument that governs a dispute is a custom, the national courts will apply it only insofar as it is consistent with the law and public order of Congo. If the custom is inexistent or inconsistent with Congo’s law or public order, the national courts will apply general principles of law.<sup>208</sup> It is possible that questions of custom may be peripherally relevant to a human rights claim, but in general terms, this branch of law only governs questions pertaining to people’s personal status (e.g. marriage) and to property rights (including the law of inheritance and of land tenure).<sup>209</sup>

The main private law provision which the claimant is likely to invoke in a civil action based on a human rights violation is art 258 of the Congolese Civil Code (‘Civil Code’).<sup>210</sup> This provides that ‘[a]ny individual’s act which entails damage to a third party obliges the individual by whose fault the damage occurred to compensate for it’.<sup>211</sup> This article constitutes the cornerstone of the whole regime of tort liability under DRC law.

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<sup>205</sup> Ibid art 50 (‘Sous réserve de la réciprocité, tout étranger qui se trouve légalement sur le territoire national bénéficie des mêmes droits et libertés que le Congolais, excepté les droits politiques’).

<sup>206</sup> Ibid art 60 (‘Le respect des droits de l’homme et des libertés fondamentales consacrés dans la constitution s’impose aux pouvoirs publics et à toute personne’).

<sup>207</sup> Ibid art 61.

<sup>208</sup> Judicial Ordinance (n 3) art 116.

<sup>209</sup> Zongwe, Butedi and Phebe ([n](#) 1).

<sup>210</sup> This provision is to be found in Book III (‘Obligations’) of the Civil Code, which was enacted on 30 July 1888. In that respect, the Congolese Civil Code was not adopted as a whole: its three books were enacted ‘at different times and out of order’. For more details, see Crabb (n 2) 89.

<sup>211</sup> P Piron, J Devos, *Codes et Lois du Congo Belge I – Matières Civiles, Commerciales, Pénales* (8th edn Larquier, Brussels 1960). This is an informal translation from the corresponding French formulation.

Where the tort was committed outside the borders of the DRC, the Civil Code provides that the applicable civil law under the conflict of law rules is that of the country of occurrence of the act generating the damage. Art 11 para 3 of the Civil Code reads: '[t]he obligations which result from a act that is personal to the debtor (quasi-contracts, 'delicts' or 'quasi-delict') are subject to the law of the place where the act occurred'.<sup>212</sup> The Civil Code does not expressly provide for circumstances where the law of the country of occurrence of the tort is silent on the question of the tortfeasor's civil liability or is found to be contrary to DRC public order.<sup>213</sup> Nevertheless, it seems that in such a case the law of common nationality of the parties to the dispute ought to apply or, in case of divergent nationalities, the *lex fori* (i.e. art 258 of the Civil Code).<sup>214</sup> Obviously, the connecting factor embodied by art 11 para 3 of the Civil Code will not always be easy to implement in complex situations where several simultaneous or successive acts occurring in different States contributed to the damage caused by the defendant or where the damage took place in a different country from that where the tort occurred.

#### D. Recognition and Enforcement of Foreign Judgments

In terms of the enforcement of foreign judgments, the Ordinance-Law on Judicial Organisation and Competence contains one single ground of 'exclusive international competence' which Congolese courts can rely upon.<sup>215</sup> Indeed, art 117 of the Ordinance-Law on Judicial Organisation and Competence provides that foreign judgments can be denied the exequatur and thus their 'executing force' in the DRC if the foreign court found itself competent solely on the basis of the claimant's nationality.<sup>216</sup> In such a case, the foreign judgment will be unenforceable in the DRC and it will be up to the DRC's competent court (both materially and territorially) to adjudicate upon the dispute *de novo*.

A foreign judgment can be recognised in the DRC subject to no further condition of form or substance. This means that the foreign judgment has an automatic 'obligatory effect' under the law of DRC. Nevertheless, if the recognition of the foreign judgment becomes contested by the party against which it is being enforced, then the claimant will need to launch an exequatur procedure so as to have the 'executing effect' of the judgment forcibly applied.<sup>217</sup>

A foreign judgment will be made enforceable in the DRC by the 'Tribunal de Grande Instance' ('Court of High Instance'), which has exclusive material competence over this particular matter. This is known as the 'exequatur' procedure. The following conditions must be satisfied in order for the foreign judgment to be granted this 'executing effect':

- (1) The judgment has to be consistent with the public order of the DRC;
- (2) The judgment needs to have *res judicata* effect under the law of the host State;

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<sup>212</sup> Ibid.

<sup>213</sup> J de Burlet, *Précis de Droit International Privé Congolais* (Maison Ferdinand Larcier, Brussels 1971) 89, 308–10.

<sup>214</sup> Ibid 294–95.

<sup>215</sup> Ibid 325.

<sup>216</sup> Judicial Ordinance (n 3) art 117.

<sup>217</sup> De Burlet (n 22) 322–23.



- (3) The judgment must have been delivered in an authentic form under the foreign law;
- (4) The rights of the defence must have been respected in the foreign court; and
- (5) The foreign court must not have found itself competent solely by reason of the claimant's nationality.<sup>218</sup>

The Court of High Instance has no power to actually revise the substance of the judgment.<sup>219</sup> However, DRC courts are empowered to send 'rogatory letters' (*commission rogatoire*) to foreign judges in order to get further insight into a particular dispute which a foreign judge has been in a better position to assess.<sup>220</sup>

A difficult requirement to meet will be that relating to the DRC's public order. This public order caveat adds considerable uncertainty from the perspective of a foreign victim, who is likely to be less informed than a Congolese TNC about the substance of Congolese public order. The identification of a public order exception will have the effect that all or parts of the judgment may be denied the exequatur by the Court of High Instance. If the remainder of the judgment is distinguishable from that part considered to be inconsistent with Congolese public order, only the latter will be discarded. If the other parts of the judgment are intrinsically linked to the inconsistent one, then the whole foreign judgment will be denied exequatur.<sup>221</sup> Such result will evidently frustrate the claimant's legal expectations. This public order condition thus confers a substantial margin of appreciation upon the competent Court of High Instance, since the public order provisions of a piece of legislation are not necessarily automatically identified by the legislator and this task will mainly be incumbent upon the Congolese court.

If the 'right of defence' (part of fair trial rights) has not been respected in the foreign court to the detriment of the TNC, the latter will be entitled to raise the matter during the exequatur proceedings and have the foreign judgment discarded in whole or in part. It will have to be determined which conception of the rights of defence (International, Congolese or that of the country of the foreign court) was being referred to in the Ordinance-Law on Judicial Organisation and Competence. Presumably, the Ordinance-Law was referring to the Congolese understanding of the rights of defence, in the absence of contrary specification. In such a case, the Court of High Instance will have to undertake a comparison between the level of protection of the rights of defence provided in that foreign country and that prevailing in the DRC. If the level provided abroad is lower than the DRC's, the foreign judgment will be denied the exequatur except if in practice the foreign court applied the relevant procedural law in a more generous way than was permitted. If the level of protection provided under the foreign procedural law is higher than the DRC's, it will have to be ascertained whether that level was effectively and correctly applied by the foreign court. If that were not the case, the foreign judgment should be denied the exequatur as a whole.

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<sup>218</sup> Judicial Ordinance (n 3) art 117.

<sup>219</sup> De Burlet (n 22) 324.

<sup>220</sup> *Décret du 7 mars 1960 portant Code de Procédure Civile* (Code of Civil Procedure) art 38.

<sup>221</sup> De Burlet (n 22) 324.

With regard to the status of judgments of DRC courts in foreign jurisdictions, the defects endemic in the DRC judicial system are likely to present a considerable barrier to their enforcement, although obviously the rules which obtain will vary depending on the extant rules in the state in which enforcement is sought.

## E. Criminal Law

It is not entirely clear whether non-natural persons can be held criminally liable under DRC law. There is at least one situation in which the agents of a TNC (Anvil Mining) have faced trial on indictment for human rights abuses committed in the DRC.<sup>222</sup> However, the TNC itself was not indicted.<sup>223</sup> It is unclear why the company itself was not prosecuted, despite the prosecutor initially suggesting his intention to do so. This matter was the subject of considerable legal discussion preceding the trial, so it is entirely possible that the company was not indicted as there was no jurisdiction to do so.<sup>224</sup>

In any event, it is highly unlikely that a TNC could face criminal prosecution in the DRC for events which occurred outside the DRC. Its officers, however, conceivably could be prosecuted. Art 3 of the Congolese Criminal Code provides that any person who has committed a criminal offence abroad which is punishable by imprisonment for more than two months can be judged in the DRC (subject to extradition law).<sup>225</sup> This therefore suggests that legal persons cannot be criminally tried in the DRC for human rights violations committed in a foreign country, since imprisonment is only conceivable in relation to natural persons.

Nevertheless, criminal actions against the directors of a TNC are possible if the human rights violation committed abroad can lead to imprisonment of more than two months' imprisonment under DRC criminal law and unless stipulated otherwise under the DRC's extradition commitments. Depending on the seriousness of the offence, different limitation periods will apply to these criminal actions. In that respect, art 24 of the DRC Criminal Code provides a limitation period of one year for offences punishable by less than a year's imprisonment, three years for offences punishable by less than five years' imprisonment and ten years in all other cases. It has been suggested that the DRC courts might follow the French courts' lead and determine that the limitation question does not apply in respect of crimes against humanity,<sup>226</sup> although this remains a matter of speculation.<sup>227</sup>

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<sup>222</sup> This case is discussed in more detail below, but see generally 'Kilwa Trial: a Denial of Justice' <[www.globalwitness.org/media\\_library\\_detail.php/560/en/kilwa\\_trial\\_a\\_denial\\_of\\_justice](http://www.globalwitness.org/media_library_detail.php/560/en/kilwa_trial_a_denial_of_justice)> accessed 12 March 2008.

<sup>223</sup> 'Proceedings of the Military Court of Katanga in the case of the Congolese Public Prosecutor and Parties Civiles versus Colonel Adémar ILUNGA and associates – Rôle Pénal 010/2006/ RMP 0065/2005' <[http://www.raid-uk.org/docs/Kilwa\\_Trial/Legal\\_Update\\_2.pdf](http://www.raid-uk.org/docs/Kilwa_Trial/Legal_Update_2.pdf)> accessed 12 March 2008.

<sup>224</sup> *Ibid* 2.

<sup>225</sup> *Code Pénal Congolais*, Journal Officiel Spécial 30 November 2004 (Congolese Criminal Code) art 3.

<sup>226</sup> See *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (1984) 78 ILR 125 (Cour de Cassation) (France) 135 .

<sup>227</sup> 'First Few Steps' (n 10) 22.

## 4. COMPETENT COURTS

### A. Civil Claims

The competent civil courts for a tort claim based on a violation of human rights are, in increasing hierarchical order:

- (1) The '*Tribunal de la Paix*' ('Justice of [the] Peace'<sup>228</sup>) for claims of low monetary value<sup>229</sup> and for the execution of 'authentic acts'.<sup>230</sup> The law provides that there is to be one or more of these courts per rural district ('territory'<sup>231</sup>) and town;<sup>232</sup>
- (2) The '*Tribunal de Grande Instance*' ('Court of High Instance') where the claim is outside the monetary jurisdiction of the Justice of Peace, or for appeals against judgments of the Justice of Peace, and for the execution of judgments (including foreign ones) except those of the Justice of Peace.<sup>233</sup> The law provides that there is to be least one such court per town and sub-region;<sup>234</sup>
- (3) The '*Cour d'Appel*' ('Court of Appeals') for any appeal against judgments of the Court of High Instance'.<sup>235</sup> There is one per region.<sup>236</sup>
- (4) The '*Cour Suprême de Justice, Section Judiciaire*' ('Supreme Court of Justice, Judicial Section') for any challenge against last resort judgments of either the Justice of Peace, the Court of High Instance or the Court of Appeals, insofar as the judgment is in breach of law or custom.<sup>237</sup> It is important to bear in mind that this Court is to be replaced by the '*Cour de Cassation*' established under the 2006 Constitution, which will hierarchically be the ultimate court for the review of judgments of ordinary courts (i.e. to the exclusion of judgments of administrative courts) on points of law exclusively.<sup>238</sup>

Subject to special exceptions, the competent territorial judge will normally be that of the location of the defendant's domicile or residence.<sup>239</sup> For corporations enjoying legal personality, this court should be the one with territorial jurisdiction over their seat of

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<sup>228</sup> Translation borrowed from Crabb (n 2) 108.

<sup>229</sup> Judicial Ordinance (n 3) art 110. This legislation is quite outdated. It refers to '...any civil dispute whose object does not exceed 5,000 zaires'. As the DRC currency is no longer denominated in *zaires*, it is unclear at what financial limit the jurisdiction currently expires.

<sup>230</sup> For example, its own judgments that would recognise the obligation to compensate owed by one party to another. Cf. Judicial Ordinance (n 3) art 110. The *Tribunal de la Paix* is also competent to adjudicate upon specific claims pertaining to the law of successions, property rights and family law that fall under the scope of customary law, whatever the amount of those claims is.

<sup>231</sup> Cf. Crabb (n 2) 108.

<sup>232</sup> Judicial Ordinance (n 3) art 22.

<sup>233</sup> *Ibid* arts 111, 112, 114.

<sup>234</sup> *Ibid* art 31.

<sup>235</sup> *Ibid* art 111.

<sup>236</sup> *Ibid* art 36.

<sup>237</sup> *Ibid* art 155.

<sup>238</sup> Zongwe, Butedi and Phebe (n 1).

<sup>239</sup> Judicial Ordinance (n 3) art 127.

incorporation, in the absence of specific provision to the contrary. In case of plurality of defendants, the claimant has the choice as to the competent territorial judge, so long as this judge has territorial competence over the domicile or residence of anyone of the defendants.<sup>240</sup>

If the plaintiff lives outside of the DRC, he or she is entitled to request the Governor of the Province to appoint an 'ad litem representative' to file and support the civil claim in his/her name before the competent court.<sup>241</sup> This *ex gratia* arrangement is distinct from the right to be represented by a lawyer and is not presented in the Code of Civil Procedure as an automatic right unlike the latter.

## **B. The Specialised Jurisdiction of the Commercial Court**

Provision is also made for a specialist commercial court, the *Tribunal de Commerce* ('Commercial Court').<sup>242</sup> There are a number of specialised rules that apply in the Tribunal de Commerce, but generally the procedure is the same as in the ordinary civil courts unless otherwise provided.<sup>243</sup>

The *Tribunal de Commerce* can be competent on several grounds. One such ground is that the nature of the dispute lies in the statutory acts of a company.<sup>244</sup> This may be the case if the TNC's statutory acts refer to objectives or activities constituting a breach of human rights law in its broadest sense. The action before the Commercial Court might thus be aimed at annulling the contested act of incorporation of the TNC or ceasing its legal effect or operation. Another ground is that the dispute lies in transactions between the parties when either of them habitually exercises commercial activities.<sup>245</sup> In this second type of case, the human rights violation has to take place in the context of those commercial transactions.

With regard to territorial competence, the same rules apply as for standard civil actions.

## **5. OBSTACLES IN ACCESS TO JUSTICE**

### **A. Obstacles in Civil Procedure**

#### **i. Inquiry Procedures**

The court can order an inquiry on its own motion or following a party's request. Such request has to pertain to facts 'precisely and succinctly articulated'.<sup>246</sup> In the context of such an

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<sup>240</sup> Ibid art 127.

<sup>241</sup> Code of Civil Procedure (n 29) art 9.

<sup>242</sup> *Loi 002/2001 du 3 juillet 2001 portant création, organisation et fonctionnement des tribunaux de commerce, Journal Officiel n° 14, 15 July 2001* ('Law on the Organization and Functioning of Commercial Courts').

<sup>243</sup> Ibid art 47.

<sup>244</sup> Ibid art 17.3.

<sup>245</sup> Ibid art 17.1.

<sup>246</sup> Code of Civil Procedure (n 29) art 29.

inquiry, the court will summon witnesses to appear, testify, re-testify and possibly be cross-examined.<sup>247</sup> Such witnesses will have had to make a sworn declaration before the court.<sup>248</sup>

One of the difficulties with the inquiry procedure is that the claimant is likely to request that the court summon witnesses that are domiciled or resident in the country where the tort was committed. As well as the usual problems regarding the unwillingness of some witnesses to appear, there are likely to be additional logistical problems (such as immigration and transportation, both of which are troublesome in the DRC) as well as financial constraints. For these reasons, the trial could be more focused on the production of written evidence than on testimonial evidence, at least as far as the plaintiff is concerned.

## ii. Appeals

Any party that wishes to appeal any judgment rendered on first instance may do so within 30 days, counted from the day of the notification of the judgment to the appellant.<sup>249</sup> The appeal is launched through a statement of appeal deposited at the competent appeal court's registry or through registered mail addressed to the registrar of the competent appeal court.<sup>250</sup>

The appeal procedure has the effect of suspending the challenged judgment, unless the first instance court declared the judgment to be provisionally enforceable notwithstanding the lodging of an appeal.<sup>251</sup> If the judgment rendered on first instance judgment benefits the claimant, the 'suspending' effect of the appeal will be detrimental to him or her, unless the judge on first instance judge declared his or her judgment to be provisionally enforceable. If the favourable judgment is suspended pending the outcome of the appeals procedure, the plaintiff will be in a fragile position during this interim period, given that any damages will not be paid until the appeal court disposes of the matter. Given the under-resourcing of the courts (see below), this may take a significant amount of time.

## iii. 'Civil Request' Procedures

The Code of Civil Procedure provides, in addition to the right to an appeal, a revision procedure known as 'requête civile' ('civil request').<sup>252</sup>

Through this 'extraordinary' action, any party to a dispute can challenge a judgment rendered in last resort by a Justice of Peace, Court of High Instance, or Court of Appeals before that same court (and even before the same judges).<sup>253</sup> The grounds for such a challenge are:

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<sup>247</sup> Ibid arts 29–38.

<sup>248</sup> Ibid art 33.

<sup>249</sup> Ibid art 67.

<sup>250</sup> Ibid art 68. 'Appeal court' for the purpose of this paragraph is to be understood as referring to any superior court that is empowered to review the first instance judgment on points of law and fact.

<sup>251</sup> Ibid art 74.

<sup>252</sup> Ibid art 85.

<sup>253</sup> Ibid art 89.

- (1) Personal fraud (*'dol'*) committed in the course of the court proceedings leading to the challenged judgment;
- (2) That the judgment was based on declarations held to be false since the delivery of the contested judgment;
- (3) The discovery, since the delivery of the judgment, of decisive elements withheld by one of the parties; and
- (4) Incompatibility between two judgments of last resort (i.e. non-appealable judgments) delivered by the same court in regard to the same claims between the same parties.<sup>254</sup>

The applicant has three months, as of the date of discovery of the fact underpinning such a request, to submit it.<sup>255</sup> The request will be launched through the notification of a writ of summons.<sup>256</sup> If the request succeeds, the court will have to vitiate the contested judgment and rehear the case.<sup>257</sup>

A peculiar requirement for the admissibility of the request lies in the consultation by the applicant of three lawyers (*'avocats'*) who, through a declaration, must have converged towards the conclusion that the *'civil request'* is likely to be found grounded before a court of law.<sup>258</sup> These lawyers must have practised for a minimum of five years in the jurisdictional area of the court before which the request is to be launched.<sup>259</sup> Furthermore, the request can only contain the grounds of challenge agreed upon in the three lawyers' consultation statement.<sup>260</sup> Finally, the launching of a civil request does not suspend the enforceability of the contested judgment.<sup>261</sup>

On the face of it, recourse to this exceptional procedure is rather unappealing from a claimant's point of view, due to its rigidity (the grounds discussed in court will be those agreed upon by the three lawyers), potential high costs (entailed by the consultation fees of three experienced lawyers), the absence of *'suspending'* effect following the submission of this action, and the interference with the right of a client to communicate freely and confidentially with his or her lawyer. Conversely, this procedure may provide a means for defendant companies to further delay and manipulate the justice process.

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<sup>254</sup> Ibid art 85.

<sup>255</sup> Ibid art 87.

<sup>256</sup> Ibid art 89.

<sup>257</sup> Ibid art 94.

<sup>258</sup> Ibid art 88.

<sup>259</sup> Ibid art 88.

<sup>260</sup> Ibid art 92.

<sup>261</sup> Ibid art 90.

#### iv. Review before the Supreme Court

The DRC judicial system provides for a right to challenge a final judgment (after the expiry of the time limit for lodging an appeal or after the appeal court pronounced itself on an appeal from a first instance judgment) before the Supreme Court. This ultimate review action is likely to be out of reach of ordinary plaintiffs. First of all, the challenge can only pertain to errors of law as opposed to errors of fact: misinterpretation of the law, violation of substantial formalities, misuse of power, incompetence or enforcement by the lower court of a custom that is contrary to the public order or the law of the DRC.<sup>262</sup> Secondly, the use of such a procedure will require the expertise of very specialised litigation lawyers and make the defence costs extremely high. Therefore, the availability of this procedure is, as with the civil request process, more likely to benefit defendants, and for similar reasons.

#### v. Statute of Limitations

As there is no specific term provided under the Civil Code for the extinctive prescription<sup>263</sup> of a tort action, the latter will fall under the scope of the general statute of limitations period. According to art 647 of the DRC Civil Code, personal and real actions are barred after a period of 30 years.<sup>264</sup> This period of prescription will be interrupted by the notification of a writ of summons against the person wishing to invoke the statute of limitation.<sup>265</sup>

#### vi. Obstacles in Commercial Procedure

The comments made above in relation to civil claims apply equally to commercial law claims. The only peculiarity that ought to be emphasised is in relation to the statute of limitations. Unlike civil law actions, those based on commercial acts (*'actes de commerce'*) are barred after a period of 10 years as of the date of that act.<sup>266</sup>

#### vii. Counter-Claim for Abusive Recourse to Judicial Procedure

The foreign victim must make sure that their claim is reasonable and not abusively launched. It appears that Congolese law has indeed endorsed the concept of abuse of process based on a plain reading of art 139 of the Ordinance-Law on Judicial Organisation and Competence<sup>267</sup> which provides that: '[c]laims grounded on the persecutory and reckless character of an action shall be brought before the court seised of that action'. This wording suggests that a plaintiff could become a defendant in a counter-claim brought by the original defendant now requesting an award of damages to redress the wrong committed as a result of a manifestly groundless action or an action disproportionate to the importance of the

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<sup>262</sup> Judicial Ordinance (n 3) art 156.

<sup>263</sup> In legal parlance, 'extinctive prescription' is the equivalent to the statute of limitations. In French-based legal systems, this notion signifies that claims will no longer be enforceable before courts or other related organs (e.g. bailiffs, etc.). However, although the right to enforcement is foreclosed, the underlying substantive right is not lost by 'extinctive prescription'.

<sup>264</sup> Piron and Devos (n 20). This is an informal translation from the corresponding French formulation.

<sup>265</sup> Cf. Ibid; *Code Civile* (Civil Code) art 638.

<sup>266</sup> Law on the Organization and Functioning of Commercial Courts (n 51) art 43.

<sup>267</sup> N 3.

original tort. Given the problems identified below with regard to corruption, political interference and under-resourcing, it is not inconceivable that this process could be invoked in response to what is, objectively, a well-founded claim.

### viii. Legal Aid

There is no formal system of legal aid in operation. However, there are a number of initiatives by the United Nations and by NGOs to provide limited legal aid to victims of human rights abuses in some areas. For example, the African Division of the American Bar Association's Rule of Law Initiative is in the process of opening an office in the DRC (funded by the US Agency for International Development). The function of this office will be to conduct '...legal aid and access to justice programs with the purpose of combating gender based crimes and sexual violence'.<sup>268</sup> Similarly, the United Nations Mission in the DRC has established a number of legal aid clinics with a similar remit.<sup>269</sup>

Obviously, given the extreme constraints within which these schemes function, the extension of legal aid to non-citizens is unlikely.

### ix. Costs, Filing Fees and Delays

If a foreign victim wishes to launch a civil claim based on a human rights violation against a TNC before a Congolese court, they might be discouraged from bringing the claim against the TNC based on the risk of facing the entire costs of legal procedure ('*depenses*') in the event that they lose the suit. Indeed, according to the Code of Civil Procedure, any party to a civil action who loses the case is liable to pay such costs as those relating to summoning witnesses, obtaining expert testimony, on-the-spot visits, the judicial inquiry itself, and the issuance of various judicial documents by court officers.<sup>270</sup>

Even if the claimant were to succeed, the costs may still be prohibitive. A 2007 US State Department Report described the fees associated with filing a civil case as 'often prohibitive' and beyond the means of most individuals.<sup>271</sup> It is difficult to quantify precisely how much a claim for abuses of human rights would cost to litigate in a DRC court. However the World Bank's 'Doing Business' project has estimated that the cost of enforcing a standard commercial contract would outstrip the amount likely to be recovered by a factor of a half—with court costs amounting to 6.8% of the cost of a claim, lawyers' fees 138% and enforcement costs 7%.<sup>272</sup> The same study suggested that such a straightforward enforcement claim would take 685 days to complete, and require 43 separate legal procedures to be undertaken. Given that these significant costs pertain to a straightforward commercial claim, one can infer that the costs of litigating a more complicated human rights claim would be even more prohibitive.

<sup>268</sup> See American Bar Association, 'Rule of Law Initiative Programs - Democratic Republic of Congo' <[http://www.abanet.org/rol/africa/drc\\_programs.html#drc\\_legal\\_aid](http://www.abanet.org/rol/africa/drc_programs.html#drc_legal_aid)> accessed 29 February 2008.

<sup>269</sup> See United Nations, Office of the High Commissioner for Human Rights, 'OHCHR in Democratic Republic of the Congo (2008–2009)' <<http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ZRSummary0809.aspx>> accessed 29 February 2008.

<sup>270</sup> Code of Civil Procedure (n 29) arts 20, 149.

<sup>271</sup> US Department of State, 'Country Reports on Human Rights Practices – 2006' (6 March 2007).

<sup>272</sup> World Bank Group, '*Enforcing Contracts in Congo, Dem Rep. Details – Doing Business*' (2007) <<http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/Details.aspx?economyid=48>> accessed 29 February 2008.



## B. Political Interference with the Judiciary

Executive and legislative manipulation of judicial matters has been a considerable problem in the DRC. Under the legal order as it existed prior to the 2006 Constitution, the Executive effectively controlled the appointment and dismissal of judges. Further, a lack of economic autonomy ensured effective executive control over judicial matters.<sup>273</sup>

Formally, the 2006 Constitution turns it back on such practices, declaring that the judiciary is independent, with the courts' budget independently determined<sup>274</sup> and with security of tenure for judicial officers.<sup>275</sup> The Executive is barred from interfering with the judicial process, and legislation intended to annul judicial decisions is to be null and of no effect.<sup>276</sup>

The Superior Council of Magistracy ('Conseil Supérieur de la Magistrature') was created under Act 86-006 of 23 November 1986 on the Organisation and Functioning of the Judicial Council. Under this legislation, the Council was to be composed of high-ranking magistrates and 'military listeners', and to be chaired by the Minister of Justice.<sup>277</sup> The 2006 Constitution sets forth a new framework for the functioning of the Superior Magistracy Council by removing all interferences by the Government in its functioning.<sup>278</sup> Under this framework the Council, whose composition now consists exclusively of high-ranking prosecutors and judges, is in charge of administering of the judiciary. It drafts proposals for the appointment and dismissal of magistrates; it enjoys a 'disciplinary power over magistrates'; oversees the budget of the judiciary and delivers its opinion in pardon procedures.<sup>279</sup>

However this newly found independence is under threat. As of late 2007, an amending bill designed to allow the President as well as the Minister of Justice and civil society representatives to serve on the Council has been proceeding through the Congolese Parliament, suggesting that even formal independence might soon be undermined.<sup>280</sup>

## C. Corruption and Institutionality

The 2006 Constitution contains provisions which ought to prevent corruption and bias in the justice system. Art 20 requires courts to sit in public, unless there is good reason to sit in private. Art 21 requires written reasons for judgment to be given, and provides a right of appeal under conditions fixed by law. It is unclear whether such provisions are likely to be anything more than aspirational in the short term. In its 2007 Report, Transparency International reported that the judicial reforms instituted by the 2006 Constitution had not yet

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<sup>273</sup> See International Commission of Jurists, *Attacks on Justice* (2002) 119.

<sup>274</sup> DRC Constitution (n 9) art 149.

<sup>275</sup> *Ibid* art 150.

<sup>276</sup> *Ibid* art 151.

<sup>277</sup> *Loi n° 86-006 du 23 novembre 1986 portant organisation et fonctionnement du Conseil Judiciaire, Journal Officiel Spécial n° 23, 1<sup>er</sup> décembre 1986*, art 3.

<sup>278</sup> DRC Constitution (n 9) art 152.

<sup>279</sup> *Ibid* arts 149, 152.

<sup>280</sup> Zongwe, Butedi and Phebe (n 1); Transparency International (n 7) 56.

been implemented, and that in practice judicial power was still exercised in terms of the pre-existing laws.<sup>281</sup> Further, there is no formal mechanism to monitor conflicts of interest.<sup>282</sup>

Human Rights Watch has noted that corruption is endemic in the DRC judiciary, with bribery of both judges and judicial officers being common practice. As a result of a long period of war and economic stagnation, the judicial system suffers from significant logistical and financial problems.<sup>283</sup> It is unlikely that these will abate quickly, with the Secretary General of the United Nations commenting in November 2007 that

[s]erious financial constraints complicate the attempts of the [DRC] to establish and foster the development of democratic institutions... Non-existent or barely functioning State institutions and decaying infrastructure, along with a lack of resources, continue to hamper the Government's efforts to extend basic services and to address the urgent needs of the population.<sup>284</sup>

Commenting on the criminal justice system, Human Rights Watch has reported that most persons staffing military and civilian courts are poorly trained, and that investigators often do not know how to gather evidence to be used in court. The lack of resources in the criminal justice system is such that courts and prosecutors often lack basic materials such as stationery and computers, and there are usually insufficient vehicles and money to pay for travel to outlying areas where violations often occur.<sup>285</sup>

Transparency International reports similar problems in the civil justice system, giving the example of a court in Kisangani, a city of 1,000,000 inhabitants, which has been serviced by a single judge for over five years.<sup>286</sup> A 2004 audit of the justice system concluded that only 20% of Congolese citizens had access to the formal justice system, and that 'the infrastructure of the judicial system has all but collapsed; judges and prosecutors lack copies of basic laws and are in dire need of training or re-training'.<sup>287</sup>

These conclusions are mirrored by the United States' State Department, which notes that:

[I]n practice, the judiciary continued to be poorly paid, ineffective, subject to influence by other government officials, and corrupt. The civilian judicial system, including lower courts, appellate courts, the Supreme Court, and the Court of State Security, continued to be largely dysfunctional, and the rule of law was not generally respected. ... Corruption remained pervasive, particularly among magistrates, who were paid very poorly and only

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<sup>281</sup> Specifically, Ordinance Number 82-020 of 31 March 1982 supplemented by the ordinance-law No 83/009 of 29 March 1983; Transparency International (n 7) 52.

<sup>282</sup> Transparency International (n 7) 55.

<sup>283</sup> Kippenberg (n 6) 17(1(A)).

<sup>284</sup> UNSC 2007 (n 5).

<sup>285</sup> Cf. Kippenberg (n 6) 17(1(A)); International Commission of Jurists (n 82) 120.

<sup>286</sup> Transparency International (n 7) 54.

<sup>287</sup> 'Audit organisationnel du secteur de la justice en RDC, Rapport d'Etat des Lieux, Synthèse' (May 2004), cited in 'First Few Steps' (n 10) 24.

intermittently, and there were credible reports that judges regularly prolonged trials as a form of blackmail and a means of soliciting bribes.<sup>288</sup>

In the context of the application of the civil law more generally, the US State Department noted in a separate report that while

[o]n paper, the DRC's official policies are satisfactory ... in recent years they have often been inoperative in practice due to problems with the judicial system. There is no transparent and responsible hierarchy for public order; courts are marked by a high degree of corruption; public administration is not reliable; and both expatriates and nationals are subject to selective application of a complex legal code.<sup>289</sup>

At a more basic level, there is a general lack of access to legal resources and legal information in the DRC, which means that

...effectively, with the exception of practising lawyers, very few people are able to access legal information readily or ascertain which laws have come into force and which ones have been repealed. In addition, most printed and online resources are only infrequently published and updated.<sup>290</sup>

Given this, the ability of individuals to learn about, let alone assert their rights under DRC law must be acknowledged as a considerable barrier.

Authority figures such as police and military commanders are known to have encouraged victims of abuse to settle out of court.<sup>291</sup> One could expect similar pressures to be brought to bear on those pursuing action in other scenarios.

#### **D. Reprisals**

The possibility of reprisals against individuals making claims must be considered seriously, with reported cases of arbitrary execution, rape, torture and cruel, inhumane and degrading treatment by both the armed forces and police growing in the last year.<sup>292</sup> In addition, the Secretary General of the United Nations has reported that:

...military and civilian intelligence services, the Special Services Branch of the National Police in Kinshasa and the Republican Guard have also been

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<sup>288</sup> US Department of State, *Democratic Republic of the Congo – Country Report on Human Rights Practices* (8 March 2007).

<sup>289</sup> US Department of State, *2006 Investment Climate Statement – Democratic Republic of Congo*.

<sup>290</sup> Zongwe, Butedi and Phebe (n 1).

<sup>291</sup> UNSC 2007 (n 5) [40].

<sup>292</sup> See *Ibid* [39]; Amnesty International, 'Democratic Republic of Congo Torture And Killings By State Security Agents Still Endemic' (2007) AFR 62/012/2007.

implicated in politically motivated crimes, including intimidation of opposition members, journalists and human rights activists.<sup>293</sup>

There are also documented cases of suspected reprisals against lawyers and judicial officers associated with controversial claims.<sup>294</sup>

Efforts are ongoing (under the auspices of the United Nations Mission in the DRC and of the European Commission) to build capacity for the protection of those whose participation is crucial (human rights defenders, victims and witnesses) but this is very much a work in progress.<sup>295</sup>

## 6. CASE STUDY: THE KILWA TRIAL

The particular problems which are likely to arise in any criminal prosecution of (or, for that matter, contentious civil claim against) a TNC in the DRC are illustrated by the events surrounding a recent attempted prosecution of a TNC, and actual prosecution of its agents, for their role in providing logistical support for an operation which resulted in the illegal detention, torture, and summary execution of a number of civilians by members of the armed forces.<sup>296</sup>

There was official interference in the investigation from the outset, with United Nations investigators being delayed and denied access to witnesses.<sup>297</sup> Threats were made against a human rights organisation involved in the case, fuelled by concerns regarding the economic effects of taking action against the TNC. Police refused to take any action to protect the organisation targeted by the threats.<sup>298</sup>

Following the investigative stage, the Military Court assumed jurisdiction over the company and its officers, despite the fact that under DRC law the civilians ought to have been tried by a civilian court. This decision was criticised by the UN High Commissioner for Human Rights, who described the decision as 'inappropriate and contrary to DRC's international obligations'.<sup>299</sup>

A number of further pre-trial irregularities were documented. Most notably, there was the summoning of the military prosecutor to the capital, where he was allegedly pressured to

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<sup>293</sup> UNSC 2007 (n 5) [39].

<sup>294</sup> International Commission of Jurists (n 82) 121.

<sup>295</sup> Ibid 55.

<sup>296</sup> The TNC argued that its support for the operation was not voluntary, but that its equipment had been requisitioned by the military. See 'Kilwa Trial' (n 31). The background to the case is provided in the United Nations' Mission in the DRC's report on the incident: MONUC 'Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004' <[http://www.abc.net.au/4corners/content/2005/MONUC\\_report\\_oct05.pdf](http://www.abc.net.au/4corners/content/2005/MONUC_report_oct05.pdf)> accessed 24 April 2008.

<sup>297</sup> See MONUC Special Investigations Unit (SIU) 'Report of the Special Investigation in Kilwa 22-24 October 2004, Lubumbashi', 10 November 2004, cited in 'Kilwa Trial' (n 31).

<sup>298</sup> MONUC (n 105) [43].

<sup>299</sup> Office of the High Commissioner for Human Rights, 'High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo' (4 July 2007) Press Release <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument>> accessed 12 March 2008.

drop the charges against the company and its employees, and one of the victims' lawyers being permitted to act for the accused, in spite of his involvement in confidential discussions about the prosecution's strategy.<sup>300</sup>

Significant irregularities were also present in the trial process itself. These included the transfer of the military prosecutor to another jurisdiction and his replacement with someone with little knowledge of the case, the absence of the victims' lawyers, and the failure to summon key witnesses to appear in court.<sup>301</sup> There is also evidence that a senior politician with links to the defendant company attempted to dissuade victims from participating in the trial, enlisting the help of tribal leaders to do so.<sup>302</sup>

In the event, all civilian defendants were acquitted. The UN High Commissioner for Human Rights noted her concern at the court's processes, and urged the appeal court 'to fully and fairly weigh all the evidence before it reaches the appropriate conclusions that justice and the rights of the victims demand.'<sup>303</sup>

An appeal was filed, but prior to the hearing, a number of further irregularities occurred. Most notably, a prosecutor who was not involved in the trial, and was not competent to act (being of a junior rank to those on trial), altered the appeal documents, narrowing the grounds of appeal to include only matters relating to the sentencing of two military defendants. The appellate court considered that this alteration was permissible, and that they were thus without jurisdiction to consider the other grounds for appeal.<sup>304</sup>

## 7. CONCLUSION

DRC law contains, on paper, a number of human rights protections which might be invoked by victims of corporate human rights abuse; however with regard to legal persons, it is likely that liability can only be civil, rather than criminal, in nature. Despite these formal protections, once one examines the situation on the ground in the DRC, it becomes apparent that enforcing these protections is expensive, time consuming and, ultimately, subject to the whims of a corrupt and under-resourced judiciary which is jeopardised by extensive executive interference. Given this, the prospects for success in claims by non-nationals in the DRC courts are extremely slim.

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<sup>300</sup> 'Kilwa Trial' (n 31) 10, with further references.

<sup>301</sup> Ibid 10–23, with further references.

<sup>302</sup> As observed by MONUC sources. Cf. Ibid fn 122.

<sup>303</sup> High Commissioner Press Release (n 108).

<sup>304</sup> Global Witness, Rights and Accountability in Development (RAID), 'Military Court of Appeal succumbs to Political Interference in Kilwa Trial' (21 December 2007) <[http://www.raid-uk.org/docs/Kilwa\\_Trial/kilwa\\_appeal-21dec07-pdf.pdf](http://www.raid-uk.org/docs/Kilwa_Trial/kilwa_appeal-21dec07-pdf.pdf)> accessed 12 March 2008.

# EUROPEAN UNION

— Nicolas A J Croquet and Tolga R Yalkin\* —

## 1. BACKGROUND AND INTRODUCTION

The European Union ('EU') is currently composed of 27 Member States and 492 million citizens. It accounts for an estimated \$16,671 Billion GDP.<sup>305</sup> With world GDP averaged at \$53,640 Billion,<sup>306</sup> the economic output of the EU constitutes approximately 30% of the globe's total economic output. Some of the world's leading multinational corporations are headquartered in the EU, such as Adidas, BASF, Bayer, BNP Paribas, Deutsche Bank, JCDecaux, Siemens, Société Générale, and ThyssenKrupp, to name a few. The outward flow of foreign direct investment is averaged at EUR 175 Billion per year, and steadily rising.<sup>307</sup> The growth of the European Community ('EC') has led to its characterisation as 'the largest trading bloc in the world'.<sup>308</sup> Because of this, any consideration of the ability of foreign claimants to obtain redress against transnational corporations ('TNCs') must consider the EU in concert with the Union's largest and most prominent economies.

This section will attempt to outline the institutional evolution of the EU and EC, identify the key institutions that play decision-making roles. It will later describe the types of instruments enacted by these institutions, clarifying the obligations that they impose and on whom these obligations are incumbent. A basic understanding of these instruments and the way in which they operate is essential to effectively consider the sections of this report that follow.

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<sup>305</sup> The International Monetary Fund 'European Union Gross Domestic Product' <<http://www.imf.org/external/pubs/ft/weo/2007/01/data/weorept.aspx?sy=2004&ey=2008&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPWT&grp=1&a=1&pr1.x=35&pr1.y=10>> accessed 3 April 2008.

<sup>306</sup> CIA World Factbook <<https://www.cia.gov/library/publications/download/>> accessed 3 April 2008.

<sup>307</sup> Eurostat 'European Union Foreign Direct Investment Yearbook 2007' <[epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-BK-07-001/EN/KS-BK-07-001-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-BK-07-001/EN/KS-BK-07-001-EN.PDF)> accessed 26 April 2008.

<sup>308</sup> JHH Weiler, *The Constitution of Europe* (CUP, Cambridge 1999) 10.

## A. Institutional Evolution of the European Union and European Community

The European Coal and Steel Community Treaty ('ECSC') constituted the first main step in the creation of the European Community legal system. Adopted in 1952 in Paris by its 6 founding members (Belgium, France, Luxembourg, Italy, Netherlands and Germany), the ECSC was underpinned by the objective of achieving 'a common market for coal and steel'.<sup>309</sup> The ECSC also provided for the setting up of a High Authority (consisting of independent members with decision-making and implementing functions), an Assembly (a body composed of representatives of national parliaments entrusted with a consultative role), a Council (a body composed of national governments' representatives and entrusted with decision-making and advisory functions) and a Court of Justice (the Community's main judiciary). The ECSC expired on 23 July 2002 and has not been renewed since then, its subject-matter now falling under the scope of the EC Treaty.<sup>310</sup>

Following the ECSC, in 1957 the same six members came together in Rome to sign the Treaty Establishing the European Community ('TEC'). Initially termed the European Economic Community ('EEC'), this organisation became known as simply the European Community ('EC') due to the introduction by the Treaty on European Union ('TEU') into the TEC of matters of a patently non-economic character.

The EC enjoys separate legal personality.<sup>311</sup> It was set up as a permanent entity (unlike the ECSC).<sup>312</sup> Initially, it was designed to establish a customs union in which Member States agreed to gradually suppress customs duties and to eliminate 'non-tariff barriers' to trade and to harmonise their external commercial policy. The TEC also strives for the creation of an internal market, characterised not only by the free movement of products and services, but also by the free movement of people and capital ('factors of production').<sup>313</sup> The EC Treaty provided for the establishment of the Commission, Council, Commission and the Court of Auditors. The Social and Economic Committee and the Committee of Regions were added as advisory bodies after relevant amendments to the TEC were made.

In addition to the TEC, the European Atomic Energy Community Treaty ('EAEC Treaty') was also adopted in Rome in 1957. This treaty was meant to encourage an integrationist form of cooperation between the founding members in the field of atomic energy. The EAEC represented the third European Community next to the EEC and the ECSC.

As a result of the adoption in the 1957 Convention on certain Institutions Common to the European Communities and the 1965 'Merger Treaty', the three communities were managed by the same institutions, even if they still performed different functions when administering each community.<sup>314</sup>

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<sup>309</sup> D Wyatt, A Dashwood, *European Union Law* (5<sup>th</sup> edn Sweet & Maxwell, London 2006) 5.

<sup>310</sup> D Chalmers and others, *European Union Law* (CUP, Cambridge 2006) 9.

<sup>311</sup> Treaty Establishing the European Community (Treaty of Rome, as amended) (TEC) art 281.

<sup>312</sup> *Ibid* art 312.

<sup>313</sup> C Barnard, *The Substantive Law of the EU* (2<sup>nd</sup> edn OUP, Oxford 2007) 8–13.

<sup>314</sup> Treaty Establishing a Single Council and a Single Commission of the European Communities [1967] OJ 152/1.

Although initially economic-oriented, the scope of the TEC was expanded beyond the economic sphere to include environment, social cohesion, and working conditions. This initial expansion was the result of the adoption in 1986 of the Single European Act.<sup>315</sup> This expansion was continued with the TEU, which empowers the EC to regulate such matters as consumer protection, culture, public health, education, and development cooperation.<sup>316</sup> Additionally, the Treaty of Amsterdam transferred from the EU to the EC competence over 'Visas, asylum, immigration and other policies related to free movement of persons' that prior resided in Pillar III.<sup>317</sup>

The EU, *stricto sensu*, is an international governmental organisation that was founded following the adoption in Maastricht in 1992 of the TEU. The EU implicitly enjoys legal personality, based on the fact that it can conclude international agreements under Pillars II and III.<sup>318</sup> Like the EC, the EU is set up as a permanent entity.<sup>319</sup> The TEU, which entered into force on 1 November 1993, created a comprehensive institutional framework designed to encompass three Pillars.

Pillar I consists in the pre-existing European Community structure, now composed of the TEC and EAEC (mentioned above).

Pillars II and III pertain respectively to 'Common Foreign and Security Policy' and to 'Police and Judicial Cooperation in Criminal Matters'.

These last two Pillars form the cornerstone of the EU's political cooperation and are inter-governmental by their very nature.<sup>320</sup> Art 1 of the TEU stipulates in this respect that '[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.' Those European institutions performing their functions under the EC and EAEC are the same as those acting under Pillars II and III.<sup>321</sup> Therefore, the institutions are common regardless of the Pillar system and, within Pillar I, regardless of the applicable Community Treaty. Furthermore, all Pillars are subjected to an identical procedure regarding the amendment of the EC and EU Treaty, and the accession of new Member States.<sup>322</sup>

It is noteworthy that on 13 December 2007, the EU Member States adopted the Treaty of Lisbon,<sup>323</sup> which will come into force on 1 January 2009, provided the 27 Member States ratify it by then. This Treaty has the advantage of comprehensively classifying competences into three categories: exclusive, shared and supporting ones. It increases the European Parliament's role by generalizing even further the use of the co-decision procedure and reinforcing its budgetary powers. The Treaty abolishes the Pillar structure and assigns to the Union a single legal personality. The role of national parliaments is also increased,

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<sup>315</sup> Single European Act [1987] OJ L 169/1.

<sup>316</sup> Treaty on European Union (Maastricht Treaty) [1992] OJ C191 (TEU) arts 8–10.

<sup>317</sup> Treaty of Amsterdam [1997] OJ C340.

<sup>318</sup> TEU (n 12) arts 24, 34(2)(d); P Craig and G De Burca, *EU Law* (4<sup>th</sup> edn OUP, Oxford 2008) 95.

<sup>319</sup> TEU (n 12) art 51.

<sup>320</sup> 'EUROPA — the EU at a Glance' <[http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm)> accessed 24 April 2008.

<sup>321</sup> TEU (n 12) art 3.

<sup>322</sup> TEU (n 12) arts 48, 49.

<sup>323</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] C306/50.



especially in regard to the monitoring of compliance with the subsidiarity principle. At the heart of the Treaty lies an entirely new institution, the President, who is appointed for a two and a half year term. Finally, the Treaty of Lisbon also turns the Human Rights Charter into a legally binding act of the EU.

## **B. Institutions of the European Union and European Community**

The institutional structure of the EC is primarily characterised by seven institutions (the Commission, the Council, the European Parliament, the European Court of Justice ('ECJ') and the Court of First Instance ('CFI'), and Court of Auditors), two advisory bodies (the Committee of the Regions, and the Economic and Social Committee) and two statutory bodies (the European Central Bank and the European Investment Bank).<sup>324</sup>

The European Parliament is currently composed of 785 representatives directly elected by the citizens of Member States for a 5-year term. The Parliament exercises partial oversight of the European Commission. It has the power to hold a vote of no confidence in respect of the Commission as a whole, which, if successful, will lead to the Commission's collective dismissal.<sup>325</sup> The Parliament can also request the Commission to answer certain oral or written questions.<sup>326</sup> In addition to this oversight function, the Parliament also has a quasi-equal legislative role under the co-decision procedure, and equal legislative power under the assent procedure. Under the co-decision procedure the Parliament can adopt the Common Positions put forward by the Council, reject Council's amendments or propose new amendments. The Parliament also serves a consultative function in the legislative process in relation to certain subject-matters and can attempt to initiate legislation by requesting the submission of proposals from the Commission.<sup>327</sup>

The Council is composed of a 'ministerial' representative from each Member State who is competent to enter into binding commitments on behalf of his or her Member State.<sup>328</sup> Depending on the subject matter, the Council adopts measures by simple or qualified majority or on a unanimous vote. If acting by qualified majority, the votes of each Minister will be 'weighted'.<sup>329</sup> The Council is also in charge of coordinating Member States' general economic policies.<sup>330</sup> It has important legislative powers and can, with or without the involvement of the European Parliament, pronounce itself on the appropriateness of adopting a Commission's proposal. Much like the Parliament, the Council can request the Commission to table proposals,<sup>331</sup> and shares budgetary competence with the Parliament.<sup>332</sup>

The European Commission is currently composed of 27 independent members who are forbidden from receiving instructions from any external body, whether at the EU or national

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<sup>324</sup> TEC (n 7) arts 7–9.

<sup>325</sup> Ibid art 201.

<sup>326</sup> Ibid art 197(3).

<sup>327</sup> Ibid art 192.

<sup>328</sup> Ibid art 203.

<sup>329</sup> Ibid art 205.

<sup>330</sup> Ibid art 202.

<sup>331</sup> Ibid art 208.

<sup>332</sup> Ibid arts 270–280.

level.<sup>333</sup> In this way, the Commission is not intended to act in the interest of a particular Member State. It is empowered to adopt binding acts in the following circumstances: (i) when it acts pursuant to an enabling provision of the EC Treaty; (ii) when it acts by virtue of a delegation of power (e.g. from the Council of Ministers or of the Council and the Parliament acting together); and (iii) when it implements the acts of the Council.<sup>334</sup> It is also empowered to adopt Opinions and Recommendations when expressly required to do so by the TEC or on its own motion when it deems such action appropriate.<sup>335</sup> Finally, the Commission has the residual power of supervising the application of EC secondary law.<sup>336</sup>

The European Court of Justice ('ECJ'), composed of 27 judges, is the main judicial organ of the EU. It is entrusted with ensuring that 'in the interpretation and application of the law [the TEC] is observed'.<sup>337</sup> At the EC level, the ECJ can hear requests for preliminary rulings filed by individuals or corporations before a national court on questions of interpretation of EC primary and secondary law or on the validity of EC secondary law.<sup>338</sup> It can also be seised of a dispute between two Member States or between a Member State and the European Commission in circumstances where one of the parties is arguing that there has been a breach of EC law.<sup>339</sup> The Court also has jurisdiction to hear direct challenges (annulment actions and actions for a declaration of illegal failure to act) brought by the Council, Commission, European Parliament, the Court of Auditors, or the European Central Bank against an act of any of these institutions on various grounds of illegality as those well as those from private individuals who can claim a 'special interest'.<sup>340</sup> The ECJ has the power to issue interim measures in the exercise of its ordinary judicial powers.<sup>341</sup> It also adjudicates upon compensation claims for damages incurred as a result of a breach of EC law by an EC institution.<sup>342</sup> The CFI, also composed of 27 judges, is a first instance court of the ECJ, which can hear annulment and 'failure to act' actions (if brought by individuals), compensation claims, staff cases (except those devolved upon judicial panels). As the name suggests, decisions rendered by the CFI are subject to a right of appeal on points of law before the ECJ.<sup>343</sup> That said, the Treaty provides for the extension of the CFI's jurisdiction by the Statute of the ECJ.<sup>344</sup>

### C. Decision-Making Procedure under Pillar I

Under Pillar I, EC institutions are empowered to adopt binding acts (Regulations, Directives, and Decisions), and also to take non-binding measures (Opinions or Recommendations) through a complex legislative process containing several variants.<sup>345</sup>

Regulations are acts that are general in nature. They become, as upon their entry into force, directly transposed into all Member States' national law (i.e. directly applicable').<sup>346</sup>

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<sup>333</sup> Ibid art 213(2).

<sup>334</sup> Ibid art 202, 211.

<sup>335</sup> Ibid art 211.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid art 220.

<sup>338</sup> Ibid art 234.

<sup>339</sup> Ibid arts 227–28.

<sup>340</sup> Ibid arts 230–31.

<sup>341</sup> Ibid art 243.

<sup>342</sup> Ibid arts 235, 288.

<sup>343</sup> Ibid art 225(1); Statute of the European Court of Justice, arts 48, 51.

<sup>344</sup> TEC (n 7) art 225(1).

<sup>345</sup> Ibid art 249.

Directives can be either general or individual in their scope. They are, by definition, not directly applicable in the Member State's national legal order as upon their entry into force. Rather, Directives oblige Member States, on the international plane, to achieve a certain result within a particular time frame, leaving the means and methods to achieve the result to the discretion of the Member State.<sup>347</sup> This procedure envisions the national implementing measure's transposition of the directive into national law, unless some of its provisions are directly effective (see below).

Decisions are individual measures binding upon their addressees and directly applicable in the Member States' national legal orders.<sup>348</sup>

Opinions and recommendations do not have any binding force. They do nonetheless produce legal effects indirectly: they must be taken into account by the courts of Member States when interpreting national or EC law.<sup>349</sup>

Due to silence in the TEU, it became incumbent upon EC Courts early on to identify under what circumstances the various instruments of EU law are to have direct effect. 'Direct effect' of an instrument means that it confers newly created rights upon individuals who can then enforce these rights in the Member States' courts, whether against a public authority or another individual.<sup>350</sup> In achieving this objective, the EC Courts adopted the general rule that provisions of the EC Treaty, Regulations, Decisions and Directives are all capable of producing direct effect provided they are sufficiently clear, precise, and unconditional.<sup>351</sup> The 'unconditionality' requirement means that there should be no autonomous margin of discretion in the implementation of any given measure, be that of a Member State or another EC institution.<sup>352</sup>

While Regulations intrinsically have a propensity to have direct effect, such capacity seems to be more the exception than the norm as regards Directives. Indeed, Directives inherently leave the implementation of their provisions to the discretion of Member States, making the 'unconditionality' requirement *prima facie* relatively difficult to satisfy. That said, the ECJ has interpreted the 'unconditionality' requirement with increasing flexibility, allowing particular provisions of EC Directives to have direct effect in circumstances where: (i) minimum rights can be detached from those provisions that are either unclear, ambiguous or that require the exercise of further discretion by the implementing authority;<sup>353</sup> or (ii) the Member State's

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<sup>346</sup> Ibid art 249(2); Craig and De Burca (n 14) 83–85.

<sup>347</sup> TEC (n 7) art 249(3).

<sup>348</sup> Ibid art 249(4).

<sup>349</sup> Ibid art 249(5). Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, [18]–[19]. Although this judgment was concerned with recommendations, there seems to be no compelling reason why the court's opinion should not be extended given the normative similarity between opinions and recommendations.

<sup>350</sup> K Lenaerts, T Corthaut, 'Of Birds and Hedges: The Role of Primacy in invoking Norms of EU Law' (2006) 31 *European L Rev* 291, 310.

<sup>351</sup> For the direct effect of the Treaty, see Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [12]–[13]. For the direct effect of Regulations, see Case 39/72 *Commission v Italy* [1973] ECR 101, [17]. For the direct effect of Decisions, see Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825, [5]. For the direct effect of Directives, see Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, [12]–[13]; Case C-246/00 *Commission v Netherlands* [2003] ECR I-7485, [61]. See also A Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford 1993) 269.

<sup>352</sup> Ibid.

<sup>353</sup> Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, [29]–[30]; Case C-292/02 *Meiland Azewijn BV v Hauptzollamt Duisburg* [2004] ECR I-7905, [56]–[63]; Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECR I-3419, [30].

implementation power has been completely exhausted.<sup>354</sup> However, it must be acknowledged that this interpretation of ‘unconditionality’ remains contentious amongst lawyers and academics, and the direction the ECJ has taken has not always been consistent with its principled position on the subject.

Direct effect aside, the ECJ has consistently held that EC Directives are to be the subject of ‘consistent interpretation’ upon the expiry of their implementation period. Accordingly, national courts are under an obligation, where possible, to interpret national laws in a way that is compatible with the wording and underlying intent of the Directive. The only limit placed on this obligation is that the conclusion supported by the Directive cannot be *contra legem*.<sup>355</sup>

Unlike Regulations and Decisions, Directives can only be directly invoked by private persons against the State or one of its public authorities as understood in its widest sense (i.e. vertical direct effect) and not against another private person (i.e. absence of horizontal direct effect).<sup>356</sup> The ECJ has interpreted the concept of ‘public authority’ as requiring that: (i) the body be in charge of the provision of a public service; (ii) the body be under State control when providing the public service; (iii) the body be empowered by virtue of a State’s measure; and (iv) the body enjoy ‘special powers’ exceeding those prevailing in private relations.<sup>357</sup>

Thus, in relation to this report we will be primarily concerned with EC Directives, considering the possibility of direct effect, whilst also highlighting the role ‘consistent interpretation’ may play.

#### **D. Decision-Making Procedure under Pillar II**

The legislative procedure and the range of instruments that can be adopted under Pillar II differ from those under Pillar I.

The main instruments adopted under Pillar II can be summed up as follows:<sup>358</sup> The Council can adopt Principles and General Guidelines regarding the content of the Common Foreign and Security Policy. It can also outline Common Strategies mentioning these goals, and identify time frames and the means that the EU and the Member States should rely upon in achieving the objectives. The Council is also to adopt Joint Actions, which are designed to tackle specific areas that require ‘operational action’ on behalf of the EU. The Council can also adopt Common Positions, which outline the EU’s approach to specific geographical or thematic issues. Finally, the Council may authorise the Presidency of the EU to commence negotiations for the conclusion of an international treaty, in which case the Council itself will be competent to conclude the treaty following the President’s recommendation.

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<sup>354</sup> Case 441/99 *Riksskatteverket v Soghra Gharehveran* [2001] ECR I-7687, [44].

<sup>355</sup> Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [26]; Case C-212/04 *Konstantinos Adeneler et al v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, [116].

<sup>356</sup> Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, [31], [39]; Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825, [5]; Case C-253/00 *Munoz v Frumar Ltd* [2002] ECR I-7289, [27].

<sup>357</sup> Case C-188/89 *Foster v British Gas PLC* [1990] ECR I-3313, [20].

<sup>358</sup> TEU (n 12) arts 14–15, 24.

## E. Decision-Making Procedure under Pillar III

This subsection will be of interest to our study in relation to human rights violations criminalised under EU or domestic law. Here, the legislative process is similar to that under the Pillar II.

The Council can, as a general rule and subject to certain exceptions, adopt proposals submitted by either the Commission or any Member State, after a unanimous vote (with certain exceptions).<sup>359</sup> It must also consult with the European Parliament (except for the adoption of Common Positions).<sup>360</sup>

The main instruments adopted under Pillar III can be summed up as follows:

- (1) *Common Positions* are intended to define the EU's approach on a particular question.<sup>361</sup>
- (2) *Framework Decisions* are measures intended to achieve harmonization of national laws by compelling Member States to achieve a certain result while leaving to them the means and methods to achieve it.<sup>362</sup> In this way they function in a fashion similar to Directives issued under Pillar I and art 249 of the TEC. That said, unlike Directives, Framework Decisions as well as Decisions are, according to the express terms of the TEU, incapable of producing direct effect despite the fact that their provisions may be sufficiently clear, unambiguous, and unconditional.
- (3) *Decisions* are binding measures designed to pursue any other function in line with the objectives of Pillar III except for the purpose of harmonising national laws. As with Framework Decisions, they cannot produce any direct effect, whether vertical or horizontal. These Decisions will be subject to further implementation measures to be agreed upon by the Council.<sup>363</sup>
- (4) *International Conventions* can be recommended to Member States for their adoption in compliance with their national constitutional systems.<sup>364</sup>

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<sup>359</sup> Ibid art 34(2).

<sup>360</sup> Ibid art 39(1).

<sup>361</sup> Ibid art 34(2)(a).

<sup>362</sup> Ibid art 34(2)(b).

<sup>363</sup> Ibid art 34(2)(c).

<sup>364</sup> Ibid art 34(2)(d).

## 2. EXECUTIVE SUMMARY

Different elements of European law, outlined above, may impact on the ability of claimants to obtain redress in two ways.

First, there exist a series of European law instruments that provide possible assistance to claimants in obtaining remedies against TNCs. This will be dealt with in Part III of the EU section of the submission.

Secondly, the EC, under Pillar I, has enacted a number of instruments that regulate the way in which questions of private international law are to be dealt with in Member States. These instruments directly affect the capacity of claimants to have their cases heard in Member States, the law applicable to any decision that might be rendered, and the ability to have their judgments recognised and enforced in other Member States. These issues will be dealt with in Part IV.

In order to bring clarity and a necessary degree of simplicity, the scope of the EU section of the submission must be limited. Without taking this step, the analysis would become vexingly expansive, and would entail consideration of factual situations unlikely to arise in practice. Thus, the scope of this part of the submission will be limited to situations where:

- (1) The defendant is an EU domiciled company;
- (2) The claimant is a Non-EU domiciled person; and
- (3) The wrong in question was committed outside the European Union.

An example of such a scenario would be a case in which an English limited liability company commits acts in, say, an African country, harming African plaintiffs. This report does not consider the circumstances under which, say, an American domiciled company may have proceedings brought against it by a foreign claimant in the English courts.

Additionally, this report will not consider State responsibility imposed by the ECHR (Europe's comprehensive human rights convention concluded under the aegis of the Council of Europe in 1952) for the State failure to legislate so as to provide adequate protection of human rights in horizontal relationships (i.e. 'theory of effective positive obligations').<sup>365</sup> Such issues could easily form the subject of a standalone report.

At the outset, it is important to identify definitions that the EU section of the submission will use.

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<sup>365</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR'). This is referred to in the Introduction.

- ‘Claimant’ refers to a non-EU domiciled person who has incurred damage as a result of the actions of a TNC abroad.
- ‘EC Courts’ refer to the ECJ and the CFI taken as a whole.
- ‘ECHR’ refers to the European Convention on Human Rights.
- ‘ECJ’ refers to the European Court of Justice and ‘CFI’ to the Court of First Instance.
- ‘ECtHR’ refers to the European Court of Human Rights.
- ‘EU’ is to be understood as referring to the European Union and ‘EC’ to the European Community.
- ‘Horizontal dispute’ refers to a dispute between two private persons.
- ‘ILO’ refers to the International Labour Organisation.
- ‘OECD’ refers to the Organisation for Economic Co-operation and Development.
- ‘TEC’ refers to the Treaty Establishing the European Community.
- ‘TEU’ refers to the Treaty on European Union.
- ‘TNC’ refers to a transnational corporation established in a Member State of the European Union.
- ‘UN’ refers to the United Nations.
- ‘Vertical dispute’ refers to a dispute between a private person and a Member State’s public authority.

### **3. SUBSTANTIVE ASPECTS OF EU LAW**

Substantive provisions of European law may assist in obtaining redress when a foreign victim directly brings his claim before a Member State’s national courts. The following areas and their appropriate binding and non-binding norms will be considered below: ‘Human Rights Generally’, ‘Due Process Rights’, the ‘Human Rights Charter’, ‘Non-Discrimination

clauses', 'Standing of Victims in Criminal Proceedings', 'Criminal Law and Corporations', 'Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising', 'Directive 2004/18/EC (2004) on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts' and 'Miscellaneous Soft Law Instruments'.

The substantive legal position in each area is considered in detail in the separate subsections, below. At the outset it should be noted that the only substantive advantage which European law is likely to offer in the context of the paradigm case is in relation to general due process rights, the specific rights of victims in criminal proceedings, and very indirectly, to specialised fields under the three Pillars such as public procurement, misleading advertising, arms control and human trafficking.

## A. Human Rights Generally

Aside from EC due process rights and the equal treatment guarantees (discussed below), EC human rights law will be irrelevant for the purposes of considering our paradigm case. This is due to the absence of horizontal direct effect assigned by the EC courts to EC substantive rights generally and the practical difficulty of proving a 'Community link' given the non-existence of a European Community's autonomous power to regulate human rights in regard to national proceedings. Without such a link, EC substantive human rights cannot be triggered in any national judicial forum.

The case law of EC Courts, as it currently stands, has recognised the applicability of human rights law to the legislative and administrative actions of EC institutions. It has also held Member States to be bound by human rights law when implementing EC law or when departing from it after invoking express derogation grounds or mandatory requirements. Exceptions to this state of affairs exist under the EC Treaty, in order to allow Member States to directly derogate from free movement principles on certain public interest grounds that are expressly and exhaustively enumerated in the Treaty itself.<sup>366</sup> Mandatory requirements, although not listed in the EC Treaty, have been recognised by the EC Courts only so as to allow Member States to justify certain indirect discriminations in the exercise of the free movement provisions on certain grounds that are wider in scope than those of express derogation.<sup>367</sup> EC human rights law will therefore not be triggered in a 'purely internal' situation (i.e. where the underlying dispute presents no link with the EC).<sup>368</sup>

These rights, encompassed in EC law, are either substantive (right to privacy; right to human dignity; freedom of expression; freedom of association) or procedural (right to a fair trial; right to counsel; right to not self-incriminate; right to an effective remedy).

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<sup>366</sup> Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, [70]–[77]; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, [34]–[41]; Case C-60/00 *Carpenter v Home Secretary* [2002] ECR I-6279, [37]–[46]; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689; Case C-71/02 *Karner v Troostwijk* [2004] ECR I-3025. See also Barnard (n 9) 460, 470–72, 491–98.

<sup>367</sup> *Schmidberger* (n 62) [70]–[77]; *Omega* (n 62) [34]–[41]; *Carpenter* (n 62) [37]–[46]; *Vereinigte* (n 62); *Karner* (n 62). See also Barnard (n 9) 460, 470–72, 491–98.

<sup>368</sup> Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.



The fact that the EC is not formally empowered to enter into international treaties on the protection of human rights has not prevented it from developing its own body of human rights law based on Member States' constitutional traditions and international human rights conventions.<sup>369</sup> The development of EC Human Rights law has been achieved in a number of stages, first judicial, then political.

Initially, the ECJ was reluctant to refer to human rights law in cases brought before it.<sup>370</sup> However, in a series of subsequent cases, the ECJ has warmed to its role. In the *Stauder* case (1969), the ECJ took the view that fundamental human rights formed part of the general principles of EC law whose respect the ECJ needs to control.<sup>371</sup> In the *Internationale Handelsgesellschaft* case (1970), the ECJ held that human rights derived from Member States' constitutional traditions, and their respect had to be guaranteed 'within the framework of the structure and objectives of the Community'.<sup>372</sup> In the *Nold* case (1974), the Court went even further by referring not just to the Member States' constitutional traditions as sources of human rights, but also to international human rights treaties 'on which the member States have collaborated or of which they are signatories'.<sup>373</sup>

These keystone judgments delimiting the mode and circumstances for the recognition of fundamental rights at the EC level demonstrate a willingness of the ECJ to review the compliance of European institutions with fundamental rights.

Subsequent cases have expressly referred to (i) to the European Convention of Human Rights;<sup>374</sup> and eventually (ii) to the actual case law of the European Court of Human Rights.<sup>375</sup>

Although originally limiting the application of human rights to EC institutional decision-making and enforcement, the ECJ has progressively extended its control of human rights compliance to the legislative, administrative or judicial acts of Member States when 'falling within the arena of Community law'.<sup>376</sup> This control takes different forms. The Court has reserved for itself the right to ascertain whether Member States have abided by European human rights law when implementing EC law in general,<sup>377</sup> especially an EC act that guarantees human rights protection.<sup>378</sup> The Court also considers itself empowered to monitor the enforcement of European human rights law by Member States when departing from EC law by reference to mandatory requirements or express derogations found under the EC Treaty.<sup>379</sup>

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<sup>369</sup> *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759, [27].

<sup>370</sup> Case 1/58 *Stork v High Authority* [1959] ECR 17; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

<sup>371</sup> Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, [7].

<sup>372</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, [3]–[4].

<sup>373</sup> Case 4/73 *Nold v Commission* [1974] ECR 491, [12].

<sup>374</sup> Case 36/75 *Rutili* [1975] ECR 1219.

<sup>375</sup> Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, [149]–[150].

<sup>376</sup> *Chalmers* (n 6) 265.

<sup>377</sup> Case 5/88 *Wachauf v Germany* [1989] ECR 2609, [17]–[19]; Case C-292/97 *Kjell Karlsson and ors* [2000] ECR I-2737; Case C-101/01 *Lindqvist* [2003] ECR I-12971, [84]–[90]; Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, [15]–[23].

<sup>378</sup> Case 222/84 *Johnston v RUC* [1986] ECR 1651, [18]; Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, [14].

<sup>379</sup> *Schmidberger* (n 62) [70]–[77]; *Omega* (n 62) [34]–[41]; *Carpenter* (n 62) [37]–[46]; *Vereinigte* (n 62); *Karner* (n 62).

In its *Opinion 2/94 on Accession by the Community to the ECHR*, the ECJ held that the EC could not become a party to the ECHR unless it amended the TEC.<sup>380</sup> This was because, in its view, EC institutions do not enjoy a ‘general power to enact rules on human rights or to conclude international conventions in [the] field [of human rights]’.<sup>381</sup> However, it also held that human rights constitutes a ‘condition of the lawfulness’ of EC binding acts,<sup>382</sup> forming part of the block of legality of EC secondary legislation under the 230 TEC annulment procedure and under the 234 TEC preliminary ruling procedure (where the validity of such act is being contested).

More to the point, the ECJ does not view human rights as embodying an independent Community objective.<sup>383</sup> As such, the ECJ does not enjoy an autonomous power to impose compliance with human rights. There must be a link between the right invoked and a subject-matter covered by the founding Treaties of the EC. Because of this, human rights have tended to play an interpretive role, the effect of which has been to either restrict the meaning of an EC fundamental economic freedom (e.g. free movement of workers, services and goods) or to extend it. Nevertheless, art 308 TEC was held by the ECJ to constitute a legal basis whereby human rights legislation could be adopted in the absence of ‘express or implied powers to act’, so long as it is necessary for the achievement of one of the Treaty’s objectives.<sup>384</sup>

The ECJ has held that it will not assess the compliance of Member States’ national measures with EC human rights law if the situation fails to fall within the scope of EC law.<sup>385</sup> Obviously, there is a thin line between a ‘wholly internal situation’ and a situation whereby a Member State departs from EC law through a mandatory requirement or an express derogation. Indeed, uncertainty as to the characterisation of an internal situation has increased since the delivery of the *Mary Carpenter* judgment.<sup>386</sup> In that case, a link was established between free movement of services and the right to family life. The deportation order issued by the Home Secretary against a third-State national married to a British national was held to constitute a mandatory requirement or a departure from the rules of free movement of services that was, in the circumstances of the case, disproportionate to the interference caused to the British national’s right to family life.<sup>387</sup> By way of contrast, in the *Kremzow* case the ECJ rejected the allegation by a former Austrian judge that his criminal conviction for murder constituted an impediment to his free movement across the EU as an EU citizen. The ECJ held that this object of the dispute did not fall within the scope of EC law given that a ‘purely hypothetical prospect’ of the Austrian judge making use of his right to free movement was not sufficient to create a Community link.<sup>388</sup> The ECJ stressed that that it would not monitor the compliance by a Member State with EC human rights law when ‘the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of Community law’.<sup>389</sup>

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<sup>380</sup> *Opinion* (n 65) [35].

<sup>381</sup> *Ibid* [27].

<sup>382</sup> *Ibid* [34].

<sup>383</sup> Craig and De Burca (n 14) 406–07.

<sup>384</sup> *Opinion 2/94* (n 65) [28]–[29].

<sup>385</sup> Case 12/86 *Demirel v Stadt Schwabisch Gmuend* [1987] ECR I-3719, [28]; [18]–[19] *Kremzow* (n 64).

<sup>386</sup> Craig and De Burca, (n 14) 400–01.

<sup>387</sup> *Carpenter* (n 62) [37]–[46].

<sup>388</sup> *Kremzow* (n 64) [16].

<sup>389</sup> *Kremzow* (n 64) [18].

Although traditional human rights have been held to apply to either Member States or the EC institutions, two particular human rights with an economic character and expressly provided for under the EC Treaty have been held to have horizontal direct effect and thus to be directly enforceable in disputes between two private persons before a court of law: non-discrimination based on gender in regard to salary<sup>390</sup> and on nationality in the exercise of free movement of workers.<sup>391</sup> These rights will be discussed separately (see 'Non-discrimination' below).

Since the entry into force of the Maastricht Treaty, art 6 (as renumbered) of the Treaty on European Union reads as follows:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The second part of this quotation codifies the EC Courts' now consistent case law on the recognition of human rights as general principles of EC law. This Treaty codification does not have the effect of making EC human rights law generally applicable in horizontal relationships. It simply endorses the pre-existing EC case law on human rights and suggests that human rights, also a concern for the European Union, form part of its body of primary law ('block of legality') through the concept of 'General Principles'.<sup>392</sup>

As mentioned in the opening paragraph of this section, due process rights aside, EC human rights law will be irrelevant for the purposes of considering our paradigm case. This observation is due to the absence of horizontal direct effect of EC substantive rights generally and to the practical difficulty of proving a 'Community link' given the non-existence of the European Community's autonomous power to regulate human rights in regard to national proceedings. Without such a link, EC substantive human rights cannot be triggered in any national judicial forum.

## B. Human Rights Charter

The Charter of Fundamental Rights ('Human Rights Charter') will not be helpful to a claimant given the following limitations: (i) it is not yet legally binding;<sup>393</sup> (ii) it does not expressly

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<sup>390</sup> TEC (n 7) arts 12, 141.

<sup>391</sup> Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, [37]–[42]; C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921, [82]–[84]; C-411/98 *Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8081, [50].

<sup>392</sup> This argument is confirmed by the combination of Articles 7(1)(2), 46 and 49 of the TEU (n 12) and of Articles 220 and 230 of the TEC (n 7).

<sup>393</sup> *Wyatt and Dashwood* (n 5) 318–19.

provide for its horizontal enforcement even though some of its rights are conceivably conducive to such enforcement; (iii) it is silent on its effects outside the borders of the EU.

The European Parliament, the Council of Ministers and the European Commission adopted the Human Rights Charter at the European Council meeting of Nice on 7 December 2000.<sup>394</sup>

Although adopted, the Human Rights Charter is not yet in force.<sup>395</sup> The Charter will become legally binding if the Treaty of Lisbon<sup>396</sup> itself enters into force.

Regardless of the question of its legal effect, the Human Rights Charter only applies to actions of EU institutions, and of Member States implementing EU law.<sup>397</sup> It does not expressly provide for horizontal enforcement (e.g. against individuals, TNCs, etc.) although some of the human rights it protects could conceivably be breached by TNCs directly. These include: the right to human dignity;<sup>398</sup> the right to protection of personal data;<sup>399</sup> the right to marry and found a family;<sup>400</sup> the right to respect for private and family life;<sup>401</sup> freedom of thought, conscience and religion;<sup>402</sup> freedom of expression and information;<sup>403</sup> freedom of assembly and of association;<sup>404</sup> right to property;<sup>405</sup> non-discrimination;<sup>406</sup> equality between men and women;<sup>407</sup> right of collective bargaining and action;<sup>408</sup> right to protection against unjustified dismissal;<sup>409</sup> prohibition of child labor.<sup>410</sup> For these Charter rights that correspond to rights protected under the ECHR, the interpretation given by the European Court of Human Rights will constitute a minimum level of protection, upon which the ECJ and CFI could expand (but not restrict).<sup>411</sup> Since these rights cannot be given a meaning that is more restrictive under EC law than under the case law of the European Court of Human Rights, the ECHR as interpreted by the ECtHR constitutes a minimum standard for the EC Courts under the Human Rights Charter.

Next to these substantive rights, Member States are also bound by a series of due process rights that are relevant in the context of a foreign victim bringing a claim directly before a Member State's court, so long as the subject-matter of the case falls within the material scope of the EU.

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<sup>394</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364.

<sup>395</sup> Wyatt and Dashwood (n 5) 318–19.

<sup>396</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306 (Lisbon Treaty) art 6. The Charter will not apply to Poland and the UK in accordance with the relevant protocol appended to the Lisbon Treaty.

<sup>397</sup> Human Rights Charter (n 90) art 51.

<sup>398</sup> Ibid art 1.

<sup>399</sup> Ibid art 8.

<sup>400</sup> Ibid art 9.

<sup>401</sup> Ibid art 7.

<sup>402</sup> Ibid art 10.

<sup>403</sup> Ibid art 11.

<sup>404</sup> Ibid art 12.

<sup>405</sup> Ibid art 17.

<sup>406</sup> Ibid art 21.

<sup>407</sup> Ibid art 23.

<sup>408</sup> Ibid art 28.

<sup>409</sup> Ibid art 30.

<sup>410</sup> Ibid art 32.

<sup>411</sup> Ibid art 52(3).

In addition, the Charter makes it clear that it does not create new competences for the European Union.<sup>412</sup> Therefore, these rights can only be invoked in relation to a subject matter that already falls within scope of EC law.

Instead of containing specific limitation clauses, the Human Rights Charter provides for a general limitation clause that applies to all rights and freedoms mentioned in the Charter unless otherwise provided. According to art 52, any limitation upon one of the rights or freedoms contained in the Charter must be provided for by law and may not prejudice the 'essence' of the rights or freedoms contained therein. This art requires the measure to be proportionate to the general interest objectives of the EU or to the aim of safeguarding the rights or freedoms of others.

The Charter is silent on the question of situations that take place outside the EU and thus on the issue of extra-territorial effect of its provisions.

As stated above, the Charter does not yet enjoy binding force.<sup>413</sup> But despite its inapplicability to our paradigm case, the Charter has been having a tangential affect on the legal and political institutions of the EU. The ECJ and the Court of First Instance have expressly referred to some of the Charter's provisions in recent judgments. Although they do not characterise the Charter as a direct source of EU human rights law or clarified its status from a normative point of view.<sup>414</sup> Further, reference made to the Charter in the European Parliament's Rules of Procedure.<sup>415</sup>

### C. Non-Discrimination

Art 39 TEC (free movement of workers and the prohibition of discrimination based on nationality in the exercise thereof) may produce extraterritorial effects but only if a 'sufficiently close link' can be established between the employment relationship and one of the Member States. This will be typically the case if the worker is a resident of a Member State sent abroad on a temporary basis by a corporation established in another member State. Although this provision directly applies both vertically and horizontally and has limited extra-territorial effect, it does require a nationality bond: the worker has to be a national of a Member State.

One huge advantage of art 141(1) TEC (embodying the principle of non-discrimination on gender basis in regard to salary) over any of the four EC Directives implementing the principle of equal treatment is that the former is directly effective in both vertical and horizontal disputes, unlike the latter which may only produce vertical direct effect.<sup>416</sup> The advantage of the latter, nevertheless, is that it tends to be broader in scope and contains provisions on sanctions and enforcement procedures with respect to these rights. A

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<sup>412</sup> Ibid art 51(2).

<sup>413</sup> Wyatt and Dashwood (n 5) 318–19.

<sup>414</sup> Case T-54/99 *Max.Mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313, [48], [57]; Case C-131/03 *PRJ Reynolds Tobacco Holdings v Commission* [2006] ECR I-7795; Case T-77/01 *Jégo-Quéré* [2002] ECR II-2365; *European Parliament* (n 73) [30].

<sup>415</sup> Wyatt and Dashwood (n 5) 319; European Parliament, 'Rules of Procedure' (February 2008) arts 34, 96.

<sup>416</sup> Craig and De Burca (n 14) 884.

shortcoming that is common, to both art 141(1) and the four Directives for that matter, is that, absent express extra-territorial effect, they only apply inside the Community.

The non-discrimination principles provided under the EC law, although undeniably belonging to the 'human rights' taxonomy, constitute a category apart. They are usually analysed separately from the other human rights in many EC law textbooks.<sup>417</sup> Non-discrimination principles can be embodied in the EC Treaty, EC Courts' case law, and secondary legislation. Under EC secondary legislation, they produce indirect effect in horizontal relations. Under the TEC, the principle of equal pay for equal work between men and women, as well as the right of EU citizens not to be discriminated on the basis of nationality in their exercise of free movement of workers can produce horizontal direct effect.<sup>418</sup>

This part of the submission does not generally address discrimination in the free movement of goods, services, persons and capital under the EC Treaty.<sup>419</sup> Such discrimination is immaterial for our purposes, as it pertains to the circulation of products and 'factors of production' within the Community. It could nevertheless be briefly mentioned that the right of EU workers not to be discriminated against on the ground of nationality apply in certain circumstances outside the EU.

Among the most relevant secondary legislation implementing the principle of non-discrimination are the following instruments:

- (1) Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Race Directive');<sup>420</sup>
- (2) Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('Directive on Equal Treatment in Access to and Supply of Goods and Services');<sup>421</sup>
- (3) Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Framework Employment Directive');<sup>422</sup> and
- (4) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ('the Recast Equal Treatment Directive').<sup>423</sup>

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<sup>417</sup> Wyatt and Dashwood (n 5) 249–52; Craig and De Burca (n 14) 874–948.

<sup>418</sup> *Angonese* (n 87) [37]–[42]; *Union Royale* (n 87) [82]–[84]; *Ferlini* (n 87) [50].

<sup>419</sup> TEC (n 7) arts 28–30, 39(2), 43, 49, 56.

<sup>420</sup> [2000] OJ L180/22.

<sup>421</sup> [2004] OJ L373/37.

<sup>422</sup> [2000] OJ L303/16, arts 1–2.

<sup>423</sup> [2006] OJ L204/23.

These instruments cover several grounds of discrimination in fields as diverse as employment, self-employment, supply of goods and services, social advantages, and so on. These grounds include gender, race, ethnical group, age, disability, religion, sexual orientation to belief. The directives, although applying to discrimination situations stemming from both the private and public sectors, cannot have horizontal direct effect according to well-established ECJ case law, nor are they intended to have extra-territorial effect. National law could thus only be interpreted 'in the light of' these Directives' objective and wording wherever such an interpretation is possible. This is particularly interesting with regard to remedies, since the Directives require Member States to establish 'effective, proportionate and dissuasive sanctions'. Additionally, they do not lay claim to effect outside the EU.<sup>424</sup> Even if they did have extra-territorial effect, the 'sufficiently close link' between the legal relationship and the EC via the law of a Member State is likely to be met predominantly by reference to the residence requirement of the claimant, thus making the non-domiciled victim unlikely to fall within the purview of those directives. Hence, because of the combination of their limitation to the territory of the EU, and their absence of direct effect, the instruments are unlikely to prove helpful to any claimant.

## i. EC Treaty

Non-discrimination principles found in the EC Treaty can be characterised in two ways:

- (1) They can be directly effective even if their provision is addressed to Member States and provide for further implementation by the Member States or the EC institutions;
- (2) They can lack direct effect and provide the legal basis for further implementation.

### *Directly Effective Equal Treatment Provisions*

Among the directly effective provisions of the TEC stands art 39 which embodies the principle of free movement of workers and, its corollary, the principle non-discrimination on ground of nationality as regards recruitment, wage and other working conditions. According to the ECJ, EC workers enjoy the right not to be directly or indirectly discriminated against on grounds of nationality outside the EU if the employment relationship presents a 'sufficiently close link' with the EC territory and thus with a Member State's law.<sup>425</sup> This link may be established if: (i) the worker is the national of a Member State recruited as a local staff for the diplomatic mission of another Member State;<sup>426</sup> (ii) the employment contract was concluded or implemented within the EC;<sup>427</sup> or (iii) the rules of conflict of law governing the employment contract are those of a Member State;<sup>428</sup> (iv) the worker is the national of a

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<sup>424</sup> Cf. Race Directive (n 117) art 1; Framework Employment Directive (n 119) art 1; Directive on Equal Treatment in Access to and Supply of Goods and Services (n 118) art 1. They all refer to the setting up a framework against certain forms of discrimination '...with a view to putting into effect in the Member States the principle of equal treatment'.

<sup>425</sup> Case 237/83 *Prodest v Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 03153, [6]; Case C-9/88 *Mario Lopes da Veiga v Staatssecretaris van Justitie* [1989] ECR 02989, [15]; Case C-60/93 *Aldewereld v Staatssecretaris van Financiën* [1994] ECR I-02991, [14]; Case C-214/94 *Boukhalfa v BRD* [1996] ECR I-2253, [14]–[15].

<sup>426</sup> *Boukhalfa* (n 122) [14]–[15].

<sup>427</sup> Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405, [28].

<sup>428</sup> *Boukhalfa* (n 122).

Member State working on ship 'flying' the flag of another Member State;<sup>429</sup> or (v) the worker is a resident of a Member State other than that of establishment of the corporation.<sup>430</sup> In the *Boukhalfa v BRD* case (free movement of workers case), the ECJ held that '[t]he geographical application of the Treaty is defined in art 227 (now 299)' and that the latter 'does not, however, preclude the Community rules from having effects outside the territory of the Community'.<sup>431</sup> In *Walrave and Koch v Association Union Cycliste Internationale* (also a free movement of workers case), the ECJ held that given its imperative character, the principle of non-discrimination applied to all employment relationships so long as they are concluded or implemented within the EC.<sup>432</sup> Free movement of workers is not the only area where the EC law has paved the way for extra-territorial effects. In *Gencor Limited v EC Commission*, the ECJ extended the geographical scope of the Merger Regulation so as to block the merger of two South-African companies on the basis that the announced concentration would be conducive to the creation of 'dominant duopoly' on the markets for rhodium and platinum that could, as a result, substantially impede 'effective competition' in the 'common market'.<sup>433</sup> The jurisdictional title in this case was grounded on the following elements: (i) business carried out by the South-African companies within the EC before the merger; (ii) likelihood of their continued business within the EC; (iii) likelihood of the planned concentration having 'immediate' and 'substantial effect' within the EC.<sup>434</sup> This judgment would be a limited version of the 'effects doctrine' in regard to extra-territorial jurisdiction.<sup>435</sup> Under Pillar III this time, the Council Framework Decision of 19 July 2002 on combating trafficking in human beings ('Framework Decision on Human Trafficking') has also urged for the exercise of extra-territorial jurisdiction by member States based on the 'active personality principle' (i.e. the nationality of the offender).<sup>436</sup>

Therefore, although the principle of territoriality of jurisdiction is the rule,<sup>437</sup> the ECJ has departed therefrom in regard to free movement of workers, competition law and certain aspects of criminal law without offering a grand theory of how and when the EC's jurisdictional titles of the EC are to be exercised beyond the borders of the EU. In the Free movement of workers cases, what will be determinant is the existence of a close relationship between an employment relationship and a member State's legislation. This will require right at the start that the worker be the national of a Member State, given that the exercise of art 39 TEC is reserved to EU nationals. This of course limits the usefulness of this case law on the extra-territoriality since we are considering claims of foreign nations, domiciled abroad. Furthermore, the criterion of a 'sufficiently close link' is more likely to be satisfied if the EU citizen is a temporary worker still maintaining a residence in a Member State as opposed to a non-EU domiciled national of a Member State. Therefore, art 39 TEC will be of little relevance, if at all, to our paradigm case where the claimant is a non-EU domiciliary, regardless of his nationality.

Notwithstanding the fact that the ECJ's case law refers to discrimination in general when allowing for the extra-territorial effect of art 39 TEC, great caution must be exercised in the

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<sup>429</sup> *da Veiga* (n 122) [15]–[16].

<sup>430</sup> *Aldewereld* (n 122) [21].

<sup>431</sup> *Boukhalfa* (n 122) [14].

<sup>432</sup> *Walrave and Koch* (n 124) [28].

<sup>433</sup> Case T-102/96 *Gencor Limited v EC Commission* [1999] ECR II 753, [297].

<sup>434</sup> *Ibid* [87]–[88], [90], [101].

<sup>435</sup> PT Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> edn, OUP 207) 146–47.

<sup>436</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings [2002] OJ L203/1, art 6(3).

<sup>437</sup> Muchlinski (n 132) 125–26.



extension of this case law to discrimination generally due to the ECJ's failure to take a principled position and the context-specific nature of judgments.

Turning now to another economic-oriented discrimination provision, art 141(1) TEC, provides that '[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work of equal value is applied'. The ECJ has held this specific right to be directly effective and enforceable before a national court not only in vertical, but also in horizontal disputes.<sup>438</sup> The Court held in *Defrenne v Sabena* that art 141(1) also extended to 'agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.<sup>439</sup>

In *Defrenne v Sabena III*, the ECJ emphasised the importance of the 'elimination of sex discrimination' as a fundamental principle of Community law by reference to its recognition under the International Covenant on Civil and Political Rights, the European Social Charter, and under Convention 111 of the International Labour Organisation on discrimination in respect of employment and occupation.<sup>440</sup>

Although art 141(1) does not expressly address the issue of extra-territoriality, it seems to go without saying that there is a need for a link with EC law for the provision to be applied. The requirement for such a link is satisfied in circumstances where the salary discrimination is committed by an EU-domiciled company operating in the EU. If abovementioned case law on extra-territoriality of discrimination provisions were to be sustained, art 141(1) would be of little relevance for our paradigm case, as a condition of residence on behalf of the claimant is likely to be determinant in establishing this 'sufficiently close link' between the employment relationship and the Member State's law justifying the application of EC law.

#### *Non-Directly Effective Equal Treatment Clause*

In relation to the first category, art 13(1) TEC provides:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This provision is of little help by virtue of its lack of direct effect.<sup>441</sup> It means that the prohibition cannot be directly enforced whether in horizontal or vertical disputes, although Member States will be bound to interpret their national legislation in light of the wording and objective of this provision (doctrine of consistent or 'harmonious' interpretation).

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<sup>438</sup> *Defrenne* (n 52) [39].

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*

<sup>441</sup> *Craig and De Burca* (n 14) 410.

To conclude, art 141(1) and art 39TEC will not form a realistic substantive basis for a human rights action launched by a non-EU domiciled victim of a human rights violation. Although both provisions produce vertical and horizontal direct effect, their geographic reach beyond the EU is unlikely to cover employment relationships that are completely detached from the EC because of likelihood that the claim will be characterised by: (i) the conclusion of the contract with a worker outside the borders of the EU; (ii) the absence of residence of the claimant within the EU; (iii) the potential absence of effects of this employment relationship upon the Community. Furthermore, even if extra-territorial effect was established, the grounds of discrimination are extremely limited. In the case of art 39 TEC, the ground of discrimination is based on nationality (whether direct or indirect) while in the case of art 141(1)TEC, it is based on gender in regard to salary conditions. It is highly improbable that such concerns will factor prominently in the sort of human rights cases this report considers.

## ii. Secondary Legislation

The Recast Equal Treatment Directive<sup>442</sup> is based on art 141(3) TEC. The Directive goes beyond the question of remuneration and guarantees non-discrimination on the basis of gender regarding access to employment, labour conditions and social security.<sup>443</sup> The Directive prohibits both direct and indirect gender-based discrimination, whether committed in the private or public sector.<sup>444</sup> It compels Member States to put in place appropriate procedures to allow victims of discrimination to have their claim heard.<sup>445</sup> Member States are to make available awards of damages that are dissuasive and proportionate to the harm suffered by the victim.<sup>446</sup>

Directive 2004/113 on Equal Treatment in Access to and Supply of Goods and Services<sup>447</sup> is based on art 13 TEC. This Directive does not cover media, advertising, employment or self-employment.<sup>448</sup> It prohibits direct and indirect gender-based discrimination regarding the access to and supply of goods and services to the public.<sup>449</sup> It also regulates arrangements for the access to these goods and services by both the private (e.g. insurance companies) and the public sector.<sup>450</sup> The Directive also provides that Member States have to make available appropriate procedures in case of gender-based discrimination suffered by an individual in breach of the Directive and allow for the awarding of dissuasive and proportionate damages.<sup>451</sup>

The Race Directive, whose legal basis is found in art 13 TEC, prohibits direct and indirect discrimination that is based on ethnic or racial origin (to the exclusion of national origin) regarding access to employment and self-employment, labour conditions, vocational training, and membership of or involvement in a workers' or employers' organisation, 'social protection', education, access and supply of goods / services to the public, 'social

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<sup>442</sup> Recast Equal Treatment Directive (n 120).

<sup>443</sup> Ibid art 1.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid art 17.

<sup>446</sup> Ibid art 18.

<sup>447</sup> N 118.

<sup>448</sup> Ibid art 3(3), 3(4).

<sup>449</sup> Ibid art 4(1).

<sup>450</sup> Ibid art 3(1).

<sup>451</sup> Ibid art 8(1)-(2).

advantages'.<sup>452</sup> The Directive covers practices from both the private and public sectors.<sup>453</sup> It compels Member States to put in place appropriate procedures to allow victims of discrimination to have their claim heard.<sup>454</sup> It also requires Member States to make available sanctions, which may consist in compelling the author of the discrimination to pay 'effective, proportionate and dissuasive' compensation to the victim.<sup>455</sup>

The Framework Employment Directive, whose legal basis is to be found in art 13 TEC, prohibits direct and indirect discrimination on the basis of age, disability, religion, sexual orientation, and belief, as regards the level of access to employment and self-employment, labour conditions, vocational training, and membership of and involvement in a workers' or employers' organisation.<sup>456</sup> The Directive covers employment and self-employment practices from both the private and public sectors.<sup>457</sup> It excludes from its scope discrimination on the basis of nationality,<sup>458</sup> and it compels Member States to put in place appropriate procedures to allow victims of discrimination to exercise their rights under the Directive in case they have been aggrieved.<sup>459</sup> It also requires Member States to make available sanctions, which may consist in compelling the author of the discrimination to pay 'effective, proportionate and dissuasive' compensation to the victim.<sup>460</sup>

These four Directives are quite far-reaching. They:

- (1) Cover both direct and indirect discrimination;
- (2) Apply to both the private and the public sector;
- (3) Partially harmonize the law on remedies in case of breach of the principle of equal treatment;
- (4) Establish grounds of discrimination that are extensive, ranging from gender, belief, race, religion to sexual orientation; and
- (5) Cover not just employment but also aspects of social security access, self-employment, social advantages, and supply of goods and services.

Nevertheless, they suffer from inherent and external limitations, as they:

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<sup>452</sup> Race Directive (n 117) arts 1–2, 3(2).

<sup>453</sup> Ibid art 3(1).

<sup>454</sup> Ibid art 7.

<sup>455</sup> Ibid art 15.

<sup>456</sup> Framework Employment Directive (n 119) arts 1–2.

<sup>457</sup> Ibid art 3(1).

<sup>458</sup> Ibid art 3(2).

<sup>459</sup> Ibid art 9.

<sup>460</sup> Ibid art 17.

- (1) Cannot produce, absent transposition measures by the Member States, horizontal direct effect given the established ECJ case law on the direct effect of Directives;<sup>461</sup> and
- (2) Are designed to have intra-Community effect only.

With respect to the Race Directive, the Framework Employment Directive, and the Directive on Equal Treatment in Access to and Supply of Goods and Services, intra-Community effect can be inferred from, *inter alia*, art 1, which stipulates that the purpose of the framework is the fight against certain forms of discrimination, 'putting into effect in the Member States the principle of equal treatment'. Insofar as the Recast Equal Treatment Directive is concerned, such effect can be inferred from its art 29, which stipulates that Member States are to account for the principle of equality of treatment on gender basis when drafting and implementing national law in its broadest sense.

It is questionable whether such matters would be relevant to the paradigm case we are considering. First, it is unlikely that the question of discrimination that the instruments refer to would arise in practice, but further, as already mentioned, the Directives do not have horizontal direct effect. Thus, much like other EU instruments, they impose obligations on States, not on individuals or other legal entities. Further, any interpretive role the Directives might play is likely irrelevant and speculative.

#### **D. Criminal Law and Corporations**

Council Framework Decision of 19 July 2002 on combating trafficking in human beings ('Framework Decision on Human Trafficking') compels Member States to provide for the criminal liability of corporations enjoying legal personality if they have committed, aided, abetted or attempted to commit the crime of human trafficking for sexual or forced labour purposes.<sup>462</sup> It contains far-reaching provisions by its extra-territorial reach and the extension of criminal liability to corporations. This Pillar III instrument suffers from restrictions as to its *ratione materiae* scope: it is limited to human trafficking for the purposes of forced labour or sexual exploitation. As a Framework Decision, it cannot produce any direct effect whatsoever and is limited instead to eliciting a harmonious interpretation. It is to be analysed in conjunction with the Framework Decision on the Standing of Victims in Criminal Proceedings.

As far as criminal sanctions against TNCs for acts committed outside of the EU are concerned, there is no general European legislation that incriminates human rights violations extra-territorially. Nevertheless, reference ought to be made to the Framework Decision on Human Trafficking. The Framework Decision was adopted by the Council acting under Pillar III of the TEU. It requires Member States to criminalise the 'recruitment, transportation, transfer, harbouring, subsequent reception' of people through specified means (e.g. deceit, fraud, abduction, the granting of benefits, 'abuse of authority') in view of their trafficking for

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<sup>461</sup> Cf. Clapham (n 47) 269 ('...the present situation in Community law means that vital social and economic rights enshrined in directives may be useless against "private" social and economic forces where a directive remains unimplemented at the national level').

<sup>462</sup> Framework Decision on Human Trafficking (n 133).

sexual exploitation or forced labour purposes.<sup>463</sup> The Framework Decision is targeted not just at the main commission of this offence but also at the 'instigation of, aiding, abetting and attempt to commit' such an offence.<sup>464</sup> What is peculiar about this Pillar III instrument is that provision is made for the imposition of criminal sanctions, including in relation to legal persons. Vis-à-vis the latter, Member States are to adopt 'effective, proportionate and dissuasive' sanctions for their involvement in the commission of the offence. These sanctions include criminal sentences consisting in fines, a winding up order, judicial supervision, deprivation of their public benefits, and dissolution.<sup>465</sup> For TNCs to be held liable in this context, the criminal acts must have been committed in the corporations' interest by a person holding a 'leading position' therein at the decision-making, representation or control level.<sup>466</sup> Their criminal liability will only be engaged in a Member State if: (i) the physical person committing the offence is a national of that Member State; (ii) the offence took place in whole or in part in the territory of that Member State; or (iii) the criminal act was performed for the benefit of a corporation established therein.<sup>467</sup> The Framework Decision makes provision for TNC criminal liability either accessorially (accomplice liability) or principally (as an author or co-author) or in conjunction with the criminal liability of physical persons.<sup>468</sup> The present Framework Decision also cross-refers to the Framework Decision on the Standing of Victims in Criminal Proceedings and stipulates that child victims of human trafficking are to be qualified as 'vulnerable witnesses' for the purpose of the latter EU instrument and their family ought to be provided with 'appropriate assistance'.<sup>469</sup> Art 6(3) of the present Framework Decision refers to the commission of a criminal offence under this Framework Decision by a Member State's national 'outside its territory'. This suggests that the offence need not have been necessarily committed within the European Union but might also have taken place in a third State.

One main shortcoming in regard to this EU measure is that it is, under the actual terms of the TEU, incapable of producing a direct effect. Nevertheless, the *Pupino* judgment posited that the doctrine of consistent interpretation, well established under the Community Pillar, has to be extended to Pillar III and thus to Framework Decisions.<sup>470</sup> A victim will be able to invoke the indirect effect of this instrument by requesting the national court, insofar as is possible, to interpret national criminal law (if it is ambiguous or incomplete) in light of the wording and objective of the EU measure. We refer the reader to our comments below under the Framework Directive on the Standing of Victims in Criminal Proceedings (Part III(G)(i)).

## E. Corporate Social Responsibility

There are additional EU and EC instruments, which, it could be argued, provide an indirect course of action for potential claimants.

The first four measures, discussed below, are the result of the active role taken by the EU institutions in encouraging, by means of resolutions, communications or recommendations,

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<sup>463</sup> Ibid art 1.

<sup>464</sup> Ibid art 2.

<sup>465</sup> Ibid art 5.

<sup>466</sup> Ibid art 4.

<sup>467</sup> Ibid art 6.

<sup>468</sup> Ibid art 4(3).

<sup>469</sup> Ibid art 7.

<sup>470</sup> Case C-105/03 *Pupino* [2005] ECR I-5285, [43].

the voluntary adoption of codes of conduct by TNCs. EU institutions (mainly the European Parliament and the Commission),<sup>471</sup> through the promotion of the concept of Corporate Social Responsibility ('CSR'), have strived to raise public awareness about the necessity for TNCs to abide by certain health, environmental, and social standards when operating in third States. Such codes have drawn inspiration from ILO Conventions, EC Directives on equal treatment, and OECD guidelines. Admittedly, these codes of conduct are adopted voluntarily and, as such, their effectiveness will depend critically on the TNCs' ethical attitudes; law will have little role to play.<sup>472</sup> These soft law instruments that were enacted by the EU political institutions will only have an immediate political effect and cannot be relied upon as a direct source of law by an individual against a TNC established in the EU. They demonstrate the relative powerlessness of EC human rights law in regulating companies' behavior outside the borders of the EU, given that the instruments encourage voluntary adoption by corporations of social, environmental, health, labor, and environmental standards that originate from EU secondary law on equal treatment (within the Community), ILO Conventions, OECD guidelines, and so on. They recommend the endorsement by TNC's of these codes of conduct the concept of corporate social responsibility. They also suggest that current EC secondary legislation would have to be amended so as to govern the activities of TNCs outside the EU.

However, voluntary adoptions of codes of conduct— which do occur—provide the possibility of creating legally enforceable rights. For instance, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market has the potential to be expanded to the misleading use of codes of conduct should the TNC have inaccurately advertised that its products had been manufactured in a way that respected environmental, social, or health standards. Such misleading practice might lead to a successful suit.<sup>473</sup> As already mentioned, the claimant could not invoke the Directive directly against a TNC before a Member State's national court due to the inability of EC Directives to produce horizontal direct effect. That said, the claimant could request the national court to interpret its national law harmoniously in light of the wording and objective of the Directive providing to do so is not *contra legem*. Even so, it is unlikely that the victim will be able to enjoy the benefits of the Directive, given that it is addressed primarily at consumers whose economic behaviour has been distorted as a result of an unfair commercial practice.

Additionally, Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts ('Directive on Public Supply Contracts') could also in theory make conditional the performance of a contract upon an 'ethical', 'social', or 'environmental' clause so as to impose human rights obligations on TNCs' activities abroad, if the public contract is to be implemented outside the EU.<sup>474</sup> In this case, depending on the rules of standing in civil procedure, the foreign victim might be able to challenge the public work contract or the underlying administrative act before a Member State's administrative or

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<sup>471</sup> A Voiculescu, 'The other European framework for corporate social responsibility: from the Green Paper to new uses of human rights instruments' in D McBarnet, A Voiculescu and T Campbell (eds), in *The New Corporate Accountability* (CUP, Cambridge 2007) 370–75.

<sup>472</sup> Christopher McCrudden recalls that TNC's do resort to these codes of conduct in the context of 'private procurement'. See C McCrudden, 'Corporate social responsibility and public procurement' in *ibid* 96.

<sup>473</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC; Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

<sup>474</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

civil court on the basis of the failure to implement the contract by the TNC. In that context, it is likely that the victim might face procedural difficulties in proving his standing before the national court: the contract was indeed concluded between a TNC and the public authority. In contrast with Directive 2005/29/EC, the claimant is more likely to invoke Directive 2004/18/EC against the public authority that has awarded the public contract, in which case he will be able to rely on the vertical direct effect of those provisions of the Directive that are sufficiently clear, unambiguous and unconditional and designed to confer rights directly upon individuals.

Codes of conduct (from the OECD, ILO, UN, EU) could also form part of national commercial usages or be considered factual benchmarks for assessing fault. The determination of these codes of conduct as elements of law or of fact will impact upon the choice of procedural rules prevailing in the national proceedings, especially as regards the burden of proof of those codes.<sup>475</sup>

#### **i. European Parliament Resolution (1999) on EU Standards for European Enterprises Operating in Developing Countries**

In 1998, the European Parliament adopted a Resolution on EU Standards for European Enterprises Operating in Developing Countries ('Resolution on EU Standards'), which recommends that TNCs adhere to 'voluntary codes of conduct' which call for the activities of TNCs to be consistent with animal, health, and environmental standards that have been adopted by the EU.<sup>476</sup> The standards provide that such codes ought to be monitored by an independent body<sup>477</sup> and should promote the role of indigenous people, eschewing the immunisation of TNCs from the scrutiny of the local Government or judiciary.<sup>478</sup> Further, they should not constitute a substitute for the applicable rules of local or international law.<sup>479</sup>

The European Parliament also invited the European Commission to consider the insertion of essential environmental, labor and human rights norms in its examination of European company law, so as to make these codes of conduct compulsory.<sup>480</sup>

#### **ii. European Parliament Resolution (2002) on Commission Green Paper on promoting a European Framework for Corporate Social Responsibility**

In May 2002, the European Parliament adopted a Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility. The Parliament recalled that international law clearly permitted an extension of companies' legal

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<sup>475</sup> European Parliament (EU) 'Resolution A4-0508/98 on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct' [1999] OJ C104/180 art 26. Weissbrodt and Kruger make this argument in relation to the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' that were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights: D Weissbrodt, M Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 Am J Int L 921.

<sup>476</sup> Resolution on EU Standards (n 172) art 6.

<sup>477</sup> Ibid art 1.

<sup>478</sup> Ibid arts 1, 7.

<sup>479</sup> Ibid art 1.

<sup>480</sup> Ibid art 26. See also Weissbrodt and Kruger (n 172) 919.

obligations so as to include respect for human rights standards.<sup>481</sup> Amongst other measures, the Parliament suggested that the concept of CSR be accounted for in every area falling under the competence of EC Law, including company law.<sup>482</sup> It also called upon the Commission to propose an amendment to the Fourth Company Directive so as to incorporate a requirement for companies to report their enforcement of social and environmental standards together with their financial reporting obligation.<sup>483</sup>

### **iii. Commission Communication (2006) to the European Parliament, the Council and the European Economic and Social Committee implementing the Partnership for Growth and Jobs: making Europe a Pole of Excellence on Corporate Social Responsibility**

On 22 March 2006, the European Commission drafted a ‘Communication to the European Parliament, the Council, and the European Economic and Social Committee implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility’ (‘Communication Implementing the Partnership for Growth and Jobs’).<sup>484</sup> By this Communication, the European Commission promoted CSR defined as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.<sup>485</sup> By adopting corporate social responsibility principles into their business activities, TNCs do not content themselves with abiding by obligations deriving from local law and collective labour agreements but also contribute, amongst others, to ‘...greater respect for human rights, environmental protection and core labour standards, especially in developing countries’ and to the objective of greater social inclusion through a more important level of recruitment from disadvantaged groups.<sup>486</sup>

### **iv. European Parliament Resolution (2007) on Corporate Social Responsibility: A New Partnership**

On 13 March 2007, the European Parliament adopted the ‘Resolution on Corporate Social Responsibility: A New Partnership’ (‘Resolution on Corporate Social Responsibility’).<sup>487</sup>

In the Resolution, the Parliament recommended that bodies responsible in the EC for appraising and supervising TNCs have their mandate expanded so as to include activities taking place outside the EC—especially in developing countries. The monitoring authority could ascertain whether the TNCs comply with conventions concluded under the aegis of the ILO regarding such social rights as the prohibition of child labour and of forced labour, right

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<sup>481</sup> Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM(2001)366-C5-0161/2002-2002/2069(COS)) B.

<sup>482</sup> Ibid art 25.

<sup>483</sup> Ibid art 6.

<sup>484</sup> COM(06) 136 final (22 March 2006).

<sup>485</sup> Ibid 2.

<sup>486</sup> Ibid 2, 4.

<sup>487</sup> (2007/2133 INI) (1999) P6\_TA (2007) 0062.



to form a trade union, those specific to protected minorities (women, indigenous, migrants).<sup>488</sup>

By integrating the concept of corporate social responsibility, TNCs are encouraged to implement, amongst others, rights of workers, 'a fair wages policy', the principle of non-discrimination, and environmental principles designed to promote sustainable development.<sup>489</sup>

The Resolution encourages TNCs to organize their recruitment practices consistently with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.<sup>490</sup>

#### **v. Council Directive 84/450/EEC of 10 September 1984 concerning Misleading and Comparative Advertising**

It has been argued that Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising could cover such deceptive behaviour as the advertising by a TNC of their adherence to a voluntary code of conduct that is deliberately inaccurate as to the way its products have been manufactured or as to their 'geographic origin' (e.g. labour conditions in the country of production of those goods). Such behaviour could reasonably be assimilated with 'misleading advertising' as understood under this Directive.<sup>491</sup> The latter contains some provisions on national remedies and procedure so as to guarantee the effectiveness of the rules enshrined in the Directive, if a TNC breaches this directive against a consumer.

Directive 84/450/EEC has been amended by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive').<sup>492</sup> From now on, the latter Directive regulates unfair practices committed by a TNC vis-à-vis a consumer, and the former covers unfair practices committed by a trader vis-à-vis another.<sup>493</sup>

Under the Unfair Commercial Practices Directive, for a practice to become unfair, it has to be contrary to rules of 'professional diligence' and must be likely to adversely affect the average consumer's economic behaviour in relation to the product that either he receives or which is addressed to him/her.<sup>494</sup> If a company, in advertising a code of conduct, provides false information regarding the manufacturing process or the 'geographic origin' of a product, it could fall under the scope of this Directive.<sup>495</sup> Member States are to provide 'effective, proportionate and dissuasive' sanctions in case of breach of the Directive by a company and

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<sup>488</sup> Ibid art 23.

<sup>489</sup> Ibid art 24.

<sup>490</sup> Ibid art 25.

<sup>491</sup> O De Schutter 'The Accountability of Multinationals for Human Rights Violations in European Law' in P Alston (ed) *Non-State Actors and Human Rights* (OUP, Oxford 2005) 301.

<sup>492</sup> Directive on unfair business-to-consumer (n 170), Directives on Council Regulations (n 170).

<sup>493</sup> Ibid arts 3, 14.

<sup>494</sup> Ibid art 5.

<sup>495</sup> Ibid art 6.

organise appropriate judicial or administrative procedures for a person with a legitimate interest in putting an end to such practices.<sup>496</sup>

Therefore, these codes of conduct can be indirectly invoked by an individual who can allege having suffered from such a misleading practice. As an EC Directive, it cannot produce any horizontal direct effect. And even if it did, the claimant would still have to fall under the personal scope of the Directive. A claimant does this by showing that there has been a lack of professional diligence on behalf of the TNC and that the product was addressed to him or her as a consumer. It is unlikely that the actual victim of a breach of a code of conduct would satisfy this *ratione personae* condition, although he could testify on behalf of a consumer organisation based in the EU, which would be in a better position to launch a civil claim based indirectly on the provisions of the Directive.

#### **vi. Directive 2004/18/EC (2004) on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts, and Public Service Contracts**

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts ('Directive on Public Supply Contracts') provides another indirect venue for ensuring compliance by TNCs with human rights standards outside the EU.<sup>497</sup>

In that regard, art 26 of Directive 2004/18/EC provides that:

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Nothing prevents a public authority from conditioning, on the basis of art 26 of Directive 2004/18/EC, the awarding of a public contract upon an 'ethical clause', whereby the economic operator is bound to respect human rights standards beyond those found under the applicable ILO Conventions that are already implemented under national law into national law and to subject itself to a human rights monitoring procedure. The Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement does not contradict this interpretation.<sup>498</sup> In this case, depending on the rules of standing in civil procedure, the foreign victim might be able to challenge the public work contract or the underlying administrative act before a Member State's administrative or civil court on the basis of the non-enforcement of a stipulation by the TNC. In that context, it is likely that the victim might face procedural difficulties in proving his standing before the national court,

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<sup>496</sup> Ibid arts 11, 13.

<sup>497</sup> Directive on Public Supply Contracts (n 171).

<sup>498</sup> De Schutter (n 188) 309–12; Commission (EC) 'Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement' [2001] OJ C333/34f.

namely that the contract was indeed concluded between a TNC and the public authority. The claimant would nevertheless be in a position to refer directly, in such circumstances, to those provisions that are sufficiently clear, precise and unconditional to confer direct effect, if the action is launched against a public authority. This is likely to be the case if it is the administrative act authorising the awarding of the public contract that is being targeted and not so much the contract itself. Should the national court deny the victim's request in the face of a blatant breach by a TNC of its ethical obligations, the victim could always bring a claim for damages against the Member State of litigation for breach of EC law by the judiciary (art 26 of the Directive being disregarded by the national judge in his assessment of the compliance by the TNC with the ethical clause).<sup>499</sup>

Art 45 of Directive 2004/18/EC provides that a candidate or tenderer cannot participate in a public contract if the Member State's public authority has knowledge that the latter has been finally convicted of membership of a 'criminal organisation', corruption, money laundering, or fraud. Although this measure is not very helpful *a priori* for the victim of a wrong committed abroad, the latter could always sue the public authority that has awarded a public contract to a company. Art 45 uses the term 'shall be excluded', which seems to suggest that the provision is sufficiently clear for an omission by the Member State to be qualified as 'serious' under the *Factortame III* judgment to trigger the Member State's liability for breaches of an EC Directive.<sup>500</sup> The claimant will also have to prove the direct causality between the damage and the serious breach.<sup>501</sup>

### **vii. *Lex Mercatoria*—Factual Benchmark**

Codes of conduct (whether drafted by the OECD, ILO, UN or the EU), if sufficiently widespread in a specific sector of the economy and if endorsed by trade associations, could form a factual or legal benchmark for the assessment of the wrong committed by the TNC under the claimant's action.<sup>502</sup> Of course, it will be a matter for the national legal order to determine the weight to be attached thereto: they could be treated as commercial usages (*lex mercatoria*) thereby producing legal effects in private law disputes or be considered as facts before the national courts. The treatment of those codes of conduct by national judges as fact or as law will have an impact upon the applicable procedural rules (e.g. burden of proof).

## **F. EU Code of Conduct on Arms Exports**

As its name indicates, this EU instrument has no binding force. It is addressed to Member States only and does not as such provide any means of redress to victims of human rights violations whose origin can be traced back to the authorised trade of EU weapons to non-EU countries in breach of the present Code.

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<sup>499</sup> For an illustration of the principle of State liability for breaches of EC law by acts of the judiciary, see: Case C-224/01 *Köbler v Republic Österreich* [2003] ECR I-10239.

<sup>500</sup> C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany, ex parte Factortame* [1996] ECR I-1029, [74]–[79].

<sup>501</sup> *Ibid* [74]–[79].

<sup>502</sup> Resolution on EU Standards (n 172) art 26.

On 5 June 1998, the EU Council adopted the 'European Union Code of Conduct on Arms Exports' under Pillar II, inspired by the 1991 and 1992 Council's 'Common Criteria for arms exports' decided upon in Luxembourg and Lisbon.<sup>503</sup> In the interest of ensuring the effective functioning of the code, a consistent application across the EU by all Member States is required, thereby necessitating multilateral discussions between Member States as to a proper application of this Code.<sup>504</sup> At present, the Code only offers a framework for bilateral discussions, which is far from sufficient to ensure its effectiveness.<sup>505</sup>

This Code provides that 'Member States will not issue an export licence if there is a clear risk that the proposed export might be used for internal repression' and that Member States must be cautious in delivering export licences for exports to countries in relation to which the UN, the EU or the Council of Europe has found 'serious violations of human rights'.<sup>506</sup> This provision has been referred to during the negotiation of this soft law instrument as the principal human rights provision.<sup>507</sup> The aim of this provision is to avoid EU-fabricated weapons being the cause for or extending the duration of an underlying conflict.<sup>508</sup> The Code defines 'internal repression' as encompassing the following acts:

[T]orture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.<sup>509</sup>

Art 1 of the Code's 'Operative Provisions' requires Member States to examine every application for an export licence regarding military equipment on the basis of the particular circumstances of the case in light of the Code's provisions.

As already mentioned, the drawback of this code is that it enjoys no legal force.<sup>510</sup> Furthermore, it is extremely specialised and destined to avoid Member States' weapon industry trading with countries or groups established abroad which act in complete violation of human rights standards. The Code is a preventive measure which, if complied with consistently, could avoid licences being granted to TNC's selling weapons to third-States or to non-State entities engaging in acts of 'internal repression'.

## **G. Framework Decision on the Standing of Victims in Criminal Proceedings**

As far as the rights of victims in criminal procedure are concerned, the Framework Decision on the Standing of Victims in Criminal Proceedings ('Framework Decision on the Standing of

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<sup>503</sup> De Schutter (n 188) 297–300.

<sup>504</sup> Ibid.

<sup>505</sup> Ibid; EU Council, 'European Union Code of Conduct on Arms Exports' PESC 8675/2/98 (Brussels, 5 June 1998) Operative Provision 3.

<sup>506</sup> Code on Arms Export (n 202) criterion two.

<sup>507</sup> Clapham (n 47) 117–22. As Clapham points out, Article 296 TEC prevents the Community from regulating this particular area of economic law in which Member States have the right to adopt measures 'as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material'.

<sup>508</sup> Code on Arms Export (n 202) criterion three.

<sup>509</sup> Ibid criterion two.

<sup>510</sup> Clapham (n 47) 117–22.

Victims') is also unlikely to provide significant benefit to the claimants under consideration for the following reasons:<sup>511</sup> (i) the victim will not be able to directly invoke this Framework Decision before Member States' national courts but only indirectly as an interpretative tool; (ii) the Member State's criminal jurisdiction would have to be extra-territorial; (iii) legal persons would need the capacity to be held criminally responsible under the national law of their establishment; and (iv) three essential procedural rights provided by this Framework Decision (legal aid, certain communication rights and reimbursement of 'legitimate' participation fees) would only be available if the Member State in which the litigation is pursued has a legal system based on the civil law tradition, as common law countries tend not to allow victims of criminal offences to be immediate parties to criminal proceedings.<sup>512</sup>

On 15 March 2001, the Council of the European Union adopted the Framework Decision on the Standing of Victims in Criminal Proceedings whose legal basis is to be found in arts 31 and 34(2)(b) of the TEU.<sup>513</sup>

This Framework Decision is to be implemented by Member States by 22 March 2002 with the exception of specific provisions thereof that have their own implementation period.<sup>514</sup>

This report only dwells on the situation involving a wrong committed outside the EC, suffered by a victim located outside the EC and committed by a TNC established under the laws of a Member State of the EC.

As a victim of crime, these instruments offer procedural and substantive benefits.

The Framework Decision has relevance for the purpose of this study to the extent that: (i) the human rights violation committed outside the EC is criminalised under the law of a Member State of the EC; (ii) the Member State's criminal law has extra-territorial effect; and (iii) the Member State's criminal law provides for the criminal liability of corporations treated as legal persons.

This Framework Decision is underpinned by the objective of encouraging Member States to approximate their national legislation so as to afford victims of criminal offences a 'high level of protection', not only during the criminal proceedings but also before and after them.<sup>515</sup> The Framework Decision confers upon victims certain facilities that are not limited to procedure (e.g. treatment of a compensation request within a reasonable time; right to be heard and to produce evidence) but are also of a social nature (assistance by victim support organisations).<sup>516</sup>

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<sup>511</sup> Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA) [2001] OJ L82/1.

<sup>512</sup> S Zappala *Human Rights in International Criminal Proceedings* (OUP, Oxford 2003) 219.

<sup>513</sup> Framework Decision on the Standing of Victims (n 208).

<sup>514</sup> *Ibid* art 17.

<sup>515</sup> *Ibid* preamble [4], [6].

<sup>516</sup> *Ibid*.

It has to be emphasised that this Framework Decision only regulates the role of victims of criminal offences where criminal proceedings are concerned. It excludes ‘...arrangements under civil procedure’.<sup>517</sup>

The ECJ has not yet pronounced itself on the applicability of the Framework Decision to a Member State’s criminal proceedings involving the ‘foreign’<sup>518</sup> victim of a crime committed outside the EC that falls under the material jurisdiction of the Member State’s criminal law. Nevertheless, it must be conceded that the preamble of the Framework Decision, the specific provisions on protective measures, and art 11 of the Framework Decision dealing with ‘Victims resident in another Member State’ suggest that the drafters of the Framework Decision were mostly concerned with a Member State’s criminal proceedings involving the victim of a crime committed by a physical person within the Member State’s territory, when the victim is present in the country of the proceedings or in another Member State.

Nevertheless, an argument *a contrario* could be made for the applicability of the Framework Decision to our paradigm case. The Framework Decision defines a victim as ‘a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State’.<sup>519</sup> This definition suggests that there is no residency or nationality requirement for the victim to fall within the *ratione personae* of the Decision, even though the residency of a victim is relevant for one provision of this EU instrument (i.e. art 11). It also implies that the criminal act need not be committed in the Member State of the criminal lawsuit, so long as it constitutes a breach of its national criminal law. Additionally, in the absence of any autonomous definition of what constitutes an ‘offender’, the Framework Decision does not preclude the defendant from being a corporation.

## i. Status of the Framework Decision

As with EC Directives, Framework Decisions compel certain results, leaving the particular methods and forms for implementation to the discretion of Member States.<sup>520</sup> Nevertheless, following the ECJ’s decision in *Pupino*, individuals are entitled to have Member States’ national courts interpret ‘as far as possible’ national law in light of the wording and objective of this Framework Decision so as to achieve the result prescribed by the latter.<sup>521</sup> This holding illustrates what is referred to as the doctrine of ‘consistent’, ‘conforming’ or ‘harmonious’ interpretation,<sup>522</sup> which the ECJ extended from Pillar I to Pillar III. It justified this extension of case law on the basis of the principle of effectiveness of EU law and of the similarity in formulation between art 249(3) TEC and art 34(2)(b) TEU.<sup>523</sup> This doctrine requires the national judge to consider not just the specific national legislation aimed at implementing the EU instrument but also its entire national legal order so as to produce,

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<sup>517</sup> *Ibid* preamble [7].

<sup>518</sup> ‘Foreign’ is to be understood here as referring to the characteristic of a physical person domiciled outside the European Community, whatever his or her nationality is.

<sup>519</sup> Framework Decision on the Rights of Victims (n 208) art 1(a).

<sup>520</sup> TEU (n 12) art 34(2)(b).

<sup>521</sup> *Pupino* (n 167) [43].

<sup>522</sup> See Craig and De Burca (n 14) 287–96; TC Hartley, *The Foundations of European Community Law* (6<sup>th</sup> edn OUP, Oxford 2007) 216–20.

<sup>523</sup> *Pupino* (n 167) [33]–[34], [42]. The ECJ had already held in previous judgments that EC directives were subjected to the doctrine of consistent interpretation following the expiry of their period of implementation, on the basis of their binding force under Article 249(3) of the EC Treaty: *Von Colson* (n 51) [26]; *Adeneler* (n 51) [116].

wherever possible, ‘a result compatible with that envisaged by that framework decision’.<sup>524</sup> The ECJ made it clear, nonetheless, that this doctrine of consistent interpretation did not require a national judge to interpret the applicable national law *contra legem*.<sup>525</sup>

## ii. Content of Victims’ Rights

The Framework Decision provides that Member States will aim to treat the victim with respect for human dignity and assign the victim a relevant and effective role in the criminal proceedings.<sup>526</sup> Whereas in many jurisdictions criminal wrongs have been historically viewed as an illegal act committed against the State rather than the individual—an interpretation that altogether excludes the rights of the victim from the scope of analysis, the Framework Decision constitutes an attempt to firmly involve victims in the process.

It provides the victim with the opportunity to be heard and to produce evidence in the course of the criminal proceedings.<sup>527</sup> The victim also ought to be provided with information pertaining to the safeguarding of his legitimate interests in a language which he understands.<sup>528</sup> This would normally include information about access to legal aid and advice, crime reporting, conditions for the awarding of compensation, and support organisations.<sup>529</sup> This right to information should also allow the victim, if he or she so wishes, to be informed about the result of her or his complaint, the subsequent procedure followed by the law-enforcement authorities, and the sentencing possibilities by a court of law.<sup>530</sup>

If the victim has the status of party or witness in relation to the criminal proceedings, Member States should ensure that he or she gets reimbursed for the fees entailed by his ‘legitimate participation’ therein.<sup>531</sup>

If the victim has the status of witness or of a party to the criminal proceedings, Member States ought to alleviate as much as possible communication difficulties which the victim faces regarding his comprehension of and participation in the criminal procedure in a similar way to the treatment of the defendant.<sup>532</sup>

When the victim is in a position to become a party to the criminal proceedings, he or she should be entitled to legal aid ‘where appropriate’.<sup>533</sup> This formulation suggests that the entitlement to legal aid for a victim that can become a civil party to the criminal proceedings will not be automatic and will depend on the circumstances of the case, to be determined by the Member State’s law on criminal procedure. Such circumstances would be likely to include a consideration of the victim’s own financial resources.

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<sup>524</sup> *Pupino* (n 167) [47].

<sup>525</sup> *Ibid.*

<sup>526</sup> Framework Decision on the Rights of Victims (n 208) art 2.

<sup>527</sup> *Ibid* art 3.

<sup>528</sup> *Ibid* art 4(1).

<sup>529</sup> *Ibid* art 4(1).

<sup>530</sup> *Ibid* art 4(2).

<sup>531</sup> *Ibid* art 7.

<sup>532</sup> *Ibid* art 5.

<sup>533</sup> *Ibid* art 6.

The Framework Decision also provides that victims ought to receive a decision on their request for compensation within a reasonable time in the context of the criminal proceedings except if the legal order of the country where those proceedings are taking place provides for a separate compensation procedure.<sup>534</sup>

Provision is to be made for appropriate protective measures when the victim is exposed to a serious risk of reprisals or intrusion into the victim's private life. Such measures could consist in eluding, wherever possible, contacts at court between the victim and the offender.<sup>535</sup>

Member States ought to encourage the recourse to 'penal mediation', which allows the victim of a criminal offence and the offender to negotiate where appropriate a solution as to the outcome of the case under the general supervision of a mediator. This can take place either before or in the course of the criminal proceedings.<sup>536</sup>

Member States are to encourage the role of 'victim support systems' in the reception of victims, the provision of assistance to them during and subsequent to the closure of the criminal proceedings. Victim support organisations can be involved through the provision of information or contribution to the victims' immediate needs.<sup>537</sup>

### iii. General Assessment

The great advantage of this Framework Decision lies in the fact that it purports to be comprehensive by envisaging the status of victims not just in the actual course of criminal proceedings (e.g. the right to produce evidence and to be heard in court), but also before their commencement and subsequent to their closure (e.g. the role of victim support organisations; penal mediation).<sup>538</sup>

As mentioned earlier, the applicability of the Framework Decision to our paradigm case is rather uncertain, given that the preamble and certain provisions of the Framework Decision suggest that the drafters had in mind the situation of a criminal offence committed in the Member State by a physical person against a victim either present in the Member State of criminal lawsuit or in another Member State. Although the ECJ has not pronounced yet on the question of the *ratione personae* scope of the Framework Decision, the prospect of an interpretation that includes our paradigm case is not good.

*A fortiori*, the reception of the Framework Decision in national criminal procedures is unclear. The line between direct effect and consistent interpretation is sometimes rather hard to discern. Domestic courts across the EC are likely to adopt different attitudes as to the legal effect of the Framework Decision, and as to the way the applicable national law can be bent so as to take account of its wording and objective without constituting a *contra legem* interpretation. Therefore, in theory, this Framework Decision only produces indirect effect

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<sup>534</sup> Ibid art 9.

<sup>535</sup> Ibid art 8.

<sup>536</sup> Ibid arts 1(e), 10.

<sup>537</sup> Ibid art 13.

<sup>538</sup> Ibid preamble [5]–[6].



with respect to individuals. But in some Member States' courts, such indirect effect might turn into a 'de facto' direct effect if the doctrine of consistent interpretation has been triggered in a situation where national law is at odds with the EU instrument.<sup>539</sup>

Furthermore, there are three important provisions of this Framework Decision that will be of interest to victims of criminal offences based on human rights violations: those pertaining to the delivery of legal aid, the reimbursement of 'legitimate participation' fees, and communication safeguards. But, these provisions will only apply if the victim is capable of enjoying the status of 'party' to the criminal proceedings under the Member State's criminal procedural law.<sup>540</sup> In relation to Member States that shun the inclusion of victims in criminal proceedings, the limitations of this Framework Decision is evident. The preamble to the Framework Decision emphasises very clearly that this EU measure is not intended to impose upon Member States an obligation to assimilate the status of victims with that of a party to the proceedings. In practice, these three rights will only be relevant to certain European civil law countries from the Continent (e.g. Greece, Belgium, and France) that allow victims to be parties to the criminal proceedings and thus to have access to the criminal file as well as to claim damages before the criminal court.<sup>541</sup>

Finally, the right to have one's compensation request treated within reasonable time only applies under this Framework Decision if it is integrated into the criminal proceedings. This also limits the potential impact of this EU instrument upon the interests of victims of human rights violation.

Thus, in conclusion, the overall importance of this Framework Decision is quite limited in our paradigm case because: (i) the victim will not be able to directly invoke the Framework Decision; (ii) the criminal jurisdiction of the country must be extra-territorial; (iii) legal persons must have the capacity to be held criminally responsible under the national law of their establishment; and (iv) for the three abovementioned procedural rights, the country will have to be a civil law one, since common law countries tend not to allow victims of criminal offences to be immediate parties to criminal proceedings.

Therefore, the Framework Decision is also unlikely to provide significant benefit to the claimants under consideration.

## H. Fair Trial Standards

Unlike most human rights under EC law that are only vertically enforceable (except the discrimination clause and some economic rights such as free movement of workers), EC procedural rights are enforceable in civil and criminal proceedings, whether involving a horizontal or a vertical dispute. This is because these rights are inherently linked to the launching of a trial, regardless of who the parties thereto are so long as their dispute falls

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<sup>539</sup> Hartley (n 219) 219 argues in this respect that '[e]ven in its restrained form, the doctrine of indirect effect is a powerful tool for bringing national law into line. It nevertheless generates great uncertainty since it is hard to know how unclear national law must be for indirect effect to operate'.

<sup>540</sup> This right for victims of a criminal offence to act as 'civil parties' in criminal proceedings is a distinguishing characteristic of civil law systems such as France and Belgium. In common countries, the rule tends to be that the civil aspects of a criminal offence are dealt with in private law proceedings. On this question, see Zappala (n 209) 219.

<sup>541</sup> Framework Decision on the Rights of Victims (n 208) preamble [9].

within the scope of EC law (i.e. 'Community link').<sup>542</sup> Should the EC procedural rights be unenforceable due to the absence of a Community link, art 6 of the ECHR may apply by default in conjunction with national constitutional guarantees. For art 6(1) of the ECHR to apply, the procedure will need to be 'civil' in the autonomous sense of the term, as made explicit by the ECtHR.<sup>543</sup> This will very likely be the case for a private law claim based on a human rights violation (either in the form of a tort or a contract) given the loose and increasingly expanding definition of 'civil rights and obligations' enunciated by the ECtHR.<sup>544</sup> The 'civil' nature of the private law claim for the purposes of art 6 of the ECHR will not be precluded by the adjunction of the claim to the criminal proceedings in those civil law countries that admit the concept of 'constitution of civil party'.<sup>545</sup>

Turning first to EC due process rights, the Community courts have judicially recognised the right to be heard, the right to counsel, the right to confidentiality between a lawyer and his client, and the rights of defence, as general principles of EC law.<sup>546</sup> Although Community courts have tended to apply due process rights mostly to proceedings before EC institutions, they have nonetheless extended this case law to national proceedings where the underlying dispute presented some link with EC law.<sup>547</sup> In the decided cases, the ECJ stressed the importance of 'judicial review' as a general principle of EC law grounded in Member States' constitutional traditions and art 6 combined with art 13 of the ECHR.<sup>548</sup> In the *Joachim Steffensen v Austria*, the ECJ provided detailed insight into the way in which it was prepared to monitor compliance by national courts with fair trial standards in the event of an EC law dispute.<sup>549</sup> The ECJ held in that case, by reference to the ECtHR's established caselaw, that Article 6(1) of the ECHR does not in and of itself provide for specific rules of evidence and does not *prima facie* exclude the admissibility of evidence collected as a result of a breach of national law. In this context, it is the duty of national courts to assess the relevance of evidence put forward by the parties. The parties to the dispute are to be given a 'real opportunity' to submit effective comments upon the evidence filed. So as to abide by the principle of fairness of the proceedings, national courts when assessing evidence are to ascertain: (i) whether the evidence relates to 'technical' matters which national judges know nothing about and whether it may have a substantial impact upon the overall appraisal of the facts by the court; and, if that is the case, (ii) whether the party enjoys a genuine 'opportunity' to effectively comment upon that evidence.<sup>550</sup>

A community link will thus be established if the national dispute raises questions of interpretation of an EC secondary legislation or of the TEC. If the situation is purely internal,

<sup>542</sup> Case C-144/95 *Maurin v Austria* [1996] ECR I-2909, [12].

<sup>543</sup> *Engel and Others v the Netherlands* (App no 5100/71) (1976) Series A no 22 [80]–[85]; *Öztürk v Germany* (App no 8544/79) (1984) Series A no 73, [46]–[56]; *Campbell and Fell v United Kingdom* (App no 7819/77; 7878/77) (1984) Series A no 80, [68]–[73]; *Weber v Switzerland* (App no 11034/84) (1990) Series A no 177, [30]–[34]; *Salerno v Italy* (App no 11955/86) (1992) Series A no 245-D, [14]; *Deumeland v Germany* (App no 9384/81) (1986) Series A no 100, [59]–[74].

<sup>544</sup> *Salerno* (n 240) [14]; *Deumeland* (n 240) [59]–[74].

<sup>545</sup> *Tomasi v France* (App no 12850/87) (1992) Series A no 241-A, [121]; *Deumeland* (n 240) [59]–[74].

<sup>546</sup> Case 17/74 *Transocean Marine Paint* [1974] ECR 1063; Case T-42/96 *Eyckeler & Malt AG* [1998] ECR II-401, [76]–[80]; *Hüls* (n 71) [149]–[150]; Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, [66]–[67]; Case C-344/05 *P Commission v Joël De Bry* [2006] ECR I-10915; Case 115/80 *Demont* [1981] ECR 3147; Case 155/79 *AM & S* [1982] ECR 1575.

<sup>547</sup> Case C-97/91 *Oleificio Borelli v Commission* [1992] ECR I-6313, [14]; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, [46]; Case C-226/99 *Siples* [2001] ECR I-277, [17]; Case C-424/99 *Commission v Austria* [2001] ECR I-9285; Case C-276/01 *Joachim Steffensen v Austria* [2003] ECR I-3735, [69]–[78].

<sup>548</sup> Case C-97/91 *Oleificio Borelli v Commission* [1992] ECR I-6313, [14]; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, [46]; Case C-226/99 *Siples* [2001] ECR I-277, [17]; Case C-424/99 *Commission v Austria* [2001] ECR I-9285.

<sup>549</sup> Case C-276/01 *Joachim Steffensen v Austria* [2003] ECR I-3735, [69]–[78].

<sup>550</sup> *Ibid.*

EC procedural rights cannot be triggered, since the Member States' action (via the judiciary) will not have fallen within the scope of the European Community.<sup>551</sup>

Those procedural rights (i.e. fair trial standards and right to an effective remedy) that are protected under EC law have been codified by the Human Rights Charter. Art 47 of the Charter reflects the fact that this instrument was not aimed at producing new rights but rather at reinforcing the 'visibility' of pre-existing human rights law through a process of consolidation of EC recognised human rights.<sup>552</sup>

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Regardless of the question of the establishment of such a Community link, the Member States of the EU are still bound as parties to the ECHR. The main procedural right that will be relevant to the national proceedings of a Member State is art 6 of the ECHR. The right to a fair trial under art 6 is a framework right that can be divided into two main categories: (i) the general requirements of procedural fairness; and (ii) the minimum guarantees of the accused.

The ECtHR has adopted an autonomous definition of civil and criminal proceedings.<sup>553</sup> Under the ECtHR's case law, three main criteria will thus be assessed in order to determine the criminal character of the underlying offence (i) the characterisation of the offence under the Member State's national law; (ii) the characteristics of the actual offence; and (iii) the type and stringency of the possible penalty attached to the offence.<sup>554</sup> If national criminal procedural law expressly qualifies proceedings as criminal, it is unlikely that the ECtHR will contest the applicability of art 6(1) of the ECHR. It is only where the Member State qualifies a national procedure as non-criminal albeit conducive to 'administrative' fines that the Court's second and third criteria will come into play.<sup>555</sup>

Regarding the question of determining civil rights and obligations, the ECtHR has held that art 6 applies to situations where the parties are in 'genuine and serious' contention, the judicial outcome of which should be 'directly decisive' for the determination of a private right

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<sup>551</sup> *Maurin* (n 239).

<sup>552</sup> G de Búrca, 'The drafting of the European Union Charter of fundamental rights' 26 (2001) *European L Rev* 130.

<sup>553</sup> *Engel* (n 240) [80]–[85]; *Öztürk* (n 240) [46]–[56]; *Campbell and Fell* (n 240) [68]–[73]; *Weber* (n 240) [30]–[34]; [14] *Salerno* (n 240); *Deumeland* (n 240) [59]–[74].

<sup>554</sup> *Engel* (n 240) [80]–[85]; *Öztürk* (n 240) [46]–[56]; *Campbell and Fell* (n 240) [68]–[73]; *Weber* (n 240) [30]–[34].

<sup>555</sup> *Ibid.*

'reasonably grounded in national law'.<sup>556</sup> This is a very loose definition and the ECtHR has interpreted 'civil rights and obligations' in an increasingly expansive way.<sup>557</sup>

In practice, what will be determinative is whether the claimant in our paradigm case is involved in a dispute regarding the existence or extent of civil rights or obligations. Either the private law claim is brought before domestic civil courts, absent the launching of criminal proceedings, in which case it is very likely to fall under the scope of art 6 of the ECHR. Or, the same claim has been launched as an accessory action to the principal criminal proceedings (i.e. 'constitution of civil party'), in which case it may also be qualified as a dispute over civil rights according to the ECtHR. Indeed, the ECtHR has qualified the 'constitution of civil party' as a contestation over civil rights and obligations. Even though the outcome of the civil action will be dependent on that of the criminal action, the criminal judge will still need to satisfy himself that there has been damage and a direct causal link.<sup>558</sup>

The guarantees of procedural fairness under art 6(1) of the ECHR (common to both civil and criminal proceedings) include the requirements that:

- (1) The court be established by law;
- (2) The court be independent and impartial;
- (3) The trial be adjudicated upon within a reasonable time;
- (4) The hearing be held in public subject to certain limitations based upon 'the interests of morals, public order or national security', 'the interests of juveniles', 'the protection of private life of the parties' or, exceptionally, in the name of the 'interests of justice;'
- (5) The judgment be pronounced in public;
- (6) The hearing be fair; and
- (7) The principle of equality of arms be guaranteed (as an implicit corollary to the fairness of the hearing).<sup>559</sup>

With the exception of the publicity of the debates, none of these rights is subject to a limitation clause similar to that embodied in the second paragraph of arts 8–11 of the ECHR,

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<sup>556</sup> *Salerno* (n 240) [14]; *Deumeland* (n 240) [59]–[74]; *Pudas v Sweden* (App no 10426/83) (1987) Series A no 125-A, [30]–[42].

<sup>557</sup> J-C Soyser, M de Salvia, 'Article 6' in L-E Pettiti, E Decaux and P-H Imbert (eds), *La Convention Européenne des Droits de l'Homme : Commentaire article par article* (Economica, Paris 1999) 249–53.

<sup>558</sup> *Tomasi v France* (n 242) [121]; *Deumeland* (n 240) [59]–[74]. Henceforth, a criminal conviction will directly impinge upon the assessment of 'fault' under private law.

<sup>559</sup> *Dombo Beheer v Netherlands* (App no 14448/88) (1993) Series A no 274 [33]; *Hentrich* (App no 13616/88) (1994) Series A no 296-A, [56]. Cf. *Delcourt v Belgium* (App no 2689/65) (1970) Series A no 11, [34].

or to a general limitation clause, as contained in the Human Rights Charter. It is nevertheless important to bear in mind that, according to art 15 of the ECHR, these procedural rights are not absolute and can be suspended 'in time of war or other public emergency threatening the life of the nation.' The wording of art 15 suggests that the European Court of Human Rights will have to exercise a stricter control of proportionality than it traditionally does in relation to ordinary limitation clauses.

Thus, the right to a fair trial under EC law and the ECHR provides a substantial right to claimants to have their case heard fairly and within a reasonable time by an independent and impartial court lawfully established under conditions of procedural equality with their opponent and subject to the publicity of the judicial debates. Any claimant who brings a claim in a Member State jurisdiction would be entitled to fair trial guarantees, at the very least under the ECHR or national constitutional law,<sup>560</sup> at the very most under both the ECHR and EC law.

### **i. Remedies for Breaches of Human Rights**

Besides the question of fair trial standards, the ECJ in the *Courage and Crehan* judgment may provide the claimant with a specific type remedy in relation to his claim grounded on a human right violation.<sup>561</sup> If his claim enters within the scope of EC law by raising issues of interpretation of an EC Treaty provision or of secondary legislation (e.g. Directive or Framework Decision), the claimant may be in a position to invoke, as a matter of EC law, damages against his opponent subject to 'effective' and 'non-discriminatory rules' of procedure. This may lead to the ad hoc creation, by the national court, of hybrid rules of civil law in case the national law does not provide for such a remedy and of a hybrid body of procedural law if the national rules of civil procedure are ill-suited to this EC form of remedy. Those hybrid rules will be tailored to the particular circumstances of the case and be a source of legal uncertainty for future litigants in the absence of foreseeability as to the way national courts will adjust national law to the requirements of 'equivalence' and 'effectiveness'. Additionally, the ECJ is unclear as to whether its decision in *Courage and Crehan* applies to all forms of horizontal disputes or only to those grounded on a violation of EC competition law or on a directly effective provision of EC law.

The ECJ, in *Francovich* (1991) and later *Brasserie du Pêcheur / Factortame III* (1996), has decided that the right to damages as a result of a breach of EC law by a Member State had now become part of the *acquis communautaire* and as such must be provided for by every Member State, even if it involves departing from a Member State's traditional rules of procedure.<sup>562</sup> In the latter of these cases, the Court specified the substantial conditions for the awarding of damages: (i) conferral by the European rule of individual rights (albeit not having to be directly effective); (ii) a serious breach of EC law; and (iii) a direct link of causality between the serious breach and the damage incurred by the claimant.<sup>563</sup>

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<sup>560</sup> National constitutional law is here understood in its broadest sense, referring not just to a formal constitution but also to those various national law instruments that materially shape the State's basic institutions and citizens' inherent rights and freedoms.

<sup>561</sup> Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, [25], [29].

<sup>562</sup> Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, [31]–[37]; *Brasserie du Pêcheur* (n 197) [31]–[32].

<sup>563</sup> *Brasserie du Pêcheur* (n 197) [74]–[79].

The question has been raised as to whether this holding could be extended to horizontal actions based on a breach of EC law.

In *Courage v Crehan* (2001), the ECJ acknowledged for the first time that an individual who entered into an anti-competitive agreement in breach of art 81(1) TEC enjoyed a right to claim damages against the other co-contractor subject to the applicable rules of national procedural law provided that they accord with the principles of effectiveness and equivalence.<sup>564</sup> The Court held that to argue otherwise would deprive art 81(1) TEC of its effectiveness.<sup>565</sup> The principle of equivalence means that the procedural rules cannot be less advantageous when the action is grounded on a violation of European law as opposed to a national law claim. The principle of effectiveness implies that even though applying equally to actions based on a breach of national or European law, those procedural rules cannot make the exercise of the EC law action 'practically impossible' or 'excessively difficult'.<sup>566</sup>

The effect of the *Courage v Crehan* judgment is that it makes available a specific remedy that may not exist under a Member State's national law whilst leaving the details of its procedure upon Member State's national autonomy within certain limits, limits ultimately to be under the control of the ECJ (principles of effectiveness and equivalence).<sup>567</sup>

The holding is not as straightforward as it might appear. On the one hand, unlike the *Francovich* judgment where it was not necessary to prove that the breach of EC legislation was directly effective (so long as it conferred individual rights), the direct effect of art 81(1) in the *Courage v Crehan* judgment may have played a determinant role in the ECJ's reasoning process. If that is the case, the right to damages in horizontal actions would be inherent in the nature of the EC right being breached: it would have to be sufficiently clear, precise and unconditional in order to be directly enforceable by private persons before national courts. Alternatively, it might be argued that this misconstrues the precedent, and instead the decision should be limited to its specific competition law context. That said, the formulation in the judgment does not exclude extending the remedy of damages to other horizontal actions based on a violation of European Community law.<sup>568</sup>

Therefore, in order for a claimant to be able to invoke the *Courage v Crehan* precedent, he or she must demonstrate a Community link. It will not be enough to allege a mere violation of a human right; for instance, the precedent could be invoked where a human right is coupled with a claim based on a violation of a Treaty provision or with an EC law secondary legislation.

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<sup>564</sup> *Courage* (n 258) [25], [29].

<sup>565</sup> *Ibid* [26].

<sup>566</sup> *Ibid* [29].

<sup>567</sup> Craig and De Burca (n 14) 328–29.

<sup>568</sup> Wyatt and Dashwood (n 5) 231–32.

#### **4. INTERIM CONCLUSION**

The human rights case law of the European Community Courts targets the actions and acts of both Member States and the EU institutions to the exclusion of private persons (with the exception of some equal treatment provisions like arts 39 and 141 of the EC Treaty).

The only significant instruments that will be relevant to the actual procedure before the Member State's national court in a private law case based on a violation of human rights committed outside the EU (in the form of a contract or tort) are EC fair trial rights if the claimant can show a link between the underlying situation and Community law. That said, the absence of such a link is not fatal—art 6 of the ECHR will apply by default if the civil law claim based on a human rights violation is a 'civil' claim as understood by the ECtHR, which is very likely to be the case. Where neither EC procedural rights nor art 6 of the ECHR apply, at the very least national constitutional guarantees will apply.

The Race Directive, the Directive on Equal Treatment in Access to and Supply of Goods and Services, the Framework Employment Directive, and the Recast Equal Treatment Directive will be of no use to the victim, given that they have no effect outside the EU. Even if they were found to have extra-territorial applicability, which is all but impossible, they cannot have any direct effect in horizontal disputes.

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, coupled with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, can have the effect of indirectly forcing the compliance with human rights standards by corporations operating abroad. The remedies, nevertheless, will be difficult to attract due to the question of standing of the victim in the national court and to the inherent nature of Directives in terms of direct effect.

More specifically at the criminal law level, the Council's Framework Decision on Human Trafficking criminalises certain human rights violations that pertain to forced labour, the right to physical integrity, and the right to human dignity. It is a very promising development under Pillar III, as it urges Member States to allow for criminal penalties to be inflicted upon corporations for their principal or complicit liability in the commission of serious crimes, including those occurring outside the State of prosecution. Obviously, the scope of this measure is extremely limited and the form it has taken (Framework Decision) prevents it from being directly enforceable in a national court, subject to the doctrine of consistent interpretation.

#### **5. EC HARMONIZED RULES OF PRIVATE INTERNATIONAL LAW**

The EU system for the regulation of issues arising in private international law effectively modifies the private international law rules under the domestic law of all Member States.

As such, the relevant European instruments have the potential to affect the ability of a claimant to bring a civil claim in the courts of Member States, the law applicable to the claim, and the entitlement of any judgment rendered to recognition and enforcement throughout the EU.

In this framework, there are three specific areas which fall to be considered: jurisdiction, recognition and enforcement, and the applicable law. After careful review of the framework and its potential operation, some general conclusions might be drawn. Where a claimant sues a TNC in the courts of a Member State, jurisdiction will almost always be exercised. Further, under normal circumstances, claimants will be entitled to have judgments rendered by Member State courts recognised and enforced in other Member States. In relation to the method for identifying the applicable law, however, the EU instruments do not confer any appreciable benefit on the claimant—it is impossible to determine whether a claimant is better or worse off by their operation. This is because of two factors. Firstly, the advantage of any given applicable law will depend on the specific facts of any given case. Secondly, the determination of the applicable law, either under the Rome Convention (for breach of contract) or the Rome II Regulation (for tort or delict), is a very fact-specific exercise and will therefore turn on the facts of the case. Thus, the most that can be said is that a claimant should review the ways in which Member State courts are to select the applicable law, and attempt to use these rules to his or her advantage.

Applicable law aside, the European framework offers considerable advantages to claimants in the form of an assurance that his or her claim will be heard and that the judgment rendered will be enforceable throughout the European Union.

## A. Introduction

As mentioned, the treatment of conflict of laws issues in the EU is governed by a combination of domestic law and instruments adopted on a European level.

Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Regulation'),<sup>569</sup> and the 1980 Rome Convention on the law applicable to contractual obligations of 1980 ('Rome Convention'),<sup>570</sup> apply in all Member States of the European Union.<sup>571</sup> Additionally, Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations' ('Rome II Regulation'),<sup>572</sup> which applies to tortious or delictual actions, must also be considered, as it will come into force in January 2009.

These framework documents are generally determinative of conflict of laws questions as between Member States, circumscribing the capacity of Member State courts to determine cases according to their traditional conflict of laws rules and conflict of jurisdictions rules. For example, the Brussels Regulation has been interpreted as forbidding the invocation of *forum*

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<sup>569</sup> [2001] OJ L012/1.

<sup>570</sup> [1980] OJ L266/1.

<sup>571</sup> The only exception to this is that in relation to the Rome II Denmark is not bound – it is only subject to the Brussels Regulation (n 266) and the Rome Convention (n 267).

<sup>572</sup> Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations' ('Rome II') [2007] OJ L199/40.



*non conveniens* as a ground for the non-exercise of jurisdiction of a Member State court upon which the Regulation confers jurisdiction.<sup>573</sup> These instruments also have implications for the recognition and enforcement of judgments handed down in the courts of one Member State by the courts of another Member State.

The three instruments serve very different purposes.

- (1) The *Brussels Regulation* creates a framework detailing the exercise of jurisdiction in civil and commercial matters when the defendant is domiciled in a Member State.
- (2) The *Rome Convention* applies to contractual obligations in any situation involving a choice between the laws of different countries.<sup>574</sup>
- (3) The *Rome II Regulation* applies to choice of law in all situations not covered by the *Rome Convention*, which basically confines its application to tortious or delictual actions.

The main thrust behind the *Brussels Regulation*, the *Rome Convention* and the *Rome II Regulation* is to provide certainty in the way in which the courts of Member States approach questions of conflict of laws and of jurisdiction, such that forum shopping is reduced and uniformity increased. This is done in a number of ways. One way is by the courts of Member States referring cases to the ECJ for interpretive rulings on the provisions of these three EC instruments. Broadly speaking, upon such a reference the ECJ will determine that a particular provision has either:

- (1) An 'autonomous interpretation', such that the application of a particular term must be '...construed with reference first to the objectives of the scheme of the Convention and secondly to the general principles which stem from the corpus of the national legal system';<sup>575</sup> or
- (2) A 'national interpretation' such that the application of a particular term is to be determined according to the 'substantive rules of the law applicable in each case under the rules of the conflict of laws of the court before which the matter is first brought'.<sup>576</sup>

In this way, those provisions that, according to the ECJ, are to be given an autonomous interpretation will ideally enjoy consistent application across all Member States. Thus, if a question arises as to whether or not an action is to be brought in delict or contract, concepts

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<sup>573</sup> Case C-281/02 *Andrew Owusu v NB Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others* [2005] ECR I-1383, [37]–[46].

<sup>574</sup> *Rome Convention* (n 267) art 1.

<sup>575</sup> Case C-26/91 *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967.

<sup>576</sup> Case 12-76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 01473.

that the ECJ has directed are to be given an autonomous interpretation,<sup>577</sup> the answer to the question should be the same regardless of whether the action is heard in the French, German, English, Italian or any other Member State's courts.

On the other hand, terms which are to be given a 'national interpretation' according to the conflicts rules in any given national jurisdiction, will be determined exclusively by the laws of that jurisdiction. Such questions, where applicable, will be answered in the sections of this submission that deal with the specific national jurisdictions (such as the UK, France, etc).

## **B. Rules on Conflict of Jurisdiction in Civil and Commercial Matters**

The Brussels Regulation can be broken down into two parts:

- (1) Rules regulating when a Member State enjoys *jurisdiction* to hear a case; and
- (2) Rules regulating the *recognition* and *enforcement* of judgments, rendered in a Member State court, in other Member State jurisdictions.

The Brussels Regulation applies in civil and commercial matters,<sup>578</sup> so long as the defendant is domiciled in a Member State.<sup>579</sup> There is no domiciliary requirement—the claimant does not have to be domiciled in a Member State for the Regulation to apply. The provisions dealing with recognition and enforcement ensure that any judgment rendered in a Member State court can be enforced rapidly and in a cost-effective manner in all EU jurisdictions, irrespective of the domicile of the claimant or defendant.

### **i. The Brussels Regulation on Jurisdiction**

The section of the Brussels Regulation dealing with the exercise and non-exercise of jurisdiction will almost always apply in the context of Member State corporations and foreign claimants.

The Regulation creates a set of very strict criteria for the exercise and non-exercise of jurisdiction in 'civil and commercial matters'. Three general principles must be borne in mind:

First, the general rule is that a corporation can be sued in the Member State of its domicile, according to art 2(1) of the Brussels Regulation. Art 2 grants general jurisdiction against the defendant. This means that the courts of the domicile have jurisdiction to hear any claim so long as it is a civil or commercial one, in the sense of art 1 of the Regulation.

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<sup>577</sup> Jakob Handte (n 272).

<sup>578</sup> Brussels Regulation (n 266) art 1(1).

<sup>579</sup> Ibid art 2.

Second, art 60(1) of the Brussels Regulation stipulates that for the purposes of the Regulation a corporation is domiciled at the place where it has its statutory seat or central administration or principal place of business. If, in a given case, these components are situated in more than one Member State, the claimant has the option to choose where to sue. If proceedings are brought in two jurisdictions of different Member States in relation to the same cause of action and between the same parties, irrespective of jurisdictional competence the last seised court is obliged stay proceedings under the *lis pendens* rules of art 27 of the Regulation.

Third, claims which are so closely connected, such that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, can be joined under art 6(1) of the Regulation so long as the parties which are sought to be joined are domiciled in a Member State.

All this said, the courts of another Member State may have exclusive jurisdiction if the parties have made a valid choice of court agreement under art 23 of the Regulation. It must be noted that prorogation agreements that deprive insured individuals, consumers, and employees of the jurisdictional benefits conferred upon them under arts 13, 17, and 21 of the Regulation respectively, shall have no legal force.<sup>580</sup> In addition, prorogation agreements concluded so as to deprive national courts of the exclusive jurisdiction that they enjoy under art 22 of the Regulation in proceedings which have as their object rights *in rem* or tenancies of immoveable property, some internal affairs of corporations, the validity of entries in public registers, the registration of patents and similar rights, and the enforcement of judgments, will have no legal force. Such agreement that can be in writing, electronic format, or in a form complying with the parties' practice or with commercial usage will have legal effect only if at least one of the parties is domiciled in a Member State.<sup>581</sup>

For the purposes of this report, the Brussels Regulation will typically direct the courts of the Member State to hear the matter where the defendant is a company domiciled in the Member State, irrespective of the location of the plaintiff's domicile. This means that a company domiciled in a Member State will be unable to resist a claim of jurisdiction if it is domiciled in that Member State. There is no leeway in which to argue a claim of *forum non conveniens* where the courts of a Member State have been seised by virtue of art 2(2).<sup>582</sup>

Pursuant to art 60 of the Brussels Regulation, a company is considered to be domiciled in a Member State if its statutory seat (*siège social*), central administration, or principal place of business is located within that Member State.

The relevant date for determining these questions is the date on which proceedings were issued.<sup>583</sup>

In *Ministry of Defence of Iran v Faz Aviation*, Langley J stated that, not only did the claimant need to have a good arguable case that one of these limbs was satisfied, but due to the

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<sup>580</sup> Ibid art 23(5).

<sup>581</sup> Ibid art 23(1).

<sup>582</sup> *Owusu* (n 270).

<sup>583</sup> *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1.

finality of the decision on jurisdiction under the Judgments Regulation, the claimant faced the more onerous requirement of having 'a much better argument on the material available'.<sup>584</sup>

The answer will be clear in relation to the TNC's statutory seat, as one need only consult the register of companies. However, with respect to the location of the central administration and principal place of business, Langley J identified the following propositions as guiding the inquiry:

- (1) The central administration and principal place of business of a company may be, and frequently will be, in the same country;
- (2) The principal place of business (if there is one) is likely to be the place where the corporate authority is to be found (shareholders and directors), and to be the place from where the company is controlled and managed;
- (3) The place where the day-to-day activities of the company are carried out may not be the principal place of business if those activities are subject to the control of senior management located elsewhere.

Thus, as regards the principal place of business, it seems much emphasis is placed on the location of business management. Unfortunately, in that case, Langley J saw the central administration as coinciding with the principal place of business. As such, it is difficult to say how the criteria would apply in relation to the question of central administration. Additionally, one must be mindful that Langley J viewed the case from a common law perspective. Should this have been considered by a civilian judge he or she would likely consider Langley J's proposition (2) as the central administration.

Nevertheless, turning to our paradigm case we are able to draw some tentative conclusions:

Most frequently, the statutory seat of the TNC will be located in the Member State. If this is the case, the corporation is domiciled in that Member State for the purposes of the Brussels Regulation.

However, even where this is not the case, the place wherefrom management control is exercised, which will almost invariably be from within the Member State, will be sufficient to ground the domicile in that Member State. As such, even if the corporation is incorporated outside the European Union, Member States will still have jurisdiction so long as the company's principal place of business or central administration is within the European Union.

## **ii. The Brussels Regulation and Recognition and Enforcement of Judgments**

Recognition and enforcement of judgments may be relevant in two contexts:

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<sup>584</sup> [2007] EWHC 1042 (Comm) [25].

- (1) Where the foreign claimant seeks to have a judgment, rendered in an overseas (non-Member State) court, recognised or enforced in the courts of a Member State; or
- (2) Where the foreign claimant seeks to have a judgment, rendered in a Member State court, recognised or enforced in the courts of another Member State.

The first scenario is the most important for the purposes of this submission. However, the second scenario should still be briefly considered as it affects the ability of claimants to chase assets into the jurisdictions of other Member States.

In situations where the foreign claimant is seeking to have a judgment obtained from a non-Member State court recognised or enforced in a Member State jurisdiction, the Brussels Regulation has absolutely no role to play. The ECJ has made clear that procedures in a Member State for registration, recognition, or enforcement of a judgment granted by a non-Member State do not trigger any of the provisions of the old Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('Brussels Convention') (now replaced by the Brussels Regulation).<sup>585</sup> Rather, the Member State's national conflict of laws rules will determine whether or not the judgment may be recognised or enforced. By way of illustration, if an English court is called upon to lend its authority to recognition and enforcement it would look exclusively to the English common law and the relevant provisions of the Reciprocal Enforcement of Judgments Act. Because of this, the English court would enquire whether the foreign court had exercised jurisdiction in 'the international sense'.<sup>586</sup> Other jurisdictions will have their own rules on recognition and enforcement and will be considered in the individual Member State reports following this framework.

In relation to scenario (2), the Regulation provides a high degree of automaticity. There is no domiciliary requirement: a judgment obtained in an English court by a US-domiciled claimant against a Japanese-domiciled TNC would *prima facie* be enforceable in all Member State jurisdictions. Judgments are to be enforced in any other Member State without any special procedure being required.<sup>587</sup> Review of such judgments is not open to the Member State's court in which recognition is being sought.<sup>588</sup>

As far as enforceability is concerned, a judgment delivered in another Member State shall be declared enforceable before the court of another Member State if it is enforceable in the Member State of original jurisdiction.<sup>589</sup> To obtain such a declaration, the applicant will need to produce an authentic copy of the original judgment and a certificate. The five defences against recognition mentioned below do not apply to enforcement proceedings, as is made clear under art 41 of the Brussels Regulation, which stipulates that

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<sup>585</sup> Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Another* [1994] ECR I-117.

<sup>586</sup> *Schisby v Westenholz* (1870) LR 6 QB 155 (QB).

<sup>587</sup> Brussels Regulation (n 266) art 33(1).

<sup>588</sup> *Ibid* art 36.

<sup>589</sup> *Ibid* arts 41, 43.

[t]he judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application’.

Nevertheless, the public policy ground can be invoked by the defendant, against whom the original judgment is being enforced, during appeal proceedings against the declaration of enforceability of the original judgment.<sup>590</sup> Therefore, the procedure for obtaining a declaration of enforceability is unilateral. The judgment debtor can always appeal against the declaration itself in the course of contentious appeal proceedings.<sup>591</sup> Such appeals would occur by reference to arts 34 and 35. Art 35(1) of the Regulation, a judgment shall not be recognised if it conflicts with the rules set out in the Regulation in regard to matters relating to insurance and consumer contracts as well as to matters falling under the aforementioned exclusive jurisdiction conferred by art 22. Additionally, art 34 provides that a judgment will not be recognised if:

- (1) Recognition is manifestly contrary to public policy.<sup>592</sup> However, this defence does not extend to the exercise of jurisdiction of the court in which the judgment was originally delivered;<sup>593</sup>
- (2) The judgment was given in default of appearance and the defendant had not been properly served, unless he or she failed to commence proceedings to challenge the judgment when it was possible for him or her to do so;<sup>594</sup>
- (3) The judgment which is sought to be recognised is irreconcilable with a judgment given between the same parties in the Member State in which recognition is sought;<sup>595</sup>
- (4) The judgment which is sought to be recognised is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.<sup>596</sup>

Thus, at least in relation to recognition and enforcement of judgments of Member States, the Brussels Regulation leaves very little room for traditional conflict of laws principles to operate. Instead, certain codified exceptions exist entitling a court to decline recognition, but

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<sup>590</sup> Cf. Brussels Regulation (n 266) art 57 ([t]he court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed’).

<sup>591</sup> Brussels Regulation (n 266) art 43.

<sup>592</sup> Ibid art 34(1).

<sup>593</sup> Ibid art 35(3).

<sup>594</sup> Ibid art 34(2).

<sup>595</sup> Ibid art 34(3).

<sup>596</sup> Ibid art 34(4).

these exceptions, as listed above, are limited to consideration of such factors as the inability for the defendant to arrange time for his defence,<sup>597</sup> or conflicting judgments.<sup>598</sup>

Public policy as an exception to enforcement and recognition does exist, but is to be given a limited scope of application.<sup>599</sup> Although it is ultimately up to the courts of the Member State to determine what public policy requires, the ECJ has stressed that it itself is 'required to review the limits within which [such courts] may have recourse to [the public policy exemption] for the purpose of refusing recognition'.<sup>600</sup> The Court has, on occasion, found it necessary to stress that mere error of law, even as regards European law, is not sufficient grounds to invoke the exception contained in art 27.<sup>601</sup> Under the old Brussels Convention, whose provision on public policy is drafted similarly to the Brussels Regulation, the ECJ had declared that mere difference between the foreign law and the law of the forum is not sufficient justification to discard the former. Rather, the foreign law must be contrary to the *lex fori* to such an 'unacceptable degree' that it manifestly breaches a 'fundamental principle', an essential rule of law or an essential right of the legal order of the forum.<sup>602</sup> A real life example which falls within this expression is the defendant's inherent right to have his or her defence heard before a court of law.<sup>603</sup>

### C. Rules on Conflict of Laws in Contractual Matters

The Rome Convention is currently in force in all Member States of the European Union. It applies to all disputes involving contractual obligations.<sup>604</sup> Accordingly, it is clear that where a non-EU domiciled citizen brings a claim against a company registered, e.g., in the UK or in Germany, based on the failure to provide a safe working place as a term of the employment contract, the Rome Convention will apply.

As a preliminary matter, it is safe to assume that, consistent with the ECJ decision in *Jakob Handte*, which dealt with the interpretation of contractual obligations for the purpose of the Brussels Regulation, the claimant will only be able to invoke the application of the Rome Convention in circumstances where the claim is one in which consensual obligations have been freely entered into.<sup>605</sup>

The rules for determining the applicable law of a contract are fairly mechanical. If:

- (1) The parties select an applicable law (express choice of law); or

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<sup>597</sup> Ibid art 34(2).

<sup>598</sup> Ibid arts 34(3) and (4).

<sup>599</sup> Ibid art 34(1).

<sup>600</sup> Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935.

<sup>601</sup> Case C-38/98 *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] ECR I-02973.

<sup>602</sup> *Krombach* (n 297) [36], [37]; *Régie nationale* (n 298) [29]–[30].

<sup>603</sup> *Krombach* (n 297) [38].

<sup>604</sup> Rome Convention (n 267) art 1(1).

<sup>605</sup> *Jakob Handte* (n 272). Admittedly, this is a reformulation of the rule in *Jakob Handte* which is framed in the negative and actually states that '[t]he phrase "matters relating to a contract"...is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.' (emphasis added).

- (2) It can be demonstrated that they had intended a particular system of law to apply to their relationship (implied choice of law),

the parties' choice of applicable law will be respected,<sup>606</sup> unless to do so would conflict with 'mandatory rules' of the forum.<sup>607</sup>

In situations where a demonstrable choice of law does not exist, the courts are to apply the system of law with which the contract is 'most closely connected'.<sup>608</sup> This 'close connection' is presumed to be the place of the habitual residence of the 'characteristic performer' or the location of the immovable property where the object of the contract pertains to the right to such property or the right to use it.<sup>609</sup> These two presumptions of 'close connection' are rebuttable if it appears that the contract is more closely connected with another country.<sup>610</sup>

On a plain reading of the Convention, it is clear that much will turn on the determination of the 'characteristic performer'. This determination will depend on the particular facts obtaining in any given case. In relation to this report, one can easily envisage relevant situations to which the Rome Convention might apply. By way of example the Convention would apply where an employee working overseas for a TNC brings a claim for failure to provide a safe workplace as an implied (or occasionally express) term of an individual contract of employment, or where a given local authority or tribe having entered into a contract with a TNC, brings a claim for breach of a term of the agreement, again, be it express or implied.<sup>611</sup>

Derogatory rules apply to employment contracts. In case of employment-related breach of contract, art 6 of the Rome Convention provides that:

- (1) If there is a choice of law, this choice will be accepted by the courts as the applicable law pursuant to Article 3, subject to the mandatory rules of the law that would apply if no choice had been made;
- (2) If there is no choice of law, the employment contract is governed by the law of the place where the employee habitually carries out his work; or the law of the country in which the place of business through which he was engaged is situated, if the employee does not habitually carry out his/her work in any one country. The law of another country can be applied if it is more closely connected with the contract in question.
- (3) Additionally, in both situations above:

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<sup>606</sup> Rome Convention (n 267) art 3(1).

<sup>607</sup> Ibid art 3(3).

<sup>608</sup> Ibid art 4(1).

<sup>609</sup> Ibid arts 4(2)–(3).

<sup>610</sup> Ibid art 4(5).

<sup>611</sup> Unless to do so amounts to recognition or enforcement of a foreign public law.



- The mandatory rules of the forum regarding employment contracts would continue to apply pursuant to Article 7(2); and
- The mandatory rules (*règles d'application immédiate*) of a third country may also be applied under Article 7(1) of the Rome Convention.<sup>612</sup>

Thus, in relation to a contract for individual employment, much will turn on the particular contract, but more importantly on the question of whether or not there are mandatory rules of the forum in place protecting TNC workers working overseas. Further, rules of the *lex causae* which happen to be contrary to public policy will be excluded by the court, and replaced by the rules of the *lex fori* pursuant to art 16.

Art 16 of the Rome Convention stipulates that '[t]he application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

Unlike other provisions of the Rome Convention, the ECJ has not yet had the opportunity to deliver a judgment containing an interpretation of art 16.

Nonetheless, that Article is couched in similar terms to art 27(1) of the Brussels Convention. As such, the case law regarding the interpretation of the concept of public policy for the purposes of the Brussels Convention could be invoked by analogy. At the outset, it might be conceded that one major difference in the wording of the two provisions is that art 27(1) of the Brussels Convention omits the adverb 'manifestly' in its threshold for refusing the enforcement of foreign law. Whether or not this materially alters the applicability of the Brussels Convention case law regarding the interpretation of art 16 of the Rome Convention remains to be seen, and as such militates in favour of the exercise of a certain degree of caution in reasoning by analogy.

The ECJ has held under the Brussels Convention that both national courts themselves and the ECJ play a role in the application of the public policy exceptions. Member States' courts are free to define the requirements of public policy based on their own domestic incarnations of the doctrine. However, this right is subject to the oversight of the ECJ, which is free to determine whether any given conception does or does not fall within the limits assigned to art 27(1) of the Brussels Convention.<sup>613</sup> In addition, the ECJ has declared that difference alone, between foreign and forum laws, does not justify discarding the foreign law. Rather, the foreign law must be contrary to the *lex fori* to such an 'unacceptable degree' that it might be said that it manifestly breaches a 'fundamental principle,' an essential rule of law or an essential right of the legal order of the forum.<sup>614</sup> A real life example which falls within this expression is the defendant's inherent right to have his or her defence heard before a court of law.<sup>615</sup>

<sup>612</sup> It is important to note that in accordance with art 22, a reservation to arts 7(1) and 10(1)(e) can be made. The United Kingdom has made such a reservation. Cf. Contracts (Applicable Law) Act 1990, s 2(2).

<sup>613</sup> *Krombach* (n 297) [22]–[23]; *Régie nationale* (n 298) [27]–[28].

<sup>614</sup> *Krombach* (n 297) [36]–[37]; *Régie nationale* (n 298) [29]–[30].

<sup>615</sup> *Krombach* (n 297) [38].

It could be that the ECJ's stance on public policy under the Brussels Convention might be seen as too restrictive in the context of the art 16 of the Rome Convention. In that respect, it can be argued that under the Brussels Convention (now replaced by the Brussels Regulation), the concept of 'public policy' has been given a European meaning. This can be inferred from the fact that the Brussels Convention's main aim has been to facilitate the free circulation across the EC of judgments delivered in civil and commercial matters by Member States' courts. Therefore, the role of the forum's public policy should be seen as exceptional, representing an obstacle to the free movement of Member States' judgments across the Community.<sup>616</sup> Because of this, concept of public policy under the Rome Convention should not be given as autonomous a meaning as that assigned to it under the Brussels Convention. As to the Rome Convention, it is driven by a different objective: unifying Member States' basic conflict of law rules in the field of contractual obligations, whether the 'proper law' is the law of a Member State or not.<sup>617</sup>

Nevertheless, what is certain is that art 16 of the Rome Convention has been drafted in a restrictive way.<sup>618</sup> Those grounds of inconsistency between the applicable law and the public policy of the *lex fori* must be egregious and patent, as emphasised by the inclusion of the term 'manifestly' in art 16.<sup>619</sup> Such mention is conducive to preventing the abusive reference by a national court to the public policy of the forum so as to discard the enforcement of the 'proper law'.<sup>620</sup>

The concept of public policy covers both a procedural law (e.g. fair trial standards) and a substantive law dimension (e.g. rules of criminal law).<sup>621</sup> A manifest inconsistency between the foreign law and the public policy of the forum could, for instance, derive from the requirement found in the former of a performance that would be criminal under the latter.<sup>622</sup> Additionally, the public policy of the forum will also include what is often referred to as the 'Community Public Policy',<sup>623</sup> This could include, for instance, the general principles of EC law that are derived from the constitutional traditions of the Member States and from international human rights instruments to which Member States are parties.<sup>624</sup>

The focus of any inquiry into the possible breach of the public policy exception is directed at the application of the foreign law to the case at hand and not at a mere assessment of the legislation in the abstract.<sup>625</sup> Therefore, a foreign law might be seen as manifestly contrary to the public policy of the forum in abstract terms but be applied in such a way as not to seriously offend it.<sup>626</sup> In this way the exception is outcome-focused. Nevertheless, some authors argue that in those exceptional cases where a foreign rule considered in the abstract seriously breached human rights on its face, the national court of the forum would be entitled

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<sup>616</sup> P Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' [1979] OJ C59/42. See also *Krombach* (n 297) [19]–[21]; Case C-414/92 *Solo Kleinmotoren GmbH v Emilio Boch* [1994] ECR I-2237, [20]; *Régie nationale* (n 298) [26]; Case C-267/97 *Coursier v Fortis Bank* [1999] ECR I-2543, [25].

<sup>617</sup> M Giuliano, P Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' [1980] OJ C282/1-50.

<sup>618</sup> *Ibid.*

<sup>619</sup> L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, London 2006) 1627. Collier argues that recourse to the expression 'manifestly' under Article 16 of the Rome Convention (n 267) implies that the public policy proviso has to be applied in a restrictive way. See JG Collier, *Conflict of Laws* (3<sup>rd</sup> edn CUP, Cambridge 2001) 216.

<sup>620</sup> PR Williams, 'The EEC Convention on the Law Applicable to Contractual Obligations' (1986) 35 ICLQ 27–28.

<sup>621</sup> D Bureau, H Muir Watt, *Droit International Privé* (PUF, Paris 2007) 260–62.

<sup>622</sup> A Briggs, *The Conflict of Laws* (OUP, Oxford 2002) 173.

<sup>623</sup> Giuliano and Lagarde (n 314).

<sup>624</sup> *Krombach* (n 297) [25]; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [18].

<sup>625</sup> Collins (n 316).

<sup>626</sup> Giuliano and Lagarde (n 314).

to refuse its enforcement without examining the way in which it concretely applies to the facts of the case.<sup>627</sup>

To conclude on this point, it remains to be seen how the ECJ will interpret art 16 of the Rome Convention. On the one hand, it could be argued that the public policy exception under the Rome Convention ought not to be given as autonomous and restrictive a definition as that adopted by the ECJ in relation to the Brussels Convention due to the difference in the objectives pursued by the two Conventions. On the other hand, it is undeniable that the wording 'manifestly' found in art 16 suggests that a Member State's domestic court cannot invoke the public policy proviso in an abusive way and in the absence of serious grounds of incompatibility between the foreign law (including that of a non-EU country) and the said public policy.

Recourse to art 16 can be to the advantage of either the claimant or the defendant depending on the content of the relevant law. The latter could offend the public policy of the *lex fori* on various points of law: the grounds of invalidity of a contract; the legal consequences (or absence thereof) of a contract found to be in breach of human rights; the type of redress available to the claimant for a contractual damage incurred as a result of such breach; the conditions for the extinctive prescription of contractual obligations. What will be determinant is the extent to which the applicable law offends the public policy in deed and not just word.

In conclusion, in relation to breach of contract, other than an employment-related contract, much will turn on the specific facts of the relationship between the parties. Due to the face-sensitive nature of the exercise, it is impossible to provide any conclusion on or generalisation of the benefit the system offers.

#### **D. Rules on Conflict of Laws in Matters of Tort and Delict**

On 11 July 2007, the European Parliament and the Council of the European Union adopted the Rome II Regulation. The Regulation will enter into force on 11 January 2009 and will only apply to damages that have occurred subsequent to this date.<sup>628</sup>

The Regulation's legal basis can be found in arts 61(c) and 67 TEC, which together empower the EC to take 'measures in the field of judicial cooperation in civil matters' in view of progressively establishing 'an area of freedom, security and justice'.<sup>629</sup>

The Regulation is underpinned by two main concerns. On the one hand, it strives to put forward uniform rules that will allow predictability in the delivery of individual justice. On the other hand, the Regulation purports to achieve a fair balance between the interests of the

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<sup>627</sup> Collins and others (n 316) 1627.

<sup>628</sup> Rome II Regulation (n 269) art 31 and 32.

<sup>629</sup> Ibid preamble (introductory paragraphs).

person suffering damage and those of the person allegedly liable for the infliction of the damage.<sup>630</sup>

The Regulation governs the conflict of laws situations arising from non-contractual obligations in civil and commercial matters, so as to mirror the Brussels Regulation.<sup>631</sup>

The Regulation is without prejudice to specialised conventions on the law applicable to non-contractual obligations that were in force and binding upon one or more Member States at the time of adoption of the present Regulation.<sup>632</sup> The Regulation will nonetheless prevail, as between Member States, over treaties concluded exclusively between two or more Member States in the matters that fall under its subject-matter.<sup>633</sup>

In the same vein as the Rome Convention, the Rome II Regulation has 'universal application': the rules of law applicable are those of any State, including those of a non-EU country.<sup>634</sup> This implies that the Regulation also covers damages that took place outside European Union borders.

As regards the Rome II Regulation, the country of habitual residence of companies is to be understood as referring to the country where the corporation has its central administration and, in the situation where a company has committed a tort or delict through a subsidiary or branch, it is understood as the country of the latter's location.<sup>635</sup>

The Regulation excludes from its material scope non-contractual obligations stemming respectively from: (i) the negotiable character of negotiable instruments; (ii) company law; (iii) matrimonial property regimes (and similar regimes) as well as wills and successions; (iv) family relationships and relationships with an equivalent effect according to law; (v) nuclear damage; (vi) the relationship between settlers, trustees and beneficiaries of a trust entered into on a voluntary basis; (vii) a breach of privacy and personality rights; (viii) evidence and procedure; (ix) State liability for acts performed in the exercise of its public authority; (x) customs, revenue and administrative issues.<sup>636</sup>

The relevant applicable law will regulate the conditions for triggering civil liability, the question of division of liability, the extent and nature of the compensation, the transmissibility of the liability, the causes of exemption and limitation of liability, the liability for acts of others, the rules on extinction and prescription of liability, the appraisal of damage, the type of damage covered by compensation.<sup>637</sup>

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<sup>630</sup> Ibid preamble [16].

<sup>631</sup> Ibid preamble [7].

<sup>632</sup> Ibid art 28(1).

<sup>633</sup> Ibid art 28(2).

<sup>634</sup> Ibid art 3.

<sup>635</sup> Ibid art 23.

<sup>636</sup> Ibid art 1.

<sup>637</sup> Ibid art 15.

A direction provided by the Regulation to apply a particular system of law is a reference only to the internal law of the relevant jurisdiction and as such excludes rules of private international law.<sup>638</sup>

The Regulation will apply to the following non-contractual obligations:<sup>639</sup> (i) tort; (ii) *culpa in contrahendo*;<sup>640</sup> (iii) unjust enrichment;<sup>641</sup> (iv) *negotiorum gestio*.<sup>642</sup> The Regulation contains general rules that are common to all four categories of non-contractual obligations as well as special regimes specific to each of them. For the sake of this study, we will only concentrate on the first type of non-contractual obligations: tort.

## i. The Default Rule

The general rule is that the applicable law will be that of the State where the direct damage materialised or is likely to do so, wherever the event that generated the damage took place, and irrespective of the country where the indirect consequences of the event occurred.<sup>643</sup> This conflict of law rule (also referred to as *lex loci delicti commissi*) is presented in the Regulation as the default rule which is subject to general and special derogations.<sup>644</sup>

The default rule might be problematic from the perspective of the victim of a human rights violation for five reasons. First, it might be difficult and sometimes impossible to determine where exactly the direct damage took place. Secondly, the victim will not necessarily be acquainted with the law of the country where the direct damage occurred. The victim might be more familiar with the law of the country of his or her residence or with the law of the country of occurrence of the event generating the damage. Nevertheless, we have seen that, in the case of environmental damage, the person alleging the damage has the choice of opting for the law of the State of damage occurrence and the law of the State of occurrence of the event giving rise to the damage (see 'Special derogations' below). Thirdly, when the parties have their residence in a State other than that of the occurrence of the direct damage, the law of the country of their common residence will prevail (see 'General derogations' below). Fourthly, the distinction between direct and indirect damage is not as clear and straightforward as is presented in the Rome II Regulation, which for that matter does not define these two concepts. Finally, direct damage may be spread across several countries simultaneously.

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<sup>638</sup> Ibid art 24.

<sup>639</sup> Ibid art 2(1).

<sup>640</sup> Obligation stemming from transactions preceding the formation of a contract, irrespective of whether the latter was eventually formed or not. See *ibid* art 12.

<sup>641</sup> This would include obligations stemming from payment of unduly received sums. See *ibid* art 10.

<sup>642</sup> Obligations stemming from of an act performed in the absence of requisite authority regarding another person's affairs. See *ibid* art 11.

<sup>643</sup> Ibid art 4(1).

<sup>644</sup> S Symeonides 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *AJCL* 8, 16, 20.

## ii. General Derogations

The default rule will not apply if both the claimant and the defendant habitually resided in another country at the time of the occurrence of the damage. In such a case, the applicable law will be that of the State of habitual residence of the parties to the dispute.<sup>645</sup>

Furthermore, the law of the State of occurrence of the damage and the law of habitual residence of the parties to the dispute may be overridden by the law of the country with which the tort has a 'manifestly closer connection' based, for instance, on the parties' pre-existing relationship.<sup>646</sup> This rule is also referred to as the 'escape clause'.<sup>647</sup>

Additionally, the parties to a dispute can also agree upon the applicable law of a State wherever the damage occurred.<sup>648</sup> This agreement has to be express or inferable with 'reasonable certainty' from the circumstances of the case and take place after the dispute has arisen.<sup>649</sup> The agreement can take place before the dispute has arisen only if all the parties to the dispute are engaged in a commercial activity.<sup>650</sup> Additionally, the parties' choice cannot impinge upon the rights and obligations of third parties.<sup>651</sup> Furthermore, such choice of law agreements are without prejudice to the mandatory rules of a State other than that whose law has been chosen by the parties and in which all the other elements of the situation are situated at the time of the occurrence of the event giving rise to the damage.<sup>652</sup> It is interesting to note that, unlike the Rome Convention, the principle of party autonomy is not a central rule under the Rome II Regulation.<sup>653</sup> Instead of being erected as a general principle of the Regulation, it is conceived as a general exception to the *lex loci delicti commissi*. The Rome II Regulation regulates the agreement between the parties as to the law applicable to a tort dispute in order to ensure that it has been 'freely negotiated'.<sup>654</sup> The Regulation accounts for the potential position of vulnerability which an individual might be in if he or she were to sign an agreement on tort liability before the occurrence of the dispute.<sup>655</sup> Such an agreement will not be upheld where one of the parties, such as the victim, is not engaged in a commercial activity. The Regulation adds an additional safeguard insofar as, if the country of the law agreed upon is entirely unconnected to any of the relevant elements of the situation, the mandatory rules of the country where all these relevant elements are located will apply alongside. Although the *lex loci delicti commissi* is presented as a general principle shaping the whole Rome II Regulation, it may be wondered whether its scope has not been substantially reduced due to the impact of both general and special derogations. Those derogations cover such a large set of situations that it could be argued that the law of the country of occurrence of direct damage might in fact have become the exception or merely constitute a subsidiary rule with limited application.

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<sup>645</sup> Rome II Regulation (n 269) art 4(2).

<sup>646</sup> Ibid art 4(3).

<sup>647</sup> Ibid Preamble [14].

<sup>648</sup> Ibid art 14(1).

<sup>649</sup> Ibid art 14(1).

<sup>650</sup> Ibid art 14(1).

<sup>651</sup> Ibid art 14(1).

<sup>652</sup> Ibid art 14(2).

<sup>653</sup> This is in contrast with the European Commission's latest proposal for a 'Rome II Regulation' where the principle of party autonomy was put forward as a general principle of conflict of laws and that of *lex loci delicti commissi* as an exception. See article 4 of Amended proposal for a European Parliament and Council Regulation on the law applicable to non contractual obligations (presented by the Commission pursuant to Article 250 (2) of the EC Treaty) COM(2006) 83 final - COD 2003/0168.

<sup>654</sup> Symeonides (n 341).

<sup>655</sup> Rome II Regulation (n 269) Preamble [31]; Symeonides (n 341).

Finally, the court of the forum is to take into account, from a factual viewpoint and as it sees appropriate, the rules of 'safety' and 'conduct' that applied at the time and in the country of localisation of the event entailing the damage.<sup>656</sup> This rule is rather imprecise and leaves open the possibility that two sets of foreign rules could apply to a same factual situation. The wording of this provision suggests that, instead of representing a conflict of law rule in the true sense of the term, it merely reflects an evidentiary tool designed to determine which facts are useful to the appraisal of the tortfeasor's conduct.<sup>657</sup> A number of elements converge towards this conclusion: (i) the permissive formulation of the provision; (ii) the reference to the 'taking into account' of rules of safety and conduct as opposed to their direct application; and (iii) their involvement at the factual assessment level rather than at the legal assessment stage.<sup>658</sup> Neither 'rules of safety' nor the 'rules of conduct' have been defined by the Rome II Regulation with sufficient precision, which may in turn cause legal uncertainty for all the parties to a dispute. The definition given to these two terms by the preamble to the Rome II Regulation is based on a reference to an example thereof instead of containing its essential elements.<sup>659</sup> The preamble indeed refers to rules on road safety as an illustration of these two types of rules and does not clarify what the distinction between safety and conduct is.<sup>660</sup> Therefore, Art 17 of the Rome II Regulation remains to be clarified by national courts and ultimately by the ECJ.

### iii. Special Derogations

Two special derogatory regimes will be analysed in this section: one relates to environmental damage and the other relates to product liability. We will therefore refrain from analysing other special regimes that are regulated under the Rome II Regulation: non-contractual obligations stemming respectively from a violation of intellectual property rights, from industrial action, and from unfair competition.

In the case of environmental damages, the applicable law will be determined on the basis of the default rule unless the party who alleges having sustained damage decides to opt for the applicable law of the country where the event generating the damage took place.<sup>661</sup> This is an important provision, as it gives the claimant a unilateral choice between two legal orders in regard to the same type of damage.

Another special derogation concerns product liability. In such case, the Regulation uses a 'cascade system of connecting factors',<sup>662</sup> whereby the following laws will apply in decreasing order of preference: (i) the law of the State of habitual residence of the victim (if also the State of marketing of the product);<sup>663</sup> (ii) or, failing to fulfill the preceding conditions, the law of the State of acquisition of the product (if it also corresponds to the State of marketing of the product);<sup>664</sup> (iii) or, failing to fulfill the preceding conditions, the law of the State of damage occurrence (if it also corresponds to the State of marketing of the

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<sup>656</sup> Ibid art 17.

<sup>657</sup> Symeonides (n 341).

<sup>658</sup> Ibid.

<sup>659</sup> See Rome II Regulation (n 269) Preamble [34].

<sup>660</sup> Ibid.

<sup>661</sup> Ibid art 7.

<sup>662</sup> See ibid Preamble [20].

<sup>663</sup> Ibid art 5(1)(a).

<sup>664</sup> Ibid art 5(1)(b).

product),<sup>665</sup> (iv) or, failing to fulfill the preceding conditions, the law of the State of habitual residence of the alleged tortfeasor (if it is not at the same time the law of the State of marketing of the product) if the latter could not reasonably predict that the product were to be marketed in any of the three States alluded under subparagraph (a), (b), and (c) of art 5(1) of the Rome II Regulation.<sup>666</sup> The law of the State with which the situation is manifestly more closely connected (based for instance on the parties' pre-existing relationship) will prevail over the four previous applicable laws.<sup>667</sup> Nothing prevents the principle of party autonomy from applying to these special regimes. This can be inferred from the fact that the Regulation has expressly prevented art 14 from applying to the other special regimes such as that of intellectual property rights and unfair competition but not to those of environmental and product liability.<sup>668</sup> The general derogation based on the intervention of the law of the country of habitual residence of both parties to the dispute will continue applying to the regime of product liability.<sup>669</sup>

The provision on the rules of conduct and safety of the country of occurrence of the delict (see above under 'General derogations') and that on the mandatory rules of the forum (see below under 'Role of the law of forum') will also apply to these two special regimes, given that they form part of the common provisions of the Rome II Regulation.

The public policy proviso will also apply to these special regimes, as it forms part of the section 'Other Provisions' and is drafted in general terms that suggest it applies application to the enforcement of any applicable law.

As with the Rome Convention, the role of the public policy proviso can be to the advantage of either the defendant or the claimant, depending on the content of the applicable law pointed to by the rules of conflict of laws found under the Regulation, and on the circumstances of the case. If the foreign law, for instance, allows for punitive damages that are out of proportion with the nature of the delict or quasi-delict, the chances are very high that the court of the forum will consider them to be contrary to its public policy. This may frustrate the victim's legal expectations. The European Parliament and the Council, when adopting the final version of the draft Regulation, have nevertheless been careful enough not to deal expressly with the question of punitive damages under art 26 of the Rome II Regulation but instead under paragraph 32 of its Preamble. This legal position leaves more leeway to the national court and allows for each individual case to be assessed on its own merits after an inquiry into the way the foreign law applies concretely to the facts submitted to the forum.

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<sup>665</sup> Ibid art 5(1)(c).

<sup>666</sup> Ibid art 5(1).

<sup>667</sup> Ibid art 5(2).

<sup>668</sup> Ibid art 6(4) and 8(3).

<sup>669</sup> Ibid art 5(1).



#### iv. Role of the Law of Forum

The Regulation precludes the application of a foreign law (whether designated by the default rule, or general or special derogatory regimes) that would be ‘manifestly’ inconsistent with the forum’s public policy.<sup>670</sup>

Given that art 26 of the Rome II Regulation is drafted in very similar terms to art 16 of the Rome Convention and that it is underpinned by a similar objective (i.e. unification of some of the Member States’ basic conflict of law rules), reference might be made to the abovementioned developments regarding the public policy proviso under the Rome Convention (see ‘Rules on Conflict of Laws in Contractual Matters’).

Rules permitting the awarding of non-compensatory punitive damages that are excessive in relation to the circumstances of the case and to the law of the forum may be held to be manifestly in breach of the public policy of the forum.<sup>671</sup> The Regulation is also without prejudice to the mandatory rules of the forum that apply irrespective of the foreign rules applicable to non-contractual obligations.<sup>672</sup>

The combined effect of the public exception proviso and of the mandatory rules of the forum may lead to a ‘distortion’ of the applicable foreign law, making it uncertain what the final outcome of the case will be. The result might be that some provisions of the foreign law will be maintained while others will be discarded in favour of national rules made overriding. The ultimate law applied by the court of the forum may well be of a hybrid form.

#### v. Conclusions on the Rome II Regulation

The claimant will not always be able to reasonably foresee which private law the court of the forum will ultimately apply to the tort dispute. Whether the parties have agreed upon the applicable law or whether the default rule and the derogatory provisions point to the relevant law, the latter can take a ‘hybrid’ form in the court’s *ratio decidendi*. Its content could be distorted due to the interference of: (i) the mandatory rules of the *lex fori*; (ii) the impact of the public policy proviso; (iii) the factual consideration of the applicable rules on safety and conduct of the country of occurrence of the tort; and (iv) in the case of the exercise of party autonomy, the mandatory rules of the country in which all the relevant elements of the situation are localized. These four sets of rules are not exclusive of the application (even partial) of the ‘proper law’ depending on the circumstances of the case and on the content of these ‘interfering’ rules.

Finally, it is important to keep in mind for the sake of this study that the victim of a violation of privacy and personality rights cannot enjoy the benefit of the Rome II Regulation, which expressly excludes from its material scope non-contractual obligations stemming from a

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<sup>670</sup> Ibid art 26.

<sup>671</sup> Ibid Preamble [32]. This situation used to be incorporated into the body of the public policy proviso found in Article 23 of the Amended proposal for a European Parliament and Council Regulation on the law applicable to non contractual obligations (presented by the Commission pursuant to Article 250 (2) of the EC Treaty) COM (2006) 83 final - COD 2003/0168.

<sup>672</sup> Ibid art 16.

breach of those personal rights. Hence, such non-contractual obligations will continue to be subjected to the Member States' national rules on conflict of laws.

# FRANCE

— Markos Karavias\* —

## 1. BRIEF BACKGROUND TO JURISDICTION

The French Republic is a continental European jurisdiction deriving its legal system from the civil law tradition. In accordance with this tradition, the most distinguishing feature of the French legal order is its emphasis on codified law and the primacy of legislative rules, as opposed to that of judicial decisions in common law countries.<sup>673</sup>

This submission seeks to identify the causes of action available under French law for non-French nationals wishing to bring claims before the French courts against Transnational Corporations ('TNCs') for extraterritorial violation of human rights. The causes that seem to be most effective are those available under Criminal Law (III) and Civil Law (IV), including contract and tort. Under French Law, corporate responsibility can be either criminal or civil.<sup>674</sup> However, in respect of both criminal and civil law, a number of obstacles exist which a claimant has to overcome. The questions of the application of French Criminal Law to infractions taking place abroad, as well as the questions of private international law arising in respect of civil law actions, will be dealt with below.

A brief reference is included to international law (2), in order to outline the attitude of the French legal system to this body of law. Nonetheless, recourse to international law to seek redress against TNCs is problematic, because corporations, as widely agreed in literature, do not have clear legal obligations under public international law.<sup>675</sup>

Finally, the following issues are dealt with: limitation periods (5); legal aid (6); *amicus curiae* briefs (7); and witness protection (8).

## 2. INTERNATIONAL LAW AND FRENCH LAW

The French Constitution of 1958 ('the Constitution') provides the basic guidelines in relation to the application of public international law within the French legal order.

The Constitution in its preamble provides that the 'French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as ... confirmed and complemented by the Preamble to the Constitution of 1946'. The Constitution of 1946 in

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<sup>673</sup> J Bell, *French Legal Cultures* (Butterworths, London 2001) 244.

<sup>674</sup> M Cozian and others, *Droit des Sociétés* (19th edn Lexis Nexis, Paris 2006) 115.

<sup>675</sup> P Alston, 'The Not-A-Cat Syndrome : Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed.), *Non-State Actors and Human Rights* (OUP, Oxford 2005) 36.

its Preamble Clause 14 provided that 'The French Republic, faithful to its traditions, shall respect the rules of public international law'. This clause seems formulated in such a broad manner as to incorporate both treaty and customary law.

As to the modalities of the application of international law, art 55 of the Constitution of 1958 establishes that '[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.' The content of art 55 has been elaborated in French Case law.<sup>676</sup> For the Constitutional Council (*Conseil Constitutionnel*), a treaty prevails over a law, but this does not mean that treaties acquire a constitutional value. The Court of Cassation (*Cour de Cassation*) has aligned its case law with this view, confirming the prevalence of Rome Treaty Conventions over subsequent national law.

The general conditions for the applicability of international conventional rules within the municipal legal order of France are, in accordance with art 55 of the Constitution:

- (1) *The regularity of ratification*: French Courts can exercise control over the internal procedures followed to ratify an international agreement;
- (2) *Publication*: International agreements shall be published in the Official Gazette of the Republic (*Journal Officiel*). Such publication constitutes a means of public order;
- (3) *Reciprocity*.

International customary law can present problems of applicability. It has been argued that, generally speaking, custom is approached in a dualist manner.<sup>677</sup> It is applicable, and has been applied by French judicial organs, but the instances of its insertion in the municipal legal order are still embryonic.<sup>678</sup>

Still, the main problem of invoking international law before French courts remains the fact that in principle international human rights law binds States, and not non-State actors; thus, even if international law were applicable, it would not produce an obligation on the corporation.

### 3. CRIMINAL LAW

The French Criminal Code<sup>679</sup> ('CP'), as amended in 2004, provides for the criminal responsibility of legal persons. art 121-2 CP provides:

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<sup>676</sup> J Combacau, S Sur, *Droit International Public* (7<sup>e</sup> edn Montchrestien, Paris 2006) 189.

<sup>677</sup> *Ibid* 196.

<sup>678</sup> *Ibid*.

<sup>679</sup> *Code Pénal* (CP).

Juridical persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Articles 121-4 and 121-7 and in the cases provided for by statute or regulations.

The criminal responsibility of legal persons expands to cover all violations provided for by virtue of the Penal Code, including, among others, crimes against humanity, drug trafficking and money laundering. Thus, acts by corporate organs or representatives acting in their own personal interest cannot bring about the responsibility of the corporate entity.

This article has to be read in conjunction with art 113-1 CP, which regulates the scope of application of French criminal law. Art 113-1 CP establishes the principle of territoriality in providing that French criminal law applies to violations committed within the territory of the French Republic. Arts 113-6 to 113-12 CP, however, provide for exceptions where the extraterritorial application of French criminal law is possible, primarily in circumstances where the wrongful action has been committed by a natural or legal person of French nationality. Thus, criminal conduct by a legal entity incorporated abroad, would not fall within the scope of French Criminal Law in any case.

Art 113-6 CP establishes the following distinction. French criminal law applies to a felony committed by a person of French nationality abroad. A corporate entity is considered to have French nationality when its seat is situated within the territory of the French Republic<sup>680</sup>. The notion of the 'seat' refers to the place where the 'principal manifestation of the juridical existence [of the corporate entity] occurs'.<sup>681</sup>

Conduct, amounting to a misdemeanor under French criminal law, but not criminalised by the law of the State in which the conduct occurred, does not fall within the sphere of application of French criminal law. Furthermore, according to art 113-8 CP, the prosecution of misdemeanours may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or his or her successor, or by an official accusation made by the authority of the country where the offence was committed.

Finally, art 113-7 CP establishes a further exception to the territorial principle by providing that French criminal law applies to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place. Non-French victims of a crime or delict committed by a French corporate entity abroad do not fall within the sphere of application of art 113-7 CP.

As for the *mens rea* requirement, art 121-3 CP provides that:

There is no felony or misdemeanour in the absence of an intent to commit it. However, the deliberate endangering of others is a misdemeanour

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<sup>680</sup> *Loi n 66-537 du 24 juillet 1966 sur les sociétés commerciales* (Law of 24 July 1966) art 3(1).

<sup>681</sup> Com, 16 décembre 1958, Bull Civ III n°438.

where the law so provides. A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

The French Cour de Cassation has simultaneously both established and broadened the criminal liability of legal persons, by stipulating that ‘...legal persons are criminally liable for any non-intentional act of their organs or representatives.’<sup>682</sup>

Among the proscriptions contained in the Criminal Code pertinent to the operation of corporations, there are those making moral harassment and discrimination a crime, and those imposing criminal sanctions on for the violation of basic working and living conditions and the dignity of persons:

- (1) *Art 222-33-2 CP*: Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects is punished by a fine of € 15,000.
- (2) *Art 225-1 CP*: Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, state of health, handicap, sexual morals, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion. Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, state of health, handicap, sexual morals, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.
- (3) *In conjunction with art 225-4 CP*: Legal persons may incur criminal liability for the offence defined under art 225-2, pursuant to the conditions set out under art 121-2
- (4) *Art 225-14*: Subjecting a person to working or living conditions incompatible with human dignity, by abusing a person's vulnerability or situation of dependence, is punished by two years' imprisonment and a fine of € 75,000.
- (5) *In conjunction with art 225-16 CP*: Legal persons may be convicted of the offences defined by arts 225-13 to 225-15, pursuant to the conditions set out under art 121-2.

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<sup>682</sup> Crim, 24 octobre 2000, Bull Crim n° 308 p 917 ('...les personnes morales sont responsables pénalement de toute faute non intentionnelle de leurs organes ou représentants').

Arts 121-6 and 121-7 CP provide for the criminalisation of complicity. TNCs can be held criminally liable on the basis of complicity, notwithstanding direct criminal liability. Complicity refers to the participation of a person in criminal conduct, without the said person committing one of the constitutive elements of a crime. Participation has to be attached to a main punishable criminal act.

## **A. The Elements of Crime**

### ***i. Actus Reus***

Pursuant to art 121-7 CP any person who knowingly, by aiding and abetting, facilitates its preparation or commission of a felony or a misdemeanour is an accomplice to that crime. Furthermore, any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice. In principle, all felonies and misdemeanours provided for in the CP can constitute the main punishable act, to which complicity is attached. It follows that a legal person can be held criminally responsible as an accomplice, if the act was perpetrated by a representative or organ of the legal person, or if the criminal act was committed by a third person at the instruction of an organ of the legal person.

Nonetheless, French criminal law does apply to accomplices of extraterritorial delictual conduct. According to art 113-5 CP, French criminal law applies to any person who, on the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and foreign law, and if it was established by a final decision of the foreign court.

### ***ii. Mens Rea***

The *mens rea* requirement for accessorial liability in French law is that of intention. The CP stipulates that in order to engage the criminal liability of an accomplice to a crime in French law, the accomplice has to act “knowingly”.

## **B. Penalties**

The penalties applicable to legal persons are set out in arts 131-37 CP ff. Felonies and misdemeanours are punishable by a fine, or when statute so provides, by dissolution. Dissolution may be ordered where the legal person was created in order to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more and the legal person was diverted from its constitutive objectives in order to commit them. Further sanctions include, *inter alia*, prohibition from exercising, directly or indirectly, one or more prescribed social or professional activities; placement under judicial supervision for a maximum period of five years; permanent closure or closure for a prescribed period of up to five years of the establishment(s) of the enterprise used to commit the offences in question. Petty offences are punishable by fines.

### C. Criminal Jurisdiction

With respect to offences committed abroad, art 689 ff. of the French Code of Criminal Procedure<sup>683</sup> ('CPrP') apply. Art 689 CPrP provides:

Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence.

The French Code of Criminal Procedure then sets out the international conventions that grant French courts jurisdiction against a perpetrator or accomplice present in France. Nonetheless, criminal liability of corporations will be recognised in French courts only when criminal liability is envisaged in the Convention itself. Such is the case with the International Convention for the Suppression of the Financing of Terrorism.

### D. The '*Action Civile*'

Pursuant to art 2 CPrP 'a civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is available to all those who have personally suffered damage directly caused by the offence'. The '*action civile*' constitutes a combination of criminal and tort proceedings. Furthermore, according to art 418 CPrP 'any person claiming, in accordance with art 2, to have suffered harm caused by a misdemeanour may, if he has not already done so, file a civil party petition at the hearing itself'.

In view of the broad terms in which the provision is drafted, an '*action civile*' filed against a company with a seat in France does not appear to be precluded, especially in light of the amendments to the French Criminal Code described above. The '*action civile*' may be exercised in conjunction with public prosecution or separately. It is admissible in respect of any head of damage, whether material, bodily or moral, which ensues from the actions prosecuted (arts 3 and 4 CPrP).

Since the offence is committed abroad, the jurisdictional rule of art 689 CPrP applies.

## 4. CIVIL LAW

The civil liability of the corporation under French Law can be either contractual or delictual (tortious).<sup>684</sup> It is generally accepted that the two liability regimes are separate and cannot be invoked concurrently.<sup>685</sup> Contractual liability arises from the non-performance, partial or total,

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<sup>683</sup> *Code de Procédure Pénale* (CPrP).

<sup>684</sup> Cozian (n 2) 115.

<sup>685</sup> P Brun, *Résponsabilité Civile Extracontractuelle* (Litec, Paris 2005) 65–67.



of a contract concluded between the person who has suffered the loss and the person who has caused it. In the absence of such a form of liability, then liability is delictual/tortious.

The focus of the study rests on extraterritorial corporate conduct for which a French company might incur responsibility, either tortious or contractual. Still, in such cases there exists a 'foreign element', i.e. the conduct has taken place outside the French Republic. Logically, French Courts will have to deal first with issues appertaining to Private International Law, namely they have to examine the question of jurisdiction and the question of applicable law to the case at hand.

With respect to the applicable law, it will become obvious that in certain cases French conflict of laws rules dictate that foreign law be recognised as the applicable law. Thus, one needs to investigate causes of action provided by the latter. Nonetheless, there is always the possibility that foreign law, although *prima facie* applicable might not be applied by French Courts as contrary to the mandatory rules of the French legal system or the public order.

## A. Conflict of Laws Rules

### i. Contracts of Employment

#### *Jurisdiction*

According to art R 517-1 Labour Code<sup>686</sup> ('CT'), the competent tribunal to deal with disputes arising from employment contracts is the Industrial Tribunal (*Conseil de prud'hommes*) in the territorial jurisdiction of which the seat of the employing company is situated, or, where the employee habitually carries out his work in performance of the contract. In cases where the employee carries out his work away from the seat of the employer or at home, then the Industrial Tribunal that has territorial jurisdiction, is that in the territorial jurisdiction of which the employee is domiciled.<sup>687</sup> It should be noted that according to art 517-1 no derogation is permitted from this article.

The *Cour de Cassation* (Court of Cassation) has affirmed in relation to art R 517-1 CT that, according to French law, international jurisdiction of the French courts is determined on the basis of the municipal rules of territorial jurisdiction, irrespective of the applicable law.<sup>688</sup>

#### *Applicable Law*

Pursuant to art 121-2 CT the principle of the autonomy of parties applies in respect of determination of the applicable law. Nonetheless, French case law follows what might be termed a combinatory approach when dealing with the applicable law in respect of contracts

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<sup>686</sup> Code du Travail (CT).

<sup>687</sup> Soc, 9 avr 1987, Bull 1987 V n° 221 p 143.

<sup>688</sup> Civ 1<sup>re</sup>, 26 oct 1982, Bull Civ I n° 300..

of employment.<sup>689</sup> Whereas the Court of Cassation upholds the principle of party autonomy, there exists a caveat, whereby the law chosen by the parties is only applied if it offers more protection to the employee than the national law. In essence, the choice of law by the parties constitutes a possibility of localising the contract. The principle was established in the *Air Maroc* case<sup>690</sup> where the *Cour de Cassation* held that the intention of the parties was that French law apply to the employment contract between a French pilot and a Moroccan company to the extent that French law offered greater protection to the employer than Moroccan law.

Furthermore, in a recent decision, the Court of Cassation has employed the use of the concept of the 'international public order'. The case concerned domestic servitude and the Court held that an employer should be refused the right to use conflict of laws rules to defeat the application of French law to a dispute with links to the French legal order, especially with respect to a case where the circumstances of employment violated the conditions of personal liberty.<sup>691</sup>

If no law is chosen by the parties to govern the employment contract, the applicable law will be that of the State where the employee habitually carries out his work in performance of the employment contract, unless there exist closer links with another State.<sup>692</sup> If the employee, due to the nature of her profession, works in a variety of countries, the applicable law is the law of the State, in which the employer is domiciled or the employing company has its seat.<sup>693</sup>

### *Mandatory Rules*

Party autonomy is fundamental in relation to the employment contract. Nonetheless, with regards to cases involving a 'foreign element', one must not lose sight of mandatory rules. In France, *lois de police* constitute '...rules of substantive internal law that provide for their own application without having been selected by the normal choice-of-law of the forum'.<sup>694</sup> The legal order of the forum attaches such significance to the goals achieved by those national rules, that the foreign law, that in any other case would be applicable, is not applied, in order to avoid frustration of the said goals. This rationale seems to be interlinked with the nature of labour law. Mandatory rules of the French legal order relevant to labour law would apply to the employment contract, irrespective of the *prima facie* applicable law to of contract, thus excluding questions of conflicts of laws.<sup>695</sup> It would be difficult to create a definitive list of such 'mandatory rules' with regards to French law, not only because of the wide-ranging content of 'mandatory rules' but also because in certain instances caselaw is not illuminating.<sup>696</sup>

### *The Case of Work Accidents*

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<sup>689</sup> G Lyon Caen, Lyon Caen, *Droit Social International et Européen* (8<sup>th</sup> edn Dalloz, Paris 1993) 15.

<sup>690</sup> Soc, 31 mars 1978, Bull Soc n° 259 p 193..

<sup>691</sup> Soc, 10 mai 2006, Bull 2006 V n° 168 p 163.

<sup>692</sup> Soc, 9 oct 2001, Bull 2001 III n° 303 p 243.

<sup>693</sup> Paris, 8 juill 1981.

<sup>694</sup> TG Guedj, 'The Theory of the Lois de Police, A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories' (1991) 39 Am J of Comp L 661, 665.

<sup>695</sup> Lyon Caen and Lyon Caen (n 17) 30.

<sup>696</sup> Ibid 31.

Work accidents do not fall within either traditional contractual relations or torts for the purpose of conflicts of laws. French caselaw has accepted that the applicable law is the law of the place of the '*exploitation de la profession*', i.e. the seat of the employing company, or the place where the employee normally performs his work.<sup>697</sup>

## ii. Delictual Responsibility

### *Jurisdiction*

According to paragraphs 1 and 3 of art 46 of the New Code of Civil Procedure in delictual matters the claimant may seise the French court at his choice, in addition to the court in whose province the defendant has established his domicile, the court in whose province the wrongful act was occasioned or the court in whose province the damage was suffered.

### *Applicable Law*

French case law has held that the applicable law is that of the place where the wrongful act has taken place, namely *lex loci delicti commissi*.<sup>698</sup> The arguments proposed in favour of this applicable law is that it is neutral, in the sense that it is not the law of the nationality of the victim of the delict or the author thereof and that the consequences of the wrongful act are of a paramount interest to the State in whose territory the act took place.<sup>699</sup> The *lex loci delicti commissi* regulates, *inter alia*, the definition of fault, attribution, the existence of responsibility for the acts of third parties, mode of reparation etc.<sup>700</sup>

## iii. Recognition of Foreign Judgments in France

The criteria for enforcing foreign judgments in French courts have been set forth by the Court of Cassation in the *Munzer* case.<sup>701</sup>

The first, and fundamental, criterion is the foreign court must properly have jurisdiction under French law. The French judge is called upon to verify that the judgment was handed down by the competent authority. The Court held in the *Simitch* case that, as long as French conflicts of laws rules do not grant exclusive jurisdiction to French courts, a foreign court should be declared competent if there exists a characteristic link between the dispute and the State whose tribunal is seised and if the choice of jurisdiction is not fraudulent.

Second, the French judge will apply conflicts of law rules to determine what law he would have applied to the dispute. If the foreign judge has not decided on the basis of the law that would have been applied by the French judge, then the latter can refuse to recognise the

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<sup>697</sup> Y Loussouarn, *Droit international privé* (8th edn Dalloz, Paris 2004) 543–44.

<sup>698</sup> Civ 1<sup>re</sup>, 1 juin 1976, Bull Civ I n° 207 p 167.

<sup>699</sup> P Mayer, V Heuzé, *Droit International Privé* (8th edn Montchrestien, Paris 2004) 500.

<sup>700</sup> *Ibid.* 503.

<sup>701</sup> Civ 1<sup>re</sup>, 7 jan 1964, Bull Civ n° 15.

foreign judgment in France on this ground. Still, this condition has in practice been reformulated in the sense that the French judge seeks to establish that the foreign judgment leads to a substantially equivalent result. Thus, the French judge will recognise the foreign judgment, irrespective of the law applied by the foreign judge, as long as a result is achieved which is equivalent to that produced by the law the French judge would have applied.<sup>702</sup>

Further, the foreign decision must not contravene French concepts of international public policy. In the context of the recognition of a foreign judgment, the foreign rule has been applied in a concrete case. It is thus the result of its application in this specific case, rather than its abstract content, that has to be in conformity with the *lex fori*.<sup>703</sup> This means that a decision applying a rule, whose abstract content might *prima facie* appear in contravention of public order, can be recognised after all, if the application of such a rule in practice is not contrary to the public order.

The final condition is that the decision must not be a result of *fraude á la loi* (evasion of the law) or forum shopping. This requirement has two different elements. First, the foreign judgment must not have been obtained through deceitful maneuvers. Second, the case must not have been brought in a foreign court in order to obtain a ruling from that foreign court, under foreign law that differs from the law to which a litigant would otherwise be subjected domestically.

## B. Causes of Action

### i. French Labour Law

One of the basic principles of French Labour Law is the prohibition of discrimination. Art L. 122-45 CT provides that no one may be excluded from a hiring process and that no employee may be punished or dismissed on the grounds of, *inter alia*, sex, family status, age, genetic characteristics, race, political opinions, trade union activity, religious beliefs, etc. The protection afforded by art L.122-45 extends to cover all aspects of the employment relationship. Infringing discrimination may be both direct, in the form of an intentional act on the part of the employer, or the indirect consequence of a facially neutral act. Following the adoption of law of 16 November 2001, the employee alleging a violation of the prohibition of non-discrimination must present before the Court the constitutive elements of an act amounting to direct or indirect discrimination and in light of such allegation the employer is called upon to prove that his act was justified and non-discriminatory in nature. Discrimination with respect to employment may also lead to the company being held criminally responsible as mentioned above.

With respect to accidents occurring in the work place, art 122-32-1 CT provides that a work accident or illness suspends the employment contract and the obligations it entails. In principle, the employer is not allowed to terminate an employment contract during the period of suspension, except in cases where fault lies with the employee (*faute grave*). Once the employee is declared able to continue providing his work by the accredited labour doctor

<sup>702</sup> One needs to note that the *Court of Cassation* seems to have sidestepped this criterion in its recent decision in *Corvelissen*. Cf. Civ 1<sup>re</sup>, 20 févr 2007, N° de pourvoi 05-14082 .

<sup>703</sup> B Audit, *Droit International Privé* (Economica, Paris 2006) 385.

(*médecin du travail*), he resumes his work as before the accident. If his post does not exist or is no longer vacant, the employee has the right to continue providing similar work and has the right to an equivalent remuneration. If the employee is found incapable by the doctor of resuming his work at the same post, as before the accident took place, then the employer is under an obligation to propose to the employee another appropriate position, taking into consideration his/her skills. The employer is under an obligation to make an appropriate proposal to the employee, and it is only once the latter repeatedly refuses to take up the new post proposed by the employer that a right to terminate the contract arises for the employer. In such a case, the employee has a right to compensation. The employee might be deprived of a right to compensation, if his refusal has the character of an abuse of right. If the contract is terminated by the employer and the employee has not fulfilled his or her obligations to propose an appropriate new post to the employee, the latter has a right to compensation, the amount of which has to be equivalent at least to 12 months salary.

## ii. Civil Law: Delictual and Tortious Liability

The delictual responsibility of corporate entities does not present any problems in French law. It has been accepted<sup>704</sup> that such responsibility is governed by art 1384 lines 1 and 5 of the Civil Code<sup>705</sup> ('CC'), which provide, respectively, that '[a] person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he bears responsibility' and '... employers, [are liable] for the damage caused by their ... employees in the functions for which they have been employed.'

This mode of responsibility is based on the relationships of subordination and authority between the employer and the employee. Thus persons employed by a company on the basis of an employment contract in principle fall within this category. The tortious responsibility of companies extends to cover the damages caused by their employees to contractants of the companies or third parties.

## 5. STATUTE OF LIMITATION

### A. Causes of Action

#### i. Criminal Law

According to art 7 CPrP,<sup>706</sup> prosecution with regard to cases of felony is time-barred ten years from the day of the commission of the crime if, during this period, no step in investigation or prosecution was taken. Where such steps were taken, it is time-barred only after the passing of ten years starting from the last step taken.

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<sup>704</sup> P Merle, *Droit Commercial, Sociétés commerciales* (10<sup>th</sup> edn Dalloz, Paris 2005) 129.

<sup>705</sup> *Code Civile* (CC).

<sup>706</sup> N 11.

According to art 8 CPrP, in respect of misdemeanours, the prosecution limitation period is three years; it operates according to the distinctions provided for in art 7.

Finally, according to art 9 CPrP, in respect of petty offences, the public prosecution limitation period is one year; it operates according to the distinctions provided for in art 7.

## ii. Contract Law

Pursuant to art 2260 CC, 'all actions, both *in rem* and *in personam*, are prescribed by thirty years, without the person alleging that prescription being under an obligation to adduce a title, or a plea resulting from bad faith being allowed to be set up against him'.

## iii. Torts Law

According to art 2270-1 CC, civil actions will be barred at the end of a period of ten years, commencing from the manifestation of the injury or its aggravation.

## 6. AMICUS BRIEF INVOLVEMENT

Whilst the New Code of Civil Procedure does not provide a procedure for participation of *amicus curiae*, *amicus curiae* briefs have been accepted in certain instances by French Courts. The Court of Appeals of Paris has initiated such practice<sup>707</sup> and it has been upheld by the Court of Cassation.<sup>708</sup> The *amicus curiae* brief, according to French case law, does not constitute evidence, or expert opinion. The *amicus* may appear before a French court only at its invitation and their audience before the Court is not regulated but by the rules on the adversarial rights of Defence.

## 7. LEGAL AID<sup>709</sup>

The current legal aid scheme is governed by the Legal Aid Act (No 91-647 of 10 July 1991) and Decree No 91-1266 of 18 December 1991. It covers:

- (1) *Legal aid proper*: financial aid for court proceedings and out-of-court settlement proceedings;
- (2) *Aid towards advocates' fees* in criminal proceedings that are available as an alternative to prosecution (settlement and mediation), for legal assistance for

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<sup>707</sup> Paris, 21 juin 1988 ; 6 juill 1988.

<sup>708</sup> Ass Plén, 31 mai 1991.

<sup>709</sup> See 'European Commission – European Judicial Network – Legal Aid - France' <[http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_fra\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_fra_en.htm)> accessed 20 March 2008.

those held by the police for questioning, and for disciplinary proceedings in prisons; and

(3) *Access to the law*(information, guidance, free legal consultation).

Legal aid entitles the recipient to free assistance from an advocate or other legal practitioner (bailiff, *avoué*, notary, auctioneer, etc.) and to exemption from court costs.

Those that are entitled to legal aid include French national or a citizen of the European Union or a foreign national habitually and lawfully residing in France. Furthermore, foreign nationals not residing in France, who are nationals of a State that has an international or bilateral agreement with France giving entitlement to legal aid, are also entitled to legal aid. Although habitual and lawful residence in France is required as a matter of principle, exceptionally it is not compulsory where the claimant's action is particularly worthy of interest given its subject-matter and the likely cost.

Legal aid is also given without a residence requirement to foreign nationals who are minors, witnesses, placed under formal examination, charged, accused, convicted or have joined a civil action to a criminal prosecution, or where the action concerns entry and residence in France.

Legal aid is provided on the basis of the average of the applicant's combined resources for the preceding calendar year (excluding family allowances and certain welfare benefits), as long as such resources do not exceed a certain threshold set by statute each year.

Legal aid is given if the action is not manifestly inadmissible or devoid of substance. This condition does not apply to defendants, to persons liable civilly, to witnesses, to persons under examination, charged or accused, or to persons convicted.

In appellate proceedings, legal aid will be refused if the applicant cannot show good grounds for appeal.

Where legal aid has been refused on this basis but the court upholds the appellant's claim, the appellant is eligible for reimbursement of the various costs and fees incurred by him up to the amount of the legal aid to which his resources entitle him.

Legal aid is available both for contentious and non-contentious cases in all courts. It can also be given for the purposes of seeking enforcement of a judgment or other enforceable document.

## 8. WITNESS PROTECTION

Witness Protection under French Law is governed by arts 706–57 ff CPrP.<sup>710</sup> According to art 706-57, persons against whom there is no plausible reason to suspect that they have committed or have attempted to commit an offence and who are in a position to bring useful pieces of evidence to the proceedings can declare their registered address to be that of the police station or *gendarmerie*. The addresses of such persons are then recorded in a classified, initialled register, which is opened for this purpose.

Pursuant to art 706-58 CPrP, in proceedings brought with respect to a felony or a misdemeanour punished by at least three years' imprisonment, where the hearing of a person described in art 706-57 is liable to put his life or health or that of his family members or his close relatives in serious danger, the liberty and custody judge, seised of the case in a reasoned application by the district prosecutor or the investigating judge, may authorise, in a reasoned decision, that this person's statements will be recorded without his identity appearing in the case file for the proceedings. This decision may not be appealed, subject to the provisions of the second paragraph of art 706-60. The liberty and custody judge may himself decide to carry out the witness's hearing.

The liberty and custody judge's decision, which makes no mention of the person's identity, is attached to the official record of the witness's hearing, from which the person's signature is also omitted. The person's identity and address are written in another official record signed by him, which is put in a case file separate from the case file of the proceedings, and which also holds the application provided for in the previous paragraph. The identity and address of the person are written in a classified, initialled register, which is opened for this purpose in the district court.

Pursuant to art 706-59 CPrP, under no circumstance will the identity or the address of a witness who has benefitted from the provisions of arts 706-57 or 706-58 be revealed, outside the case provided for in the last paragraph of art 706-60.

The disclosure of the identity or the address of a witness who has benefited from the provisions of arts 706-57 or 706-58 is punished by five years' imprisonment and a fine of € 75,000.

## 9. CASE STUDY<sup>711</sup>

A case which highlights the obstacles faced by non-nationals bringing actions in France against TNCs is the case of Total, S.A.

Total, S.A. (Total), a multinational petrochemicals corporation based in France, and the Myanmar Ministry for Oil and Gas Enterprises (MOGE) established the Yadana natural gas

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<sup>710</sup> N 11.

<sup>711</sup> The description of the facts of the Total Case draws on L Hennebel, 'L'affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis' <<http://cridho.cpd.r.ucl.ac.be/documents/Working.Papers/CRIDHO.WP.2006.09.pdf>> accessed 3 April 2008.



exploration, development, and production project in July 1992. MOGE is a petroleum company that is wholly owned and operated by the State Law and Order Restoration Council of the military government of Burma. In 1993, a US based corporation, UNOCAL, joined the venture. The conduct of the two corporations led to the filing of complaints first in the United States under the Alien Tort Claims Act. Nonetheless, American courts denied personal jurisdiction over Total, thus the complaint against Total was dismissed.

On 26 August 2002, two Burmese nationals filed a complaint before the Chief Magistrate of the Court of Nanterre, alleging violations of art 224-1 CP, which states that '[t]he arrest, abduction, detention or illegal restraint of a person without an order from an established authority and outside the cases provided by law is punished by twenty years' criminal imprisonment'. The complainants argued that they had been submitted to forced labour on the gas pipeline project. They were forced to work under the supervision and constant threat of violence of members of the Burmese military, which acted in close cooperation with the Burmese subsidiary of Total.

The complaint was filed against two French nationals in managerial positions within the corporate structure of Total and "X", namely those that had not been identified in the complaint but had contributed to the commission of the violations enumerated. It should be noted that the events took place before the amendment of the French Penal Code, affirming the criminal responsibility of the corporation *per se*; thus, a criminal complaint against the corporate entity at that time would have been inadmissible.

The complainants sought to establish the direct responsibility of Total for the actions taking place on the site of the project, arguing, *inter alia*, that the Burmese military was contracted and remunerated by the multinational enterprise.

On 9 October 2002, the procedure against "X" on counts of abduction and illegal restraint was commenced. Total requested an *ordonnance de non-lieu*<sup>712</sup> arguing that the complaint was not founded in law and the illegal restraint (sequestration) in French criminal law does not extend to include cases of forced labour. This request was not upheld by the Court. On 17 May 2004, the Prosecutor of the Republic requested from the magistrate to dismiss the case, as the facts alleged could not receive a criminal qualification. In its decision of 11 January 2005, the *Chambre de l'instruction*<sup>713</sup> of the Appeals Court of Versailles held that the Prosecutor had exceeded the limits of his competence, affirming that the magistrate remain seised of the matter. On 29 November 2005, Total concluded an 'amicable agreement' (*transaction amicale*) with the initial complainants, that filed the claim in October 2002. According to the terms of the agreement, Total would pay a compensation of 10.000 euro to each of the complainants should they withdraw the complaint. Furthermore, Total agreed to provide the same amount of money to any inhabitant of the 13 villages affected by the project, who had been a victim of forced labour in similar circumstances. To this effect a fund of 5.2 million euro was set up. The agreement did not in and of itself bring the proceedings to a closure. Still, on 22 June 2006, an *ordonnance de non-lieu* was handed down which refused to include forced labour in the concept of 'illegal restraint' as laid down in art 224-1 CP.

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<sup>712</sup> The *non-lieu* can be compared to a decision not to confirm charges.

<sup>713</sup> Criminal section of the court of appeal in charge of reviewing first level decisions.

The main obstacle that the complainants had to face with respect to the action against Total was the restrictive interpretation of French Criminal Law. Leaving aside the repercussions of the agreement reached between Total and complainants, it is doubtful whether the crime of illegal restraint could encompass acts amounting to forced labour, which is not criminalised in French law.

## **10. CONCLUSION**

The above overview of the French legal system suggests a rather limited capacity of the jurisdiction to provide non-nationals with recourse against TNCs for human rights abuses. This might be attributed to the caution with which continental civil law systems approach questions of extraterritoriality. With respect to criminal law, the claimant has to be able to meet the stringent requirements established by the French Criminal Code, in order for the case to be heard by French Courts. With regards to civil law actions, the main stumbling blocks arise in the form of conflict of laws issues. If these hurdles are overcome, causes of action under French law are only relevant once French law is held to be the applicable law to the claim in question. Overall, while such causes exist, again they are limited.

# GERMANY

—Antonios Tzanakopoulos\*—

## 1. INTRODUCTION

The Federal Republic of Germany is a traditional continental European jurisdiction, which belongs to the civil law tradition. Continental European law does not generally provide for its extraterritorial application. As such, non-German nationals bringing claims against transnational corporations ('TNCs') for conduct in violation of human rights standards taken outside the territory of Germany are faced with significant substantive and procedural hurdles, particularly because of the limited international jurisdiction of German courts and the application of principles of private international law.

The following chapters will deal with a number of areas of law that could establish causes of action before German courts. Some of them will be surveyed briefly, only to demonstrate the apparent lack of any direct cause of action for individuals against TNCs. Others will be treated in more detail, in order to canvass the significant obstacles facing individual claimants. Accordingly, after discussing the lack of causes of action under International (I), Constitutional (II), and Criminal Law (III), the causes of action under Civil Law, both under contract and tort, will be examined in some detail (IV).

## 2. INTERNATIONAL LAW

Germany could be characterised as a qualified dualist jurisdiction (in contrast to strictly dualist jurisdictions, such as Australia or the United Kingdom),<sup>714</sup> or even as a qualified monist jurisdiction.<sup>715</sup> In accordance with art 25 of the Constitution of the Federal Republic of Germany<sup>716</sup> ('GG') the 'general rules of public international law' constitute part of federal law;<sup>717</sup> they supersede Acts of Parliament and create direct rights and duties for the 'inhabitants' of the federal territory. This provision evidences the 'friendly approach' of the GG and the German legal order towards international law.<sup>718</sup> Since general international law directly applies in Germany as German federal law, without requirement—at the outset—for

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<sup>714</sup> Cf M Herdegen *Völkerrecht* (CH Beck, Munich 2000) 150–51, [2]. O Rojahn 'Artikel 25' in I von Münch, P Kunig (eds) *Grundgesetz-Kommentar* (vol 2, 3rd edn CH Beck Munich 1995) 197 [4] observes that the provision of Article 25 can serve the arguments of both monists and dualists; similarly, E Menzel 'Artikel 25' in *Kommentar zum Bonner Grundgesetz* (Hansischer Gilddenverlag, Hamburg 1950) 6.

<sup>715</sup> R Streinz 'Artikel 25' in M Sachs (ed) *Grundgesetz – Kommentar* (2nd ed CH Beck Munich 1999) 914 [19].

<sup>716</sup> *Grundgesetz* ('Basic Law') (GG).

<sup>717</sup> As 'general rules of public international law' the *Bundesverfassungsgericht* ('BVerfG', the Federal Constitutional Court) understands the rules of universally applicable customary international law, as well as general principles of law 'generally recognised'. Cf. BVerfGE 15, 25, 32–34; 16, 27, 33; 23, 288, 317; 66, 39, 64 ff. Cf. also Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945) art 38(1)(b)–(c).

<sup>718</sup> 'Völkerrechtsfreundliche Tendenz' it has been called by the BVerfG. Cf. BVerfGE 31, 58, 75 ff; Rojahn (n 1) 196 [1] *in fine*; Menzel (n 1) 5.

any other act of incorporation or transcription,<sup>719</sup> human rights that have passed into customary international law accrue directly to natural persons and legal entities under the jurisdiction of the Federal Republic.<sup>720</sup> The problem is that customary law is difficult to determine and in constant flux, which limits the effectiveness of art 25.<sup>721</sup> The practical significance of art 25 is further limited, particularly with respect to the protection of human rights, by the fact that the Federal Constitution includes a long and detailed bill of rights, whereas the rights accorded to individuals through international treaties are subject to the special provisions of art 59(2) GG.<sup>722</sup> In any case, the Constitution provides that should there be any doubt on the existence or the scope of application of such a 'general rule of international law', it is the Federal Constitutional Court that will decide the matter.<sup>723</sup>

Significantly, anyone can bring a constitutional action before the Federal Constitutional Court. This if a decision by any other German court relied on a rule of domestic law that contradicts a general rule of international law, or that it interpreted or applied a rule of domestic law in a manner that is not compatible with the provisions of general international law.<sup>724</sup> The extent to which an individual could successfully claim that certain bars to the international jurisdiction of German courts, or that certain rules of German private international law, are contrary to general rules of international law and should thus not have been applied by the German courts remains to be determined on an *ad hoc* basis, but is in any case subject to the important *caveat* in the final paragraph of this chapter.<sup>725</sup>

With respect to treaties, art 59(2) GG provides that treaties concluded by Germany require the consent of the competent legislative organs in order to produce legal effects in the territory of Germany, in the form of a Federal law. This applies to both 'self-executing' and 'non-self-executing' treaties,<sup>726</sup> but it does not entail any possibility of change of the text of the treaty.<sup>727</sup> Further laws or regulations may be adopted if they are required for the implementation of the treaty.<sup>728</sup> International treaties enjoy the same rank in German law, as the act expressing parliamentary consent.<sup>729</sup> To avoid, however, the possibility of contradiction between international treaties and domestic law, the Federal Constitutional Court has established the principle that the latter is to be interpreted in conformity with the former.<sup>730</sup>

The more crucial question for present purposes is whether international human rights law, be it customary or treaty-based, creates solely rights or also obligations for natural persons and legal entities which are not generally subjects of international law. Whereas this can be

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<sup>719</sup> Cf. Rojahn (n 1) 202 [15]. Whereas 'general international law' forms part of the Federal law directly, its application in specific cases may be subject to the requirements of 'maturity' or 'law-like precision'.

<sup>720</sup> The expression 'inhabitants of the federal territory' is to be understood in this way: cf. *ibid* 215 [34].

<sup>721</sup> Rojahn (n 1) 196 [3].

<sup>722</sup> Streinz (n 2) 922–23 [68].

<sup>723</sup> GG (n 3) Article 100(2).

<sup>724</sup> GG (n 3) arts 2(1), 25. Cf. BVerfGE 31, 145, 177; 46, 342, 363; 66, 39, 64. See also JA Frowein 'Anmerkung zur *Pakelli-*Entscheidung des Bundesverfassungsgerichts' (1986) 46 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 286, with the relevant decision of the BVerfG appended at pp 289 ff.

<sup>725</sup> See nn 18–19 an associated text, below.

<sup>726</sup> R. Streinz (n 2) 1261 [32]; I. Pernice 'Artikel 59' in H. Dreier (ed) *Grundgesetz – Kommentar* (vol II Mohr Siebeck Tübingen 1998) 1133 [32].

<sup>727</sup> A. Verdross, B. Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd edn Duncker & Humblot, Berlin 1984) 544–45 [856].

<sup>728</sup> *Ibid.*

<sup>729</sup> Herdegen (n 1) 154 [6], 161–62 [19].

<sup>730</sup> See BVerfGE 74, 358, 370.

considered the crux of the matter in this context, one can simply reiterate that, at present, international human rights law is not seen as establishing obligations for non-State actors,<sup>731</sup> with the (limited) exception of international organisations. As such, whereas international law is important in that it creates rights for individuals, it does not impose the correlative human rights obligations on corporations, but rather on States.<sup>732</sup>

### 3. CONSTITUTIONAL LAW

Under art 39(2) of the BVerfGG,<sup>733</sup> the German Federal Constitutional Court has the power to order the dissolution of juridical persons, including corporations, when the latter are found by the Constitutional Court to have abused any of the rights mentioned in art 18(1) GG.<sup>734</sup> These are the right to freedom of expression, especially freedom of the press (art 5(1) GG), the freedom of teaching (art 5(3) GG), the freedoms of assembly (art 8 GG) and association (art 9 GG), the secrecy of postal communications and telecommunication (art 10 GG), the right to property (art 14 GG) and the right of asylum (art 16a GG).

However, this significant sanction, which has been likened to the death penalty for natural persons,<sup>735</sup> cannot be pursued by individuals, as it is only open to the Federal Parliament (*Bundestag*), the Federal Government (*Bundesregierung*) or the Governments of the *Länder* (*Landesregierungen*) to bring a claim for a decision by the Federal Constitutional Court under art 18(2) GG.<sup>736</sup> Thus there is no cause of action against a corporation directly under Federal Constitutional Law. Accordingly, an examination of the possible extraterritorial application of the relevant provisions appears superfluous.

The theory of *Drittwirkung*, the application of the bill of rights contained in the German Federal Constitution (GG) to the relationships between individuals deserves a note in this discussion as well. A great deal of scholarly writing has dealt with the question whether constitutional rights apply directly or indirectly in the relationships between individuals; however, the German courts have constantly found that such constitutional rights apply only *indirectly*, in the sense that they must be taken into consideration when interpreting and applying general provisions of civil, labour and commercial law.<sup>737</sup> As such there is no separate cause of action against a corporation for violation or abuse of (constitutionally protected) human rights.

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<sup>731</sup> See P Alston 'The "Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in idem (ed) *Non-State Actors and Human Rights* (OUP Oxford 2005) 30 and particularly 36, where Alston states that transnational corporations 'have no clear legal obligations in respect to human rights apart from compliance with the law of the particular country in which they are operating'. See also C Tomuschat, *Human Rights – Between Idealism and Realism* (OUP Oxford 2003) 90–91, who notes that despite the heavy moral obligations of transnational corporations, 'on the level of positive law, little if anything has materialised'. Cf also on the few obligations imposed directly by international law on individuals under GG (n 3) art 25 (eg piracy). Cf. Rojahn (n 1) 213 [30].

<sup>732</sup> Cf also the brief discussion of the theory of *Drittwirkung* infra n24 and associated text.

<sup>733</sup> *Gesetz über das Bundesverfassungsgericht* ('Law of the Federal Constitutional Court') (BVerfGG).

<sup>734</sup> Cf. *ibid* art 39(2); GG (n 3) art 18(2).

<sup>735</sup> HJ Hirsch 'La Criminalisation du Comportement Collectif – Allemagne' in H de Doelder, K Tiedemann (eds) *La criminalisation du comportement collectif – Criminal Liability of Corporations* (Kluwer The Hague 1996) 47–48.

<sup>736</sup> BVerfGG (n 20) art 36.

<sup>737</sup> Cf. e.g. BVerfGE 7, 198, 205 ff; 89, 214, 219; 97, 169, 178.

## 4. CRIMINAL LAW

According to German Law, corporations cannot be held criminally responsible in accordance with the maxim *societas delinquere non potest*.<sup>738</sup> This maxim holds strong in this jurisdiction, despite proposals and relatively strong doctrinal support for reform.<sup>739</sup> Corporations thus have no criminal liability under the German legal system.

However, it is important to note that a significant fine may be imposed on the corporation if someone, acting as an organ representing the corporation or as one of the members of such an organ, perpetrates a crime or a violation of the *Ordnungswidrigkeitengesetz*<sup>740</sup> ('OWiG'), if the act results in the breach of the corporations obligations or if the corporation accrues or was supposed to accrue enrichment.<sup>741</sup> The fine may be up to €1,000,000 in case of an intentional act and up to €500,000 in case of negligent behaviour.<sup>742</sup> This aims at ensuring that the corporation will not stand to gain from the criminal act of one of its organs or representatives.<sup>743</sup>

The fine is primarily administrative in nature,<sup>744</sup> and so is also the procedure, which however does 'borrow' a number of elements from criminal procedure.<sup>745</sup> In any case, there is no separate cause of action for individuals, as it is the administrative authority (*Verwaltungsbehörde*) that imposes the fine,<sup>746</sup> and it is before this authority that proceedings are held in the first instance.<sup>747</sup>

Presumably such fines under the OWiG are possible even when the organ of the corporation or the member of such an organ have perpetrated a crime or a violation of the OWiG outside the territory of Germany, as German criminal law applies whenever there's a 'genuine link' to Germany, most usually German nationality.<sup>748</sup> It applies extraterritorially without a genuine link only in cases of war crimes, crimes against humanity and genocide, broadly as these are

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<sup>738</sup> Cf. C Roxin, *Strafrecht – Allgemeiner Teil* (vol I, 4th edn CH Beck, Munich 2006) 262–63 [59]. See also in general Hirsch (n 22) 31 ff.

<sup>739</sup> For a discussion of proposals for reform to the effect that corporations may incur criminal responsibility see Roxin (n 25) 263 [61] ff. Conversely, Swiss law admits the criminal responsibility of corporations since 2003. Other jurisdictions that previously did not provide for corporate criminal liability in accordance with the maxim have also amended their criminal laws to allow for such responsibility: see the Chapter on France in this report. Still there are 'traditionalist' States, hostile to the introduction of criminal liability for corporations or other legal entities, like Greece and Spain. See Tiedemann (n 26) 13.

<sup>740</sup> ('Law on the Violations of Order') (OWiG).

<sup>741</sup> *Ibid* art 30(1).

<sup>742</sup> *Ibid* art 30(2).

<sup>743</sup> See HH Jescheck, T Weigend, *Lehrbuch des Strafrechts – Allgemeiner Teil* (5th edn Duncker & Humblot, Berlin 1996) 227–28.

<sup>744</sup> See Hirsch (n 22) 48 ff. However, the sheer amount of the fine is enough to earn it the characterization of a 'quasi-penal' measure. The threat of administrative fines of such magnitude are often qualified as 'criminal charges' within the meaning of Article 6 of the European Convention on Human Rights: in *Garyfallou AEBE v Greece* (App no 18996/91) ECHR 1997-V 1821, the European Court of Human Rights found that a Greek law providing for certain administrative sanctions against a corporation (such as suspension of operations and heavy 'administrative' fines) established criminal charges. Cf. C Ovey, R White (eds), *Jacobs and White – The European Convention on Human Rights* (4th ed OUP Oxford 2006) 159 seq and P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed Intersentia Antwerpen 2006) 543 seq with further references to case law. See also Tiedemann (n 24) 18–19.

<sup>745</sup> Cf. OWiG (n 27) art 88(1), to *Strafprozeßordnung* ('Code of Criminal Procedure') (StPO) arts 434, 444. Cf. also OWiG (n 27) arts 46(1) (procedures for the imposition of penalties must comply with the StPO in the absence of special provisions), 60 (the right of defence).

<sup>746</sup> OWiG (n 27) art 88.

<sup>747</sup> *Ibid* arts 35(2), 59 ff, 67, 79.

<sup>748</sup> See generally *Strafgesetzbuch* ('Criminal Code') (StGB) arts 5–7.

stipulated in art 5 of the ICC Statute.<sup>749</sup> In any case, in view of the lack of a separate cause of action for individuals, this is of somewhat limited importance.

Finally, German Criminal Law does provide for the confiscation of gains from a criminal act even against corporations, as well as for the confiscation of goods used during the criminal act and the products of a criminal act.<sup>750</sup> But these represent ‘measures’, not penalties or criminal sanctions and do not offer any opportunity for redress to the victim of a human rights violation.

## 5. CIVIL LAW

Corporations may bear responsibility under German civil law either for breach of contract or for a delict (tort). Contractual liability arises from the partial or total non-execution of a contract concluded between the person who has suffered the loss and the person who caused it. Liability is delictual when there is no underlying contractual relationship between the person causing the damage and the person suffering it. However, what is more important with respect to causes of action available to victims of corporate human rights abuses is whether German law will apply to the dispute before a German court, when the dispute refers to extraterritorial conduct of a German corporation or a subsidiary or sister corporation outside of Germany.

### A. Contractual Liability of Transnational Corporations under German Law

The contractual liability of a transnational corporation with Germany as its home State may be engaged—as far as human rights abuses are concerned—primarily because of violation of labour standards guaranteed by German law and of international law applicable in the German territory. However, it appears difficult for a person employed by a German TNC who works in a State other than Germany to bring a relevant claim before a German court on the basis of German law.

#### i. Jurisdiction

Employment disputes arising from individual contracts fall under the jurisdiction of the Labour courts in Germany, in accordance with the *Arbeitsgerichtsgesetz*<sup>751</sup> (‘ArbGG’). Their jurisdiction is exclusive, except in very limited cases where the parties may agree to have the dispute heard by an ordinary civil court. However, all employee-employer disputes arising from a contract of employment fall within the exclusive jurisdiction of Labour courts.

In general, German law does not provide for special rules establishing the international jurisdiction of German courts—international jurisdiction is established when a German court is competent to hear a case *ratione loci* in accordance with the *Zivilprozessordnung* (‘ZPO’,

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<sup>749</sup> See *Völkerstrafgesetzbuch* (‘Code of Crimes against International Law’) (VStGB) arts 6 ff.

<sup>750</sup> See StGB (n 35) arts 73–75. Generally Hirsch (n 22) 52–53.

<sup>751</sup> (‘Law on Labour Courts’) (ArbGG).

the Code of Civil Procedure) and the special rules that make reference to it.<sup>752</sup> *Ratione loci*, the place where the work is performed will establish the competent court for relevant disputes.<sup>753</sup> Accordingly, it is unlikely that a German court will establish international jurisdiction to hear a dispute brought by a person performing work abroad, even if it is on the basis of an employment contract with a German corporation. However, a juridical person, including a corporation, can *also* be sued in the courts of the place of its (legal) 'seat', meaning the courts of the place where the corporation's administration takes place (*forum domicilii*).<sup>754</sup> This establishes the potential international jurisdiction of German courts over a corporation seated in Germany, when the latter is (directly) party to a contract of employment that is to be performed fully outside of Germany.<sup>755</sup>

Significantly, and in apparent deviation from the UK and the US, there is no doctrine of *forum non conveniens* under German law, as German courts are obliged to hear and decide a case once local (and thus international) jurisdiction has been established in accordance with the aforementioned rules.<sup>756</sup>

## ii. Applicable Law

In general, it could be said that 'territoriality is a basic rule in labour law', as key importance is generally attached to the law of the State where the work is performed without regard to the nationality of the parties.<sup>757</sup> Unsurprisingly, German private international law also generally points to the *lex loci laboris*, namely the law of the place where the work is usually performed, in accordance with art 30(2) of the *Einführungsgesetz* to the *Bürgerliches Gesetzbuch* ('EGBGB').<sup>758</sup> This of course applies only where the contract of employment contains no choice of law clause.<sup>759</sup> However, certain peremptory norms of German law remain applicable even when such a choice has been made, if German law would apply as the *lex causae*, and if German law provides for more protection of the employee.<sup>760</sup>

Transnational corporations will usually not employ persons in host States directly, but through setting up a subsidiary or sister corporation in the territory of the host State.<sup>761</sup> In such a case, there would be no connection to the German legal order except in the event of a relevant choice of law clause in the employment contract, which seems unlikely. In the

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<sup>752</sup> See eg BGH VIII ZR 256/04 (Bundesgerichtshof, the Federal Supreme Court [civil]). See also P Hartmann, 'Gerichtsstand – Übersicht' in A Baumbach et al (eds) *Zivilprozessordnung* (vol I 62nd ed CH Beck Munich 2004) 91 [6].

<sup>753</sup> Article 46(2) ArbGG in conjunction with Articles 29 ZPO and 269 BGB. See in particular W Dütz, *Arbeitsrecht* (7th ed CH Beck Munich 2002) 431 [935].

<sup>754</sup> See Article 46(2) ArbGG in conjunction with Article 17(1) ZPO.

<sup>755</sup> Consider however the *caveat* stated infra text at n44, which is equally applicable here.

<sup>756</sup> See also M Ardizzone and others (eds), *German Tax and Business Law* (Sweet & Maxwell, London 2005) 13,008.

<sup>757</sup> F Morgenstern, B Knapp 'Multinational Enterprises and the Extraterritorial Application of Labour Law' (1978) 27 ICLQ 770. Cf also A Heldrich, 'Artikel 30 EG' in *Palandt – Bürgerliches Gesetzbuch* (63rd edn CH Beck, Munich 2004) 2601 [3].

<sup>758</sup> ('Introductory Law to the Civil Code') (EGBG). Cf. J Kropholler, *Internationales Privatrecht* (6th edn Mohr Siebeck, Tübingen 2006) 488.

<sup>759</sup> EGBGB (n 45) art 30(1).

<sup>760</sup> *Ibid.* This is to avoid the choice of law clause depriving the worker of the basic protection afforded by German labour law – see G Hohloch, 'Artikel 30 EG' in *Erman – Bürgerliches Gesetzbuch* (11th ed Aschendorff et al Münster et al 2004) 5666-67 [1] with references to relevant case law.

<sup>761</sup> See generally Morgenstern and Knapp (n 44) *passim*. Significantly, the Federal Supreme Court (BGH) has held that a subsidiary being established as a legal entity in Germany is not a 'place of business' of the parent company but a separate legal entity, and the parent-subsidiary relationship does not suffice to create a link between the two, at least for establishing the international jurisdiction of German courts under *Zivilprozessordnung* ('Code of Civil Procedure') (ZPO) art 21. Cf. BGH in NJW (Neue Juristische Wochenschrift) 87, 3082.



event that the employer is a corporation seated in Germany but the habitual place of performance is in another State, and in the absence of a choice of law clause, German law will not apply.<sup>762</sup> An exception exists with respect to posted workers—i.e. directors of a TNC posted at a subsidiary or sister corporation in another State, for whom German law will usually apply as the *lex loci laboris*.<sup>763</sup> It seems unlikely, however, that these should be individuals seeking redress for human rights abuses by the TNC. A further, more important exception will be the case where a German corporation has set up shop in another State: if the corporation is considered to ‘radiate’ its activity through the foreign shop (‘Ausstrahlung’), then German law will be applicable.<sup>764</sup> However, when exactly this is the case will depend on the particular circumstances.<sup>765</sup>

The *lex loci laboris* may be superseded by the law of the State that bears a stronger or closer link to the employment contract or employment relationship, in accordance with art 30(2) EGBGB *in fine*. In such a case, the law of this other State shall apply, and not the law of the State where the work is performed. While this may create some hope that people working in a State other than Germany will be able to sue in German courts and benefit from the protective provisions of German labour law, it is a difficult case to make, as German courts will consider all the relevant circumstances, among which the common nationality of employer and employee, the domicile of the employee, the place where the work is performed, the language of the contract, and the seat of the employer.<sup>766</sup>

Finally, if German courts have established international jurisdiction in accordance with the provisions discussed above, and irrespective of the *lex causae*, certain peremptory provisions (or ‘mandatory rules’) of the German legal order will apply. This is in accordance with art 34 EGBGB. However, this provision does not specify these peremptory norms.<sup>767</sup> In any case, it is accepted that, in general, mandatory rules are those that have been adopted on social and socio-political grounds, and that the rules for the protection of employees and workers fall within this category.<sup>768</sup> As such, most causes of action under the protective provisions of German labour law will exist if German courts establish international jurisdiction over the dispute, irrespective of the law applicable to the contract.

### iii. Causes of Action Available in German Labour Law

The TNC is prohibited from discriminating against employees and must treat them on the basis of the principle of equality, in accordance with art 75(1) BetrVG and (indirectly) art 3 GG.<sup>769</sup> This means that there must be an objective reason for any differentiation in the treatment of employees.<sup>770</sup> In particular there can be no discrimination on the basis of race,

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<sup>762</sup> Cf Hohloch, ‘Art 30’ (n 47) 5670 [16].

<sup>763</sup> *Ibid.*

<sup>764</sup> See Heldrich, ‘Art 30’ (n 44) 2601 [3] with references to case law.

<sup>765</sup> *Ibid.*, with references to case law.

<sup>766</sup> See further Hohloch, ‘Art 30’ (n 47) 5671 [21] with references to case law; Heldrich, ‘Art 30’ (n 44) 2602 [8].

<sup>767</sup> Hohloch ‘Artikel 34 EG’ in *Erman BGB* (n 47) 5685 [7].

<sup>768</sup> *Ibid* 5686 [12], 5687 [16] with references to case law. Cf. A Heldrich, ‘Artikel 34 EG’ in *Palandt BGB* (n 44) 2608 [3b].

<sup>769</sup> *Betriebsverfassungsgesetz* (‘Work Constitution Act’) (BetrVG). See further H Otto, *Arbeitsrecht* (3rd ed De Gruyter Berlin 2003) 106 [161] ff.

<sup>770</sup> *Ibid* 110–14 [169]–[173].

ethnic origin, other origin, nationality, religion or convictions and beliefs, disability, age, political or unionist activity or position, or sex or sexual orientation.<sup>771</sup>

Particular groups enjoy special protection under German labour law. Mothers and parents, as well as heavily disabled persons, are protected from unilateral termination of employment in accordance with the Law for the Protection of Working Mothers,<sup>772</sup> art 18 of the Law on Childcare Allowance and Parenting,<sup>773</sup> and Book 9 Social Code,<sup>774</sup> respectively. There also are numerous obligations on the TNC-employer to protect employees from dangers of loss of life and limb in accordance with arts 3–14 ArbSchG.<sup>775</sup>

Finally, special laws protect certain rights of the employees, including, with respect to paid vacation, payment of salary during sick leave and accidents in the workplace.<sup>776</sup>

#### iv. Other Obstacles

The most important procedural obstacles for a successful action in employment matters have already been described at the outset, precisely because of their potentially overwhelming nature. The plaintiff will have to establish both the international (read local) jurisdiction of the German Labour court and the applicability of German law, both of which are significant hurdles to overcome. Still, other potential obstacles remain.

Whereas proceedings in the labour courts are less expensive than other civil proceedings in Germany,<sup>777</sup> some fees are payable in proportion to the amount in controversy. The latter however will be limited to thrice the monthly salary of the employee in cases of dismissal / termination, in accordance with the ArbGG.<sup>778</sup> This significantly reduces the potential cost. Union members enjoy the possibility of legal representation free of charge in the first instance. For appeals, the availability of such free representation depends on the relevant decision of the Union in the specific case, which will usually relate to the prospects of a successful outcome. Each party bears the cost of own counsel in the first instance, but the losing party may be made to bear both parties' attorney fees on appeal or in cassation. Finally, state legal aid is available when one of the parties is not able to bear the cost of the proceeding without jeopardising her or his family's income.<sup>779</sup>

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<sup>771</sup> BetrVG (n 56) art 75(1). With respect to discrimination on the basis of sex see also *Bürgerlichesgesetzbuch* ('Civil Code') (BGB) arts 611a(1), 612(3).

<sup>772</sup> *Gesetz zum Schutz der erwerbstätigen Mutter* (MuSchG).

<sup>773</sup> *Gesetz zum Erziehungsgeld und zur Elternzeit* (BERzGG).

<sup>774</sup> *Sozialgesetzbuch* (SGB).

<sup>775</sup> *Gesetz über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit* ('Law on Protective Measures for Health and Safety in the Workplace') (ArbSchG). See further Dütz (n 40) 216–17 [448]–[454] ff.

<sup>776</sup> See eg *Mindesturlaubsgesetz für Arbeitnehmer* ('Law on Minimum Vacation for Employees') (BUrIG); *Gesetz über die Zahlung des Arbeitsentgelts an Feiertagen und im Krankheitsfall* ('Law on the Payment of Salary during Vacation and Sick Leave') (EntgFG); etc.

<sup>777</sup> See M Weiss, M Schmidt, *Labour Law and Industrial Relations in Germany* (3rd edn Kluwer, The Hague 2000) 129 [297].

<sup>778</sup> *Ibid.*

<sup>779</sup> *Ibid* [300]. For a guide on legal aid in Germany see also <[http:// ec.europa.eu/ civiljustice/ legal\\_ aid/ legal\\_ aid\\_ ger\\_ en. htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm)> [visited 18 March 2008].

Significantly, corporations enjoy protection of their ‘personality’ when they act as employers.<sup>780</sup> This may expose potential claimants to counter-action on the part of the corporation if the latter deems that a suit brought against it may cause harm to its name or goodwill, and attempts thus to protect its ‘personality’.

## B. Delictual Responsibility

Corporations bear civil responsibility under the BGB for damage caused to third parties by illegal acts of their organs or representatives in the execution of their functions.<sup>781</sup> This is basically a special rule that attributes conduct of natural persons to fictional legal entities (corporations), who cannot act physically in the real world. Other than that, the normal rules for delictual responsibility under German law apply. The basic rules, enshrined in arts 823 ff BGB<sup>782</sup> provide that whoever causes damage by illegal and culpable conduct shall be under an obligation to indemnify that damage. However, before possible causes of action are discussed, it must be established whether German courts will have international jurisdiction to hear the relevant case, and to what extent (if at all) German law will apply.

### i. Jurisdiction

The discussion of causes of action against a TNC on the basis of delictual responsibility must commence with establishing the potential international jurisdiction of German courts over the dispute. As it has been explained above, German courts must establish their jurisdiction *ratione loci* to consider that they have international jurisdiction.<sup>783</sup> Once established, German courts will have to exercise their jurisdiction to decide the claim, as there is no rule of *forum non conveniens* under German law.

As per the general rule, a corporation can be sued in the Courts of its legal seat in accordance with art 17(1) ZPO. In the case of claims against a corporation having its legal seat in Germany, this provision suffices for establishing the international jurisdiction of German courts. However, because TNCs tend to conduct business in host States through subsidiaries or sister corporations set up *in* the host State,<sup>784</sup> it is useful to consider other bases for the establishment of international jurisdiction.

Under art 23 ZPO, German courts have jurisdiction over payment claims or other claims expressed in monetary terms, if the defendant owns any property in the territory of Germany. Accordingly the resident of a host State could bring a claim against a TNC even though the tort may be perpetrated by the TNC through a subsidiary established *in* the host State, if the latter owns property in Germany (which it will, presumably, as the parent corporation—and thus most of the relevant assets—will be located in Germany). However, German courts have applied this provision restrictively, so as not to allow any foreigner to sue any other foreigner for acts perpetrated outside Germany in German courts relying on the fact that the defendant has assets in Germany. Instead, they do require some sort of *genuine link* with

<sup>780</sup> BGHZ 98, 94, 97. See also U Eisenhardt, *Gesellschaftsrecht* (9th edn CH Beck, Munich 2000) 12 [19].

<sup>781</sup> BGB (n 58) arts 31, 89(1).

<sup>782</sup> N 58.

<sup>783</sup> See nn 39–42, above, and associated text.

<sup>784</sup> See n 48 and associated text.

Germany other than the location of assets.<sup>785</sup> There is a case to be made that the parent corporation having its legal seat in German territory (even though the subsidiary does not) will suffice in establishing this genuine link.<sup>786</sup>

Further, under art 32 ZPO, in tort cases, the court of the place of commission of the tort also has concurrent jurisdiction (*forum delicti*)—however, the place of commission of the tort will rarely be Germany, as is discussed *infra* under (b).

## ii. Applicable Law

The law that German courts will apply to a claim for damages *ex delicto* (thus, the *lex causae*) is traditionally the *lex loci delicti commissi*, namely the law of the place where the tort took place.<sup>787</sup> This generally creates difficulties when the place where the tortious conduct took place is different from the place where the injury took place.<sup>788</sup> However, it is to be presumed that the human rights abuse by the TNC will take place in the same foreign (host) State where the injury will be caused, and thus a discussion of the relevant problems appears redundant. More importantly, the EGBGB provides that the law of the place of the conduct is the one applicable by default, the plaintiff having the right to demand the application of the law of the place of injury within specified time-limits.<sup>789</sup> This rather unusual provision—other continental States do not have similar rules—allows the plaintiff to unilaterally select the applicable law.<sup>790</sup> Thus, for present purposes, the plaintiff could select German law as the applicable law if either the conduct or the injury takes place in Germany. In any case, it appears that the place of commission and/or injury will usually be the host State, and thus it is its law that will apply to the claim.

Under art 40(2) EGBGB, the law of the place of commission succumbs to the law of the common habitual residence (or seat) of the parties.<sup>791</sup> This is significant, because in the case of claim by a foreigner (resident in a host State) against the subsidiary of a German corporation established in the host State, the German court will have to forgo the application of the law of the place of commission in favour of the law of common habitual residence, which in this case will be the law of the host State.

An escape clause is provided for under art 41 EGBGB. According to this provision, if the law of a State other than that established in accordance with art 40 appears to have a substantially closer link to the dispute, then it is the law of this State that should be applied as the *lex cause*. This allows both for arguing that German law should apply as substantially linked to the claim, and for arguing that the law of the host State is substantially linked to the claim. The outcome would have to be determined on an *ad hoc* basis.

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<sup>785</sup> See eg BGHZ 115, 91.

<sup>786</sup> The converse however is not possible: Cf. *Ibid*, where the Federal Supreme Court (BGH) denied international jurisdiction to hear a case brought by a Cypriot against a Liberian bank, because there was no link to Germany other than the fact that the bank maintained a branch in German territory. See also *supra* n44.

<sup>787</sup> Kropholler (n 45) 522.

<sup>788</sup> See *ibid* 524.

<sup>789</sup> EGBGB (n 45) art 40(1). For the time limits, see ZPO (n 48) arts 272, 275–76.

<sup>790</sup> Only Italian private international law makes similar provision. See Kropholler (n 45) 525–26.

<sup>791</sup> Per EGBGB (n 45) art 40(2), the habitual residence of a juridical person, including a corporation, will be the place of the corporation's main administration, or the place where the relevant 'place of business' (shop, branch) is situated.

Finally, there are two important exceptions with respect to the application of foreign law in torts claims before German courts. The first, which is peculiar to delictual responsibility, is stated in art 40(3) EGBGB. This provides that claims under foreign tort law will be acknowledged and compensation will be awarded only to the extent that German law provides for compensation. The aim is to exclude foreign law rules that would provide for compensation that goes beyond repairing the injury suffered by the claimant, such as punitive damages, treble damages and multiple compensation.<sup>792</sup> This is a reservation of German public order (*ordre public*), which is complemented however by the general reservation of German public order in art 6 EGBGB. According to this latter provision, a legal provision of a foreign law may not be applied when its application would lead to a result that is in obvious contradiction to the foundational rules of German law, in particular the basic rights (meaning the rights guaranteed by the Federal Constitution<sup>793</sup>). The parallel rules of German law apply in this case to the *causa*.

### iii. Causes of Action

In the event that German courts have international jurisdiction and can apply German law either as the *lex causae*, or because of an exception of public order, a number of causes of action are available to an individual for human rights abuses by a TNC. The German law of tort is an extremely complex body of law, and the following is only intended to provide a very brief overview of potential causes of action.

Perhaps the most important of those is enshrined in the provision of art 823(1) BGB,<sup>794</sup> according to which whoever illegally causes injury to another's (a) life; (b) body; (c) health; (d) freedom; (e) property or (f) another 'similar' right,<sup>795</sup> through intentional or negligent conduct,<sup>796</sup> is liable to compensate the injured party for damage caused. The term 'freedom' in 823(1) BGB is to be understood as encompassing only physical freedom of movement.<sup>797</sup> Significantly, the term 'similar right' is interpreted as encompassing the right to one's personality according to now established case law,<sup>798</sup> but the violation of this right falls to be determined on a case-by-case basis.<sup>799</sup>

To mount a successful claim under 823(1), the claimant will have to prove (a) the violation of one of the rights listed in the provision; (b) the attribution of this violation to the tortfeasor; (c) the illegality of the violation; (d) the fault of the tortfeasor (meaning negligence or intent on his or her part); and (e) damage caused to the claimant.<sup>800</sup>

<sup>792</sup> Cf Kropholler (n 45) 532; G Hohloch 'Artikel 40 EG' in *Erman BGB* (n 47) 5732 [66].

<sup>793</sup> BVerfGE 31, 58. The term 'basic rights' is to be read as incorporating the rights guaranteed in Conventions concluded under the auspices of the United Nations, such as the ICCPR and the ICESCR, as well as rights guaranteed under the ECHR: see G Hohloch 'Artikel 6 EG' in *Erman BGB* (n 47) 5408 [1] *in fine*; A Heldrich, 'Artikel 6 EG' in *Palandt BGB* (n 44) 2501 [7] *in fine*.

<sup>794</sup> N 58. Cf G Schiemann, 'Unerlaubte Handlungen – Vorbemerkung' in *Erman BGB* (n 47) 3039 [2].

<sup>795</sup> 'Sonstiges' Recht is the exact wording of the provision.

<sup>796</sup> Conduct is meant here as encompassing both action and omission. Omissions are legally important when there is an obligation to act or to prevent an outcome: G Schiemann, 'Artikel 823' in *Erman BGB* (n 47) 3047 [13].

<sup>797</sup> *ibid* 3050 [23]; H Sprau, 'Artikel 823' in *Palandt BGB* (n 44) 1222 [6]. See also NJW 1964, 650 (BGH).

<sup>798</sup> BGHZ 13, 334. Cf. GG (n 3) arts 1–2 (human dignity and development of personality respectively).

<sup>799</sup> Schiemann (n 81) 3054 [48].

<sup>800</sup> Cf H Sprau, 'Unerlaubte Handlungen – Einführung' in *Palandt BGB* (n 44) 1215–16 [2].

Under art 826 BGB, any damage caused by conduct that is *contra bonos mores* is also recoverable through a claim in tort. The definition of the vague notion of ‘good morals’ does pose some difficulty, but importantly its determination is influenced by the indirect *Drittwirkung* of the basic rights guaranteed in the GG.<sup>801</sup> Further, it forms the basis for claiming compensation for damage caused through abusive exercise of legal rights in conjunction with arts 226 and 242 BGB.<sup>802</sup>

Art 831 BGB provides for the vicarious liability of the principal for acts of its agents. The principal is not liable because the agent’s conduct is attributable to it, but rather because of its own conduct in selecting the agent.<sup>803</sup> Significantly, the employer is responsible under this provision for acts of its employees, which demonstrates the possibility of mounting a claim against a TNC for torts committed by employees, and not only by members of its organs.<sup>804</sup> Vicarious responsibility is not strict, but the fault of the principal in the selection of the agent is rebuttably presumed, which eases the burden of proof on the claimant.

The fault is also rebuttably presumed in the case of owners of buildings or premises for damage caused by such buildings and premises under arts 836–38 BGB. The importance of this provision for present purposes is clear when damage has been caused by buildings or premises owned by a TNC, due to eg maintenance.

There are a few cases where special laws provide for strict liability, ie liability without fault, which are pertinent to the question at hand. Under art 1 of the Law on Civil Liability (‘HaftPflG’),<sup>805</sup> the owner or operator of railways is strictly liable for death, bodily harm or damage to property through the operation of railways, with the exception of *force majeure* cases. Similarly liable are power plant owners and operators<sup>806</sup> and owners and operators of nuclear power plants.<sup>807</sup> Significantly, there is also strict liability for damage caused by water pollution under art 22 of the Law on the Management of Water Resources.<sup>808</sup> Finally, the Environmental Liability Law provides for the strict liability for damage of the operators of installations that may have environmental effects.<sup>809</sup>

In accordance with art 847 BGB, a claim for compensation may be made also for immaterial damage, such as psychological or emotional distress, in cases where there has been a violation of the rights to life, body, health and freedom. German courts are free, under art 287 ZPO,<sup>810</sup> to assess the amount of compensation in such cases. However, the amounts that German courts award in the exercise of their discretion under 847 BGB and 287 ZPO

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<sup>801</sup> See n 24 and associated text.

<sup>802</sup> See also H Sprau, ‘Artikel 826’ in *Palandt BGB* (n 44) 1269 [18].

<sup>803</sup> H Sprau, ‘Artikel 831’ in *Palandt BGB* (n 44) 1279 [1].

<sup>804</sup> *Ibid* 1280 [7]. Cf. n 47 and associated text.

<sup>805</sup> *Haftpflichtgesetz* (HaftPflG).

<sup>806</sup> *Ibid* art 2.

<sup>807</sup> See *Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren* (‘Law on the Peaceful Use of Atomic Energy and Protection from its Dangers’) (AtG) arts 25–26.

<sup>808</sup> *Gesetz zur Ordnung des Wasserhaushalts* (WHG).

<sup>809</sup> *Umwelthaftungsgesetz* (UmweltHG) art 1. An exhaustive list of the relevant operations and installations is provided for in Annex 1 to the UmweltHG.

<sup>810</sup> N 48.

are relatively low, between €500–1,000 for minor injuries and up to €50,000 for extremely serious ones.<sup>811</sup>

#### iv. Other Obstacles

The general provisions on the statute of limitations for claims under civil law in accordance with arts 195 and 199 BGB apply to claims for delictual responsibility. These provide for a period of three years following the end of the year when the claim arose and the injured party gained knowledge of the tortfeasor and the relevant circumstances of the tort.<sup>812</sup> The period of three years starts only when the injured party gains knowledge of the tortfeasor and the relevant circumstances, but the claim is finally barred after 10 years from the end of the year when the claim arose, irrespective of knowledge of the injured party.<sup>813</sup> There is an exception for claims under 823(1) BGB, which is also the most important provision for present purposes, as the claim based on a violation of the rights to life, body, health or freedom of a natural person is only finally barred after a period of 30 years following the year when the claim arose.<sup>814</sup>

With respect to fees, as in the case of labour disputes, there are court fees and attorney fees payable in cases of actions in tort. The former are generally regulated by the *Gerichtskostengesetz* ('GKG', the Court Costs Law) and the latter by the *Rechtsanwaltsvergütungsgesetz* ('RVG', the Attorney Fees Law), and cannot be waived. Both court and attorney fees are calculated on the basis of the value of the matter in dispute. The higher the value, the lower the proportional costs—this results in small claims attracting disproportionately high fees.<sup>815</sup> Legal aid is available under certain conditions.<sup>816</sup> As a general rule in civil litigation, all costs are awarded against the losing party in accordance with art 91(1) ZPO.<sup>817</sup>

## 6. CONCLUSION

Already in 1987, Ignaz Seidl-Hohenveldern rightly observed that '*...de lege lata* most States will be able to deal with the activities of [transnational] corporations *only in as much as these activities are exercised within their own territory*', despite many *de lege ferenda* proposals to the contrary<sup>818</sup> (emphasis added). More than twenty years down the line, this still holds true for most continental European jurisdictions, and in particular Germany. There are no causes of action available to non-German nationals against German TNCs for conduct taken outside the territory of the Federal Republic under International, Constitutional or Criminal Law. While non-nationals may be able to bring claims under German civil law, for breach of contract in the case of employment disputes, or in tort, they still have to pass significant procedural and substantive hurdles. These include establishing the international jurisdiction of German courts to hear and decide the case, and ensuring that German law will apply to

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<sup>811</sup> Ardizzoni (n 43) 1,052.

<sup>812</sup> BGB (n 58) art 199(1).

<sup>813</sup> Ibid art 199(3).

<sup>814</sup> Ibid art 199(2).

<sup>815</sup> Cf Ardizzoni (n 43) 13,016.

<sup>816</sup> See n 66, above.

<sup>817</sup> Cf. however the exception with respect to labour disputes at n 66 and surrounding text.

<sup>818</sup> I Seidl-Hohenveldern, *Corporations in and under International Law* (Grotius Cambridge 1987) 12.

the dispute as the *lex causae* or will control significant aspects of the dispute because of the operation of the principle of *ordre public*.



# INDIA

— Ramya Bindingnavale-Raghuram and Rahul Sagar\* —

## 1. BACKGROUND AND INTRODUCTION

Part II of the Indian Constitution enshrines a bill of fundamental rights. Some of these fundamental rights (like the civil liberties contained in art 19)<sup>819</sup> are available only to citizens, while others (like the right to life and personal liberty under art 21)<sup>820</sup> are available to all 'persons'. However, the rights enshrined in Part III of the Constitution are only available against the state and state agencies.<sup>821</sup> As such, human rights obligations in respect of corporations must be derived by implication, rather than based on constitutional text.

India is now enjoying a period of tremendous economic activity. The GDP growth rate is a steady 9%,<sup>822</sup> foreign exchange reserves are at USUSD \$290 billion,<sup>823</sup> the stock exchange has seen tremendous increase in trade volumes, about 220 of the fortune 500 companies world over have a presence in India, and 250 of these companies are clients of the Indian IT industry.<sup>824</sup> The Tata Group, UB Group, and Reliance are Indian TNCs of a size and strength that rivals corporations of most other countries. In fact, in 2007, the value of foreign acquisitions by Indian companies exceeded that of inbound acquisitions, as well as foreign Direct Investment in India.<sup>825</sup> The trend seems to suggest an increasingly Indian corporate force. Yet, as the report below will demonstrate, legal developments have not kept pace with economic ones. The Indian legal system is still struggling with balancing the need for increased economic growth against the need to alleviate poverty and ensure minimum wages. Similarly, the concept of human rights actions against corporations is in its fledgling stages. A number of Indian TNCs, like the TATA group and Infosys,<sup>826</sup> have self-imposed corporate governance standards which are internally applied. Statutory obligations under environment law and labour law provide other mechanisms of restraint on corporate action, and indirectly enforce human rights obligations. Similarly, consumer protection laws and tort actions against companies are also based on human rights violations. Constitutional remedies for breach of fundamental rights are, however, not available against companies, despite an extremely activist judiciary, because of constraints in the text of the Constitution.

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<sup>819</sup> Constitution of India 1950, art 19.

<sup>820</sup> Ibid art 21.

<sup>821</sup> Ibid art 13.

<sup>822</sup> Ministry of Finance, 'Annual Growth Rate of Gross National Product and Net National Product' (Government of India, Economic Survey 2006 2007), <<http://indiabudget.nic.in/es2006-07/chapt2007/tab12.pdf>>, accessed on 22/02/2008.

<sup>823</sup> Reserve Bank of India, 'Foreign Exchange Reserves' (Weekly Statistical Supplement dated 15/02/2008) <<http://rbidocs.rbi.org.in/rdocs/Wss/PDFs/83132.pdf>> accessed 22 February 2008.

<sup>824</sup> India Brand Equity Foundation, 'Fortune 500 Companies in India: Success Stories' <[http://ibef.org/artdisplay.aspx?cat\\_id=84&art\\_id=6989](http://ibef.org/artdisplay.aspx?cat_id=84&art_id=6989)> accessed 22 February 2008.

<sup>825</sup> India Brand Equity Foundation, 'Indian Investments Abroad' <[http://www.ibef.org/economy/indianinvestment\\_sabroad.aspx](http://www.ibef.org/economy/indianinvestment_sabroad.aspx)> accessed 22 February 2008.

<sup>826</sup> The corporate governance codes of the Tata Group and Infosys are available respectively at Tata Group, 'Tata Group | Corporate Sustainability | Corporate Governance' <[http://www.tata.com/0\\_our\\_commitment/corporate\\_governance/index.htm](http://www.tata.com/0_our_commitment/corporate_governance/index.htm)> accessed 25 April 2008 and Infosys, 'Infosys - Beyond Business' <<http://www.infosys.com/beyond-business/default.asp>> accessed 25 April 2008.

## 1. CAUSES OF ACTION AGAINST TNCs

At the outset, it is important to note that a foreign company can only do business in India in two ways. First, to buy and sell direct in the Indian market or in manufacturing etc., foreign corporations must establish a subsidiary or a joint venture company, which will be incorporated under the Companies Act 1956 and will be treated as an Indian company. Second, if it does not wish to establish a company, it can open up a branch, liaison, project office or any other place of business after securing necessary approvals according to the Foreign Exchange Management (Establishment in India of branch or office or other place of business) Regulations 2000. However, in both the cases the offices are heavily regulated by Indian authorities. Therefore, it is pertinent to understand that the term 'transnational company' in the Indian context generally refers to an aspect of control. A multinational company, with its huge investments and technical know-how, is in a position to control another company which is incorporated in India, either its subsidiary or as a joint venture company. This kind of legal difference plays a key role in legal redress for human rights abuse, when a foreign entity tries to avoid responsibility on the basis that it had no effective control.<sup>827</sup>

The cause of action can be based in criminal, civil or administrative law and often a particular set of facts may involve all three.

### A. Criminal Law

The statute that primarily governs criminal liability in India is the Indian Penal Code 1860 which extends both to the territories of India and to any offence committed by Indian citizens any place outside of India and to any person on any ship or aircraft registered in India wherever it may be.<sup>828</sup>

#### i. Lifting the Corporate Veil

First, there are certain statutory provisions for the lifting of the corporate veil and imposition of criminal penalties on directors and other company officials who are responsible for a violation. A classic illustration of such a provision may be found in s 47 of the Water (Prevention and Control of Pollution) Act 1974 (the 'Water Act'). Under this provision, where one of the offences listed in Chapter VII of that act are committed by a company, then 'every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly'. Similar provisions can also be found in other environmental legislation.<sup>829</sup>

Secondly, the Indian judiciary has been lifting the corporate veil in order to punish the people who are responsible for criminal offenses. However, most of the cases related to corporate

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<sup>827</sup> *Union Carbide Corporation v Union of India*, AIR 1992 SC 248.

<sup>828</sup> Indian Penal Code 1860, s 4.

<sup>829</sup> Cf. Air (Prevention and Control of Pollution) Act 1981, s 40; Environment Protection Act 1986, s 16.

fraud and mismanagement and the principle was seldom applied for human rights abuse. The recent order of the Supreme Court in *Som Mittal v Government of Karnataka*<sup>830</sup> is one of the first cases where the principle has been applied in the human rights domain as well. In this case, one of the female employees of a business processing outsourcing (BPO) unit, working a night shift, was raped and murdered by the driver of the cab, which the company had provided to pick her up in Bangalore. The Government of Karnataka had passed an ordinance that no female employee should be made to work during the night. The police brought criminal negligence charges against the CEO of the company, as the company was responsible for the security of the employees. Som Mittal, the CEO of the company, contested that the first information report lodged against him should be quashed. The Supreme Court has now ordered that in situations like this the CEOs may be responsible for criminal negligence and the police may proceed with investigations.

## ii. Criminal Liability of Corporations in Indian Law

It is well settled in India that corporate entities may be liable for criminal offenses. In *Standard Chartered Bank and Others v Directorate of Enforcement*,<sup>831</sup> the Supreme Court observed, 'As in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or an agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation.' In fact, S 11 of the Indian Penal Code 1860, the primary criminal statute in India, defines 'person' as including any company or association or body of persons, whether incorporated or not.

## B. Civil

Causes of action in civil suits can also be divided into two sub categories:

### i. Contract

Generally in domestic law, contracts and human rights seldom interface. The common area of contestation between them is in the labour domain, where the workers and employees are engaged under various contracts; however, they may be victims of human rights abuse falling outside the ambit of contracts. India has a wide range of labour legislation to cover this arena which provides the outer perimeters of any contract.<sup>832</sup> Therefore, most of the cases relating to working conditions, discrimination, equal remuneration, exploitation, health and safety measures and child labour are dealt with by these statutes. Apart from issues arising from employment, however, there remain a few cases, such as banks using coercive means against customers to get loans repaid, which may be classified under the head of human rights action emanating from contracts.

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<sup>830</sup> Criminal Appeal No 206 of 2008 (Supreme Court of India).

<sup>831</sup> AIR 2005 SC 2622, (2005) 4 SCC 530.

<sup>832</sup> See for instance, Industrial Disputes Act 1947, Minimum Wages Act 1948, Workmen's Compensation Act 1923, Maternity Benefits Act 1961, Personal Injuries (Emergency Provisions) Act 1962.

## ii. Tort

In India, the issue of a tort committed by a corporation was first raised on occasion of the Bhopal Gas leak disaster on 23 December 1984. More than 17,000 deaths have been reported to date because of the leak of Methyl Isocyanate (MIC). The tortfeasor in this case was a foreign company, Union Carbide Corporation. It is now settled in India that individuals may have a tort claim against a corporation.<sup>833</sup> In this regard, the case of *M.C.Mehta v Union of India*,<sup>834</sup> which involved an Oleum gas leak from Shriram Foods and Fertilizers Industries (hereinafter referred as 'Shriram'), requires special mention here as it substantively changed the law on liability. The court rejected the principle of strict liability, which had been established as early as 1868 in the landmark case of *Rylands v Fletcher*,<sup>835</sup> and instead developed the principle of absolute liability. The court held that enterprises involved in hazardous and inherently dangerous industries are under an absolute and non-delegable liability for two reasons. First, only corporations have the resources to discover and guard against such hazards and dangers. Second, the permission granted to corporations to operate is presumed to be conditional on the inclusion or absorption of the cost of any accident or harm done.

## 2. SANCTIONS AND REMEDIES AVAILABLE AGAINST TNCs

### i. Criminal Law

The Penal Code<sup>836</sup> includes three types of sanctions—imprisonment, fines and fines with mandatory imprisonment. The traditional sanction in criminal law, i.e. imprisonment, of course is not available in the case of juristic persons like companies. However, for many years the question remained whether a company could be punished with a fine, where the prescribed punishment necessarily entails imprisonment. The question was decided by the constitutional bench in *Standard Chartered Bank v Directorate of Enforcement*.<sup>837</sup> The court held that corporations were not immune from prosecution merely because the prosecution was in respect of offences for which the punishment prescribed was mandatory imprisonment. The court observed that '...as a company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when the imprisonment and fine is the prescribed punishment, the court can impose the punishment of a fine which could be enforced against the company. Such discretion is to be read into the section so far as the juristic person is concerned.'

### ii. Tort

The courts can either grant damages or award an injunction. However, damages are generally awarded only for the loss suffered; they are not punitive. However, recently there

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<sup>833</sup> Cf. *Lata Wadhwa v State of Bihar* (2001) 1 SCC 197; *M C Mehta v Union of India* (1987) 1 SCC 395.

<sup>834</sup> N 15.

<sup>835</sup> (1868) LR 3 HL 330 (HL).

<sup>836</sup> N 10.

<sup>837</sup> N 13.

appears to be a movement towards granting exemplary damages.<sup>838</sup> This will be dealt in greater length later in the section.

### iii. Contract Law

As already mentioned, the common interface of contract law and human rights law is essentially in the domain of labour and employees' disputes. In India this aspect is extensively covered in labour statutes and accordingly, a contractual remedy is now seldom used for a human rights abuse. However, it must be noted that Indian law<sup>839</sup> does not allow penalties in respect of breach of contract. The law only provides compensation for any loss or injury caused, which arose in the usual course of things from the breach, or which the parties knew, when they made the contract, was likely to result from the breach of it.

## 3. ADMINISTRATIVE AND CONSTITUTIONAL CAUSES OF ACTION AND REMEDIES

Constitutional remedies under arts 32 and 226 of the Indian Constitution for violations of statutory and/or fundamental rights are available against statutory corporations,<sup>840</sup> those public corporations which are effectively instrumentalities of the state,<sup>841</sup> and all corporations that are performing functions analogous to that of the state.<sup>842</sup>

The National Human Rights Commission ('NHRC') was established on 12 October 1993 under the legislative mandate of the Protection of Human Rights Act 1993. The NHRC can receive complaints from individuals or inquire *suo motu* into human rights violations.<sup>843</sup> For the purposes of the Act, 'human rights' is defined to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants<sup>844</sup> and enforceable by courts in India'.<sup>845</sup> Such complaints may relate to violation of human rights or abetment thereof, as well as the negligence of public servants for failing to prevent violations. In 2004–2005, the NHRC heard about 2600 complaints relating to sexual harassment, dowry deaths, rape and violation of a woman's dignity, 151 complaints relating to violations of the rights of the child, and 593 cases alleging atrocities against members of schedule castes and schedule tribes.<sup>846</sup> The NHRC may also intervene in any case involving human rights violations before any court in India.<sup>847</sup> The important factor to be noted is that the NHRC (and the state commissions) have in the past taken note of violations by non-state actors, even if only to direct the state authorities to take

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<sup>838</sup> R Sagar, 'Price for Apathy: From Bhopal to Kumbakonam: Need of a Mass Tort Law' (2004) *Combat Law* <<http://www.combatlaw.org/v7i1.php>> accessed 25 April 2008.

<sup>839</sup> Indian Contract Act 1872, s 73.

<sup>840</sup> *Air India v Nergesh Mirza* (1981) 4 SCC 335.

<sup>841</sup> *Bharat Petroleum Corporation v Maddula Ratnavalli* (2007) 6 SCC 81.

<sup>842</sup> *M C Mehta v Union of India* (1986) Supp (1) SCC 562.

<sup>843</sup> Protection of Human Rights Act 1993, s 12.

<sup>844</sup> *Ibid* s 2(f) defines International Covenants as being: 'the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16 December, 1966, and such other covenant or convention adopted by the General Assembly of the United Nations as the central government may, by notification, specify'.

<sup>845</sup> *Ibid* s 2(d).

<sup>846</sup> National Human Rights Commission, 'Annual Report 2004-2005' <<http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf>> accessed on 21 February 2008.

<sup>847</sup> Protection of Human Rights Act (n 25) s 12(b).

action against those non-state actors.<sup>848</sup> Of course, the range of actions that the NHRC may take as a result of an inquiry only include initiating prosecutions, making recommendations, or approaching the Supreme Court or High Courts for directions on the matter.<sup>849</sup> To date, although the NHRC has not hesitated to recommend or suggest action to hospitals and other non-governmental bodies found to be in violation, there has been no similar direction against a TNC or other large corporation.<sup>850</sup> However, the language of the Act, and the practice under it, leave the option open for the future.

## i. Environmental actions

The Supreme Court of India has repeatedly held that the right to a clean environment and to water are components of the right to life contained in art 21 of the Indian Constitution.<sup>851</sup> Using this interpretation, the Supreme Court has, without any hesitation, imposed positive duties on relevant government entities to ensure a clean environment by requiring such entities to impose regulations and restrictions on persons and companies causing pollution.<sup>852</sup>

In response to a growing concern for environmental protection, the Government of India passed three Acts in quick succession: the Water Act, the Air (Prevention and Control of Pollution) Act 1981<sup>853</sup> and the Environment Protection Act 1986.<sup>854</sup> The Air Act and the Water Act provide specific remedies for air and water pollution, as well as a framework stipulating the permission that companies must obtain before starting operations. The EPA is meant to be an umbrella act that empowers state or central governments to pass secondary legislation for the prevention and control of other types of pollution, and for the protection of delicate environments.

This opens up two further forms of actions against corporations. First, under the three Acts, the state or central pollution control board (as the case may be) are empowered to give or withhold permission for any industrial or other activity that may cause pollution. Where the company conducts operations in the absence of or without meeting the requirements of these permits, the pollution control boards are empowered to withdraw consent,<sup>855</sup> direct closure or stoppage of electricity and/or water supply<sup>856</sup> or prosecute directors and other company officials who have knowledge of the violation and in whose power it was to prevent

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<sup>848</sup> See for instance *Child Marriages, Chattisgarh*, Case No. 56/33/2003-2004, where the NHRC took cognizance of mass child marriages in Chattisgarh, and required the state of Chattisgarh to undertake awareness programs against the violations.

<sup>849</sup> Protection of Human Rights Act (n 25) s 18.

<sup>850</sup> However, in one case, the NHRC directed a state government to take criminal action against a factory owner whose negligence had led to an accident, resulting in the loss of 8 lives. The factory was owned by a private limited company by the name Jyothi Capsules. See *Protection of Rights of Victims in Cases of Industrial Hazards*, Case No. 19900/24/97-98. Like in the environmental public interest litigation cases mentioned below, in this case too the NHRC based its decision on the positive duty of the state to protect and ensure a clean environment derived from the public trust doctrine and an extended conception of the right to life.

<sup>851</sup> See for instance *M C Mehta v Kamal Nath* (1997) 1 SCC 388.

<sup>852</sup> *Ibid.* It is interesting to note that the Supreme Court based its decision on the Public Trust Doctrine, holding that the Government held the natural resources and the environment in trust for its citizens. Thus the government owed a duty to its citizens to ensure that the environment remain clean. Similarly, the Supreme Court has required the Municipal Corporation of Delhi to ensure that all public transport vehicles (whether privately or publicly owned) use LPG, as being a cleaner fuel, and thereby ensuring clean air for the residents of the Indian Capital.

<sup>853</sup> (Air Act).

<sup>854</sup> (EPA).

<sup>855</sup> Water (Prevention and Control of Pollution) Act 1974 (Water Act) s 27; Air Act (n 35) s 22A.

<sup>856</sup> Water Act (n 37) s 33A; Air Act (n 35) s 31A; EPA (n 36) s 5.

it.<sup>857</sup> Second, Indian constitutional jurisprudence requires state officials to exercise such quasi-judicial powers reasonably. Where a corporation is conducting its operations in violation of any of the requirements of the statutes or rules there under, the effected community or any NGO can bring a Public Interest Litigation seeking reasonable enforcement of the said rule or provision by the pollution control board.<sup>858</sup> This gives an effective indirect constitutional remedy against corporations.

## ii. Affirmative action

In India, affirmative action is a part of the constitutional commitment to equality. In the past few months there has been discussion of extending affirmative action to the private sector as well. However, affirmative action in India is a matter of compensation for historical wrongs and derives strength from a constitutional mandate. It is therefore unlikely that there can be any standing whatsoever for a foreign national to bring a case seeking affirmative action.

## 4. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS

### A. Substantive Obstacles

#### i. Liability of a Parent Company for Actions of its Subsidiary

The main question for consideration is whether a non-national is able to bring a case against an Indian parent company (being a company incorporated under the Companies Act 1956) for actions of its subsidiary in India. The question of lifting the corporate veil and making a parent company liable for the actions of a subsidiary is a vexed one, even where that subsidiary is wholly owned by the parent company. As yet, there are no consistent principles to be drawn from Indian cases on the point. The basic principle, however, is that the court will be willing to lift the corporate veil between a subsidiary and a parent company where the subsidiary is being used to perpetrate fraud or illegality.<sup>859</sup> This will be a question that depends on the facts and circumstances of each case.

#### ii. Law of Damages

Another substantive obstacle for the victim is the law of damages in India, which does not allow for punitive or exemplary damages. The fact that victims may not win adequate

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<sup>857</sup> Water Act (n 35) ch VII; Air Act (n 35) ch VI; EPA (n 36) ss 15–17.

<sup>858</sup> *Bombay Environment Action Group and Sameer Mehta v State of Maharashtra*, MANU/MH/0726/2006. See also S Ghosray, 'Searching for Human Rights to Water Amidst Corporate Privatisation in India: *Hindustan Coca-Cola Pvt. Ltd v Perumatty Grama Panchayat*' (2007) 19 *Georgetown International Environment Law Review* 643.

<sup>859</sup> 'The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and Family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people': *Delhi Development Authority v Skipper Constructions*, (1996) 4 SCC 622.

monetary relief, coupled with the costly and lengthy legal process, generally deters victims from initiating and persisting with litigation. This also materially reduces their chance of gaining a reasonable settlement. Accordingly, most of the victims find it easier and more expeditious to approach higher courts through their original writ jurisdiction and Public Interest Litigation (PIL), which were discussed above.<sup>860</sup> It is important to note, however, that writ jurisdiction of the higher judiciary is largely aimed at correcting or preventing violations of fundamental rights by state authorities, rather than compensating victims of breach. Indian courts have been extremely skeptical about awarding general or exemplary damages in writ petitions. Technically, a victim of the breach of fundamental rights would have to file a writ petition to establish the breach, and then, on the basis of this established violation, file a suit for compensation in the regular civil courts. In the recent past, however, the Indian Judiciary has developed what is sometimes referred to as a 'constitutional tort', where compensation is granted to victims of breach of fundamental rights in the writ petition itself rather than requiring them to file another case on the basis of the violation established by the court in the writ petition.<sup>861</sup> However, damages in these cases are given in a rather ad hoc manner, without express reference to established principles of the law of damages.

There have been many attempts by the higher judiciary to develop a coherent jurisprudence for compensation and damages. One such attempt can be found in the case of *Lata Wadhwa v State of Bihar*.<sup>862</sup> In that case, a fire broke out at a function in Jamshedpur due to gross negligence of Tatas, the company. As the option to initiate a civil suit for damages was deemed unattractive, a public interest litigation petition was filed. Mrs. Rani Jethmalani, the advocate for the petitioners, urged that punitive or exemplary damages should be awarded because the hazard took place solely on account of negligence on the part of the organisers. Strangely, the court completely ignored the claim for exemplary damages and awarded compensation based on the 'multiplier method.' The court based its decision on an earlier case of *General Manager, Kerala State Road Transport Corporation, Trivandrum v Susamma Thomas*,<sup>863</sup> where the court had observed that the multiplier method was a logically sound and legally well-established method of ensuring 'just' compensation, which would make for uniformity and certainty of the awards. A departure from that method could only be justified in rare and extraordinary circumstances and very exceptional cases. The court further explained the 'multiplier method' in the following terms:

...the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last.<sup>864</sup>

However, the contribution of this case lies in the fact that it used the writ jurisdiction in awarding substantial damages. Unfortunately, the court therefore indirectly discouraged the process of civil suits in the lower courts for such tort cases.

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<sup>860</sup> Cf. Constitution of India (n 1) arts 32, 226.

<sup>861</sup> Cf. *Chairman, Railway Board v Chandrima Das*, AIR 2000 SC 988; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746; *Rudul Sah v State of Bihar*, AIR 1983 SC 1086.

<sup>862</sup> AIR 2001 SC 3218.

<sup>863</sup> AIR 1994 SC 1631

<sup>864</sup> *Lata Wadhwa* (n 44) [9].



In 2001, the Supreme Court had to deal with the tragic case of the death of school children due to negligence of the organizers of a school trip. Without any adequate facilities for class act suits in tort, the Supreme Court in *M S Grewal v Deep Chand Sood*,<sup>865</sup> again found that writ petition is more efficacious and expeditious way to compensate victims. The court observed:

Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affectation of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of civil Courts obligation to award damages. As a matter of fact the decision in *D. K. Basu* has not only dealt with the issue in manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of 'justice oriented approach'. Law Courts will lose its efficacy if it cannot possibly respond to the need of the society - technicalities there might be may but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice.<sup>866</sup>

Thus, once again the Supreme Court, though noble in intent, imparted *ex gratia* justice to the victims of a tragedy. The approach taken by Supreme Court has stunted the development of tort law and the law of damages in the lower courts.

It is important to note that one of the major factors deterring potential claimants from initiating civil suits has been the delay prevalent in the lower courts. Ironically, the above-mentioned public interest litigation cases also took several years to get resolved. *Lata Wadhwa's case* took 12 years to be finally resolved and *M S Grewal's case* took more than 6 years.

Litigation arising from a tragic accident—a massive fire in the hall of Uphaar Cinema in New Delhi on 13 June 1997—has brought these questions to the fore again.<sup>867</sup> More than 50 people died and more than 100 sustained injuries. It took another six years for the Delhi High Court to award damages. The damages awarded were not only compensatory but included a hint of exemplification. The court took notice of the unjust profit earned by the owners in the past years due to disregard to safety mechanisms. For example, the court calculated the amounts earned because of extra chairs kept in the hall for past years, which were prohibited by the regulations. While it attracted little attention by the media and legal academics, this is a significant development in the law of damages.

The question of exemplary damages was discussed in the case of *M C Mehta v Kamal Nath*,<sup>868</sup> which involved the state leasing an ecologically fragile land to develop a motel, which caused environmental pollution. Though, the only sanctions available under the Acts concerned were fine or imprisonment, the court observed that,

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<sup>865</sup> (2001) 8 SCC 151.

<sup>866</sup> *Ibid* [28].

<sup>867</sup> *Association of Victims of Uphaar Tragedy v Union of India* 104 (2003) DLT 234.

<sup>868</sup> (2002) 3 SCC 653.

...keeping in view all these (the facts) and the very object underlying the imposition of imprisonment and fine under the relevant laws, to not only punish the individual concerned but also to serve as a deterrent to others to desist from indulging in such wrongs which we consider to be almost similar to the purpose and aim of awarding exemplary damages, it would be both in public interest as well as in the interest of justice to fix a quantum of exemplary damages.<sup>869</sup>

In light of the above discussion, it is evident that the law of damages in tort cases has led to two problems. First, the law has evolved around the 'multiplier principle' and seeks only to adequately compensate victims. Accordingly, the court is extremely skeptical about awarding punitive damages. For most large corporations, and even for state agencies, the current quantum of damage awarded is hardly a concern, diminishing the deterrent power of the law. On the other hand, the criminal justice administration in India is fraught with loopholes and the defendants may not get punished at all. Thus, the extremely useful deterrent effect of exemplary or punitive damages is not available. Second, while the jurisprudence on damages is evolving, this evolution is dependant upon disasters occurring: one has to wait for the misfortune of another disaster for further development.

Moreover, the judiciary suffers from two handicaps in this regard. First, the process remains time-consuming, even with the best efforts of courts. Second, the use of PILs by the higher judiciary is not without problems. PILs, historically, are not designed to encourage punitive or exemplary damages generally and, more importantly, are targeted against the state agencies, rather than the corporate tortfeasor. With the advent of transnational corporations in India, which are capable of affecting thousands of lives, the need to expressly bring them within the ambit of PILs is greater than ever.

### **iii. Applicability of Fundamental Rights to Non-Nationals**

The Indian Constitution makes a distinction between 'persons' and 'citizens'. While the rights under art 19 (freedom of speech and expression, association, movement, residence and practice of any trade or profession) are only available to 'citizens', those under art 14 (equality) and art 21 (right to life and personal liberty) are applicable to all persons, so long as they are within the territory of India.

Questions involving the act of state doctrine, the political question doctrine, or universal or extraterritorial jurisdiction have not come up in any case relating to corporations. There have been a few cases dealing with extraterritoriality in the case of dissolution of marriages,<sup>870</sup> but they have very little application in the present context, being based on private international law principles relating to conflicts of laws.

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<sup>869</sup> Ibid [9].

<sup>870</sup> Cf. for instance *Aulvin V. Singh v Chandrawati*, AIR 1974 All 278.

## B. Procedural Obstacles

### i. Statute of Limitations

The Limitation Act 1963 governs the law of limitation in India and sets out different periods of limitation for different causes of action. Generally, a claim based on breach of contract must be started within three years from the date of the breach and a claim for tort should be initiated within two years from the date of commission.

India treats the laws of limitation, even in the context of international litigation, as procedural rather than substantive. Therefore, the legal remedy is barred following the expiry of the period of limitation, while the right still remains notionally. This is unlike the situation where the right itself gets extinguished when the laws of limitation are treated as substantive. As India treats the law of limitation as procedural, the foreign party can, in case the judicial remedy has become barred in the foreign country, file an action in India if the period of limitation is longer in India than in the foreign country. The only exception to this rule is contained in s 11, which allows Indian courts to refuse relief where the foreign law has extinguished the contract and where all the parties were domiciled in the foreign country during the relevant period. This gives scope for 'forum shopping'. The problem with treating foreign laws of limitation as procedural is highlighted by the Law Commission of India in its 193<sup>rd</sup> Report (June 2005) on 'Transnational Litigation – Conflict of Laws – Law of Limitation'.<sup>871</sup> The Law Commission Report therefore recommends that the foreign limitation law should be treated as substantive law such that the Indian courts can themselves refuse to entertain suits where the cause of action or the execution of a decree is frustrated by application of limitation laws in the original country.

### ii. Jurisdictional Challenges

Under the Code of Civil Procedure,<sup>872</sup> a civil suit may be instituted at the place of business of the defendant.<sup>873</sup> The explanation to the section provides that a corporation shall be deemed to carry on business at its sole or principal office in India, or in respect of any cause of action arising at any place where it also has a subordinate office. The CPC also makes it clear that a national of a friendly state may bring a suit in an Indian court 'as if he were a citizen of India', even if not resident there.<sup>874</sup> Thus, on first principles, assuming a parent company (which has a place of residence in India) can be held liable for actions of its foreign subsidiary, a foreign national is not precluded from bringing a case in India against the parent company. Of course, where the violation is committed by the Indian company itself, civil causes of action discussed above may be brought in Indian courts even by foreign nationals. Theoretically, and subject to issues of appropriateness of the forum, the nationality or place of residence of the plaintiff is immaterial.

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<sup>871</sup> Law Commission of India, 'Transnational Litigation – Conflict of Laws – Law of Limitation' (193<sup>rd</sup> Report of the Law Commission, June 2005) <<http://lawcommissionofindia.nic.in/reports/Report193.pdf>> accessed on 22 February 2008.

<sup>872</sup> Code of Civil Procedure 1908 (CPC).

<sup>873</sup> Ibid s 20.

<sup>874</sup> Ibid s 83.

As far as criminal causes of action are concerned, the Indian Penal Code lays down strict rules of nationality and territoriality to limit the scope of its application. For an Indian court to be able to take cognizance of an offence, it would either have to be committed by an Indian citizen (in which case the place of commission of the offence is irrelevant), or by any person within the territory of India (or on a ship or aircraft registered in India).<sup>875</sup> Since corporations cannot be 'citizens' of India, a criminal action can only be brought against a corporation where the act in question was committed on the territory of India. In criminal cases, of course, the complainant is the state, and only in specific circumstances can a private complaint be brought. The rules in the Code of Criminal Procedure 1973 do not explicitly make any distinction between nationals and non-nationals for the purposes of instituting a private complaint.

### **iii. Forum Non Conveniens**

The courts in India have rarely been considered a convenient forum for victims. This is essentially because of the delays between conduct of proceedings and the final verdict, perceived corruption which makes it open to manoeuvre in favour of the more powerful parties, the fact that the law—especially in relation to torts and company law—is still in its evolutionary stages, and that the likelihood of getting a less efficacious remedy. Therefore, in most cases involving a choice of forum between India and another jurisdiction, the complainants have elected to bring the claim in the alternative forum.

In 1986 the survivors and relatives of the dead in the infamous Bhopal Tragedy, sought compensation in the United States from the parent Union Carbide corporation. They were represented by the Indian Government which had declared itself the sole litigant in relation to the disaster. Before the US case began, the Chief Justice of the Supreme Court of India stated: 'It is my opinion that these cases must be pursued in the United States ... It is the only hope these unfortunate people have.'<sup>876</sup>

The argument of *forum non conveniens* was highlighted by Keenan J of the New York District Court in the case, where he rejected the claim of the Indian Government by observing that the Indian connection with the case far outweighed the interests of citizens of the United States in the matter.<sup>877</sup> However, the facts of the case were unique and there was a much larger social interest at stake.

The Supreme Court in *Lalji Raja & Sons v Hansraj Nathuram*<sup>878</sup> held that s 20(c) of the CPC confers jurisdiction over the foreigners if the cause of action arises within the jurisdiction of the court.<sup>879</sup> Similarly, a division bench of Patna High Court in *Ramchandra Singh v Gopi*

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<sup>875</sup> Penal Code (n 10) s 4.

<sup>876</sup> D Robertson, 'The Federal Doctrine of Forum Non Conveniens', (1994) 29 Texas Int Law J 353, 372–73.

<sup>877</sup> *In Re Union Carbide Corp Gas Plant Disaster at Bhopal* 634 F Supp 842 (SDNY 1986) 866.

<sup>878</sup> (1971) 1 SCC 721.

<sup>879</sup> CPC (n 54) s 20 ('Other suits to be instituted where defendants reside or cause of action arises: Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or

the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or s(c) the cause of action, wholly or in part, arises.' [Explanation] A corporation shall be deemed to carry on business at its

*Krishna*<sup>880</sup> held that according to the principles of international law a court has no jurisdiction to entertain a suit against a foreigner who did not permanently or temporarily reside within its jurisdiction and who had not submitted to that jurisdiction, except where the local legislature confers jurisdiction upon a court situated in a particular territory, to entertain suits against foreigners in situations where a cause of action arises wholly or partly within its jurisdiction. In such a case, the rule of private international law is subject to and over-ridden by the rule of local municipal law.

The question of *forum non conveniens* was much examined in the case of *Airbus Industrie v Laura Howell Linton*.<sup>881</sup> The facts of the case were that an airplane manufactured by the appellant, a company incorporated in France, crashed in India when it was carrying respondents or relatives of the respondents, who were predominantly British residents. The respondents filed a case in the courts in Texas, United States of America in the capacity of the executor of the estates of the deceased for the compensation and the damages for the mental injuries suffered by them. The appellant sought to restrain the respondents from initiating litigation in courts outside India. The court observed that English courts restrained 'unfair' foreign proceedings where they were considered to be 'vexatious' and 'oppressive'. However these criteria were replaced by the courts giving more consideration to balancing the advantages to the plaintiff and disadvantages to the defendant in restraining foreign proceedings. The court went on to state:

The essential questions involved are –

(i) Is there another more appropriate court to which the parties can go in which justice can be achieved more conveniently and cheaply?

(ii) Will the claimant be deprived of a legitimate personal or juridical advantage?

The court noted that the factors indicating India was the most convenient forum were significant, including the fact that the witnesses and evidence related to the accident were in India, the tort was committed in India and the foreign parties were ready to submit to the jurisdiction of Indian courts. Accordingly the court held that the most appropriate and natural forum was in India.

The issue of convenient forum was also raised in *Mayar (HK) Ltd v Owners and Parties, Vessel MV Fortune Express*.<sup>882</sup> The Supreme Court put great emphasis on the principles laid down in *Spiliada Maritime Corporation v Cansulex Ltd.*,<sup>883</sup> in which the House of Lords held:

i) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to

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sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.').

<sup>880</sup> AIR 1957 Pat 260.

<sup>881</sup> ILR 1994 KAR 1370.

<sup>882</sup> AIR 2006 SC 1828.

<sup>883</sup> [1986] 3 All ER 843 (HL).

serve proceedings out of the jurisdiction was that the court would choose that forum in which the case would be tried more suitably for the interests of all the parties and for the ends of justice.

ii) In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction.

#### iv. Enforcement of Judgments

A judgment of a foreign 'superior' court may be executed in India as if it were a judgment of an Indian court if that court is part of a 'reciprocating country'.<sup>884</sup> A reciprocating country is one which is declared as such by the government of India by notification in the official gazette.<sup>885</sup> The Supreme Court of India has held that a foreign judgement which does not arise from the order of a superior court of a reciprocating territory cannot be executed in India, ruling that a fresh suit will have to be filed in India on the basis of the foreign judgement.<sup>886</sup>

#### C. Practical Obstacles and *Amicus* Brief Involvement

Even if the Indian legal system is theoretically moving towards corporate accountability for human rights violations, there are a number of practical reasons why legal action in India may be inadvisable. The two main obstacles are the long delays which characterise the system, as well as the extraordinarily high costs involved.<sup>887</sup> The Indian judiciary is heavily

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<sup>884</sup> CPC (n 54) s 44A.

<sup>885</sup> Ibid s 44A, Explanation 1. The case of *Gurdas Mann v. Mohinder Singh*, AIR 1993 P&H 92 lists some of the countries which have been declared as reciprocating territories: on 3.1.56, Federation of Malaya (now Malaysia) and the High Court and the Courts of Appeal as the Superior Court; on 18.1.56, Colony of Aden and Supreme Court of Aden as the superior Court; on 15.10.1957, New Zealand and Cook Islands, Turst Territory of Western Samoa and the Supreme Court of New Zealand as the Superior Court; on 21.1.1961, Sikkim and the High court of Sikkim or any other court whose jurisdiction is not limited to a pecuniary jurisdiction; On 15.7.1961, Burma all civil and revenue courts as Superior Courts; on 1.3.53, United Kingdom of Great Britain and Northern Ireland and the House of Lords, Court of Appeals, High Court of England, the Court of Sessions in Scotland, the High court in Northern Ireland, the Court of Chancery of the County Panlatine or Lancaster and the Court of Chancery of the county Palantine or Durham as the Superior Courts; on 22.3.54, Colony of Fiji and the Supreme Court of Fiji as the Superior Court; on 23.11.68, Hong Kong and republic of Singapore; on 1.9.66, Trinidad and Tobago; on 26.9.70, Papua New Guinea and Supreme Court as the superior court; n 6.3.76, Bangladesh and Supreme Court and Courts of District and subordinate judges as the Superior Court. Canada and the Supreme Court of Ontario.

<sup>886</sup> *Moloji Nar Singh Rao v Shankar Saran*, AIR 1962 SC 1737.

<sup>887</sup> One author remarks: 'The proceedings are extraordinarily dilatory and comparatively expensive; a single issue is often fragmented into a multitude of court actions; execution of judgments is haphazard'. See O Mendelsohn, 'The Pathology of the Indian Legal System', (1981) 15 *Modern Asian Studies* 823, 824. Although the article is based on field study conducted in the late 1970s, the problems described persist despite valiant efforts at change. See also Robert Moog, 'Indian Litigiousness and the Litigation Explosion', (1993) 33 *Asian Survey* 1136. See further, Law Commission of India, 'High Court Arrears: A Fresh

burdened and there is a backlog of cases. Further, a good lawyer is, like in any other country, very expensive but much more effective in persuading the judiciary towards that party's account. Added to an ineffective legal aid system, the propensity for delay and high costs favour the richer party to the dispute, simply because that party is able to sustain litigation for a longer period.<sup>888</sup> Indeed, a party with greater monetary power will use delaying tactics to force the claimant to withdraw or else to settle out of court. Thus, the Indian higher judiciary's amenability to activism is somewhat nullified by its systemic propensity towards defendants like transnational corporations who have greater capacity to sustain litigation.

As for amicus brief involvement, it should be noted that the inherent powers of Indian courts allow them to call for amicus brief or a 'legal opinion' from an amicus when the court deems it necessary. With the exception of the NHRC, however, no other uninterested party may as a right seek to present written or oral arguments in a case. Indian courts are more likely to allow such briefs in public interest litigation. An interested party may, however, apply as an interpleader if she can show that she will be affected by the decision in the case.<sup>889</sup>

## 5. CASE STUDY: BHOPAL GAS TRAGEDY

### A. Brief Background

On the night of 3 December 1984 the worst industrial accident on record occurred in Bhopal, the Capital city of the state of Madhya Pradesh. A highly toxic gas, methyl isocyanate ('MIC') was leaked in the atmosphere in large quantities from a chemical manufacturing plant operated by Union Carbide India Limited ('UCIL'), an Indian company, 50.9 % of which was owned by Union Carbide ('UCC'), a global giant in manufacturing chemicals. The official count showed a little over 3000 deaths and 100000 injuries, figures which later became the basis for the Court's calculation of the settlement amount. However, it has since become evident that these figures were incorrect and the actual count of victims was, in fact, five times more than the official figures adopted by the Court.<sup>890</sup>

The accident, even after two decades, has raised serious issues in relation to criminal, civil and environmental liability. The series of events show the continuing struggle of victims in accessing justice, which has been marred by protests, hunger strikes, vehement media coverage and even violence. Even after so many years, the victims have received only around \$2500 for fatalities and \$625 for injury cases<sup>891</sup> (taking the conversion rate of INR 40 = 1 USD).

The Indian legal system was faced with an unprecedented challenge in this case. On the one hand, was the issue of the lack of a clear statutory legal framework to deal with industrial hazards of this magnitude. On the other, was the question of how to deal with the multiplicity of claims that were likely to arise. Yet another issue was the monetary inability of

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Look', 124<sup>th</sup> Report of the Law Commission, 1988; Law Commission of India, 'Delays and Arrears in Trial Courts', 77<sup>th</sup> Report of the Law Commission, 1978.

<sup>888</sup> U Baxi, *Crisis of the Indian Legal System* (Vikas Publishing House Pvt Ltd, Delhi 1981) ch 1.

<sup>889</sup> Order XXXV, Rule 1, CPC.

<sup>890</sup> <http://www.ielrc.org/content/w0405.pdf>.

<sup>891</sup> <http://www.ielrc.org/content/w0405.pdf>.

the Indian Subsidiary—Union Carbide India Limited ('UCIL')—to satisfy the claims that were likely to arise. The legal ramifications of the Bhopal Gas Tragedy were multifold and complex and merit close analysis.

## **B. Legislative Response**

### **i. Enactment of the 'Bhopal Act'**

On 29 March 1985 the Indian Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (the 'Bhopal Act') whereby the Union of India would be the sole plaintiff in a suit against the UCC and other defendants for compensation arising out of the disaster. On the basis of the Bhopal Act, the Union of India filed a complaint in the Southern District Court, New York, presided by Judge Keenan.

The long title to the Bhopal Act claimed that it was an Act 'to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claims and for matters incidental thereto.'<sup>892</sup>

S 3 (1) of the Bhopal Act declared that 'the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.' Under s 3(2) the purposes referred to in s 3 (1) included: (a) the institution or withdrawal of any suit or proceeding; and (b) entering into a compromise. S 4 of the Bhopal Act required the Central Government to permit to a claimant a legal practitioner of his choice to be associated in the suit by the Union of India having 'due regard to any matters which such person may required to be urged with respect to his claim.' The tribunals for categorization processing an adjudication of claims were completely under the control of the Central Government. S 9 of the Bhopal Act gave the Central Government power to frame a Scheme in relation to these matters. S 11 gave the Bhopal Act and the Scheme overriding effect over every other statutory enactment.

On the basis of the Bhopal Act, the Union of India filed a complaint in the Southern District Court, New York, presided by Judge Keenan. The details of the proceedings in US and the challenges to the validity of the Bhopal Act will be discussed in the later section.

### **ii. Enactment of Other Statutes**

The Factories Act 1948 was amended in 1987. The Chapter IVA dealing with 'Provisions relating to Hazardous Processes' introduced ss 41A–41H in the Act. The constitution of Site Appraisal Committees, the compulsory disclosure of information by the occupier, workers' participation in safety management and right of workers to warn about imminent danger

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<sup>892</sup> Initially, this was an Ordinance which later was replaced by the Claims Act.



were all mandated. This was clearly the result of the Bhopal gas leak disaster. However, s 7B was also inserted which proved to be the most controversial section of the Act. It provided for 'general duties of manufactures as regards articles and substances for use in factories'. Under s 7B(5), the supplier, designer or manufacturer of an article would be relieved of any liability to vouch for the safety of the use of such article so long as the user of such article gives a written undertaking that 'the article will be safe and without risks to the health of the workers when properly used.' Applying it to the Bhopal situation, s 7B(5) would have the effect of completely absolving UCC of any liability as long as UCIL gave a written undertaking that the use of MIC would be safe and without risks to the health of workers. This was scathingly criticised as it was shocking that the Parliament thought it fit to insert such a provision in the Factories Act 1948, even after the experience of Bhopal tragedy.

The Public Liability Insurance Act 1991 ('Insurance Act') was enacted with a view to providing for interim compensation in the event of an industrial disaster. Again, the Insurance Act is premised on the fact that there has been a growth of 'hazardous industries, process, and operations' and 'growing risks from accidents to workmen and innocent members of the public' alike.<sup>893</sup> The essential feature of the Insurance Act is to provide for compulsory insurance of any unit or factory undertaking a hazardous activity. Based on the no fault principle as contained in s 3 of the Insurance Act, the total outgo for one accident has been limited to Rs.5. What set out to be a compulsory statutory insurance to meet contingencies for payment of interim compensation in the event of accidents in hazardous industries has been reduced to a compromise favouring the industry. There is a cap now on how much liability will be assumed by the insurer. The working of the Insurance Act depends on the local administration which is empowered to disburse the interim compensation. An Environmental Relief Fund (ERF) has been created under s 7A of the Act into which an amount equal to the premium payable by the owner would be credited by the owner under the Insurance Act.

Another law providing for compensation is the National Environment Tribunal Act, 1995 ('NETA'), which provides for the final compensation in the event of an accident. However, the NETA has yet to be notified.

## C. Bhopal Litigation

### i. Litigation in the US

Within a week of the Bhopal gas leak, a number of cases were filed in US courts under the Alien Tort Claims Act against UCC, the New York based Multinational Company which owned 50.9 % interest in UCIL.<sup>894</sup> The US Judicial panel on multidistrict litigation intervened and decided to centralize all litigation,<sup>895</sup> transferring the cases to Judge Keenan's court in the Southern district of New York.<sup>896</sup> Pursuant to the Bhopal Act, the Union of India joined the litigation as co-plaintiff. The consolidated case was dismissed on grounds of *forum non conveniens*, with Judge Keenan finding that Indian courts were the more appropriate forum

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<sup>893</sup> Statement of Objects and Reasons to the Insurance Act, 1991.

<sup>894</sup> Reference to the various cases can be found in the consolidated case *Re Union Carbide* (n 59).

<sup>895</sup> 601 F Supp 1035 (JPMDL 1985).

<sup>896</sup> N 59.

to deal with the Bhopal litigation and assign liability.<sup>897</sup> The case was unique in that it involved the government of India arguing that the Indian judiciary (another organ of the state) was incapable of dealing with the issues raised by the tragedy.<sup>898</sup> However, it was still effective legal strategy insofar as the case was dismissed by Judge Keenan and the dismissal was conditional upon UCC's assurances that (1) it would submit to the jurisdiction of Indian Courts and waive any statute of limitations defense; (2) it would satisfy any judgment rendered by the Indian Court against the parent company when held on appeal 'where such judgment and affirmance comport with the minimal requirements of due process'<sup>899</sup> and (3) provide discovery 'under the model of the United States Federal Discovery Rules of Civil Procedure after appropriate demand by the plaintiffs'.<sup>900</sup> Thus, the foreign parent company was obliged to take responsibility for the actions / negligence of its Indian subsidiary, which was extremely important because UCIL simply did not have the financial means to satisfy the possible claims. It was further obliged to provide documents that would have been necessary to show that the control of the actions of the subsidiary were vested in the parent company, thereby allowing Indian courts to 'lift the corporate veil'.

## ii. Litigation in India

The Union of India then filed a civil suit on 5 September 1986 in the Court of the District Judge, against UCC praying for 'a decree for damages for such amount as may be appropriate under the facts and the law and as may be determined by this court so as to fully, fairly and adequately compensate all persons and authorities, who have suffered as a result of the Bhopal disaster and having claims against the defendant.'<sup>901</sup> The plaintiff also sought a decree for punitive damages to deter UCC and other multinational corporations from wilful, malicious and wanton disregard of the rights and safety of the citizens of India.

The District Court at Bhopal awarded an interim compensation in the sum of Rs. 3. billion (US\$87,500,000)<sup>902</sup> by an order dated 17 December 1987. UCC filed a revision petition in the High Court at Jabalpur challenging that order, where the interim compensation was reduced to Rs. 2.5 billion (US\$62,500,000). The main ground of challenge by the UCC to the order of the District Court awarding interim compensation was that the court had no jurisdiction to grant such interim relief and further that s 151<sup>903</sup> of the CPC was not the source of such power. Further, since evidence had not been led and the exact number of affected persons not known, the order for payment of interim compensation was without any factual foundation. While the High Court agreed that the inherent powers under s 151 CPC could not be invoked, it held that the statutory rules made under the Administration of Justice Act 1969 in England, which permitted payment of interim damages, could be adapted with suitable modifications as part of the Indian common law and applied to the Bhopal suit. Further, the High Court discussed extensively the development of the law of torts in India and held that in view of the judgment of the Supreme Court in the Oleum Gas Leak case<sup>904</sup> the defendants were 'liable to pay damages to the gas victims in accordance with the rule of

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<sup>897</sup> Ibid 866.

<sup>898</sup> Ibid 846–48.

<sup>899</sup> Ibid 867.

<sup>900</sup> Ibid.

<sup>901</sup> The full text of the plaint is reproduced in U Baxi, A Dhanda (compiled), *Valiant Victims and Lethal Litigation: The Bhopal Case* (Indian Law Institute, 1990) 3–12. The extracted portion is prayer (1) at p 11.

<sup>902</sup> Assuming USD 1 = Rs. 40.

<sup>903</sup> CPC (n 54) ('Nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court').

<sup>904</sup> *MC Mehta v India* 1987 (n 15).

absolute liability without the exceptions' outlined in the English case of *Rylands v Fletcher*.<sup>905</sup>

Thereafter, UCC and the Union of India, both filed appeals before the Supreme Court of India. The appeals were heard in the five judge bench in the case of *Union Carbide Corporation v Union of India*.<sup>906</sup> While the proceedings were going on, a settlement was arrived between the UCC and the Union of India whereby UCC were supposed to pay a lump sum of US\$470 million towards full and final settlement of all claims, arising out of both civil and criminal liability. The settlement covered all future claims as well. The agreement contained an indemnity clause which required the Union of India and the State of Madhya Pradesh to take steps to ensure that they would defend any claims filed in future against UCC and UCIL.

The settlement order was widely criticised as it was considered to be grossly undermining the actual needs of the victims. In order to limit the damage, the Supreme Court admitted review petitions. On 4 May 1989 the Court passed a detailed order purporting to explain the basis upon which it had arrived at the figure of US\$470 million as settlement of all civil and criminal and future liabilities of the UCC and UCIL.<sup>907</sup> The Court stated that the estimate of the number of deaths was 3,000 with compensation ranging from Rs. 100,000 (\$2,500) to Rs.300,000 (\$7,500). In about 30,000 cases of permanent total or partial disability compensation ranging from Rs. 50,000 (\$1,250) to Rs.200,000 (\$5,000) per individual was envisaged. In another 20,000 cases of temporary total or partial disability compensation in the range of Rs.25,000 (\$625) to Rs.100,000 (\$2500) was envisaged. For cases of utmost severity, estimated at 2,000, a compensation of Rs. 4,00,000 (\$1000) per individual was considered. A total sum of Rs. 500 crore (i.e. Rs. 5 billion) (\$125,000,000) was thought to be allocable to the fatal cases and 42,000 cases of such serious personal injuries. The basic reason of the court to approve the settlement essentially rested upon pragmatic considerations. In its explanation the court indicated that, although the case may not have dealt with the developing law on compensation, 'the compulsions of the need for immediate relief to tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they be, are resolved in the due course of judicial proceedings.' According to the court, 'the tremendous suffering of thousands of persons... should not be subordinated to the uncertain promises of the law.'<sup>908</sup>

The validity of the Bhopal Act was challenged in the *Charan Lal Sahu v Union of India*<sup>909</sup> on the basic ground that it violated the fundamental rights of the citizens as it prohibited them to initiate litigation on their own behalf. Further, it was also contended that the settlement was reached without consulting the victims. The court upheld the validity of the Bhopal Act based upon the doctrines of necessity and *parens patriae*. This led to another round of review petitions. The court in *Union Carbide Corporation v. Union of India*<sup>910</sup> upheld the settlement except that the Court directed that the criminal proceedings against UCC and UCIL, which had been quashed, be revived.

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<sup>905</sup> N 17.

<sup>906</sup> (1989) 1 SCC 674.

<sup>907</sup> *Union Carbide Corporation v Union of India* (1989) 3 SCC 38.

<sup>908</sup> Id at 51.

<sup>909</sup> (1990) 1 SCC 613.

<sup>910</sup> (1991) 4 SCC 584.

By the end of 2002 it was apparent that the adjudication of the claims was nearing completion. The balance available for disbursement as on 31 March 2002 was approximately Rs.13.6 billion (i.e. Rs. 1,360 crores) (\$340,000,000). Another petition under art 32 was filed by 36 individual victims whose claims had been settled, one from each of the 36 affected wards. The petition also raised the issue of non-payment of interest on the compensation amount awarded to the victims by the tribunals constituted under the Bhopal Act. The principal contention of the petitioners was that the retention of the remaining compensation money coupled with the denial of payment of interest on the compensation awarded, which by themselves were meagre, was arbitrary and unconstitutional. Further, it was claimed that this amount legitimately belonged to and was payable to the victims of the Bhopal gas disaster in terms of the settlement and ought to be distributed among them on a pro-rata basis. Accordingly, it was submitted that the balance compensation be 'distributed pro rata amongst the Bhopal gas victims whose claims have been processed and settled in terms of the Bhopal Act and that the retention of the said amount without disbursal amongst the victims constitutes a grave violation of their fundamental rights under arts 14 and 21 of the Constitution of India.'<sup>911</sup> A detailed action plan was prepared and the balance amount was finally distributed in 2004. Further actions seeking re-examination of the adequacy of compensation were dismissed recently.<sup>912</sup>

#### **D. Interim Conclusion**

The massive and lengthy litigation arising out of the Bhopal tragedy has itself been called a tragedy. As this complex litigation comes to a close, there is little satisfaction from the point of view of the victim. Claims of inadequacy of compensation abound and are exacerbated by the long delay in access to justice. However, the litigation did establish the basis for environmental and mass tort litigation in India, creating a framework within which corporations can be held accountable.

## **6. CONCLUSION**

On the whole, even after imaginative interpretations, corporate accountability for human rights violations in India is, as yet, an elusive concept. While the higher judiciary has been very activist in enforcing fundamental rights, it is still constrained by the reality that these rights are available only as against the state. While criminal law constrains actions which amount to violation of fundamental rights, these constraints are only available against individuals. Without doubt, tort law has proved a useful tool, but, at this point, it is important to note that Indian tort law has evolved almost entirely around one type of tort—industrial and environmental hazards, e.g., pharmaceutical products, toxic wastes, asbestos exposure, defective heart valves and environmental hazard, such that the scope of redress is limited at best. A non-national seeking redress in India faces further procedural obstacles, not only in establishing jurisdiction of Indian courts over the matter, but also in executing judgments of foreign courts in India. Litigation in India is also fraught with delays and is expensive. As such, reliance on imaginative application of existing norms by the judiciary is perhaps not the right way ahead.

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<sup>911</sup> *Bhopal Gas Peedit Mahila Udyog Sangathan v Union of India* (2001) 2 SCALE 495.

<sup>912</sup> *Bhopal Gas Peedit Mahila Udyog Sangathan and Another v Union of India* (2007) 6 SCALE 507.

On the other hand, specialist legislation has done much to increase corporate accountability to stakeholders other than creditors and shareholders. Labour laws have incorporated a number of human rights standards and are easily directed at corporate actors. Environmental legislation in India was consciously developed to bring corporate actors within its ambit. Indian TNCs are a force to be reckoned with, and are increasingly active in numerous transnational enterprises. They effect, and will continue to effect, the rights and lives of people outside the national boundaries of India. If the Indian state can benefit from business activities of its TNCs, it also bears a responsibility to ensure these activities do not violate human rights. In this regard, we are contemplating corporate accountability not only for traditional shareholders, but also duties of the state to non-nationals. The study conducted above demonstrates that this cannot be done satisfactorily by *ad hoc* judicial adjustment and adaptation of existing rights and liabilities. There is an urgent requirement for express legislative intervention, both in substantive law and in the creation of specialist remedies.

# MALAYSIA

— Yong Fei, Wong and Amelly Kok\* —

## 1. EXECUTIVE SUMMARY

The current state of Malaysian law does not appear to provide a conducive platform for non-nationals seeking to pursue a claim against Malaysian corporations for wrongs committed abroad. Only limited options are available to non-nationals for such claims to be made. Legally, there are little or no impediments facing non-nationals in Malaysian courts. Often, it is the practical difficulties that provide the disincentive to potential claimants from commencing and continuing legal proceedings against Malaysian corporations.

## 2. BRIEF BACKGROUND TO JURISDICTION

Malaysia is a multi-ethnic, multicultural, multi-religious country. The national legal system reflects this heterogeneous society and is an integration of the common law, Syariah law and customary law traditions.

As Malaysia is a federation of 13 states, it has 14 constitutions altogether: the Federal Constitution and 13 State Constitutions. Unlike the British Constitution, the rules of the Federal Constitution are written down in a single document which sets out the structure and powers of the Federal Government<sup>913</sup> and enshrines the fundamental rights<sup>914</sup> of the individual vis-à-vis the federation. Of particular relevance to the current discussion is art 5(1) of the Federal Constitution, which prescribes that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'. Art 8(1) further declares that '[a]ll persons are equal before the law and entitled to the equal protection of the law'.

As regards the court system, although a federation, Malaysia has a single hierarchy of courts which enforces both the Federal and State laws. The hierarchy comprises, in order of prominence, the Federal Court; the Court of Appeal; the High Court (Malaya) and High Court (Sabah and Sarawak); the Sessions Courts; the Magistrates' Courts; and the Penghulu's Courts.

On the status of Malaysia's ratification of the main Human Rights Treaties, it is worth noting that of the many important instruments, Malaysia has to date ratified only the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the

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<sup>913</sup> Federal Constitution of Malaysia, Part IV.

<sup>914</sup> Ibid Part II .

Rights of the Child.<sup>915</sup> There is also no methodical incorporation of the provisions of the treaties which it has ratified into its municipal laws.

In such event, causes of action for human rights abuses committed by Malaysian transnational corporations ('TNCs') rest primarily on the traditional contractual and tortious liabilities. A victim who is an employee of the TNC concerned may also resort to employment law protection. Victims who have no contractual relationship with the TNC, such as the consumers of hazardous products and the environmental victims, may rely on consumer law protection and tort law remedies respectively. Actions which are administrative in nature unfortunately are restricted to TNCs which have public character or statutory TNCs.

### 3. CAUSES OF ACTION AND REMEDIES AVAILABLE TO NON-NATIONALS

It is important from the outset to identify the potential claimants against the TNCs before we delve into the heads of available recourses. For the purposes of this report the authors shall endeavour to discuss the available redresses in relation to employees and / or the general public which may be affected by the actions of the TNCs.

#### A. Contract And Tort Law

In general, legal actions under general contract law are permissible so as long as the individuals have contractual nexus with the TNCs. That said, it is worth noting that the relationship between employers and employees<sup>916</sup> and the obligations and rights of an employment contract are generally governed by Employment Law.<sup>917</sup> Hence, claims brought under this head are usually confined to individuals whose contractual relationships with the TNCs fall outside the scheme of Employment Law such as persons who do not fall within the definition of employee under the Employment Act 1955,<sup>918</sup> sole traders who supply goods and services to the TNCs and independent contractors.

Human rights abuses can also be classified and recognised as tortious claims in national courts. For example, a claim in negligence provides a basis of private law protection from injury to the person and / or damage to property.<sup>919</sup> The doctrine of vicarious liability applies, following which a corporate entity, as principal, is vicariously liable for torts committed by its employees, as agents, in the course of their employment.

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<sup>915</sup> UNHCHR, 'Status by Country' <<http://www.unhcr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=105#105>> accessed 29 March 2008.

<sup>916</sup> An employee under the Employment Act 1955 means: (a) any person whose wages does not exceed RM1,500 per month under a contract of service with an employer; (b) any person who irrespective of the wages earns in a month has entered into a contract of service with an employer and disengaged in (i) manual labour or (ii) engaged in the operation of mechanically propelled vehicles; (c) one who supervises and oversees employees in manual labour; (d) any person engaged in any capacity in any vessel registered in Malaysia with certain exception.

<sup>917</sup> See pp 161–63, below.

<sup>918</sup> N 4.

<sup>919</sup> Environmental actions are usually brought based upon the law of torts, see *Woon Tan Kan (Deceased) & Seven Ors v Asian Rare Earth Sdn Bhd* [1992] 4 CLJ 2299.

## B. Criminal Law

As a general rule, criminal law in Malaysia is territorial in nature. The Malaysian Penal Code is the primary statute which governs criminal liability in Malaysia. S 11 of the Malaysian Penal Code defines 'person' as including 'any company or association or body of persons, whether incorporated or not', therefore making corporate entities liable for criminal offences in Malaysia.

The Malaysian Penal Code applies also to punishment of offences committed by any person beyond the limits of Malaysia but who by law may be tried within Malaysia.<sup>920</sup> With respect to certain offences in the Penal Code, s 4 provides for the application of the code to certain offences committed outside Malaysia.<sup>921</sup>

As corporate entities are not natural persons, they may either be liable for criminal offences committed by their directing organs (ordinarily, the directors, managing director and / or senior officers), or they may also be vicariously liable for the criminal acts of their employees committed within the scope of their employment. The general requirements of *actus reus* and *mens rea* for a criminal offence must be present. Lastly, corporate entities cannot, of course, be sentenced to imprisonment and cannot be convicted of offences which by their nature can only be committed by natural persons.

From the above, it follows that it would not be practical to bring criminal proceedings to against TNCs in relation to human rights abuses committed outside Malaysia.

## C. Administrative Law

Order 53 of the Malaysian Rules of High Court 1980<sup>922</sup> is the route to follow for any applications for judicial review. However, such administrative law remedy is only available for challenging the acts and / or decisions of a public body or authority. Hence, unless the TNCs concerned are statutory bodies or have public elements, judicial review has no application.

## D. Other Courses of Action

### i. Environmental Law

In Malaysia, the primary legislation regulating this area is the Environmental Quality Act 1974<sup>923</sup> ('EQA 1974') for the prevention, abatement, control of pollution and enhancement of the environment. However, as it stands, s 1(1) EQA 1974 states that it shall apply only to

<sup>920</sup> (Act 574) (Revised 1997) s 3; *Public Prosecutor v Rajappan* [1986] 1 MLJ 152.

<sup>921</sup> Apart from ss 3 and 4 of the Penal Code, other written law which seems relevant for consideration is the Extra-Territorial Offences Act 1976 (Act 163) which deals with certain offences under written laws (e.g. the Official Secrets Act 1972 (Act 88) and Sedition Act 1948 (Act 15)) committed in any place without and beyond the limits of Malaysia and on the high seas on board any ship or on any aircraft registered in Malaysia or otherwise as if they were committed in Malaysia.

<sup>922</sup> (RHC).

<sup>923</sup> (Act 127) (EQA 1974).



the whole of Malaysia. As such, it does not apply to environmental damage committed abroad. Therefore, claimants would have to rely on the common law causes of actions (e.g., nuisance, the negligence rule in *Rylands v Fletcher*)<sup>924</sup>—in environmental liability and claims if actions are brought in the home states of the TNCs.

## ii. Employment Law

The discussion to follow assumes that the contract of employment entered into between a non-National and a Malaysian TNC stipulates that the applicable law is the Malaysian Law. If the case were otherwise, the law of the host States would apply, to the exclusion of Malaysian Law.

The principal legislation governing the labour market and employment relationship in Malaysia is the Employment Act 1955. The Act provides, *inter alia*, for the minimum conditions to be set out in a contract of employment such as the normal work hours,<sup>925</sup> the minimum paid holidays in one calendar year,<sup>926</sup> the minimum payment for overtime work,<sup>927</sup> to name but a few. Some other legal regulations include:

- (1) *Pensions Act 1980*.<sup>928</sup>
- (2) *Employees Social Security Act 1969*.<sup>929</sup>
- (3) *Employees Provident Fund Act 1951*.<sup>930</sup>
- (4) *Occupational Safety and Health Act 1994*.<sup>931</sup>
- (5) *Private Employment Agencies Act 1981*.
- (6) *Human Resources Development Act 1992*.

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<sup>924</sup> (1868) LR 3 HL 330 (HL). The case of *Woon Tan Kan (Deceased) & Seven Ors v Asian Rare Earth Sdn Bhd* [1992] 4 CLJ 2299 illustrates that claims pertaining to environmental matters can be made, and usually have been based upon common law causes of action such as negligence, the rule in *Rylands v Fletcher* and nuisance.

<sup>925</sup> Employment Act (n 4) s 60A states that the normal work hours of an employee shall not exceed 8 hours in one day or 48 hours in one week.

<sup>926</sup> *Ibid* s 60D states that all employees are permitted to paid holiday on at least 10 gazetted public holidays in any one calendar year.

<sup>927</sup> *Ibid* s 60A(3) states that the minimum payment for overtime work is 1 1/2 times the hourly rate of pay on normal working days, 2 times the hourly rate on rest days and 3 times the hourly rate on public holidays.

<sup>928</sup> The Act provides for the administration of pensions, gratuities and other benefits for officers in the public service and their dependants.

<sup>929</sup> The Act provides for the social security protection to all employees and their dependants as well as the employers.

<sup>930</sup> The Act makes provisions of financial security to its members particularly after retirement, through a compulsory savings scheme.

<sup>931</sup> This Act regulates the safety, welfare and health of persons of workplaces or in the operation of high risk machinery against risks to safety or health.

- (7) *Factories and Machinery Act 1967.*
- (8) *Petroleum (Safety Measure) Act 1984.*
- (9) *Trade Unions Act 1959.*
- (10) *Workmen's Compensation Act 1952.*<sup>932</sup>
- (11) *Industrial Relations Act 1967.*<sup>933</sup>
- (12) *Wages Council Act 1947.*
- (13) *Employment Information Act 1953.*
- (14) *Employment (Restriction) Act 1968.*
- (15) *Workers' Minimum Standards of Housing and Amenities Act 1990.*
- (16) *Weekly Holidays Act 1950.*
- (17) *Children and Young Persons (Employment) Act 1966.*

A victim of a human rights abuse who wishes to bring an action against a Malaysian TNC must comply with the requirements set out in the Industrial Relations Act 1967<sup>934</sup> ('IRA 1967'). The IRA 1967 emphasises direct negotiation between employers and workmen or employees and their trade unions to settle their differences and to regulate their collective relationship and to settle any dispute arising therefrom through their own effort and through mutually agreed procedures with minimal government intervention.<sup>935</sup> Where direct negotiation between employers, workmen or employees and their trade unions fails, the Act provides for settlement of trade disputes by conciliation or arbitration. The Act empowers the Minister of Human Resources to intervene and to refer a trade dispute at any stage to the Industrial Court for arbitration purposes.<sup>936</sup>

As regards the nature of disputes that may be brought under the IRA 1967, any trade disputes, unfair labour practices or trade union activities such as unlawful and constructive

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<sup>932</sup> This Act governs the compensation to foreign workers injured in the course of their employment and to worker's dependents in the event of fatal accident.

<sup>933</sup> This Act governs the relationship between employers and workmen or employees and their trade unions and generally deals with trade disputes.

<sup>934</sup> (Act 177) (IRA 1967).

<sup>935</sup> *ibid* Part IV.

<sup>936</sup> *Ibid* s 8(2A).

dismissal, retrenchment, transfer, promotion, unilateral change in terms and conditions of service and victimisation in connection with trade union activities may be referred to the Industrial Relations Department.

When a reference is made to Industrial Court, the court will hear, decide and hand down awards relating to trade disputes referred to it. An award can be in lieu awards, proper compensation or reinstatement of the employee to his former position.<sup>937</sup>

A decision, order or award of the Industrial Court is conclusive and final and cannot be challenged, appealed against, reviewed, quashed or called into question in any court.<sup>938</sup> However, by way of certiorari on grounds of error of law or excess of jurisdiction, the decision or award made by the Industrial Court can be challenged in the High Court.<sup>939</sup>

### iii. Consumer Protection Law

Another possible avenue open to a victim of human rights abuses (in the form of defective or hazardous products) is to bring an action under the Consumer Protection Act 1999 ('CPA 1999'). The CPA 1999 applies to areas of consumer protection that are not already covered by other statutes, such as the Contracts Act 1950, the Sale of Goods Act 1957 and the Sale of Drugs Act 1952.<sup>940</sup>

Under the CPA 1999, consumers are protected from products, services and manufacturing processes that may expose their health and life to danger.<sup>941</sup> Perhaps the most important feature of the CPA 1999 is that it prohibits any person from contracting out of the provisions in the Act.<sup>942</sup>

Where the implied guarantee regarding quality, repairs, spare parts or description and express guarantee is not being met, a consumer has a right of redress against the supplier by rejecting the product and demanding a refund or replacement.<sup>943</sup> If a product does not comply with the implied guarantee, the consumer is also entitled to claim damages for any loss or damage directly caused by the failure of the product to perform properly and for the reduced value of a product.<sup>944</sup>

Apart from providing civil remedies to consumers, the CPA 1999 also contemplates criminal liability against suppliers and manufacturers who contravene the mandatory safety standards set out in Part II of the CPA 1999.<sup>945</sup>

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<sup>937</sup> Ibid s 30.  
<sup>938</sup> Ibid s 33B.  
<sup>939</sup> Ibid s 33A.  
<sup>940</sup> Consumer Protection Act 1999 (Act 599) (CPA 1999) s 5.  
<sup>941</sup> Ibid Part III.  
<sup>942</sup> Ibid s 6.  
<sup>943</sup> Ibid s 41.  
<sup>944</sup> Ibid s 52.  
<sup>945</sup> Ibid s 25.

The CPA does not specifically state that non-nationals are barred from bringing claims. Thus, provided the non-national falls within the meaning of ‘consumer’ under the CPA, non-nationals should be entitled to bring a claim. Further, the definition of ‘manufacturer’ appears to be wide enough to embrace goods manufactured outside Malaysia. However, like most Malaysian legislation, the CPA is territorial in nature. In light of this, while it is possible for nationals and non-nationals alike to bring a claim under the CPA 1999, the claim must be brought before the Tribunal for Consumer Claims (for claims not exceeding RM25,000)<sup>946</sup> or the Malaysian courts (for claims exceeding RM25,000). It should be noted however that there are yet to be any cases heard in the court on the CPA 1999.<sup>947</sup>

#### 4. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS

##### A. Legal Aid

There are two main organisations offering legal aid in Malaysia: the Legal Aid Bureau under the Prime Minister’s Department and the Bar Council Legal Aid Centre, which is set up by the Malaysian Bar.

The activities of the Legal Aid Bureau are primarily governed by the Legal Aid Act 1971.<sup>948</sup> An applicant is entitled to legal aid if they possess financial resources which do not exceed RM25,000 per annum<sup>949</sup>, or possess financial resources exceeding RM25,000 per annum but do not exceed RM30,000 per annum.<sup>950</sup> For criminal proceedings, legal aid is only available where the accused (not being represented by counsel) pleads guilty to the charge(s) and wishes to make a plea in mitigation in respect thereof and proceedings brought under the Minor Offences Act 1955.<sup>951</sup> Similarly, legal aid is only available for civil proceedings in specified categories of cases, mostly in relation to family matters, rights and liabilities under the Workmen’s Compensation Act 1952, etc.<sup>952</sup> However, legal aid provided by the Legal Aid Bureau is limited to citizens of Malaysia.

On the other hand, the operation of the Legal Aid Centre is funded by a yearly subscription from each practising lawyer. Following its limited financial and manpower resources, legal aid is not provided in all cases. Generally, an applicant has to satisfy the ‘means test’: the monthly income after deducting certain allowed living expenses must not exceed RM650 per month (for single person) or RM900 per month (for married couple), or an applicant must not own any property worth RM45,000 or more, or an applicant must not own a car worth more than RM10,000 or a motorcycle worth more than RM4,500 (unless such vehicle is necessary for job or business purposes). Legal aid is generally available for cases involving actual or threatened physical or emotional harm, or criminal punishment other than the death penalty or a life sentence, or family law or employment law matters.

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<sup>946</sup> Ibid s 98. Under s 99 of the Act, the parties may agree in writing to extend the jurisdiction of the Tribunal for Consumer Claims in relation to claims exceeding RM25,000.

<sup>947</sup> K Loganathan, ‘An Insight into the Law of Product Safety’ [2006] 5 MLJ xxx, xxxiii.

<sup>948</sup> Act 26.

<sup>949</sup> Ibid s 15.

<sup>950</sup> Ibid s 16.

<sup>951</sup> Ibid sch 2.

<sup>952</sup> Ibid sch 3.

Unlike the Legal Aid Bureau, legal aid provided by the Legal Aid Centre is not confined to citizens of Malaysia only, nor is it restricted to the means test. Where it involves public interest matters, the means test is not applied (for example, in urgent arrest cases involving public rallies or squatters). As the operation of the Legal Aid Centre is funded by practising lawyers, it is more flexible in its operation by comparison to that of the state funded Legal Aid Bureau.

## B. Costs

The Malaysian courts impose court fees for claims filed in court. The typical fees a claimant will be expected to incur in an action brought before the High Court include formal claim filing fees (this can be by way of a writ of summons, an originating summons, an originating motion or a petition), defence fees, reply fees, interlocutory applications (if any) and the supporting affidavits, draft and sealed Order fees.<sup>953</sup> The fees are relatively insubstantial.

## C. Security For Costs

It is common for the defendant to apply to court for an order for security for costs against a foreign plaintiff for the purposes of securing payment of costs at the end of the trial.<sup>954</sup> However, security for costs is not ordered as of right for a foreign plaintiff but only if the Court thinks it just to order depending on the circumstances of the case.<sup>955</sup> Such an order is therefore discretionary.<sup>956</sup>

The circumstances that the court might take into account, include but are not limited to: whether the plaintiff's claim is bona fide and not a sham; whether the company has a reasonably good prospect of success; whether there is an admission by the defendant on the pleadings or elsewhere; whether the application for security was being used oppressively—so as to try and stifle a genuine claim.<sup>957</sup>

In practice, the defendant would apply for a consequential order that the proceedings be stayed or deemed struck off in the event that the plaintiff fails to furnish security as ordered. Such application appears to be a barrier to further court proceedings if an order for security for costs is made and the foreign plaintiff is not in a position to provide the same.

## D. Contingency or Conditional Fees

Contingency or conditional fees and / or other fee arrangements based on the result of litigation / arbitration are prohibited by the Malaysian Legal Profession Act 1976 ('LPA

<sup>953</sup> RHC (n 10) Order 59 rule 31 Appendix 1.

<sup>954</sup> Ibid Order 23 rule 1(a).

<sup>955</sup> *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310; *Salchi SPA v Ler Cheng Chye (No 2)* [2000] 1 MLJ 556.

<sup>956</sup> *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors* (No 1) [1998] 1 MLJ 99; *Ho Kai Neo (widow) & Anor v Tan Kim Tee and Tan Kiem Tie Ltd* [1940] MLJ 84.

<sup>957</sup> *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609 (CA).

1976'). S 112(b) of the LPA 1976 provides that no advocate and solicitor shall enter into any agreement by which they are retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success of such suit, action or proceeding. This section contemplates the charging of such fees in both litigation and arbitration proceedings. An advocate or solicitor who is in breach of s 112(b) will be subject to disciplinary proceedings and if found guilty of misconduct by the Disciplinary Board may be liable to be struck off the Roll or suspended from practice for a period not exceeding five years.<sup>958</sup>

## E. Limitations

The limitation periods for civil claims in Malaysia are prescribed under the Limitation Act 1953 (for West Malaysia) and the Limitation Ordinances (for Sabah and Sarawak).

For actions founded on a contract or tort the limitation period is six years from the date on which the cause of action accrued.<sup>959</sup> But in the case of a continuing injury or damage, time begins to run when the act causing the injury or damage ceased.<sup>960</sup> In so far as latent damage is concerned, the limitation period runs from the date where the cause of action accrues, not when the damage is discovered.<sup>961</sup> It is to be noted that in the case of a minor, the limitation period does not begin to run until the minor attains the age of eighteen.<sup>962</sup>

It is also worth noting that the limitation period will be suspended by reason of fraud or mistake and such limitation period will not run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.<sup>963</sup>

## F. *Forum Non Conveniens*

Even if the Malaysian courts have jurisdiction to deal with the case, at common law, a Malaysian court has still the discretion to decide whether to deal with it on the doctrine of *forum non conveniens*.

The doctrine of *forum non conveniens* has received judicial acceptance in the Malaysian courts and it is accepted that a defendant to a suit may apply to a court to stay the action on the ground that the court is not the appropriate forum and there exists another more appropriate forum to hear the matter. It has to be satisfied that by comparison, the Malaysian court is the most appropriate forum to try the action. It will be obligatory for a Malaysian court to consider as a most important factor whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. There is a great variety of factors that a Malaysian court ought

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<sup>958</sup> Legal Profession Act 1976 (Act 166) s 94.

<sup>959</sup> Limitation Act 1953 (Act 254) (Revised 1981) s 6(1)(a).

<sup>960</sup> *Arab-Malaysian Finance Berhad v Steven Phoa Cheng Loon* [2003] 1 MLJ 567.

<sup>961</sup> *Credit Corporation (M) Sdn Bhd v Fong Tak Sin* [1991] 1 MLJ 409.

<sup>962</sup> Limitation Act (n 47) s 24(1).

<sup>963</sup> *Ibid* s 29.

to consider in applying the said doctrine; the prominent one being whether any particular forum is one with which the action has the most real and substantial connection.<sup>964</sup>

## G. Piercing the Corporate Veil

Many TNCs today conduct their businesses abroad through the incorporation of foreign subsidiaries. In these circumstances, prospective claimants may wish not only to sue those foreign subsidiaries but also parent companies for liabilities incurred by their subsidiaries. The Malaysian courts have an inherent jurisdiction to pierce or lift the corporate veil. It appears that 'doing justice' is the sole criterion that motivates the courts to exercise such jurisdiction, though the categories of purposes for which the court will do so are non-exhaustive.<sup>965</sup> Lifting the corporate veil within the Malaysian context is done on a case-by-case basis. For example, the court will be willing to lift the corporate veil between a subsidiary and a parent company in situations where a group of companies may be treated as a single unit if there is unity of ownership and control.<sup>966</sup> As such it is not impossible for the Malaysian courts to lift the corporate veil so as to hold a Malaysian parent company liable for the conduct of its subsidiary abroad, whether proceedings are brought by nationals or non-nationals.

## H. Political Question and Act of State Doctrines

To the best of our knowledge, there is no restriction of this kind on a Malaysian court's ability to adjudicate on the conduct of a Malaysian TNC irrespective of whether it is a government-linked TNC or a private TNC.

### I. Amicus Brief Involvement

Malaysian courts can, in the exercise of their inherent jurisdiction—and provided it is in the interests of justice—permit participation of *amicii curiae*. In practice, an amicus is usually allowed to participate if some public interest is involved in the litigation.<sup>967</sup> An *amicus curiae* brief is to be differentiated from a watching brief, where the latter has no right of audience.

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<sup>964</sup> *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & anor* [1995] 1 MLJ 160, following *Spiliada Maritime Corporation v Cansulex Ltd*, [1986] 3 All ER 843.

<sup>965</sup> *Hotel Jaya Puri Sdn Bhd v National Union Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109; *Aspatra Sdn Bhd & ors v Bank Bumiputra Malaysia Bhd* [1988] 1 MLJ 97; *Yap Sing Hock v Public Prosecutor* [1992] 2 MLJ 714; *Tengku Abdullah ibni Sultan Abu Bakar & ors v Mohd Latiff bin Shah Mohd & ors and other appeals* [1996] 2 MLJ 265.

<sup>966</sup> *Hotel Jaya Puri* (n 53).

<sup>967</sup> One recent example is the case of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, in which the Malaysian Bar Council was invited to submit a brief in relation to the right to freedom of religion.

## J. Witness Protection

Witness protection is generally not available in Malaysia. However, in certain high profile cases,<sup>968</sup> notably criminal trials, the Royal Malaysian Police has provided protection for vulnerable witnesses.<sup>969</sup>

## K. Recognition and Enforcement of Judgments

Generally, there are no legal obstacles to enforcing within the jurisdiction judgments rendered by the national courts. The obstacles, if any, are practical in nature, e.g., delay in processing and extracting sealed orders of the court, impecuniosity of defendant, etc. However, it is pertinent to note that an action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.<sup>970</sup>

As for judgments rendered by a foreign court, the Malaysian Reciprocal Enforcement of Judgments Act 1958<sup>971</sup> (Act 99) ('REJA 1958') is relevant. A foreign judgment becomes enforceable under the REJA 1958 if it is a judgment of the superior courts of the countries specified in schedule 1,<sup>972</sup> final and conclusive between the parties, and for a liquidated sum.<sup>973</sup> Where the REJA 1958 applies, enforcement is done by way of registration of this judgment with the High Court of Malaya.<sup>974</sup> Once registered, the foreign judgment has the same force and effect as a Malaysian judgment. However, its registration can be revoked by the opposing party. This can be done, among other grounds, on the basis of fraud, public policy concerns and the original court's lack of jurisdiction.<sup>975</sup> The REJA 1958 does not differentiate between foreign judgments against parent corporations in Malaysia, whether obtained by nationals or non-nationals.

## L. Weaknesses of the Malaysian Judicial System

The Malaysian judicial system has long been perceived as lacking independence not because of the individual characteristics of the judges appointed but, rather, the manner in which appointment of judges is carried out in Malaysia. To begin with, Malaysia does not observe the true doctrine of separation of powers and there is no independent commission for the appointment and promotion of judges. All judges are appointed by the Monarch acting on advice of the Prime Minister according to art 122B(1) of the Federal Constitution.

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<sup>968</sup> The ongoing Altantuya Shaariibuu murder case is a fine example of witness protection accorded by the police force.

<sup>969</sup> It would appear that it is within the jurisdiction of the police to protect a witness under s 20(3)(j) of the Police Act 1967 which provides that the police has a duty to give 'assistance in the protection of life'.

<sup>970</sup> Limitation Act (n 47) s 6(3) .

<sup>971</sup> (Act 99) (REJA 1958).

<sup>972</sup> These include: United Kingdom (High Court in England, Court of Session in Scotland, High Court in Northern Ireland, Court of Chancery of the County Palatine of Lancaster, Court of Chancery of the County Palatine of Durham), Hong Kong (High Court), Singapore (High Court), New Zealand (High Court), Republic of Sri Lanka (Ceylon) (High Court, District Courts), India (excluding State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra) (High Court), Brunei Darussalam (High Court).

<sup>973</sup> REJA 1958 (n 59) s 3.

<sup>974</sup> RHC (n 10) order 67.

<sup>975</sup> REJA 1958 (n 59) s 5.



Before tendering his advice on the appointment of judges other than the Chief Justice, the Prime Minister is required to consult the Chief Justice according to art 122B(2). Under art 132(1) of the Federal Constitution, the Judicial and Legal Service is a public service answerable to the Judicial and Legal Service Commission of which the Attorney General is a member. In practice, a majority of the judges in the superior courts and the subordinate courts are appointed from the Judicial and Legal Service.<sup>976</sup> Perhaps, the greater cause for concern as to the independence of the judges stems from the practice of the the Judicial and Legal Service allowing its employees to move around in each of its departments. In practical terms, this means an employee of the Judicial and Legal Service Commission could be a prosecutor one day and a magistrate the next; but in either capacity, this employee would still form part of the same service and would only be answerable to the Judicial and Legal Service Commission.<sup>977</sup> It is hearty to note however that the Prime Minister of Malaysia has recently announced in his keynote address at the Malaysian Bar dinner that the government will set up a Judicial Appointment Commission to identify and recommend candidates for the judiciary to the Prime Minister.<sup>978</sup>

Apart from the issue of appointment of judges, the efficiency of the judiciary has also come under occasional scrutiny where judges reportedly fail to write their grounds for judgment, in some cases up to nine years after a verbal decision, which holds up the appeals process.<sup>979</sup>

The country's judicial system also suffers from bad deployment of resources. This is evident from the recurring vacancies in the superior courts, a cycle caused by the promotion of judges with relatively few years left to retirement. Needless to say, the shortages of judges and judicial commissioners in turn produces a severe delay and backlog of cases.

## 5. CASE STUDY

To the best of the authors' knowledge, there has not been a case brought before the Malaysian courts by a non-Malaysian victim of a human rights abuse committed by a TNC. However, the *Asian Rare Earth* case may serve as a useful guide to gauge the attitude of the Malaysian courts in respect of allegations of human rights abuse.

The plaintiffs, residents of the Bukit Merah village, sued the defendants, principally for an injunction to restrain the defendant company (Asian Rare Earth) from operating and continuing to operate its factory. They alleged that Asian Rare Earth's activities produced dangerous radioactive gases harmful to Bukit Merah residents. The claim was based on negligence, nuisance and the rule in *Rylands v Fletcher*,<sup>980</sup> the plaintiff sought various declarations, damages and injunctions.

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<sup>976</sup> A Fadzil, 'Judicial Independence in Australia and Malaysia' (2004) <<http://ssrn.com/abstract=929856>>, 5.

<sup>977</sup> Ibid.

<sup>978</sup> The full text of the Prime Minister's speech entitled "Delivering Justice, Renewing Trust" is available at 'The Malaysian Bar – Prime Minister: Delivering Justice, renewing Trust' <[http://www.malaysianbar.org.my/speeches/prime\\_minister\\_delivering\\_justice\\_renewing\\_trust.html](http://www.malaysianbar.org.my/speeches/prime_minister_delivering_justice_renewing_trust.html)> accessed 1 May 2008.

<sup>979</sup> 'Chief Justice: I've asked Judge to explain' *News Straits Times* (Kuala Lumpur 30 August 2007).

<sup>980</sup> N 12.

The factory was a Japanese / Malaysian joint venture. Operations began in May 1982. The plant processed monazite, which contains 6% of thorium, a radioactive substance. Monazite also contained smaller quantities of other radioactive substances such as uranium, and radium. The processing of monazite has as its purpose the obtaining of 'rare earths' chemical compounds of great utility. In processing monazite, the plant also produced a low-level radioactive thorium hydroxide as a by-product, which give off radiations of the alpha or gamma variety. These forms of radiation could have harmful biological effects on human cells.

The civil suit was filed in the High Court of Malaya in 1985 and the action proceeded to trial. The trial judge found that the claim based on negligence and the rule in *Rylands v Fletcher* failed following the failure on the part of the plaintiffs to prove damage. The claim based on private nuisance was allowed on the basis that there was substantial interference with the comfort of the plaintiffs in the enjoyment of the land. An injunction was granted in July 1992, though no pecuniary compensation was awarded.

However, the injunction was subsequently lifted by the Supreme Court on appeal, as the Court did not consider an injunction to be the correct remedy for nuisance. The defendant was allowed to continue its operations. The appellate Court in an unreported judgment ruled that the company did not do any wrong, as it followed all regulations made under the EQA 1974 and regulations made by the Malaysian Institute of Nuclear Technology. Nevertheless, the defendant in 1994 announced officially that it would close down permanently for economical reasons.

The *Asian Rare Earth* case highlights the difficulties in bringing actions before the local courts, even by nationals. First, the proceedings took approximately seven years for a decision to be rendered by the court. Second, the requirement to prove damage in a claim based on negligence and the rule in *Rylands v Fletcher* is difficult to prove and may not be easily demonstrated in all cases. This is an evidentiary issue. The case illustrates that besides needing a strong case on its merits, a prospective claimant must be prepared to bear out the inevitable protracted resolution of their case in Malaysian courts. Having adequate financial means is also vital to one's chance of success in the legal battle given that legal aid is not widely available in Malaysia—be it to nationals or non-nationals. The authors therefore suggest that the same difficulties will be faced whether proceedings are brought by nationals or non-nationals.

## 6. CONCLUSION

Based on the foregoing discussion, it is apparent that the legal framework in Malaysia does not present particular difficulties that would prevent non-nationals from bringing claims against Malaysian TNCs in Malaysia. This is especially so for contractual claimants and the employees of the TNCs. The same cannot be said about environmental claimants because, as the *Asian Rare Earth* case demonstrated, proving causation is a difficult task.

On a more practical level, the backlog of cases which have blighted the local courts for some time now along with the attendant delays could prove to be a major hindrance to non-nationals from obtaining justice in Malaysia.

# PEOPLE'S REPUBLIC OF CHINA

— Lianlian Guo, Mary Yu Guo, Sally Ho, Connie Lee, Yida Xu, Liangjin Zhao\* —

## 1. BRIEF BACKGROUND TO JURISDICTION

This part of the submission is concerned solely with the legal rules in force in mainland China, therefore excluding any applicable legal rules in Hong Kong, Macau or Taiwan.

China is a civil law country and hence most of the applicable laws are derived directly from legislation whereas decisions in earlier cases have little or virtually no precedent value. Although art 33 of the Constitution contains a general statement that the State respects and protects human rights, it is worth noting that citizens cannot litigate on the Constitution and as such no individual can refer directly to the Constitution in his or her lawsuit. Nevertheless, every statute is enacted with a view to protecting certain concrete rights (e.g. environmental rights) in general or for a particular group (e.g. adolescents or female citizens). Whereas international treaties to which China has concluded or acceded have the force of law in China and China is a signatory party to certain international treaties dealing with human rights such as the Convention on the Elimination of All Forms of Discrimination against Women, it is rarely the case that disputes between private parties, as in the case of corporate human rights abuses, can be enforced through this mechanism. This because relevant national laws may address the same issues (e.g. the Law of the Protection of Women's Rights and Interests in the People's Republic of China). To the extent that Chinese corporations may be held liable for corporate human rights abuses, they are to be found within the various legal instruments dealing with civil, criminal and administrative law.

China has witnessed unprecedented levels of economic development in the past thirty years. In 2007, the growth rate of GDP soared to 11.4%,<sup>981</sup> and the foreign exchange reserves reached 1,528 billion US Dollars at the end of the same year.<sup>982</sup> The prospect of the investment market also appears favourable, with 37,871 foreign enterprises, including all the major TNCs, investing \$74.7 billion in almost all branches of the national economy (other than those that are controlled under a state monopoly or where there are prohibition on the investment of foreign capital), representing a 13.6% increase; while foreign direct investment (excluding financial investment) amounted to \$18.7 billion, plus \$40.6 billion of revenues from contracting projects overseas.<sup>983</sup> China is exporting capital and labour to all parts of the world, contributing tremendously to the exploitation of natural resources and construction of infrastructure in many developing countries. Chinese TNCs are required by State policy to comply with the law of the place where they carry out their business, and are encouraged to integrate harmoniously into the local society by offering assistance to the economy.<sup>984</sup> The

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<sup>981</sup> National Bureau of Statistics, 'Statistical Report on National Economy of 2007' <[http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20080228\\_402464933.htm](http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20080228_402464933.htm)> accessed 16 March 2008.

<sup>982</sup> The People's Bank of China, 'Report on Gold and Foreign Exchange Reserves of 2007' <<http://www.pbc.gov.cn/diaochatongji/tongjishuju/gofile.asp?file=2007S09.htm>> accessed 16 March 2008.

<sup>983</sup> Report on National Economy 2007 (n 1).

<sup>984</sup> Chinese Commerce Office in Equatorial Guinea, 'Contributing to the Friendship of the Peoples in China and Equatorial Guinea', <<http://www.mofcom.gov.cn/aarticle/i/dxfw/gzzd/200803/20080305429776.html>> accessed 16 March 2008.

human rights of local residents are protected not only under their national law, but also under Chinese law governing corporate activities overseas. Chinese government has also paid adequate attention to the rights of consumers purchasing Chinese products. The Chinese legal system can largely guarantee that the human rights abuse committed by its corporate citizens overseas can be regulated.

## 2. CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST TNCS

### A. Civil Liability

Under the general principles of Chinese civil law, legal liabilities can arise from either the breach of contract proactively made by civil subjects (natural and corporate persons) or the violation of duties prescribed by statute. All civil claims are grounded on these 'privately agreed liabilities' or 'legally imposed liabilities'. The legal rules concerning contractual liability can be found in the General Principles of the Civil Law of the People's Republic of China<sup>985</sup> ('Civil Law'), the Contract Law of the People's Republic of China<sup>986</sup> ('Contract Law'), and other ancillary or supporting laws or legislative documents, for example, the Civil Procedure Law of the People's Republic of China<sup>987</sup> ('Civil Procedure Law'). The question relating to tort is addressed in the Civil Law and the Opinion of the Supreme People's Court of Several Problems Concerning the Implementation of the General Principles of Civil Law.

Legal persons have the capacity of incurring civil liabilities and those who bear civil liabilities shall also be held for administrative responsibilities, if applicable, with the possibility of attracting criminal sanctions as well if the act constitutes a crime.<sup>988</sup> Liabilities arising from acts of directors and employees of the legal person within their normal business activities are to be undertaken by the legal person.<sup>989</sup> Companies are classified as legal persons, but branches or representative offices of a company cannot assume civil liabilities independently. Although a reasonably recent doctrine in Chinese law, legislation has allowed the piercing of corporate veil by prohibiting shareholders of a company from abusing the corporation's separate legal personality.<sup>990</sup> It is generally agreed amongst lawyers that an analogy can be drawn from the theory of corporate crime in criminal law, and a company intentionally established to carry out illegal acts or a company primarily engaged in illegal acts after its establishment should be regarded as an abuse.

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<sup>985</sup> Adopted at the Fourth Session of the Sixth National People's Congress on 12 April 1986.

<sup>986</sup> Adopted at the Second Session of the Ninth National People's Congress on 15 March 1999.

<sup>987</sup> Adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1991, and revised in accordance with the 'Decision on Revising the Civil Procedure Law of the People's Republic of China', adopted at the Thirtieth Session of the Standing Committee of the Tenth National People's Congress on 28 October 2007.

<sup>988</sup> Civil Law (n 5) arts 106, 110..

<sup>989</sup> The Opinion of the Supreme People's Court on Several Problems Concerning the Implementation of the General Principles of Civil Law (1990) art 55.

<sup>990</sup> Company Law of the People's Republic of China (adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress on 29 December 1993 and revised for the third time at the Eighteenth Session of the Standing Committee of the Tenth National People's Congress on 27 October 2005) (Company Law) art 20.

## i. Contract Law

Under the relevant provisions in Civil Law and Contract Law, the claimant for a breach of contract action can generally expect to seek remedies in the form of specific performance, remedial measures, and monetary compensation.<sup>991</sup> The parties may specify in the contract that damages are payable upon breach of contract and may also stipulate the method of assessing the compensation of any loss that result from a breach.<sup>992</sup>

Corporate human rights abuses can result from breaches of employment contracts between employers and employees. The newly promulgated Employment Contract Law of the People's Republic of China<sup>993</sup> ('Employment Contract Law'), which came into force on 1 January 2008, aims to improve the employment contract system by specifying the rights and obligations of the parties to employment contracts and protects the lawful rights and interests of employees.<sup>994</sup> Art 17 provides that an employment contract shall specify, inter alia, matters such as working hours and leaves, labour compensation, social insurance, labour protection, working conditions and protection against occupational hazards, as well as other matters which laws and statutes require to be included in employment contracts. Where an employer breaches the employment contract, the employee can seek damages for breach of contract under the general provisions of the Contract Law or the Civil Law. An employer may also be subject to administrative responsibility or criminal liability if it uses violence, threats or unlawful restriction of personal freedom to compel an employee to work; or instructs the employee to perform operations that are dangerous and threatens his personal safety or those in violation of rules and regulations; or provides odious working conditions or a severely polluted environment which causes serious harm to the physical or mental health of employees.<sup>995</sup> However, art 2 of the Employment Contract Law limits its application to the establishment of employment relationships, and the conclusion and performance of employment contracts by employers and employees in the People's Republic of China. The law does not have extra-territorial effect.

### *Jurisdiction*

In contracts involving foreign elements, the court of jurisdiction can either be agreed upon by the contracting parties or determined by law. The contracting parties are generally allowed to freely choose, through written agreement, the court of the place which has practical connections with the dispute.<sup>996</sup> Should the parties fail to state any particular court of jurisdiction in their contract, the court of the place where the contract is signed or performed or where the defendant's representative office is located, shall have jurisdiction.<sup>997</sup> It is worth noting that where there is a conflict between the provisions in the Civil Procedure Law and provisions in an international treaty concluded or acceded to by China, the provisions in the

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<sup>991</sup> Civil Law (n 5) art 111; Contract Law (n 6) art 107.

<sup>992</sup> Civil Law (n 5) art 112.

<sup>993</sup> Adopted at the twenty-eighth session of the Standing Committee of the Tenth National People's Congress on 29 June 2007.

<sup>994</sup> *Ibid* art 1.

<sup>995</sup> *Ibid* art 88.

<sup>996</sup> Civil Procedure Law (n 7) art 242.

<sup>997</sup> *Ibid* art 241.

international treaty shall prevail, unless China has made reservations on that particular provision.<sup>998</sup>

### *Substantive Law Governing the Contracts with Foreign Elements*

The parties to a contract involving foreign elements are allowed to choose the applicable law, and in the absence of a choice, the law of the country to which the contract is most closely connected shall apply.<sup>999</sup> It is often subject to the interpretation of the court on a case-by-case basis to determine which place is regarded to have the closest connection. However, the place where the defendant has its domicile can usually be regarded as a factor pointing towards the place of the closest connection. A legal person such as a company has its domicile where its main administrative office is located.<sup>1000</sup> As in the case of jurisdiction, relevant provisions on choice of law in an international treaty to which China has concluded or acceded shall prevail in case of a conflict between the former and the choice of law provisions contained in the Civil Procedure Law, unless the provision in the international treaty is one for which China has made reservation.<sup>1001</sup>

### *Remedies for Claimants in the Event of Breaches of Contract*

If Chinese law applies to the case in litigation, the claimant is able to seek remedies such as specific performance, remedial measures, and monetary compensations, as discussed above.

## **ii. Tort Law**

### *Jurisdiction*

Tort claims arising from a dispute on property rights or interests involving foreign elements can also be submitted to a court with which the dispute has practical connections, to be chosen by the parties through a written agreement.<sup>1002</sup> In the absence of a choice, the court of the place where the object of the action is, or where the defendant's distrainable property is, or where the torts are committed, shall have jurisdiction.<sup>1003</sup> The place of the commission of tort includes the place where the tortious act is committed and where the tortious outcome occurs.<sup>1004</sup>

### *Substantive Law governing Torts*

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<sup>998</sup> Ibid art 236.

<sup>999</sup> Civil Law (n 5) art 145; Contract Law (n 6) art 126.

<sup>1000</sup> Civil Law (n 5) art 39.

<sup>1001</sup> Ibid art 142.

<sup>1002</sup> Civil Procedure Law (n 7) art 242.

<sup>1003</sup> Ibid art 241.

<sup>1004</sup> Supreme Court Opinion 1990 (n 9) art 216.

Claimants are not allowed to choose the substantive law governing torts. If the case is brought in a Chinese court, the law of the place where the tortious act was committed shall apply. However, for an act to be treated as tortious, the act committed must also be a tortious act under the Chinese law.<sup>1005</sup>

### *Remedies Available for Claimants when Torts are committed*

In cases of personal injury, the Civil Law requires the infringer to pay the victim medical expenses, loss in income and living subsidies, and if the victim dies, funeral expenses and necessary living expenses of the deceased's dependents are also payable (art 119). However, this provision is for the benefit of citizens only and by virtue of art 8, rights and obligations of citizens shall apply to foreigners within territory of the People's Republic of China. Hence foreign nationals who sustained personal injury abroad are unable to invoke this provision. Nevertheless in such a case the governing law will generally be the law of the place where the tort took place, and it is open to the foreign national to plead the applicable foreign law in a Chinese court for the determination of the issue.

The Civil Law also imposes liabilities on those who manufacture substandard products that cause property damages or physical injury to others (art 122), persons engaging in operations that are hazardous to the surroundings and thereby causing damages to other people (art 123), and those who cause environmental damages and pollution (art 124). In the case of those tortious acts, remedies may be claimed without proving the subjective fault of the tortfeasor.<sup>1006</sup>

## **B. Criminal Liability**

### **i. The Legal Regime**

The Criminal Law of the People's Republic of China<sup>1007</sup> ('Criminal Law') has two parts. Part I sets out the basic principles about crimes and punishments, the scope of application of the Criminal Law and concrete application of punishments. Part II contains provisions about specific crimes.

The Criminal Procedure Law of the People's Republic of China<sup>1008</sup> ('Criminal Procedure Law') has four parts: (i) general provisions; (ii) filing a case, investigation, and initiation of public prosecution; (iii) trial; and (iv) execution. Three categories of public organs are responsible for dealing with criminal cases:

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<sup>1005</sup> Civil Law (n 5) art 146.

<sup>1006</sup> See Ibid art 106, which provides that civil liability shall still be borne even in the absence of fault, if the law so stipulates. See also Ibid arts 122–24, which specify the situations under which relevant persons may be held accountable for civil liabilities even without negligence.

<sup>1007</sup> Adopted by the Second Session of the Fifth National People's Congress on 1 July 1979 and amended at the Fifth Session of the Eighth National People's Congress on 14 March 1997.

<sup>1008</sup> Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and revised in accordance with the Decision on Revising the Criminal Procedure Law of the PRC adopted at the Fourth Session of the Eighth National People's Congress on 17 March 1996.

- (1) *Public Security Bureaus* carry out investigation, detention, execution of arrest and preparatory examination;
- (2) The *People's Procuratorates* approve arrest warrants, conduct investigations (initiated on their own initiative) and pursue public prosecution; and
- (3) The *People's Court* adjudicates cases.<sup>1009</sup>

## ii. 'Criminal Capacity' of Corporations and Extraterritorial Effects of Chinese Criminal Law

The concept of 'corporate criminal capacity' was introduced to the criminal laws of the PRC for the first time in 1997.<sup>1010</sup> According to art 30 of the Criminal Law,<sup>1011</sup> a company, enterprise, institution, organ, or public organisation (collectively and generally referred to as 'units') that conducts an act harmful to society, where such an act is stipulated as a crime, shall bear criminal responsibility. A key principle adopted in the Criminal Law is the 'dual-responsibility principle'<sup>1012</sup> which is manifested in art 31 of the Criminal Law. Under art 31, a 'unit' which commits a crime shall be punished with a fine, and the persons directly in charge and other persons directly involved in the crime shall be given a punishment, unless specified otherwise in other specific provisions of the Criminal Law.<sup>1013</sup>

According to art 7 of the Criminal Law, the application of the Criminal Law extends to the citizens of the PRC who commit crimes prescribed in the Criminal Law *outside* the territory of the PRC, except those for which the Criminal Law prescribes a maximum punishment of fixed-term imprisonment of not more than three years. Under the Constitution, 'citizens' are natural persons, but not juridical persons. Therefore the extra-territorial effect of the Criminal Law does not extend to TNCs that may have committed crimes prescribed in the Criminal Law outside the PRC. This raises the question whether the extra-territorial effect of the Criminal Law nevertheless extends to the persons directly in charge of corporate conduct and to other persons directly involved in the crime that could be committed by a unit but for the fact that the crime has been committed by the unit outside the PRC.

There is no clear answer to this question, which has been raised as one of the uncertainties about unit crimes in the Criminal Law.<sup>1014</sup> The answer to this question partly hinges on another uncertainty in the Criminal Law: the relationship between the criminality of persons

<sup>1009</sup> JF Chen, SW Ke, 'Criminal Law' in J Chen, S Ke (eds) *China Business Law Guide* (vol 1 Asia Business Law Series, 1<sup>st</sup> Asian edn Kluwer Law International, The Hague 2005) para 7-820.

<sup>1010</sup> *Ibid* para.7-176.

<sup>1011</sup> This part of the report concerning the criminal law of the PRC adopts the English translation in Ministry of Commerce of the People's Republic of China, 'Invest in China' <<http://www.fdi.gov.cn>> accessed 25 April 2008.

<sup>1012</sup> Chen and Ke (n 29) para 7-180.

<sup>1013</sup> It should be noted that the Criminal Law also contains some provisions that are stipulated to be violated by a unit but the criminal responsibility is laid only on the persons directly responsible for it but not the unit itself. Cf. Criminal Law (n 27) art 137. However such provisions are relatively rare in the Criminal Law. Cf. G Hong 'Tantan Danweifanzui Zerenrenyuan de Tedingxing yu Chufa Shixing Shuangfazhi Yuanze de Lijie he Shiyong' [A Comment on the Specificity of the Person-in-Charge in Unit Crimes and the Understanding and Application of the Principle of Dual-Liability] (2005) <<http://www.chinacourt.org/html/article/200511/07/184438.shtml>> accessed 8 March 2008.

<sup>1014</sup> See for example, L Peng 'Tantan Danweifanzui zhong de Jige Wenti' [A Comment on Several Issues in Unit Crimes], [2000] 4 Journal of Guizhousheng Zhengfaguanliganbu Xueyuan <<http://www.criminallawbnu.cn/criminal/Info/print.asp?pkid=11463>> accessed 8 March 2008.



in charge of a unit or persons directly involved in a crime committed for the benefit of a unit and the criminality of the unit. It is unclear whether persons in charge of a unit or persons directly involved in a crime committed for the benefit of a unit are criminally liable if the crime is one that is not stipulated as a crime that can be committed by a unit.<sup>1015</sup> The Supreme People's Procuratorates has pointed out in its binding Reply that, with respect to stealing of property, the individual in charge of a unit that organised theft for the purpose of obtaining benefits for the unit should be punished under art 264 Criminal Law, which is not one of the crimes that is stipulated as a crime capable of being committed by a unit.<sup>1016</sup> This Reply is restricted to theft only and uncertainty still persists in respect of other crimes. Nevertheless, it is the view of most commentators that the same principle should apply in respect of other crimes. Thus, under this view, individuals in charge of a unit or individuals who are directly involved in a crime committed for the benefit of a unit may still be held criminally liable even if the crime is one that is not stipulated as a crime that can be committed by a unit.

A more indirect route that a victim of human rights violation by TNCs may adopt to subject TNCs operating outside the PRC to criminal liabilities is to argue that the criminal act took place within the territory of the PRC. Under art 6 of the Criminal Law, in such a case, the crime shall be deemed to have been committed within the territory of the PRC. Whether this argument can be substantiated will turn on the facts of each individual case.

### **iii. Offences Applicable to TNC Human Rights Violations Overseas**

In the context of overseas human rights violations, there are three relevant crimes under the Criminal Law: the production and sale of fake or substandard commodities (arts 140–50), offences relative to endangering public health (arts 330–37) and offences relative to undermining the protection of environmental resources (arts 338–46). If a unit commits the prescribed crime, the unit would be sentenced to a fine and the persons directly in charge and other persons directly responsible would also receive punishment. On the other hand, it is not specified in the provisions on the crimes of Organising, Forcing, Luring, Sheltering and Introducing Women Into Prostitution (arts 358–62) that a unit is capable of committing the prescribed offences. This type of crime is not a type of unit crime expressed in the legislation. However, under art 361, personnel of a unit in the trade of hotel, catering or entertainment or in taxi service is criminally liable for organizing, forcing, luring, sheltering or procuring anyone to engage in prostitution. Therefore, the above provisions may be relevant in the case of human right violations such as women trafficking.

### **iv. PRIVATE AND PUBLIC PROSECUTION**

Criminal prosecutions can be brought by public organs and, for certain types of cases, by private persons. The following discussion focuses on the victim's involvement and rights in the criminal process. Generally, a first instance criminal process involves the following steps: filing of cases, investigation, initiation of prosecution and trial.

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<sup>1015</sup> C Jianbin, Y Jie 'Sifa Shiwu zhong Danweifanzui de Jige Wenti Tanxi' [A Research into Several Problems Concerning Unit Crimes in Law Practice] (2006) <<http://www.chinacourt.org/html/article/200605/15/204747.shtml>> accessed 8 March 2008; L Zihua 'Danwei Shishi Ziranren Fanzui Falv Shiyong Wenti Tanxi' [A Research into the Problem of Application of Law in the Natural-Person Crimes Committed by Units] (2006) <<http://www.dffy.com/faxuejieti/xs/200612/20061212203537.htm>> accessed 8 March 2008.

<sup>1016</sup> Reply to the Question of the Application of Law in the Event of Stealing Committed and Organised by the Personnel of a Unit, promulgated and enforced by the Supreme People's Procuratorate on 13 August 2002.

### *Private Prosecution*

Art 186 of the Interpretations Concerning Several Issues in the Implementations of the Criminal Procedure Law of the People's Republic of China ('Legal Interpretation No [1998]23')<sup>1017</sup> provides that private prosecution is available if:

- (1) The provisions in art 170 of the Criminal Procedure Law and art 1 of the Legal Interpretation No [1998]23 are met (the provisions are spelt out below);
- (2) The case is under the jurisdiction of the court;
- (3) A victim in a criminal case files a lawsuit; and
- (4) There are specific defendants, concrete claims and evidence to prove that the criminal acts were committed by the defendant

Art 170 of the Criminal Procedure Law and art 1 of the Legal Interpretation No [1998]23 stipulate that cases in which private prosecution are available include the following:

- (1) Cases to be handled only upon complaint such as defaming, forcibly interfering with another person's freedom of marriage or unlawful possession of property;
- (2) Cases for which the victims have evidence to prove that are minor criminal cases, which include, amongst others, intentional infliction of bodily injury, unlawful entrance upon other people's residence, obstruction of freedom of communication and production and distribution of fake shoddy goods; and
- (3) Cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, but the public security organs or the People's Procuratorates has made a written decision not to investigate.

Under art 88 of the Criminal Procedure Law, a victim or, if the victim is dead or has lost his ability of conduct, his legal representatives and near relatives shall have the right to bring a suit directly to a people's court.

### *Public Prosecution*

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<sup>1017</sup> Promulgated by the Supreme People's Court of the People's Republic of China Legal Interpretation No [1998]23. For an English translation of this Interpretation, please refer to W Luo, *The Amended Criminal Procedure Law and the Criminal Court Rules of the People's Republic of China: With English Translation, Introduction, and Annotation* (vol 3 China Law Series, WS Hein, Buffalo 2000) 147.

Under art 84 of the Criminal Procedure Law, when a victim's personal or property rights are infringed upon, he or she shall have the right to report to a public security organ, a People's Procuratorate or a People's Court about the facts of the crime or bring a complaint to it against the criminal suspect. The body to which this is reported or brought shall accept all reports, complaints and information and refer the case to the competent organ and notify the victim if a case does not fall under its jurisdiction. If the case does not fall under its jurisdiction but calls for emergency measures, it shall take emergency measures before referring the case to the competent organ.

The relevant public organ will then examine the relevant materials and decide if a case should be filed.<sup>1018</sup> Where a victim considers that a case should be filed for investigation by a public security organ but the latter has not done so and the victim has brought the matter to a People's Procuratorate, the People's Procuratorate shall request the public security organ to state the reasons for not filing the case. If the People's Procuratorate considers that the reasons for not filing the case given by the public security organ are untenable, it shall notify the public security organ to file the case, and upon receiving the notification, the public security organ shall file the case.<sup>1019</sup>

After a case is filed, the public security organ will start investigating.<sup>1020</sup> The decision whether to initiate public prosecutions is considered and made by the People's Procuratorates.<sup>1021</sup> If the People's Procuratorate decides not to initiate a prosecution with respect to a case that involves a victim, it shall send the decision in writing to the victim. A dissatisfied victim may (i) petition to the People's Procuratorate at the next higher level and, if rejected, bring a lawsuit to a people's court, or (ii) bring a lawsuit directly to a people's court.<sup>1022</sup>

### *Incidental Civil Action*

A victim that has suffered material losses as a result of the defendant's criminal act has the right to file an incidental civil action during the course of the criminal proceeding.<sup>1023</sup>

### *Right to entrust Agents Ad Litem*

A victim in a case of public prosecution and a party in an incidental civil action and his legal representatives shall, from the date on which the case is transferred for examination before prosecution, have the right to entrust agents ad litem.<sup>1024</sup> A private prosecutor in a case of

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<sup>1018</sup> Criminal Procedure Law (n 28) art 86.

<sup>1019</sup> Ibid art 87.

<sup>1020</sup> Ibid art 89.

<sup>1021</sup> Ibid art 136.

<sup>1022</sup> Ibid art 145.

<sup>1023</sup> Ibid art 77. For conditions to be complied with to initiate an incidental civil action, see Legal Interpretation No [1998]23 (n 37) art 88.

<sup>1024</sup> Criminal Procedure Law (n 28) art 40.

private prosecution and a party in an incidental civil action and his legal representatives shall have the right to entrust agents ad litem at any time.<sup>1025</sup>

### *Penalties and Compensation*

The principle of the penalties for the unit crime in PRC is dual-responsibility. Under art 30 of the Criminal Law, a unit which commits a crime shall be punished with a fine, and the person(s) directly in charge and other person(s) directly involved in the crime shall be given punishment. Therefore the criminal penalty for the unit is only restricted to fines, but there may be other administrative penalties such as an order to close down the company.

Art 36 further provides: If a victim has suffered economic losses as a result of a crime, the criminal shall, in addition to receiving a criminal sanction according to law, be sentenced to make compensation for the economic losses in the light of the circumstances. If a criminal who bears civil responsibility and is punished with a fine in the meantime, has not enough property to pay off, or is punished with confiscation of property, he shall first bear responsibility of civil compensation to the victim.

### *Piercing the Corporate Veil in Chinese Criminal Law*

As discussed above, the Criminal Law adopts a dual responsibility principle and therefore persons directly in charge of a unit and other persons directly involved in the relevant crime shall be punished. There is another case in which the corporate veil will be removed: if the person(s) set up the corporation, enterprise or institution for the purpose of committing crimes, or the main activities of the corporation, enterprise or institution are committing crimes, the person(s) in charge shall bear criminal liability (Judicial interpretation of the Supreme Court of PRC).

PRC criminal law is not applicable to overseas subsidiaries as they do not have Chinese nationality, and it does not have extraterritorial effect on corporations. Therefore it seems hard to pierce the corporate veil between the parent company and the subsidiary and impose criminal liability on the parent. Nevertheless, where a parent company sets up a subsidiary overseas that is primarily engaged in illegal activities, and the conducts such as giving orders to the subsidiary constitute a conspicuous part of the activities of the parent company, then the person in charge may be punished directly regardless of any corporate form.

## **C. Administrative Law**

Administrative law in China provides actions to interested parties for the review of decisions made by administrative organs. The actions of corporations, even if they are state-owned, cannot normally be reviewed under Chinese administrative law.<sup>1026</sup>

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<sup>1025</sup> Ibid.

### 3. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS

#### A. Availability of Legal Aid

Legal aid is available to citizens with economic difficulties under the Regulation on Legal Aid.<sup>1027</sup> Non-citizen defendants without a defence lawyer would be granted legal aid in criminal actions.<sup>1028</sup> On the other hand, it is not stipulated in any legislation that legal aid is available to non-citizen plaintiffs in civil actions. However, the view commonly held is that foreign citizens are entitled to legal aid if one of the following conditions are met: 1) if Chinese citizens are also entitled to legal aid in civil actions under the law of the country of residence of the foreign citizen; or 2) if China has entered into a treaty on judicial assistance on legal aid with that foreign country.<sup>1029</sup>

There are 4 types of legal aid bodies in China: the central, provincial (or autonomous region or metropolitan city directly under the central government), regional (municipality or prefecture) and county or district legal aid bodies.<sup>1030</sup> The standard of economic difficulty required is assessed by the people's government of the province, autonomous region, or municipality directly under the Central Government where a case is accepted.<sup>1031</sup>

The claims which are within the scope of legal aid in civil actions include requesting for state compensations, requesting for social insurance treatment or minimum life alimony treatment, requesting for survivor's pensions or relief funds, requesting for the payment for supporting parents or grandparents, and children, requesting for the payment of labour remunerations and claiming civil rights and interests arising from the brave act of righteousness.<sup>1032</sup> The list is not exhaustive. The people's government of the provinces, autonomous regions, and municipalities directly under the Central Government may make further additions. Therefore, whether a claim lies within the scope of legal aid depends on the relevant regional legislation.

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<sup>1026</sup> See in general, Administrative Procedure Law of the People's Republic of China (adopted at the Second Session of the Seventh National People's Congress on 4 April 1989) (Administrative Procedure Law) art 11, which provides for the scope of accepting administrative cases.

<sup>1027</sup> Adopted at the 15th executive meeting of the State Council on 16 July 2003 and promulgated for effect as of 1 September 2003.

<sup>1028</sup> Article 4 of the Notice of the Supreme People's Court and the Ministry of Justice on the Work for Legal Aid in Criminal Actions, 20 May 1997.

<sup>1029</sup> See the interview with the Vice-minister of the Ministry of Justice of the People's Republic of China, <<http://www.china.com.cn/chinese/LP/1978.htm>> accessed 17 March 2008; See also, as an example, the legal aid policy of Heshan City which provides for the granting of legal aid to a foreign citizen on the condition that a treaty on judicial assistance has been entered into between China and the country of residence of the foreign citizen. <[http://big5.heshan.gov.cn:82/gate/big5/www.heshan.gov.cn/wsbs\\_admin/html/2006/08/20060823154951-1.htm](http://big5.heshan.gov.cn:82/gate/big5/www.heshan.gov.cn/wsbs_admin/html/2006/08/20060823154951-1.htm)> accessed 19 March 2008.

<sup>1030</sup> Wong Kai-shing 'China: Legal Aid in China' (1999) 9 Human Rights Solidarity <<http://www.hrsolidarity.net/mainfile.php/1999vol09no11/1949/>> accessed 17 March 2008.

<sup>1031</sup> Regulation on Legal Aid (n 47) art 13. Cf. Notice of the Supreme People's Court and the Ministry of Justice on Printing and Distributing the Provisions on the Work for Legal Aid in Civil Actions, No. 77 [2005] of the Ministry of Justice September 22<sup>nd</sup>, 2005, art 3.

<sup>1032</sup> Regulation on Legal Aid (n 47) art 10.

## B. Legal Costs and Other Formal Costs

According to the Measures for the Payment of Litigation Costs<sup>1033</sup> (adopted at the 159<sup>th</sup> executive meeting of the State Council on 8 December 2006) ('Litigation Costs Measures'), a party participating in a civil or administrative litigation shall pay litigation costs to the people's court ('litigation costs'). Foreigners participating in such litigations in the people's court are also governed by the Litigation Costs Measures.<sup>1034</sup>

The litigation costs include:

- (1) Case acceptance fees;
- (2) Application fees; and
- (3) Traffic expenses, accommodation expenses, living expenses, and subsidies for absence from work, which are incurred by witnesses, authenticators, interpreters and adjustment makers for their appearing in the people's court at designated dates.<sup>1035</sup>

Litigation Costs are generally borne by the losing party.<sup>1036</sup> Depending on the type of cases, the amount of case acceptance fee and application fee are either a fixed sum or a percentage of the claimed amount or compensation. It is beyond the scope of this report to list out the entire scheme, but to give a few possibly relevant examples, the case acceptance fee for a labour dispute case is RMB10 whilst it ranges from RMB50 to RMB100 for a non-property case which is not one of divorce or infringement of right to name, portrait, reputation, honour or personality.<sup>1037</sup>

The State will provide judicial relief to the parties who have real difficulties in paying Litigation Costs and guarantee their lawful exercise of their litigation rights, and safeguard their lawful rights and interests.<sup>1038</sup> The details are set out in Chapter 6 of the Litigation Costs Measures. No Litigation Cost is payable in a civil action incidental to a criminal action.<sup>1039</sup>

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<sup>1033</sup> Adopted at the 159<sup>th</sup> executive meeting of the State Council on 8 December 2006 ('Litigation Costs Measures').

<sup>1034</sup> Art 5.

<sup>1035</sup> Ibid art 6.

<sup>1036</sup> Ibid art 29.

<sup>1037</sup> Ibid art 13.

<sup>1038</sup> Ibid art 4.

<sup>1039</sup> Legal Interpretation No [1998]23 (n 37) art 102.

## C. Procedural Obstacles

### i. Standing of Foreign Nationals and Evidential Burdens

Art 3 of the Civil Procedure Law provides that aliens, stateless persons, foreign enterprises and organisations that bring suits or enter appearance in the people's courts shall have the same litigation rights and obligations as citizens, legal persons and other organisations of the People's Republic of China.

Although there is no specific provision in the Criminal Procedure law, the same treatment can be drawn from the general principles of the Chinese legal system and the state policy, which will not impose extra burdens on foreign nationals.

In public prosecution cases, the victim shall have the right to report to a public security organ, a People's Procuratorate or a people's court about the facts of the crime or bring a complaint to it against the criminal suspect,<sup>1040</sup> but the victim does not have to prove the crime. Instead, the evidentiary burden rests on the public prosecution organ.<sup>1041</sup>

In the private prosecution cases, the private prosecutor should bear the evidentiary burden. Art 171 of the Criminal Procedure Law provides:

After examining a case of private prosecution, the People's Court shall handle it in one of the following manners in light of the different situations: (1) If the facts of the crime are clear and the evidence is sufficient, the case shall be tried at a court session; or (2) In a case of private prosecution for which criminal evidence is lacking, if the private prosecutor cannot present supplementary evidence, the court shall persuade him to withdraw his prosecution or order its rejection.

According to art 77 of the Criminal Procedure Law, if a victim has suffered material losses as a result of the defendant's criminal act, he shall have the right to file an incidental civil action during the course of the criminal proceeding.

Though the incidental civil action shall be heard together with the criminal case, the substantial law applicable to it should be the Civil Procedure Law. Thus the burden of evidence should rest on the plaintiff of the incidental civil action.<sup>1042</sup>

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<sup>1040</sup> Criminal Procedure Law (n 28) art 84.

<sup>1041</sup> See W Jianfa, 'Lun Xingshi Susong zhong de Juzheng Zerenzhuti' [A Discussion about the Onus of Proof on Parties in Criminal Litigation] <[http://www.chinalawedu.com/news/2004\\_5%5C13%5C0955066291.htm](http://www.chinalawedu.com/news/2004_5%5C13%5C0955066291.htm)> accessed 19 March 2008.

<sup>1042</sup> Ibid.

## **ii. Prohibitions to Prosecute, Prosecutorial Discretion and Withdrawal of Proceedings**

Art 15 of the Criminal Procedure Law stipulates that no investigation shall begin, or if investigation has already been undertaken, the case shall be discontinued if:

- (1) An act is obviously minor, causing no serious harm, and is therefore not deemed a crime;
- (2) The limitation period for criminal prosecution has expired;
- (3) An exemption of criminal punishment has been granted in a special amnesty decree;
- (4) The crime is to be handled only upon complaint according to the Criminal Law and there has been no complaint or the complaint has been withdrawn;
- (5) The criminal suspect or defendant is deceased; or
- (6) Other laws provide an exemption from investigation of criminal responsibility.

## **iii. Statute of Limitation**

### *Civil Claims*

Art 135 of the Civil Law provides a general limitation period of two years regarding applications to a people's court for protection of civil rights. In cases concerning the claims for compensation for bodily injuries and sales of substandard goods without proper notice to that effect, art 136 provides a one-year limitation period. The limitation period shall be deemed to start running when the entitled person knows or should know that his or her rights have been infringed upon, subject to the proviso that the people's court shall not protect the right if 20 years have elapsed since the infringement of rights occurred (art 137). However, the limitation of action may be extended at the people's court's discretion under special circumstances. Further, there are some special provisions in Environmental Law and Maritime Law with different limitation periods.

### *Criminal Claims*

The limitation period, stipulated in art 87 of the Criminal Law, varies with the term of imprisonment prescribed for the crime. The shortest limitation period is five years when the maximum prescribed punishment is fixed-term imprisonment of less than five years. The maximum limitation period is twenty years when the maximum prescribed punishment is life



imprisonment or death. If after twenty years it is considered that a crime must be prosecuted, the matter must be submitted to the Supreme People's Procuratorate for approval. It should be noted that there is no limitation period with respect to criminals who escape from investigation or trial after a people's procuratorate or public security organ or state security organ places the case on file and conducts investigation, or a people's court handles the case. Also, there is no limitation period if a victim puts forward an accusation during a limitation period for prosecution, and a people's court or people's procuratorate or public security organ shall place the case on file but fails to do so.

The limitation period for prosecution shall be counted from the date of the crime; if the criminal act is of a continual or continuous nature, it shall be counted from the date the criminal act is terminated.<sup>1043</sup>

#### **iv. Subsidiary and Parent Company Liability**

A corporation can bear civil or criminal liabilities. The main concern here is whether a foreign national who suffered injury or other damages because of acts committed by an overseas subsidiary of a Chinese corporation is able to bring a case against the Chinese parent company, and thus hold it liable for the conduct of its subsidiaries. The doctrine of separate legal personality often makes this impossible. However, as discussed in the relevant sections of Civil Liability and Criminal Liability above, Chinese law does enshrine the doctrine of piercing the corporate veil in that shareholders are not allowed to abuse a corporation's separate legal personality. Where a subsidiary has been set up for the main purpose of carrying out illegal activities for example, this may trigger the operation of the doctrine. Yet where Chinese corporations establish overseas subsidiaries, it will rarely be the case that the parent company has illegal purposes in mind. To the contrary, subsidiaries are often set up in a foreign country in order to facilitate investment or trading or some other legal purposes. Therefore it seems difficult to hold a Chinese parent company liable for the conduct of its subsidiaries overseas, unless it can be shown that the overseas subsidiary has been set up for the purpose of carrying out some criminal activities.

#### **D. Political Question and Act of State Doctrines**

Under Chinese law there is a general doctrine that acts of state are not justiciable. However, the doctrine is not relevant to the conduct of a corporation, even if it is state-owned, as a corporation is not even considered a state-entity under administrative law.

#### **E. Amicus Brief Involvement**

To the best of our knowledge, there is no scope for third party intervention as *amicus curiae* in Chinese law.

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<sup>1043</sup> Criminal Law (n 27) art 89.

## F. Witness Protection

The people's courts, the People's Procuratorates and the public security organs are required under art 49 of the Criminal Procedure Law to ensure the safety of witnesses and their near relatives. Any person who intimidates, humiliates, beats or retaliates against witnesses or their near relatives, and if this act constitutes a crime, it shall be investigated for criminal responsibility according to law. If the case does not constitute a criminal act, such person shall be punished for violation of public security in accordance with law.

## G. Enforcement of Judgments

### i. Enforcement of Foreign Judgments in China

According to art 265 of the Civil Procedure Law, there are two routes to recognise and enforce a foreign judgment in Chinese courts. The first route is for the claimant to apply directly to the intermediate people's court of PRC for recognition and enforcement, provided that it has jurisdiction over the claim. The second route is for the foreign court to request recognition and enforcement of its judgment. The foreign court could only do so in accordance with an international treaty under which both that foreign country and China are signatory parties. In the absence of such a treaty, the Chinese court would only enforce the foreign judgment in accordance with the principle of reciprocity. Art 266 of the Civil Procedure Law further provides that the Chinese court would only enforce the foreign judgments if it considers that the judgment does not contradict basic principles of the law of PRC and does not violate the state sovereignty, security, social, public interest of China.

However, China has signed very few such international treaties<sup>1044</sup> and it is rare that it would enforce a foreign judgment based on the principle of reciprocity. Reciprocity here means that there must be a precedent where the foreign court has enforced a Chinese judgment before.<sup>1045</sup> It has been pointed out by commentators that this requirement in effect is forcing other foreign courts to first recognise a Chinese judgment.<sup>1046</sup> Therefore, this explains the rare instances of foreign judgments being recognised on the basis of reciprocity. For example, in 1994, the Dalian Intermediate Level People's Court rejected the application for enforcing a Japanese court judgment by which a Japanese national was seeking a transfer of the Defendant's (also a Japanese national) equity interest in a Chinese company to him in satisfaction of a debt.<sup>1047</sup>

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<sup>1044</sup> For example, China has not entered into any of such a treaty with its major trading partners (US, UK, Germany and Japan).

<sup>1045</sup> W Hui 'On the Legal Basis of Recognition and Enforcement of Foreign Judgment in China' <<http://www.intereconomiclaw.com/article/default.asp?id=5319>> accessed 16 March 2008.

<sup>1046</sup> Ibid.

<sup>1047</sup> See Riben gongmin Wuwei Huang shenqing Zhongguo fayuan chengren he zhixing Riben fayuan panjue an [The Case of the Application of Japanese Citizen Gomi Akira to a Chinese Court for the Recognition and Enforcement of a Japanese Court Judgment], *Zuigao Renmin Fayuan Gongbao* [Supreme People's Court Gazette], No 1, 20 March 1996, p 29.

It should be noted that China is a party to the New York Convention. Therefore, a better alternative would be for the foreign plaintiff to obtain an arbitration award in a New York Convention member country.<sup>1048</sup>

## ii. Enforcement of PRC Judgments in a Foreign Country

Where a claimant has obtained a legally effective judgment or written order from a people's court against a TNC and the TNC's property is situated outside the territory of PRC, the claimant can directly apply for recognition and enforcement of the judgment to the foreign court which has jurisdiction.<sup>1049</sup> This requires consideration of the relevant rules on recognition and enforcement of judgments in the foreign jurisdiction, which is outside the scope of this report. Under art 264 of the Civil Procedure law, the people's court may also request recognition and enforcement by the foreign court in accordance with relevant international treaties concluded or acceded to by China, or with the principle of reciprocity, which raises the same issue as discussed in the section above.

## 4. CASE STUDY

To the best of our knowledge, there has been no case reported in China where a non-Chinese victim of a human rights abuse resulting from operation of Chinese transnational corporations overseas has sued the TNC. Whilst the Chinese media has reported on the active involvement in the economic construction of the host state, the promotion of friendship of the peoples, and the establishment of a positive image of Chinese enterprises, the Western media reports regularly on potential violations of environmental regulations and human rights by Chinese corporations operating overseas.

However, the judgment of the People's Court of Canglang District, Suzhou Municipality, Jiangsu Province on 15 July 2003, where environmental rights were concerned, may demonstrate the possible obstacles that a claimant may face when seeking remedies against a corporation for damages to environmental rights. In 1999 Mr Wu bought a property in Donggang New Village. In December 2002, the Suzhou-Jiaxing-Hangzhou Highway, which passed in close proximity to the property of Mr Wu, was completed. Mr Wu alleged to have suffered severe sound pollution caused by the vehicles passing on the Highway in the following months, and subsequently sued the Suzhou-Jiaxing-Hangzhou Co Ltd for damages to the health of his family. He argued that the company had violated his right to peaceful residence and requested the court to issue an order for noise reduction measures and to award monetary compensations. The court did not accept the noise report of Mr Wu, since it failed to contain an expert opinion and the required approval of the monitoring authority. The expert sponsored by the court found that it was impossible to monitor the noise on the Highway, without temporarily closing down a ring-road below, which was managed by another company. Although the court advised Mr Wu to add the other company

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<sup>1048</sup> Donald C. Clarke and Angela H. Davis 'Dispute Resolution in China: The Arbitration Option, in China 2000' in Lilan Zhu and Asia Law and Practice (eds) *Emerging Investment, Funding and Advisory Opportunities For a New China* (Euromoney Publications (Jersey) Limited, Hong Kong 1999) 151–62.

<sup>1049</sup> Civil Procedure Law (n 7) art 264.

to the same case, he refused. As Mr Wu could not supply sufficient evidence, the claim was dismissed.<sup>1050</sup>

As argued by Liu and Qi, this case illustrated the difficulties that a claimant could face in a civil litigation in relation to environmental rights. They point out that the claimant bore a relatively heavy burden of proof in such a case—the claimant needed to prove the existence of both the injury that he alleged to have suffered and the defendant's acts that were alleged to have inflicted the injury. They argued that, although the claimant was exempted from proving the causality between these two elements, it might not always be feasible for the claimant to submit evidence on the defendant's acts because the defendant was often in possession of the various facts and information that were related to the dispute in question and should thus be in a better position to provide the necessary evidence.<sup>1051</sup> This case also showed that the claimant seemed to have misunderstood the exemption of evidence and did not pay due attention to the facts that he ought to prove. The complaining party should attempt to obtain an expert report desirably before the litigation and fulfil the requirements on evidence, since he still has to undertake quite a heavy burden of proof.

Although this case has no precedent value, it does provide an insight into the potential problems that a foreign national may face when suing for corporate human rights abuses in China (the production of satisfactory evidence, for example).

## 5. CONCLUSION

From the discussion above, it appears that there is some, although limited, scope for legal recourse in China against Chinese TNCs. One way to achieve this is to bring a claim for breach of contract or tort. It is important for a foreign national who wishes to seek such redress in China to establish the jurisdiction of a people's court. This can be achieved through a written agreement in which the parties submit to the jurisdiction of a people's court, provided that the court has some practical connections with the dispute. It is also possible to attribute liability to the parent company operating in China by piercing the corporate veil, where an overseas subsidiary has been intentionally established to carry out illegal acts or is primarily engaged in illegal acts after its establishment.

Although a company can bear criminal liability under PRC law, the operation of the Criminal Law does not extend to crimes committed by Chinese TNCs that carry out activities outside China. Whether the Criminal Law has extra-territorial effect on persons directly in charge of the overseas company and those directly involved in the crime is unclear. Nevertheless, it seems to be the view of most commentators that persons directly in charge of a unit (which includes a company) or persons directly involved in a crime committed for the benefit of a unit can still be held criminally liable even if the crime is not one that is stipulated as a crime that a unit is capable of committing. Therefore this may provide an alternative route for victims of corporate human rights abuses, especially when the case is concerned with fake or substandard products, activities that endanger public health or those that undermine the protection of the environment. However, criminal actions are usually brought by People's Procuratorates, although private prosecution is available under certain circumstances.

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<sup>1050</sup> L Qiumei, Q Daomeng, 'A Study on the Improvement of Environmental Tort Civil Remedy in China: Study on A Representative Case' <<http://www.riel.whu.edu.cn/show.asp?ID=4495>> accessed 3 April 2008.

<sup>1051</sup> Ibid.

Further, the regime for recognition and enforcement of foreign judgments may enable a foreign national to have a foreign judgement recognised and enforced as a treaty obligation or in accordance with the principle of reciprocity.

# RUSSIA

— Oleg Haritonov\* —

## 1. BRIEF BACKGROUND TO JURISDICTION

### A. Economic Background

It is now widely accepted that the largest companies in the Russian transitional economy have gone through a process of conversion to TNCs. The presence of TNCs in Russia was officially—though informally—recognised after Vladimir Putin named Gazprom, a State-owned company and the world's largest gas producer,<sup>1052</sup> '...quite a developed TNC'.<sup>1053</sup>

According to the UNCTAD World Investment Report 2007, foreign direct investment (FDI) outflows from South-East Europe and the Commonwealth of Independent States increased for the fifth consecutive year to reach \$18.7 billion. Virtually all of this outward FDI reflected the expansion abroad of Russian TNCs, especially some large resource-based firms seeking to become global players and some banks expanding into other CIS countries.<sup>1054</sup> Russian TNCs with the biggest outward FDI rate include Gazprom, Lukoil, Norilsk Nickel, Rusal, Novoship and SeverStal.<sup>1055</sup> According to the UNCTAD report, if there were a combined list of the top 100 TNCs from developing and transitional economies, two Russian firms would be included: Lukoil and Norilsk Nickel.<sup>1056</sup>

For the last several years Russian companies have made attempts to enter the global market with substantial outward-flowing investment. While some of these initiatives were successful (e.g., the acquisition of a 20 per cent share in the South-African gold mining company 'Gold Fields' by Norilsk Nickel in 2004), others were not (e.g., the recent failure of the merger between SeverStal and Arcelor). That Western TNCs take a cautious approach to big Russian businesses may reflect perceptions of corruption in the Russian economy and the lack of a mature corporate and financial culture.

Nowadays Russian TNCs have opened offices in practically all of the world's largest financial centres, including London and New York. According to existing observations, the target regions for investment activity from Russian TNCs are the CIS (mainly Kazakhstan and the Ukraine) and the European Union (mainly Great Britain, Italy, Germany, though

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<sup>1052</sup> United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York and Geneva 2007) 32 <[http://www.unctad.org/en/docs/wir2007\\_en.pdf](http://www.unctad.org/en/docs/wir2007_en.pdf)> accessed 14 March 2008.

<sup>1053</sup> В Никитин, *Российские транснациональные компании взрослеют не по дням, а по часам* Российская газета <<http://www.rg.ru/bussines/rinky/691.shtml>> accessed 14 March 2008.

<sup>1054</sup> UNCTAD (n 1).

<sup>1055</sup> А Кузнецов, *Перспективы российских ТНК* (27 октября 2006 г.) Русский журнал <<http://www.russ.ru/content/view/full/10620>> accessed 15 March 2008.

<sup>1056</sup> UNCTAD (n 1).

there will be more attempts to invest in Central and Eastern Europe).<sup>1057</sup> Russian companies also have interests in resource-rich countries of Asia, Africa and South America. In sum, Russian companies have a global presence, spanning several different regions and a large number of host states. Their visibility and intervention in global markets is likely to increase in the future.

## **B. Jurisdictional and Legal Aspects**

The Russian Federation<sup>1058</sup> is a monist jurisdiction; generally recognised principles and rules of international law as well as international treaties to which Russia is a party are constituent elements of its legal system.<sup>1059</sup> Pursuant to art 15(4) of the Constitution, Russia proclaims the supremacy of international law, which means that relevant legal norms of international treaties overrule national law in the case these norms conflict.

Russia is a party to most major human rights instruments, including both international (e.g., the UNCHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights) and regional ones (e.g., the ECHR and the CIS Covenant on Human Rights and Basic Freedoms 2002). Most of the human rights recognised in these instruments are incorporated in the Constitution.

Russia is a civil law jurisdiction. Its legal system is based on a large variety of statutory provisions of diverse legislative levels. As a general rule, non-nationals present in the Russian territory have the same rights and obligations as its nationals.<sup>1060</sup> This rule also applies to access to justice. For example, under art 398 of the Russian Code of Civil Procedure, non-nationals can initiate proceedings before Russian courts and seek relief for violations of rights under the same rules as Russian nationals. There may, however, be limitations in the form of counter-measures in respect of citizens of those countries which impose limitations on domestic actions for Russian citizens.

Despite the fact that Russian law has a reputation amongst foreigners as an impenetrable legal system,<sup>1061</sup> in certain circumstances it provides effective causes of action for non-nationals whose rights have been affected by illegal overseas conduct of Russian corporations.

As a general point, it is worth mentioning that general rules may sometimes be changed with respect to some specific juridical persons because of their particular legal status (for instance, Russian banks working abroad) or the enactment of reciprocal agreements between Russia and other countries, especially within the CIS. A potential litigants should therefore always seek to clarify its exact status in law and that of its potential opponent prior to initiating proceedings.

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<sup>1057</sup> Кузнецов (п 3).

<sup>1058</sup> Конституция Российской Федерации от 12 декабря 1993 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Russian Constitution) art 1.

<sup>1059</sup> Ibid art 15(4).

<sup>1060</sup> Ibid art 62(3).

<sup>1061</sup> To the best of our knowledge, this part of the report reflects Russian law as of March 2008.

## 2. CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST TNCs

### A. Causes of Action

#### i. Criminal Law

##### *Capacity*

Russian criminal law does not support the concept of criminal capacity of corporations. Only mentally healthy individuals above the age specified in criminal legislation can be found liable for criminal wrongs.<sup>1062</sup> Criminal responsibility for certain specific offences that are relevant to corporate abuses can only be imposed on individuals with a special status, for instance, those obliged to comply with safety standards within a company.<sup>1063</sup> The Russian Criminal Code specifies punitive measures for a broad range of human rights abuses including genocide, human trafficking and slavery as well as more specific rights including, for instance, adequate remuneration for labour and protection of motherhood.<sup>1064</sup>

The absence of criminal capacity for corporations has the advantage, on the one hand, of preventing corporate officers from hiding behind the corporate veil. However, the overall effect of limiting corporations' liability to civil law remedies and the absence of punitive damages arguably places corporations in an unduly advantageous position and ignores the potential deterrent force of imposing criminal liability against the abuse of human rights.

##### *Extraterritoriality and Offences*

The general rule for the imposition of criminal liability on Russian citizens and stateless persons resident in Russia for acts committed abroad is that an alleged offender must commit an act which is criminalised both in the host country and in Russia, and must not have been convicted for that act in the host country (the principle of territoriality).<sup>1065</sup> In this way, employees of Russian TNCs who are nationals or resident in Russia, may be held responsible for extraterritorial human rights abuses in the Russian courts.

It may also be the case that there are employees on the board or on other structures of a Russian TNC operating abroad who are not Russian nationals. In this case, those individuals can be prosecuted in Russia for extraterritorial human rights abuses under the following principles. First, the principle of universality allowing criminal prosecution in Russian courts under the provisions of international treaties for the most violent abuses of human rights committed overseas (e.g., genocide).<sup>1066</sup> Second, the principle of reality can trigger

<sup>1062</sup> Уголовный кодекс Российской Федерации от 13 июня 1996 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Criminal Code) art 19.

<sup>1063</sup> Ibid art 143.

<sup>1064</sup> Ibid arts 127, 145, 357.

<sup>1065</sup> Ibid art 12(1); АВ Наумов, 'Практика применения Уголовного кодекса Российской Федерации: комментарий судебной практики и доктринальное толкование' (2005 г.) комментарий к ч. 1 ст. 12 <<http://www.lawmix.ru/comm.php?state=34782>> accessed 16 March 2008.

<sup>1066</sup> Наумов (n 14).



incrimination when crimes, though committed outside the Russian Federation, are nonetheless considered to be against Russian interests, as expressed in international agreements or stemming from the particular status of the territory where the crimes were committed (for example, offences committed by non-nationals of Russia in Kazakhstan on the territory of the Russian space launching site which affects Russia's interests because it has special power over that site).<sup>1067</sup>

In sum, there are no criminal prohibitions directly against Russian TNCs for acts committed in a host state under the Criminal Code. However, victims can nevertheless obtain redress by seeking the prosecution of responsible individuals within the corporation whether nationals and non-nationals where the above-mentioned conditions for expanding the courts' jurisdiction are met.

## ii. Civil Law

Russian civil law provides causes of action against human rights abuses both under contract law and tort law provisions. It is worth noting that there are some other rules for the protection of the rights of employees within the scope of employment law, a separate branch of Russian law which differs from civil law regulations substantially.<sup>1068</sup> Regarding the fact that Russian employment law is generally territorial in its extension, it may nevertheless be applicable abroad in a few, limited cases; for example, a case in which non-national employees are transferred from TNCs inside Russia to their branches in other states under employment contracts concluded in Russia. Therefore employment law may provide a possible cause of action, although this will not be discussed in detail here.

The most important element for establishing a right of action under civil law is to demonstrate a link between the dispute and Russian courts. Pursuant to the Code of Civil Procedure and the Code of Arbitrazh Procedure (the difference between the two and its implications will be discussed below when describing the legal obstacles to access to justice) as a general rule non-nationals can initiate proceedings before a court in Russia if the defendant is located within the territory of the court's jurisdiction.<sup>1069</sup>

In Russian corporate law, the requisite link is present when a Russian TNC operates in a host state through establishing a 'representation' (an office) or a 'branch', which are not themselves legal entities and act on behalf of the TNC.<sup>1070</sup> In comparison with Western corporate traditions, there is a difference between a 'representation' and a 'branch'. According to art 55 of the Civil Code of the Russian Federation, the former only represents and protects interests of the company while the latter can—in addition to these functions—

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<sup>1067</sup> Ibid.

<sup>1068</sup> Трудовой кодекс Российской Федерации от 30 декабря 2001 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008 (Labour Code).

<sup>1069</sup> Гражданский процессуальный кодекс Российской Федерации от 14 ноября 2002 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Code of Civil Procedure) arts 28(2), art 398 art 402; Арбитражный процессуальный кодекс Российской Федерации от 24 июля 2002 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Code of Arbitrazh Procedure) arts 35(1), 254.

<sup>1070</sup> Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Civil Code) art 55(3).

exercise some or all functions of its company. All representations and branches of the company must be listed in its constituent instruments.<sup>1071</sup> For instance, Gazprom, under its Charter, has representations in Minsk (Belarus), Kiev (the Ukraine), Beijing (China), New Delhi (India) and other countries.<sup>1072</sup> When breaches of rights and interests are made by representations or branches of Russian TNCs abroad, they are considered to be perpetrated by the corporations themselves. In that case, victims of the wrongs can submit claims to Russian courts established on territories where corporations are officially located (the location must be noted in the companies' constituent instruments).

It becomes much more difficult for victims to find causes of action for the protection of their rights and interests in Russia when a TNC, instead of setting up its representations and branches, opens subsidiaries which are independent legal entities incorporated under the law of a host country. This is common practice in Russian business so as to avoid liability. For example, the Russian oil giant Lukoil has more than one hundred subsidiaries in countries ranging from Finland to the Ivory Coast.<sup>1073</sup>

In accordance with art 105(2) of the Civil Code, a parent company can be found jointly responsible for its subsidiary's obligations in deals made pursuant to the parent's instructions. Thus there can be causes of action against Russian TNCs in contract in circumstances where the TNC has incorporated subsidiaries in another state, provided that the TNC had initiated the contracts or otherwise guided their subsidiaries in entering into such contracts.

In tort law it is more difficult to establish a cause of action against a TNC in Russia for harm inflicted by its subsidiaries. Generally speaking, it is practically impossible to sue a parent Russian company for tortious acts of its independent subsidiaries. However, it is possible to bring a claim in tort against a Russian parent company—for the tortious acts of its subsidiary—when the subsidiary becomes bankrupt because of acts of that parent company.<sup>1074</sup> For example, an action can be brought against the parent when the subsidiary is bankrupt and cannot redress all the damage inflicted on victims caused by use of defective mining technology imposed on the subsidiary by its parent company in Russia. But generally, if a subsidiary exists, it should always be held liable for its tortious acts independently. In addition, a foreign subsidiary can also be separately sued in Russian courts both in contract and tort if it has property in Russia.<sup>1075</sup> According to arts 1095 and 1096 of the Civil Code there are some exceptions from the rule in relation to consumer protection. For harm done to consumers by low-quality products, civil indemnification may be directly sought from Russian producers irrespective of where the products were bought and who sold them.

In sum, Russian law provides causes of action before domestic courts in contract and tort to redress wrongs committed by Russian TNCs in an overseas country when they are direct actors there. There are possible causes of action in contract against Russian TNCs in

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<sup>1071</sup> Ibid.

<sup>1072</sup> Открытое акционерное общество 'Газпром', 'Устав Открытого акционерного общества 'Газпром' глава 1 подп. 4.14 <<http://www.gazprom.ru/docs/topics/3389.shtml>> accessed 14 March 2008.

<sup>1073</sup> ОАО 'Lukoil', '-ОАО "Lukoil" – Subsidiaries' <[http://www.lukoil.com/static\\_6\\_5id\\_214\\_.html](http://www.lukoil.com/static_6_5id_214_.html)> accessed 15 March 2008.

<sup>1074</sup> Civil Code (n 19) art 105(2).

<sup>1075</sup> Code of Civil Procedure (n 18) art 402(3); Code of Arbitrazh Procedure (n 18) art 36(3).

respect of acts committed by their subsidiaries, so long as the above-mentioned conditions are met; other than an action under the consumer protection rules, there are no causes of action directly available against parent TNCs in tort. However, proceedings against foreign subsidiaries can also be separately brought before Russian courts in both contract and tort if they have property in Russia.

### iii. Administrative Law

In the Russian Federation, corporations have administrative capacity.<sup>1076</sup> As a general rule, an action for administrative wrongs committed by Russian nationals outside its territory can only be brought against a corporation under the provisions of the Code of Administrative Wrongs in those cases specified in international treaties (art 1.8(2)). Consequently, Russian administrative law is mainly of territorial effect and subject to spatial extension only in accordance with reciprocal and other international agreements. The said rule of extraterritoriality was implemented only in July 2007 and its application in practice in Russian administrative law is still under development.<sup>1077</sup>

## B. Remedies Available

### i. Criminal and Administrative Remedies

Codified remedies and sanctions may be awarded against certain individuals within corporations if they are found guilty of crimes. The Russian Criminal Code provides for a variety of sanctions, including fines, bans on holding certain appointments or undertaking certain occupations, compulsory public work, personal restraint, arrest, imprisonment for a term, and life imprisonment.<sup>1078</sup> Under the Russian Code of Criminal Procedure aggrieved persons can also bring a civil claim in a criminal trial if civilly recoverable harm was inflicted by the crime.<sup>1079</sup> In this way, due to the fact that under Russian civil law corporations are liable for wrongs of their employees,<sup>1080</sup> TNCs can be brought to trial as civil defendants on the side of their accused employees who are criminal defendants.<sup>1081</sup>

If, in accordance with international treaties and other legislation, there are causes of action against Russian corporations for administrative wrongs committed abroad, TNCs can be punished in the following ways: issuance of a warning; imposition of an administrative fine;

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<sup>1076</sup> Кодекс об административных правонарушениях Российской Федерации от 30 декабря 2001 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Code of Administrative Wrongs) art 2.10.

<sup>1077</sup> О внесении изменений в Кодекс Российской Федерации об административных правонарушениях: Фед. закон. Росс. Фед., 24 июля 2007 г., № 210-ФЗ // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. - М., 2008. – (Law of 24 July 2007) art 1(3).

<sup>1078</sup> Criminal Code (n 11) art 44.

<sup>1079</sup> Уголовно-процессуальный кодекс Российской Федерации от 18 декабря 2001 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Code of Criminal Procedure) art 44.

<sup>1080</sup> Civil Code (n 19) art 1068(1).

<sup>1081</sup> Code of Criminal Procedure (n 28) art 54(1).

confiscation of illicit objects and means used to commit the wrong; administrative suspension of their business activity.<sup>1082</sup>

## ii. Civil Remedies

### *Applicable Law*

The question of remedies available under civil law in disputes involving non-nationals largely depends on the applicable substantive law. Applicable law is either to be determined by the court deciding a case or chosen by the parties to the case. The Civil Code provides a number of regulations covering legal issues pertaining to the applicability of both contract and tort law. International treaties entered into by the Russian Federation can constitute—or affect—the applicable law. In the absence of agreement between the parties, the applicable law in cases of contract can be either that of the jurisdiction of the plaintiff or the defendant, subject to the type of the contract, the parties' roles and other factors. In general, the rule is that the applicable law is that of the jurisdiction that is more closely linked with the contract.<sup>1083</sup>

In tort, pursuant to art 1219(1) of the Civil Code, the applicable law is the law of the country where acts or other circumstances leading to the damage took place. Therefore, the law will generally be that of the host country. However, the parties to a dispute are free to agree to designate the law of the Russian court (*lex fori*) as the applicable law.<sup>1084</sup> The rule is slightly different when the harm is a result of defective products. In this case the victim can choose the law of the country (i) of the producer's or the seller's main business activity, (ii) of her domicile, or (iii) of the place of the purchase.<sup>1085</sup>

### *Specific Remedies*

Art 12 of the Civil Code provides a non-exhaustive list of remedies available for a plaintiff to defend her rights under civil law. These remedies include: acknowledgement of a right (e.g., recognising the right to privacy for a TNC worker); invalidation of a deal (e.g., quashing a leonine contract); restitution of rights (e.g., annulling an illicit eviction from property owned by a TNC); forfeit (in contracts); and compensation for moral damage and compensation for losses. Compensation for loss is probably one of the most often applicable remedies both in contracts and tort.

Russian legislation contains a general principle of full indemnification of loss subject to limitations in certain cases by law or by contract.<sup>1086</sup> Full indemnification of loss includes compensation for actual damages and loss of profit.<sup>1087</sup>

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<sup>1082</sup> Code of Administrative Wrongs (n 25) art 3.2.

<sup>1083</sup> Civil Code (n 19) art 1211(1).

<sup>1084</sup> Ibid art 1219(3).

<sup>1085</sup> Ibid art 1221(1).

<sup>1086</sup> Ibid art 15.

<sup>1087</sup> Ibid art 15(2).

In some circumstances liable parties in contracts are obliged to pay a penalty (art 330 of the Civil Code). The said payment can be established by law or by contract. Depending on the applicable provisions, it can be charged in addition to compensation for loss, instead of it, or compensation may be made only to redress losses not offset by forfeit.

Pursuant to art 401(3) of the Civil Code, corporations that fail to fulfil their obligations in commercial contracts are responsible for the consequences of their fault unless they are able to identify a *force majeure* (the principle of responsibility without guilt in contracts).

Russian law also adheres to the doctrine that corporations can be found liable for harm in tort without guilt. The relevant legal provisions declare, for instance, that a corporation which uses in its business activity 'sources of increased danger' (e.g., vehicles, explosives, extremely poisonous chemicals) is obliged to redress damages inflicted by those sources unless it proves that the damages were the result of force majeure or were intended by the victim.<sup>1088</sup> Corporations are also liable if they are proprietors or rightful possessors (e.g., lessees) of the sources of increased danger actually used.<sup>1089</sup>

Where the victim of the tort suffers physical or fatal injuries, Russian legislation provides a detailed legal mechanism to calculate actual damages and loss of profit, taking into account the victim's spending on medical treatment, convalescence, as well as any loss of income resulting from diminished working capacity.

Apart from compensation for loss, it is also possible to seek compensation for moral damage. In general, this compensation is available only when non-property rights are abused. The rights concerned substantially intersect with human rights and include the right to life and health, dignity, security of person, honour, the right to privacy, the freedom of movement and others.<sup>1090</sup> In accordance with art 151 of the Civil Code a person can demand compensation for moral damage, which must be an affliction of both physical and mental suffering, only where her non-property rights and immaterial wealth are infringed. There are some exceptions stated in law where it is possible to be awarded moral compensation for breaches of other rights. One such exception is the granting of compensation to consumers for moral damage done by wrongs to their rights to proper goods and services under special consumer protection regulations (art 15 of the Russian Federal Law on Protection of Consumer Rights 1992).

### **3. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS**

#### **A. Substantive Obstacles**

One of the main obstacles for a non-national planning to bring a criminal suit against a Russian TNC for its overseas wrongs is that Russian law does not recognise the concept of criminal capacity of corporations. Any possible proceedings can only be brought against

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<sup>1088</sup> Ibid art 1079(1) .

<sup>1089</sup> Ibid.

<sup>1090</sup> Ibid art 150.

individuals within corporations who are liable for particular crimes. There are provisions enabling victims of crime to simultaneously file a writ for damages under civil law and bring the TNC to trial if causes of action for that are present. However, non-corporate criminal capacity becomes problematic in circumstances where the individual offender absconds, and, despite the continuing presence of the TNC, investigations will necessarily be suspended (art 208(1) of the Code of Criminal Procedure).

Existing civil law allows Russian parent TNCs to hide behind the corporate veil when abuses are committed by their subsidiaries. While there are some possible causes of action for suing Russian parent corporations for wrongs of their subsidiary companies in contract, generally speaking it is very difficult to pierce the corporate veil.

While not a direct obstacle for non-nationals, the fact that Russian law does not recognise the concept of punitive damages may act as a disincentive for choosing Russian courts and Russian civil law as the applicable law. Although it is possible to obtain some measures of a punitive nature (for instance, forfeit in contracts) this arises only in specific cases and is not of general application. The concept of indemnification in Russian law has a purely compensatory character, requiring detailed research by courts on the harm involved and its economic consequences for victims. In this light, victims who bring claims before Russian courts, to be decided under Russian law, cannot—as a general rule—expect to be awarded punitive damages. In accordance with the civil regulations discussed above, victims can demand full compensation for losses including actual damages and loss of profit. Additionally, for abuses of non-property rights one can expect compensation for moral damage.

## **B. Procedural Obstacles**

### **i. Statute of Limitations**

Art 78 of the Criminal Code stipulates limitations for prosecution and conviction that range from two to fifteen years from the time the alleged crime was committed, depending on the gravity of the crime charged. The effects of the statute of limitations can be suspended when suspects hide from investigation or trial. But when the statute of limitations applies with full force, defendants are not liable to criminal prosecution.

Russian civil legislation treats limitations as a question of substantive law rather than procedural law. For this reason, relevant Russian limitations are not effective when a case is being decided under the applicable law of another jurisdiction. The general rule for all civil claims is that a person can protect her claim in court within three years from the moment when she has learned or was potentially able to learn about the infringement.<sup>1091</sup> For certain claims, as prescribed by law, limitations may vary (for instance, one year for leonine

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<sup>1091</sup> Ibid arts 196, 200.

contracts).<sup>1092</sup> In exceptional cases related to the plaintiff's personality (for instance, serious illness or illiteracy) courts can grant extension of limitations.<sup>1093</sup>

Civil procedural law also provides some limitations, which reflect and regulate certain procedural peculiarities. Usually these limitations are quite specific and do not considerably hinder the process of deciding claims.

## ii. Jurisdictional Challenges

The judicial system of the Russian Federation includes two groups of courts which are distinguished by their subject matter: 'courts of general jurisdiction' and 'arbitrazh courts'.<sup>1094</sup> The latter are arbitral authorities and represent a separate branch of Russian judicial authority. In accordance with art 1 of the Code of Arbitrazh Procedure, arbitrazh courts are entitled to administer justice in the field of commercial and economic activities. There is a statutory test for the grant of jurisdiction to either of the two court systems over a particular case. The arbitrazh courts have jurisdiction to tackle disputes: (i) of an economic nature; and (ii) whose parties are legal entities or private entrepreneurs (individuals specially registered under Russian law to engage in business).<sup>1095</sup> If either of these criteria is not met, the case will fall under the authority of the courts of general jurisdiction. Thus disputes between two corporations may not be submitted to arbitrazh courts if they are not of commercial nature (e.g., pecuniary damages inflicted by collision of two corporate vehicles). A dispute is also generally not covered by the jurisdiction of arbitrazh courts if one of the parties is an individual without the required commercial status.

While this test is easy enough to apply, non-nationals should be careful in choosing the right court for their claim. If a writ is submitted to the improper court, the plaintiff will be denied standing.

Once a court accepts jurisdiction over a suit, it must be decided by that court, even if it later becomes apparent that the matter should not fall within the court's jurisdiction for certain reasons.<sup>1096</sup> In some cases both courts of general jurisdiction and arbitrazh courts which have accepted particular disputes can pass them to the other type of court where it falls within their judicial power to do so.

The doctrine of *forum non conveniens* is neither applicable in courts of general jurisdiction nor arbitrazh courts. Once all formalities required by Russian law to accept a case for deliberation are met, Russian procedural legislation does not allow its courts to deny judicial protection only because there is a potentially more suitable forum abroad. However, Russian

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<sup>1092</sup> Ibid arts 179(1), 181(2).

<sup>1093</sup> Ibid art 205.

<sup>1094</sup> О судебной системе Российской Федерации: Фед. конституционный закон Рос. Фед., 31 декабря 1996 г., № 1-ФКЗ // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Constitutional Law of 31 December 1996) art 4.

<sup>1095</sup> Code of Arbitrazh Procedure (n 18) art 28.

<sup>1096</sup> Code of Civil Procedure (n 18) art 33(1).

courts can strike out a dispute when it is already being decided or has been decided between the same parties in a foreign court.<sup>1097</sup>

### iii. Enforcement of Judgments

Enforcement of judgments issued by Russian courts depends on the legal provisions of host countries. Russia accepts judgements of foreign courts only if it is allowed to do so under its international obligations (art 409(1) of the Code of Civil Procedure).<sup>1098</sup> Usually, the said provisions can be found in reciprocal agreements on legal assistance among countries. Russia has concluded such international agreements with many countries within the CIS. In addition, reciprocal obligations concerning the enforcement of judgements are also in place with some non-post-Soviet countries. For instance, India and Russia reciprocally enforce one another's judgments in civil and trade disputes as well as judgments on damages in criminal cases.<sup>1099</sup>

## C. Practical Obstacles

### i. Assessment of Legal System

In general, the Russian legal system is effective, both in terms of adjudicating cases and enforcing judgments. Among some of the most important positive characteristics of the system include its relative affordability for litigants and the fact that decisions are usually rendered quickly. For example, courts of general jurisdiction must decide civil cases within two months from the moment of submission of the claim; the time limitation can be even shorter than that for some categories of cases (art 154 of the Code of Civil Procedure).

The legal system does not discriminate against people on grounds of their nationality. It provides access to legal aid and enables non-nationals to use their native or any other language, as well as guaranteeing the assistance of qualified translators.<sup>1100</sup>

### ii. Legal Aid

Art 48 of the Russian Constitution 1993 guarantees every person the right to legal aid without regard to nationality. In certain circumstances legal aid can be offered. Non-nationals participating in a trial in Russia should be aware of restrictions on use of the assistance of foreign advocates (attorneys at law). In criminal cases professional legal aid to victims who submit a civil claim for compensable harm can be provided only by advocates who have

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<sup>1097</sup> Ibid art 222; Code of Arbitrazh Procedure (n 18) art 148.

<sup>1098</sup> As civil and arbitrazh procedures are based on very similar principles and as most human rights claims relevant to this report fall to be decided by courts of general jurisdiction, references will only be made to Code of Civil Procedure hereafter.

<sup>1099</sup> О правовой помощи и правовых отношениях по гражданским и торговым делам: договор между Российской Федерацией и Республикой Индией, 3 октября 2000 г. <<http://www.rus-ind.ru/eng/partnership/law/jural/>> accessed 19 March 2008 (Russian-Indian Agreement) art 24.

<sup>1100</sup> Code of Civil Procedure (n 18) art 19(2).



obtained their status under Russian law.<sup>1101</sup> As a general rule, in Russia foreign advocates can engage in legal activity only by offering aid in the law of their jurisdiction and only after special registration with the relevant local authority of justice (Art 2 of the Federal Law on Advocacy and the Bar 2002).

Russian legislation offers free legal aid to low-income and other socially protected groups of people either by subsidizing legal services or through a system of established state judicial consulting offices.<sup>1102</sup> This aid is conditional upon subject matter limitations and requires proof of eligibility under Russian social law, which depends on nationality and residence criteria that make it inapplicable in practice to non-nationals not living on the Russian territory. There is also a rule of consular representation providing for legal assistance by the diplomatic institutions of non-nationals.

### iii. Cost of Actions

Under art 88(1) of the Code of Civil Procedure, the cost of actions includes state fees and litigation costs. As a general rule, the cost is allocated to the losing party.<sup>1103</sup> Litigation costs include costs of the services of experts, translators and legal aid as well as other relevant expenses.<sup>1104</sup>

Rates of state fees and those cases in which they are imposed on litigators are specified in the Tax Code of the Russian Federation (Second Part) 2000 (chapter 25.3). For courts of general jurisdiction some examples of the rates are as follows (the rates for the initiation of proceedings before arbitrazh courts are different):

I. Filing a statement of claim stemming from property rights which can be pecuniarily evaluated:

#### The price of the claim

#### The fees to be paid

1. Less than 10,000 RUB<sup>1105</sup>

4 per cent of the price but not less 200 RUB.

<sup>1101</sup> Об адвокатской деятельности и адвокатуре в Российской Федерации: Фед. закон Росс. Фед., 31 мая 2002 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Federal Law on Advocacy and the Bar 2002) art 55.

<sup>1102</sup> Истребление имущества государственного или муниципального имущества: ооа. ппoаиiаеаiеаi iааеооаеиiоаа Диiпeеiеiе Оаааооeе iо 22 сентября 2005 г. №534 // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008.

<sup>1103</sup> Code of Civil Procedure (n 18) art 98.

<sup>1104</sup> Ibid art 94.

<sup>1105</sup> The figures are given in the Russian official currency (the Russian Rouble or RUB). 1,000 RUB are equal to approximately £21. The official exchange rates information of the Bank of Russia, 'Foreign Currency Market | Bank of Russia' <[http://www.cbr.ru/eng/currency\\_base/](http://www.cbr.ru/eng/currency_base/)> accessed 19 March 2008.

2. From 10,001 to 50,000 RUB	400 RUB and 3 per cent of the sum exceeding 10,000 RUB.
3. From 50,001 to 100,000 RUB	1,600 RUB and 2 per cent of the sum exceeding 50,000 RUB.
4. From 100,001 to 500,000 RUB	2,600 RUB and 1 per cent of the sum exceeding 100,000 RUB.
5. More than 500,000 RUB	6,600 RUB and ½ per cent of the sum exceeding 500,000 RUB but not more than 20,000 RUB.

II. Filing a statement of claim stemming from property rights which cannot be pecuniarily evaluated or from non-property rights:

<u>The litigators</u>	<u>The fees to be paid</u>
1. Individuals	100 RUB
2. Legal entities	2,000 RUB

The loser-pays principle can be extremely burdensome and for individuals when they sue large corporations and when inter-state relations are involved. The relevant legislation has adopted certain waivers, mainly in respect of state fees, but those waivers often require special status and depend on nationality. Generally speaking, non-nationals should be ready to cover legal costs on their own and should not expect to be granted with waivers.

#### **iv. Witness Protection**

In accordance with federal law there are measures available for witness protection including personal protection, resettlement, and change of identity and appearance.<sup>1106</sup> Art 309 of the Criminal Code imposes punishment for any coercive influence on witnesses.

<sup>1106</sup> О государственной защите потерпевших, свидетелей и иных участников уголовного судопроизводства: Фед. закон Росс. Фед., 20 августа 2004 г. // Консультант Плюс Интернет: Версия Проф. Технология 3000 [Электронный ресурс] / ЗАО 'Консультант Плюс'. – М., 2008. – (Law of 20 August 2004) art 6.

#### 4. AMICUS BRIEF INVOLVEMENT

Russian courts have the power to call for an amicus to clarify both legal and non-legal matters. This power may be exercised because of the need to have a credible opinion on issues that require specific knowledge or competence. The question is not so straightforward when potential amici wish to enter proceedings without a court's invitation. In criminal procedure there are strict regulations on those who can participate in litigation.<sup>1107</sup> In light of this, host countries or their officials generally cannot act in Russian courts in support of their nationals if they are not invited to take an appropriate procedural position in a criminal trial.

In the Russian legal system, a substantial role is played by public prosecutor's office, whose functions are not limited to prosecution. In civil procedure courts can invite a '*procureur*' (public prosecutor) who represents the Russian state to express a legal opinion in various disputes including, for example, indemnification of physical damages and eviction.<sup>1108</sup> A *procureur* is also in the position to bring a civil action in favour of individuals when they are not able to do so on their own.<sup>1109</sup> In accordance with art 47 of the Code of Civil Procedure, in cases specified by federal law Russian state agencies and local authorities can enter proceedings or be called to do so for the purpose of giving an opinion within their competence.

#### 5. CASE STUDY

Russian TNCs are a new phenomenon, having operated in the international market for less than 15 years. At this stage, it is difficult to find disputes involving human rights abuses committed by Russian corporations overseas. Nevertheless, the Russian judiciary has heard a range of cases illustrating the absence of a doctrine of punitive damages in civil law. The absence of this doctrine is worth noting as it can affect non-nationals suing corporations for tortious acts under Russian law.

On 22 August 2006, flight No 612 (Anapa to St. Petersburg) of Pulkovo Airlines (at the time, a large Russian airline company) crashed near Donetsk (the Ukraine) due to human error.<sup>1110</sup> The accident took the lives of 170 people including 39 children.<sup>1111</sup> One of the relatives of the victims filed a suit against FSUE State Transport Company RUSSIA, which was a successor of Pulkovo Airlines, seeking *inter alia* compensation for the moral harm inflicted by the death of her sister.<sup>1112</sup> The plaintiff claimed from the defendant 9,000,000 RUB in compensation for moral harm suffered.

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<sup>1107</sup> Code of Criminal Procedure (n 28) chs 6–8.

<sup>1108</sup> Code of Civil Procedure (n 18) art 45(3).

<sup>1109</sup> Ibid art 45(1).

<sup>1110</sup> Межгосударственный авиационный комитет Российской Федерации, 'Информация технической комиссии по результатам катастрофы самолета ТУ-154М авиакомпании 'Пулково' под Донецком 22 августа 2006 года' 3.10 <[http://www.mak.ru/russian/investigations/2006/85185/Tu-154M\\_22-08-2006.pdf](http://www.mak.ru/russian/investigations/2006/85185/Tu-154M_22-08-2006.pdf)> accessed 31 March 2008.

<sup>1111</sup> Новости NEWSru.com, 'На Украине разбился ТУ-154 авиакомпании 'Пулково': все пассажиры погибли' (22 августа 2006 г.) <<http://www.newsru.com/world/22aug2006/tu.html>> accessed 31 March 2008.

<sup>1112</sup> Коллегия адвокатов г. Москвы 'Трунов, Айвар и партнеры', 'Решение Московского районного суда г. Санкт-Петербурга по гражданскому делу по иску Б. к ФГУП 'ГТК 'Россия' о взыскании стоимости багажа и компенсации морального вреда' <<http://www.trunov.com/content.php?act=showcont&id=3188>> accessed 31 March 2008.

The court of the Moscovsky judicial district of St. Petersburg applied the rule of art 1101(2) of the Civil Code, which provides that the amount of compensation for moral damage depends on the character of physical and mental suffering caused to the victim as well as requirements of common sense and justice.<sup>1113</sup> The court held that whatever the amount of the compensation was, it would not be possible to make up for the loss the claimant's sister's life.<sup>1114</sup> It also took into consideration the circumstances of the accident, the total number of the victims and their relatives, and the potential financial consequences of its decision for FSUE State Transport Company RUSSIA, and awarded the plaintiff 70,000 RUB instead of the 9,000,000 RUB claimed.<sup>1115</sup> This decision illustrates well the tendency of Russian law to award only compensatory damages.

Another example of the same kind is the claims brought by families of the victims who died in the crash of flight No 778 (Moscow to Irkutsk) of Sibir Airlines in Irkutsk in July 2006. As the plane (an A-310) was owned by Airbus Leasing (Airbus) located in New York and Sibir Airlines (a Russian company) had a branch there, the suit was submitted to the United States District Court for the Southern District of New York mainly for the purpose of claiming more money in punitive damages.<sup>1116</sup> The lawyers of the Russian airline moved to dismiss the action on the grounds of *forum non conveniens*.<sup>1117</sup> The US District Court granted Sibir a conditioned dismissal on that ground.<sup>1118</sup> The disputes were returned to the Russian courts, which by July 2007 had considered only one case, ordering Sibir to pay to a sister of one of the 125 people killed 210,700 RUB in damages.<sup>1119</sup>

## 6. CONCLUSION

Despite the fact that domiciled TNCs are a relatively new feature of Russia's transitional economy, they already have a substantial global presence, spanning several different regions and a large number of host states. Russian law generally treats foreigners as its nationals and, so long as certain conditions are satisfied, provides effective causes of action for those whose rights are affected by the illegal overseas conduct of Russian corporations. Causes of action and remedies are provided by civil, criminal, administrative and in some cases by other branches of law. Causes of action and the remedies available for civil litigation that involves non-nationals (that is, when issues of conflict of laws arise) largely depends on the applicable law.

There are, however, some legal obstacles that can affect victims of corporate human rights abuse. First, Russian law does not support the concept of criminal capacity of corporations. By limiting corporate liability to mainly civil law remedies, the law arguably

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<sup>1113</sup> Коллегия адвокатов г. Москвы 'Трунов, Айвар и партнеры', 'Решение Московского районного суда г. Санкт-Петербурга по гражданскому делу по иску Б. к ФГУП 'ГТК 'Россия' о взыскании стоимости багажа и компенсации морального вреда' <<http://www.trunov.com/content.php?act=showcont&id=3188>> accessed 31 March 2008.

<sup>1114</sup> Idem.

<sup>1115</sup> Коллегия адвокатов г. Москвы 'Трунов, Айвар и партнеры', 'Решение Московского районного суда г. Санкт-Петербурга по гражданскому делу по иску Б. к ФГУП 'ГТК 'Россия' о взыскании стоимости багажа и компенсации морального вреда' <<http://www.trunov.com/content.php?act=showcont&id=3188>> accessed 31 March 2008.

<sup>1116</sup> Lindsay H. Tasher, 'Forum Non Conveniens Dismissal Granted Despite Co-Defendant's Objection' (Holland & Knight LLP August 2007) <<http://www.hklaw.com/id24660/publicationid1591/returnid31/contentid47437/#1B>> accessed 31 March 2008.

<sup>1117</sup> Idem.

<sup>1118</sup> Lindsay H. Tasher, 'Forum Non Conveniens Dismissal Granted Despite Co-Defendant's Objection' (Holland & Knight LLP August 2007) <<http://www.hklaw.com/id24660/publicationid1591/returnid31/contentid47437/#1B>> accessed 31 March 2008.

<sup>1119</sup> Илья Калинин, 'Правосудие не для русских' (3 июля 2007 г.) НГС.НОВОСТИ <<http://news.ngs.ru/more/29139.php>> accessed 31 March 2008.

places corporations in an unduly advantageous position, ignores the potential deterrent force of the imposition of criminal liability in preventing human rights abuse, and creates practical obstacles for litigants. Second, it is almost impossible to pierce the corporate veil and impose liability on Russian parent companies for the tortious acts of independently incorporated overseas subsidiaries. Finally, while not a direct obstacle for non-nationals, it is a general rule that punitive damages cannot be claimed under Russian civil law, which means that civil remedies are limited to compensation for loss of profits, actual and moral damages.

# SOUTH AFRICA

— Nicola Palmer and Tolga Yalkin\* —

## 1. BACKGROUND AND INTRODUCTION

From a historical perspective, TNCs have featured prominently in the South African economic, political and legal environment. During Apartheid the withdrawal of TNCs from South Africa exerted significant pressure on an economy already straining under the burden of international sanctions. Since the advent of the new dispensation, TNCs have made, and continue to make, a substantial contribution in terms of foreign direct investment in the developing economy. Under the influence of the Washington Consensus, such investment forms a principal pillar in the current South African government's macroeconomic planning as introduced through the 1996 Growth, Employment And Redistribution ('GEAR') strategy.<sup>1120</sup>

The American Chamber of Commerce estimates that nearly 50% of the chamber's top companies operate in South Africa. The list of TNCs operating through subsidiaries is extensive and includes multinationals such as Caltex Oil, BP, IBM, Vodafone, Volkswagen, Barclays Bank, Johnson Controls, Cisco Systems and BMW.

However, more relevant to the questions which this submission addresses, South Africa plays a leading role in development in the sub-Saharan African region, with a large number of companies incorporated in South Africa operating abroad. Initially driven by the mining sector, these TNCs operating outside of South Africa's borders include De Beers, Anglo American Platinum, Dimension Data and SABMiller. This makes a discussion of the liability that might attach in South Africa to such corporations for human rights abuses particularly pertinent.<sup>1121</sup>

The defining feature of the current South African legal landscape is the relatively newly adopted Constitution. The interim Constitution came into force on 27 April 1994, under which the doctrine of parliamentary sovereignty was circumscribed by the empowerment of the Constitutional Court to declare invalid any law or conduct inconsistent with the Constitution. Upon the introduction of Act 108 of 1996, the operation of this interim document was superseded and the current Constitution for the Republic of South Africa came into force.<sup>1122</sup>

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<sup>1120</sup> L Thomas, J Leape 'Foreign Direct Investment in South Africa: The initial impact of the Trade, Development and Cooperation Agreement between South Africa and the European Union' (2005) CREFSA, London School for Economics and the BusinessMap Foundation  
<[http://www.lse.ac.uk/Depts/CREFSA/pdf/CREFSA\\_BusinessMap\\_FDI\\_in\\_South\\_Africa\\_October\\_2005.pdf](http://www.lse.ac.uk/Depts/CREFSA/pdf/CREFSA_BusinessMap_FDI_in_South_Africa_October_2005.pdf)> accessed 1 April 2008.

<sup>1121</sup> 'South Africa's official gateway - investment, travel, country information - SouthAfrica.info' <<http://www.southafrica.info/>> accessed 1 April 2008.

<sup>1122</sup> J De Waal, I Currie, G Erasmus, *The Bill of Rights Handbook* (4<sup>th</sup> edn Juta & Co, Lansdowne 2002) 5–6.

The primary role of the South African Constitution is to provide a framework for the democratic structure of the state, and the respective powers of the executive, judiciary and legislature. In addition to this, and more relevant for the purposes of this submission, Chapter 2 of the Constitution contains a Bill of Rights. This chapter embeds fundamental human rights solidly in the South African legal order.<sup>1123</sup>

At its core, South African law consists of a blend of Roman-Dutch and English law (introduced only after 1806). English legal principles govern criminal, corporate and mercantile law and also guide statutory interpretation of acts and regulations. The Roman-Dutch tradition on the other hand is restricted to, *inter alia*, matters relating to property, succession, leases, and chattels. However, the role of Roman-Dutch law should not be underestimated. It often informs parts of the law (such as in relation to jurisdiction) and influences the acceptance and application of common law doctrines (such as *forum non conveniens*). As such, the character of the legal system as 'blended' adds an additional dimension to the consideration of any legal question.

In relation to international law, strictly speaking, South Africa is a dualist jurisdiction. As such, international human rights treaty obligations must be incorporated by legislative act before they become part of South African domestic law.<sup>1124</sup> However, customary international law is a legitimate source of law before South African domestic courts and in addition plays a specifically identified interpretive role when giving effect to the Constitution, provided it does not conflict with the Constitution or an Act of Parliament.<sup>1125</sup> In this way, courts are to prefer interpreting legislation in such a way that it is consistent with international law.<sup>1126</sup> This role was given a constitutional basis by the adoption of s 39(1) of the Bill of Rights. These Constitutional obligations should be kept in mind whenever considering the application of principles of civil and criminal law.

After careful review, similarly to other common law jurisdictions, there does appear to be some scope for litigation against South African companies operating abroad through actions in delict (the South African equivalent of tort) and contract, criminal litigation, and the application for enforcement of foreign judgments. However, to effectively hold South African companies liable the law must be further developed. In aid of such development, the South African Constitution may provide an extremely effective mechanism for establishing stronger domestic corporate liability for such human rights abuses. In addition to this there is a weaker argument that the Constitution contains scope for direct application of the fundamental rights enunciated in Chapter 2. In an attempt to review the potential success of these available routes of litigation, this submission will provide a detailed discussion of each.

Throughout the submission, conclusions reached should be treated as tentative. The Constitution continues to play a defining role in the determination of the validity of established laws. This role is further complicated by the applicability of both Roman-Dutch and English common law principles. Thus, not only is the law currently undergoing a rapid and innovative stage in its development, but it is doing so in an environment characterised by relatively nascent underlying principles. While this leaves scope for quite progressive human rights litigation, it also means that the exercise of ascertaining the exact content and

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<sup>1123</sup> Ibid.

<sup>1124</sup> J Dugard, *International Law: A South African Perspective* (2<sup>nd</sup> edn Juta, Kenwyn 2000) 2.

<sup>1125</sup> The Constitution of the Republic of South Africa Act 108 of 1996 (SA Constitution) s 232.

<sup>1126</sup> *Parry v Astral Operations* Case C190/2004 delivered 21 June 2005; SA Constitution (n 6) s 233.

application of the law can be difficult. As such, conclusions reached within the body of this submission should be treated as indicative, rather than definitive.

## **2. CONSTITUTIONAL BILL OF RIGHTS**

In relation to the potential for domestic constitutional litigation against transnational companies incorporated in South Africa, two principle issues must be considered:

- (1) The jurisdictional and procedural steps that must be met in order to bring a constitutional action against a South African TNC; and
- (2) The substantive applicability of the rights enshrined in the Bill of Rights to TNCs.

In order for an action to be successfully brought before the courts, the claimant must satisfy both of the above. They must also satisfy the necessary jurisdictional and procedural requirements necessary to bring a constitutionally based action. In addition, there must be a violation of a Constitutional duty imposed on the company, thus entitling the claimant to a remedy. Such a consideration relates to the substantive application of a particular right. As mentioned, Chapter 2 of the Constitution embeds a number of fundamental human rights into the legal fabric of South African law.<sup>1127</sup> Much like the Canadian Charter, this Bill of Rights is subject to limitations and the realisation of these rights is dependent on their substantive applicability.

Extensive in its scope, Chapter 2 recognises a number of rights covering such diverse areas as equality, freedom and security of the person, freedom from servitude and forced labour, privacy, religion, belief and opinion, freedom of expression, assembly, demonstration and petition, freedom of association, freedom of movement, right to chose one's residence, labour relations, property, environment and children.

This discussion will focus on the procedural elements for the establishment of a claim based on the Constitution. Although a summary of the rights that are protected by Chapter 2 is provided below, it must be emphasised that the substantive application (i.e. the determination of violation and potential justifiable limitation of the Bill of Rights) is case-specific. Given these practical constraints, this submission will only briefly catalogue the rights that may be invoked.

### **A. Jurisdiction and Procedures in Bill of Rights Litigation**

The supremacy of the Constitution is manifested in both direct and indirect application. 'Direct application' refers to the obligation of South African courts to both override ordinary laws and deem unacceptable any official conduct that is inconsistent with the principles

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<sup>1127</sup> SA Constitution (n 6) s 7(1) ('This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.').



contained in the Bill of Rights. 'Indirect application' refers to the obligation of South African courts to interpret and develop the law in a way that is consistent with the Constitution.

At present, the Constitutional Court has not expressly dismissed the prospect of directly applying Constitutional provisions to the conduct of private entities. In practice, however, it has preferred to use the common law and statutory provisions to indirectly give effect to the values and rights of the Constitution. As such, from a strategic perspective, litigants would be well advised to couch their actions in common law and statutory provisions before resorting to constitutional remedies. It is for this reason that while this section of the submission initially looks at the potential of constitutional litigation, civil and criminal mechanisms for holding transnational companies to account are also considered.

In establishing the procedural grounds for litigation, the court must be satisfied that:

- (1) The obligations under the Bill of Rights are binding against the respondent;
- (2) The relevant issues are constitutionally justiciable, insofar as the applicant has standing before the court; and
- (3) The court has jurisdiction to grant the relief claimed.

Each of these will be dealt with in turn.

#### **i. TNC Liability under the Bill of Rights**

Perhaps dissimilar to other Bills of Rights, Chapter 2 of the South African Constitution is not only vertically but also horizontally applicable. This means that the rights contained therein apply both to governments in their dealings with private citizens,<sup>1128</sup> and between private citizens *inter se*.<sup>1129</sup>

As this part of the submission considers the ability of claimants to gain redress from South African corporations, it is principally concerned with the horizontal application of Chapter 2. It is clear that horizontal application extends '...to the conduct of a private or *juristic* person.'<sup>1130</sup> (emphasis added) However, in relation to a private or juristic person the application of a particular right may be limited '...to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'<sup>1131</sup>

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<sup>1128</sup> Ibid s 8(1).

<sup>1129</sup> Ibid s 8(2).

<sup>1130</sup> De Waal Currie and Erasmus (n 3) 55.

<sup>1131</sup> Ibid

Juristic persons are both beneficiaries of, and subject to, the provisions of the Bill of Rights.<sup>1132</sup> As such, a company incorporated under the Companies Act would be subject to the Bill of Rights and the jurisdiction of the Constitutional Court.

The issue of the extraterritorial obligations of South African companies has not been brought directly before the Constitutional Court. However, the possibility of such litigation seems to be supported by recent *obiter dicta* of Chaskalson CJ in *Kaunda v President of the Republic of South Africa*.<sup>1133</sup> The decision also provides interesting insight into the limitations on the extraterritorial application of the Bill of Rights. The case considered the plight of South African citizens detained by the Zimbabwean government. Those citizens sought to invoke s 7(2) of the Constitution to argue that the South African government was obliged to make representations to the Zimbabwean government on their behalf in order to safeguard their constitutional rights. Chaskalson CJ delivered a unanimous decision on behalf of the Court, which rejected the contention that the state's obligation to South African citizens under that section extended to South African citizens abroad. In fairly strong language, the Chief Justice stated that s 7 could not be construed as having extraterritorial effect.<sup>1134</sup>

The Chief Justice was careful to distinguish the case at hand, which considered circumstances in which South African citizens sought to invoke provisions of the Constitution in regards to the South African government's relations with foreign actors (in this case the Zimbabwean government), from the case where individuals seek to invoke the Constitution against South African natural or juristic persons. Based on this distinction, one might draw the inference that there are no barriers to extraterritorial application of constitutional principles against South African corporations doing business abroad. Further, the Chief Justice expressly contemplated the bringing of an action in the South African courts to enforce the performance of such obligations extraterritorially, adding that '...nothing in this decision should be construed as excluding that possibility.'

Indeed, *a fortiori*, there is ample precedent for the regulation of extraterritorial activities of South African companies. South Africa has introduced legislation which expressly provides for the actionability of certain civil and criminal claims against a business entity with respect to activities taking place outside South Africa. However, as will be discussed, the success of any action still depends on the claimant establishing jurisdiction. Notable examples of legislation which has extraterritorial application include:

- (1) The *Regulation of Foreign Military Assistance Act* 1997, which regulates the activities of private military and security companies;
- (2) The *Prevention and Combating of Corrupt Activities Act*, which provides for extraterritorial jurisdiction in respect of the offence of corruption;<sup>1135</sup> and

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<sup>1132</sup> SA Constitution (n 6) s 8(4).

<sup>1133</sup> [2005] (4) SA 235 (CC).

<sup>1134</sup> *Ibid* [37] ('The bearers of the rights are *people in South Africa*. Nothing suggests that it is to have general application, beyond our borders.'). (emphasis added).

<sup>1135</sup> SA Constitution (n 6) s 35(1).

- (3) The *Private Security Industry Regulation Act*, which similarly provides for extra-territorial jurisdiction.<sup>1136</sup>

Most recently, the implementation of the Rome Statute of the International Criminal Court Act 2002 provides for extraterritorial jurisdiction in respect of individuals guilty of war crimes, crimes against humanity, and genocide. The implications of this legislation will be discussed further in the section of this submission which considers the criminal accountability of corporations.

## ii. Standing before the Constitutional Court to bring Claims against TNCs

Standing before the Constitution Court is significantly broader than that traditionally applicable under the common law. A person has standing to challenge the constitutionality of laws or conduct provided that:

- (1) The person alleges that a fundamental right is infringed or is under threat of infringement; and
- (2) The person has, in terms of the categories listed in s 38, a sufficient interest in obtaining a remedy.<sup>1137</sup>

The Constitutional Court has adopted an objective approach to the interpretation of this section. In the decision of *Ferreira v Levin NO*<sup>1138</sup>, the court held that standing would be determined according to the two stages listed above. Assuming the first stage of the test above is satisfied and a fundamental right has been threatened or infringed, s 38 of the Bill of Rights provides a list of people who are considered as having a sufficient interest:

- (1) Anyone acting in their own interest;
- (2) Anyone acting on behalf of another person who cannot act in their own name;
- (3) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (4) Anyone acting in the public interest; and
- (5) An association acting in the interest of its members.

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<sup>1136</sup> Ibid s 39(1).

<sup>1137</sup> De Waal, Currie and Erasmus (n 3) 41.

<sup>1138</sup> [1996] (1) SA 984 (CC).

In addition, s 34 of the Bill of Rights provides that:

Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

It goes almost without saying that, by the combined operation of ss 34 and 28, if the rights of a potential claimant have been infringed they would have sufficient standing to bring an action. In determining such standing, citizenship is immaterial; aliens (whether legally or illegally in the country) are considered in the same position as South African citizens.<sup>1139</sup> As such, a non-national working for a South African company would be entitled to bring Bill of Rights claims before the Constitutional Court.

### iii. Constitutional Court Jurisdiction to grant the Remedy sought

In relation to a breach of the Bill of Rights, the jurisdiction of the Court is closely linked to the remedy sought. Jurisdiction of a particular court in relation to Constitutional issues turns on whether or not it is competent to grant the remedy sought.<sup>1140</sup> Although the jurisdiction of the Constitutional Court as set out in s 167 establishes it as the final court in relation to constitutional questions, in dealing with the potential grounds for direct application of the Bill of Rights the available remedies may determine the Court's exercise of its jurisdiction.<sup>1141</sup>

Although nothing in the Constitution prevents a court from awarding damages as a remedy for violations of fundamental rights, the jurisprudence of the Constitutional Court seems to suggest that courts would be unlikely to do so. This is primarily due to the fact that the Court envisages constitutional remedies as 'forward-looking,' 'community-orientated' and 'structural'. Damages, by their very nature, are retrospective, seeking to compensate a plaintiff for damage wrongly inflicted upon them. This view is supported by the decision of the court in *Fose v Minister of Safety and Security*<sup>1142</sup> in which it appears the court did not envisage deriving a claim damages directly from the Constitution. Nevertheless, it might be conceded that scope exists for the legal development of new claims under the law of delict by operation of the values enunciated in the Bill of Rights. If the law developed in this way, damages would naturally flow from the delictual liability established, supported by constitutional principles. However, such a suggestion is speculative at best.

At first glance this may seem to be quite a serious constraint on the potential of constitutional principles to provide redress to claimants. However, s 8(3) of the Constitution provides a mechanism which obligates a court to follow a three step process in deciding cases dealing

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<sup>1139</sup> De Waal, Currie and Erasmus (n 3) 90.

<sup>1140</sup> Whether the available remedies would limit the possibility of constitutional litigation in this instance is a complicated issue that is by its nature case-specific and extends beyond the scope of this report. However it should be noted that this may be one of the major constraints on potential litigation and it is an area of interest for further research.

<sup>1141</sup> De Waal, Currie and Erasmus (n 3) 90.

<sup>1142</sup> [1997] (3) SA 786 (CC).

with private violations of fundamental rights. The court must first seek a constitutional remedy in legislation, failing which such a remedy should be sought in common law. In the absence of a remedy at either of these two stages, the court is under an obligation to develop the common law to give effect to the Bill of Rights. Very importantly, this means that although corporate liability in South African law, as discussed below, may be insufficiently developed as it currently stands, there is a mechanism for its further realisation and development through the use of the Constitution.

## B. Substantive Provisions of the Bill of Rights

The substantive provisions of the Bill of Rights contained in Chapter 2 of the Constitution cover a wide range of topics from discrimination to the right to life. It is intended here to briefly summarise the provisions. Any consideration of how they might apply in the context of South African corporations operating overseas would be entirely beyond the scope of this submission, and further, venture into the hypothetical. Suffice to say that the provisions provide a number of potential routes for redress.

S 9 contains provisions on discrimination. Reading ss 9(3) and 9(4) in concert, they provide:

Private persons may not unfairly discriminate directly or indirectly against anyone on one or more grounds including: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience; belief, culture, language, and birth.

Where there is a violation of these provisions, s 9(5) creates a presumption that the discrimination is 'unfair' and as such a violation of the right. This section requires substantial equality, as opposed to formal equality—therefore the focus of equality here is outcome-oriented.<sup>1143</sup> One can imagine a multitude of situations where this provision might be engaged in a case of a South African corporation operating overseas. By way of illustration, it could find application in a situation in which the corporation was not providing as favourable conditions to overseas workers as compared to the treatment afforded South African workers.

Other articles contained in Chapter 2 provide sanction for more egregious violations of human rights. One might assume that such rights as freedom from slavery and the right to security of person are unlikely to be relevant in the context of South African corporations operating overseas. However, it must be emphasised that TNCs have been accused of very serious crimes, ranging in everything from complicity with dictatorial regimes to murder.<sup>1144</sup> Thus, in principle, fundamental rights and freedoms should be considered as potentially applicable.

Section 10 provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.' Section 11 enshrines the right to life. Section 12 secures 'Freedom and security of the person' by providing that:

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<sup>1143</sup> I Currie, J De Waal, *The New Constitutional and Administrative Law* (1<sup>st</sup> edn Juta, Landsdowne 2001) 348.

<sup>1144</sup> S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, Oxford 2004) 1–6.

(1) Everyone has the right to freedom and security of the person, which include the right

- a. Not to be deprived of freedom arbitrarily or without just cause;
- b. Not to be detained without trial;
- c. To be free from all forms of violence from either public or private sources;
- d. Not to be tortured or punished in a cruel, inhuman or degrading way;

(2) Everyone has the right to bodily and psychological integrity, which includes the right

- a. To make decisions concerning reproduction;
- b. To security in and control over their body; and
- c. Not to be subjected to medical or scientific experiments without their informed consent.

Section 13 prohibits slavery, servitude and forced labour. Currie and de Waal point out that 'Servitude...includes the practices of debt bondage and serfdom. The former refers to the status of a debtor who pledges personal services as security for a debt if the length and nature of the work is not defined.'<sup>1145</sup>

S 14 guarantees a right to privacy:

'Everyone has the right to privacy, which shall include the right not to have –

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

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<sup>1145</sup> Currie and De Waal. (n 24) 367.

Section 17 provides for a freedom of Assembly, demonstration picket and petition and 18 provides for a right to freedom of association. Section 23 deals directly with labour relations:

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right –

- a. To form and to join a trade union;
- b. To participate in the activities and programmes of a trade union; and
- c. To strike.

(3) Every trade union...has the right –

- a. To determine its own administration, programmes and activities;
- b. To organise; and
- c. To form and join a federation.

(4) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1).

Finally, in relation to environmental protection, s 24 provides that:

Everyone has the right –

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Ultimately, in addition to the hurdles mentioned above, whether or not these fundamental rights would accommodate particular claims against South African corporations would depend on the applicant meeting the procedural obligations discussed and, critically, whether an appropriate remedy could be sought.

### **3. CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST TNCs**

#### **A. Civil Law: Contract and Tort**

Both the South African law of contract and delict provide a potential route for claimants to seek redress for wrongs committed against them by South African corporations overseas. There are a number of factors that must be considered when seeking such redress. In order for an action to effectively be brought against a South African corporation:

- (1) The corporation must be duly served;
- (2) The South African court must have jurisdiction over the corporation; and
- (3) Any problems of piercing the corporate veil must be overcome.

Through *forum non conveniens*, a court has discretion not to exercise jurisdiction, even all requirements for that court to exercise jurisdiction are met. This doctrine has the potential to stymie any delictual action. However, compared to other common law jurisdictions, South Africa has either a nascent or non-existent concept of *forum non conveniens*. *Forum non conveniens* will be briefly discussed.

Additionally, South Africa has a prescriptions act which limits the time to bring claims to approximately three years from the time at which the damage occurs or the claimant has or ought to have knowledge of the wrong committed against him or her. Such limitations might also pose a potential obstacle to justice.

Finally, it will become important to consider the ability to have recognised and enforced judgments rendered by overseas courts in South Africa, and the principal requirements to achieve this.



## i. Service

In South Africa, service is a necessary, but not sufficient, condition for establishing jurisdiction. This position should be contrasted with that of the United Kingdom and Australia where effective service is the only jurisdictional consideration. Thus, as regards South African law, not only does the defendant corporation have to be duly served, but it must also be independently subject to the jurisdiction of the court. The question of jurisdiction, as distinct from service, will be discussed below.

The ability to serve a South African company is effectively secured by operation of the Companies Act 1973. Any associations of persons carrying on any business for profit will not be considered a body corporate unless registered under the Companies Act.<sup>1146</sup> As such, it is certain that any South African corporation will be subject to the provisions of the Companies Act as failure to do so would directly expose the association's members to personal unlimited liability. Along with registration comes the requirement to maintain a registered office in South Africa<sup>1147</sup> upon which service can be validly effected.<sup>1148</sup> This requirement equally applies to non-South African companies where they have a 'place of business' in South Africa.<sup>1149</sup> Thus, in relation to South African companies, effecting service does not pose any appreciable difficulties.

## ii. Jurisdiction

As mentioned, in addition to validly serving an originating process on the defendant, any claimant wishing to have the matter heard in a South African court must satisfy the court that it has jurisdiction over the defendant. The grounds for establishing jurisdiction are characterised by South Africa's Roman roots.<sup>1150</sup> In relation to corporations, there are two solid bases for establishing jurisdiction.

(1) Residence,<sup>1151</sup> and

(2) Domicile;<sup>1152</sup>

Each of these grounds will be considered separately in the following section.

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<sup>1146</sup> WA Joubert, *The Law of South Africa, Volume 4 Part 1: Companies* (1<sup>st</sup> edn reissued Lexis Nexis Butterworths, Durban 1995) [57].

<sup>1147</sup> HS Chilliers and others, *Company Law* (3rd edn Butterworths, Durban 1977) 28.

<sup>1148</sup> C Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* (3rd edn Juta & Co Ltd, Kenwyn 1996) 181; Chilliers (n 28) 28 citing The Companies Act 1973 s 71 which provides: 'Any notice, order or other document which by this Act may be or is required to be served upon any company, including any external company, may be served by delivering it at or sending it by registered post to the registered office or postal address of the company.'

<sup>1149</sup> The Companies Act 61 of 1973, s 71 includes 'external company' the definition of which is 'a company...incorporated outside the Republic...which...has established a place of business in the Republic.'

<sup>1150</sup> Forsyth (n 29) 150.

<sup>1151</sup> Supreme Court Act 59 of 1959, s 19(1)(a).

<sup>1152</sup> Forsyth (n 29) 183.

## Residence

In the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*<sup>1153</sup> it was held that a company incorporated in South Africa resides at its principal place of business.<sup>1154</sup> Pursuant to s 71, determination of this principal place of business can be assumed to be the place of the registered office.<sup>1155</sup> Thus, if the company has a registered office in South Africa, which is a requirement imposed by the Companies Act on *all* South African companies and for that matter companies operating within South Africa,<sup>1156</sup> one can safely conclude that all South African companies would be resident in South Africa for the purposes of jurisdiction.

## Domicile

Domicile, another valid ground of jurisdiction for South African corporations, is determined by place of incorporation.<sup>1157</sup> By definition the place of incorporation of a South African corporation is South Africa, and as such a South African court would have jurisdiction over a South African company on this basis as well.

Thus, it is clear that on any view valid service could be effected on a South African company and, further, the court thus seised would unquestionably have jurisdiction to hear the matter.

### **iii. Forum Non Conveniens**

In many common law jurisdictions such as the United States and the United Kingdom, the court will entertain a plea from the defendant that it decline to exercise jurisdiction because the matter would be best heard by an overseas court<sup>1158</sup> on the basis of the doctrine of *forum non conveniens*.<sup>1159</sup> Although the exact formulation of the ground upon which a court will grant a stay on such a basis varies from jurisdiction to jurisdiction, the essence of the justification for granting a stay is that there is a more appropriate court in which the matter can be heard and that, all things considered, it would be more fair to all the parties involved if the matter is heard in that jurisdiction.

In South African law, there currently exists heated controversy as to the existence of *forum non conveniens* as a valid ground for the discretionary non-exercise of jurisdiction.<sup>1160</sup>

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<sup>1153</sup> [1991] (1) SA 482 (A).

<sup>1154</sup> Forsyth (n 29) 180–81.

<sup>1155</sup> Companies Act 1973 (n 30) s 71. In the definitions section of the Companies Act 1973, 'place of business' is defined as 'any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office.' By definition all South African incorporated companies will have a share transfer or registration office within South Africa, and as such will be resident in South Africa for the purposes of jurisdiction.

<sup>1156</sup> Chilliers (n 28) 28.

<sup>1157</sup> Forsyth (n 29) 183.

<sup>1158</sup> Admittedly, in the case of federated systems this might equally apply to other domestic courts.

<sup>1159</sup> Or, in the case of the US, another State's court, and the UK another one of the Kingdom's countries.

<sup>1160</sup> Forsyth (n 29) 163.

Pistorius has argued that s 9(1) of the Supreme Court Act incorporates this doctrine into South African Law.<sup>1161</sup> In support of this proposition, two cases in which the court adverted to the convenience of the forum are held out as providing a basis for the doctrine.<sup>1162</sup> However, this view is contested by numerous academics both from a positive and normative perspective.<sup>1163</sup> Some commentators, who conclude that the doctrine does not exist under South African law, have nonetheless argued in support of its adoption.<sup>1164</sup>

Generally, if the court is properly seised, both as regards to service and jurisdiction, it is unlikely that it will decline jurisdiction over a corporation resident or domiciled in the jurisdiction. This is likely for two reasons:

- (1) The relatively underdeveloped state of *forum non conveniens* itself; and
- (2) The additional jurisdictional requirements imposed by South African law.

Thus, claimants may generally disregard the potential applicability of *forum non conveniens* when considering bringing an action against a South African company in the South African courts. The doctrine does not provide a substantial barrier to justice for claimants.

#### **iv. Piercing the Corporate Veil in South African Law**

As in most other jurisdictions, South African law recognises separate legal personality for corporations. Thus, claimants might commonly face a situation in which a South African subsidiary company, operating overseas with few assets, cannot provide adequate compensation. In such circumstances, the material question becomes whether or not the claimants can effectively pierce the corporate veil and satisfy his or her claim.

For the purposes of this submission, there are four grounds upon which veil piercing is permissible under South African law. It should be noted at the outset that these grounds draw heavily on principles of the English common law. As such, this section will mirror, very closely, the discussion on veil piercing in the United Kingdom and Australian chapters. In relation to foreign claimants seeking remedies in an action against a South African company, the court may be persuaded to pierce the corporate veil where:

- (1) A relationship of agency has been established;<sup>1165</sup>

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<sup>1161</sup> D Pistorius, *Pollak on Jurisdiction* (2nd edn Juta, Capetown 1993) 20.

<sup>1162</sup> *Estate Agents Board v Lek* [1979] (3) SA 1048; *A and Lane & another NNO v Dabelstein* [1999] (3) SA 150 (C).

See J Taitz 'Jurisdiction and Forum Conveniens – A New Approach?' (1980) 43 THRHR 187.

<sup>1163</sup> E Spiro 'Forum Non Conveniens' (1980) 13 CILSA 333 at 339; AC Beck 'The Convenience of Jurisdiction' (1982) 15 CILSA 344, 346.

<sup>1164</sup> Forsyth (n 29) 163; H Schulze 'Forum Non Conveniens in Comparative Private International Law' (2001) South African Law Journal 118.

<sup>1165</sup> Chilliers (n 28) 10 citing *Smith, Stone and Knight, Ltd v Lord Mayor, Aldermen and Citizens of Birmingham* [1939] 4 All ER 116 (KB). For further detail see provisions dealing with 'agency' in Australian report, pp 18–19, above.

- (2) A sufficient degree of control is exercised by one company over another in the context of a corporate group;<sup>1166</sup>
- (3) The corporation is a mere 'sham' or 'cloak' for the commission of a fraud;<sup>1167</sup>  
or
- (4) In the event of insolvency, the business was carried on recklessly or with intent to defraud.<sup>1168</sup>

As detailed in the Australian and UK chapters, the tests which must be satisfied to pierce the corporate veil are fairly onerous. They include circumstances in which the subsidiary has been set up to commit a fraud<sup>1169</sup> or where the corporation is not treated as a separate entity but controlled entirely by the parent company's shareholders.<sup>1170</sup> South African case law in this area focuses on the intent to defraud, with emphasis falling on the latter two of the above four grounds.

Additionally, with respect to South African law, Joubert places emphasis on the particular circumstances of the claimant. He suggests that in claims of delict against a corporation, a court will be more willing to pierce the corporate veil in order to ensure compensation, say, for personal injury, than it would in contractual situations in which sophisticated entities have made business arrangements.<sup>1171</sup> He rightly points out that in the former scenario the claimant has no choice by whom he or she is injured. That said, one must still conclude that although the courts may be more likely in some situations to pierce the corporate veil, the fact remains that some legal basis must be found. Ultimately, the court's decision of whether or not to pierce the veil will turn on satisfaction of one of the legal grounds listed above, and would have to be considered on a case-by-case basis. It will be a rare case where the corporations which this submission considers have, for example, committed serious fraud or exercised agency over a subsidiary. As such, separate legal personality is likely to prove a considerable obstacle for claimants, a conclusion echoed by Joseph.<sup>1172</sup>

As with other jurisdictions, the South African Companies Act provides for attribution of liability in circumstances of insolvency. Provision for this is made in s 424 of the Act. Broadly speaking, that provision provides that any person who knowingly was a party to the carrying on of the business of the company recklessly or with intent to defraud can be held personally liable without limitation. This position might be contrasted with the insolvent trading provisions of the Australian Corporations Act 2001 which are altogether more generous to creditors, and do not require such a high degree of knowledge. Thus, only in exceptional circumstances will the insolvent trading provisions provide a plaintiff with an effective claim against directors or a controlling holding company.

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<sup>1166</sup> Joubert 1995 (n 27) [43].

<sup>1167</sup> *ibid* citing *Gilford Motor Co v Home* [1933] Ch 935 (CA).

<sup>1168</sup> Companies Act 1973 (n 30) s 424.

<sup>1169</sup> Joubert 1995 (n 27) [44].

<sup>1170</sup> *Ibid* [46].

<sup>1171</sup> *Ibid* [44].

<sup>1172</sup> Joseph (n 25) 129–32.

## v. Successful Claim

The success of any claim, be it in contract or delict, will depend on satisfying the particular principles of law involved in that claim. Consideration of the substantive principles of liability for breach of contract or delict is beyond of the scope of this paper.

## B. Recognition and Enforcement of Foreign Judgments in South Africa

This section seeks to identify circumstances in which a South African court will lend its authority to recognition or enforcement of a judgment of a foreign court.

If a claimant obtains a judgment in a foreign court it will be advantageous to satisfy the judgment in South Africa should the judgment debtor (corporation) have assets within the jurisdiction. However, to do so the judgment must first be entitled to recognition and enforcement according to South African law. Seeking recognition and enforcement involves the navigation of a number of substantive and procedural hurdles, notably compliance with the *Foreign Civil Judgments Act* and the *Protection of Business Act*, which have the potential to make obtaining recognition or enforcement within South Africa problematic.

As a general principle, a South African court will not review the merits of any decision rendered by a foreign court when recognition or enforcement is sought. Rather, the court will investigate whether or not jurisdiction was properly exercised.<sup>1173</sup>

In relation to foreign judgments to pay a sum of money,<sup>1174</sup> four requirements must be satisfied for a South African court to lend its authority to recognition and enforcement:

- (1) jurisdiction must have been exercised 'in the international sense';
- (2) the judgment must be final and conclusive;
- (3) recognition and enforcement of the judgment must not violate public policy; and
- (4) the judgment must not breach the provisions of the Protection of Business Act of 1978.<sup>1175</sup>

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<sup>1173</sup> WA Joubert, *The Law of South Africa, Volume 2 Part 2: Conflict of Laws* (1<sup>st</sup> edn reissued Lexis Nexis Butterworths, Durban 2003) [344]–[346].

<sup>1174</sup> Like most other legal systems, recognition and enforcement in South African law is limited to foreign judgments to pay a sum of money (as opposed to foreign equitable orders).

<sup>1175</sup> Forsyth (n 29) 364.

## i. Foreign Civil Judgments Act

South Africa has a regime for the reciprocal recognition and enforcement of judgments of foreign courts. This system is one of recognition and enforcement by registration, and thus avoids the cost, expense and delay associated with initiating proceedings to have a judgment recognised or enforced.

In South Africa the relevant statutory instrument is the *Enforcement of Foreign Civil Judgments Act* of 1988. This act basically follows the United Kingdom's *Foreign Judgments (Reciprocal Enforcement) Act* 1993. The provisions of both acts substantially mirror the common law principles for recognition and enforcement (set out below). The benefit that registration provides is that it is automatic. A claimant need not prove jurisdiction, but only register the judgment and wait for the judgment debtor to challenge registration. Should the judgment debtor not challenge registration within 21 days after being served with notice of registration the judgment will become fully enforceable.<sup>1176</sup> However, should the judgment debtor challenge the registration, it might be set aside if the South African court is satisfied that the foreign court should not have exercised jurisdiction.

The grounds for setting aside the registration are:

- (1) The judgment was registered in contravention of a provision of the Act;
- (2) The court of the relevant designated country had no jurisdiction in the circumstances of the case;
- (3) The judgment debtor did not receive notice of the proceedings in which the judgment was given, as prescribed by the law of the designated country or, if no notice was prescribed, did not receive reasonable notice of those proceedings to enable the judgment debtor to defend, and he or she did not appear;
- (4) The judgment was obtained by fraud;
- (5) Enforcement of the judgment would be contrary to public policy;
- (6) The certified copy of the judgment lodged with the registering court was lodged at the request of a person other than the judgment creditor or the person in whom the rights under the judgment vested;
- (7) The matter in dispute had, prior to the date of the judgment, been the subject of a final judgment in civil proceedings by another court of competent jurisdiction;

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<sup>1176</sup> Joubert 2003 (n 54) [346].

- (8) The judgment has been set aside by the court of competent jurisdiction;
- (9) The judgment has become proscribed under either the laws of the Republic or the designed country concerned;
- (10) The judgment has been wholly satisfied already;
- (11) The judgment has been partially satisfied; to the extent to which it has been satisfied it constitutes a ground for setting it aside; and
- (12) The judgment is a judgment or order which in terms of any law may not be recognised or enforced in the Republic.<sup>1177</sup>

As regards jurisdiction, the Act provides that, where there is residence or submission, jurisdiction exists.<sup>1178</sup>

## ii. Recognition under the Common Law

Although the definition of international jurisdiction for the purposes of South African law is very similar to that of England, there are some slight differences.<sup>1179</sup> Broadly speaking, jurisdiction in the international sense as according to South African law means one of the following:

- (1) The corporation is 'resident' in the foreign jurisdiction; or
- (2) The corporation has submitted to the foreign jurisdiction.

Interestingly, Forsyth suggests that, contrary to what is the case in English law, mere presence is not sufficient to base jurisdiction in an international sense from the perspective of a South African court.<sup>1180</sup>

As regards corporations, the South African law in this area is dominated by the Protection of Business Act of 1978. Section 1E(1)(b) of this Act provides that a foreign court will not be understood as having exercised international jurisdiction:

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<sup>1177</sup> Ibid [345]. Note that implicit in sub s (12) of the list above is reference to The Protection of Business Act 1978 which will be considered further on in this report.

<sup>1178</sup> Ibid

<sup>1179</sup> Note that English common law principles provide for jurisdiction in the international sense to be limited to situations in which the judgment creditor was present within the foreign jurisdiction at the time proceedings were initiated or where the judgment creditor has validly submitted. However, the Foreign Judgments (Reciprocal Enforcement) Act 1993 (UK) provides that in the context of enforcement under the Act residence is an additional legitimate basis for the exercise of jurisdiction by a foreign court.

<sup>1180</sup> Forsyth (n 29) 373.

...merely on the ground...that [the judgment debtor]...did business within the area of that court, unless such person, at the time when the events occurred which gave rise to the relevant proceedings, conducted a permanent business establishment within that area.<sup>1181</sup>

Thus, although the wording of the provision does not explicitly state the proposition, it can be safely assumed that a South African company will only be considered 'resident' within a foreign jurisdiction if its principal place of business was in that foreign jurisdiction.

In regards to submission, jurisdiction can be established either by agreement (such as in a contract, which is highly unlikely in the typical fact considered here) or by participation in proceedings. Although not yet tested in South African courts, one might assume that contesting jurisdiction does not amount to submission.<sup>1182</sup> Such an assumption is reinforced by operation of ss 1E(1)(a) and (2) of the Protection of Business Act of 1978 which provides that appearances, conditionally or otherwise, to contest the jurisdiction of the foreign court do not constitute submission of jurisdiction. However, it is clear that pleading the merits without contesting jurisdiction will undoubtedly be considered a submission.<sup>1183</sup>

### *Final and Conclusive Judgments*

For a judgment to be entitled to recognition or enforcement in South Africa it must be final and conclusive. On this question South African law has broadly followed the English common law.<sup>1184</sup> Generally speaking, a South African court will not recognise or enforce a judgment if it is subject to a genuine appeal in its originating jurisdiction.<sup>1185</sup> The fact that a judgment is subject to an appeal is not conclusive, and the South African court enjoys a broad discretion to stay proceedings.<sup>1186</sup> The onus to prove that the judgment is final and conclusive rests on the party seeking to have the judgment recognised or enforced, but once the South African court has been satisfied of finality, the onus shifts to the defendant to prove otherwise.<sup>1187</sup> It appears from the commentary, although it is not conclusive on the point, that if the South African court is satisfied that a genuine appeal has been initiated, it will probably exercise its discretion to stay enforcement proceedings pending the outcome of the appeal.

### *Public policy*

The public policy exception to recognition and enforcement contain a number of separate heads.<sup>1188</sup> Broadly speaking these exceptions include:

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<sup>1181</sup> Ibid 365–66.

<sup>1182</sup> Ibid 369.

<sup>1183</sup> Ibid 370.

<sup>1184</sup> Ibid 395.

<sup>1185</sup> Ibid 396.

<sup>1186</sup> Joubert 2003 (n 54) [345].

<sup>1187</sup> Ibid

<sup>1188</sup> As compared to Australian and UK commentators, their South African counterparts seem to prefer to collapse all exceptions under the umbrella of public policy.



- (1) Breach of natural justice;
- (2) Fraud;
- (3) Intrinsic public policy; and
- (4) Penal and revenue judgments.

A South African court will not lend its authority to recognition or enforcement of a foreign judgment rendered under circumstances where the requirements of natural justice have not been satisfied.<sup>1189</sup> Thus, circumstances where the judgment debtor was not given sufficient notice to allow him or her to prepare an adequate defence will likely violate public policy.<sup>1190</sup>

The fraud exception in South Africa is different to that in England. Most certainly, where the fraud is patent—i.e. there has been some forgery or perjury, or fraud on the part of the judge or court – the South African court will not lend its authority to the recognition or enforcement of the judgment.<sup>1191</sup> However, where, in Forsyth’s words, the fraud is ‘intrinsic,’ meaning it was raised, genuinely considered, and rejected by the foreign tribunal, the South African court will not, on the basis of fraud alone, refuse recognition or enforcement.<sup>1192</sup> This should be contrasted with the position of English<sup>1193</sup> and Australian<sup>1194</sup> law which both provide for a much broader fraud exception.

In relation to the exception for situations in which the judgment offends ‘intrinsic public policy,’ Forsyth states that ‘the distinctive heads of South African public policy are relatively rare.’<sup>1195</sup> Further, this ‘general public policy’ exception is, to a certain degree, characterised by a degree of dynamism. As such, determining the content of the exception is an exceedingly difficult task. The exercise requires a specific case to come up before it becomes clear what would offend intrinsic public policy.

Much like other jurisdictions, South Africa will not recognise or enforce a judgment based on a revenue or penal law.<sup>1196</sup>

In addition to the common law exceptions discussed above, the Protection of Business Act No 99 of 1978 provides a number of statutory exceptions:

- (1) Section 1A prohibits the recognition or enforcement of multiple or punitive damages.

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<sup>1189</sup> Forsyth (n 29) 398.

<sup>1190</sup> Ibid 398–99.

<sup>1191</sup> Ibid 401.

<sup>1192</sup> Ibid 401.

<sup>1193</sup> *Owens Bank v Bracco* [1992] 2 AC 443 (HL).

<sup>1194</sup> *Yoon v Song* (2000) 158 FLR 295 (FCA).

<sup>1195</sup> Forsyth (n 29) 401.

<sup>1196</sup> *Raulin v Fisher* [1911] 2 KB 93 (KB).

(2) Section 1B is a 'claw-back provision' which allows for the recovery of punitive or multiple damages paid out by South Africans abroad.

(3) Section 1D withdraws entitlement to recognition or enforcement for:

...any liability which arises from any bodily injury of any person resulting directly or indirectly from the consumption or use of or exposure to any natural resource of the Republic...unless the same liability would have arisen under the law of the Republic...

This imposes a kind of double actionability requirement for having such a judgment recognised or enforced in South Africa, and is aimed at product liability cases.<sup>1197</sup>

### *Permission and the Protection of Business Act 1978*

In addition to the legal modifications listed above, the 1978 Act requires the Minister to certify the recognition or enforcement of any:

...judgment, order, direction, arbitration award or letter of request or any other request delivered, given or issued or emanating from outside the Republic...if it arises from an act or transaction which took place at any time and is connected with mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material of whatever nature whether within outside into or from the Republic.<sup>1198</sup>

On a plain reading of this provision it seems that Ministerial authorisation would be needed for almost any action for recognition or enforcement of a judgment against a South African corporation. Whether enforcement is sought via the Act or the common law, this provision applies.<sup>1199</sup> The deep impact of the above conclusion on the ability of claimants to enforce judgments is patent.

Joubert, however, has suggested that this provision should be read in the context of the prohibitions listed above.<sup>1200</sup> Unfortunately, in terms of the paradigm case we are considering, the adoption of such a reading is immaterial, because when one looks at the principle limitations imposed by the Act in ss 1A, 1B and 1D, it becomes clear that they cover situations in which physical injury is suffered by individuals abroad at the hands of South African corporation. Thus, even if one accepts Joubert's ostensibly contextual reading, a respondent corporation would be likely to succeed in the argument that Ministerial authorisation is necessary for the court to hear a claim. Thus, whether or not the judgment is capable of enforcement in South Africa will depend exclusively on how the Minister decides to exercise his discretion. The only constraint on such a decision is the potential for judicial review provided by the Promotion of Administrative Justice Act 3 of 2000.

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<sup>1197</sup> Forsyth (n 29) 402.

<sup>1198</sup> Ibid 403.

<sup>1199</sup> Joubert 2003 (n 54) [345].

<sup>1200</sup> Ibid

In summary, the operation of the Protection of Business Act:

- (1) Prohibits recognising or enforcing awards which include punitive or multiple damages.<sup>1201</sup>
- (2) Entitles South African companies to claw back such damages where awarded overseas.
- (3) Exempts South African corporations from liability for bodily injury arising from consumption, use or exposure to a natural resource of the Republic.<sup>1202</sup>
- (4) Imposes a regime of Ministerial authorisation for most other relevant recognition and enforcement proceedings.

## 4. CRIMINAL LAW

### A. Vicarious Liability

South African criminal law does not generally impose vicarious liability. However, some statutes have been held to impose vicarious criminal liability either expressly or implicitly.

The common law principle of vicarious liability which holds an employer liable for the delicts committed by its employees where the employees are acting in the course of, and within the scope of, their duty is well established in South African law and greatly influenced the development of corporate criminal liability.<sup>1203</sup> For this reason, vicarious liability will be considered here. The principles ascribe liability to an employer where its employees have committed a wrong but where the employer is not at fault. In certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority.

One of the important underlying rationales of this principle is the desirability of affording claimants efficacious remedies for harm suffered, while another is the need to use legal remedies to encourage employers to take active steps to prevent their employees from harming members of the community.

In the recent Constitutional Court decision of *K v Minister of Safety and Security*,<sup>1204</sup> the validity of this common-law principle was called into question. The applicant had instituted an action for damages in delict against the Minister of Safety and Security, seeking to hold him vicariously liable for her rape at the hands of three policemen, employees of the respondent.

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<sup>1201</sup> Ibid; Cf. JM Burchell, J Milton *Principles of Criminal Law* (3rd edn Juta, Lansdowne 2005) 557.

<sup>1202</sup> Note that this is irrespective of ministerial authoritarianism.

<sup>1203</sup> *Jordaan v Bloemfontein Transitional Local Authority and Another* [2004] (3) SA 371 (SCA) [3].

<sup>1204</sup> [2005] (6) SA 419 (CC).

The issue before the Court was whether vicarious liability should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights. In determining that it should and in holding the Minister of Safety and Security as the employer liable, O'Regan J provides the following insight into the current status of vicarious liability as established in South African law;

The approach in *Minister of Police v Rabie*<sup>1205</sup> makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer.<sup>1206</sup>

This means that the test is one which contains both a factual assessment (the question of the subjective intention of the perpetrator of the delict) as well as a consideration which raises a mixed question of fact and law, the objective question of whether the delict committed is 'sufficiently connected to the business of the employer' to render the employer liable.

The common-law principle of vicarious liability is well established in South African law and allows for the attribution of both delictual responsibility for the actions of an employee to his or her respective employer in certain circumstances. This is a potential ground for an action should the employees of the TNC be those individually responsible for the human rights abuses. However liability would be limited to the individual actions of those employees and would not provide a route to hold a TNC liable for abuses that result from its institutional decisions. To establish such criminal liability the discussion must move to corporate liability.

## B. Capacity

A corporation has criminal capacity in South Africa and as such may be held liable under South African law for any criminal acts it commits.

Section 332(1) of the Criminal Procedure Act 1977<sup>1207</sup> removes the legal obstacle of imposing criminal liability on an artificial person, effectively creating potential liability of a corporation for the acts of its directors or servants. The application of criminal liability was demonstrated in *R v Bennet & Co (Pty) Ltd* where the negligence of an employee was imputed to the company, resulting in a conviction of the latter for culpable homicide. The scope of criminal liability extends to include negligence and strict liability as emphasised in *Ex parte Minister van Justisie: In re S v Suid-Afrikaans Uitsaaikorporasie*.<sup>1208</sup>

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<sup>1205</sup> [1986] (1) SA 117 (A).

<sup>1206</sup> *K v Minister* (n 85) [44].

<sup>1207</sup> Act 51 of 1977.

<sup>1208</sup> 1992 (4) SA 804 (A) 807.

This definition of corporate liability broadens the reach of the common-law concept of vicarious liability for delictual acts in that imposes corporate liability for *ultra vires* acts committed by its servants so long as the acts are performed in the interests of the corporate body.<sup>1209</sup> However, it should be noted that such criminal liability is limited in two respects. First, if a statute specifically confines liability to a natural person, corporate liability cannot result. Second, in situations in which the director of servant acted solely in his or her own personal interests and not 'in furthering or endeavouring the interests' of the body corporate.

To a certain extent, South African corporate law subscribes to the principle of 'identification' such that the conduct and state of mind of certain high-ranking officials of the corporation are attributed to the corporation itself. Burchell suggests that there is a need for review of the theory behind corporate responsibility and the reflection of this theory in law. He suggests that the law requires a shift to an organisational model of liability that determines fault by examining the institutional practices and corporate policies of the institution.<sup>1210</sup> If this were to occur it would broaden the potential scope for establishing corporate liability. As the law currently stands, establishing liability only through the actions of high-ranking officials is quite a narrow form of accountability. In current corporate managerial structures, decision-making power is often quite diffuse and it is not always easy to identify the individual to whom the decision to act can be attributed. If such identification cannot be made then it is not possible to hold the body corporate liable as the *mens rea* component of criminal liability cannot effectively be established.

In other words, the current approach to criminal liability of corporations in South Africa is based on derivative liability insofar as the conduct and fault of the agent or servant of the corporation is imputed to that corporation. However as commentators have pointed out, such liability is still dependant on proof of misconduct of a particular individual rather than the institutional practices and corporate policies of the company as a whole.<sup>1211</sup>

This strict requirement would prevent a South African parent company, or related company, being held liable for the potentially criminal acts committed by subsidiaries overseas. Thus, the fact that the incorporation of local subsidiaries in foreign jurisdictions is a common commercial practice may represent a serious obstacle to holding South African companies liable for human rights abuses committed outside the jurisdiction.

It is worth briefly drawing attention the recent decision in which the Constitutional Court struck down s 332(5) of the Criminal Procedure Act, on the grounds that it attached liability to a director or servant for crimes committed by another director or servant. In *S v Coetzee*<sup>1212</sup> the Court held that such automatic liability undermined the presumption of innocence. However, in the same breath the court also stated that criminal liability could be established in such circumstances if the common-law requirements for accomplice liability are established.

Criminal liability of a corporate body in South Africa has wider application than that of vicarious liability of a natural person; it rests upon the imputation to the corporate body of

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<sup>1209</sup> L Jordann, 'New Perspectives on the Criminal Liability of Corporate Bodies' [2003] ATCA Juridica 48.

<sup>1210</sup> Burchell and Milton (n 82).

<sup>1211</sup> Ibid.

<sup>1212</sup> [1997] (3) SA 527, [1997] (1) SACR 379 (CC).

crimes of persons acting on their behalf, rather than upon vicarious liability which requires conduct in the course and scope of employment. As discussed, vicarious liability is limited to when the employee in question is acting within the course and scope of their employment at the time that the violation occurs. However, corporate criminal liability may be established if it can be shown that the person (whether an employee or not) was acting on behalf of the company. Although the scope of criminal liability is broader than that of vicarious liability, it is likely still insufficient as a form of redress, since liability must still be established through the principle of identification.

### C. Extraterritoriality and Offences

The Parliament of South Africa has the power to enact criminal laws of extraterritorial application.<sup>1213</sup> However, the extraterritorial scope of a criminal law must be expressly stated in such statutes. As with other common law jurisdictions, it is presumed that unless legislation is expressly stated to have extraterritorial application, its application will be taken to be limited to South Africa. In practice the number of substantive offences for which South African law has imposed extraterritorial liability is very limited. Mostly they concern certain acts committed by citizens abroad (e.g. the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act)<sup>1214</sup> and specific individual criminal offences (e.g. the Criminal Law (Sexual Offences) Amendment Act).<sup>1215</sup>

However, it is important to note that extraterritoriality does apply to those crimes defined before the International Criminal Court. As South Africa is a state party to the Rome Statute, Parliament enacted the Implementation of the Rome Statute of the International Criminal Court Act.<sup>1216</sup> Through this domestic mechanism the international definitions of genocide, crimes against humanity and war crimes are incorporated in South African law. In application of the principle of complementarity as envisaged under art 17 of the Rome Statute, prosecution can and should be undertaken before South African courts.

However, incorporating the definitions, the Act obliges a domestic court hearing a prosecution for such crimes to consider and apply the terms of the statutes having regard to the Constitution and South African law. While s 39(1) of the Constitution permits the court, where appropriate, to apply international law, it does not oblige it to do so. This means that a South African court trying a case of genocide would apply the international definition of the crime but would also apply the general principles of South African criminal law to aid in interpreting the meaning of the definition. This differs from other states, such as New Zealand, who have incorporated not only the specific definitions of the crimes but also the 'General Principles of Criminal Law' set out in Part 3 of the Statute.

Burchell suggests that the influence of the national criminal law of South Africa 'will be felt especially in determining the content of concepts of individual responsibility, defences, fault

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<sup>1213</sup> This was implicit in the decision of Oliver J in *Veenendaal v The Minister of Justice* Case Number: 317/97 27 September 1999 [34].

<sup>1214</sup> Act 27 of 2006.

<sup>1215</sup> Act 6 of 2007.

<sup>1216</sup> Act 27 of 2002.

and participation in the international arena. As the criminal law within South Africa is relatively well developed and consistently applied this would be favourable to the client.<sup>1217</sup>

#### **D. Remedies**

Given that corporations are not legal persons, South African courts generally impose the penalty of a fine.

In terms of s 332(5) of the Criminal Procedure Act, when an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it. Thus, any such director or person 'shall be liable to prosecution therefore, either jointly with the corporate body or apart there from, and shall on conviction be personally liable to punishment therefore.'<sup>1218</sup>

#### **5. ACCESS TO INFORMATION**

The Promotion of Administrative Justice Act 3 of 2000<sup>1219</sup> allows for review of a decision when a company

- (1) Exercises a public power; or
- (2) Performs a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct external legal effect.

Perhaps of more indirect importance to litigants is the Promotion of Access to Information Act 2 of 2000. This act allows for the vindication of the right of access to information enshrined in the Constitution. The Act plays an important role by allowing individuals to gather records held by government or private persons (the definition of which includes companies) that are necessary for the exercise or protection of a right. The Act sets out a number of procedural requirements that need to be satisfied before a private person would be required to furnish records. Chapter Four of the act allows private persons to refuse to furnish records when:

- (1) Doing so would:
  - Violate the privacy of a natural person; or

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<sup>1217</sup> Burchell and Milton (n 82) 3.

<sup>1218</sup> Ibid 86.

<sup>1219</sup> s 1(l).

- Constitute a breach of duty of confidence owed to a third party;
- (2) The information is the commercial information of either the private person or a third party; or
- (3) Such information may endanger an individual, the public or property.

However, these grounds for refusal are void and the private body must provide the information when the disclosure of the information would reveal evidence of:

- (1) Violation of the law; or
- (2) Imminent and serious public risk; or
- (3) Public interest that clearly outweighs any harm caused.

The ability to collect information in this way might indirectly affect the ability of a claimant to bring a successful action, and as such provides claimants with a substantial advantage when compared with other jurisdictions without such legislation.

## **6. OBSTACLES TO JUSTICE FOR NON-NATIONALS**

### **A. Statute of Limitation**

A statute of limitations prohibits the initiation of prosecution after the lapse of a certain period of time. The rationale behind such legislation in a domestic criminal context is that the passage of time irretrievably hampers the possibility of collecting reliable evidence.<sup>1220</sup>

In regard to claims in contract and delict, unlike other common law jurisdictions such as the United Kingdom and Australia, South African limitation periods are included in a 'Prescriptions Act,' which covers not only limitation periods but also acquisitive prescription. For the purposes of this submission we are interested exclusively in this Act to the extent that it extinguishes or limits the right of claimants to bring actions against TNCs.

In particular, the Prescription Act 1969 governs limitation periods. Fortunately, the temporal application of the South African Act can be distinguished from those of say, Australia, in that it avoids complicated periods of application due to the introduction, abrogation, and

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<sup>1220</sup> A Cassese, *International Criminal Law* (OUP, Oxford 2003) 316.



amendment of statutes. For the purposes of this submission, we will consider only the 1969 Act, as it covers all actions arising after 1969.<sup>1221</sup>

Although the Act itself refers to 'debt' in all its provisions, it is clear as a matter of law that it applies equally to delictual liability.<sup>1222</sup> The limitation period begins to run at the time when the damage is suffered.<sup>1223</sup> The limitation period is generally three years for delictual and contractual actions.<sup>1224</sup> As is typical with such statutes, the running of the limitation period is delayed until such a time as the victim has or ought to have known both the identify of the debt and the facts from which the debt arises.<sup>1225</sup>

In terms of current constitutional litigation it is of note that the Constitution does not have retroactive application. Thus, in relation to actions based on potential violations of the Bill of Rights, there is an effective statute of limitations such that actions before 27 April 1994 cannot be litigated.<sup>1226</sup>

## **B. Assessment of legal system**

The South African legal system is generally effective. Despite the intervening years of Apartheid, the judiciary has maintained a high degree of independence and inherent stability. Additionally, although claimants may experience considerable delay and costs in the bringing their actions, such problems are not found in the South African legal system to such a degree as to distinguish it from other like jurisdictions.

## **C. Legal Aid**

The core mandate of Legal Aid Board in South Africa is the provision of legal services to the indigent at the expense of the state. The Constitutional rights, discussed at length in this submission, provide substance to the Legal Aid Board's core mandate referring principally to s 35 of the Constitution under which every person who is arrested, detained or accused has a right to a fair trial, which includes the right to have a legal practitioner assigned by the State and at State expense.<sup>1227</sup>

In addition the Board operates in terms of the Public Finance Management Act 1 of 1999 and the constitutional obligations of the Legal Aid Board are further defined in terms of the Restitution of Land Rights Act 22 of 1984, the Extension of Security of Tenure Act of 1999,

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<sup>1221</sup> Joubert (n 54) 43.

<sup>1222</sup> WA Joubert, *The Law of South Africa, Volume 21: Postal Services to Public Service* (First Reissue Lexis Nexis Butterworths, Durban 2000) [152].

<sup>1223</sup> Ibid

<sup>1224</sup> Ibid

<sup>1225</sup> Ibid

<sup>1226</sup> Although there may be room for argument that the principle of prospectivity may extend from entry into force of the interim Constitution (27 April 1994). Nevertheless, as a matter of South African law, it is clearly settled that neither the interim nor the 1996 Constitution are retrospective in their operation. *Gardener v Whitaker* [1996] (4) SA 337 (CC) [13]; *Key v A-G* [1996] (4) SA 187 (CC) [6].

<sup>1227</sup> Legal Aid Board of South Africa 'Homepage of the Legal Board of South Africa' <<http://www.legal-aid.co.za/index.php>> accessed 16 March 2008.

and the Criminal Procedure Act 51 of 1997. It is an independent statutory body established in terms of the Legal Aid Act, 1969 (Act 22 of 1969) as amended by Act 20 of 1996.<sup>1228</sup>

The realisation of these rights is subject to budgetary constraints. Consequently, in relation to criminal cases, the Legal Aid Board publicly states that it considers that substantial injustice would result where an accused is not provided with legal representation at the expense of the State in the following circumstances:

- (1) The accused cannot afford the cost of his or her own legal representation; and
- (2) The accused would, if convicted, probably receive a prison sentence of which the unsuspended portion would be more than three months, without the option of a fine, or if given the option of a fine, such fine would remain unpaid for two weeks after the imposition of the fine.

This means that the provision of legal aid is subject to a means test, potentially ruling out the provision of legal aid for many prospective applicants.

In civil matters, in determining whether a person qualifies for legal aid, the joint income and assets of an applicant and his or her spouse may be taken into account. In calculating the applicant's means, the Board considers:

- (1) The joint income of spouses, except in divorce matters where only the income of the applicant will be considered;
- (2) The joint income of spouses, where an application is made for legal aid for their dependent minor child;
- (3) The income of the minor alone, if he or she is self-supporting;
- (4) The income of one parent who has children from a previous marriage, if those children have not been legally adopted by the applicant's present spouse and the application is made for legal aid for those children; or
- (5) The joint income of parents, if legal aid is sought for a person who, though not a minor, is still fully supported by his or her parents.

There is some support for the view that legal aid for undertaking litigation within South Africa extends to non-nationals, when one considers the provision of legal aid to asylum seekers. In relation to asylum seekers, the individual seeking asylum need not be ordinarily resident

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<sup>1228</sup> Ibid

in South Africa.<sup>1229</sup> However, at the time of submitting their application for legal aid, he or she should be physically present in South Africa. This leaves scope for the argument that the same principle should in relation to human rights violations if a non-national is physically present at the time of bringing the action.

In order to facilitate access to legal aid, the Legal Aid Board has Justice Centres that are spread throughout South Africa. These centres employ attorneys and candidate attorneys to provide legal representation to the indigent. The centres tend to focus on criminal representation. In regard to constitutional litigation the board scope from the issuing of costs may play a more substantive role in facilitating litigation. This is discussed in more detail in subsequent sections.

From a practical perspective, the demands on legal aid in South Africa are extensive and the resources limited. This means litigation against a South African TNC may not be given principal attention.

#### **D. Cost of Actions**

South African courts have the power to make costs orders.<sup>1230</sup> The basic rule, is that:

- (1) Costs follow the award; and
- (2) Any award is made at the discretion of the court.<sup>1231</sup>

There are two central factors which should be considered in relation to costs orders:

- (1) How and on what basis the court exercises its discretion to award costs; and
- (2) The types of costs that are likely to be awarded.

The court will exercise its discretion to grant costs orders on the basis of fairness to all parties involved.<sup>1232</sup> As with Australia and the United Kingdom, costs generally follow the event<sup>1233</sup> meaning that there is a *prima facie* assumption that the unsuccessful party will pay, to a certain degree, the costs of the successful party. There are a number of factors upon which the court can exercise its discretion, and much will turn on the vagaries of the litigation in question (i.e. was the litigant vexatious in his or her claims, did one of the parties fail to limit or curtail proceedings unreasonably, negligence in litigation, etc.).

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<sup>1229</sup> Ibid

<sup>1230</sup> WA Joubert, *The Law of South Africa, Volume 3 Part 2: Civil Procedure and Costs* (2nd edn Lexis Nexis Butterworths, Durban 2006) 289.

<sup>1231</sup> Ibid 291.

<sup>1232</sup> Ibid

<sup>1233</sup> Ibid 292.

Generally, party-party costs, namely those costs which the successful party has incurred in bringing or defending an action, will be awarded so long as they were 'necessary or proper for the attainment of justice or for defending the rights of any party...'<sup>1234</sup> Awards of attorney-client costs, namely those costs owing to the solicitor from the client, are rarely made. These are generally awarded when the court is satisfied that the actions of the litigator were in some way unreasonable. Costs *de bonis propriis* are awarded under circumstances in which the lawyer had acted irresponsibly, such as misleading a client into defending or bringing an entirely hopeless claim.<sup>1235</sup> The rules on taxation (assessment) of damages are complicated, and depend to a large degree on the exercise of discretion by the taxing master of the court. Thus, the most important factor to be aware of is that in most situations:

- (1) The unsuccessful litigant will be required to pay a reasonable amount of legal fees to the successful party; and
- (2) The unsuccessful litigant will also be required to pay the costs of his or her attorney.

In the context of TNCs, this reality provides a compromise from the perspective of claimants. It means that where the TNC has expended exorbitant amounts of money, far beyond reason, on defending a claim, it will be unlikely that an unsuccessful claimant will be required to pay the true expense of the litigation. Unsuccessful claimants that are expected to pay party-party costs can generally expect to pay roughly one third of the costs of litigation. This combined with the likely fact of relative disparity of resources between the parties and the unenviable station of the claimant would likely influence the court to limit an award of costs.<sup>1236</sup> Nevertheless, in most circumstances this would be cold comfort to a claimant of limited means who is nonetheless liable for some costs, along with those of his or her own attorney, amounts which are likely to be relatively disproportionate to the claimant's means.

In *Ferreira v Levin (II)*,<sup>1237</sup> the court acknowledged that in non-constitutional litigation awards of costs are to be made at the discretion of the presiding judicial officer with the presumption that a successful litigant is usually awarded his or her costs. However, in relation to constitutional actions, under certain circumstances costs may not be awarded. This is important as constitutional litigation provides one of the primary methods for holding South African companies operating abroad accountable before domestic courts.

The rationale for this is to remove the disincentive to constitution litigation of an adverse cost order. Thus, if:

- (1) The issues raised by the applicant in a constitutional case,
  - Are raised in good faith,

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<sup>1234</sup> Ibid 315.

<sup>1235</sup> Ibid 320.

<sup>1236</sup> Obviously this is subject to the particular given fact situation.

<sup>1237</sup> [1996] (2) SA 621 (CC).

- Bring to the fore an important and contested issue; and

(2) The proceedings resolve the issue,

the applicant should not be penalised by a cost order even if the decision is given against the applicant.<sup>1238</sup>

Essentially this means that an unsuccessful constitutional litigant who has raised issues of substance will not usually have a cost order made against them.<sup>1239</sup> Further, the Constitutional Court has, on appeal, overturned cost orders made by lower courts, even where the appeal has been unsuccessful on its merits.<sup>1240</sup>

## E. Witness Protection

Witness protection is available in South Africa for vulnerable witnesses in criminal cases. Governed by the Witness Protection Act 112 of 1998, the Witness Protection unit forms part of the National Directorate of Public Prosecutions. There are regional office in each of the nine provinces, which co-ordinate both temporary (no longer than two weeks) and permanent protection (for the duration of the threat against the witness). Temporary protection is granted after application to Witness Protection Unit or other specified authorities involved in the case, after which there will be a risk assessment to determine whether permanent protection is required.<sup>1241</sup> It is unlikely that a claimant's circumstances would satisfy the requirements of the Witness Protection Act such that the National Directorate of Public Prosecutions might exercise discretion to provide protection.

## 7. CASE STUDY

Although there appears to be scope for litigation against a South African TNC operating overseas, as yet no actions have been brought before the South African courts by either nationals or foreign aliens.

In addition, within the ambit of criminal law, corporate liability for human rights abuses remains insufficiently developed and would require either development or reform in order to offer an effective form of redress.

In light of both these points, a case study on the precise fact scenario this submission considers cannot be provided.

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<sup>1238</sup> *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) [30].

<sup>1239</sup> De Waal, Currie and Erasmus (n 3) 121.

<sup>1240</sup> *MEC for Development Planning and Local Government, Gauteng v Democratic Party* [1998] (4) SA 1157 (CC) [15].

<sup>1241</sup> For more information concerning witness protection refer to 'Cape Gateway – Easy Access to Government Information and Service' <<http://www.capegateway.gov.za>> accessed 19 March 2008.; National Prosecuting Authority of South Africa, 'NPA' <<http://www.npa.gov.za/ReadContent390.aspx>> accessed 19 March 2008.

However, there is a current case that involves South African litigants that should be flagged as providing some comment on the relative effectiveness of the South African legal system in providing effective remedies. The case began in November 2002, and was initiated by Khulumani Support Group, the only national South African organisation for victims and survivors of Apartheid human rights abuses. The suit was filed in the courts of New York State under the Alien Tort Claims Act<sup>1242</sup> in a move to hold 23 multinational corporations accountable for their role in fostering, through their business dealings, violations of human rights committed in South Africa under the apartheid regime.

In October 2007 the United States Circuit Court of Appeal overturned the New York district dismissal of the action upholding liability of corporations for aiding and abetting the perpetration of human rights abuses under the statute, laying the groundwork for further litigation by the group.

At first sight it may seem that this case is irrelevant as regards claims brought against South African TNCs operating abroad. However, on reflection, it might be accepted as evidence tending to indicate the attractiveness of the South African legal system for claimants when compared to that of the United States. Thus, it might be said that the South African system provided a less attractive method for obtaining redress than was available in the courts of New York. This conclusion is supported by the fact that the company had not sought amnesty from the Truth and Reconciliation Commission and as such remained fully liable as far as South African law was concerned.<sup>1243</sup>

## 8. CONCLUSION

After careful review, it would appear that there is some scope for litigation against TNCs operating in South Africa. As with other common law jurisdictions, primarily this redress might be obtained through a claim brought in breach of contract or delict. Additionally, the South African regime for recognition and enforcement of foreign judgments provides an effective alternative to seeking out a South African court at first instance.

However, there exist other routes as well. Delictual claims might be brought through the principle of vicarious liability and in a corporate criminal action. However, any such claims are attended by a high standard of proof demonstrating misconduct of a particular individual. This burden restricts the likelihood of a successful action being brought, and is indicative of a need for legal development in this area. The Constitution has the capacity to play a key role in this development, by providing a mechanism by which principles enunciated in the Bill of Rights have the potential to inform the development of the common law. In this way, it might be said that relative to other countries the South African common law has an increased capacity for development. Thus, although at this stage merely theoretical, there is potential for the imposition of domestic corporate liability for human rights abuses committed by South African companies operating outside of the Republic. In addition, there may be limited scope for direct application of the fundamental rights realised in the Constitution; however, the

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<sup>1242</sup> 28 USC § 1350.

<sup>1243</sup> 'Khulumani | Khulumani Support Group in South Africa | Govern' < <http://www.khulumani.net/> > accessed 1 April 2008.

effectiveness of this route to provide redress is effectively stymied by the nature of the remedies available for Constitutional actions.

# UNITED KINGDOM

— Rebecca Money-Kyrle<sup>\*</sup> —

## 1. INTRODUCTION

This paper assesses the obstacles faced by non-nationals in bringing claims for human rights abuses against transnational corporations (TNCs) in the UK, as the ‘home state’ of TNCs. The primary focus of this paper is on access to justice in England and Wales, one of the UK’s three jurisdictions. It assumes that the human rights abuses complained of will have occurred in ‘host states’ outside the European Union, where the relevant TNC conducted commercial operations, either directly or through subsidiary or group companies.

Background information is provided in Section 2. That section assesses in summary form the presence of TNCs within the jurisdiction, describes the nature and substance of human rights law so far as it relates to private entities, and sets the paper within the context of the UK’s international human rights obligations. It also explains the constitutional framework of the domestic legal system. Section 3 considers potential substantive criminal and civil causes of action, including assessing how the courts will determine the applicable law of claims, and describing potential remedies. Section 4 describes some of the substantive and procedural obstacles that claimants might encounter, including considering the possibility of political hurdles, limitation of claims, challenges to jurisdiction and forum, whether the ‘corporate veil’ may be pierced to hold shareholder companies to account, and considers mechanisms for enforcement of judgments. That section also discusses practical matters that might affect the extent to which claims are expeditious and successful, such as the effectiveness of the administration of justice, costs and funding, and witness protection. Section 5 summarises the mechanisms for appointment of amicus briefs and admission of third party submissions. Section 6 presents a case study, describing the factual and legal issues arising in the litigation against Cape Plc, the English domiciled parent company of asbestos mining, sales and distribution companies based in other countries including South Africa and the USA. Section 7 presents a brief summary and conclusion.

The Appendix includes three tables summarising the UK’s status pursuant to certain international human rights instruments, European instruments relating to human rights, and International Labour Organisation (ILO) conventions.

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## 2. BACKGROUND

### A. Transnational Corporations in the United Kingdom

One of the principal motors of the UK's economy is the City of London. A major international financial centre, the City is the seat of a considerable number TNC, of which some are listed on the London Stock Exchange (LSE). In 2001, 7 of the top 50 non-financial TNCs (measured by assets, sales and employment) were based in the UK, including Vodafone, BP, Royal Dutch / Shell Group (UK / Netherlands), Unilever (UK / Netherlands), GlaxoSmithkline Plc, Diageo PLC and National Grid Transco.<sup>1244</sup> In relation to international trade, the laws of England and Wales are frequently chosen as the applicable law in commercial contracts. London is a major international centre for commercial litigation, arbitration, and dispute resolution. In recent years, negligence claims have been launched in the High Court in London against a number of TNCs, for compensation for personal injury and death. For example, several group actions have been brought by South African mine workers against Cape Plc, both to enforce foreign judgments and seeking compensation for personal injury / death alleged to have been caused by asbestos exposure (these cases are referred to as 'the Cape litigation' throughout this paper).<sup>1245</sup> Cape Plc is the parent company of several South African subsidiaries. The Cape litigation has resulted in novel settlement schemes, including establishment of a trust fund to compensate both existing and potential claimants.<sup>1246</sup> The Cape litigation will be referred to where relevant throughout this paper and is presented as a case study in section 7. Other negligence claims against English parent companies of TNCs operating through subsidiaries in Namibia and South Africa have related to uranium<sup>1247</sup> and mercury<sup>1248</sup> poisoning.

### B. The Nature and Substance of Human Rights Law

Human rights law is commonly understood to concern the legal rights and freedoms of citizens which should be protected by the state and its public institutions. This could be described as human rights understood in a narrow sense. Although subject to most of the important human rights instruments in international law, in reality the prospect of successful pursuit of legal action in the UK against private entities such as TNCs in relation to human rights abuses (understood in the narrow sense) committed abroad is limited. This is due to various factors, including a strict division in domestic law between public and private law proceedings,<sup>1249</sup> and constitutional supremacy of the Westminster parliament over and above international legal obligations of the state. The courts will only exercise jurisdiction over extraterritorial acts and omissions which breach international human rights where this is specifically codified in domestic legislation.

<sup>1244</sup> UNCTADGlobalStat, 'World's Top 50 Non-Financial TNCs in 2001' (2001) UNCTAD <<http://globstat.unctad.org/html/index.html>> (Accessed 15 February 2008).

<sup>1245</sup> *Adams v Cape Industries* [1990] Ch 433 (CA) ; *Lubbe v Cape Plc* [2000] 4 All ER 268 (HL).

<sup>1246</sup> *Re Cape Plc and Other Companies* [2006] EWHC 1446 (Ch) (Companies Court) .

<sup>1247</sup> *Connelly v RTZ Corporation* [1998] AC 854 (HL) .

<sup>1248</sup> *Ngcobo v Thor Chemicals Holdings Ltd* The Times 10 November 1995 (CA) ; *Sithole v Thor Chemicals Holdings Ltd and Another* [1999] All ER (D) 102 (CA) .

<sup>1249</sup> *O'Reilly v Mackman* [1983] 2 AC 237 (HL) ; Civil Procedure Rules CPR 54.

Human rights law is a matter of public law in the international and domestic domains, and does not automatically create binding legal obligations on private entities. It requires a certain leap of legal imagination to conceive of a 'human rights claim' being brought against a private entity, whereby the substance of the right (for example, physical integrity of the individual), as opposed to the legality and rights and obligations flowing from it in law (duty of the state, owed to an individual, to protect that right), is the starting point. Certain core human rights which concern the physical integrity of individuals give rise to positive obligations on the state, including for example the right to life,<sup>1250</sup> freedom from torture, inhuman and degrading treatment,<sup>1251</sup> and to some extent, protection of the right to private and family life, the home and correspondence.<sup>1252</sup> Although TNCs, as private entities, cannot be held accountable in law for breach of such public law rights and freedoms, this paper considers the scope for criminal prosecutions and civil claims in instances where an individual alleges some interference with their physical integrity, similar in substance to prohibited acts in the public law domain under international human rights standards, for example through acts or omissions, and / or breaches of legal duty leading to personal injury or death. The Cape litigation illustrates that there is some scope to bring private civil actions in tort, including with regard to personal injury and death caused by negligence. This paper assumes that these types of grave violations will be of the most pressing concern and interest, and therefore discussion is focussed in the main part on tort claims alleging interference with the physical integrity and well-being of individuals.

Some consideration is given to the prospect of contractual claims arising. It is assumed that the most likely contractual relationship will be an employment contract, and that the most likely human rights issues will relate to equality and discrimination. This paper explains why the law preventing discrimination and protecting and promoting equality in the employment sphere affords a very low prospect of redress for claimants employed in other jurisdictions outside the European Union.

### C. State Obligations in Public International Law

The UK has ratified the principal international human rights instruments.<sup>1253</sup> Along with all other member states of the EEA, the UK has not, however, ratified the Migrant Workers Convention ('MWC'), although it has other international obligations in relation to labour rights pursuant to various treaties of the International Labour Organisation ('ILO'),<sup>1254</sup> and also pursuant to European Community law. The UK is a member of the Council of Europe, and has ratified the ECHR, together with some of its protocols. It has not ratified substantive protocols 4 (prohibition of imprisonment for debt; freedom of movement), 7 (procedural safeguards relating to expulsion of aliens, right of appeal in criminal matters,

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<sup>1250</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as amended) (ETS No 5) (ECHR) art 2; Universal Declaration of Human Rights (10 December 1948) A/RES/217 (UDHR) art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

<sup>1251</sup> ECHR (n 7) art 3; torture is also prohibited pursuant to the UDHR, the ICCPR, CAT, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) (ETS No 126) (ECPT).

<sup>1252</sup> ECHR (n 7) art 8. In *Tysiack v Poland* (2007) 45 EHRR 42 (ECtHR) [107], where the European Court of Human Rights reiterated that the scope of art 8 (right to private and family life) extends to the physical and psychological integrity of a person. In other cases it has been held that environmental pollution (including chemical and noise pollution) which adversely affects that integrity can give rise to a breach of art 8. Cf. *Lopez Ostra v Spain* (1994) 20 EHRR 277 (ECtHR).

<sup>1253</sup> Table I, pp 264–65, below.

<sup>1254</sup> Table III, p 269, below.

compensation for wrongful conviction, right not to be tried or punished twice, and equality between spouses), or 12 (general prohibition of discrimination).<sup>1255</sup>

## D. Constitutional Framework

### i. International and Domestic Law

In terms of international law obligations, the UK is a dualist system. The principle of parliamentary supremacy is central to the constitutional scheme, and has been described as the 'bedrock' of the constitutional framework.<sup>1256</sup> The UK has no written constitution and no entrenched bill of rights.<sup>1257</sup> Constitutional conventions (non-legal rules), statute and common law regulate the legislative, executive and judicial branches of state. With the exception of certain obligations under European Community law (see below), international and regional treaty obligations have no force in domestic law unless expressly incorporated by way of primary legislation.

### ii. Separation of Powers and the Rule of Law

Sovereign power rests in the 'Queen-in-Parliament'. Executive government is conducted by ministers of the Crown, and the judicial system is administered by judges appointed by the Crown, on ministerial advice. Separation of powers in the UK constitutional scheme is incomplete, but constitutional conventions are observed and, in practice, ensure functional separation of power. By convention, the Monarch, as head of state, is politically benign, only acting on the advice of the Prime Minister. The Lord Chancellor sits in the House of Lords, and is a cabinet minister appointed by the Prime Minister. Traditionally, the Lord Chancellor has in the past observed the convention of being apolitical. (S)he must swear an oath that (s)he will respect the rule of law and defend the independence of the judiciary.<sup>1258</sup>

By convention the Monarch appoints and dismisses ministers on prime ministerial advice. The Prime Minister is also appointed by the Monarch, again on the basis of convention, that (s)he is the person best placed to receive majority support in the House of Commons.<sup>1259</sup> Government ministers are accountable to parliament<sup>1260</sup> and are subject to the rule of law.<sup>1261</sup> Residual prerogative powers are in reality exercised by government ministers in the name of the Crown.

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<sup>1255</sup> Table II, pp 267–68, below.

<sup>1256</sup> *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262,[9].

<sup>1257</sup> Although the ECHR is incorporated into domestic law pursuant to the Human Rights Act 1998, it may be repealed at any time like all other legislation and has no protected constitutional status.

<sup>1258</sup> Constitutional Reform Act 2005 , s 17.

<sup>1259</sup> A Bradley, K Ewing, *Constitutional and Administrative Law* (13th edn Longman, Harlow 2003) 238.

<sup>1260</sup> Cf. W Blackstone, *Commentaries on the Laws of England in Four Books* (12th edn Strahan and Woodfall, London 1793-5) Book I, 243; A Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959) 325; 'The Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers' (The Cabinet Office 2005) .

<sup>1261</sup> Dicey (n 17) 327; Constitutional Reform Act s 1.

### iii. European Community

The UK is a member of the European Economic Community (the EC).<sup>1262</sup> Pursuant to the European Communities Act 1972, certain provisions of European Community law (EC law) have 'direct effect' in domestic law. UK courts recognise the primacy of EC law over incompatible domestic legislation.<sup>1263</sup> To an extent, therefore, the supremacy of Parliament is fettered by virtue of the UK's membership of the EC.

### iv. The Human Rights Act 1998

In 1998, the substantive provisions of the ECHR were incorporated into domestic law pursuant to the HRA.<sup>1264</sup> As a result, public authorities (including government ministers and the courts) are obliged to act compatibly with ECHR rights, unless incompatible primary legislation prevents this.<sup>1265</sup> This legislation is similar in substance to a constitutional bill of rights, although it is not entrenched, and like other legislation, may be repealed at any time by parliament. Whilst the HRA gives rise to causes of action against public authorities for breach of ECHR rights, it does not enable pursuit of such actions against private legal persons, including corporations. However, so far as possible all primary and delegated law (including that relating to the activities of corporate bodies) must be interpreted compatibly with ECHR rights.<sup>1266</sup> Importantly, the HRA does not displace the supremacy of parliament: the courts cannot overrule incompatible primary legislation, although a declaration of incompatibility may be made.<sup>1267</sup> Ministers are obliged to make a 'statement of compatibility' when presenting proposed legislation to parliament.<sup>1268</sup>

### v. UK Jurisdictions and Legal Systems

The UK consists of the territories of Great Britain and Northern Ireland.<sup>1269</sup> 'Great Britain' includes the territories of England, Scotland and Wales.<sup>1270</sup> There are devolved administrations in Scotland (the Scottish Parliament),<sup>1271</sup> Wales (the National Assembly for Wales)<sup>1272</sup> and Northern Ireland (the Northern Ireland Assembly).<sup>1273</sup> Although the devolved administrations are representative, they operate pursuant to delegated statutory powers, and subject to the overriding principle of the supremacy of the UK Westminster parliament. Legislation of the devolved administrations is 'delegated legislation' for the purposes of the HRA.<sup>1274</sup>

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<sup>1262</sup> Treaty of Accession 1972 (TA).

<sup>1263</sup> *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 (HL); *Case C-213/89 R v Secretary of State for Transport ex p Factortame Ltd* ECR I-2433 (ECJ); *R v Secretary of State for Trade and Industry, ex p Factortame (No 2)* [1991] 1 AC 603, *sub nom Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70 (ECJ and HL).

<sup>1264</sup> Human Rights Act 1998.

<sup>1265</sup> *Ibid* s 6.

<sup>1266</sup> *Ibid* s 3.

<sup>1267</sup> *Ibid* s 4.

<sup>1268</sup> *Ibid* s 19.

<sup>1269</sup> Interpretation Act 1978 s 5, sch .1.

<sup>1270</sup> Union with Scotland Act 1706 preamble art 1; Interpretation Act s 22(1), sch 2 para 5.

<sup>1271</sup> Scotland Act 1998.

<sup>1272</sup> Government of Wales Act 2006.

<sup>1273</sup> Northern Ireland Act 1998.

<sup>1274</sup> Human Rights Act s. 21.

Although a unitary sovereign state, the UK includes within it three separate and distinct legal systems: England and Wales, Scotland, and Northern Ireland. Each is a separate jurisdiction. With regard to Scotland, there are marked differences in criminal law and procedure, and civil procedure. In particular, the Scottish legal system's historical origins are influenced by continental systems of civil law, rather than in the common law of England and Wales. Whilst the UK House of Lords is the final appellate court with regard to civil matters for Scotland, it has no appellate function in criminal matters.<sup>1275</sup> Northern Ireland law is similar to the common law system of England and Wales, although distinct in some respects. It is, however, a distinct legal system, with separate courts; appeal lies to the UK House of Lords in criminal and civil matters.<sup>1276</sup> Appeals on devolution issues currently fall within the remit of the Judicial Committee of the Privy Council,<sup>1277</sup> although in due course this function will be transferred to the Supreme Court when the relevant provisions of the Constitutional Reform Act 2005 come into force.<sup>1278</sup>

The Judicial Committee of the Privy Council also provides the final avenue of appeal in civil and criminal cases from some, but not all, Commonwealth countries and dependant territories. Although derived from ancient prerogative powers, the Judicial Committee's jurisdiction is now provided for in statute.<sup>1279</sup>

It is not feasible to address in detail the three jurisdictions and legal systems of the United Kingdom and all of those jurisdictions and legal systems which fall within the appellate jurisdiction of the UK's Privy Council. This part of the submission will thus focus primarily on the obstacles that claimants might face in bringing claims against TNCs in the jurisdiction and subject to the laws of England and Wales, although, where relevant, some reference is made to the other jurisdictions.

### **3. CAUSES OF ACTION AND REMEDIES AVAILABLE AGAINST TNCs**

#### **A. Causes of Action**

##### **i. Criminal Law**

There is only limited scope for prosecution of TNCs for criminal acts amounting to human rights abuses which have been committed outside the jurisdiction of the UK. This is for four reasons. First, the scope for exercise of extra-territorial or universal jurisdiction in criminal cases is limited. Jurisdiction is addressed separately below. Secondly, there is a general presumption that the criminal law only extends to acts and omissions within the territory of England and Wales (this is, strictly speaking, a distinct issue from the question of the court's jurisdiction). Thirdly, due to the requirement to prove a mental element of a crime (intention or recklessness), corporations cannot be liable for all types of crimes. Fourthly, the limited incorporation of international human rights obligations into domestic

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<sup>1275</sup> Halsbury's, 'Laws of England' (2001 Re-issue edn, 2001) para 52.

<sup>1276</sup> Ibid para 84.

<sup>1277</sup> See for example Scotland Act (n 28) s 33; Northern Ireland Act (n 30) s 11.

<sup>1278</sup> Constitutional Reform Act (n 15) s 40, and schedule 9 (not yet in force).

<sup>1279</sup> Judicial Committee Act 1833, s 3.

criminal law creates offences carrying mandatory prison sentences; such imprisonable offences cannot be enforced against corporate legal persons.

As a general rule, the criminal law in England and Wales only extends to acts / omissions within the territory of those two countries. This applies with regard to common law offences.<sup>1280</sup> Absent express words extending the effect of a specific statutory offence beyond the territory of England and Wales, it is presumed that parliament intended to restrict the territorial reach of statutory offences to England and Wales.<sup>1281</sup> No criminal cause of action will generally lie against an individual or corporation for acts or omissions outside the territory.

In relation to human rights abuses, some statutory provisions do expressly provide that certain acts or omissions amount to offences wherever committed (including outside the territory of England and Wales). These include offences of torture, inhuman and degrading treatment, although this crime is limited to public officials and persons acting in an official capacity.<sup>1282</sup> Genocide, war crimes and crimes against humanity, and acts ancillary thereto, wherever committed, are criminal offences under domestic law of England and Wales<sup>1283</sup> and Northern Ireland,<sup>1284</sup> and may give rise to extradition to the International Criminal Court.<sup>1285</sup> However, as these statutory crimes are imprisonable by a term not exceeding 30 years,<sup>1286</sup> and there are no alternative non-custodial punishments which may be imposed instead, corporate criminal liability cannot arise, for the reasons explained below.

It is also a statutory offence if 'Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach...' of the Four Geneva Conventions of 1949, and is protocols.<sup>1287</sup> Again, however, as such offences are punishable by a term of imprisonment<sup>1288</sup> it is not feasible that a corporation (as opposed to an individual) could be indicted pursuant to this statute, due to the general principles relevant to corporate criminal liability (see below).

There is no doubt that the provision in UK law to ensure individual culpability for international crimes of genocide, war crimes and crimes against humanity is important in enhancing the protection of human rights. However, there is a lacuna as regards the possibility of trial and punishment of TNCs for culpability in relation to human rights abuses outside the UK, and, in particular, with regard to the most serious abuses concerning breach of the right to life. Steps have been taken recently to improve standards of legal corporate accountability in relation to deaths caused by corporate acts or omissions: the Corporate Manslaughter and Corporate Homicide Act 2007 creates an offence of 'corporate manslaughter' (England and Wales and Northern Ireland) or 'corporate

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<sup>1280</sup> *R v Page* [1954] 1 QB 170 (Courts Martial Appeal Court) 175 (Lord Goddard CJ).

<sup>1281</sup> *Treacy v DPP* [1971] AC 537 (HL) 551 (Lord Diplock).

<sup>1282</sup> Criminal Justice Act 1988, s 134.

<sup>1283</sup> International Criminal Courts Act 2001, ss 51–52.

<sup>1284</sup> *Ibid* ss 58–59.

<sup>1285</sup> *Ibid* s 71.

<sup>1286</sup> *Ibid* s 53.

<sup>1287</sup> Geneva Conventions Act (as amended) 1957, s 1; see also International Criminal Courts Act (n 44) s 70; for details of UK ratification of Geneva Conventions I–IV, see Table I, p 264–65.

<sup>1288</sup> Geneva Conventions Act (n 44) s 1A.

homicide' (Scotland).<sup>1289</sup> However, the territorial extent of the offence is expressly confined in extent and territorial application to acts and omissions occurring in England and Wales, Scotland and Northern Ireland and the seaward limits of the 'territorial sea adjacent to the United Kingdom', on ships registered under the Merchant Shipping Act, aboard 'British-controlled' aircraft, and on certain off-shore petroleum operations.<sup>1290</sup> During the committee stage of the parliamentary process, the Joint Home Affairs and Work and Pensions Committee recommended that the government consider whether the territorial extent of the offence should extend to deaths occurring in EU territory, and, potentially, elsewhere in the world. The Joint Committee noted that there would be jurisdictional problems in extending the offence to cover the activities of corporations internationally, but suggested that the government could legislate to require companies to report on deaths occurring outside the territory.<sup>1291</sup> The government, after careful consideration, ultimately rejected these proposals. In summary, the government considered that there were strong public policy reasons for criminal acts to be prosecuted within the country where those acts occurred, and that to legislate with extra-territorial effect would give rise to jurisdictional and evidential problems. In relation to the Joint Committee's proposal that the legislation should require UK companies to report on deaths occurring abroad, the government considered that this proposal would be difficult to enforce, and, in any event, could potentially require reporting companies to incriminate themselves with regard to criminal prosecutions within the state where the deaths might have occurred.<sup>1292</sup>

Besides the fact that the majority of criminal offences do not have extra territorial effect, there are other obstacles to criminal prosecutions of corporations. Due to the general requirement in English law that both the act / omission (*actus reus*) and intention / recklessness (*mens rea*) of a criminal offence are required to be proved, there are only limited exceptions when it is possible to prove *mens rea* on the part of a corporation, pursuant to the 'identification principle'. This means that criminal liability on the part of the company can only be proved if it is demonstrated that the *mens rea* element of the crime can be attributed to those individuals identified as the 'directing mind' of the company. Ordinarily, the 'directing mind' of the corporation will be the directors, the managing director, and in some instances the senior management and officers of the company.<sup>1293</sup> A corporation cannot be prosecuted in reliance on the identification principle for acts and omissions of its officers and employees which clearly fall outside the remit of their employment.

With regard to 'strict liability' offences, these do not require proof of *mens rea*. Corporations may, in the case of strict liability offences, be held vicariously liable for the acts / omissions of employees. Strict liability offences are codified in statute law. As already noted, there is a general presumption that parliament intended to confine the scope of legislation creating criminal offences to England and Wales, unless the contrary were expressly stated in the statute in question.

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<sup>1289</sup> Corporate Manslaughter and Homicide Act 2007, s 1.

<sup>1290</sup> *Ibid* s 28.

<sup>1291</sup> Joint Home Affairs and Work and Pensions Committee, 'First Joint Report: Draft Corporate Manslaughter Bill' HC (2005-6) 540, para 254.

<sup>1292</sup> Secretary of State for the Home Department, 'The Government Reply to the First Joint Report from the Home Affairs and Work and Pensions Committees' (Cm 6755, 2006), 24.

<sup>1293</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL).

Various statutory offences exist with regard to health and safety at work.<sup>1294</sup> There is a broad executive power to make delegated legislation by Order in Council extending the provisions of the Health and Safety at Work Act (HSAWA) to persons and premises outside Great Britain.<sup>1295</sup> Several statutory instruments have been made using this power. In the main, they relate to off-shore installations. However, in one instance, provision is made to extend the provisions of the HSAWA, 'to and in relation to the working of a mine, and to work for the purpose of or in connection with the working of any part of a mine, within territorial waters or extending beyond them'.<sup>1296</sup> It would appear that offences committed pursuant to this provision can be prosecuted as if they had been committed within the territory of Great Britain.<sup>1297</sup>

A company cannot be found liable for offences punishable by imprisonment.<sup>1298</sup> As already explained above, all the offences in domestic law which criminalise breaches of the Geneva Conventions, or which relate to torture and genocide, carry mandatory prison sentences. As there is no provision allowing for judicial discretion to impose an alternative penalty, it follows that a company cannot be indicted and convicted of such offences.

## ii. Civil

### *Tort Law*

This section focuses on torts that concern the physical integrity of the person, such as claims in negligence for personal injury and death. No detailed consideration is given to tort claims relating to interference with property. The courts will not entertain any claims *in rem* regarding land situated in a foreign jurisdiction.<sup>1299</sup> It should be noted, however, that *in personam* equitable claims relating to foreign land may be pursued,<sup>1300</sup> although this paper does not consider such claims in any further detail.

Claimants face a number of obstacles in bringing claims against parent or other group companies of TNCs in relation to allegations of torts occurring in another country. The UK has no legislation expressly providing for the pursuit of tort claims for violation of international law, as is the case in the United States under the Alien Tort Claims Act.<sup>1301</sup> As already noted in the context of criminal claims, international law obligations of the state do not give rise to a cause of action in domestic law unless specifically enacted by way of primary legislation. In relation to acts and omissions of TNCs causing damage to an individual outside the jurisdiction, as a general rule, a cause of action in tort is only likely to be upheld by the domestic courts if the acts and / or omissions amounted to a tort under the applicable law of the foreign state where the damage arose. The issue of applicable law in tort claims has implications for the prospect of obtaining legal aid funding. As

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<sup>1294</sup> The Health and Safety at Work etc Act 1974.

<sup>1295</sup> Ibid s 84 (3). 'Council' means The Privy Council in this context. Whilst this power is expressed to be exercisable by the Queen, by constitutional 'convention' (i.e. unwritten non-legal rule), the Queen only acts on the advice of ministers. Orders in Council are treated as delegated decisions of the executive, and are subject to judicial review challenge. Cf. *R (Bancoult) v Secretary of State for Foreign Affairs (No 2)* [2006] EWHC 1038, [2006] All ER (D) 149 (May) (Admin) [163].

<sup>1296</sup> The Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 1989 SI 1989/840, art 6.

<sup>1297</sup> Ibid .

<sup>1298</sup> Halsbury's, 'Corporations' *Laws of England* (2006 Re-Issue edn) para 1280.

<sup>1299</sup> *The British South Africa Company v Companhia de Moçambique* [1893] AC 602 (HL) .

<sup>1300</sup> *R Griggs Group Ltd v Evans* [2004] EWHC 1088, [2004] All ER (D) 155 (May) (Ch) [66].

<sup>1301</sup> 28 USC § 1350 .



explained below, legal aid is unlikely to be granted to fund cases where the applicable law of the substantive claim is not that of England and Wales. Consequently the question of applicable law has practical as well as legal implications for claimants.

Regulations under European law relating to applicable law in non-contractual cases have been agreed but are not yet in force, nor have they been incorporated into domestic law.<sup>1302</sup> This paper therefore addresses the current legal position (as of March 2008) under the domestic law of England and Wales, whilst noting that the law will change in the near future. As it cannot be predicted with absolute certainty how the domestic and European courts will interpret the new law, it would not be helpful to go into further detail at this stage. It should be noted, however, that this uncertainty itself may be considered an obstacle to claims to be brought against TNCs, because any uncertainty concerning the law may be perceived as increasing risk of extending the duration, complexity, and costs of litigation.

#### *Applicable Law: Claims prior to 1 May 1996*

In relation to claims arising prior to 1 May 1996, common law principles provide that a claim must be actionable both under the law of the forum and also under the law of the country where the damage arose, in order for a tort to be actionable (the 'double actionability rule').<sup>1303</sup> There continues to be only a limited prospect that the law in force before 1996 will be applied by the courts in some cases, in the event that the court exercises its discretion to extend the limitation period (see below). The common law principles provide that where, in all the circumstances, the parties and the events are more closely connected with England and Wales, the English courts will apply the *lex fori* in determining liability, rather than the *lex loci delicti*.<sup>1304</sup> In determining whether or not the double actionability rule should or should not be applied in tort claims, the courts will have regard to where in substance the tort was committed, including considering where the breaches of duty and damage arose.<sup>1305</sup>

#### *Applicable Law: Private International Law (Miscellaneous Provisions) Act 1995*

Civil law claims in relation to torts occurring in another country since 1 May 1996 are subject to the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 (PIL(MP)A), part III, which applies to claims brought in England and Wales, Scotland and Northern Ireland.<sup>1306</sup> In relation to civil claims for personal injury / death and damage to property, the general rule '...is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur'.<sup>1307</sup> Where the facts relevant to elements of the tort occur across different jurisdictions (for example, where a TNC is based in the UK, but the injury, death or damage is sustained in another jurisdiction) the applicable law will be that of the country where the injury, death or damage was sustained.<sup>1308</sup> This general rule can be displaced. The courts will consider whether, in all

<sup>1302</sup> The European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations 2007 (EC) 864/2007.

<sup>1303</sup> *Phillips v Eyre* (1870) LR 6 QB 1 (Exch Ch) 28–29.

<sup>1304</sup> *Boys v Chaplin* [1971] AC 356 (HL).

<sup>1305</sup> *Metall & Rohstoff AG v Donaldson Lusklin & Jenrette Inc* [1989] 3 All ER 14 (CA).

<sup>1306</sup> S 18 (3).

<sup>1307</sup> *Ibid* s 11(1).

<sup>1308</sup> *Ibid* s 11(2).

the circumstances, ‘...it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country’. The courts will take into account factors relating to the parties and the tort in question.<sup>1309</sup>

By implication, this means that where the applicable law is that of a state with a monist system, or which has expressly enacted its own laws creating civil causes of action for breach of international human rights obligations, it may be possible, subject to the courts having jurisdiction, for individuals to bring such claims against UK TNCs for breach of human rights. However, even when the law of another country is the correct applicable law, on public policy grounds the courts will not give effect to foreign law which breaches international law.<sup>1310</sup> Public policy may also prevent enforcement of other aspects of foreign law. Public policy generally is discussed in further detail below.<sup>1311</sup>

### *Applicable Law in Cases Against TNCs*

The most significant case law on applicable law in tort claims brought by individuals against TNCs was decided on the basis of the common law double actionability rule, rather than pursuant to the statutory provisions of the PIL(MP)A. Those cases remain instructive, in terms of understanding the approach of the courts to the issue of where the tort occurred and which legal system it is most closely connected to, and for this reason certain of the cases are referred to below. However, it should be noted that (subject to discretionary extension of the limitation period) new claims will be determined pursuant to the provisions of the PIL(MP)A.

In rare cases, the courts may accept that, whilst damage or injury occurred abroad, the breach of duty in fact occurred within England and Wales and so should be subject to English law. Several negligence claims have been pursued against Thor Chemicals Holdings Ltd (‘Thor’), and its Chairman, Desmond Cowley, in the High Court, in relation to mercury poisoning (‘the Thor case’). As these actions were settled, and there is consequently no court ruling on the substantive issues in the cases. The primary source of information about these claims is from journal and internet articles by lawyers acting for the South African claimants.<sup>1312</sup> This is an interesting case, not least because of the many steps taken by Thor apparently to avoid liability in England. It would appear that Thor managed to avoid criminal prosecution under health and safety legislation in the UK by relocating its mercury-based processing operations to South Africa. Once litigation had commenced, it attempted (unsuccessfully) to challenge the jurisdiction of the court in England,<sup>1313</sup> and apparently went to considerable lengths to avoid liability by undertaking a corporate restructuring / demerger, and transferring assets the group of companies.

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<sup>1309</sup> Ibid s 12.

<sup>1310</sup> *Kuwait Airways Corporation v Iraqi Airways Company and Others* [2002] UKHL 19, [2002] 2 AC 883, [168].

<sup>1311</sup> See p 277 ff, below.

<sup>1312</sup> R Meeran, ‘Cape Plc: South African Mineworkers’ Quest for Justice’ (2003) (9) *International Journal of Occupational Environmental Health* 218, 229; R Meeran, ‘The Thor Case’ (2003) *Mines and Communities Website* <<http://www.minesandcommunities.org/Company/meeran2.htm>> accessed 22 February 2008; R Meeran, ‘Liability of Multinational Corporations: A Critical Stage’ (1999) *Labour Net* <<http://www.labournet.net/images/cape/campanal.htm>> accessed on 25 February 2008.

<sup>1313</sup> *Ngcobo* (n 5); *Sithole and Others v Thor Chemicals Holdings Ltd and Another* (n 5).

With regard to the applicable law of the claims, whilst the personal injuries and deaths occurred in South Africa, the facts of the case appear to have supported a credible (although ultimately undetermined) claim that the double actionability rule should be displaced, and that the applicable law should have been that of England and Wales. It could also be speculated that, had the PIL(MP)A been applied, the facts in this case may have persuaded the court that it should displace the general rule and instead apply the law of England and Wales. Thor's UK operations were originally based at Margate in Kent, England. During the 1980s, it came under the scrutiny of the Health and Safety Executive ('HSE'), a statutory body with criminal prosecution powers relating to health and safety at work. The HSE's concerns related to high levels of mercury identified in blood and urine samples taken from workers at the Margate plant. In 1986, the Margate operations were halted, and Thor relocated the same type of mercury-based processes to a plant in Cato Ridge, Kwa Zulu Natal, South Africa. It has been claimed that this included relocating critical personnel and plant from Margate to South Africa; however, there, the local work force comprised a large proportion of untrained casual labour. The plaintiffs' solicitors asserted that, instead of implementing proper health and safety measures, Thor appears to have 'controlled' mercury exposure by laying off casual workers when cumulative levels of mercury became too high, replacing them from a ready supply of workers queuing at the factory gates; the plaintiffs' solicitors describe this as 'recycling of workers'. In 1992, the deaths of three workers, and poisoning of many others, led to an inquiry and criminal prosecution of Thor in South Africa. Thereafter, 20 workers launched negligence claims in England against the parent company, and its chairman Desmond Cowley, asserting that whilst the harm occurred in South Africa, the torts were significantly connected with the law of England and Wales, because of the defendants' direct involvement in the 'negligent design, transfer, set up, operation, supervision and monitoring of an intrinsically hazardous process'.<sup>1314</sup> Thor initiated a jurisdiction challenge (*forum non conveniens*) and applied to have the action stayed. That application was dismissed<sup>1315</sup> and an application to appeal that dismissal was struck out by the Court of Appeal.<sup>1316</sup> It is stated by the plaintiffs' solicitors that the judge at first instance, Mr James Stewart QC, noted the 'connections of the claim with England' and held that 'English law would probably be applied to the case'.<sup>1317</sup>

Subsequently, a further 21 negligence claims were issued against Thor on similar legal grounds. Again, the defendants' jurisdictional challenge was rejected,<sup>1318</sup> and the cases settled before trial.

If the Thor cases had not settled, it would have been necessary for the court to determine properly not only whether the involvement (acts and omissions) of the parent company were such that the double actionability rule could be ignored and English law applied instead. It would also have had to consider whether the 'corporate veil' of the group companies could / should be pierced, and the shareholder (parent company) held liable for the breaches of duty of a separate corporate entity.

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<sup>1314</sup> Meeran 1999 (n 69).

<sup>1315</sup> *Ngcobo v Thor Chemical Holdings Ltd*, High Court (11 April 1995) (unreported).

<sup>1316</sup> *Ibid.*

<sup>1317</sup> Meeran 1999 (n 1312); H Ward, 'Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemical and Cape Plc Cases.' (2002) *Yearbook of International Environmental Law* 105, 120–21.

<sup>1318</sup> *Sithole* (n 5).

In a subsequent claim, *Connelly v RTZ Corporation Plc*, similar legal issues arose.<sup>1319</sup> Mr Connelly was employed by Rossing Uranium Ltd ('Rossing'), between 1977 and 1982, at its uranium mining plant in Namibia. Rossing was a subsidiary of RTZ Overseas Services Ltd, and its ultimate parent company, RTZ Corporation Plc, both English companies with registered offices in London. The following is a summary of relevant matters arising in the hearing before Wright J, when the case was struck out on limitation grounds. Connelly was diagnosed with laryngeal cancer in 1986. In the proceedings, he alleged that his cancer had resulted from inhaling silica uranium and its radioactive decay products at the Rossing mine where he had worked. At around the time of his diagnosis, Connelly returned to his native Scotland. He took advice from Scottish counsel as to whether a claim in Scotland might be pursued, but was advised that such a claim was unlikely to proceed on the grounds of *forum non conveniens*. In Namibia, Connelly's application for compensation under the Workmen's Compensation Act 1941 of South Africa and Namibia was rejected by the Workmen's Compensation Commissioner. In December 1993 Connelly obtained a legal aid certificate to bring proceedings against RTZ; proceedings were issued in September 1994, alleging that RTZ 'had devised [Rossing's] policy on health, safety and the environment, or alternatively that they had advised [Rossing] as to the contents of the policy.' It was also alleged that RTZ employees, or 'supervisors', had implemented the policy and supervised health, safety and environmental protection at the Rossing uranium mine. When it became apparent that the 'supervisors' had been transferred to another subsidiary, RTZ Overseas, leave of the court was sought and granted to join RTZ Overseas as second defendant. The defendants sought to have the claim struck out on a number of grounds. In terms of establishing a cause of action against Rossing's parent companies, one ground was that the defendants owed no duty of care to the employees of Rossing. Wright J disagreed, and noted that in certain circumstances, third parties could owe duties of care to employees which resembled those owed by employers. If true, the allegations gave rise to 'a duty of care upon those Defendants who undertook those responsibilities, whatever contribution Rossing itself may have made towards the safety procedures at the mine'.

In the same hearing the court had also to determine various other applications from the Defendants to strike out the claim, including that, as Connelly was not employed by the defendants and so they did not owe him a duty of care, and no case was pleaded that the doctrine of 'piercing the corporate veil' should be invoked, the claim was an abuse of process as it disclosed no cause of action. Wright J rejected this part of the defendants' application, on the basis that Connelly was alleging that RTZ and / or other group companies '...had taken into its own hands' and '...implemented the safety policy and supervised the precautions necessary to ensure so far as was reasonably possible, the health and safety of the Rossing employees through the RTZ Supervisors.' As such, a duty of care to Connelly could have arisen.<sup>1320</sup>

At the same time, the defendants also sought (successfully) to have the claim struck out on the grounds that it was time-barred. In considering this issue, the court had to determine whether the question of limitation should be decided pursuant to Namibian or English law. As the facts in the case pre-dated the PIL(MP)A, the common law double actionability rule fell to be considered. Connelly claimed that the principle issue in the case, the question as to whether the defendants owed a duty of care to him, fell to be determined by English law, the *lex fori*, and following the decision in *Boys v*

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<sup>1319</sup> *Connelly v Rio Tinto Plc*, Queen's Bench (4 December 1998) (unreported).

<sup>1320</sup> *Ibid.*

*Chaplin*,<sup>1321</sup> that the double actionability rule should not be applied to the issue of limitation, as well as to the substantive claim. Wright J disagreed, observing that even if the defendant parent companies had had a role in devising policies relating to health, safety and environmental issues, that could not be regarded in isolation, and that in substance it was in Namibia that the torts complained of had occurred. As such, Namibian as well as English law should, prima facie, be applied, in accordance with the double actionability rule. It was, ultimately, on the ground that Connolly's claim was time-barred pursuant to English and Namibian law (in accordance with the dual actionability rule), that the claim was struck out.<sup>1322</sup>

These cases demonstrate that establishing a cause of action in English law in tort for personal injury or death will depend significantly on the question of applicable law. The general rule under the PIL(MP)A is clear: in most cases, these types of claims will be governed by the domestic law of the host state. In such cases, expert evidence on the applicable foreign law will be necessary. This will increase the costs and complexity of the litigation, necessarily increasing the number of professionals required to present a credible case.

#### *Vicarious Liability in Civil Law for Acts and Omissions of Directors and Employees of TNCs*

Whether a cause of action exists against an employer for vicarious liability for the acts and omissions of staff will be determined pursuant to the relevant applicable law. Only if the general rule of the PIL(MP)A is displaced will English law be relevant. At common law, employers may be held vicariously liable for acts and omissions of employees committed in the course of their employment. A broad 'claimant-friendly' approach may be taken by the courts as to what constitutes acts within the 'course of employment'.<sup>1323</sup> Where an employee's acts are so far outside the scope of his or her employment (where the employee was 'on a frolic of his own'), the employer will not be held vicariously liable.<sup>1324</sup> Vicarious liability may arise further to a breach of a duty of care / tort claim, and with regard to a breach of a statutory duty.<sup>1325</sup>

#### *Contract Law*

Besides establishing a substantive claim, contractual claims for damages against TNCs are, as in the case of tort claims, likely to encounter certain legal and practical hurdles. In the absence of any contractual choice of law clause the courts will have to consider whether or not the laws of England and Wales apply in relation to any issues arising pursuant to a contractual claim against a TNC. Even if it is the case that a claimant can overcome jurisdictional and applicable law hurdles, it is doubtful that certain statutory protections of individual rights have effect with regard to activities conducted outside the territory of Great Britain and Northern Ireland.

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<sup>1321</sup> N 61.

<sup>1322</sup> At an earlier stage of proceedings, the defendants sought to have the case stayed on the grounds of *forum non conveniens*: the decision of the House of Lords in *Connolly v RTZ Corporation* is discussed below in the context of jurisdiction and forum.

<sup>1323</sup> Clerk and Lindsell, *Torts* (19th edn), 6-27-8; *Kooragang Investment Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462 (PC); *Lister v Hesley Hall Ltd* [2002] 1 AC 219 (HL).

<sup>1324</sup> *Joel v Morison* (1834) 6 C & P 501, 503.

<sup>1325</sup> *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [10].

It would seem reasonable to assume that the most likely basis of any claim for breach of contract by individuals against TNCs for abuse of human rights would be in the context of employment relations. Consequently, this section addresses substantive law issues, and questions of applicable law, with specific reference to employment and discrimination claims.

The applicable law in contract cases is determined pursuant to the Rome Convention on the Law Applicable to Contractual Obligations (Rome I)<sup>1326</sup> which has been incorporated into domestic law by the Contracts (Applicable Law) Act.<sup>1327</sup> The provisions of Rome I will be applied by the courts in member states to determine applicable law of contracts regardless of the domicile of the parties to a dispute.<sup>1328</sup>

The general rule is that, absent a choice of law clause in a contract, the applicable law will be that of the country with which the contract is most closely connected.<sup>1329</sup> Employment contracts will (unless there is an express choice of law clause in the contract itself) be governed by the law of the country in which the work is 'habitually carried out', or in the case where an employee's work is not habitually in any one country, the applicable law will be the country where place of business of the through which (s)he is engaged is situated.<sup>1330</sup> Consequently, it would seem unlikely that an individual employed by a TNC in another country would be able to demonstrate that he or she was employed pursuant to a contract governed by English law.

### *Employment and Discrimination Law*

In short, individuals employed by TNCs abroad have little prospect of establishing a cause of action in English law for breach of employment contract and / or breach of statutory employment protections. In terms of private law relations, international treaty obligations relating to prohibition of discrimination on various grounds<sup>1331</sup> is reflected in domestic labour law to a large extent. However, under current law there is no possibility of individual employees of TNCs pursuing claims for discrimination in the course of employment outside the territory of Great Britain and Northern Ireland whose employment is not of a business carried out at an establishment in Great Britain. On the assumption that most UK-head-quartered TNCs will conduct their activities outside the UK through subsidiary or other independent corporate entities based within the host states where they operate. It would seem that in the majority of cases there would only be a very low prospect that claims of discrimination occurring abroad would succeed.

Whilst unlikely, given the probable corporate structures and organisation and management of TNC operations worldwide, it is not completely impossible to conceive of circumstances where a claimant may be able to prove that his or her employment contract with a TNC is for a business carried out at an establishment in Great Britain. Bearing in mind the comments above concerning applicable law, in such a case an individual would also have to demonstrate either (a) that there was a choice of law clause in the contract of

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<sup>1326</sup> Convention on the Law Applicable to Contractual Obligations (Rome I) .

<sup>1327</sup> Contracts (Applicable Law) Act 1990 .

<sup>1328</sup> Rome I (n 83) art 1.

<sup>1329</sup> Ibid art 4.

<sup>1330</sup> Ibid art 6.

<sup>1331</sup> Table III, p 269, below.

employment, or (b) that he or she was not 'habitually' working in another country and the business for which he or she was working was conducted from here. If this were the case, there is potential for a claim to be brought on the grounds of breach of UK legislation which protects employees from discrimination. Domestic legislation implements extensive protections for employees, in accordance with international law obligations relating to race and sex discrimination, and equal pay. Statutory provisions prohibit discrimination on the grounds of sex, race, disability, age, sexual orientation, religion and belief although none of these provisions extend to employees working outside Great Britain and Northern Ireland.<sup>1332</sup> In a recent ruling, it was held that employment tribunals will not exercise jurisdiction for discrimination claims relating to employment outside Great Britain.<sup>1333</sup>

### *Privity of Contract and Third Parties*

As a general rule, the courts recognise the common law doctrine of privity of contract, and will not hold a third party liable for breaches of contract between other parties.<sup>1334</sup> There are certain exceptions to this doctrine which may apply in the case of an individual seeking to bring an action for breach of contract against a TNC parent company. It may also enable third party employees to claim the benefit of contractual terms which exclude or limit liability between a subsidiary and parent of a TNC.<sup>1335</sup>

In summary, claimants will face potentially insurmountable obstacles bringing contractual claims for employment discrimination where the employment occurred through a subsidiary company in a host state outside Great Britain.

### **iii. Administrative**

#### *Administrative Law and Procedural Exclusivity*

In England and Wales there is a clear distinction between public or administrative law, which regulates the public powers and functions of public authorities, and 'private' law, applicable to the acts of private legal persons (including corporations).<sup>1336</sup> Private law also regulates certain legal relations of public authorities which fall outside its public functions. For example, employment law and commercial contractual relations of public authorities are governed by private law. Actions relating to breaches of public law obligations are generally restricted to judicial review claims. As a general rule, the issue of human rights is a public law matter, applicable in relation to acts of public authorities. Whilst the HRA may apply to corporations undertaking a public function pursuant to 'contracting out' of certain public functions (an example might include provision of prison security services) the HRA

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<sup>1332</sup> Relevant legislation includes: Equal Pay Act 1970, s 1; Equal Pay (Northern Ireland) Act 1970; Sex Discrimination Act 1975, s 6; Sex Discrimination (Northern Ireland) Order 1976; Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005; Civil Partnership Act 2004; Race Relations Act 1976; Race Relations (Northern Ireland) Order 1997; Disability Discrimination (Northern Ireland) Order 2006; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; Employment Equality (Age) Regulations (Northern Ireland) 2006.

<sup>1333</sup> *Williams v University of Nottingham* [2007] IRLR 660 (EAT).

<sup>1334</sup> Chitty, *Contracts* (29th edn) 18-001.

<sup>1335</sup> Contracts (Rights of Third Parties) Act 1999; Chitty (n 91) 18-084-7.

<sup>1336</sup> *O'Reilly v Mackman* (n 6); *Davy v Spelthorne Borough Council* [1984] AC 262 (HL) 276, 285.

does not extend beyond the territory of England and Wales, Northern Ireland.<sup>1337</sup> Consequently there is no prospect of direct HRA claims being brought by non-nationals against TNCs with regard to allegations of human rights abuses occurring abroad.

Statutory and regulatory bodies with power to regulate companies are themselves subject to obligations under public and administrative law, including pursuant to the HRA.<sup>1338</sup> These include, for example, the Health and Safety Executive (HSE), which is responsible, amongst other things, for enforcing legislation relating to health and safety at work, including criminal offences referred to above.<sup>1339</sup> The HSE has criminal enforcement powers, although these do not extend to activities of employers outside the territory of England and Wales. Individuals can complain to the HSE, and the HSE itself is subject to the judicial review jurisdiction of the court, so in the event that individual complaints are not properly or adequately investigated and prosecuted, proceedings may be invoked in the Administrative Court on public law and human rights grounds. However, given the territorial restriction on the HSE's powers and duties, and the territorial limits on the extent of the HRA, neither complaint to the HSE nor judicial review proceedings have much prospect of delivering redress for individuals whose rights have been breached in another country.

## B. Remedies

### i. Criminal

There is only limited scope for victims of crime to receive compensation payments from the state, and non-nationals victims of crimes inflicted abroad will not be eligible under the current system. The Criminal Injuries Compensation Scheme (CICS) does not allow compensation in relation to harm occurring outside England, Wales and Scotland.<sup>1340</sup>

### ii. Civil

The most likely remedies available to victims of abuse by TNCs which give rise to a civil private law claim are damages pursuant to a civil action in tort or contract. Assessment of damages is treated as a procedural rather than a substantive issue. The provisions of PIL(MP)A concern actionability of the substantive issue (*lex causa*), and damages will be determined pursuant to the *lex fori*, English law, even in cases where the applicable law of the substantive claim is that of another country.<sup>1341</sup>

#### *Tort*

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<sup>1337</sup> Human Rights Act (n 21) s 22; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

<sup>1338</sup> Human Rights Act (n 21) s 6.

<sup>1339</sup> The Health and Safety at Work etc Act (n 51)..

<sup>1340</sup> Criminal Injuries Compensation Act 1995, s13 enables the Secretary of State to establish a statutory compensation scheme. The CICA's territorial extent is limited to England and Wales, and Scotland.

<sup>1341</sup> *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1, [24].



In tort, damages are recoverable for losses arising from the tort. The most likely obstacles to be encountered by claimants will be the issues of causation (in other words, demonstrating that the tort caused the damage complained of), and remoteness of loss. Quantum in tort cases is assessed on the basis that damages should put the injured party in the position (s)he would have been in had (s)he not sustained the wrong.<sup>1342</sup> Damages are available for pecuniary loss (for example, loss of earnings) as well as for pain and suffering.

### *Contract*

Remedies for breach of contract include damages, as well as equitable remedies such as injunctive relief, orders for specific performance, and restitution. Special rules apply to damages for breach of employment contracts—for example damages for unfair or constructive dismissal are capped at £55,000.

### **iii. Administrative**

As noted, the prospect of a substantive cause of action pursuant to administrative law or regulatory procedures is limited, so the issue of remedies does not require detailed discussion in this context.

## **4. OBSTACLES TO ACCESS TO JUSTICE FOR NON NATIONALS**

### **A. Substantive Obstacles**

#### **i. Political Questions**

Whilst there is no formal constitutional separation of powers, it can be said that generally the judiciary and the legal system functions with a high degree of independence and with no visible signs of direct political interference. That said, the doctrine of judicial deference means that the courts will not interfere with political questions which should more appropriately fall within the domain of the executive, and this is particularly the case where an issue of national security arises.<sup>1343</sup> Judicial deference arises most obviously in the context of decisions and actions of the executive and other public bodies acting under delegated powers, which are in principle subject to the court's judicial review jurisdiction.

It is possible that the prosecuting authorities may decide not to investigate or instigate criminal proceedings on the grounds of public interest and national security. Although not generally considered politicised or biased, there are inherent ambiguities in the role and functions of the Attorney General. The Attorney General is appointed by the Prime Minister and is a member of the executive. Despite this, the Attorney General is responsible for a very wide range of functions that should require high standards of impartiality and

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<sup>1342</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39.

<sup>1343</sup> See for example *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (HL).

independence, including for example being responsible for the Crown Prosecution Service, and also being ultimately responsible for investigations and prosecutions of the Serious Fraud Office. (S)he is also required to act as legal adviser to the executive. The Attorney General is also responsible for appointing 'advocates to the court', and has various other public interest functions.<sup>1344</sup>

There has been controversy recently over the decision of the Attorney General to intervene in a fraud investigation being conducted by the Serious Fraud Office against BAE Systems, concerning certain defence contracts with Saudi Arabia, and allegations of illegal payments to Saudi nationals in the course of those dealings. On 14 December 2006, the Serious Fraud Office issued a press statement, announcing that the 'decision [to halt the investigation] has been taken following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security.'<sup>1345</sup> On the basis of information ordinarily available in the public domain concerning the activities of investigating and prosecuting authorities, it cannot be said that this is a common occurrence. On 10 April 2008, the High Court ruled that the decision to stop the SFO investigation was unlawful.<sup>1346</sup> Threats made by 'Saudi representatives' to the Prime Minister's chief of staff, that if the SFO investigation was not stopped, certain contracts for the export of Typhoon aircraft would not proceed, and 'previous close intelligence and diplomatic relationship would cease',<sup>1347</sup> were described in the court's judgment as a 'successful attempt by a foreign government to pervert the course of justice in the United Kingdom'.<sup>1348</sup> The court held that the Director of the SFO's decision to halt the investigation in response to the threats was unlawful: in deciding to yield to the threats and to halt the investigation, the Director had failed to act independently, and had failed to give adequate consideration to the damage to national security and the rule of law in making the decision.<sup>1349</sup> The Director had also failed to demonstrate to the court that, in discharging the responsibility to uphold the rule of law, all reasonable steps had been taken to resist the threats.<sup>1350</sup> This important judgment demonstrates that the courts in England and Wales can take a robust and independent stance when the rule of law is threatened by unjustified and unlawful political intervention.

## ii. Act of State Doctrine and Public Policy

There is no fully developed and clear 'act of state' doctrine which would be applied by the courts of England and Wales, although the courts will decline to rule on certain acts of foreign sovereign states. In particular, the courts will not enquire into or rule on transactions between foreign states.<sup>1351</sup>

The courts will not enforce foreign laws which conflicts with public policy.<sup>1352</sup> On public policy grounds the courts will not recognise acts of state which are contrary to international

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<sup>1344</sup> Halsbury's, 'Laws of England' *Constitutional Law and Human Rights* Vol 8 (2) (Reissue) para 529; 'The Governance of Britain: A Consultation on the Role of the Attorney General' (2007) Cm 7192, 25–26.

<sup>1345</sup> The Serious Fraud Office, 'Serious Fraud Office Statement (Press Release)' (14 December 2006) <[http://www.sfo.gov.uk/news/prout/pr\\_497.asp?id=497](http://www.sfo.gov.uk/news/prout/pr_497.asp?id=497)> accessed 28 February 2008.

<sup>1346</sup> *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714, [2008] All ER (D) 151 (Apr) (Admin).

<sup>1347</sup> *Ibid* [4].

<sup>1348</sup> *Ibid* [6].

<sup>1349</sup> *Ibid* [102], [170].

<sup>1350</sup> *Ibid* [171].

<sup>1351</sup> *Buttes Gas and Oil Co v Hammer* [1982] AC 888 (HL) 938.

<sup>1352</sup> *Vervaeke v Smith* [1983] 1 AC 145 (HL) 164.

law.<sup>1353</sup> In particular, the courts are unlikely to enforce any foreign law which constitutes a 'grave infringement of human rights'.<sup>1354</sup>

Further, on public policy grounds the courts will not recognise or enforce foreign public laws, including penal and revenue laws.<sup>1355</sup> Such laws are considered to be a matter for the exclusive domestic forum of the relevant sovereign state.<sup>1356</sup> Treaty or convention between states may modify this principle.<sup>1357</sup>

## B. Procedural Obstacles

### i. Statute of Limitations

#### *Foreign Limitation Periods Act 1984*

The issue of limitation is referred to in the leading authoritative text as a 'procedural' issue.<sup>1358</sup> As already noted, matters of procedure should generally be dealt with in accordance with the *lex fori* as opposed to the *lex causa*.<sup>1359</sup> This general rule has been modified by the Foreign Limitation Periods Act 1984: where substantive issues in a case fall to be determined pursuant to foreign law, the courts will determine questions of limitation relating to those issues pursuant to the relevant foreign law.<sup>1360</sup> However, the courts will not apply any foreign limitation laws if it is found that they are in conflict with public policy, including if application of such foreign law would cause undue hardship.<sup>1361</sup> Exceptionally, English law will be taken into account, not only when the public policy exception applies, for example when the common law double actionability rule on applicable law is relevant. S 1(2) of the Foreign Limitation Periods Act provides that if the determination of substantive issues requires both foreign law, and the law of England and Wales to be taken into account, limitation should not be determined only in accordance with the relevant foreign law.<sup>1362</sup>

#### *Limitation Act 1980*

The following sections provide a brief overview of the principle legal provisions relating to limitation periods under the law of England and Wales. The rules on limitation periods are codified pursuant to the Limitation Act 1980 (as amended, including pursuant to the Latent Damage Act). Regarding interpretation and application of these statutory provisions there is a significant body of case law. Whilst detailed nuances in that case law is clearly

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<sup>1353</sup> *Kuwait Airways Corporation v Iraqi Airways Company and Others* [2002] UKHL 19, [2002] 2 AC 883.

<sup>1354</sup> *Oppenheimer v Cattermole* [1976] AC 249 (HL), 278 (Lord Cross, *obiter dicta*).

<sup>1355</sup> As restated in *Williams & Humbert Ltd v W & H Trademarks (Jersey) Ltd* [1986] AC 368 (HL), 428; *Re Visser* [1928] Ch 877 (Ch) 884 (courts will not collect taxes of foreign governments).

<sup>1356</sup> *Huntingdon v Attrill* [1893] AC 150 (PC) 156.

<sup>1357</sup> *Government of India v Taylor* [1955] AC 491 (HL) 514.

<sup>1358</sup> Clerk and Lindsell (n 80) Ch 33, 33-02.

<sup>1359</sup> See for example *Harding v Wealands* (n 98).

<sup>1360</sup> Foreign Limitation Periods Act 1984, s 1 (1).

<sup>1361</sup> *Ibid* s 2 (1)–(2).

<sup>1362</sup> *Ibid* s 1(2).

important in understanding this area of the law, this paper aims merely to give an overview of the main legal provisions concerning limitation that might apply to claims against TNCs.

The general limitation period for *tort claims* is 6 years from the date on which the cause of action accrued.<sup>1363</sup> In negligence cases, the cause of action accrues and time starts to run for limitation periods from the date of the damage (rather than from the date of the wrongful act). The cause of action accrues at that point in time even if the claimant is unaware of the damage until a later date, save in relation to personal injury and death claims, and claims involving latent damage.

In claims involving personal injury or death, special rules apply. Pursuant to the Limitation Act there is a three year limitation period,<sup>1364</sup> which runs from the later of the date the cause of action accrued, or the date on which the claimant had knowledge of material facts, including that the injury was significant, was attributable to the defendant's acts or omissions which form the basis of the claim, and as to the identity of the defendant (s).<sup>1365</sup> The court has discretionary power under s 33 of the Limitation Act to allow a claim to be brought out of time.<sup>1366</sup> For negligence claims not involving personal injury, there is a 'long-stop' period of fifteen years from the date of the wrongful act or omission, beyond which an action will be time-barred.<sup>1367</sup>

As for contract claims, these will be time-barred six years from the date on which the claim accrued,<sup>1368</sup> save that in claims involving personal injury and death, the special provisions of s 11 apply, so that the limitation period will be three years from the date of the damage (as is the case in negligence claims involving personal injury and death).

#### *Application of the Law in Connelly v Rio Tinto Plc*<sup>1369</sup>

In the case of *Connolly v Rio Tinto Plc*, the question of limitation and applicable law arose. As already noted above, Wright J held that the torts alleged occurred in Namibia, and that the double actionability rule applied.<sup>1370</sup> As noted above, where both English law and foreign law apply to the substantive issues, the Foreign Limitation Periods Act provides that, exceptionally, English law will be relevant to the determination of limitation.<sup>1371</sup> The court considered 3 questions in determining whether the claim should be struck out on limitation grounds.

First, the court considered whether the claim was time barred under English law, and if so whether the court should exercise its discretion under s 33 of the Limitation Act to allow the claim to be brought out of time. Wright J held that the claim was clearly time-barred, as Mr Connelly had, on the evidence, constructive knowledge of the claims within 18 months

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<sup>1363</sup> Limitation Act 1980 s 2.

<sup>1364</sup> *Ibid* s 11.

<sup>1365</sup> *Ibid* s 14 (1).

<sup>1366</sup> *Ibid* s 33.

<sup>1367</sup> *Ibid* s 14B.

<sup>1368</sup> *Ibid* s 5.

<sup>1369</sup> *Connelly* QB (n 76).

<sup>1370</sup> *Ibid* pp 11–12.

<sup>1371</sup> Foreign Limitation Periods Act 1984, s 1(2).

of September 1988; but proceedings were only issued and served in September 1994. Wright J went on to decide that the balance of prejudice, taking into account the clear prejudice to the plaintiff as regards his illness and permanent disability, uncertain grounds for the case on causation of his cancer, and the likely prejudice that would be caused to the defendant in facing extensive and complex litigation against a legally-aided plaintiff, weighed more heavily against the defendant. The balance of prejudice weighed against the exercise of discretion to allow a claim to be brought out of time.

Secondly, the court considered whether s 1(2) of the Foreign Limitation Periods Act required Namibian law to be taken into account. Applying the double actionability rule, and having regard to the facts in the case, Wright J held that 'prima facie at least' both English and Namibian law must be applied.

The court then went on to consider whether there might be public policy reasons (in particular, potential hardship to the plaintiff) why Namibian law should not be applied. This required consideration of a third question, as to the effect of Namibian limitation law in that case. Having heard expert evidence on Namibian law, Wright J held that the plaintiff's claim would also be time-barred under Namibian law, and that no discretion equivalent to that contained in s 33 of the Limitation Act existed, so it would not be possible to allow the claim to proceed out of time. A further point was raised by the plaintiff in support of his contention that it would be contrary to public policy to apply Namibian limitation law. The plaintiff submitted that the limitation provisions under Namibian law had originally been enacted by the South African regime pursuant to the purported annexation of Namibia in 1949 by South Africa, which had been declared illegal by the United Nations Security Council. Namibia became independent in 1990. Wright J held that, as the UK government regarded the South African government as the *de facto* administering authority in Namibia during the period of annexation (1949–1990), and by s140 of the Namibian constitution, the limitation laws had been retrospectively ratified by the Namibian government, there were no public policy grounds on which to reject the application of Namibian law. Consequently, the case was struck out on limitation grounds.

## ii. Jurisdictional Challenges

The courts of England and Wales have inherent jurisdiction over English companies, as well as foreign corporations that carry on business 'to a definite and, to some reasonable extent, permanent place' within the jurisdiction; the foreign company must have 'premises in England from which or at which its business is carried on'.<sup>1372</sup> However, the courts' inherent jurisdiction is now also to some extent governed by the provisions of European law. The courts can also exercise jurisdiction on the basis of consent.<sup>1373</sup>

### *Extraterritorial Jurisdiction in Criminal Cases*

The courts' general jurisdiction over English companies and foreign companies with a premises / place of business in England, referred to above, applies equally in criminal cases. What the court cannot do is convict anyone of a crime committed outside the

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<sup>1372</sup> *Adams v Cape Industries* (n 2) 530, 567–68.

<sup>1373</sup> *Ibid* 457–58.

territory of England and Wales unless there has been specific provision making it clear that Parliament intended the legislation creating the offence to have extra territorial effect. Further, there is no inherent power enabling the court to assume criminal jurisdiction over non-domiciled individuals and corporations not present within the jurisdiction. 'Universal jurisdiction' is only provided for in a very limited way in primary legislation, for example with regard to torture offences (see above), which do not apply to corporations.

Despite the general jurisdiction referred to above, cases involving acts or omissions occurring abroad frequently give rise to applications from defendants that the claim ought to be stayed on the grounds that there is a more convenient forum. The courts in England and Wales do have inherent jurisdiction, now codified in statute, to stay or strike out proceedings in order to prevent injustice.<sup>1374</sup> In the *Thor*, *RTZ* and *Cape* cases already referred to,<sup>1375</sup> defendants applied to the court to have the litigation stayed on the common law ground of *forum non conveniens*. A crucial question to be addressed by the courts in the case of such applications will be whether the court should apply European law (which restricts the extent to which the courts may exercise inherent powers to stay or strike out cases), or whether it can and should apply the alternative common law principles.

The Civil Jurisdiction and Judgments Act 1982 (CJJA) incorporated into domestic law various provisions concerning jurisdiction and enforcement of judgments, including the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('Brussels Convention').<sup>1376</sup> By subsequent amendment the CJJA also incorporates Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Regulation')<sup>1377</sup> into domestic law.<sup>1378</sup> When claimants issue proceedings against a defendant TNC which is domiciled in England and Wales, the courts will have jurisdiction in accordance with the provisions of the Brussels Regulation.<sup>1379</sup> Further to the decision of the European Court of Justice (ECJ) in *Owusu v Jackson*, the court will not be able to stay such a claim on the grounds of *forum non conveniens*.<sup>1380</sup> Consequently, application of common law rules on *forum non conveniens* will not apply in cases where the TNC defendant is domiciled here.

In some respects, however, aspects of the law after *Owusu* remain unresolved or unclear,<sup>1381</sup> and in some cases domestic law will be applied, and the court may stay on the grounds of *forum non conveniens*. Legal arguments concerning jurisdiction and forum may be extremely expensive and time-consuming to resolve, precisely because of the complexity and, in some respects, uncertainty, of the law in this area. In particular, if there is any question as to application and interpretation of EU law, the courts may refer that issue to the European Court of Justice for determination. Such a reference to the ECJ would undoubtedly delay the progress and increase the legal costs of a claim substantially.

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<sup>1374</sup> Supreme Court Act 1981, s 49 (3); Civil Jurisdiction and Judgments Act 1982, s 49.

<sup>1375</sup> Ns 2–5; pages 10–13; see also the Case Study of the Cape Litigation, pp 259 ff, below.

<sup>1376</sup> Civil Jurisdiction and Judgments Act 1982; Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).

<sup>1377</sup> Civil Jurisdiction and Judgments Order 2001 SI 2001/3929; Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation).

<sup>1378</sup> Civil Jurisdiction and Judgments Act (n 131) Part I.

<sup>1379</sup> Brussels Regulation (n 134) art 2.

<sup>1380</sup> *Case C-281/02 Owusu v Jackson* [2005] ECR I-1383, [2005] QB 801 (ECJ).

<sup>1381</sup> For example see discussion in: C Knight, 'Owusu and Turner: The Shark in the Water?' (2007) 66 (2) Cambridge Law Journal 288.

When a defendant is not domiciled in any convention state (this is not an unlikely scenario in the context of claims against TNCs),<sup>1382</sup> national laws will apply.<sup>1383</sup> This will include, for example, cases where there are multiple defendants, including claims brought against non-domiciled, as well as domiciled, defendant companies. Whilst it may be clear that the court cannot stay the claim as regards the domiciled defendants on *forum* grounds, there is nothing to prevent an application being made by non-domiciled defendants for stay of the claims against those defendants. In such cases, the court must apply domestic common law in determining applications for a stay as regards claims against non-domiciled defendants.

It has also been suggested that the common law power to stay proceedings is not affected with regard to determination of forum issues as between the jurisdictions of England and Wales, Scotland and Northern Ireland.<sup>1384</sup> In addition, the Brussels Regulation will not be applicable to Privy Council appeals from commonwealth jurisdictions. Even in cases involving a defendant domiciled in a member state, the issue of *lis alibi pendens* arises, where alternative proceedings have been launched involving the same parties and issues. This issue will be resolved according to domestic law, including as regards questions of *forum*. It is asserted in the principle authoritative text on conflicts of laws that nothing in *Owusu v Jackson* prevents the domestic courts from applying common law principles in such cases.<sup>1385</sup> In addition, service of proceedings outside a Convention state, which requires the permission of the court,<sup>1386</sup> will be determined pursuant to domestic law and not EC law, and that common law principles (see below) may still be applied.

In all the above types of cases, there is a risk that claimants will face the obstacle of potentially protracted and expensive hearings on matters of jurisdiction and forum.

#### *Common Law Principles concerning Forum Non Conveniens*

In any case where it is arguable that national laws can be applied and where the defendant applies to have the action stayed on the grounds of *forum non conveniens* the common law principles stated in the leading case of *Spiliada Maritime Corporation v Cansulex Ltd* will be applied.<sup>1387</sup> According to the *Spiliada* test, on deciding whether to grant a stay of proceedings on the grounds of *forum non conveniens*, the court will consider:

- (1) First, what is the 'natural forum' of the issues in the case? The natural forum will be the place in which the action had the most real and substantial connection. Factors to be taken into account will include convenience and expense (for example with regard to witnesses); the governing law of the relevant transaction; and the places where the parties reside and / or carry on their business (as the case may be).

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<sup>1382</sup> A Dicey, Morris and Collins, *Conflict of Laws* (14th edn) 12-023.

<sup>1383</sup> Brussels Regulation (n 134) art 4.

<sup>1384</sup> Dicey, Morris and Collins (n 139) 12-024.

<sup>1385</sup> *Ibid* 12-017; 12-022; 12-048.

<sup>1386</sup> Civil Procedure Rules 6.20.

<sup>1387</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

- (2) Secondly, having established the natural forum, the courts will consider whether there are 'circumstances by reason of which justice requires that a stay should nevertheless not be granted'.

In the case of *Connolly v RTZ*,<sup>1388</sup> the facts of which are summarised briefly above, the defendants applied to the High Court for a stay of the proceedings on the ground that Namibia was the appropriate forum for the trial of action. The issue came before the courts on several occasions and was finally ruled on by the House of Lords.<sup>1389</sup> It should be noted that in this case, both defendants were domiciled within the jurisdiction, and so, if the case were to be determined now, after *Owusu*, the common law would not be applied. However, vis-à-vis the application of *Spiliada* by the courts, it would still be relevant to the circumstances listed above where common law rules do still apply. In this case, the plaintiff conceded that Namibia was 'prima facie the jurisdiction with which the claim had the most real and substantial connection'. As such, the defendants had discharged the first part of the *Spiliada* test establishing that Namibia was the natural forum for the claim. Consequently, in applying *Spiliada*, the

...crucial question arose, therefore, whether a stay should nevertheless be refused because justice so required, on the grounds that the plaintiff could not proceed with the trial without financial assistance and that, whereas no such assistance was available in Namibia, it was available in England, in the form of legal aid, or failing that, a conditional fee agreement.<sup>1390</sup>

In the exceptional circumstances, although Namibia was the natural forum, the House of Lords ruled (Lord Hoffmann dissenting) that stay of proceedings should be lifted, because 'having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available'.<sup>1391</sup>

It is important to note that the *Connolly v RTZ* case did not change the law; it is noteworthy that the court emphasised that it was not simply a matter of the plaintiff being able to present a 'Rolls Royce' case here as opposed to a rudimentary one in Namibia that determined the court's decision.<sup>1392</sup> It is clear from this case that the courts will only refuse to grant a stay where the natural forum is another country in exceptional circumstances, and depending on the specific facts of the case, and subject to the case falling out-with the scope of European law.

### *The Corporate Veil and the Courts*

It is settled law in England and Wales that the courts will not generally 'pierce the veil' of an incorporated body to trace liability to the shareholders (including parent companies). Shareholders are only liable to the extent of the share capital and may not be held

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<sup>1388</sup> *Connolly v RTZ Corporation* (n 4).

<sup>1389</sup> Ibid 864.

<sup>1390</sup> Ibid 872.

<sup>1391</sup> Ibid 874.

<sup>1392</sup> Ibid.



generally liable for the acts of the company.<sup>1393</sup> The corporate veil will only be 'pierced' in very limited exceptional circumstances. It will not be pierced just because justice requires it.<sup>1394</sup> As held by the court of Appeal in *Adams v Cape*, the court will only pierce the veil if:

- (1) 'Statute or contract permits a broad interpretation to references to members of a group of companies'; or
- (2) The company is a sham or façade (the 'fraud exception').<sup>1395</sup>

Although not the same legal construction as piercing the corporate veil, liability may be established if it can be established that the company is an authorized agent with authority or capacity to create legal relations on behalf of the parent company.<sup>1396</sup>

Also to be distinguished from the corporate veil exceptions are cases where the parent company has itself acquired a direct legal obligation with the plaintiff. Whilst, in the context of the strike-out hearing before Wright J, the court in *Connolly v RTZ* rejected the defendants' application to strike out the case on the ground that no duty had been owed by the parent companies, this was not an issue of piercing the corporate veil, rather that the parent company had it taken upon itself to design and implement safety policy. Therefore it was arguable that it had separately assumed a duty of care to the Claimant.<sup>1397</sup>

### iii. Enforcement of Judgments

The courts in England and Wales may recognise and enforce foreign judgments. Recognition and enforcement of foreign judgments from outside Europe will be determined pursuant to domestic law.

There are, in the most general terms, three categories of judgments in relation to which differing law and procedure are considered potentially relevant to the question of non-nationals obtaining redress against TNCs.

First, judgments made and enforced by the courts of England and Wales are relatively free from obstacles. In this case, if a non-national brought a substantive claim in the courts of England and Wales and obtained judgment against a TNC, the judgment would be automatically enforceable as a judgment debt. Subject to solvency of the judgment debtor, enforcement following the practice and procedure of the Civil Procedure Rules should not present any unusual obstacles.<sup>1398</sup>

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<sup>1393</sup> *Salomon v Salomon & Co* [1897] AC 22 (HL).

<sup>1394</sup> *Trustor v Smallbone (No 2)* [2001] 1 WLR 1177 (ChD).

<sup>1395</sup> *Adams v Cape Industries* (n 2) 539.

<sup>1396</sup> *Smith Stone and Knight v Birmingham Corporation* [1939] All ER 116 (KB).

<sup>1397</sup> *Connolly v RTZ Corporation* (n 4).

<sup>1398</sup> Civil Procedure Rules (n 6) Part 70.

Secondly, judgments made in EU member states enforceable pursuant to the EC Judgment Regulations, or judgments made in states party to the Brussels or Lugano Conventions, are enforceable in domestic law pursuant to the CJJA.<sup>1399</sup> Enforcement of judgments under these mechanisms is not considered further in this paper on the presumption that most cases of individuals seeking to enforce foreign judgments against TNCs will arise further to judgments made outside Europe.

Thirdly, recognition and enforcement of foreign judgments made outside the Judgment Regulations or Conventions is governed by domestic law. Statutory and common law principles that will be applied when claimants seek to enforce judgments which are not subject to the Judgment Regulations or the Brussels and Lugano Conventions are explained further in the sections which follow. Where a claimant seeks to enforce a judgment obtained in a commonwealth jurisdiction, or a state with which a bilateral treaty on enforcement of judgments exists, enforcement proceedings will be determined pursuant to statutory provisions. In cases where a claimant seeks to enforce a judgment obtained in a state with which no treaty on enforcement exists, enforcement will be determined pursuant to common law provisions.

### *Statute Law on Enforcement of Foreign Judgments*

There is a variety of statutory provisions regarding recognition and enforcement of judgements from certain jurisdictions. Judgments from foreign courts covered by those acts may be registered in the civil courts of England and Wales for enforcement.

Pursuant to Part II, Administration of Justice Act 1920, claimants who have obtained civil judgments or orders for a sum of money in many commonwealth jurisdictions may apply to the to the High Court within twelve months of the date of judgment for registration of the judgment; the court has a discretionary power to register the judgment if it is just and convenient to do so.<sup>1400</sup> This process is more straightforward than common law cases described below. Applications for registration may be made without notice, supported by certain evidence as directed in the Civil Procedure Rules. Once a registration order has been made, it must be served on the judgment debtor. No further permission is required to serve out of the jurisdiction. Subject to the terms of the registration order, and any appeals or application to set aside the registration order, the judgment may thereafter be enforced.<sup>1401</sup> The court will not register a judgment under the Administration of Justice Act if:

- (1) the original court acted without jurisdiction;
- (2) the judgment debtor was not ordinarily resident, nor carried on a business, within the jurisdiction of the original court and did not submit to the jurisdiction;

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<sup>1399</sup> Civil Jurisdiction and Judgments Act (n 131).

<sup>1400</sup> Administration of Justice Act 1920 ss 9, 12(1).

<sup>1401</sup> Civil Procedure Rules (n 6) Part 74 I.

- (3) the judgment debtor was not properly served with process of the original court and did not appear;
- (4) the judgment was obtained by fraud;
- (5) there is an appeal pending or the debtor is entitled to appeal;
- (6) the judgment was in respect of a cause of action which the courts of England and Wales would not have entertained, on public policy grounds.<sup>1402</sup>

As already noted above, public policy would prevent registration and enforcement of penal and revenue judgments and judgments founded on laws contrary to international law and human rights.<sup>1403</sup>

Once registered pursuant to the Administration of Justice Act, a judgment may be enforced, and proceedings taken on it, as if it had been obtained within the jurisdiction of England and Wales.<sup>1404</sup> Countries and territories to which the Administration of Justice Act 1920 extend include New Zealand, Nigeria, Botswana, the Republic of Cyprus, the Gambia, Ghana, Kenya and various other commonwealth territories.<sup>1405</sup>

Final and conclusive judgments for a sum of money (excluding in relation to taxes) made in countries with which reciprocal treaty arrangements exist for recognition and enforcement may be registered and enforced pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1933 (as amended), if that Act has been extended to the relevant country by Order in Council.<sup>1406</sup> Countries to which the Act has been extended include Israel,<sup>1407</sup> Canada,<sup>1408</sup> Australia,<sup>1409</sup> Surinam,<sup>1410</sup> Jersey,<sup>1411</sup> Guernsey,<sup>1412</sup> the Isle of Man,<sup>1413</sup> and Tonga.<sup>1414</sup> An application to the High Court for registration of a judgment may be made within six years of the date of judgment; once registered, the judgment may be executed as if it had been a judgment of the High Court of England and Wales.<sup>1415</sup> However, the registration of a judgment may be set aside in certain circumstances, including if it was a judgment to which the Act does not apply, or registration contravened the provisions of the 1933 Act; or if the original court had no jurisdiction; or the judgment debtor did not receive sufficient notice to defend the original proceedings; or the judgment

<sup>1402</sup> Administration of Justice Act (n 157) s 9(2).

<sup>1403</sup> See p 246, above.

<sup>1404</sup> Administration of Justice Act s 9 (3).

<sup>1405</sup> The Reciprocal Enforcement of Foreign Judgments (Administration of Justice Act 1920, Part II) Consolidation Order 1984 SI 1984/129.

<sup>1406</sup> Foreign Judgments (Reciprocal Enforcement) Act 1933, s 1.

<sup>1407</sup> Reciprocal Enforcement of Foreign Judgments (Israel) Order 1971 SI 1971/1039 (as amended).

<sup>1408</sup> Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987 SI 1987/468 (as amended).

<sup>1409</sup> Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 SI 1994/1901.

<sup>1410</sup> Reciprocal Enforcement of Foreign Judgments (Surinam) Order 1981 SI 1981/735.

<sup>1411</sup> Reciprocal Enforcement of Foreign Judgments (Jersey) Order 1973 SI 1973/612.

<sup>1412</sup> Reciprocal Enforcement of Foreign Judgments (Guernsey) Order 1973 SI 1973/610.

<sup>1413</sup> Reciprocal Enforcement of Foreign Judgments (Isle of Man) Order 1973 SI 1973/611.

<sup>1414</sup> Reciprocal Enforcement of Foreign Judgments (Tonga) Order 1980 SI 1980/1523.

<sup>1415</sup> Foreign Judgments (Reciprocal Enforcement) Act (n 163) s 2.

was obtained by fraud; or if the applicant for registration was not vested with rights under the judgment.<sup>1416</sup> Registration may also be set aside on public policy grounds.<sup>1417</sup>

### *Common Law Principles and the Enforcement of Foreign Judgments*

A foreign judgment obtained in a non-commonwealth state with which no treaty arrangements exist is not automatically enforceable at common law. Separate proceedings must be brought first for recognition and enforcement of the judgment. An application should be made for summary judgment on the basis that the defendant has no real prospect of defending the claim.<sup>1418</sup> The court will only recognise a foreign judgment which is final and conclusive,<sup>1419</sup> for a debt or a definite sum of money,<sup>1420</sup> and which is not in respect of taxes,<sup>1421</sup> or for the direct or indirect enforcement of penal laws of a foreign state.<sup>1422</sup> In proceedings for recognition and enforcement of a foreign judgment, at common law the defendant may claim that he has a legal excuse which should prevent the court ordering enforcement.<sup>1423</sup> A foreign judgment is impeachable if the foreign courts did not have jurisdiction.<sup>1424</sup> The courts will not recognise and enforce a foreign judgment obtained by fraud.<sup>1425</sup> If there has been a breach of natural justice in the foreign proceedings, the court will not enforce a judgment which offends against 'English views of substantial justice'.<sup>1426</sup> Further, public policy grounds may be raised in defence of an action to recognise and enforce a foreign judgment at common law.<sup>1427</sup>

In *Adams v Cape*, the Court of Appeal restated the general common law principle that judgments *in personam* obtained in a foreign jurisdiction may be recognised and enforced by the courts of England and Wales, on the basis that a legal obligation has arisen further to a judgment of a court of competent jurisdiction.<sup>1428</sup> In that case, however, the Court of Appeal declined to enforce the judgment on the basis that it breached natural justice.

## **C. Practical Obstacles**

### **i. Assessment of Legal System**

The legal system is generally effective. Although there is no true separation of powers in the constitutional scheme, in practice the judiciary operates independently and is generally considered to be robust, and immune from political interference. Since enactment of the HRA, the right to a fair trial under art 6, ECHR, has further strengthened guarantees of due

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<sup>1416</sup> *Ibid* s 4.

<sup>1417</sup> *Ibid*. Public policy grounds could include the matters referred to at p 246, above.

<sup>1418</sup> Civil Procedure Rules (n 6) Part 24; Dicey, Morris and Collins (n 139) 14-009, citing *Grant v Easton* (1883) 13 QBD 302 (CA) and *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287 (CA).

<sup>1419</sup> *Nouvion v Freeman* (1889) AC 150 (PC).

<sup>1420</sup> *Sadler v Robins* (1808) 1 Camp 253.

<sup>1421</sup> *Government of India v Taylor* (n 114).

<sup>1422</sup> *Huntingdon v Attrill* (n 1356); *US v Inkley* [1989] QB 255 (CA).

<sup>1423</sup> *Schibsby v Westenholz* (1870) LR 6 QB 155 (QB) 159.

<sup>1424</sup> Dicey, Morris and Collins (n 139) Rules 42, 14R-118; *Adams v Cape Industries* (n 2) 450.

<sup>1425</sup> Dicey, Morris and Collins (n 139) Rule 43; *Abouloff v Oppenheimer* (1882) 10 QBD 295 (CA); *Jet Holdings Inc v Patel* [1990] 1 QB 335 (CA).

<sup>1426</sup> *Pemberton v Hughes* [1899] 1 Ch 781 (CA), 790-91.

<sup>1427</sup> Dicey, Morris and Collins (n 139) Rule 44; see p 246, above.

<sup>1428</sup> *Adams v Cape Industries* (n 2) 457.

process in civil and criminal trials.<sup>1429</sup> A major reform of the civil justice procedure in 1998, with the introduction of the Civil Procedure Rules 1998 ('CPR') and practice directions, has generally improved the speed and efficacy of civil trials.<sup>1430</sup> The 'overriding objective' of the CPR directs that cases should be dealt with justly, including ensuring equality of arms between parties, saving expense, dealing with the case in a manner which is proportionate, and ensuring the litigation proceeds 'expeditiously and fairly'.<sup>1431</sup> The judges have enhanced case management powers,<sup>1432</sup> generally improving the speed and efficacy of cases. Further, the courts have enhanced powers to stay proceedings and require parties to attempt to resolve disputes through mediation or other alternative dispute resolution.<sup>1433</sup> In general terms, such initiatives would appear to benefit individual claimants when pursuing complex litigation against large corporations.

## ii. Legal Aid

There is provision in England and Wales for legal aid in civil and criminal cases. An independent statutory body, the Legal Services Commission (LSC), is responsible for considering applications for legal aid. Its powers and functions are governed primarily by the Access to Justice Act 1999 (as amended). The LSC cannot, as a general rule, grant legal aid in relation to claims where the applicable law of the substantive case is not the law of England and Wales. This restriction is set out in s 19 of the Access to Justice Act 1999, which provides that the LSC

...may not fund as part of the Community Legal Service or Criminal Defence Service services relating to any law other than that of England and Wales, unless any such law is relevant for determining any issue relating to the law of England and Wales'.<sup>1434</sup>

No reported cases have been identified on how the courts might interpret s 19. The ordinary meaning of the words suggests that where the applicable law of the dominant substantive issues in a case is foreign law, legal aid will be refused. Having regard to the likely application of foreign law in tort claims where the injury or damage occurred in another country, this means that claimants in such cases are not likely to obtain legal aid funding under the current legislative scheme.

However, legal aid may be available in relation to preliminary issues, including determination by the courts of questions of applicable law and jurisdiction (both of which are determined pursuant to the laws of England and Wales), and recognition and enforcement of foreign judgments. It would seem that, if other funding criteria are satisfied (as to the claimant's means, availability or otherwise of alternative funding, and regarding the prospects of success), then the LSC would have discretion to award funding in relation to those issues.

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<sup>1429</sup> Human Rights Act (n 2) sch 1, art 6.

<sup>1430</sup> Civil Procedure Act 1997; Civil Procedure Rules 1998.

<sup>1431</sup> Civil Procedure Rules (n 6) Part 1.

<sup>1432</sup> Ibid Parts 3 and 26.

<sup>1433</sup> Ibid Part 26 r 4.

<sup>1434</sup> Access to Justice Act 1999 s 19.

As noted above, the *lex fori* will be applied in assessing damages, even in cases where the applicable law of the substantive claim is not English law. Consequently, it may be possible for claimants to obtain legal aid funding for aspects of the proceedings relating to the determination of the quantum of damages.

Besides legal aid, it is possible to instruct lawyers to act on the basis of a conditional fee agreement,<sup>1435</sup> and to obtain litigation insurance to cover potential adverse costs awards in the event that a claim is unsuccessful. Solicitors acting on a conditional fee basis are professionally obliged to discuss with their clients the prospect of adverse costs awards<sup>1436</sup> (which, in large-scale complex litigation are likely to be very large), and about the possibility of litigation insurance to cover that eventuality. No investigations have been undertaken for the purpose of this paper about the availability or otherwise of litigation insurance for claimants who are non-nationals.

### iii. Cost of Action

Litigation in England and Wales is expensive. Hourly rates for solicitors vary considerably depending on the nature of the case, the level of expertise, and the locality of the practice. The Court Service publishes guideline hourly rates for the purpose of summary assessment of costs by the courts in civil cases. At the top end of the scale, City of London firms' guideline rates range from £134 (trainees and paralegals) through to £396 per hour for solicitors with eight years post-qualification experience. The guideline rates are somewhat lower in other areas of London and the regions (ranging from £99 to £304).<sup>1437</sup> Although some solicitors do have rights of audience in the higher courts, in many cases, counsel will also need to be instructed to conduct the advocacy. In complex cases, it is not uncommon to instruct at least two barristers, including a leader (Queen's Counsel) and junior counsel. Judges have a wider discretion as to the allowable fees for counsel in summary assessments of costs. The courts will use statistically-determined counsels' fees in 'run-of-the-mill' cases as a starting point. For a half day civil hearing, these range from about £450 for junior counsel, to around £1700 for counsel of more than ten years' call.<sup>1438</sup> Complex civil claims are likely to involve frequent hearings on procedural and substantive issues during the course of the case. Preliminary hearings on more complex matters of law and fact can be listed for hearings of several days. Professional fees at these rates can quickly escalate.

Court fees vary depending on the nature of the litigation, and the type of document being filed at court. In civil proceedings, a sliding scale operates with regard to the cost of issuing proceedings. Court fees to issue a claim worth less than £300 are £30; for claims worth more than £300,000, the court fee to issue of proceedings currently stands at £1530. Court fees must be paid for filing or issuing most types of formal documents during the course of litigation. Mostly these fees are in the range of tens or low hundreds of pounds, although, exceptionally, a fee of up to £5000 (for higher value cases) must be

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<sup>1435</sup> Courts and Legal Services Act 1990 s 58.

<sup>1436</sup> Solicitors Code of Conduct, Rule 2.03.

<sup>1437</sup> HMCS, 'Guide to the Summary Assessment of Costs' (2008) <[http://www.hmcourts-service.gov.uk/publications/guidance/scco/appendix\\_2.htm](http://www.hmcourts-service.gov.uk/publications/guidance/scco/appendix_2.htm)> accessed 15 March 2008 .

<sup>1438</sup> *Ibid.*

paid when an application is made for a detailed assessment of costs where parties are not legally aided.<sup>1439</sup>

#### iv. Witness Protection

Witness protection schemes do operate in England and Wales. Intimidation and harassment of witnesses in civil proceedings is a criminal offence.<sup>1440</sup> Recent legislation makes provision for witness protection schemes, including in relation to ensuring the physical security of witnesses, and with regard to protecting the identity of individuals under witness protection.<sup>1441</sup>

### 5. AMICUS BRIEF INVOLVEMENT

The courts have inherent common law jurisdiction to invite the appointment of an 'advocate to the court' (formerly referred to as *amicus curiae*). Advocates to the court are independent counsel appointed to assist the court. Appointment of advocates to the court is a function of the Attorney General.<sup>1442</sup> Submissions from advocates to the court are generally legal submissions. In the case concerning an application for extradition of General Pinochet, the court appointed an *amicus curiae* (as it was then referred to).<sup>1443</sup> Although the court's power to appoint an advocate to the court is wide, the role is one of neutral advisor to the court. As such, it is not conceivable that industry groups and states with a vested interest in the outcome of the case would be invited to submit evidence or legal arguments pursuant to this mechanism. Where the legal interests of non-parties would be directly affected by the outcome of proceedings, yet are unrepresented, it may be that the court decides to appoint an advocate to the court to present relevant legal submissions in a neutral manner on such issues. Particularly in the case of judicial review proceedings, the court has the power to permit interventions on issues of law and fact from interested third parties, which may include public interest organisations with specialist knowledge relevant to the proceedings.<sup>1444</sup> In civil litigation proceedings, the court may make witness summons orders requiring individuals to make depositions and / or to attend and give evidence at trial.<sup>1445</sup>

### 6. CASE STUDY: THE CAPE LITIGATION

The litigation against Cape Industries Plc ('Cape') and various subsidiary companies would appear to be the most significant multi-party claims to be launched in the UK by non-nationals against a TNC. As will be described below this litigation involved several claims, including an action to enforce a foreign judgment, and applications for approvals of novel settlement trusts. Many of the legal issues already referred to in this paper arose during the Cape litigation.

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<sup>1439</sup> HMCS, 'Fee Guides' (2008) Her Majesty's Court Service Online <<http://www.hmcourts-service.gov.uk/publications/guidance/fees/index.htm>> (Accessed on 2 March 2008).

<sup>1440</sup> Criminal Justice and Police Act 2001, ss 39–41.

<sup>1441</sup> Serious Organised Crime and Police Act 2005, ss 82–94.

<sup>1442</sup> 'The Governance of Britain: A Consultation on the Role of the Attorney General' (2007) Cm 7192.

<sup>1443</sup> *R v Bow Street Magistrates ex p Pinochet Ugarte* [1998] 4 All ER 897 (HL).

<sup>1444</sup> Civil Procedure Rules (n 6) Part 54.17.

<sup>1445</sup> *Ibid* Part 34.

## A. Summary of Key Facts

Cape owned various asbestos mining subsidiaries in South Africa, and marketing products through other subsidiary companies. Claims were brought in various jurisdictions against Cape companies for damages for personal injury and death alleged to have been caused by negligent exposure by Cape companies of workers to asbestos.

## B. Texas Litigation

This is a very brief summary of the key facts, as set out in the judgment of the Court of Appeal in *Adams v Cape*.<sup>1446</sup> During the 1970s, group action claims were issued by workers from a factory in Owentown, Texas in the Tyler Federal District Court. The factory was owned and operated by Pittsburg Corning Corporation ('PCC'). Defendants in the first group action ('Tyler 1 action') included Cape (the English-incorporated parent company), its wholly owned subsidiary Capasco (also an English company), and North American Asbestos Corporation ('NAAC'), an Illinois-incorporated subsidiary of Cape, and others. Capasco was the world-wide marketing company for Cape; NAAC was the marketing subsidiary for the USA. The two South African mining companies, Egnep Pty Ltd ('Egnep'), and Cape Asbestos South Africa (Pty) Ltd, were both subsidiaries of Cape until 1975. Egnep was also a party to the Tyler 1 actions. Cape and Capasco contested the jurisdiction of the court; their initial motions on this point were dismissed without reasons, but this was not a final court ruling; it was still open to Cape and Capasco to contest jurisdiction at trial. They both then entered a defence on the merits and reiterated their defence on the grounds of lack of jurisdiction. The jurisdiction issue was never ruled on finally by the court, as the claims were settled in September 1977, for US \$20 million, of which over \$5 million was to apportioned to Cape and its subsidiaries.

Between April 1978 and November 1979, further claims were issued by 206 Owentown workers, against defendants including Cape, Capasco and Egnep, in the Tyler Federal District Court ('Tyler 2 actions'). This time, Cape, Capasco and Egnep did not take any part in the proceedings, so as not to do anything that could be construed as having submitted to the jurisdiction. Those three companies had no assets in the jurisdiction against which a judgment in default could be enforced (by this point in time NAAC shares were valueless because of the outstanding asbestos claims). Any attempts to enforce a default judgment from the Tyler court in England could be defended on the ground that under English law, the US courts had no jurisdiction over the three companies. It was decided by the Cape board that NAAC should be liquidated and the asbestos selling arrangements of the group be re-organised, re- focusing control over those activities to South Africa. (transferring control over those activities to South Africa?)

Judgment in default for a total of US \$15.5 million was entered in the Tyler court on 12 September 1983, without a hearing.

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<sup>1446</sup> *Adams v Cape Industries* (n 2) 443–54.



### C. *Adams v Cape*<sup>1447</sup>

This was an action brought in the High Court in England and Wales to enforce the Tyler 2 default judgment against Cape and Capasco.

The Defendants contended that the Tyler court had no jurisdiction, so the English court should not recognise and enforce the default judgment. The defendants also contended that the default judgment had been obtained fraudulently, and that it would be a breach of natural justice for the English court to enforce it, on public policy grounds.

The plaintiffs contended that the Tyler court did have jurisdiction on the following grounds.

- (1) The defendants had appeared voluntarily in the Tyler 1 actions, and that the Tyler 1 and 2 actions represented 'one litigation unit'; the Court of Appeal described this as a 'somewhat startling proposition';
- (2) Cape and Capasco had, by inference from actions taken in the Tyler 1 actions, submitted to the jurisdiction;
- (3) The Tyler court had jurisdiction because of Cape's and Capasco's presence in the jurisdiction. This argument was based on the fact that NAAC was present in Illinois (not Texas) up until its dissolution in 1978, as was a subsequent subsidiary, CPC, between January 1978 and June 1979, and that the relationship between the companies justified treating the presence of NAAC and CPC as the presence of Cape and Capasco. This ground raised factual and legal issues; and
- (4) Finally, the plaintiffs asserted that the English court should recognise the jurisdiction of the Tyler court on comity or reciprocity grounds. This argument was dropped at the outset of the Court of Appeal hearing.<sup>1448</sup>

The court of appeal held that neither of the defendants was present within the jurisdiction for the purposes of Tyler 2. The court considered in some detail whether the defendants were present and carrying on a business in the jurisdiction through the agency of NAAC and CPC but ultimately held that it was clear that the latter companies were carrying out businesses of their own; as such the agency argument failed.<sup>1449</sup>

The court also considered whether, despite separate legal incorporation, in fact Cape / Capasco and NAAC constituted a 'single economic unit' meaning that the presence of NAAC within the Illinois jurisdiction would be sufficient to constitute a presence on the part of Cape and Capasco. This point was also rejected on the basis that in law the entities were legally separate, whatever the economic reality. The court then went on to consider

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<sup>1447</sup> Ibid.

<sup>1448</sup> Ibid 455.

<sup>1449</sup> Ibid 545–550.

whether CPC was a facade, covering the real presence within the US of Cape, and thus whether the corporate veil should be pierced on the 'fraud exception' ground. Although it found that the establishment of the South African trading company AMC was a sham and that it was in reality a 'creature of Cape', the same could not be said of CPC, which was clearly carrying on a business in the US, so the 'corporate veil' could not be lifted.<sup>1450</sup>

On the basis that the defendants had not been present in the jurisdiction for the purposes of the Tyler 2 proceedings, the Court of Appeal held that the defendants had disproved the competence of the Tyler court to give judgment, so the English courts would not recognise and enforce that judgment.<sup>1451</sup> It also held that the judgment in the Tyler 2 case offended English notions of justice because the default judgment had assessed damages in a questionable manner. As such it declined to enforce the judgment on natural justice grounds.<sup>1452</sup>

#### **D. *Lubbe v Cape***<sup>1453</sup>

This subsequent case against Cape concerned asbestos-related personal injuries and deaths alleged to have been suffered at Cape's South African mines. Proceedings were issued in England in February 1997 against Cape, by Mrs Lubbe and four other South African mine workers, claiming damages in negligence. The defendants applied to the court for, and obtained, a stay of the proceedings on the grounds of *forum non conveniens*, on the basis that South Africa was the more appropriate forum for the claims.<sup>1454</sup> The plaintiffs appealed, and when the case came before the Court of Appeal for the first time, the stay was lifted.<sup>1455</sup> Shortly thereafter some 3,000 further claims were issued against Cape. The defendants applied to the court to have all the action stayed, including the *Lubbe* case, on the grounds of abuse of process and *forum non conveniens*. At first instance, Buckley J again stayed all the proceedings, on the grounds that South Africa was the more appropriate forum. The Court of Appeal subsequently upheld that decision, rejecting the plaintiffs' case that the lack of availability of legal aid in South Africa meant justice could not be done in that forum. The Court of Appeal considered but rejected the defendants' argument that there had been an abuse of process.<sup>1456</sup>

The plaintiffs' appeal came before the House of Lords. The main argument in their case was that substantial justice could not be done in South Africa, because they could not obtain legal aid funding there. The case was decided prior to the ECJ ruling in *Owusu v Jackson*, and whilst the plaintiffs contended that art 2 of the Brussels Regulation precluded the court from staying the proceedings on the grounds of *forum*, that argument was not pursued because the plaintiffs did not wish to delay the case pending a reference to the ECJ for a ruling on that point.<sup>1457</sup> Applying the common law rules, the House of Lords stated that the Court of Appeal had been correct in finding that South Africa was the more appropriate forum for the claims, but was wrong in concluding that the plaintiffs had not shown that substantial justice would not be done in that more appropriate forum. On the

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<sup>1450</sup> Ibid 543–545.

<sup>1451</sup> Ibid 550.

<sup>1452</sup> Ibid 568.

<sup>1453</sup> *Lubbe v Cape Plc* (n 2).

<sup>1454</sup> *Lubbe v Cape*, 12 January 1998 (unreported).

<sup>1455</sup> *Lubbe v Cape* [1998] CLC 1559 (CA).

<sup>1456</sup> *Lubbe and Others v Cape Plc* [2000] 1 Lloyd's Rep 139 (CA).

<sup>1457</sup> *Lubbe and Others v Cape Plc* (n 2) 273; 282.

basis that there were 'special and unusual' circumstances in the case, because the Claimants would not be able to access adequate funding to bring the claims in South Africa, the stay of proceedings was lifted by the House of Lords.<sup>1458</sup>

This case subsequently settled out of court. As a result, novel settlement trusts have been established and approved by the courts, which will provide for compensation to existing and future claimants.<sup>1459</sup> Despite the substantive, procedural and practical hurdles faced by claimants in the Cape litigation, in this case redress was ultimately obtained in the form of these settlements. However, as will be apparent from other authorities cited, including the case of *Connelly v RTZ*,<sup>1460</sup> and the litigation against Thor Chemicals,<sup>1461</sup> the Cape litigation is unusual in this regard.

## 7. SUMMARY AND CONCLUSIONS

To summarise, TNCs, as with other private entities, are not directly bound in law to observe human rights standards, which are a matter of public and not private law. It is necessary to look to the substance, rather than the strict legal rights and obligations, of human rights standards in public international law. Thus, this paper has perceived 'human rights' in a wider sense in order to contemplate TNCs being held to account for breaches committed in other countries.

The paper focused primarily on the question of physical integrity of the person, and considered the extent to which criminal and civil law might provide redress for individuals whose physical integrity has been harmed or interfered with by TNCs operating abroad.

Further, whilst breach of some international human rights standards concerning torture, genocide, and crimes against humanity is a criminal offence under domestic law, corporations cannot be indicted and convicted of any of those crimes, because of the mandatory prison sentences that those crimes carry.

It has also been shown in this paper that most criminal law does not extend beyond the territory of England and Wales, or, in some cases, Great Britain, and Northern Ireland (if provided for in primary legislation).

Consequently, as regards criminal liability, there is little prospect of TNCs being held criminally liable for human rights abuses committed in host states abroad. This part of the submission then addressed the prospect of tort claims, for personal injury and death. In short, it is in the arena of tort that there is some prospect of individuals being able to obtain redress for interferences with their physical integrity occurring outside the jurisdiction. However, litigation may be littered with obstacles for the claimants. These were referred to in the context of discussion about substantive causes of action, as well as in the context of

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<sup>1458</sup> Ibid 279.

<sup>1459</sup> *Re Cape Plc and Other Companies* (n 3).

<sup>1460</sup> n 1247.

<sup>1461</sup> n 1248.

discussion about access to justice more generally. Some of the most prominent likely obstacles can be summarised briefly as follows.

First, establishing a cause of action in tort will inevitably involve questions of applicable law. It is unlikely that English law will be found to be the applicable law. Where foreign law is the correct applicable law, expert evidence will be required on foreign law; whilst the substantive law will be that of the foreign jurisdiction, procedure will be a matter for English law. Secondly, the question of jurisdiction and forum may arise. As discussed, in most cases it is now clear that the court cannot stay proceedings on the grounds of *forum non conveniens* when the defendant is domiciled here, but there are other cases where the law is less clear and it would appear that domestic as opposed to European law will apply (for example, when an action between identical parties on similar grounds is already proceeding in another jurisdiction, an application may be made for a stay on the grounds of *lis alibi pendens*). The situation may be more complex in cases with several defendants, each with different domicile status. Not least as a consequence of the legal uncertainty in this area, it is not unlikely that many complex and expensive legal arguments may need to be resolved at an early stage in proceedings, adding to the cost and duration of litigation, and making the ultimate outcome difficult to predict with any certainty.

This part of the submission also considered questions of equality and discrimination in employment, and the potential for claims against TNCs for breach of employment contract. It demonstrated that the Employment Tribunal is unlikely to exercise jurisdiction in most cases of employment abroad. Further, the statutory provisions, which incorporate international standards on equality and non-discrimination into domestic law, do not have effect beyond the territory. In conclusion, unless an employment contract contains a choice of law and jurisdiction clause, actions for breach of contract relating to employment outside the jurisdiction in another host state have a very low prospect of success.

Whilst costs and funding may present some obstacles, the civil justice system generally operates expeditiously and fairly, in accordance with standards that would be expected in any democratic state that observes the rule of law and international human rights standards. Whilst legal aid is limited, and not available for cases not governed by the law of England and Wales, lawyers may act on the basis of conditional fee agreements. Consequently, lack of legal aid is not necessarily an insurmountable obstacle to justice.

**8. APPENDIXES: TABLES WITH INFORMATION OF CERTAIN RELEVANT INTERNATIONAL OBLIGATIONS FOR THE UNITED KINGDOM**

**TABLE I: UK Principal International Human Rights and Humanitarian Treaty Obligations**

<b>TREATY</b>	<b>ABBREVIATION</b>	<b>UK STATUS<sup>1462</sup></b>	<b>DOMESTIC LAW</b>	<b>NOTES</b>
International Covenant on Economic, Social and Cultural Rights	ICESCR	20 August 1976	Not incorporated	
International Covenant on Civil and Political Rights	ICCPR	20 August 1976	Not incorporated but similar rights under ECHR incorporated into domestic law by Human Rights Act 1998	
ICCPR Optional Protocol	ICCPR-OP1	Not ratified		
ICCPR Second Optional Protocol on the abolition of the death penalty	ICCPR-OP2	10 December 1999		
International Convention on the Elimination of All Forms of Racial Discrimination	CERD	6 April 1969		
Convention on the Elimination of All Forms of Discrimination Against Women	CEDAW	7 May 1986		
CEDAW Optional Protocol	CEDAW-OP	Not ratified		

<sup>1462</sup> Save where expressly noted otherwise in footnotes, all data on ratification status obtained from: UN, 'Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004' (2004) UN Office of the High Commissioner for Human Rights <<http://www.unhcr.ch/pdf/report.pdf>> (Accessed 15 February 2008).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	CAT	Ratified 8 December 1988, to take effect from 7 Jan 1989	Criminal Justice Act 1988 s 134- criminal offence for public official or person acting in official capacity to torture, whatever his / her nationality and wherever in the world committed	
CAT Optional Protocol	CAT-OP	Ratified 10 December 2003		
Convention on the Rights of the Child	CRC	Ratified 16 December 1991		
CRC Second Optional Protocol (sale of children, child prostitution, child pornography)	CRC-OP-SC	Ratified 3 August 2003		
International Convention on the Protection of the Rights of All Migrant Workers and their Families	MWC	Not ratified		The MWC (in force 2003) has only been ratified by 37 states; no state from the European Economic Area has ratified the MWC <sup>1463</sup> .
Rome Statute of the International Criminal Court	RSICC	Signed 30 November 1998  Ratified 4 October 2001 <sup>1464</sup>	International Criminal Courts Act 2001	

<sup>1463</sup> E MacDonald and R Cholewinski, *The Migrant Workers' Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* (UNESCO Migration Studies 2007) <<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>> accessed 15 February 2008, 9.

<sup>1464</sup> ICC, 'State Parties to the Rome Statute of the International Criminal Court' (2007) International Criminal Court <<http://www.icc-cpi.int/statesparties.html>> accessed 15 February 2008.

Convention on the Prevention and Punishment of the Crime of Genocide		Ratified 19 June 1980 <sup>1465</sup>	Genocide Act 1969 (repealed); International Criminal Courts Act 2001	
Geneva Convention I (Amelioration of the Wounded and Sick in Armed Forces and Field)	GC I		Geneva Conventions Act 1957 and Geneva Conventions (Amendment) Act 1995	Breach of GCs I–IV an offence under domestic law, including if committed outside jurisdiction
Geneva Convention II (Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea)	GC II		Geneva Conventions Act 1957 (as amended)	
Geneva Convention III (Relative to the Treatment of Prisoners of War)	GC III		Geneva Conventions Act 1957 (as amended)	
Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War)	GC IV		Geneva Conventions Act 1957 (as amended)	

<sup>1465</sup> FCO, 'International Human Rights Agreements Ratified or Acceded to by the UK' (2008) Foreign & Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360377428>> accessed 15 February 2008.

**TABLE II: UK OBLIGATIONS UNDER EUROPEAN TREATIES AND INSTRUMENTS**

TREATY	ABBREVIATION	UK STATUS	DOMESTIC LAW	NOTES
European Convention for the Protection of Human Rights and Fundamental Freedoms 1951	ECHR	Ratified 8 March 1951		Notifications in 1988 and 1989 with regard to Northern Ireland Prevention of Terrorism Acts.
ECHR Protocol 1 (protection of property, right to education, right to free elections)	ECHR P1	Ratified 3 November 1952 <sup>1466</sup>	HRA	Reservation dated 20 March 1952 in respect of the right to education, which was accepted 'only so far as compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'
ECHR Protocol 4 (prohibition of imprisonment for debt; freedom of movement)	ECHR P4	Not ratified		Ratification currently 'under review' <sup>1467</sup> .
ECHR Protocol 6 (abolition of the death penalty save in times of war)	ECHR P6	Ratified 20 May 1999 <sup>1468</sup>	HRA	

<sup>1466</sup> Ibid.

<sup>1467</sup> DCA, 'Frequently Asked Questions: Further information on the European Convention on Human rights and Other International Instruments' (2008) Department for Constitutional Affairs <<http://www.dca.gov.uk/peoples-rights/human-rights/faqs.htm>> accessed 15 February 2008.

<sup>1468</sup> FCO (n 222).



ECHR Protocol 7 (expulsion of aliens; rights in criminal matters; equality between spouses)	ECHR P7	Not ratified		Ratification currently 'under review' <sup>1469</sup> .
ECHR Protocol 12 (General prohibition of discrimination)	ECHR P12	Not ratified		Ratification currently 'under review' <sup>1470</sup> .
ECHR Protocol 13 (abolition of the death penalty in all circumstances)	ECHR P13			
European Convention for the Prevention of Torture and Other Inhuman and Degrading Treatment <sup>1471</sup>	ECPT	Ratified 24 June 1988 <sup>1472</sup>	Criminal Justice Act 1988 s. 134	Arts 17 and 18 amendments opened for signature New York 8 September 1992; UK acceptance 7 February 1994; amendments not yet in force <sup>1473</sup> .
ECPT Protocol 1	ECPT-P1	Ratified 11 April 1996 <sup>1474</sup>		
ECPT Protocol 2	ECPT-P2	Ratified 11 April 1996 <sup>1475</sup>		
Treaty of Accession 1972	TA	Ratified	European Communities Act 1972 (ECA)	Pursuant to the ECA certain EC measures have direct effect in UK law.

<sup>1469</sup> DCA, 'Frequently Asked Questions: Further information on the European Convention on Human rights and Other International Instruments'.

<sup>1470</sup> Ibid.

<sup>1471</sup> ECPT (n 7).

<sup>1472</sup> FCO (n 222).

<sup>1473</sup> Ibid.

<sup>1474</sup> Ibid.

<sup>1475</sup> Ibid.

Charter of Fundamental Rights of the European Union	CFR	Signed 12 December 2007		
Treaty of Lisbon 2007	TL	Signed 13 December 2007		

**TABLE III: UK RELEVANT INTERNATIONAL LABOUR ORGANISATION TREATY OBLIGATIONS<sup>1476</sup>**

TREATY	ABBREVIATION	UK STATUS	DOMESTIC LAW	NOTES
ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value		Ratified 15 June 1971	Not expressly incorporated but similar legal provisions exist in EC law and pursuant to the Equal Pay Act	
ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation		Ratified 8 June 1999	Not incorporated;	
ILO Convention No 122 concerning Employment Policy		Ratified 27 June 1966		
ILO Convention No. 87 on Freedom of Association		Ratified 27 June 1949		
ILO Convention No 135 concerning protection and Facilities to be afforded to the Workers' Representatives in the Undertaking		Ratified 15 March 1973		
ILO Convention No 151 Concerning the Protection of the Right to Organise and Procedures for determining conditions of Employment in the Public Service		Ratified 19 March 1980		

<sup>1476</sup> Ibid..

# UNITED STATES

— Catherine Dobson, Ernesto Félix, Emily Mok and James Upcher\* —

## 1. EXECUTIVE SUMMARY

The United States is the seat of incorporation of many of the world's largest TNCs and many TNCs have business contacts and assets in the United States. Furthermore, the United States has enacted a number of (federal) statutes that allow lawsuits of the kind envisioned in this submission. Because of this, the United States presents some potential for human rights litigation against TNCs for violations of human rights committed abroad. The Federal Government, through amicus curiae briefs or through prosecution, actively intervenes in cases like the ones contemplated in this submission; as have industry groups, which have obvious interests in the solution of many of these controversies.

As for criminal statutes, the United States has enacted the Foreign Corrupt Practices Act ('FCPA'). This statute criminalises bribes committed by TNCs in pursuit of decisions by certain officials abroad in order to further their business interests. This statute seeks to reconcile the clashing interests of preserving a certain level of ethical business practices and of allowing business to prosper in jurisdictions where corruption is present. However, it does not allow foreigners to prosecute TNCs directly, but through intermediation of certain government agencies. Furthermore, there is the mixed civil-criminal Racketeer Influenced Corrupt Organisations Act ('RICO'), which allows plaintiffs to directly sue TNCs for certain human rights abuses committed abroad. However, RICO really aims to protect the US economy against 'racketeering activities' committed abroad and within the US. Therefore, human rights abuses could only be enforced through RICO if RICO plaintiffs prove that the actions of TNCs somehow impair the US economy.

As for civil statutes, the US has enacted the Alien Tort Claims Act ('ATCA'). Revived in 1980 after nearly 200 years of neglect, this statute allows any foreign plaintiff to sue TNCs for breaches of the 'law of nations' (international customary law) or a treaty approved by the United States. A successful ATCA plaintiff would have to prove that the TNC in question either (a) colluded 'under the colour of law' with a foreign de jure or de facto State in committing a breach of international law, or (b) committed a breach of international law by itself, in cases where international law imposes direct liability on individuals. If the plaintiffs or their successors have been the victims of either torture or extra-judicial killings, they can avail themselves of the Torture Victim Protection Act ('TVPA'), which establishes a cause of action for the commission of these offences. There is some controversy as to whether TVPA applies to TNCs, but in any case it does apply to TNC officers.

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Furthermore, the possibility of any administrative claims being brought in the US is foreclosed by the Federal Tort Claims Act ('FTCA'). This act is an exception to the general principle that the Federal Government cannot be sued without the consent of Congress. However, the FTCA does not allow the United States to be sued for actions of TNCs that may be its 'instrumentalities' if the claim arises in a 'foreign country' (i.e. abroad).

Furthermore, any potential plaintiff would have to overcome both substantive and practical obstacles that exist when suing in the US.

Among the substantive obstacles, there is the (a) act of state and (b) political question doctrines. The former precludes courts from adjudicating on the validity of the acts of foreign sovereigns committed in their territory; these acts may become indistinguishable from the acts of TNCs in some cases. The latter precludes courts from adjudging on issues that fall within the purview of the executive branch of government.

There are also a number of practical obstacles to be overcome in the context of pursuing a claim in the US courts. Foremost among them is the problem of establishing personal jurisdiction over a TNC's parent for the actions of a subsidiary (and vice versa). This matter is complicated by the fact that TNCs often form part of conglomerates and many parts of these conglomerates carry on business globally. A further practical obstacle is the *forum non conveniens* doctrine. This doctrine gives US courts a discretion in declining cases of which adjudication should optimally be left to foreign courts, notably the courts with jurisdiction over the place where the alleged violations of human rights have been committed. Moreover, there is the practical obstacle of enforcing abroad the judgments obtained before US courts. This effort is hampered by, among other problems, the lack of enforcement agreements by the US with other States, the perceived—excessive exercise of extraterritorial jurisdiction by US courts when deciding on the statutes named above, the reticence of US courts in enforcing foreign criminal judgments, etc. Furthermore, legal aid is provided in the US free of charge by lawyers and also by certain NGOs, as opposed to by the Federal Government, which is a problem for any potential claimant with little financial means. There is no 'loser pays' principle in the United States, and therefore, the party that successfully sues must still bear its own litigation expenses, save in some limited cases. There are also perceived problems of discovery in cases like those relevant to this submission, even if rules of discovery in the United States are very lenient for plaintiffs. Finally, certified interpreters are not appointed before the courts unless the Government is the plaintiff.

Most of these causes of action and legal / non-legal obstacles are illustrated by the *Doe v Unocal* litigation, which is analysed below.

## **2. BACKGROUND INFORMATION**

The United States has a federal system of government in which power is shared at national, state and municipal levels. As a general rule, US courts do not look to international law for enforceable legal norms as frequently as the courts of other States do. This distinction is explained by reference to the long history and robust practice of protecting rights under the Federal Constitution. It has been noted that 'over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in

domestic litigation.<sup>1477</sup> As a result, international law plays almost no part in the judicial business of the United States and is rarely discussed in American cases.<sup>1478</sup> Furthermore, the US legal system is *dualist* with respect to the domestic application of international law. Therefore, international human rights law is not self-executing before US courts and has to be transposed into national law by the Federal Congress in order to provide appropriate causes of action.

It is noteworthy that transnational corporations arguably account for 'as much as one-fourth of the US economy'.<sup>1479</sup> The US serves as the headquarters for the greatest number of Fortune 500 companies in the world<sup>1480</sup> and 34 of the top 100 Fortune 500 companies are based in the US. A number of major US companies have been sued in the United States for alleged human rights abuses, among them: Chevron Texaco, Wal-Mart, ExxonMobil, Shell Oil, Coca-Cola, Southern Peru Copper, Pfizer, Ford, Del Monte, Chiquita, Firestone, Unocal, Union Carbide, Gap, Nike, Citigroup, IBM, and General Motors. Non-US companies have also been sued for the same reasons in US courts (e.g. Rio Tinto, Talisman Energy, and Barclays Bank).

### 3. CAUSES OF ACTION AVAILABLE AGAINST TNCs

#### A. Criminal Law

In most jurisdictions, criminal laws generally only apply to acts committed or at least partially committed within the territory and jurisdiction of the State applying the criminal law.<sup>1481</sup> However, the US has made an exception to this state of affairs in the Foreign Corrupt Practices Act 1977 ('FCPA').<sup>1482</sup> The FCPA establishes extra-territorial jurisdiction for US courts over US citizens and companies for certain acts of bribery committed abroad.<sup>1483</sup> As such, the FCPA is relevant in the context of this submission as it may enliven the jurisdiction of US courts when US nationals or companies engage in corruption or fail to observe human rights.

The FCPA applies to three types of legal persons, and by implication their officers, directors, employees, and stockholders:

'Issuers',<sup>1484</sup> corporations whose securities are registered with the Securities and Exchange Commission ('SEC')<sup>1485</sup> or corporations that are required by the SEC to

<sup>1477</sup> PM McFadden, 'Provincialism in United States Courts' (1995–96) 81 Cornell L Rev 4, 4.

<sup>1478</sup> Ibid 4.

<sup>1479</sup> JC Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999–2000) 2 U Pennsylvania J of Labor & Employment Law 463, 467.

<sup>1480</sup> 162 companies, as of 2007. Cf. Cable News Network (CNN) 'Fortune Global 500: Countries US' <<http://money.cnn.com/magazines/fortune/global500/2007/countries/US.html>> accessed 22 March 2008.

<sup>1481</sup> S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, Oxford 2004) 13.

<sup>1482</sup> 15 USC §§ 78dd-1–78dd-3.

<sup>1483</sup> For an overview of the FCPA, see US Department of Justice, 'Lay-Person's Guide to FCPA' <<http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>> accessed 22 March 2008.

<sup>1484</sup> FCPA (n 6) § 78dd-1(a).

<sup>1485</sup> This includes corporations that trade on a national stock exchange, that feature a certain number of shareholders and that have assets in excess of US\$1 million. Cf. 15 USC §§ 78(g), 78dd-1(a); A Dahms, N Mitchell, 'Foreign Corrupt Practices Act' (2007) 44 Am Crim L Rev 605, fn 21; TR Snider, W Kidane, 'Combating Corruption through International Law in Africa: A Comparative Analysis' (2007) 40 Cornell Int'l L J 691, fn 69 and associated text.

submit reports when it deems such reports as ‘...necessary or appropriate in the public interest or for the protection of investors and to ensure fair dealing in security’;<sup>1486</sup>

‘*Domestic concerns*’,<sup>1487</sup> or, among others, corporations which are not ‘issuers’<sup>1488</sup> but that nevertheless (a) have their main seat of business in the United States or (b) are organised under the laws of any of the US’s constituent parts (States, Commonwealths, etc.);<sup>1489</sup> and

‘*Any person*’,<sup>1490</sup> including certain corporations incorporated under the laws of a foreign jurisdiction<sup>1491</sup> that are neither ‘issuers’ nor ‘domestic concerns’.<sup>1492</sup>

Furthermore, the FCPA makes it unlawful to pay or promise to pay anything of value to (a) foreign officials, (b) foreign political parties or party officials, (c) political candidates, or (d) the representatives of the latter three, with the intention of obtaining, retaining or directing business to any person.<sup>1493</sup> This payment may occur within the US or abroad.<sup>1494</sup> The briber must seek either to (a) influence an act or decision of the government or party officials mentioned above that these government or party officials will carry out under their authority, or (b) have these officials violate their ‘lawful duties’ by taking the decision, or (c) secure ‘improper advantages’ from the decision of these officials.<sup>1495</sup> The briber may also intend to use these party or government officials as intermediaries with the officials of a different foreign government or political party to secure a decision from the latter that may provide the briber analogous advantages.<sup>1496</sup> It is also noteworthy that the briber or its officials must know that the FCPA will be or has been violated; mere negligence and ‘foolishness’ will not trigger FCPA action.<sup>1497</sup>

Additionally, the FCPA will only apply where the decisions sought by the briber will violate lawful duties of the party and government officials mentioned above. If the purpose of the payment is to expedite a decision that falls within the purview of the officials’ lawful competencies,<sup>1498</sup> the FCPA’s bribery provisions do not apply.<sup>1499</sup> Furthermore, in 1988 Congress added two ‘affirmative defenses’ that exempt corporations from the FCPA bribery provisions in circumstances where: (a) the payments in question were legal under the laws of the foreign official’s State, or (b) that the payments were made to demonstrate or explain products or services or that they were made so that a contract made with a foreign government could be executed.<sup>1500</sup>

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<sup>1486</sup> Cf. 15 USC §§ 78m, 78o(d); Dahms and Mitchell (n 9) fn 22.

<sup>1487</sup> FCPA (n 6) § 78dd-2(a).

<sup>1488</sup> Ibid § 78dd-2(a) (‘...other than an issuer under section 78dd-1’).

<sup>1489</sup> Ibid § 78dd-2(h)(1)(B).

<sup>1490</sup> Ibid § 78dd-3(a).

<sup>1491</sup> Ibid § 78dd-3(f)(1).

<sup>1492</sup> Ibid § 78dd-3(a).

<sup>1493</sup> Ibid §§ 78dd-1(a)(1)–(3) (for ‘issuers’), 78dd-2(a)(1)–(3) (for ‘domestic concerns’), 78dd-3(a)(1)–(3) (for ‘any person’).

<sup>1494</sup> Cf. Ibid §§ 78dd-1(g)(1)–(2), 78dd-2(i)(1)–(2). There is no equivalent provision for foreign-incorporated corporations in s 78dd-3.

<sup>1495</sup> Ibid.

<sup>1496</sup> Ibid §§ 78dd-1(a)(1)(B), a(2)(B), a(3)(B), 78dd-2(a)(1)(B), a(2)(B), a(3)(B), 78dd-3(a)(1)(B), a(2)(B), a(3)(B).

<sup>1497</sup> Cf. Dahms and Mitchell (n 9) 616–17.

<sup>1498</sup> But cf. *US v Kay* 359 F 3d 738 (5<sup>th</sup> Cir 2004) 751, suggesting that this category of decisions is narrow.

<sup>1499</sup> FCPA (n 6) §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

<sup>1500</sup> Dahms and Mitchell (n 9) 606.

Moreover, it should be noted that private individuals cannot initiate any FCPA prosecution<sup>1501</sup>—only the Department of Justice or the SEC can.<sup>1502</sup> Potential plaintiffs for FCPA violations have instead made use of the Racketeer Influenced and Corrupt Organisations Act ('RICO').<sup>1503</sup> They can also bring FCPA breaches to the attention of these government agencies.<sup>1504</sup> All of this significantly limits action by individuals aggrieved by human rights violations who want to base their corrupt practices claims under the FCPA.

Finally, criminal penalties can be imposed for breaches of the FCPA. Corporations and other business entities may be fined up to US\$2,000,000.<sup>1505</sup> Officers, directors, stockholders, employees, and agents may be fined up to \$100,000 and / or face imprisonment for up to five years.<sup>1506</sup> It is noteworthy that FCPA enforcement in the US has been described as 'aggressive' by at least two commentators.<sup>1507</sup> Some examples of successful FCPA enforcement against corporations include the GE InVision Technologies Inc case,<sup>1508</sup> the ABB Ltd case,<sup>1509</sup> and the Titan Corp case,<sup>1510</sup> all of which were settled out of court.

## B. Civil Law

Despite the above provisions for criminal prosecution of transnational corporations operating abroad, civil remedies provide a more accessible remedy for claimants.

As stated above, the United States is a federal republic where state, federal and local competencies are separate. Broadly speaking, there is no unified common law of the United States; the '*Erie Doctrine*' provides that '[t]here is no federal general common law.'<sup>1511</sup> That said, 'non-general' federal common law exists only to the extent that it is '...necessary to protect uniquely federal interests'<sup>1512</sup> or where the Federal Congress, when competent, has given federal courts the power to develop federal common law.<sup>1513</sup> This does not ordinarily include tort law,<sup>1514</sup> whose development remains mostly within the purview of state authorities. Keeping this in mind, unlike many of the other States considered in the body of this submission, a complete picture of US tort law would require a review of the law of all 50 States and other commonwealths that form the Federation. Such a task, although within the scope of this submission, would be outside its capacity.

This part of the submission focuses on Federal statutes which provide for civil actions against TNCs. Foremost among them are the Alien Tort Claims Act 1789,<sup>1515</sup> the—closely

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<sup>1501</sup> *Lamb v Philip Morris, Inc* 915 F 2d 1024 (6<sup>th</sup> Cir 1990) 1027–30, cert denied 498 US 1086 (1991).

<sup>1502</sup> Cf. *Clayco Petroleum Corp v Occidental Petroleum Corp* 712 F 2d 404 (9<sup>th</sup> Cir 1983) 409, cert denied 464 US 1040 (1984).

<sup>1503</sup> Dahms and Mitchell (n 9) 619; Snider and Kidane (n 9) 737–38. However, RICO itself has some limitations as a tool to redress human rights violations. See pp 280–81, below.

<sup>1504</sup> Dahms and Mitchell (n 9) 619–20.

<sup>1505</sup> FCPA (n 9) §§ 78dd-2(g)(1)(A), 78dd-3 (g)(1)(A).

<sup>1506</sup> FCPA (n 9) §§ 78dd-2(g)(2)(A), 78dd-3(g)(2)(A).

<sup>1507</sup> Cf. Dahms and Mitchell (n 9) 623.

<sup>1508</sup> Cf. US Securities and Exchange Commission, 'GE InVision, Inc. (formerly known as InVision Technologies, Inc.): Lit. Rel. No. 19078 / February 14, 2005' (2005) <<http://www.sec.gov/litigation/litreleases/lr19078.htm>> accessed 9 April 2008.

<sup>1509</sup> Cf. US Securities and Exchange Commission, 'ABB Ltd : Lit. Rel. No. 18775 / July 6, 2004' (2004) <<http://www.sec.gov/litigation/litreleases/lr18775.htm>> accessed 9 April 2008.

<sup>1510</sup> US Securities and Exchange Commission, 'The Titan Corporation: Lit. Rel. No. 19107 \ March 1, 2005' (2005) <<http://www.sec.gov/litigation/litreleases/lr19107.htm>> accessed 9 April 2008.

<sup>1511</sup> *Erie Railroad Co v Tompkins* 304 US 64 (US SC 1938) 78.

<sup>1512</sup> *Banco Nacional de Cuba v Sabbatino* 376 US 398 (US SC 1964) 426. The 'uniquely federal interest' in this case was that of the conduct of international relations.

<sup>1513</sup> Cf. *Texas Industries, Inc v Radcliffe Materials* 451 US 630 (US SC 1981) 640.

<sup>1514</sup> Cf. *Erie* (n 35) 78.

<sup>1515</sup> 28 USC § 1350.



related—Torture Victim Protection Act 1991,<sup>1516</sup> and RICO.<sup>1517</sup> The former two allow federal courts to entertain cases that deal with certain breaches of international law with respect to individuals. The latter enables federal courts to entertain cases dealing with breaches of federal law that occur abroad in particular circumstances, as will be explained immediately below.

It is noteworthy that in contrast to other jurisdictions, these statutes, especially ATCA and TVPA, specifically impose liability for breaches of international human rights law.

### **i. Alien Tort Claims Act 1789 and the Torture Victim Protection Act 1991**

ATCA raises a number of very complex issues, both in international and US law. ATCA remained ‘a historical oddity’ without a ‘discernible place in the jurisprudence of US courts’ for nearly 200 years after its enactment,<sup>1518</sup> the origins and the intention behind its enactment remaining obscure.<sup>1519</sup> However, the Second Circuit decision in *Filartiga v Pena-Irala*<sup>1520</sup> resuscitated ATCA and enabled it to be used as a tool for human rights litigation. *Filartiga* held that ATCA authorised federal courts to establish jurisdiction over civil actions arising out of torture committed under colour of state authority. This case involved the exercise of jurisdiction over a suit brought by Paraguayans in circumstances where acts of torture had been committed by a Paraguayan official against a relative, resulting ultimately in the death of the victim. On remand, the District Court awarded judgment of nearly US\$10.4 million, comprising both compensatory damages pursuant to Paraguayan law and punitive damages according to United States cases and international law.<sup>1521</sup>

#### *Jurisdiction under ATCA*

ATCA provides that, ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’<sup>1522</sup> Thus, the plaintiff must:

be an alien;

have suffered a tortious wrong at the hands of the defendant; and

show that this tort represents a violation of the ‘law of nations’<sup>1523</sup> or a treaty ratified by the United States.<sup>1524</sup>

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<sup>1516</sup> Pub L 102–256.

<sup>1517</sup> 18 USC §§1961–1968.

<sup>1518</sup> I Fuks, ‘Sosa v Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability’ (2006) 106 Colum L Rev 112, 113.

<sup>1519</sup> Cf. *Sosa v Alvarez-Machain* 542 US 692 (US SC 2004) 712–13.

<sup>1520</sup> 630 F 2d 876 (2d Cir 1980).

<sup>1521</sup> HH Koh, ‘Transnational Public Law Litigation’ (1990–1991) 100 Yale L J 2347, 2367.

<sup>1522</sup> ATCA (n 39).

<sup>1523</sup> I.e. International customary law. Cf. *Flores v Southern Peru Copper Corp* 414 F 3d 233 (2<sup>nd</sup> Cir 2003) 237 fn 2. Cf. also *Sosa* (n 43) 714–15.

Actionable<sup>1525</sup> violations of the 'law of nations' under ATCA must be based on international norms that are (1) definable, (2) universal and (3) obligatory.<sup>1526</sup> There is some debate as to whether these norms must also constitute a principle of *jus cogens*.<sup>1527</sup> However, the majority view seems to be that the norm breached does not need to have attained *jus cogens* status, so long as it meets the three criteria advanced above.<sup>1528</sup>

### *Applicability of ATCA on TNCs*

For a claim to succeed pursuant to ATCA the defendant must have breached international law. As is well known, international law deals principally with State-to-State relations, but plaintiffs are increasingly using ATCA to sue non-State defendants, including TNCs. In *Sosa*, the Supreme Court noted that in determining the liability of a defendant pursuant to ATCA it is relevant to consider whether '...international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.'<sup>1529</sup> This implies that ATCA covers TNCs as well as individuals. Despite prior uncertainty this now seems to be the settled position,<sup>1530</sup> confirmed by decisions of lower courts subsequent to the *Sosa* decision<sup>1531</sup> (see, e.g., the *Unocal* litigation).<sup>1532</sup> As of 2007 as many as 40 corporate claims based on ATCA have been filed.<sup>1533</sup>

### *Attaching ATCA Liability to TNCs: the Relevant Tests*

As mentioned, under ATCA a plaintiff must show that international law 'extends the scope of liability' to the defendant sued'.<sup>1534</sup> As such, ATCA cases can be broadly divided in two categories. International norms which can only be breached by States and those which can be breached by individuals. In the former, individuals can only be held liable as accessories

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<sup>1524</sup> *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995) 238.

<sup>1525</sup> There has been some debate in Federal courts as to whether ATCA only establishes jurisdiction to entertain cases or whether it also establishes a cause of action at common law. See the exchanges on this point in *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) 777 ff (Edwards J) (holding ATCA grants both a forum and a right to action), 801 ff (Bork J) (holding ATCA only grants a forum, but not a right to action). The practical importance would lie in that any ATCA right to action would result from federal common law and would therefore require prior congressional authorization under the *Erie* doctrine. Cf. *Sosa* (n 43) 739–742, 747 (Scalia J). However, for the majority in *Sosa*, Congress did intend that the grant of jurisdiction in ATCA would allow a right to action. Cf. *Sosa* (n 43) 724.

<sup>1526</sup> Cf. *Tel-Oren* (n 49) 781, quoted with approval in *Sosa* (n 43) 732, with further references.

<sup>1527</sup> See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53. Cf. *Xuncax v Gramajo* 886 F Supp 162 (D Mass 1995) 184, holding that breached norm must also be non-derogable.

<sup>1528</sup> *Presbyterian Church of Sudan v Talisman Energy, Inc* 244 F Supp 2d 289 (SDNY 2004) 306 fn 18; *Doe I v Unocal* 395 F.3d 932 (9<sup>th</sup> Cir 2002) (*Unocal III*) 945 fn 15, with further references.

<sup>1529</sup> (n 43) 732 fn 20.

<sup>1530</sup> UNHRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises' (2007) UN Doc A/HRC/4/035, para 30.

<sup>1531</sup> *Arias v Dyncorp* 517 F Supp 2d 221 (D DC 2007) 227, with further references; *Presbyterian Church of Sudan v Talisman Energy, Inc* 374 F Supp 2d 331 (SDNY 2005) 333–34 (especially), 335–37.

<sup>1532</sup> The District Court held jurisdiction could be established over corporations. Cf. *Doe I v Unocal Corp* 963 F Supp 880 (CD Cal 1997) (*Unocal I*) 891–92. It later departed from its own ruling — under a different judge — *Doe v Unocal Corp*, 110 F Supp 2d 1294 (CD Cal 2000) (*Unocal II*). The Court of Appeals reversed this ruling in part and asserted jurisdiction over Unocal under ATCA. Cf. *Unocal III* (n 52) 946 ff. The case was settled and the Court later dismissed the case (403 F 3d 708). For a closer look at the procedural history of this case before the District Courts, see SM Hall, 'Multinational Corporations' Post-Unocal Liabilities for Violations of International Law' (2002) 34 *Geo Wash Int L Rev* 401, 416–22.

<sup>1533</sup> SRSG Business and Human Rights Report (n 54) para 30.

<sup>1534</sup> Cf. *Sosa* (n 43) 732 fn 20, 760 (Breyer J).

to the State ('indirect liability' cases), such as in the case of torture.<sup>1535</sup> In the latter case, no relationship with the State is necessary ('direct liability' cases). Included within this category is the prohibition on genocide.<sup>1536</sup>

### Indirect Liability Cases

In cases of indirect liability, Federal courts require the plaintiff to prove that the defendant acted 'under the colour of law'.<sup>1537</sup> Courts have applied this standard to ATCA cases by 'analogy'<sup>1538</sup> from the standard applied in civil suits for deprivation of civil rights. ATCA provides that:

Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...<sup>1539</sup> (emphasis added)

Individuals act 'under the colour of law' when they act '...together with state officials or with significant state aid.'<sup>1540</sup> To the best of our knowledge, there are at least four separate tests that Federal courts use to determine whether an individual has acted under the 'colour of law':<sup>1541</sup>

- (1) *The 'public function' test*, whereby individuals are liable as the State itself when the latter 'devolves' on them any function that is within the legal competence of that State.<sup>1542</sup>
- (2) *The 'nexus' test*, whereby courts investigate whether the individual's conduct is so closely intertwined with State action so as to make the individual liable for such action as though the act had been committed by the State.<sup>1543</sup> Under this test, the State must be significantly involved in the breach of international law complained of or must have participated in it.<sup>1544</sup>

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<sup>1535</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112, art 1(1) ('...when ... inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.').

<sup>1536</sup> *Kadic* (n 48) 242. Cf. also *Tel-Oren* (n 49) 794–95.

<sup>1537</sup> Cf. *Bigio v Coca-Cola Co* 239 F 3d 440 (2<sup>nd</sup> Cir 2000) 448; *Kadic* (n 48) 245.

<sup>1538</sup> Cf. *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987) 1546, quoted with approval in *Kadic* (n 48) 245.

<sup>1539</sup> 42 USC §1983. This section was originally enacted as part of the Civil Rights Act 1871.

<sup>1540</sup> *Kadic* (n 48) 245.

<sup>1541</sup> Cf. *Beanal v Freepport-McMoRan, Inc* 969 F Supp 362 (ED La 1997) 376 ff (especially) aff'd 197 F 3d 161 (5<sup>th</sup> Cir 1999), applying the four tests to an ATCA case. Cf. *Lugar v Edmonson Oil Co* 457 US 922 (US SC 1982) 939; Hall (n 56) 410–11; BJ Kieserman, 'Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act' (1991) 48 Cath U L Rev 881, 905–06.

<sup>1542</sup> *Terry v Adams* 345 US 461 (US SC 1953) 484 (especially).

<sup>1543</sup> *Jackson v Metropolitan Edison Co* 419 US 354 (US SC 1974) 454.

<sup>1544</sup> Cf. *Beanal* (n 65) 377; *Gallagher v Neil Young Freedom Concert* 49 F 3d 1442 (10<sup>th</sup> Cir 1995) 1448.

- (3) *The ‘symbiotic relationship’ test*, whereby the State ‘...has so far insinuated itself into a position of interdependence with the private party.’<sup>1545</sup> In order for this test to be satisfied, the conducts of both the State and the private actor must form a ‘...physically and financially integral and ... indispensable part’ of one another.<sup>1546</sup> In *Gallagher*, it was suggested that enquiries under this particular test focus on long-term interdependence between the State and the individual.<sup>1547</sup>
- (4) *The ‘joint action’ test*, whereby individual action becomes State action if the individual has obtained assistance from State authorities in carrying out the conduct complained of.<sup>1548</sup> Contrary to the ‘symbiotic relationship’ test, the ‘joint action’ test can be satisfied after one particular breach of law is committed, irrespective of whether the State and the private actor have formed a long-term legal relation.<sup>1549</sup> Hence States and individuals can act jointly if they agree, conspire or ‘substantially’ cooperate to breach international law.<sup>1550</sup>

### Direct Liability Cases

There is some controversy as to the tests that must be applied in ATCA cases where no State action is required to breach international law and, therefore, TNC liability is not indirect. To the best of our knowledge, the major point of controversy is determining whether Federal courts should be guided by international law standards or by federal law standards in attaching liability to plaintiffs.<sup>1551</sup> This problem is well illustrated by the different opinions in the 2<sup>nd</sup> Circuit judgment in the *Apartheid Litigation Case*.<sup>1552</sup>

Among other reasons, the Federal Court of Appeal vacated the ATCA aspect of the District Court judgment<sup>1553</sup> on the grounds that ‘aiding and abetting’ violations of international law can indeed provide a basis for ATCA legal action.<sup>1554</sup> But the different judges (notably Katzmann and Hall JJ) were divided as to which standard to use.<sup>1555</sup>

Katzmann J held that the ‘colour of law’ tests were not relevant in direct liability cases.<sup>1556</sup> Instead, his honour preferred to apply international legal standards to determine indirect liability for private actors.<sup>1557</sup> After analysing some relevant—notably Nuremberg-related—international materials and case law, Katzmann J concluded that international custom provides that private actors can be held liable if they provide such practical assistance to the

<sup>1545</sup> *Beanal* (n 65) 376–77, citing *Gallagher* (n 68) 1447. Cf. *Burton v Wilmington Park Authority* 365 US 715 (US SC 1961) 725.

<sup>1546</sup> *Burton* (n 69) 723.

<sup>1547</sup> (n 68) 1453.

<sup>1548</sup> Cf. *Lugar* (n 65) 942.

<sup>1549</sup> *Gallagher* (n 68) 1453.

<sup>1550</sup> Cf. *Kieserman* (n 65) fns 166–68 and associated text.

<sup>1551</sup> Cf. *Sarei v Rio Tinto PLC* 487 F 3d 1193 (9<sup>th</sup> Cir 2007) 1202–03.

<sup>1552</sup> *Khulumani v Barclay National Bank Ltd* 504 F 3d 254 (2<sup>nd</sup> Cir 2007) (*Apartheid II*).

<sup>1553</sup> *In re South African Apartheid Litigation* 346 F Supp 2d 538 (SDNY 2004) (*Apartheid I*).

<sup>1554</sup> *Apartheid II* (n 76) 260.

<sup>1555</sup> Korman J, partly dissenting, limited himself to the concrete case of apartheid, at issue in the case. Since he believed that apartheid was an indirect liability case, requiring State action, he would have applied the ‘colour of law’ tests. Cf. *Apartheid II* (n 76) 311–13.

<sup>1556</sup> *Apartheid II* (n 76) 283.

<sup>1557</sup> Korman J was more sympathetic to this standard than to Hall J’s. Cf. *Ibid* 330 ff. But see n 79, above.

principal of the breach that (1) it has a 'substantial effect' on the commission of the breach of international law or (2) it is intended to facilitate the commission of that breach.<sup>1558</sup>

On the other hand, Hall J preferred to apply federal law to indirect liability cases,<sup>1559</sup> such that liability would be established if the plaintiff proved that the defendant:

- (1) *Knowingly and substantially assisted the principal tortfeasor.*<sup>1560</sup> As an example of such eventuality, his honour cited a case in which the principal tortfeasor sought assistance from the defendant to breach international law;<sup>1561</sup> or
- (2) *Encouraged, advised, contracted or solicited the breach of international law with '...actual or constructive knowledge' that the principal tortfeasor would breach international law.*<sup>1562</sup> As an example of liability under this heading, Hall J cited a case where the defendant would 'purchase' security services knowing the latter were likely to breach international law;<sup>1563</sup> or
- (3) *Provided the principal tortfeasor with the tools, instrumentalities and services necessary to commit the breaches of international law complained of.*<sup>1564</sup> As an example, he cited the *Zyklon B* case, the judgment from one of the Nuremberg trials in which Bruno Tesch and others were condemned to death by hanging for supplying Zyklon B gas to the Auschwitz concentration camp and training SS personnel in how to use it, with knowledge that it would be used to exterminate human beings.<sup>1565</sup>

It is noteworthy that the defendants in *Apartheid II* have petitioned the US Supreme Court to grant *certiorari*. As of 22 March 2008, this petition has not been granted.<sup>1566</sup> However, if it were granted, this case would provide the Supreme Court with a chance to further clarify the operation of ATCA.<sup>1567</sup>

### *Non-State Actors and TNCs*

An interesting question is whether ATCA indirect liability attaches to corporations for actions committed by certain non-State actors, such as armed groups. It could occur that a TNC uses armed groups, such as mercenaries, terrorist organisations, armed militias, etc, to

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<sup>1558</sup> *Apartheid II* (n 76) 277.

<sup>1559</sup> *Apartheid II* (n 76) 285. Hall J did not believe international law would not apply in any case. Rather, he believed that there existed no guidance from the text of ATCA or from the Supreme Court on which standard to apply, and thus he would rather apply federal common law as the 'traditional source' used by federal courts. Ibid 286–87.

<sup>1560</sup> Ibid 289.

<sup>1561</sup> Ibid 289.

<sup>1562</sup> Ibid 288–89.

<sup>1563</sup> Ibid 289–90, citing *Unocal III* (n 52).

<sup>1564</sup> *Apartheid II* (n 76) 289.

<sup>1565</sup> Ibid 291. The Zyklon B case is available at —, 'The Zyklon B Case: Trial of Bruno Tesch and two Others. United Nations War Crimes Commission' <<http://www.ess.uwe.ac.uk/WCC/zyklonb.htm>> accessed 22 March 2008.

<sup>1566</sup> The case is now listed as *American Isuzu Motors, Inc v Ntsebeza*. It was docketed on 11 January 2008 under petition number 07-919.

<sup>1567</sup> *Certiorari* might well be granted, given that the apartheid litigation was mentioned in *Sosa* (n 43) 733. It also involves a number of important issues, such as deference to other branches of Government and to foreign Governments.

further its business interests in the same way that it uses organs of State. The question would therefore be to what extent ATCA indirect liability extends to TNCs for actions of non-State actors. Federal Courts have only answered this question in part.

In *Kadic*, the defendant, Radovan Karadžić, was president of the Bosnian-Serb *Republika Srpska* (“Serbian Republic” or “Republic of Srpska”). During the war in Bosnia (1992–1995), *Republika Srpska* grouped most of Bosnia’s ethnic Serb population; it splintered from the Bosnian Federation and fought for control of the country with the Bosnian Government. However, the *Republika Srpska* was not an entity recognised by the United States. In holding ATCA liability to Karadžić, the court deemed the *Republika Srpska* a *de facto* ‘State’ for the purposes of determining liability under ATCA. This was the case for two reasons. Firstly, the *Republika Srpska* exercised some attributes of State authority *de facto*, and secondly, the prohibition on torture applies to recognised and non-recognised States as well. Additionally, the court stressed that although non-recognition by the United States reflects ‘disfavour’ with a foreign regime, it does not make that regime a ‘juridical nullity’ or shield the foreign regime from liability for torture.<sup>1568</sup> In this sense it might be said that ATCA liability can attach to certain non-State actors as well.

Therefore, if TNCs make use of armed groups like the *Republika Srpska*, which exercise some degree of State authority *de facto*, they may attract liability under ATCA. However, insofar as armed groups that do not exercise State authority are concerned, it seems the law remains uncertain; to the best of our knowledge, federal courts have not yet had the opportunity to answer this question. A chance to clarify this position was missed in *Doe v Islamic Salvation Front*.<sup>1569</sup> In that case, the defendants sued the Islamic Salvation Front (‘ISF’) an Algerian armed group and Anwar Haddam, one of its members against whom they asserted certain human rights violations. The District Court dismissed the case because it did not agree that international law attributed liability to defendants for the international crimes relied upon by the plaintiffs,<sup>1570</sup> but not based on the broader principle that a similar lawsuit cannot be filed in other circumstances.

It should be noted, however, that *Kadic* established that the scope of ATCA liability will vary against the current state of the ‘law of nations’ at the time when the court seised hears the case.<sup>1571</sup> Thus if in international law the actions of armed groups that are not *de facto* States could constitute international crimes that would ordinarily require State action, TNCs may be held liable under ATCA. Such an enquiry would be, at best, speculative and digress significantly from the scope of this submission.

### *The Torture Victim Protection Act (‘TVPA’)*

TVPA<sup>1572</sup> is a companion statute to the ATCA which specifically covers torture<sup>1573</sup> and extrajudicial killings.<sup>1574</sup> As stated before, a successful suit in the United States requires both a

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<sup>1568</sup> Cf. *Kadic* (n 48) 244–45. This statement raises a number of international law questions which cannot be pursued here.

<sup>1569</sup> 257 F Supp 2d 115 (DDC 2005).

<sup>1570</sup> *Ibid* 120–21.

<sup>1571</sup> *Kadic* (n 48) 238, with further references. Cf. *Sosa* (n 43) 732 fn 20 (describing changes in consensus in Federal courts over time), 733 (‘Thus, Alvarez’s detention claim must be gauged against the current state of international law’).

<sup>1572</sup> N 40.

<sup>1573</sup> *Ibid* s 3(b). Cf. Torture Convention (n 59) art 1.

grant of jurisdiction and a course of action to succeed.<sup>1575</sup> TVPA only provides the civil course of action<sup>1576</sup>—jurisdiction is provided by ATCA.<sup>1577</sup> Therefore, in order to satisfy the jurisdictional requirements to ground an action under the TVPA, a plaintiff must meet the jurisdictional requirements under ATCA outlined above.<sup>1578</sup> There are only two jurisdictional differences implemented by TVPA. First, TVPA expands jurisdiction by allowing US citizens, in addition to foreign nationals, to bring claims.<sup>1579</sup> Secondly, it restricts jurisdiction by imposing the requirement that the local remedies of the *lex loci delicti commissi* be exhausted.<sup>1580</sup>

In relation to jurisdiction, a certain degree of controversy currently persists over whether TVPA allows corporations to be sued as distinct to individual company officers or employees. The wording of TVPA provides that an 'individual' may be held liable for torture and extra-judicial killings, leaving open the question as to whether this applies only to natural persons, or legal persons as well.<sup>1581</sup> The decided cases provide no clear resolution on this question. In *Beanal*, the District Court refused to extend TVPA liability to a corporation because the word 'individual' did not ordinarily encompass corporations.<sup>1582</sup> However, in *Sinaltrainal v Coca-Cola*, the District Court held that 'individual' is ordinarily synonymous with 'person', and therefore that in the absence of clear intention on the part of Congress to leave out corporations, such an exclusion should not be presumed.<sup>1583</sup> These contradictory decisions, both issued by District Courts, means that neither definition can be considered absolutely authoritative. This uncertainty is compounded by the fact that both decisions invoke the same authority to arrive at contradictory interpretations—*Sinaltrainal* cites part of *Beanal's* findings and both judgments rely on the Supreme Court decision of *Clinton v New York*.<sup>1584</sup> That said, the balance of authority seems to suggest that TVPA liability does not attach to corporations. Such an interpretation would nevertheless leave in tact the possibility of suing officials of such corporations. Nevertheless, as both torture and extrajudicial killings constitute cases of 'indirect liability', for an action to be successful there must be *some* state action TVPA.<sup>1585</sup> In determining whether or not this component exists, the 'colour of law' tests outlined above will be applied.<sup>1586</sup>

## ATCA and TVPA Remedies

### ATCA Remedies

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<sup>1574</sup> TVPA (n 40) s 3(a) ('...a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.')

<sup>1575</sup> Cf. n 49 and associated text, above.

<sup>1576</sup> Cf. TVPA (n 40) ss 2(a)(1), 2(a)(2) ('...shall, in a civil action').

<sup>1577</sup> Cf. *Arndt v UBS AG* 342 F Supp 2d 132 (EDNY 2004) 141, with further references.

<sup>1578</sup> See pp 271–72, above.

<sup>1579</sup> Cf. TVPA (n 40) s 2(a)(1) ('...subjects an individual to torture), 2(b)(2); *Flores* (n 47) 245, 247; *Estate of Cabello v Fernandez-Larios* 157 F Supp 2d 1345 (SD Fla 2001) 1354–55, with further references.

<sup>1580</sup> TVPA (n 40) s 2(b).

<sup>1581</sup> TVPA (n 40) s 2(a).

<sup>1582</sup> *Beanal* (n 65) 381–82. Cf. *Doe v Exxon Mobil Corp* 393 F Supp 2d 20 (D DC 2005) 28; *Arndt* (n 101) 141, with further references.

<sup>1583</sup> 256 F Supp 2d 1345 (SD Fla 2003) 1358.

<sup>1584</sup> 524 US 417 (1998) 428–29.

<sup>1585</sup> The act itself seems to require it. Cf. TVPA (n 40) s 2(a) ('...who, under actual or apparent authority, or color of law, of any foreign nation'); *Apartheid II* (n 76) 260. This is unambiguously the case for torture. See n 59 and associated text, above.

<sup>1586</sup> See pp 272–74, above.

ATCA does not contain express remedies. In absence of such remedies the courts have seen fit to impose common law remedies. As a US Attorney General's opinion from 1795 states:

... there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.<sup>1587</sup>

In *Filartiga*, the Federal Court of Appeals for the Second Circuit held that ATCA did not require international law itself to provide a specific remedy, but rather that domestic common law remedies may be imposed.

Damages is the most common remedy sought under ATCA. Damages awarded may be compensatory or punitive.<sup>1588</sup> The plaintiffs in *Filartiga* were awarded US\$10 million in punitive damages by the District Court;<sup>1589</sup> in awarding this sum, the court considered jury verdicts in the United States and the punitive damages awarded in the case of *Letelier v Republic of Chile*.<sup>1590</sup> The Court noted that ATCA provided a cause of action for torts that violate international law. Punitive damages served the purposes of both punishment and deterrence.<sup>1591</sup> In this regard, the Court noted that:

Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example ... To accomplish that purpose this court must make it clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect.<sup>1592</sup>

In a similar vein, and by analogy, equitable remedies, such as injunctions, are also available.

Although in principle damages lie, there remains uncertainty over the applicable law. In *Martinez-Baca v Suarez-Mason*, the District Court held that punitive damages were 'proper under the law of nations', but also linked its assessment of damages to California law.<sup>1593</sup> In *Trajano v Marcos*, torture and death of the deceased was held to give rise to damages according to the Philippine Civil Code.<sup>1594</sup> Regrettably, few judgments have been executed, as defendants have frequently had no assets or have transferred assets out of the jurisdiction while proceedings are underway.

Finally, as already mentioned, in contradiction to TVPA, ATCA does not on its face require exhaustion of local remedies. That said, in *Sosa*, the Supreme Court held it '... would

<sup>1587</sup> 1 Op. Att'y Gen 57 (1795) 59 (emphasis in original).

<sup>1588</sup> *Abebe-Jira v Negewo* 72 F 3d 844 (11<sup>th</sup> Cir 1996) 848 (especially), cert denied 519 US 830 (1996); *Xuncax* (n 51) 198; *Paul v Avril* 901 F Supp 330 (SD Fla 1994) 335.

<sup>1589</sup> *Filartiga v Pena-Irala* 577 F Supp 860 (DC NY 1980) 867.

<sup>1590</sup> *Ibid* 865. Cf. *Letelier v Republic of Chile* 502 F Supp 259 (DC Cir 1980) 266–67.

<sup>1591</sup> *Filartiga District Court* (n 113) 865.

<sup>1592</sup> *Ibid* 866.

<sup>1593</sup> (N D Cal 22 April 1988) No C-87-2057-SC, slip op, p 4.

<sup>1594</sup> *Trajano v Marcos* (D Haw 25 March 1991) No 86-0207, slip op, pp 3–4.



certainly consider this requirement in an appropriate case.<sup>1595</sup> However, subsequent cases have suggested that this statement should not be taken as imposing such a requirement. In *Sarei v Rio Tinto*, the Court of Appeals held that although there would be considerable benefits in reading this requirement into ATCA, it was not clear whether Congress intended such a result. As such, the Court concluded that it would be inappropriate to read in such a requirement, and instead left this 'next step' to Congress and the Supreme Court.<sup>1596</sup> It would seem, therefore, that the precise contours of *Sosa's* dictum on exhaustion of local remedies remain to be clarified.

### TVPA Remedies

TVPA, unlike the ACTA, provides for an express right to damages where the plaintiff has been subject to official torture or extrajudicial killing committed under authority or colour of law. According to its terms, the 'individual' perpetrator of acts of torture or extrajudicial killings '...shall, in a civil action, be liable for damages' to the victim of torture or rightful claimants for the deceased victim of extrajudicial killings.<sup>1597</sup> Although TVPA does not specify the types of damages which may be awarded, it seems settled that they may, as with the ACTA, constitute a compensatory or punitive element.<sup>1598</sup>

As already mentioned, for jurisdiction to be enlivened under TVPA local remedies must have been exhausted.<sup>1599</sup> However, this requirement is relaxed in circumstances where it can be demonstrated that resort to domestic remedies would be 'unreasonably prolonged.'<sup>1600</sup> The Senate Committee Report for TVPA outlines a detailed procedure for addressing exhaustion of remedies:

[A]s an initial matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption...Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion in the issue of exhaustion of remedies, however, lies with the defendant.<sup>1601</sup>

In addition, plaintiffs should note that there is a 10-year statute of limitations on claims under TVPA.<sup>1602</sup>

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<sup>1595</sup> *Sosa* (n 43) 733 fn 21.

<sup>1596</sup> Cf. *Sarei 2007* (n 75) 1213–23.

<sup>1597</sup> TVPA (n 40) s 2(a).

<sup>1598</sup> RF Drinian and TF Kuo 'Putting the World's Oppressors on Trial: The *Torture Victim Protection Act*' (1993) 15 Human Rights Quarterly 605, 612.

<sup>1599</sup> TVPA (n 40) s 2(b).

<sup>1600</sup> Drinian and Kuo (n 122) at 614.

<sup>1601</sup> Senate Report No 102-249 (26 November 1991) 1991 WL 258662, 9–10. This report is accessible through Westlaw International.

<sup>1602</sup> TVPA (n 40) s 2(c).

## ii. Racketeer Influenced and Corrupt Organisations Act ('RICO')

In a number of transnational human rights cases, plaintiffs have claimed relief under the Racketeer Influenced and Corrupt Organizations Act, commonly known as 'RICO'.<sup>1603</sup> RICO was originally intended to combat organised crime within the United States.<sup>1604</sup> As will be shown below, RICO is essentially designed to safeguard the US economy against the adverse effects of racketeering at home or abroad. As a consequence, generally speaking, RICO is not an appropriate tool to remedy human rights violations that do not relate to its limited scope.

RICO extends civil jurisdiction to Federal courts<sup>1605</sup> to adjudge on, *inter alia*, the acts of

...any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a *pattern of racketeering activity*...<sup>1606</sup> (emphasis added)

RICO defines 'person' as 'any individual or entity capable of holding a legal or beneficial interest in property'.<sup>1607</sup> This definition encompasses corporations.<sup>1608</sup> Standing under RICO depends on the plaintiffs successfully showing they have been victims of (1) conduct (2) of an enterprise<sup>1609</sup> (3) through a pattern (4) of racketeering activity.<sup>1610</sup>

RICO lists a number of Federal criminal offences as 'racketeering activities'. The list includes offences as diverse as mail fraud, sports bribing, and the forging of 'citizenship papers',<sup>1611</sup> but it also includes, more relevantly, offences related to 'peonage, slavery, and trafficking in persons'<sup>1612</sup> or the sexual exploitation of children.<sup>1613</sup> The racketeering activities complained of must have injured the property or business of 'any person',<sup>1614</sup> including foreigners. It might also be noted that the definition of 'property or business' has been lent a broad interpretation, such as to make RICO relevant to this report. For instance, the 'interference with commerce through acts of violence' is a racketeering activity;<sup>1615</sup> such 'interference with commerce' that affect one's 'property or business' also include protection against being compelled to labour against one's will.<sup>1616</sup> Furthermore, the activities complained of must

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<sup>1603</sup> N 41. See Joseph (n 5) 78–80.

<sup>1604</sup> Cf. Hall (n 56) 415.

<sup>1605</sup> RICO (n 41) §1964(a).

<sup>1606</sup> Ibid §1962(c).

<sup>1607</sup> Ibid §1961(3).

<sup>1608</sup> *Fitzgerald v Chrysler Corp* 116 F 3d 225 (7<sup>th</sup> Cir 1997) 226; *Liquid Air Corp v Rogers* 834 F 2d 1297 (7<sup>th</sup> Cir 1987) 1306.

<sup>1609</sup> Cf. This includes corporations, partnerships or other legal entities, as well as 'any union or group of individuals associated in fact although not a legal entity'. Cf. RICO (n 41) § 1961(4).

<sup>1610</sup> *McDonald v Schencker* 18 F 3d 491(7<sup>th</sup> Cir 1994) 494, with further references.

<sup>1611</sup> RICO (n 41) § 1961(1).

<sup>1612</sup> Ibid § 1961(1)(B). This heading includes the offences established in 18 USC §§1581–1592, which make crimes, for instance, obtaining labour from a person against their will (forced labour) (18 USC § 1589) or 'Sex trafficking of children' (18 USC § 1591).

<sup>1613</sup> RICO (n 41) § 1961(1)(B). This is so even when the offence is committed outside the US in certain cases. Cf. 18 USC § 2260.

<sup>1614</sup> RICO (n 41) § 1964(c).

<sup>1615</sup> Ibid § 1961(1)(B). Cf. 18 USC § 1951.

<sup>1616</sup> Cf. *Unocal III* (n 56) 961 ('The right to make personal and business decisions about one's own labor... fits... [the] definition of "property" included in 18 USC § 1951.') In practical terms, this makes forced labour a form of 'extortion', and therefore also a form of 'interference with commerce'. Cf. RICO (n 41) § 1961(1)(B), 18 USC § 1951(b)(2), *Unocal III* (n 56) 960–61.

form a 'pattern'.<sup>1617</sup> The plaintiff must show that the many events that constitute the racketeering activities he or she complains of (1) relate to each other and (2) represent 'continued criminal activity' either in the present, projecting into the future ('open-ended continuity') or that they constitute 'continued criminal activity' in the past ('closed-ended continuity').<sup>1618</sup>

However, RICO does not apply extraterritorially. in principle;<sup>1619</sup> its real purpose is the protection of the US economy against the effects of organised crime.<sup>1620</sup> With this in mind, the application of RICO to acts having occurred outside the US depends on the 'effects' test.<sup>1621</sup> Under *Unocal III*,<sup>1622</sup> one of the leading cases in the area, any prospective plaintiff must prove that the conduct in question produces, or has produced, 'substantial effects within the United States'.<sup>1623</sup> There must therefore be a 'domestic effect', which must be the 'direct and foreseeable result' of the conduct in question,<sup>1624</sup> even when committed abroad.

As can be inferred from the foregoing, RICO indeed imposes 'a difficult burden' on any foreign plaintiff.<sup>1625</sup> This may be the reason why the use of RICO to remedy violations of human rights and international law by foreign defendants has not yet met with much success, despite persistent attempts on a number of occasions.<sup>1626</sup>

A notable exception is *Wiwa v Royal Dutch Petroleum Co.*<sup>1627</sup> In *Wiwa*, the plaintiffs were Nigerian citizens and residents. Among other claims, the *Wiwa* plaintiffs brought a RICO action against two European oil companies who allegedly provided the Nigerian Government with weapons with which to attack villages in the Ogoni region as a means of stifling opposition to the companies' commercial activities in the area. As a consequence, the plaintiffs' human rights were allegedly violated by the Nigerian Government.<sup>1628</sup> The District Court found that the plaintiffs met the 'effects' test because the defendants' actions lowered oil production costs and therefore adversely affected the US oil market by giving the defendants an unfair advantage over their rivals.<sup>1629</sup>

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<sup>1617</sup> See p 279, above.

<sup>1618</sup> Cf. *HJ Inc v Northwestern Bell Telephone Co* 492 US 229 (US SC 1989) 239, 241; *McDonald* (n 134) 497.

<sup>1619</sup> 'In principle', because there is some disagreement between US courts on this issue. Cf. *Jose v M/V Fir Grove* 801 F Supp 349 (DC Oregon 1991) 357 ('...the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries.');

*Doe I v State of Israel* 400 F Supp 2d 86 (D DC 2005) 115 ('The Court concludes that Congress intended RICO to apply extraterritorially...'). As will be explained below, RICO does apply extraterritorially in limited circumstances.

<sup>1620</sup> Cf. *Jose* (n 143) 356–57; *Doe v Israel* (n 143) 115–16.

<sup>1621</sup> There is also the 'conduct' test, whereby RICO applies to conduct that occurred within the United States. Cf. *Unocal III* (n 52) 961. This test goes beyond the scope of this report.

<sup>1622</sup> N 52.

<sup>1623</sup> *Ibid* 961, citing *Consol Gold Fields PLC v Minorco, SA* 871 F 2d 252 (2d Cir 1989) 261–62.

<sup>1624</sup> Cf. *Unocal III* (n 52) 961.

<sup>1625</sup> E Eguh Udobong, 'Multinational Corporations facing the Long Arm of American Jurisdiction for Human Rights and Environmental Abuses: The Case of WIWA v Royal Dutch Petroleum, Co.' (2005) 14 *Southeastern Envtl L J* 89, 126.

<sup>1626</sup> Cf. generally *Doe v Israel* (n 143) 95–96 (especially), dismissing RICO suit brought by Palestinian residents of the West Bank (some of whom were US citizens) against Israel and US fund-raisers because of Israel's settlement-building policy in the West Bank; *Unocal III* (n 52) 960 ff, dismissing RICO aspect of action brought by Burmese (Myanmar) citizens against a French company for acts of the Burmese government; *Jose* (n 143), dismissing suit brought by Philippine citizens against Japanese and Philippine owners of vessel for alleged fraudulent labour practices committed against them in the Philippines, Japan and the US.

<sup>1627</sup> 2002 WL 319887 (SD NY 2002) (unreported). This case has been acceded to using Westlaw International.

<sup>1628</sup> The plaintiffs cited, among others, torture, arbitrary executions, crimes against humanity and cruel, inhuman or degrading treatment. Cf. *Ibid* 2.

<sup>1629</sup> *Ibid* 22. We have been unable to determine whether this case is ongoing or not. To the best of our knowledge, the case was active as of early 2007. Cf. Center for Constitutional Rights, 'Wiwa v Royal Dutch Petroleum, Wiwa v Anderson and Wiwa v

Nevertheless, and as stated before,<sup>1630</sup> RICO's main purpose is the protection of US economic interests. This is illustrated well by both *Wiwa's* emphasis on economic injury and by *Wiwa's* counterpart: *Bowoto v Chevron Corp.*<sup>1631</sup> Against an essentially similar factual background as that of *Wiwa*,<sup>1632</sup> the plaintiffs' RICO claim in *Bowoto* failed because they could not show that the defendants' actions procured the defendants financial benefits. Therefore, it could not be said that the defendants gained any competitive advantage vis-à-vis its rivals or that they affected the US economy in any way.<sup>1633</sup>

### RICO REMEDIES

RICO provides for both criminal and civil sanctions; those violating its provisions may be subject to a fine or to 20 years' imprisonment<sup>1634</sup> and may forfeit property.

Moreover, RICO provides for the recovery of treble damages against those violating its provisions. RICO's civil remedies provision states:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees ...<sup>1635</sup>

By way of example, this treble damages provision was relied upon by the plaintiffs in *Wiwa*<sup>1636</sup> and in *Doe v Israel*.<sup>1637</sup>

In order to be entitled to relief, however, proximate cause must be shown: the plaintiff must show more than monetary loss, but that there is a direct link between injury suffered and the injurious conduct.

### C. Administrative Law

When a TNC is also an 'instrumentality' of the US Government, it is ordinarily possible to sue the United States through the Federal Tort Claims Act ('FTCA').<sup>1638</sup> However, FTCA precludes US liability for claims '...arising in a foreign country.'<sup>1639</sup> Since the scope of this

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Shell Petroleum Development Company' <<http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum,-wiwa-v.-anderson-and-wiwa-v.-shell-petroleum-d>> accessed 9 April 2008.

<sup>1630</sup> See n 144 and associated text, above.

<sup>1631</sup> 481 F Supp 2d 1010 (ND Cal 2007).

<sup>1632</sup> Cf. *Ibid* 1012.

<sup>1633</sup> *Ibid* 1014–15. *Bowoto* is an ongoing case, to the best of our knowledge, but the RICO aspect of this decision has not been appealed. The latest decision in this case was reached on February 2008, on a motion by the defendants. Cf. *Bowoto v Chevron Corp* 2008 WL 552456 (ND Cal 2008). This decision has been accessed using Westlaw International.

<sup>1634</sup> RICO (n 41) § 1963 (a).

<sup>1635</sup> *Ibid* § 1964(c).

<sup>1636</sup> Cf. Second Amended Complaint and Demand for Jury Trial, *Wiwa v Brian Anderson* (SDNY) <[http://ccrjustice.org/files/Wiwa\\_ProposedAndersonComplaint\\_06\\_03.pdf](http://ccrjustice.org/files/Wiwa_ProposedAndersonComplaint_06_03.pdf)> accessed 10 April 2008, 27; .

<sup>1637</sup> (n 143) 97.

<sup>1638</sup> 28 USC §§ 1346(b), 1402(b), 2401(b), 2671–2680.

<sup>1639</sup> FTCA (n 162) §2680(k).

submission is limited to courses of action open to victims of violations of human rights by TNCs abroad, all claims relevant to this submission would be covered by the 'foreign country' exception of FTCA. This would effectively foreclose any administrative claim for the action of TNCs contemplated in this section.

The general principle in this area of US law is that the federal government '...is not liable to be sued, except with its own consent, given by law.'<sup>1640</sup> Through the FTCA, Congress intended to remove immunity from the federal government for 'certain specific exceptions'.<sup>1641</sup> Thus through the FTCA, Congress has granted district courts jurisdiction over the United States

...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>1642</sup>

On this same order of thought, FTCA government liability also arises for '...corporations primarily acting as instrumentalities or agencies of the United States'.<sup>1643</sup> To the best of our knowledge, the factors considered to determine whether a corporation is a federal agency for FTCA liability purposes include:<sup>1644</sup> (a) whether the federal government controls the 'detailed physical performance' and 'day to day operations of the corporation, or (b) if the government is involved in the company's finances, or (c) whether the company's mission furthers US policy, etc.<sup>1645</sup>

However, as stated before, the FTCA exempts the Federation from liability for claims arising in a foreign country. *Sosa*<sup>1646</sup> involved both an ATCA claim, as previously discussed, and a FTCA claim. The FTCA aspect of the claim clarifies the 'foreign country' exception greatly. The plaintiff, Humberto Álvarez-Machain, was kidnapped in Mexico at the request of the United States Drug Enforcement Agency ('DEA'), among others by the defendant, Francisco Sosa. The Supreme Court held that the foreign country exception applied to Álvarez-Machain's kidnapping in Mexico.<sup>1647</sup> The Court of Appeals had held that even if the plaintiff's arrest had occurred in Mexico, it had been planned by the DEA in California. Therefore, it applied the so-called 'headquarters doctrine', whereby acts occurring in a foreign country but which are planned<sup>1648</sup> in the United States could be actionable under FTCA on the grounds that they actually occurred in the United States, but produced their effects outside it.<sup>1649</sup>

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<sup>1640</sup> *US v McLemore* 45 US 286 (US SC 1846) 288. Cf. *Ickes v Fox* 300 US 82 (US SC 1937) 96 ('...no rule is better settled than that the United States cannot be sued except when Congress has so provided'); *Reeside v Walker* 52 US 272 (US SC 1850) 290.

<sup>1641</sup> *Sosa* (n 43) 700, with further references.

<sup>1642</sup> FTCA (n 162) § 1346(b).

<sup>1643</sup> *Ibid* § 2671. It should be noted that this section specifically excludes liability arising for the government due to contractors with the United States.

<sup>1644</sup> *Lewis v US* 680 F 2d 1239 (9<sup>th</sup> Cir 1982) 1240 ('There are no sharp criteria for determining whether an entity is a federal agency').

<sup>1645</sup> *Ibid* 1240 ff, with further references.

<sup>1646</sup> N 43.

<sup>1647</sup> *Ibid* 700.

<sup>1648</sup> Cf. *Ibid* 758 (Ginsburg J, concurring) ('...proximately caused by acts in the United States').

<sup>1649</sup> Cf. *Ibid* 701–02, with references.

The Supreme Court rejected this doctrine on three grounds. First, that even if the abduction was planned in California, harm arose for the acts—the abduction itself—that occurred in Mexico.<sup>1650</sup> Secondly, that in such a scenario, American courts would normally apply the *lex loci delicti* when determining liability arising in a foreign country; and Congress specifically intended that such a scenario should not occur under the FTCA.<sup>1651</sup> And finally, that accepting the ‘headquarters doctrine’ would ultimately imply that the choice of the law governing federal FTCA liability would ultimately depend on State law, a result Congress did not intend.<sup>1652</sup>

In sum, the Supreme Court held that ‘FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.’<sup>1653</sup> Under the headquarters doctrine, it would have been possible for plaintiffs wronged by acts of the United States abroad if ‘...steps toward the commission of the tort occurred within the United States’;<sup>1654</sup> but even that possibility has been foreclosed by *Sosa*. Accordingly, claims like those relevant to this submission would fall within the foreign country exception of FTCA and would give rise to no liability for the federal government.

## 2. OBSTACLES TO ACCESS TO JUSTICE FOR NON-NATIONALS

Both substantive and procedural obstacles may bar recovery by non-nationals in US courts.

### A. Substantive Obstacles

#### i. Act of State Doctrine

Pursuant to the act of state doctrine, a court will refuse to rule on certain aspects involving another State’s conduct. The act of state doctrine ‘...reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.’<sup>1655</sup> According to the classic statement in *Banco Nacional de Cuba v Sabbatino*, ‘[t]he act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.’<sup>1656</sup> The invocation of the act of state doctrine is determined according to a process of balancing the foreign policy interests and separation of powers issues at stake.<sup>1657</sup> The District Court in *Sarei v Rio Tinto* stated that:

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<sup>1650</sup> Ibid 704.

<sup>1651</sup> Ibid 705–710.

<sup>1652</sup> Ibid 711–12.

<sup>1653</sup> Ibid 712.

<sup>1654</sup> Ibid 758 (Ginsburg J).

<sup>1655</sup> *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9<sup>th</sup> Cir 1992) 707.

<sup>1656</sup> (n 36) 401.

<sup>1657</sup> See *Bigio* (n 61) 452.

...courts find that a claim is barred by the act of state doctrine only if it involves (1) an official act of a foreign sovereign, (2) performed within its own territory, and (3) seeks relief that would require the court to declare the foreign sovereign's act invalid.<sup>1658</sup>

The act of state doctrine is primarily invoked by sovereign States. However, it may also be invoked by private defendants in cases that call into question the legality of acts of a foreign government.<sup>1659</sup> In US courts, the US Department of State is often consulted for its views on the applicability of the act of state doctrine.<sup>1660</sup> The act of state doctrine has been invoked in cases brought under ATCA. In *Kadic v Karadzic*, it was stated that 'it would be a rare case in which the act of state doctrine precluded suit under s 1350.'<sup>1661</sup> Nevertheless, the act of state doctrine has barred action under ATCA.<sup>1662</sup> Corporate defences based on this doctrine are a primary means of challenging the right of US courts to judge conduct occurring abroad in which a foreign government took part.<sup>1663</sup> The act of state doctrine has been raised in a number of cases against corporations. In *Sarei v Rio Tinto*, the plaintiffs claim was dismissed due to the act of state doctrine.<sup>1664</sup>

## ii. Political Question Doctrine

The act of state doctrine is not the same as the political questions doctrine, but both involve questions of judicial deference. Under the political questions doctrine, a court will not adjudicate issues that fall more appropriately within the domain of the executive branch. Under the political question doctrine elaborated in *Baker v Carr*<sup>1665</sup> a six-pronged test is used to determine whether the issue to be adjudicated involves a political question and is thus non-justiciable:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various department on one question.<sup>1666</sup>

In *Kadic v Karadzic*, despite the sensitivity of the subject matter, jurisdiction was exercised. The Second Circuit stated that '[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable

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<sup>1658</sup> *Sarei v Rio Tinto Plc* 221 F Supp 2d 1116 (CD Cal 2002) 1184.

<sup>1659</sup> See *ONE Shipping Ltd v Flota Mercante Grancolombiana, SA* 830 F2d 449 (2d Cir 1987) 452.

<sup>1660</sup> See *Sarei 2002* (n 182) 1190 ff.

<sup>1661</sup> *Kadic v Karadzic* 70 F3d 232 (2d Cir 1995) 250.

<sup>1662</sup> *Sarei 2002* (n 182) 1193 rev'd in part *Sarei 2007* (n 75) 1208 ff.

<sup>1663</sup> J Brown Chomsky, 'Fighting for Justice Abroad Through Litigation at Home: Multinationals in US Courts' Paper presented at the 2002 Meetings of the Law and Society Association, Vancouver, Canada, cited in R Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility (2004) 38 (4) L & Society Rev 635, 643.

<sup>1664</sup> *Sarei 2002* (n 182) 1193 rev'd in part *Sarei 2007* (n 75) 1208 ff.

<sup>1665</sup> 369 US 186 (US SC 1962).

<sup>1666</sup> *Ibid* 217.

political questions.<sup>1667</sup> The District Court for the District of New Jersey dismissed claims against Ford based on the political question doctrine in *Iwanowa v Ford Motor Co.*<sup>1668</sup>

## B. Procedural Obstacles

There are two main procedural obstacles to actions in the US. First, US courts cannot exercise jurisdiction over defendants unless they can establish 'personal jurisdiction' over them. Secondly, a US court may refuse to exercise jurisdiction on the discretionary ground of *forum non conveniens*.<sup>1669</sup>

### i. Establishing Personal Jurisdiction: TNCs and the Problem of Multiple Nationality

International business is typically organised through a legal structure of separate corporations for distinct operations, whether on a geographical or functional basis. The scope of remedies available under ATCA is affected by jurisdictional rules and principles of corporate law whose cumulative effect is to restrict legal action against individual members of a corporate group.

Establishing American *in personam* jurisdiction – jurisdiction over a particular defendant as opposed to an item of property – over a foreign subsidiary of an American multinational is a difficult undertaking. The subsidiary typically has a tenuous link to the given American jurisdiction. To the extent that such a link exists at all, *in personam* jurisdiction must be based on the relationship of the subsidiary to its parent corporation with jurisdiction of the subsidiary deriving from the amenability of its domestic parent corporation or sister subsidiary.

While practically speaking the companies in question may form a corporate group, acting as a single enterprise in economic or business terms, it does not follow that law would view them as such. Absent special circumstances, each member of the group is a distinct legal entity deriving its nationality from the nation state in which it is incorporated; therefore, a parent company is unlikely to be held responsible for the acts of a subsidiary, or vice versa, unless certain exceptions apply. The fact that the parent corporation or a sister group corporation is subject to local jurisdiction is insufficient to establish jurisdiction over the subsidiary.<sup>1670</sup> The combined effect of these rules upon actions under ATCA is likely to be (1) to limit the exercise of jurisdiction in action against foreign parents even if they have wholly owned subsidiaries that are incorporated in the US, and (2) to insulate the US parent from liability with respect to the operation of a foreign affiliate, which affiliate would normally be amenable to US jurisdiction for the alleged violation.

This is obviously, a great obstacle to any ATCA civil action. In the sole human rights case that has dealt with this issue of attributive intragroup jurisdiction, *Doe v Unocal Corp*, the

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<sup>1667</sup> *Kadic* (n 48) 250.

<sup>1668</sup> 67 F Supp 2d 424 (DNJ 1999) 483–89.

<sup>1669</sup> Joseph (n 5) 83.

<sup>1670</sup> PI Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 Am J Comp L 493, 496.



Court of Appeals had little difficulty in dismissing an action against the French multinational parent, Total, S.A., whose local subsidiaries and subsidiaries were its sole link to the forum.<sup>1671</sup>

While instituting an action against the parent corporation solves the jurisdictional and collectability problems, it does so at the high cost of creating problems of its own. First, it creates serious difficulties in the preparation of the complaint. Unless the case rests on the vicarious liability of the parent corporation under traditional 'piercing the veil' jurisprudence, agency law, or some theory of enterprise liability, the plaintiff must allege and prove the parent's participation in the acts complained of. In most cases, this presents very difficult problems for counsel. On pleading, Federal Rule 12(b)(6) requires specific allegations of the involvement of the parent corporation in the tortious actions complained of. General allegations of the parent's participation and control are insufficient. In consequence, before reaching the next barrier of whether the court will exercise its jurisdiction in the light of the doctrine of *forum non conveniens*, some human rights complaints have been dismissed under Federal Rule 12(b)(6) for failure to state a cause of action.<sup>1672</sup>

## **ii. Forum Non Conveniens**

The defendant may still contend that the court should defer the exercise of its jurisdiction because another forum is more appropriate. This is the doctrine of *forum non conveniens*. While, as will be seen, the courts have overwhelmingly applied the doctrine to bar litigation in the United States where the wrong was allegedly committed abroad, there are some signs of change, particularly in litigation involving ATCA and TVPA.<sup>1673</sup>

Two cases were dismissed on *forum non conveniens* grounds. One was against Texaco for its operations in Ecuador and the other involved human rights claims against Shell in Nigeria. In the first of these cases, *Sequihua v Texaco*, a claim was filed under ATCA in federal court in New York. The Court of Appeals for the Second Circuit dismissed the claim on the basis of *forum non conveniens*.<sup>1674</sup> The Court argued that foreign plaintiffs are shown less deference than a plaintiff's choice of its home forum, and proceeded to note that there were crucial factors pointing to the selection of Ecuador as a more appropriate forum than Texas. These included: access to evidence and witnesses; the possibility of site viewing; the cost of travel between Ecuador and the US; and the uncertainty of whether a judgment given in Texas would be enforced in Ecuador.<sup>1675</sup> The second case involved human rights abuses and environmental damage in Nigeria. The allegation was that Shell had actively recruited the Nigerian military to attack and suppress the Nigerian people who opposed the company. The district court dismissed the case on the grounds of *forum non conveniens* in 1998.<sup>1676</sup> The Court of Appeals for the Second Circuit, however, reversed the district court's dismissal on *forum non conveniens* grounds, holding that the US was a proper forum.<sup>1677</sup> In reaching this decision, it cited as a factor the US's strong public interest in adjudicating international

<sup>1671</sup> See generally *Doe v Unocal Corp* 248 F 3d 915 (9th Cir 2001) 925 ff (especially). Cf. Blumberg (n 194), 497.

<sup>1672</sup> *Beanal v Freeport-McMoran, Inc* 197 F 3d 161 (5th Cir 1999) 163 ff; *Iwanowa* (n 192) 446–69. But see *Unocal I* (n 56) 895–96, where the complaint was held sufficient under Rule 12(b)(6). Cf. Blumberg (n 194) 500.

<sup>1673</sup> Blumberg (n 194) 503.

<sup>1674</sup> 847 F Supp 61 (1994) 63–65.

<sup>1675</sup> *Ibid.*

<sup>1676</sup> *Wiwa v Royal Dutch Petroleum Co No 96 Civ 8386*, 1998 US Dist At 1 (SDNY, Sept 25 1998).

<sup>1677</sup> *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2d Cir 2000) 106–08.

human rights litigation.<sup>1678</sup> In March 2001, the plaintiffs filed a lawsuit against Brian Anderson, former Managing Director of Royal Dutch / Shell's Nigerian subsidiary. This case was eventually ruled as outlined above.<sup>1679</sup>

### iii. Enforcement of Judgments

Even if a plaintiff were to succeed in an action against a TNC before US courts, the recognition and enforceability of the resulting judgment in foreign courts may provide a further stumbling-block to obtaining satisfaction for a non-national claimant. Choice of law questions will be influenced by the practical question of the location in which the remedy sought may be enforced.

### iv. Recognition and Enforcement of US Criminal Judgments in Foreign Courts

In the rare cases where a criminal remedy is available against a TNC or associated individual, there will be limited scope for the enforcement of a US criminal judgment against an individual in a foreign court. Seeking enforcement of a criminal decision outside of the US will only be necessary where the US court has no jurisdiction over the natural or legal person who is the object of a US criminal conviction. In other words, in rendering a criminal conviction, the US court will have exercised extra-territorial criminal jurisdiction.

It is a common rule of the domestic law of many jurisdictions that courts will not enforce penal laws of another state. UK domestic law provides for this.<sup>1680</sup> It is a fundamental principle of the conflict of laws in the United Kingdom.<sup>1681</sup> Exceptions to the principle will most likely be found in the form of bilateral treaty arrangements for the extradition or transfer of prisoners, or *ad hoc* arrangements for the enforcement of specific foreign convictions. There are no such exceptions for the penal sanction of corporations.

### v. Recognition and Enforcement of US Civil Judgments in Foreign Courts

In the more frequent case where an individual has obtained redress against a TNC for human rights violations in the form of a civil remedy, the location of the TNC's interests affected by this judgment will determine the jurisdiction in which recognition and enforcement of the judgment is sought. In the case of a civil judgment providing damages in the form of financial compensation, this will be the location of the TNC's financial assets. In the case where a civil judgment provides relief other than in the form of financial damage, for example in the form of an injunction against the TNC, the activity of the TNC affected by this remedy will be of principal concern.

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<sup>1678</sup> Ibid 101 cert den'd 532 US 941 (2001).

<sup>1679</sup> Cf. n 56, above.

<sup>1680</sup> Cf. Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) ss 1(2), 11(1).

<sup>1681</sup> Cf. CMV Clarkson, J Hill, *The Conflict of Laws* (OUP, Oxford 2006) 15; *Huntington v Attrill* [1893] AC 150 (PC) 155–56 (especially).

In the scenario where an individual has obtained a civil judgment in the US court against a TNC whose principal assets and / or activities are located in a foreign jurisdiction, either through pursuing a claim under ACTA or under an ordinary civil suit, the following general considerations will apply to the recognition and enforceability of such a judgment:

#### *Absence of Reciprocal Enforcement Arrangements for US judgments in Overseas Courts*

Unlike many of the other jurisdictions considered in this submission, there are no bilateral or multilateral treaties in force between the United States and any other country on reciprocal recognition and enforcement of judgments. As a consequence, the recognition and enforcement of a US judgment by the courts of a foreign State will depend upon the local domestic law on recognition and enforcement of foreign judgments of that foreign country.

While substantive and procedural requirements for the enforcement of foreign laws can vary widely across jurisdictions, US judgments recognised as authoritative and final will generally be enforced, subject to the principles of comity, reciprocity and *res judicata*.

#### *Principal Stumbling Blocks for the Recognition and Enforcement of US Judgments by Foreign Courts*

Two principal stumbling blocks, which stand as exceptions to this trend for general enforcement should be noted, however.

#### Objections to the Extraterritorial Jurisdiction Asserted by Courts of the United States

It is a fundamental principle of most domestic legal systems that a court must have personal jurisdiction over a defendant before it can validly issue a judgment imposing a personal obligation on the defendant. A chief reason for the non-enforcement of US judgments by foreign courts, is the objection to what are perceived as illegitimate assertions of extraterritorial jurisdictions in contravention of this fundamental principle of public international law by the US courts.

Much of the controversy stems from the expansion of US laws of personal jurisdiction in civil suits, rendering US jurisdiction extraterritorial according to the local rules of conflict of laws of these jurisdictions. The assertion of jurisdiction by the US courts based on the 'effects doctrine', whereby a US court may impose liabilities for conduct outside its borders that has consequences within its borders.<sup>1682</sup> The 'minimum contacts' principle is the primary source of such conflicts.<sup>1683</sup>

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<sup>1682</sup> S Metzger, 'The "Effects" Doctrine of Jurisdiction', (1967) 61 Am J Int L 1015; V Lowe, 'Jurisdiction' in M Evans (ed), *International Law* (2<sup>nd</sup> edn OUP, Oxford 2006) 335, 344.

<sup>1683</sup> Cf. *World-Wide Volks-Wagen Corp v Woodson* 444 US 286 (US SC 1980) 291–92 (especially); *Shaffer v Heitner* 433 US 186 (US SC 1977) 203–05; *Hanson v Denckla* 357 US 235 (US SC 1958) 251; *International Shoe Co v Washington* 326 US 310 (US SC 1945) 316, 319–20.

A notable example of a refusal of a foreign court to enforce a judgment of a US court can be found in UK Court of Appeal judgment in *Adams v Cape Industries Plc.*<sup>1684</sup> In this case, claimants brought a class-action suit against Cape Industries before a Texan court. The Texan court accepted jurisdiction over the case on the basis that Cape was a registered company in the US. The UK Court of Appeal determined that according to UK jurisdiction laws, the Texas court did not have jurisdiction over Cape such that recognition should not be given to the US judgment awarded against it.<sup>1685</sup>

### Objections to the Excessive Money Judgments delivered by the Courts of the United States

A number of foreign jurisdictions object to the excessive money judgments delivered by the US courts in the form of awards of 'multiple damages' or 'punitive damages', and refuse to enforce such judgments on public policy grounds.<sup>1686</sup> Notably, the UK has introduced the Protection of Trading Interests Act 1980, which prevents enforcement of US judgments awarding multiple damages.<sup>1687</sup>

In sum, it may be said that judgments which are not based on assertions of extraterritorial jurisdiction and do not involve awards of multiple damages or punitive damages stand a good chance of being enforced in a foreign court, provided the conditions for recognition and enforcement in the foreign domestic law are observed. Claimants considered bringing a claim against a TNC in a US Court should consider, in advance, in which foreign jurisdiction they might seek to enforce an eventual judgment in their favour. By so doing, the claimant may seek to frame a civil action so as to ensure that the conditions of recognition and enforcement of judgments obtained in that jurisdiction are satisfied.

## **C. Practical Obstacles**

There are also a number of practical, as well as procedural, obstacles to recovery in US courts.

### **i. Legal Aid**

There are significant differences between the civil legal aid system in the US and that of other developed countries. Firstly, the US has not established a statutory or constitutional right to counsel in most civil cases. Secondly, the US has not embraced or suggested changes to the existing system that would substantially increase the involvement of paid private lawyers in the delivery of civil legal assistance to low income persons. Instead, the US continues to rely on the free or low-cost representation of pro bono attorneys, local bar association referrals, and legal service organisations to deliver legal services to the poor.<sup>1688</sup>

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<sup>1684</sup> [1990] Ch 433.

<sup>1685</sup> Ibid 443, 461 ff.

<sup>1686</sup> See generally, SW Waller, 'Under Siege: United States Judgments in Foreign Courts' (1993) 28 Texas Int'l L J 427, 429.

<sup>1687</sup> SS 5(1), 5(2)(a), 5(3), defining a judgment for multiple damages as one '...for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.'

<sup>1688</sup> L Mecham, *The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in other Countries* (2<sup>nd</sup> edn, 2001) <<http://www.uscourts.gov/library/internationalbook-fedcts2.pdf>> accessed 22 March 2008.

Some have argued that the US could improve its funding if more private attorneys were paid for providing civil legal aid, so far there is virtually no legislative pressure to change the staff attorney model at either the federal or state legislative level.<sup>1689</sup> The US government provides funding to legal services organisations through the Legal Services Corporation ('LSC'), a non-profit corporation, but it has been reported that 'one in every two individuals who qualify for and actually seek assistance from LSC-funded programs are turned away because of a lack of resources'.<sup>1690</sup>

## ii. Cost of Actions

In the US judicial system, all parties pay for their own costs of litigation regardless of whether they win or lose. A moderate level of fees<sup>1691</sup> is charged by the federal courts, but the other costs of litigation (e.g. attorney or expert fees) can be 'more substantial'.<sup>1692</sup> Civil plaintiffs may be excused by a court from paying court fees if they are unable to afford them (i.e. under *forma pauperis*). In criminal cases, however, the US government covers the costs of investigation and prosecution.<sup>1693</sup>

In general, the US is a desirable jurisdiction in which to bring an action primarily because unsuccessful litigants are not required to pay opponents costs, unless the claim is deemed utterly vexatious. This can be especially important in human rights cases brought against transnational corporations because the legal arguments raised can be novel and thus involve a high element of risk.<sup>1694</sup> Another advantage of the US system is that lawyers can act on a contingency fee basis which significantly lowers a plaintiff's own legal costs in case of a loss.<sup>1695</sup>

## iii. Witness Protection

Witness protection may be granted to an essential witness in specific cases, such as serious federal felonies or certain civil and administrative proceedings, because the testimony provided may jeopardize his or her safety.<sup>1696</sup>

## iv. Other Non-Legal Obstacles

A significant obstacle for plaintiffs involved in a lawsuit against transnational corporations is obtaining the information and evidence relevant to the suit. It has been commented that this

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<sup>1689</sup> AW Houseman, 'Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005' (2005) <[http://www.clasp.org/publications/us\\_overview\\_program\\_2005.pdf](http://www.clasp.org/publications/us_overview_program_2005.pdf)> accessed 22 March 2008, p 6.

<sup>1690</sup> American Bar Association, 'Access to Legal Services— Legal Services Corporation' <[http://www.abanet.org/poladv/priorities/legal\\_services/](http://www.abanet.org/poladv/priorities/legal_services/)> accessed 22 March 2008, p 6.

<sup>1691</sup> Cf. US Courts, 'Court Fees' <<http://www.uscourts.gov/library/courtfees.html>> accessed 22 March 2008.

<sup>1692</sup> Mechem (n 213) 23.

<sup>1693</sup> Ibid.

<sup>1694</sup> B Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 Yale J Int'l L 1, 29.

<sup>1695</sup> Joseph (n 5) 16.

<sup>1696</sup> US Department of Justice, 'USAM 9-21.000 Witness Security', <[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/21mcr.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/21mcr.htm)> accessed 26 March 2008.

process can 'drag on for years'.<sup>1697</sup> However, in the US, the rules regarding discovery are comparatively lenient to plaintiffs. This can be of great importance when much of the evidence is likely to lie in the corporate defendant's control.<sup>1698</sup> It is certainly true that '...the US legal system offers a uniquely supportive framework for civil lawsuits seeking damages for international human rights abuses',<sup>1699</sup> which is very important when (as is often the case) redress is simply unavailable in the country where the alleged abuse takes place.<sup>1700</sup>

Another potential obstacle for foreigners who bring civil suits in the US is that certified interpreters will not be appointed and paid for unless the government is the plaintiff.<sup>1701</sup>

### 3. AMICUS BRIEF INVOLVEMENT

#### A. United States

There is a recent history of the United States submitting *amicus* briefs, particularly in relation to litigation under ATCA. Briefs were submitted in cases including *Filartiga*,<sup>1702</sup> *Unocal III*,<sup>1703</sup> *Doe v Exxon*<sup>1704</sup> and *Sosa*.<sup>1705</sup>

In *Filartiga*, the plaintiffs were supported by an important US government *amicus* brief pressing the Carter Administration's human rights policy.<sup>1706</sup> In contrast to the U.S position taken in regards to *Filartiga*, the US Department of Justice and State Department submitted an *amicus curiae* brief for the defense in the rehearing of the *Unocal* cases by the Ninth Circuit Court of Appeals in 2003. The US brief argued against the use of ATCA as a basis for filing civil suits, that ATCA did not cover international human rights treaties, and that human rights violations committed outside the US could not be covered under the law.<sup>1707</sup> Similar arguments were made in the US government's *amicus* brief submissions for *Doe v ExxonMobil* and *Sosa v Alvarez-Machain*.<sup>1708</sup>

Although *Sosa* did not involve an action against a corporation for human rights abuse, it was a pivotal case because it was heard by the Supreme Court and produced a major development for claims under ATCA. In addition to the US, an *amicus* brief was submitted in support of *Sosa* (the petitioner) by the Governments of Australia, Switzerland and the UK.<sup>1709</sup>

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<sup>1697</sup> R Mullerat (ed) *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, The Hague 2005) 93.

<sup>1698</sup> Stephens (n 219) 15–16.

<sup>1699</sup> Ibid 16.

<sup>1700</sup> Joseph (n 5) 17.

<sup>1701</sup> Meham (n 213) 47.

<sup>1702</sup> N 44.

<sup>1703</sup> N 52.

<sup>1704</sup> N 9.

<sup>1705</sup> N 43.

<sup>1706</sup> 'Memorandum for the United States as *Amicus Curiae*' 19 ILM 585 (1980).

<sup>1707</sup> Human Rights Watch, 'US: Ashcroft Attacks Human Rights Law' (15 May 2003) <<http://hrw.org/english/docs/2003/05/15/usdom6050.htm>> accessed 22 March 2008.

<sup>1708</sup> Supplemental Statement of Interest of the USA, *Doe v ExxonMobil*; cf. n 9. Brief for the US supporting Petitioner, *Sosa v Alvarez-Machain*, Case No. 03-339; cf. n 43.

<sup>1709</sup> *Amici Curiae* in Support of the Petitioner at 27 (Jan. 23, 2004), *Sosa v Alvarez-Machain*. Cf. n 43.

## B. Industry Groups

Industry organisations have filed *amicus curiae* briefs in notable cases regarding ATCA, such as *Sosa v Alvarez-Machain* and *Doe v Unocal*. As *amicus curiae* in relation to the *Sosa v Alvarez-Machain* case, The National Foreign Trade Council, USA Engage, the US Chamber of Commerce, the US Council for International Business, the International Chamber of Commerce, the Organisation for International Investment, the Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council argued that ATCA does not contain a private right of action and that it confers jurisdiction only where Congress has provided a cause of action by statute or treaty. They also voiced their concern that ATCA has

...transformed... into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealings with other nations.<sup>1710</sup>

In *Doe v Unocal*, USA Engage, the National Foreign Trade Council, the National Association of Manufacturers, the US Chamber of Commerce, the US Council of International Business and the Organisation for International Investment filed an *amicus* brief, arguing that ATCA provides a federal forum, but not a cause of action, for torts in violation of the law of nations.<sup>1711</sup>

## 4. CASE STUDY: DOE V UNOCAL

*Burmese villagers brought a class action lawsuit against the Unocal consortium in the US District Court pursuant to ATCA, charging the consortium with profiting from forced labour and conspiring in numerous other violations of international and US law. The US Court agreed. Subsequently Unocal settled.*<sup>1712</sup>

The *Unocal* litigation concerned alleged human rights violations arising out of collaboration between the Unocal consortium, a US corporation, Total, a French corporation, the SLORC (the Myanmar Military government) and the Burmese state owned Myanmar Oil and Gas Enterprise ('MOGE') in the Yadana oil pipeline project in Burma. The plaintiffs, a group of 14 Burmese villagers, brought a class action law suit in the US federal District Court for the Central District of California, alleging complicity in human rights abuses arising out of collaboration in the Yadana oil pipeline project.<sup>1713</sup>

In a landmark decision the US district court agreed to hear the action, finding that corporations can be held legally responsible under ATCA for violations of international human rights norms in foreign countries and that the US courts may have jurisdiction over

<sup>1710</sup> Brief for the National Foreign Trade Council and others as *Amici Curiae* in Support of Petitioner, (6 Oct 2003), *Sosa v Alvarez-Machain* <<http://www.sdshh.com/Alvarez/NFTC%20Amicus%20Brief.pdf>> accessed 26 March 2008.

<sup>1711</sup> Brief *Amicus Curiae* for USA Engage and others Supporting Affirmance and Defendants-Appellees (29 April 2003) <<http://www.uschamber.com/NR/rdonlyres/eor6fglkpj3t5puqkugddssu3wvcbkw3oy6tn7rnqw34axzuunw3j7fpeavgvf2vj4xwho5jioq6l/Resource313.pdf>> accessed 11 April 2008.

<sup>1712</sup> Cf. n 56, above.

<sup>1713</sup> *Unocal I* (n 56).

such claims.<sup>1714</sup> The District Court dismissed the claims against SLORC on the basis of sovereign immunity<sup>1715</sup> and against Total for lack of personal jurisdiction.<sup>1716</sup> The Court of Appeals held that it was sufficient that Unocal knowingly assisted the military in perpetrating the abuses for Unocal.<sup>1717</sup> The Court set a trial date, but subsequently Unocal agreed to compensate the plaintiffs in a settlement that ended the lawsuit.

The litigation highlights the complexity that may arise in seeking to pursue a claim against state and private actors in a US Court.

## **A. Causes of Action and Remedies Against Multinational Corporations involved with Foreign Governments**

In the *Unocal* case, the plaintiffs successfully argued that the case fell within ATCA's confines.

The human rights abuses were alleged to have been perpetrated by the Burmese military, hired by Unocal to provide security for the Yadana project. It was accepted on the evidence at trial that Unocal knew of the human rights violations perpetrated by the military. The main legal issues raised regarding Unocal's liability for these violations were:

- (1) Whether Unocal could be vicariously liable for the human rights violations perpetrated by the military in the course of providing security services for the Yadana project; and

Whether knowledge of the perpetration of such abuses was a sufficient basis for the imposition of this liability.

The court found evidence that would reasonably allow a jury to find that Unocal's joint venture hired the military and that Unocal is therefore vicariously liable for the military's human rights abuses. The plaintiffs sought redress in the form of damages for the victims of the alleged human rights abuses and an injunction restraining the defendants from further collaboration in the construction of the pipeline and from making further payments to the SLORC and MOGE.

## **B. Substantive Obstacles: Act of State Doctrine**

The Court of Appeal upheld the finding of the District Court that the Act of State doctrine applied to grant complete immunity to the state defendants, SLORC and MOGE. The plaintiffs argued that SLORC and MOGE fell within the commercial exception to the Foreign

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<sup>1714</sup> Ibid 889–92.

<sup>1715</sup> See Ibid 885–89. See also *Doe I v Unocal Corp* 27 F Supp 2d 1174 (CD Cal 1998) aff'd 248 F 3d 915 (9th Cir 2001), denying motion of class certification for injunctive and declaratory relief.

<sup>1716</sup> 27 F Supp 2d 1174 (CD Cal 1998), aff'd 248 F 3d 915 (9<sup>th</sup> Cir 2001).

<sup>1717</sup> *Unocal III* (n 52) 953.



Sovereign Immunity Act.<sup>1718</sup> The Court rejected this argument, applying the Supreme Court decision in *Saudi Arabia v Nelson*<sup>1719</sup>—which provides that ‘...a state engages in commercial activity...where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns’.<sup>1720</sup> The Court therefore found that the SLORC’s participation in the pipeline project constituted a State function. Moreover, the Court determined that the requirement of the FSIA that the activity in question has an effect in the US was met.

The plaintiffs in this action raised a number of further arguments, based on principles of public international law and international human rights law in support of their claim against the state entities. The resistance of the US Court to these arguments highlights the significant obstacle that a defence of State Immunity will prevent with regards to actions against a state actor in US courts.

The Court found that the nature of Unocal’s collaboration with the Burmese military did not constitute joint action with the government such that the Act of State doctrine would apply.

### **C. Procedural Obstacles: *Forum Non Conveniens***

The Court found that it could not exercise *in personam* jurisdiction over Unocal’s partner, the French corporation Total, one of the original defendants.

### **D. Practical Obstacles**

The protracted nature of the *Unocal* litigation, spanning seven years before eventually being settled before trial started, highlights the complexity of litigation against TNCs and highlights one of the hurdles in bringing a claim against a TNC: costs. Due to the landmark nature of this case, the plaintiffs enjoyed significant support from high level counsel operating on a pro bono basis. However, it should be noted that costs were not awarded to the plaintiffs during their pre-trial litigation, and it is likely that such costs would have been prohibitive had pro bono legal assistance not been provided.

## **5. Conclusion**

The United States has laid down some legal mechanisms whereby foreign plaintiffs can recover damages for human rights abuses by TNCs in host States. At Federal level, a number of statutes allow individuals aggrieved by these abuses to initiate legal proceedings. Some of them, like the Alien Tort Claims Act or the Torture Victim Protection Act, deal squarely with violations of those human rights that might form part of customary international law. Others do not primarily deal with human rights violations but their scope is wide enough that they encompass certain human rights violations in their respective grants of jurisdiction.

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<sup>1718</sup> 28 USC §§ 1602–1611.

<sup>1719</sup> 507 US 349 (1993).

<sup>1720</sup> *Ibid* 360.

Examples include the Foreign Corrupt Practices Act and the Racketeer Influenced Corrupt Organizations Act.

The US legal system is constructed around a federation, characterised by the doctrine of separation of powers. This creates a number of obstacles for adjudication. One example is the political question doctrine, whereby deference is given by the courts to other branches of government in the determination of international legal wrongs. Another example is the—at times—uneasy relationship between Federal and State competencies, on whose account federal courts may be reluctant to develop relevant common law principles, absent clear congressional indication. Furthermore, the US legal system has a particular outlook on international law that creates additional obstacles for any potential plaintiff in human rights litigation. Thus under the act of state doctrine, US courts may decline to adjudicate a case where in so doing they would ‘sit in judgment’ of the actions of another State.

The picture that emerges from an analysis of the system as a whole is somewhat mixed. Human rights litigation has some obstacles to contend with, as discussed above. At times, these obstacles decisively dispose of litigation or fetter the enforcement of judgments. Nevertheless, the potential for human rights litigation and the avenues to pursue it before US courts is remarkable. The possibilities of successful litigation under the statutes named above are considerable, however limited these statutes may be. And given the extensive number of TNCs that are either based or doing business in the United States, the resources laid down by the US legal system for human rights litigation makes this legal system one of the more remarkable in the world in this regard.

## Conclusion

— Jennifer Robinson\* —

This submission confirms the SRSG's own conclusion in his recent paper, entitled 'Business and Human Rights: The Evolving Agenda', that while '[n]othing prevents states from imposing international legal responsibilities for human rights directly on corporations ... evidence ... does not indicate that they have already done so to any appreciable extent.'<sup>1721</sup> Aside from the US, most states do not have specific laws or regulations adjudicating corporate human rights abuse abroad, nor do they give victims specific causes of action against TNCs for their violation of such rights. Nevertheless, in jurisdictions such as Australia, France, the US and the UK, litigants have, with varying degrees of success, begun to utilise existing criminal and civil law, including tort, contract and consumer protection, to hold corporations domiciled or resident in their jurisdictions liable for human rights abuses committed abroad. In each of the jurisdictions studied in this submission, similar possibilities exist, even if they have yet to be put to such use.

As already mentioned, this diffuse collection of existing criminal and civil laws do not directly refer to human rights and do not generally have extraterritorial operation.

As a consequence, in each particular case the effectiveness of any remedy will turn on the substance and facts of the actions or omissions of the TNC and its agents, rather than on whether or not there has been a violation of a human right. Because of this, it is almost impossible to provide a generalised account of the obstacles facing victims of corporate human rights abuses; each particular cause of action will have its own obstacles: different tests to be satisfied, different rules affecting jurisdiction and different burdens of proof.

Australia provides a good example of the intricacies and vagaries of domestic remedies for claimants seeking redress for corporate human rights abuse. Tort claims for environmental damage caused to land outside of Australia, which have as their gravamen title to that foreign land, will not be heard in some Australian States because of a particular common law rule of jurisdiction. On the other hand, claims not so characterised, based purely on personal injury in the order of the asbestos related claims brought by South African victims in the UK against Cape Industries,<sup>1722</sup> are not affected by this rule. That said, victims bringing such claims may face further obstacles such as the legislative restrictions on the recovery of damages imposed by Australian limitation statutes.

The fact that generalisations are difficult to reach posed substantial difficulties to researchers working to identify the relevant *obstacles* faced by non-national victims in each jurisdiction. Documenting every factual situation which might arise is virtually impossible. Because of this, the starting point of any effective and comprehensive inquiry will be the consideration of

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<sup>1721</sup> J Ruggie, 'Business and Human Rights: The Evolving Agenda' (2007) 101 Am J Int Law 819, 833.

<sup>1722</sup> *Lubbe v Cape*, 12 January 1998 (unreported); *Lubbe v Cape* [1998] CLC 1559 (CA); *Lubbe and Others v Cape Plc* [2000] 1 Lloyd's Rep 139 (CA).

the factual circumstances of the particular case. Such facts will determine both the causes of action available to a claimant, and tease out the potential obstacles they might face.

That said, when viewed collectively, the research from the various jurisdictions identifies some congenital obstacles that will typically be faced by claimants. The first, already alluded to, is the non-extraterritorial application of laws. Generally speaking, causes of action—whether criminal or civil—are not intended to operate outside of the state in which they are established. This fact poses a serious obstacle. In addition, claimants have to contend with the varying conflict of laws rules of each home state jurisdiction.

Given the wealth of the material presented in this submission, this conclusion will attempt to draw out and summarise the key points made in respect of each jurisdiction. It will then attempt to draw some general conclusions on obstacles to justice in home states of TNCs for victims of corporate human rights abuse.

## **1. JURISDICTION SPECIFIC CONCLUSIONS**

### **A. AUSTRALIA**

Australia has neither a constitutional bill of rights, nor a systematic pattern of incorporating the provisions of binding international human rights treaties into domestic law. The mechanisms for holding Australian corporations liable for human rights abuses committed abroad are limited. To the extent that possibilities do exist for holding Australian corporations liable in such circumstances, they are characterised by a diffuse collection of legal instruments and common law principles, none of which are formulated in the language or context of human rights.

As foreshadowed above, the particular cause of action open to the claimant will depend on the particular facts surrounding the human rights violation. That Australian corporations have criminal capacity is well established. However, despite capacity to commit criminal acts, driving home liability is made difficult if not impossible for two reasons: separate legal personality and the presumption against the extraterritorial application of statutes. The principle of separate legal personality makes it all but impossible to drive home liability for crimes committed by a subsidiary to the parent company. The presumption against extraterritoriality means that for a criminal statute to apply outside Australia, it must contain express words to that effect.

The result is that, in practice, the causes of action most likely to be effective against an Australian company are those that are grounded in either contract or tort law. That said, both contract and tort, contain a number of hurdles that any potential claimant must overcome. These include effecting valid service upon a defendant, resisting a claim of *forum non conveniens* and formulating an effective claim. Such considerations are reflected in most common law jurisdictions. It might be observed that the particular formulation of *forum non conveniens* in Australia is less restrictive than that adopted by American and English courts. As such, the potential of a discretionary non-exercise of jurisdiction by Australian courts

poses less of an obstacle than in the US or UK.<sup>1723</sup> That said, Australia retains some obstacles which set it apart from such jurisdictions. The *Moçambique* rule, which remains in force in various Australian states, constitutes a potential bar to claims by victims of particular corporate abuse. It is a common law rule that prevents Australian courts, to the exception of those of New South Wales, from hearing claims where possessory or proprietary rights over foreign land form the basis of the claim. Depending on the way the court characterises the claim, a victim may be prevented from claiming damage for pollution to land or water and related harm caused to inhabitants. A prescient demonstration of the potential of the *Moçambique* rule to stymie a claim is demonstrated in a case involving BHP operations in PNG.<sup>1724</sup> However, it must be said that rather than being the norm, the particular facts which are necessary for *Moçambique* to apply are unique and occur infrequently. Generally, claims for personal injury and other actions based on negligence or breach of contract, which do not directly concern title to immovable property, will not be impeded by its operation. In conclusion, it might be said that tort and contract law provide a satisfactory, albeit imperfect, method for engendering corporate accountability and providing redress to claimants bringing actions against Australian companies.

## B. CANADA

Canadian law on corporate legal accountability for extraterritorial operations and human rights abuses by TNCs is generally recognised to be insufficient. Few options are available to non-nationals seeking to pursue Canadian TNCs in Canada for wrongs committed abroad, except those provided by general principles of private international law.

The potential for bringing criminal claims against corporations operating overseas is negligible. That instances of extraterritorial criminal liability exist is beyond question. The Crimes Against Humanity and War Crimes Act<sup>1725</sup> criminalises genocide, crimes against humanity, and war crimes. However, doubt persists as to whether such criminalisation is to apply to corporate activity. As a matter of Canadian jurisprudence, the elements and characteristics of the crimes derive from their definitions in international law. As such, the Canadian government has expressed some uncertainty as to whether such crimes 'can, as a matter of international law, be committed by corporations'.<sup>1726</sup> This approach should be contrasted with that of the US and civil liability under the Alien Tort Claims Act ('ATCA'), where corporations can be found liable for international crimes such as genocide.<sup>1727</sup> The lack of effective civil causes of actions in Canada against TNCs has had international repercussions: under ATCA, Canadian corporations have been called before US courts in actions having no connection with the US.<sup>1728</sup> The US courts have been steadfast in their refusal to decline jurisdiction in favour of Canadian courts, pointing to the lack of any effective mechanism for corporate accountability in Canadian law.<sup>1729</sup>

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<sup>1723</sup> See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA).

<sup>1724</sup> See *Dagi and Ors v The Broken Hill Proprietary Company Ltd and Anr (No. 2)* [1997] 1 VR 428 (VSC).

<sup>1725</sup> SC 2000 c 24.

<sup>1726</sup> Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, *Mining In Developing Countries – Corporate Social Responsibility*. Cited in the Canada report at p X.

<sup>1727</sup> See discussion in the US report at pp 307 ff.

<sup>1728</sup> 28 USC § 1350.

<sup>1729</sup> See *Presbyterian Church of Sudan v Talisman Energy Inc* 224 F Supp 2d 289 (SDNY 2004) 337.

As reflected in the Australian research, the only causes of action that a claimant might successfully invoke in Canada against a Canadian corporation operating overseas are found in contract or tort law, subject of course to common law rules of private international law. While Canadian courts will generally find themselves competent to exercise jurisdiction over corporations domiciled within Canada, issues of piercing the corporate veil and *forum non conveniens* figure prominently.

To date, there exists only one example of a civil lawsuit brought in the Canadian courts involving human rights violations by a Canadian TNC abroad by non-nationals and is illustrative of the barriers litigants face. In *Recherches Internationales Québec v Cambior Inc.*,<sup>1730</sup> Cambior Inc was sued for environmental damage associated with its gold-mining operations in Guyana. The Canadian courts refused to exercise jurisdiction on the grounds that the foreign court, in this case Guyana, was competent to hear the case. This was because, in that particular case, it could not be said that ‘the administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana’.<sup>1731</sup>

The Canada section of this submission affirms conclusions articulated by the Standing Committee on Foreign Affairs and International Trade of the House of Commons, Parliament of Canada: more needs to be done to allow non-nationals to sue in Canada for acts committed by Canadian corporations abroad.

### C. THE DEMOCRATIC REPUBLIC OF CONGO

The Democratic Republic of Congo (‘DRC’) inherited Belgium’s monist system and approach to international law. International human rights treaties ratified by DRC have automatic and direct effect in the DRC. In practice, however, DRC courts have been reluctant to rely on international law in the absence of implementing legislation and there is no precedent for the direct domestic application of customary international law. Nevertheless, DRC law contains, on paper, actionable human rights protections in both the national Constitution and in ordinary law. Most of these protections are extended to non-nationals, with the exception of political rights, which are reserved solely for the benefit of DRC nationals.

Despite the fact that individuals can be exposed to extraterritorial criminal prosecution for human rights violations, DRC corporations cannot. First, it is unclear whether corporations possess criminal capacity.<sup>1732</sup> However, and perhaps more critically, DRC courts are unable to try corporations for activities that occur abroad. Only individual officers of corporations can be prosecuted for human rights abuse committed by corporations abroad.

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<sup>1730</sup> [1998] QJ no 2554 (Quebec Superior Ct).

<sup>1731</sup> Ibid [12].

<sup>1732</sup> ‘Proceedings of the Military Court of Katanga in the case of the Congolese Public Prosecutor and Parties Civiles versus Colonel Adémar ILUNGA and associates – Rôle Pénal 010/2006/ RMP 0065/2005’ <[http://www.raid-uk.org/docs/Kilwa\\_Trial/Legal\\_Update\\_2.pdf](http://www.raid-uk.org/docs/Kilwa_Trial/Legal_Update_2.pdf)> accessed 12 March 2008. See also generally ‘Kilwa Trial: a Denial of Justice’ <[http://www.globalwitness.org/media\\_library\\_get.php/463/kilwa\\_chron\\_en\\_170707.pdf](http://www.globalwitness.org/media_library_get.php/463/kilwa_chron_en_170707.pdf)> accessed 12 March 2008.

As in other jurisdictions, human rights violations may give rise to a private law claim in tort, but in circumstances where the tort is committed abroad, DRC conflict of laws rules may constitute a barrier.

The above obstacles aside, the DRC legal system poses serious practical obstacles. Costs are prohibitive, official legal aid non-existent, and corruption and intimidation rife. The case study of the Kilwa trial, the attempted prosecution of agents of a foreign corporation for human rights abuses committed within the DRC, demonstrates how such obstacles may themselves preclude justice for victims. Despite the United Nations assistance in the prosecution, systemic intimidation, under-resourcing and corruption within the judicial system meant that the defendants were acquitted and the victims denied justice.

In view of both the legal and practical obstacles faced by litigants bringing claims in the DRC, prospects for obtaining justice there are extremely slim.

#### **D. EUROPEAN UNION**

While European law and corporate social responsibility standards provide some limited mechanisms of corporate accountability for human rights abuse, they do not confer direct causes of actions which allow non-nationals to seek legal recourse directly against corporations.

However, European law affects claimants in other ways. As demonstrated in relation to all jurisdictions considered in this submission, issues of private international law figure prominently in EU law. In this regard, the EU has imposed a system which directly regulates rules of conflict of laws in Member States. In some regards, such as in relation to jurisdiction, the framework ensures that claims brought against EU domiciled corporations will almost always be heard if brought in the courts of a Member State. However, in other regards, such as in relation to choice of law, the benefit conveyed by EU law is ambivalent and turns on the specific facts of any given claim. Thus, the main advantage of the EU framework might be said to be the certainty it brings in clearly codifying rules of private international law.

There are no criminal sanctions available against TNCs for acts committed outside of the EU because there is no general European legislation that incriminates human rights violations extra-territorially. Rather, this will depend on the laws of particular Member States.

Substantive provisions of European law in other areas may prove of some assistance in obtaining redress for victims bringing claims in national courts. However, such advantages are limited to general due process rights, the specific rights of victims in criminal proceedings, and very indirectly, to specialised fields under the three Pillars such as public procurement, misleading advertising, arms control and human trafficking.

Worth noting are the soft law instruments on corporate social responsibility enacted by EU political institutions. The instruments encourage voluntary adoption by corporations of social, environmental, health, labor, and environmental standards that originate from EU

secondary law on equal treatment (within the Community), ILO Conventions, the OECD Guidelines and so on, through the adoption of codes of conduct. Although a laudable objective, the instruments only have political effect and cannot be relied upon as a direct source of law by an individual against a TNC established in the EU. In this regard, the instruments themselves confirm that current EC secondary legislation would have to be amended so as to govern the activities of TNCs outside the EU. Nevertheless, voluntary adoptions of codes of conduct have the potential to provide for the creation of legally enforceable rights against corporations. For example, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices could arguably be invoked in relation to the misleading use of codes of conduct in circumstances where TNCs inaccurately advertise their adherence to certain environmental, social, or health standards<sup>1733</sup> That said, the limitations of such actions are patent: EC Directives do not have direct horizontal application and any remedy would be that of the consumer whose economic behaviour has been distorted as a result of an unfair commercial practice. Thus, while it cannot be said that such mechanism provides redress to victims, they do have the potential to provide some level of corporate accountability.

Turning to questions of private international law, where a claimant sues a TNC in the courts of a Member State, jurisdiction will almost always be exercised. Further, under normal circumstances, claimants will be entitled to have judgments rendered by Member State courts recognised and enforced in other Member States. In relation to rules for identifying the applicable law, as already mentioned, the advantage or disadvantage to be gained by a claimant will depend on the specific facts of the case and the relative benefits of the substance offered in each case by the potentially applicable law. This will fall to be determined on a case-by-case basis. The most that can be said is that a claimant should review the ways in which Member State courts select the applicable law, and attempt to use these rules to his or her advantage. It might also be said that the obligation to hear the case provides a substantial safeguard to potential claimants: should a claim be brought in a Member State against one of its corporations, it is not open to the defendant corporation to argue that the court exercise its discretion not to hear the claim.

## E. FRANCE

The French legal system provides few options for non-nationals to seek recourse against TNCs for human rights abuses committed abroad. As reiterated by the legal position in Germany, this is, to some extent, reflective of the cautiousness with which continental civil law systems approach questions of extraterritoriality.

With respect to criminal law, claimants must be able to meet the stringent requirements established by the French Criminal Code before a case can be heard by French Courts. Illustrative of the obstacles faced by non-nationals bringing actions in France against TNCs is the 2002 case brought by two Burmese nationals against officers of Total, S.A.<sup>1734</sup> The Burmese complainants alleged they had been subject to forced labour in Total's operations

<sup>1733</sup> Cf. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC; Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

<sup>1734</sup> This case arose from the same facts as those discussed in *Doe v Unocal* litigation. See discussion in the US report at pp 294–97. The case was originally brought against the Burmese state, Total and Unocal. US Courts had dismissed the case against Total on the grounds it lacked personal jurisdiction over Total, a French corporation.



on the Yandana gas pipeline in Burma in breach of provisions against 'arbitrary detention' and 'forced restraint' in Article 224-1 of the French Penal Code. While Total settled the matter by offering compensation to the complainants, the criminal action continued. French courts eventually held that forced labour did not fall within the concept of 'illegal restraint' in Article 224-1 CP. This case is demonstrative of the difficulties complainants may face given the restrictive interpretation of French criminal law. It should be noted that the French Penal Code has since been amended to affirm the criminal responsibility of corporations *per se*. While this amendment ameliorates the difficulty encountered in bringing a criminal claim against a French corporations, it does nothing in relation to the restrictive interpretation of French criminal law which continues to poses a formidable obstacle to claimants.

As with all of the jurisdictions studied, the main issue in bringing civil claims against corporations in France is that of conflict of laws. Once jurisdiction is established, causes of action under French law will only be available where French law is determined to be the applicable law. As the French chapter demonstrates, while such causes of action exist, they are limited.

## F. GERMANY

As is the case for France and most other continental European jurisdictions, there are no causes of action available to non-German nationals against German TNCs for acts committed outside of the territory of the Federal Republic under international, constitutional or criminal law.

Despite proposals to the contrary and despite relatively strong doctrinal support for reform, corporations have no criminal capacity under German law. However, fines may be imposed on a corporation if a person, acting as an organ representing the corporation, perpetrates a crime or a violation of the *Ordnungswidrigkeitengesetz* ('the Law on the Violations of Order'), provided the act results in the breach of the corporation's obligations and the corporation is thereby enriched. This could potentially apply to wrongs committed abroad. However, as is commonly the case with criminal prosecution and other types of regulatory action, it provides no separate cause of action for victims, as it is the administrative authority (*Verwaltungsbehörde*) that imposes and collects the fine. As such, these measures do not offer any direct possibility for redress to the victim.

While non-nationals may be able to bring claims under German civil law, for example, for breach of contract in employment disputes or in tort, claimants face significant procedural and substantive hurdles. These include establishing the international jurisdiction of German courts to hear and decide the case, and ensuring that German law will apply to the dispute or will control significant aspects of the dispute by operation of the principle of *ordre public*. The *ordre public* principle will apply, allowing the application of German law to aspects of the claim, where application of the foreign law would lead to a result that is in obvious contradiction to foundational rules of German law, including basic rights guaranteed by the Federal Constitution. Significantly, and in apparent deviation from Australia, the UK and the US, there is no doctrine of *forum non conveniens* under German law, as German courts are obliged to hear and decide a case once local (and thus international) jurisdiction has been established in accordance with the aforementioned rules. Nevertheless, complainants face significant obstacles in establishing jurisdiction. There are no known cases where non-

nationals have brought claims against German TNCs in Germany for human rights violations committed abroad.

## **G. INDIA**

Corporate accountability for human rights violations in India—whether for human rights violations committed within India or abroad—is, as yet, elusive.

Human rights claims under the Indian Constitution are only available against the state. Indian criminal law constrains actions which amount to violations of fundamental rights, however prosecution is only available against individuals, not corporations. Civil claims in tort, through proactive and inventive judicial interpretation, have provided victims of corporate human rights abuse within India recourse against Indian corporations. However, it is important to note that Indian tort law has evolved almost entirely around one type of tort: industrial and environmental hazards (for example, pharmaceutical products, toxic wastes, asbestos exposure, defective heart valves and environmental hazard), such that the scope of available redress is limited and dependant on the particular violation in each case. A non-national seeking redress in India from an Indian corporation faces further procedural obstacles, not only in establishing jurisdiction of Indian courts over the matter, but also in executing judgments of foreign courts in India. Litigation in India is also expensive and fraught with delays—whether for nationals or non-nationals. Indeed, it is these practical obstacles that may provide the greatest disincentive to potential claimants from commencing and continuing legal proceedings against Indian corporations in India.

The Bhopal case, in which the Indian government sued Union Carbide on behalf of Indian victims of the Bhopal gas leak, established the basis for environmental and mass tort litigation in India and created a framework within which corporations can be held accountable. Yet, the serious delay, the inadequacy of the final settlement amount and the lack of consultation with victims in the conduct of the claim raise significant concerns about the entire process. Questions remain as to whether the Indian legal system is able to cope with such large and complex claims and provide victims of abuse with justice and adequate compensation. As the Indian chapter concludes, judicial adjustment and adaptation of existing rights and liabilities in India does not provide a satisfactory basis for corporate accountability for human rights abuse. There is an urgent requirement for express legislative intervention, both in substantive law and in the creation of specialist remedies.

While specialist legislation in India has done much to increase corporate accountability for certain human rights abuses, it has done little to provide effective causes of actions to victims. Labour laws have incorporated a number of human rights standards and provide clear causes of action for victims against corporations. Leaving aside the question whether India is a desirable forum within which to bring such claims, non-nationals seeking to bring claims in respect of labour rights violations abroad will face significant hurdles in establishing jurisdiction. Environmental legislation in India has also been developed to bring corporate actors within its ambit. Regulatory authorities have the power to impose significant fines and cancel operating licenses of corporations which cause air or water pollution. Further, communities affected by polluting corporate activities might bring constitutional claims against the state for failing to enforce these environmental regulations against offending corporations. This gives an effective indirect constitutional remedy against corporations, but

it does not provide victims direct recourse against the corporation itself, nor does it provide redress for abuses occurring abroad. In conclusion, there are insufficient avenues for justice for victims of corporate human rights abuse in India against Indian corporations.

## **H. MALAYSIA**

Malaysia provides only limited options for non-nationals seeking to pursue a claim against Malaysian corporations for wrongs committed abroad.

Malaysia has ratified very few international human rights treaties and there is no methodical incorporation of the provisions of these treaties into Malaysian municipal law.

Causes of action for human rights abuses committed by Malaysian TNCs are primarily those arising under tort or contract. A victim who is an employee of the TNC concerned may also resort to employment law protection. Victims who have no contractual relationship with the TNC, such as the consumers of hazardous products and victims suffering as the result of environmental damage, may rely on consumer protection laws and tort law remedies respectively. Administrative actions are only available in respect of TNCs that have public character or statutory TNCs.

No cases have been brought by non-nationals in the Malaysian courts for human rights violations of Malaysian corporations abroad. However, the case of *Asian Rare Earth*, a tort claim brought by Malaysian residents against a corporation for hazardous environmental and health effects of a factory, illustrates the problems faced in bringing claims against corporations in Malaysia. The major issues identified were the length of delays, the proceedings taking seven years to be finally determined and difficulties in meeting the burden of proof in establishing damage and causation. Claimants must have very strong claims and be prepared to engage in lengthy proceedings. These issues will be faced by both nationals and non-nationals alike in bringing claims before Malaysian courts.

While causes of action against corporations are available to non-Malaysian victims, the practical obstacles provide a major disincentive to potential claimants from commencing and continuing legal proceedings against Malaysian corporations in Malaysia. Long delays are common in proceedings and legal aid is not generally available to nationals or non-nationals.

## **I. PEOPLE'S REPUBLIC OF CHINA**

China is a civil law country and hence most of the applicable laws are derived directly from legislation and as such, decisions in earlier cases have little or virtually no precedent value. While international human rights treaties concluded by China have force of law in China, they rarely apply in disputes between private parties, as will be the case in corporate human rights abuses. Art 33 of the Constitution contains a general statement that the State respects and protects human rights but citizens cannot bring claims pursuant to the Constitution. Administrative law in China provides actions to interested parties for the review of decisions

made by administrative organs. That said, the actions of corporations, even if they are state-owned, cannot normally be reviewed under Chinese administrative law.

Nevertheless, national laws have been enacted to protect certain concrete rights, such as environmental rights, or the rights of a particular group, such as adolescents or women. To the extent that Chinese corporations may be held liable for human rights abuses, they are to be found within the various domestic legal instruments dealing with civil and criminal law.

Although corporations can be held criminal liable under Chinese law, such liability does not extend to crimes committed outside of China. There is a possibility, however, that individual corporate officers may be prosecuted for crimes committed by or on behalf of a corporation abroad. This may therefore provide an alternative route for victims of corporate human rights abuses, especially in cases involving fake or substandard products, activities which have the potential to endanger public health or the environment. Yet while individuals can, in very limited circumstances, institute criminal actions against individual corporate officers, criminal actions are generally brought by People's Procuratorates. That said, victims that have suffered loss as a result of criminal acts can bring an incidental civil action during the course of the criminal proceeding under art 77 of the Criminal Procedure Law.

There is only limited scope for legal recourse in China against Chinese TNCs for abuse committed abroad in contract or tort. For foreign nationals to establish the jurisdiction of a people's court, the parties must submit a written agreement consenting to the exercise of jurisdiction in China and demonstrate that there is some practical connection between the dispute and China. In certain circumstances, the corporate veil will not act as an obstacle to suing parent corporations in China, as Chinese law will pierce the corporate veil where an overseas subsidiary has been intentionally established to carry out illegal acts or is primarily engaged in illegal acts after being established. However, proving as much is difficult. It will rarely be the case that subsidiaries are created with such specific intent to defraud or engage in illegal acts. To the contrary, subsidiaries are often set up in host states as a prerequisite to investment and trading (see, for example, in India and Indonesia) or for some other legal purpose. This fact means that separate corporate liability presents a considerable obstacle for litigants bringing a claim against a Chinese corporation.

There are no reported cases in China where a non-Chinese victim of human rights abuse resulting from operation of Chinese corporations overseas has sought a remedy in Chinese courts. Mindful of the fact that Chinese cases, as in other civil law jurisdictions, do not bind lower courts, a relatively recent case concerned a failed attempt by a Chinese citizen to bring a claim sounding in damages caused by road construction provides insight into the types of obstacles claimants may face. In relation to that case, commentators noted that significant obstacles imposed in the context of civil litigation brought for environmental wrongs by the heavy burden of proof borne by claimants and the difficulties claimants face in obtaining evidence from corporations.

## **J. RUSSIA**

Russian law generally treats foreigners and nationals equally. Under certain criteria and conditions, it might be said that Russian law provides effective causes of action for non-

nationals for human rights violations committed by Russian corporations abroad. Causes of action and remedies are provided by civil, criminal, administrative and, in some cases, by other branches of law. The causes of action and remedies available in civil litigation for foreign nationals for damage suffered in host states are largely dependent on rules of private international law and the law applicable in the host state (as opposed to Russian law), which may be found to be the applicable law in such disputes.

Russian law does not support the concept of criminal capacity of corporations. Only individual corporate officers can be prosecuted, with corporations being subjected to fines or other penalties by the state. Individuals may, however, bring civil claims for recoverable damage suffered as the result of the crime.

In relation to civil claims, it is almost impossible to pierce the corporate veil and impose liability on Russian parent companies for tortious acts committed by overseas subsidiaries. In contract claims, a Russian parent company can be found jointly responsible for its subsidiary's obligations in deals made pursuant to the parent's instructions. In tort claims it is impossible to establish a cause of action against Russian corporations for harm inflicted by its subsidiaries, except for circumstances where the subsidiary becomes bankrupt because of acts of that parent company. Finally, remedies available in civil claims are limited to compensation of loss of profit, actual and moral damages. Unlike the US, but in the tradition of other jurisdictions such as the UK and Australia, Russian courts do not award punitive damages. This means that in comparison to some jurisdictions, potential compensation recoverable by victims will be significantly reduced. This is demonstrated by the recent airplane crash disaster cases in which Russian claimants, rather than bringing their claim in Russia, brought it in the US in order to maximise the award of damages they might receive.

## **K. SOUTH AFRICA**

There is some, albeit limited, scope for litigation against TNCs operating in South Africa for human rights abuse committed abroad. As with other common law jurisdictions, this is primarily through claims brought in contract or tort.

South Africa is a dualist jurisdiction, therefore international human rights treaty obligations must be incorporated by legislative act. However, customary international law provides a legitimate source of law before South African courts and plays an interpretive role in giving effect to the Constitution. In this way, courts prefer interpreting legislation in such a way that it is consistent with international law. Therefore international law and constitutional obligations may be relevant in the application of principles of civil and criminal law in South Africa.

As distinct from the other jurisdictions reviewed in this submission, South African law arguably provides scope for nationals and non-nationals wishing to bring claims against South African corporations for breaches of constitutionally protected human rights for violations occurring both within and outside South Africa. However, the prospective benefit offered by such litigation from the perspective of a claimant is minimal. At present, the Constitutional Court has not expressly dismissed the prospect of directly applying

Constitutional provisions to the conduct of private entities. In practice, however, the Court has preferred to use the common law and statutory provisions to give effect indirectly to the values and rights of the Constitution. Furthermore, the remedies available for Constitutional actions do not include damages withholding the possibility of effective redress to claimants. As such, from a strategic perspective, litigants would be well advised to couch their actions in common law and statutory provisions before resorting to constitutional remedies.

Within the ambit of criminal law, corporate liability for human rights abuses remains insufficiently developed and either development or reform is necessary to be able to say that it offers an effective form of redress. The Constitution has the capacity to play a key role in this development, by providing a mechanism by which principles enunciated in the Bill of Rights have the potential to inform the development of the common law. In this way, it might be said that relative to other countries the South African common law has an increased capacity for development. Thus, although at this stage it is merely theoretical, there is potential for the imposition of domestic corporate liability for human rights abuses committed by South African companies operating outside of the Republic.

The primary means by which victims can bring claims against South African corporations for human rights abuse are through claims in contract or delict. Delictual claims might be brought through the principle of vicarious liability and in a corporate criminal action. However, any such claims are attended by a high standard of proof demonstrating misconduct of a particular individual. This burden restricts the likelihood of a successful action being brought, and indicates a need for legal development in this area.

Additionally, the South African regime for recognition and enforcement of foreign judgments provides an effective alternative to seeking out a South African court at first instance.

Although there appears to be scope for litigation against a South African TNC for violations committed abroad, no actions have been brought before the South African courts either by nationals or foreign aliens. Indeed, the fact that several cases involving corporate human rights abuses *within* South Africa have been brought elsewhere, such as the US and UK, suggests that South Africa does not provide a desirable forum for the resolution of such disputes.

For example, Khulumani Support Group claim brought a claim in US courts under the Alien Tort Claims Act on behalf of South African claimants against TNCs for their role in fostering violations of human rights committed in South Africa under apartheid.<sup>1735</sup> The fact the claim was brought in the US, instead of in South Africa, indicates that the South African legal system provided a less attractive method for obtaining redress for victims of human rights abuse than that available in the courts of New York. The unavailability of legal aid in South Africa constitutes a significant obstacle to justice for victims of human rights abuse, as affirmed in the case of *Lubbe and Others v Cape Plc* before the UK courts. It is telling that in the UK proceedings, argument proceeded on the basis that substantial justice could not be provided in South Africa, primarily due to the inability to obtain legal aid funding or arrange

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<sup>1735</sup> 28 USC § 1350.

for a contingency fee agreement. Because of this and other considerations, the House of Lords permitted the claims to be heard in the UK.<sup>1736</sup>

## L. THE UNITED KINGDOM

TNCs, as with other private entities, are not directly bound in law to observe human rights standards, which are a matter of public and not private law. While breach of some international human rights standards concerning torture, genocide, and crimes against humanity is a criminal offence under UK law, corporations cannot be indicted and convicted because of the mandatory prison sentences that such crimes carry. Furthermore, most criminal law does not extend beyond the territory of England and Wales, or, in some cases, Great Britain, and Northern Ireland. Consequently, there is little prospect of TNCs being held criminally liable for human rights abuses committed in host states abroad.

However, as in other jurisdictions, there is some prospect of victims bringing tort claims to obtain redress for human rights abuse involving interferences with their physical integrity, such as personal injury and death, occurring outside the jurisdiction. However, in this regard claimants will face significant obstacles. First, establishing a cause of action in tort will inevitably involve questions of applicable law and it is unlikely English law will be found to apply. Where the law of the host state is the correct applicable law, expert evidence will be required. The law of the host state will be applied to matters of substance, while English law will govern procedure. As mentioned in the EU portion of this submission, an English court cannot decline to exercise jurisdiction over a UK domiciled company on the basis of *forum non conveniens*. But in other cases the law is less clear. For example, it becomes all together unclear whether a UK court will exercise jurisdiction where an action between identical parties on similar grounds is already proceeding in another jurisdiction or where there are several defendants, each with different domicile status. Further, in relation to such questions, it is likely that many complex legal arguments will need to be resolved at an early stage in proceedings, adding to the cost and duration of litigation, making the ultimate outcome difficult to predict with any certainty.

The claim brought against the mining corporation, Cape, by victims for asbestos-related personal injuries and deaths suffered in South Africa is an example of a case where victims were successful in obtaining redress for abuses committed abroad.<sup>1737</sup> However, the proceedings were protracted and involved several appeals on the point of *forum non conveniens*, the defendants seeking to argue that South Africa was a more appropriate forum in which for the claims to be heard. Ultimately, the claim was allowed on the grounds that substantial justice could not be done in South Africa, because the claimants could not obtain legal aid funding.<sup>1738</sup> Despite the substantive, procedural and practical hurdles faced by claimants in the Cape litigation, redress was ultimately obtained in the form of an out of court settlement. Novel settlement trusts have been established and approved by the courts, which will grant compensation to existing and future claimants.<sup>1739</sup> However, the Cape litigation is a rare example of claimants obtaining redress. Other cases brought in the UK, such as *Connelly v RTZ* and the litigation against Thor Chemicals, have not been successful.

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<sup>1736</sup> *Lubbe v Cape 2000* (n 2) 279.

<sup>1737</sup> Cf. references in n 2, above.

<sup>1738</sup> *Lubbe v Cape 2000* (n 2) 279.

<sup>1739</sup> *Re Cape Plc* [2006] EWHC 1446 (Ch).

In contractual cases concerning labour rights such as equality and discrimination in employment, unless an employment contract contains a choice of law and jurisdiction clause, actions for breach of contract relating to employment outside the jurisdiction in another host state have little prospect of success.

Whilst costs and funding present obstacles to victims in the UK, the UK civil justice system generally operates expeditiously and fairly. Legal aid is limited and not available for cases not governed by the law of England and Wales, however, lawyers may act on the basis of conditional fee agreements as was demonstrate in *Cape v Lubbe*. Consequently, lack of legal aid is not necessarily an insurmountable obstacle to justice in the UK.

## **M. THE UNITED STATES**

The United States has enacted specific legislation providing foreign plaintiffs with the right to recover damages for human rights abuses by TNCs in host States. At the Federal level, a number of statutes allow individuals aggrieved by these abuses to initiate legal proceedings. Some of them, like the Alien Tort Claims Act or the Torture Victim Protection Act, deal squarely with violations of those human rights that might form part of customary international law. Others statutes, such as the Foreign Corrupt Practices Act and the Racketeer Influenced Corrupt Organisations Act, do not primarily deal with human rights violations but their scope is wide enough that they encompass certain human rights violations in application.

As for criminal statutes, the United States has enacted the Foreign Corrupt Practices Act (FCPA). This statute criminalises bribery committed abroad by TNCs in the attempt to influence the decisions of officials in furtherance of the TNC's business interests. While aimed at preserving ethical business practices of US corporations abroad, it does not allow foreigners to prosecute TNCs directly, but rather through intermediation of certain government agencies. Furthermore, there is the mixed civil-criminal Racketeer Influenced Corrupt Organisations Act (RICO), which allows plaintiffs to directly sue TNCs for certain human rights abuses committed abroad. However, RICO really aims to protect the US economy against 'racketeering activities' committed abroad and within the US. Therefore, human rights abuses could only be enforced through RICO if plaintiffs prove that the actions of TNCs somehow impair the US economy.

As for civil statutes, the US has enacted the Alien Tort Claims Act ("ATCA"). Revived in 1980 after nearly 200 years of neglect, this statute allows any foreign plaintiff to sue TNCs for breaches of the 'law of nations' (international customary law) or a treaty approved by the United States. A successful ATCA plaintiff would have to prove that the TNC in question either (a) colluded 'under the colour of law' with a foreign de jure or de facto State in committing a breach of international law, or (b) committed a breach of international law by itself, in cases where international law imposes direct liability on individuals. If the plaintiffs or their successors have been the victims of either torture or extra-judicial killings, they can avail themselves of the Torture Victim Protection Act (TVPA), which establishes a cause of action for the commission of these offences. There is some controversy as to whether TVPA applies to TNCs, but in any case it does apply to TNC officers.



Furthermore, administrative claims in the US are provided under the Federal Tort Claims Act (FTCA). This act provides an exception to the general principle that the Federal Government cannot be sued absent the consent of Congress. However, the FTCA does not allow the United States to be sued for actions of TNCs which may be its 'instrumentalities' if the claim arises in a 'foreign country' (i.e. abroad).

Human rights litigation in the US faces significant obstacles, which may decisively dispose of litigation or fetter the enforcement of judgments. Potential plaintiffs must be cognisant of these obstacles if claims are to be successfully brought in the US. The most significant of the available causes of action and legal and non-legal obstacles are illustrated by the *Doe v Unocal* litigation, but are summarised briefly here.

Among the substantive obstacles, the act of state and political question doctrines may prevent courts adjudicating human rights claims. The act of state doctrine precludes courts from adjudicating on the validity of the acts of foreign sovereigns committed in their territory. In some cases, these acts may become indistinguishable from the acts of TNCs. The political question doctrine precludes courts from adjudicating issues that fall within the purview of the executive branch of government.

There are also a number of procedural obstacles which must be overcome before an action can be successfully maintained in US courts. Foremost among them is the problem of establishing personal jurisdiction over a TNC's parent for the actions of a subsidiary (and vice versa). This matter complicated the way in which TNCs and their operations are structured and the way on which the different parts of these conglomerates carry on business globally. A further practical obstacle is the *forum non conveniens* doctrine. This doctrine permits American courts to decline to exercise jurisdiction in cases where the court is of the view that adjudication should be left to a foreign, most frequently the courts which exercise jurisdiction over the territory in which the alleged wrong has been committed. Moreover, there is the practical obstacle of enforcing abroad the judgments obtained before US courts. This effort is hampered by, among other problems, the lack of enforcement agreements by the US with other States, the perception of excessive long-arm jurisdiction of the US courts.

There are also a number of practical obstacles that successful plaintiffs must overcome. Legal aid for claimants is provided by lawyers acting pro bono and also by certain NGOs, rather than the Federal Government. Furthermore, in the United States costs do not follow the action. As such the successful party must bear the expenses of his or her own litigation, save in some exceptional cases. Problems posed by the rules in regards to discovery, even if relatively more advantageous to plaintiffs, persist in cases which fall within the ambit of this submission. Finally, certified interpreters are not appointed before the courts unless the Government is the plaintiff.

Thus, the picture that emerges from analysis of the US legal system is somewhat mixed. Human rights litigation suffers from some obstacles and in some cases such obstacles decisively dispose of litigation altogether. American judgments may be difficult to enforce abroad. Nevertheless, there is immense potential for human rights litigation against TNCs for human rights committed in host states in the US. This is confirmed by the fact that claimants from around the world, notably from many of the jurisdictions considered in this submission,

have sought to bring their claims in the US. While there has yet to be a claim finally determined, plaintiffs have been successful in obtaining out of court settlements in a number of cases. The possibilities of success in litigation are considerable. Given the extensive number of TNCs that are either based or doing business in the US and the potential avenues for redress provided to non-national claimants, the US provides a relatively attractive forum for potential claimants.

## 2. GENERAL CONCLUSIONS FROM THE JURISDICTION CHAPTERS

Admittedly, in a submission such as this that considers a number of legal systems, drawing general conclusions is a difficult task. Many of the germane details and nuances of particular cases and principles of law are compromised in carrying out this exercise. Reference must be had to the detail of specific jurisdiction chapters. That said, some recurrent patterns and similar threads might be drawn out from the various chapters.

### A. Possible Causes of Action Available to Non-Nationals in TNC Home States

#### i. International Human Rights Law & National Bills of Rights

International human rights law and national bills of rights do not provide victims with direct causes of action against corporations. As noted in the introduction, corporations are not subject to binding or legally enforceable obligations under international human rights law. Thus, even in states where international law has direct effect in the domestic legal system, such as France and Germany, international law does not provide victims of human rights abuse a cause of action against corporations. Similarly, no causes of action are provided against corporations by domestic constitutional bills of rights (such as India and Germany) or human rights legislation (such as Canada and the UK). Even at the domestic level, the human rights contained in national constitutions and human rights legislation apply only in respect of public—and not private acts—and therefore do not apply directly to TNCs unless the corporation is acting in some public capacity.<sup>1740</sup> With possible exception of South Africa,<sup>1741</sup> constitutional bills of rights and domestic human rights legislation will not provide claimants with a cause of action against TNCs for violations of protected human rights.

However, in some jurisdictions, such as South Africa and Germany, constitutional rights may impact upon claims brought against corporations under provisions of civil, labour and commercial law, in the sense that they must be taken into consideration when interpreting and applying such provisions.

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<sup>1740</sup> Cf. Indian Constitution 1950, arts 32, 226.

<sup>1741</sup> See pp 204–05, above. However, the application of bills of rights between private parties has been the subject of debate elsewhere. For example, there has been a great deal of scholarly writing in Germany on the theory of *Drittwirkung*, regarding the application of the bill of rights contained in the German Federal Constitution (GG) in the relationships between individuals. Nonetheless, the German courts have constantly found that such constitutional rights apply only *indirectly*, in the sense that they must be taken into consideration when interpreting and applying general provisions of civil, labour and commercial law. See discussion in the German report at pp 129,137.

## ii. Specific Legislation Regulating Corporate Human Rights Violations Abroad

The United States is the only jurisdiction to have enacted specific legislation providing causes of action for individuals that are directly referable to international human rights standards and that have extra-territorial operation. The Alien Tort Claims Act (“ATCA”) and the Torture Victim Protection Act (“TVPA”) deal squarely with violations of those human rights that might form part of customary international law.<sup>1742</sup>

As noted above, in order to bring a claim against a corporation under ATCA, plaintiffs must demonstrate that the TNC in question either colluded ‘under the colour of law’ with a state in committing the breach of international law, or that the TNC committed a breach of an international law norm that imposes direct liability on individuals. TVPA provides a cause of action for victims of torture or extra-judicial killings. While there is some controversy as to whether TVPA applies to TNCs, it certainly applies to individual officers of TNCs.

As recognised above, bringing a claim before the US courts under ATCA is not without obstacles. Nevertheless, ATCA has proved an effective mechanism by which victims of corporation human rights abuse can seek redress for damage suffered as the result of corporate human rights abuse. While no cases have been finally determined, victims have received generous compensation in out of court settlements. The large number of claims involving human rights abuse by corporations committed in the developing world that have been brought in the US pursuant to ATCA can be explained by one or two factors. First, ATCA provides a relatively attractive cause of action. Other jurisdictions simply do not provide them. This is illustrated by the *Talisman* case, brought in respect of violations committed by Canadian corporations abroad because Canadian law offered no effective cause of action.<sup>1743</sup> Second, the host state is a less attractive forum for potential applicants in terms of the causes of action, the remedies available under US law and the possibility of execution of final awards against assets held by TNCs within the United States. This is evidenced by the cases being brought in the US in respect of alleged violations committed in South Africa, India and Russia, despite the availability of causes of action in those jurisdictions.

It is noteworthy that States other than the US have indeed enacted specialised legislation providing for extraterritorial jurisdiction in respect of individuals guilty of war crimes, crimes against humanity, torture and genocide.<sup>1744</sup> However, it is generally the case that corporations cannot be indicted and prosecuted under these statutes. This is because, subject to some exceptions, corporations typically do not have criminal capacity (that is, the mandatory prison sentences that those crimes carry cannot be imposed upon corporations)<sup>1745</sup> and, even where they do have criminal capacity, other insurmountable obstacles exist (e.g. in Canadian law, international crimes do not apply to corporations).<sup>1746</sup>

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<sup>1742</sup> Others statutes in the US and elsewhere, for example, the Foreign Corrupt Practices Act and the Racketeer Influenced Corrupt Organisations Act, do not primarily deal with human rights violations or refer specifically to international human rights. However, their scope is wide enough that they encompass certain human rights violations.

<sup>1743</sup> See p 33, above.

<sup>1744</sup> See, for example, the Implementation of the Rome Statute of the International Criminal Court Act 2002 (South Africa). Similar legislation can be found in (inter alia) Australia, Canada and the UK.

<sup>1745</sup> See, the UK position at p 236-37, 263.

<sup>1746</sup> See the Canadian position at p 37, above.

### iii. Domestic Laws

As noted in the introduction, the domestic, social and environmental laws, such as legislation regulating labour and employment, anti-discrimination, sexual harassment, occupational health and safety, consumer protection and environmental protection, impose domestic human rights responsibilities on corporations. Criminal laws exist in some states to punish and deter certain forms of egregious corporate behaviour, through, for example, the creation of crimes such as corporate manslaughter for deaths caused by gross corporate negligence.

### iv. Specialist Legislation: Environmental Protection & Consumer Protection

While environmental protection and consumer protection laws provide some forms of corporate accountability for certain violations of human rights, these areas of law are generally unhelpful to the victims of the abuse in seeking redress against corporations in home states.

Environmental protection legislation is aimed at the protection of the *environment* from pollution *within* the TNC home state, *not* the protection those who suffer from the effects of pollution – whether at home or abroad. As demonstrated by the example provided in India, environmental protection legislation generally has strict territorial operation and will not apply to corporate activities abroad. While the legislation grants regulatory authorities in India the power to impose significant fines and other penalties on corporations which cause air or water pollution within India, it does not provide those affected by the environmental damage a cause of action against the corporation itself. Communities affected by the pollution can bring constitutional claims against the state for failing to enforce these environmental regulations against offending corporations, but it does not provide victims direct recourse against the corporation itself, nor does it provide redress for human rights abuse involving environmental degradation – whether at home or abroad. For this, claimants must turn to claims in tort, as occurred in the Bhopal case.

Similarly, consumer protection legislation is aimed at the protection of *consumers* from unfair or misleading commercial practices. As such, they are not intended to protect the *victims* of corporate human rights abuse—whether at home or abroad. As mentioned in various chapters, where corporations have advertised codes of conduct that contain human rights standards, consumer protection and false advertising laws can provide some level of corporate accountability for human rights abuse. An example of this was the case of *Nike, Inc v Kasky*<sup>1747</sup> where a consumer brought an action against Nike in California for unfair competition and false advertising in relation to an advertisement campaign aimed to demonstrate that the company had taken steps to improve conditions for overseas workers. Kasky argued this was misleading given the patent labour rights violations committed by Nike in its overseas factories. The case eventually settled out of court. The settlement agreement provided that Nike would pay US\$1.5 million to the Fair Labor Association (FLA),

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<sup>1747</sup> 593 US 654 (US SC 2003). Nike argued that its expression of its views on the public topic of labour standards was entitled to free speech protection under the First Amendment and, thus, false advertising laws did not apply to the expression in question. The California Supreme Court rejected this argument on appeal from a lower court, concluding that Nike's communications were commercial speech and therefore subject to false advertising laws. The Supreme Court reviewed the case in *Nike v. Kasky* but sent the case back to trial court without issuing a ruling on the constitutional issues on free speech. The parties subsequently settled out of court before of the claim against Nike could finally be determined.

a labour-rights-related NGO, for ‘...program operations and worker development programs focused on education and economic opportunity.’<sup>1748</sup> While the cause of action does not provide direct redress for victims, this case demonstrates such actions can provide an indirect benefit to victims. Similar consumer protection provisions exist elsewhere, such as Australia, Malaysia, Russia and the EU,<sup>1749</sup> where similar actions might be brought. Such actions envision consumers couching their claim such that a corporation’s breach of human rights contrary to its code of conduct constitutes misleading, deceptive or unfair commercial conduct. The advantage of this sort of action is that it does not raise any issues arising from extraterritoriality. Any person within the jurisdiction of the TNC home state can bring a claim alleging that the corporation has engaged in misleading or deceptive conduct, even where the human rights violations occurred outside the territorial jurisdiction of the home state. However, as already stated, the disadvantage is that victims cannot bring the claim themselves due to the fact that consumer protection law is addressed primarily at consumers whose economic behaviour has been distorted as a result of an unfair commercial practice. In this sense, while it provides some level of corporate accountability, it does not provide the victims of abuse with redress.

Given the focus of the project is upon obstacles to justice for *victims* of corporate human rights abuse, environmental and consumer protection laws prove interesting but offer little in terms of redress for victims. However, victims may use existing domestic criminal and civil law to gain redress for particular human rights violations.

## **v. Criminal Law**

Domestic criminal law in each jurisdiction constrains actions that may also amount to violations of human rights. However, domestic criminal law often has limited application to corporations and, in many States, there is a presumption against the extraterritorial operation of criminal law. In comparison to civil claims, criminal actions are burdened by a higher standard of proof, the elements of the offence are more difficult to prove and only limited forms of redress are available to victims. As such, criminal laws provide less attractive mechanisms for non-nationals seeking redress against TNCs in their home states.

In some jurisdictions, such as Australia, corporations can be prosecuted for crimes. In other jurisdictions, such as Germany and Russia, domestic law does not support a concept of criminal capacity for corporations. In those jurisdictions criminal prosecution is available against individuals and individual officers of corporations, but not against corporations. However, in all jurisdictions a corporation may be subject to fines and other penalties for criminal acts, whether attributed directly to the corporation or following prosecution of individual officers of the corporation.

In so far as it is available, criminal prosecution may satisfy some concepts of justice in providing retribution and serving as deterrent to future abuses. However, in most jurisdictions criminal law offers limited remedies for victims. The financial penalties imposed upon corporations by domestic criminal law are collected by the state, not the individuals affected by the crime. However, in many jurisdictions criminal prosecution may give rise to a

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<sup>1748</sup> Cited in SustainAbility, ‘Issue Brief: Nike v Katsky’ <<http://www.sustainability.com/insight/issue-brief.asp?id=61>> accessed 20 April 2008.

<sup>1749</sup> In the EU context, cf. references at n 13, above.

civil claim for the damage caused to victims by the crime. For example, in France, China, Russia and South Africa, individuals can bring civil claims against corporations (or against the individual officers prosecuted, for which the corporation will be vicariously liable) for damage caused by the commission of crime. In this way, criminal prosecution may provide victims with compensation.

Furthermore, as is the case with civil causes of action, a lack of special criminal laws tackling human rights violations may also hinder the success of any prosecution. The Total litigation in France is an example of this. The case was ultimately dismissed at the preliminary stages because the courts refused to recognise forced labour as equivalent to offences existing in (general) French criminal law. Article 224-1 of the French Criminal Code (*Code pénal*) punishes certain forms of illegal arrest and kidnapping, but this was found not to include forced labour. Fortunately for the victims, they had agreed to an out of court settlement amount with Total prior to the Court's decision and therefore received some compensation. But this method of resolving disputes and providing victims recompense, prevalent in this and other jurisdictions, leaves much to be desired.

Finally, it should also be noted that criminal prosecution cannot always be initiated by the victims directly. To the extent that criminal actions against corporations are possible and available at the instigation of an individual, it provides a less attractive means of seeking redress than that available under civil law actions in tort or contract. As a practical matter, claimants would be well advised to pursue civil claims because such claims can be brought directly against a corporation at the victims' initiative, the elements of the action are easier to make out and require a lower burden of proof and civil claims provide more effective remedies from the perspective of victims. However, as the prosecution of Total in France demonstrates, the value in criminal prosecution may lie in more pragmatic concerns, such as the adverse publicity caused to the corporation, which may prompt the payment of compensation and may deter future abuse.

## **vi. Civil Claims: Tort, Contract, Employment**

As this submission demonstrates, litigants have made creative use of existing causes of action within domestic systems such as the US, Australia and the UK, in both tort and contract, to obtain justice and compensation from TNCs for human rights abuse committed abroad. As noted above, the particular cause of action most likely to be effective will depend on the particular human right violated and the circumstances surrounding the violation. Depending on the facts of the particular case, different obstacles might arise, some of which may decisively dispose of litigation.

Further, it should be noted that in researching this submission, we experienced difficulties in finding in each jurisdiction case examples of our paradigm case: where non-nationals have sued TNCs in the home state for human rights violations committed abroad. Despite the availability of causes of action to non-nationals in tort and contract in all jurisdictions considered by this submission, there has been a notable dearth of reported cases in which non-nationals have sued in courts of a TNC's home state. This fact raises the question as to why this is the case. While it is impossible to say with certainty, some suggestions might be put forward. It might be that the lack of specialised legislation, such as ATCA, is perceived as a significant disadvantage. However, given that alternative causes of action exist, it might

be that the substantive, procedural and practical obstacles are preventing or deterring would-be claimants from bringing such claims. Without further empirical research and consideration such conclusions are but hypotheses. Therefore, we simply outline the obstacles claimants will face should they bring a claim.

## **B. Substantive and Procedural Obstacles**

The jurisdiction chapters detailed a large number of substantive and procedural obstacles which impact upon the ability of victims to gain redress for corporate human rights abuse committed abroad. It is impossible, and ultimately unhelpful to list all of the obstacles faced here. Thus, at this point, we will seek to draw out the recurrent patterns found with relative consistency throughout the jurisdictions considered.

Essentially, the potential obstacles to justice that OPBP was requested to investigate under the terms of the research proposal impact upon claims in different ways. For the purposes of this conclusion, the obstacles will be considered in terms of the obstacles that might decisively dispose of the litigation and other, more peripheral obstacles that claimants should consider when deciding whether to litigate in any particular jurisdiction.

It was consistently observed across the jurisdictions that claimants will face the following major obstacles to bringing a claim in TNC home states, each of which will be discussed in turn:

- The need to establish jurisdiction over the corporation and foreign claim;
- The *forum non conveniens* doctrine; and
- Issues relating to piercing of the corporate veil.

### **i. Establishing Jurisdiction over Foreign Claims – Private International Law**

In the jurisdictions surveyed there are generally at least two requirements for the case to proceed to be heard on its merits. First, there is the matter of establishing jurisdiction over the TNCs conduct abroad. Second, there is the matter of the availability of a possible course of action. This will depend on the domestic rules of private international for the given jurisdiction, and in the case of France, Germany and the UK, the relevant European regulations.

Claimants must first establish whether the courts of the home state will have jurisdiction to hear the relevant case, and to what extent (if at all) the law of the home state jurisdiction will apply. Although the degree to which various jurisdictions will exercise jurisdiction vary, it can be said that in most circumstances, in the majority of jurisdictions, a case against a domiciled corporation will be heard – subject to other discretionary rules which may

otherwise lead to the non-exercise of jurisdiction. This is the case in, for example, the European Union and Canada. However, in other jurisdictions, such as Australia, in the normal course of things the case will be heard. Even where such a discretionary non-exercise of jurisdiction is possible it would seem counterintuitive and contrary to principles of fairness and justice for a court not to exercise jurisdiction over a corporation domiciled within its territory.

In the courts of many states, even if jurisdiction over the dispute is established, it is quite likely that the law of the host state will be found to be the applicable law. Where foreign law (of the host state) applies the dispute, it is that system of law that will provide the available causes of action to victims. Whilst the substantive law will be that of the host state, the procedural law of the forum – that of the home state – will govern the conduct of proceedings. This fact can prove both an advantage and a disadvantage to claimants depending on the particular facts at hand.

Consider an example of the paradigm case considered in this submission: a hypothetical situation involving victims in the DRC who have a claim for personal injury against a UK domiciled TNC arising from human rights abuse committed in the DRC. While causes of action are provided under DRC law allowing the claim in the DRC, the condition of the Congolese legal system means that having the claim heard in accordance with the rule of law is all but impossible. The DRC is a clearly inappropriate forum. Given that the TNC is domiciled in the UK, the claim will be justiciable before UK courts. Even if the applicable law is found to be that of the DRC, ability to bring the claim before UK courts and be determined in accordance with UK procedure will ensure proper procedures are followed, that the claim is determined according to law and that the judgment is entered and able to be enforced against the TNC's assets in the UK. Leaving aside whether this is desirable, as a matter of general policy and the proper administration of justice, it nevertheless provides a significant advantage to claimants who have no prospects of success in the DRC. Indeed, it might even be the case that DRC law proves to be more favourable to the claimant than UK law in establishing negligence. Equally, in some circumstances, the law of the TNC home state may prove disadvantageous to claimants. For example, where the jurisdiction in which the claim is brought contains a cap on damages (which are construed as procedural according to the decision in *Harding v Wealands*),<sup>1750</sup> this might prevent or restrict the provision of adequate redress to a claimant.

Special mention should be made here of labour laws, which have incorporated a number of human rights standards and provide clear causes of action for victims against corporations within most states. Non-nationals seeking to bring claims in respect of labour rights violations abroad will face significant hurdles in establishing jurisdiction. For example, in many contractual cases concerning labour rights in the UK, unless an employment contract contains a choice of law and jurisdiction clause, actions for breach of contract relating to employment outside of the jurisdiction (in a host state) have little prospect of success.

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<sup>1750</sup> [2006] UKHL 32, [2007] 2 AC 1.



## ii. Parent-Subsidiary Corporate Structures and the Corporate Veil

A notable problem in some of the jurisdictions surveyed is that of establishing jurisdiction over a parent TNC for the acts of one of its subsidiaries and vice versa. Most TNCs today conduct their businesses abroad through the incorporation of foreign subsidiaries. Claimants will commonly face situations in which they are unable to bring claims against a subsidiary corporation for the acts of the parent or of another subsidiary that belongs to the same business group in the host state. Alternatively, claimants may be faced with situations where a subsidiary, operating in host states with few assets, cannot provide adequate compensation. In these circumstances, prospective claimants may wish not only to sue those foreign subsidiaries but also the parent companies. In both circumstances, the separate legal personality of corporations may constitute an insurmountable barrier to bringing claims in home states against parent TNCs.

All of the jurisdictions reviewed recognise separate legal personality for corporations. Therefore, the material question becomes whether or not the claimants can effectively pierce the corporate veil and satisfy his or her claim.

As detailed in the Australian, UK and Russia chapters, the tests to be satisfied to pierce the corporate veil are fairly onerous. Further, as noted in the UK, the corporate veil will not be pierced just because justice requires it.<sup>1751</sup> While the precise test varies from jurisdiction to jurisdiction, the tests include circumstances in which the subsidiary has been set up to commit a fraud or where the corporation is not treated as a separate entity but controlled entirely by the parent company's shareholders.<sup>1752</sup> In South Africa, Canada and China the law focuses on the intent to defraud or commit an illegal act. In most jurisdictions, and for example, in South Africa and Russia, parent companies will also assume the liability of its subsidiaries in circumstances of insolvency.

Although the circumstances under which piercing the corporate veil occurs in various jurisdictions is interesting from an academic perspective, as argued in the China chapter, it is unlikely that the sort of fact situations that the exceptions contemplate would bear out in practice in cases involving human rights abuse. As such, the principle of separate legal personality presents a difficult, if not insurmountable, obstacle in situations in which the parent company has incorporated subsidiaries to carry on its overseas operations.

## iii. Forum Non Conveniens

*Forum non conveniens*, or a discretionary non-exercise of jurisdiction, has the potential to stymie any action brought in tort even where all the above hurdles are satisfied. The extent to which this poses an obstacle to human rights victims bringing tort claims varies from jurisdiction to jurisdiction. In some circumstances, such as where substantial evidence is located overseas and where the host state has a functioning legal system, home state courts may seek a stay of the matter in favour of it being heard in the host state jurisdiction. It might be said that on a spectrum of attractiveness from the perspective of the claimant,

<sup>1751</sup> *Trustor v Smallbone (No 2)* [2001] 1 WLR 1177 (ChD).

<sup>1752</sup> See, for example, discussion at pp 18–19 (Australia), p 34 (Canada), p 146 (India), p 179 (China), p 194 (Russia), p 214 (South Africa) and p 250 (United Kingdom).

European and Australian law is the most attractive as it imposes the most stringent test on defendant corporations wishing to have the matter stayed on these grounds. For example, in Germany there is no concept of *forum non conveniens*. Therefore, German courts are obliged to hear and decide a case once local (and thus international) jurisdiction has been established in accordance with German private international law rules. Similarly, compared to other common law jurisdictions, South Africa has either a nascent or non-existent concept of *forum non conveniens*. While *forum non conveniens* is not an insurmountable obstacle in the UK, the House of Lords ultimately exercising its discretion to hear *Lubbe v Cape* given the unavailability of legal aid in South Africa,<sup>1753</sup> the protracted arguments and appeals on this point added to the cost and duration of litigation and makes the ultimate outcome of such cases difficult to predict with any certainty. Canada and the US might be considered at the other end of the spectrum, where *forum non conveniens* may pose a significant obstacle, as evidenced in the case brought against Cambior in Canada<sup>1754</sup> and the Bhopal litigation brought by India in the US.<sup>1755</sup>

#### iv. Other Obstacles and Practical Impediments

Even putting aside the significant substantive and procedural obstacles facing potential claimants, it might often be the practical difficulties that provide the greatest disincentive to bringing claims in TNC home states or in particular jurisdictions. These problems might relate to the political stability of a TNC's home state or the ability of its legal system to cope with large and complex claims. For example, the DRC has seen a succession of dictatorships, civil war and international armed conflicts in the last two decades. Naturally, such a state of affairs has a detrimental effect on the ability of the judiciary to function at all, let alone deal with the complex litigation against TNCs envisaged in this submission. In other jurisdictions, such as India and Malaysia, delays in judicial proceedings are considerable. These delays adversely affect all parties to litigation, but will generally tip the balance in favour of the party that can bear protracted litigation, and its attendant costs, more easily. In most cases this will work to the benefit of the TNC.

Further, one set of facts might give rise to several claims, in several different jurisdictions against separate parent TNCs who operate in a joint-venture. This is illustrated by the various claims brought by Burmese nationals in response to forced labour imposed on the construction of the Yandana pipeline in Burma. Forced labour was used on work on the pipeline, being constructed through a joint venture company, in which both Unocal (a US corporation) and Total (a French corporation) had interests. A civil claim was brought in the US against both Unocal and Total. The proceedings against Total were dismissed on the grounds the US court did not have personal jurisdiction over a French domiciled TNC. Yet the claim against Unocal proceeded. At the same time, criminal proceedings were initiated against Total in France. That one incidence of human rights violations by a corporation can give rise to several claims, in several different jurisdictions against separate parent TNCs highlights the complexities and potential difficulties victims may face in obtaining redress.

Domestic litigation is expensive, but these costs are amplified in transnational litigation, where proceedings are often protracted and there are additional costs for basic logistics

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<sup>1753</sup> Cf. references at n 2, above.

<sup>1754</sup> N 10.

<sup>1755</sup> *In Re Union Carbide Corp Gas Plant Disaster at Bhopal* 634 F Supp 842 (SDNY 1986).

such as travel, collection of evidence and specialised needs such as separate teams of lawyers in different jurisdictions and expert witnesses etc. As indicated in *Lubbe v Cape*, where the unavailability of legal aid in South Africa was considered a prohibitive obstacle to claimants obtaining redress in the courts of that jurisdiction, the absence of legal aid may even prevent claimants bringing claims *within* host states. The additional costs incurred in transnational litigation pose an even greater obstacle. In most jurisdictions legal aid for nationals is limited and, in some cases (such as the UK) it is not available for cases not governed by the law of the jurisdiction. However, in some jurisdictions lawyers may act pro bono or pursuant to conditional fee agreements (see cases in the US and UK respectively), which significantly reduces costs. In these situations, the lack of legal aid need not necessarily act as an insurmountable obstacle to justice. However, in most cases costs will be prohibitively expensive and constitute a formidable obstacle to victims bringing claims in TNC home states.

The examples of practical impediments listed here are by no means exhaustive. There may be many others. However, this short list of the practical obstacles faced by claimants in bringing claims in TNC home states illustrates the real difficulties claimants will face in seeking redress.

### C. Prospects of Success and Available Remedies

Despite the substantive, procedural and practical hurdles faced by claimants, victims of corporate human rights abuse have ultimately obtained by redress in several cases. However, it must be noted that all such cases involved out of court settlements. A review of the 13 jurisdictions reveals that not one case has been finally determined in favour of non-national litigants. Nevertheless, compensation has been paid to litigants, even in circumstances where claims ultimately failed.

For example, significant out of court settlements were reached in *Doe v Unocal* in the US, *Lubbe and Others v Cape Plc* in the UK and *Dagi v BHP* in Australia. In the case of *Lubbe v Cape Plc*, novel settlement trusts have been established and approved by the courts, which will grant compensation to existing and future claimants.<sup>1756</sup> Yet as is apparent from the other cases brought in the UK, such as *Connelly v RTZ*, and the litigation against Thor Chemicals, the successful outcome in the Cape litigation makes it a rare and unusual case.

However, that claimants receive compensation may often be the result of adverse publicity and public pressure or a commercially driven decision of the corporation, rather than the threat of a successful claim in the courts of the home state. For example, Burmese complainants in the criminal action against Total in France for forced labour imposed in Burma received compensation from Total *before* the criminal prosecution against Total's officers was finally determined. The matter was ultimately dismissed. Similarly, in *Nike Inc v Katsky*, Nike settled the consumer protection case with Katsky, paying compensation to a US labour rights group, before the US courts finally determined the question. By settling out of court, Nike avoided the courts deciding upon the question of corporations' free speech and the applicability of false advertising laws. Nike also avoided having a public airing of the truth or falsity of its claims about labour standards in its operations abroad.

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<sup>1756</sup> *Re Cape* (n 3).

Alternatively, it might be said that corporations are settling these disputes out of court as part of a broader litigation strategy. While benefiting the victims in the particular case, settling disputes before they can finally be determined impacts upon the development of jurisprudence and precedent, which may pave the way for more victims to bring claims against corporations for human rights abuse. Pursuing out of court settlements as a litigation strategy prevents the development of a settled body of law. The remaining uncertainty as to whether claimants will actually obtain final judgment in such cases may operate as an obstacle or disincentive to potential claimants initiating actions or, at the least, provide incentive for other claimants to settle out of court, rather than risking an adverse finding.

In bringing claims in particular jurisdictions, claimants should also be aware that the remedies available differ from jurisdiction to jurisdiction, sometimes markedly. This is illustrated by the Russian case studies involving airplane crashes caused by corporate negligence. Only compensatory, and not punitive damages are available for tort claims in Russia. Punitive damages are available in other jurisdictions (for example, in the US). In order to seek greater levels of compensation, Russian claimants sought to bring their claim before the US courts. The claim failed on the grounds of *forum non conveniens* and was returned to Russian courts for determination.<sup>1757</sup> While conflict of laws rules and other practical obstacles will prevent forum shopping in many cases, victims seeking to bring claims should be aware of the different remedies available since complex corporate structures surrounding TNC operations may give rise to several different legitimate claims in different jurisdictions.

### 3. CONCLUSION

Almost as great a concern as the frequency with which human rights are violated by TNCs operating in developing countries is the notable absence of effective systems for imposing legal accountability for such violations. Examples where victims have been able to obtain redress against corporations are rare. Domestic courts of developing states cannot always be relied upon to provide legal accountability for corporate human rights abuses or to provide victims with justice and redress. In many states, victims have no available cause of action, or face insurmountable obstacles to bringing their claims. Because of this, there has been an increasing tendency of victims to instead seek justice in the courts of the home states of TNCs.

In the face of such challenges, it is incumbent upon policymakers to reflect on the ability of victims to obtain justice, and examine how and the extent to which, in the various jurisdictions, TNCs can be held legally accountable for violations of internationally recognised human rights.

As this submission has demonstrated, transnational litigation for corporate human rights abuse is by no means straightforward. There is no uniform approach or standard adopted by states in regulating and adjudicating human rights abuse by TNCs abroad or for providing

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<sup>1757</sup> See И Калинин, 'Правосудие не для русских' (3 июля 2007 г.) НГС.НОВОСТИ <<http://news.ngs.ru/more/29139.php>> accessed 31 March 2008 and LH Tasher, 'Forum Non Conveniens Dismissal Granted Despite Co-Defendant's Objection' (Holland & Knight LLP August 2007) <<http://www.hklaw.com/id24660/publicationid1591/returnid31/contentid47437/#1B>> accessed 31 March 2008. See discussion in Russian part of report at p 194-5, above. See also the discussion in the India report at p 148.

redress to those adversely affected by such abuse. There is also a dearth of specialised legislation on this matter in the jurisdictions surveyed. This affects significantly all human rights litigation undertaken against TNCs, since the law on which general (as opposed to specialised) causes of action are based is not intended to address the many idiosyncratic issues that arise with respect to transnational human rights litigation.

For the victims of abuse, it may be difficult to access information or the requisite legal knowledge and expertise to investigate potential causes of actions in foreign jurisdictions. Once potential causes of action against TNCs are identified in the relevant jurisdiction, victims may face a broad range of obstacles in bringing claims, including those substantive and procedural obstacles arising under private international law and the domestic law of the home state as well as more practical obstacles such as the cost of litigation, the logistics of bringing a claim in a foreign country and access to information. The combination of these factors all but rule out the likelihood of victims obtaining adequate and prompt compensation in the home states of TNCs.

The results in this submission paint a bleak picture. Victims of corporate human rights abuse in host states face significant, if not insurmountable, obstacles to bringing claims against TNCs in their home states. In fact, the research identifies many obstacles facing victims of corporate abuse occurring *both* within and outside the jurisdictions examined. This raises serious questions as to whether states are adequately fulfilling their duties under international human rights law to protect against human rights abuse by corporations, which includes the need to punish the abuse and provide redress. While this may provide individuals with recourse against their state before international and regional human rights bodies for the failure to regulate and adjudicate corporations within its jurisdiction, it provides little help to would-be claimants in their attempt to obtain a remedy against the corporation itself. To accomplish this, the only path will be found in domestic law.

The SRSG has himself identified the need to ‘...strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations’.<sup>1758</sup> In addition, the SRSG has concluded that:

States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations.<sup>1759</sup>

This submission affirms that conclusion: more needs to be done to ensure that victims of corporate human rights abuse have effective avenues to obtain justice in both host states and TNC home states. At the very least this submission provides a comprehensive taxonomy of the options available to claimants and the obstacles such claimants face across a broad range of jurisdictions. It is hoped that this information might inform policy debates

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<sup>1758</sup> Ruggie (n 1) 838.

<sup>1759</sup> UNHRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises’ (7 April 2008) UN Doc A/HRC/8/5 [91].

on how to better achieve justice and provide redress to victims of corporate human rights abuse, wherever the abuse occurs.