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**Civil Human Rights Litigation against Corporations
– From the United States to the European Union**

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List of abbreviations

AJIL	The American Journal of International Law
ATCA	Alien Tort Claims Act, see ATS
ATS	Alien Tort Statute, Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789)
Beck OK	Beck'scher Online-Kommentar
BeckOGK	beck-online.GROSSKOMMENTAR zum Zivilrecht
Berk. J. Int. Law.	Berkeley Journal of International Law
Brook. J. Int'l L.	Brooklyn Journal of International Law
Brussels I	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Chi. J. Int'l L.	Chicago Journal of International Law
CityU LR	City University of Hong Kong Law Review
CSR	Corporate Social Responsibility
Draft norms	Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, Res. 2003/16/2003, U.N. Doc E/CN.4/Sub.2/2003/12/rcv.2 (2003)
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5
ECJ	European Court of Justice
EuR	Europarecht
FIA	Federal Investigation Agency Sidh Zone Karachi

List of abbreviations

FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11
Geo. Wash. Int'l L. Rev.	The George Washington International Law Review
Georgetown J. Int'l L.	Georgetown Journal of International Law
Guiding Principles	Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", UN Human Rights Council, UN-doc. A/HRC/17/31 (21 March 2011), Commentary to Art. 17
Harv. Int'l L.J.	Harvard International Law Journal
Harv. Law Rev.	Harvard Law Review
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, 999 U.N.T.S. 171
ICESCR	International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16 December 1966, 993 U.N.T.S. 3
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes between States and Nationals of other States
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission of the United Nations
ILO	International Labour Organization
IMT	International Military Tribunal
JZ	JuristenZeitung
KJ	Kritische Justiz
Md. J. Int'l L.	Maryland Journal of International Law
MüKoBGB	Münchener Kommentar zum BGB
NGO	Non-governmental organization

List of abbreviations

NMT	Nuremberg Military tribunals
OHCHR	Office of the United Nations High Commissioner for Human Rights
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TVPA	Torture Victims Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73
U. Miami Int'l Comp. L. Rev.	University of Miami International and Comparative Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.N.T.S.	United Nations Treaty Series
UDHR	Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A (III)
UNCTAD	United Nations Conference on Trade and Development
UNWG	UN Working Group on business and human rights
USMT	United States Military Tribunal
Yale L.J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

1 Introduction

1.1 Corporations and Human Rights

The relationship between corporations and human rights is an ambivalent issue. As private actors, succumbing first and foremost to the principle of efficiency and profitability, one may rightfully ask whether human rights are any of their business. At the same time, the two have become more and more intertwined: Today's globalized world is characterized by interconnectedness and interdependence, brought about by movement of ideas, goods, services and people.¹ In this global context, the production of goods and raw materials in low wage countries is a crucial element of an economic model that is built on relative cost advantages to gain efficiency and simultaneously raise global welfare for all participants through cooperation, development and transfer of knowledge. Against this backdrop, the role of corporations has changed significantly: Whereas historically an instrument to serve public purposes and tightly controlled by the state,² corporations now operate in widely deregulated spaces, considered as crucial element to the development process of nation states, and at the same time assume typical state responsibilities such as the provision of security, the running of prisons and the control of basic supply of food and water.³ The growing role and influence of corporations has afforded them with more opportunities to violate human rights, a situation that naturally calls for an increased accountability for such conduct.⁴ Where, to a certain extent, the pursuits of the factory owner and the worker will always diverge, the conflicts in business have grown to include serious human rights violations in conflict zones, forced and child labor in the extractive sector, exploitative working conditions in the textile industry, and so on.

Corporations can be involved in these violations in different ways,⁵ through own

¹Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business*, 2 (2012).

²*Id.*, 4 with further references.

³*Id.*, 3 *et seq.*

⁴*Id.*

⁵See e.g. child labor in the tobacco industry, <https://www.hrw.org/world-report/2016/photo-essay-tobacco-fields-united-states> and mining of precious metal, <https://www.amnesty.org/en/latest/news/2016/01/child-labour-behind-smart-phone-and-electric-car-batteries/>, <https://www.hrw.org/report/2015/06/10/precious-metal-cheap-labor/child-labor->

conduct, or in complicity with state actors: They might invest in a country with widespread human rights violations, support or benefit from suppressive regimes, and even request harmful activities.⁶

In this global economy, based on the division of labor, transnational corporations⁷ operate through a complex web of joint ventures, affiliates, subsidiaries and sub-contractors, making it hard to apply a uniform standard of human rights and to identify the appropriate addressee.⁸

Although standards in International Law, binding States to respect labor and social rights, exist in the form of numerous resolutions, an effective protection of human rights demands their enforcement, e.g. by the implementation of institutional bodies with respective competences or the transformation of international into domestic law, providing for direct applicability and enforcement through legal action if necessary⁹ – a rather rare fact in emerging economies.¹⁰ Accordingly, transnational corporations are largely able to escape adjudication of violations on the international plane. At the same time, the transnational context can actually serve as a starting point to seek remedies for the victims outside of their home states. An analysis of publicly accessible data from the Business & Human Rights Resource Centre, an NGO tracking corporations' human rights activities, collecting reports of allegations and corporate responses,¹¹ has shown that the majority of human rights allegations, related to conduct abroad, involves corporations based in the United States, the UK, Canada and other Western states.¹² These states must ask

and-corporate-responsibility-ghanas and forced relocation with oil production (see e.g. *Esther Kiobel v. Royal Dutch Petroleum*, 569 U.S. (2013)).

⁶Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berk. J. Int. Law. 91, 93 (2002).

⁷UNCTAD defines transnational corporations (TNCs) as “incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates”, [unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx), last visited 05.05.2016.

⁸*Cf.* Deva, *supra* note 1, 4.

⁹Katarina Weilert, *Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 4, 883–917, 890 (2009).

¹⁰Sebastian Krebber, *Aufgabe, Möglichkeiten und Grenzen des Arbeitsvölkerrechts im liberalisierten Welthandel*, *JZ* 53, 59 (2008).

¹¹<https://business-humanrights.org/pt/node/100990>, last accessed: 5 Oct. 2016.

¹²Menno T. Kamminga, *Company Responses to Human Rights Reports: An Empirical Analysis*, 1 *Business and Human Rights Journal*, 95–110, 102 (2016).

themselves how to fulfill their obligations to regulate such conduct and to provide for remedies. After all, human rights are their business without question.

1.2 Civil Human Rights Litigation

Although founded in international law, *civil human rights litigation* allows private persons to initiate lawsuits for human rights violations and is focused on the victim's perspective with the main goal of compensation.¹³ The potential of civil human rights litigation, regarding not only private but public benefits as well, has been subject of debate and advocated by human rights activism.¹⁴ Without further addressing respective discussion, the options of human rights enforcement through civil litigation, based on international as well as domestic civil and common law, are subject of this thesis as an existing possibility to bring human rights violators to court. Although the universal validity of human rights may warrant universal jurisdiction over their violations, there is no international civil court¹⁵ and the transnational context entails questions of state sovereignty, personal and subject matter jurisdiction, and finally, politics. Civil proceedings against corporations thus by and large are based on conventional tort law, the option remaining highly fragmented and dependent on national regulations. Although rules on jurisdiction and the applicable law in international cases have been harmonized in the European Union (see chapter 4), it remains to be seen how receptive domestic courts will be of transnational tort cases.

“Civil human rights litigation”, on the other hand, remains a unique phenomenon from the United States (see part 3), spawned by some specificities of its legal system that have proven to be particularly favorable for its development. As im-

¹³Claudia Hailer, *Menschenrechte vor Zivilgerichten: die Human Rights Litigation in den USA*, 24 *et seq.* (2006).

¹⁴See e.g. Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, *City UHKL Rev.* 3, 1 (2011); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *Yale J. Int'l L.* 1 (2002); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 *Mich. L. Rev.* 2031, (1998); Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992); https://www.ecchr.eu/en/our_work/business-and-human-rights.html, last accessed: 6 Oct. 2016.

¹⁵Robert Grabosch, *Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen*, 70 (2013).

portant part of the US legal culture, civil lawsuits are a common instrument for social reform and civil rights promotion, considered not only as serving the interest of the litigant but that of the public as well.¹⁶ Public interest litigation helped to bring human rights violations into the public eye and led to a subsequent growth of a “vigorous network of public interest, nonprofit litigation offices, funded by tax deductible donations”.¹⁷ Against this background, it may not be surprising that revelation of the ATS as an instrument for transnational tort litigation against private parties has furthered a singular development in the area of human rights litigation¹⁸ (see chapter 3.3). Throughout its case history, the provision has been interpreted in such broad ways as not even requiring any connection to the United States regarding nationality of the parties or the place of alleged wrong. Through the latest Supreme Court decision in *Kiobel*,¹⁹ however, its applicability to extraterritorial occurrences is now limited (see chapter 3.3.4).

Notwithstanding, civil litigation of transnational cases remains a possibility outside of the context of the ATS worth exploring, in the United States, as well as in the European Union. Based on conventional tort law, seeking redress for human rights violations through these proceedings presents something of a middle ground between the denunciation of such conduct on the international stage and no interference by the judiciary at all.

In March 2015, such a case was brought before the German regional Court in Düsseldorf: Four Pakistani citizens filed a compensation claim against German textile and non-food corporation KIK.²⁰ This was the first case of its kind to be decided by a German Court, in accordance with the Rome II regulation²¹ by application of Pakistani common law. The claim, based on joint responsibility for working security deficiencies in a Pakistani clothing factory subcontracted by KIK,²² will

¹⁶Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *Yale J. Int'l L.* 1, 13 (2002).

¹⁷Stephens, *supra* note 16, 13.

¹⁸*Cf.* Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 *Chi. J. Int'l L.*, 421–29 (2000).

¹⁹*Kiobel v. Royal Dutch Petroleum Co. et al.*, 569 U.S. (2013) = 133 S.Ct. 1659 (2013).

²⁰https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html.

²¹Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

²²https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-

serve as an exemplary case for the evaluation of the possibilities to hold a company accountable for Human Rights violations having occurred in a jurisdiction outside of the EU.

This thesis will progress as follows: Part 2 provides for an overview on Human Rights Sources that form the substantive basis of civil human rights litigation. Their relevance for claims based on domestic tort law will be examined in the chapter on Europe (4). Due its outstanding role regarding human rights litigation, the United States will serve as a starting point, with recent developments warranting an exploration of similar possibilities in other jurisdictions. The formal requirements for transnational litigation in the USA will be illustrated in chapter 3, including a delineation of the development of Civil Human Rights Litigation through the Alien Tort Statute (ATS) up to the latest Supreme Court Decision in *Kiobel* (chapter 3.3). Chapter 4 then will address respective possibilities in the European Union, based on conventional tort law. By means of the KIK case, an empirical example will help flesh out these options (chapter 4.3).

2 Human Rights in International Law

Human rights sources exist in the form of international treaties, as customary international law, legal principles and regional agreements. As public international law instruments, its originators as well as obligors are the states, bound to ensure the observance of human rights through their legal implementation and the provisions of judicial remediation. Human rights sources bind private parties on different levels, if in general not directly (see discussion in chapter 2.2) as in the special case of the ATS, then as possible guiding principles in the interpretation of existing statutes, the delineation of certain obligations or standards of liability. Additionally, private initiatives have begun to create soft law instruments on a voluntary basis. Although not presenting an enforceable body of rights, the adoption of such codes may also help in the determination of a private party's obligation (see case study, chapter 4.3.3). This chapter will provide for a short overview of relevant sources in the context of corporations and human rights. Their practical

asia/pakistan-kik/q-a-compensation-claim-against-kik.html.

application will be illustrated in respective chapters on litigation in the U.S. and the EU (chapters 3 and 4).

2.1 The International Bill of Rights and the European Convention of Human Rights

Today's understanding of human rights as an international matter is rooted in the events of the Second World War and subsequent birth of the UN charter, the constituent charter of the UN, establishing the promotion of human rights as one of its main purposes.²³ Although the idea of basic rights in international relations developed as early as the 17th century,²⁴ the Universal Declaration of Human Rights of 1948 (UDHR),²⁵ as one of the first Human Rights documents with such broad coverage,²⁶ presents a landmark that set the beginning of a new period for the international Human Rights movement. Although only declaratory in nature, it was not only meant to define a lowest common denominator, but instead presented a comprehensive enumeration of all rights deemed necessary for human dignity, including also social and economic rights.²⁷

As a non binding declaration, it was originally meant to precede a comprehensive and more detailed convention; however, in 1952 a decision was taken to divide subsequent provisions into two treaties, the Covenant on Civil and Political Rights,²⁸ and the Covenant on Economic, Social and Cultural Rights.²⁹ As opposed to the UDHR, the Covenants impose formal obligations on States according

²³Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in: *International enforcement of human rights: reports submitted to the colloquium of the Internat. Assoc. of Legal Science*, 1-18, 2 (1987).

²⁴*Id.*

²⁵UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

²⁶Philip Alston, Ryan Goodman and Henry J. Steiner, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 136 (3rd ed. 2008).

²⁷Henkin, *supra* note 23, 4.

²⁸UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

²⁹UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; Philip Alston and Ryan Goodman, *International human rights: text and materials*, 136 (2012).

to international law and the terms of the treaties³⁰ and outline many rights of the the UDHR in greater detail.³¹

Today, the UDHR and the two Covenants constitute a universal human rights system, i.e. a system in which membership is open to all States of the world, forming an International Bill of Rights³² that has by now been approved by virtually all states in the world.³³ With its almost universal recognition, the International Bill of Rights represents a consensus “highly reflective of customary international law”.³⁴ Those principles of the UDHR which have acquired the status of customary international law have thus become legally binding.³⁵ The UDHR is commonly invoked as a standard of justice and freedom, and its significance as “principal conduit for bringing the idea of human rights into the life of many nations”³⁶ and a source of numerous international conventions can not be underestimated.³⁷ Likewise in reaction to the crimes of the Second World War, Europe took its own effort to secure a peaceful future through the codification of fundamental human rights. To that end, Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden and the UK founded the Council of Europe,³⁸ an international organization with the aim “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress”.³⁹ Among its numerous conventions, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)⁴⁰ is the core human rights document,

³⁰Alston et al., *supra* note 26, 152.

³¹*Id.*, 153.

³²Philip Alston and Ryan Goodman, *International human rights: text and materials*, 60 (2012).

³³*Supra* note 23, 5.

³⁴Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law*, 89 (2009).

³⁵Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 86 (2006).

³⁶Henkin, *supra* note 23, 6.

³⁷*Id.*

³⁸Christopher P. Schmidt, *Grund- und Menschenrechte in Europa: das neue System des Grund- und Menschenrechtsschutzes in der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon und dem Beitritt der Union zur EMRK*, 36 (2013).

³⁹Art. 1 lit. a of the statute of the Council of Europe.

⁴⁰Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

containing, in close accordance to the UDHR,⁴¹ fundamental rights, and additionally having established the European Court of Human Rights, thus providing for a mechanism of control and enforcement.⁴² Apart from establishing the European Court of Human Rights with Art. 19 of section II of the Convention, section II comprises all further rules regarding the functioning of the court. After ratification by ten members of the Council of Europe, the convention came into force on 3 September 1953.⁴³ An outstanding characteristic of the ECHR is its explicit conferral of individual rights, independent of national implementation by the contracting parties:⁴⁴ According to Art. 1 ECHR, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this convention”, the term “securing” amounting to an effective guarantee of those rights.⁴⁵ Partial subjectivity of individuals under international law has accordingly been confirmed under the ECHR’s scope of application (*cf.* below, 2.2). The guaranteed rights and fundamental freedoms of the Convention are enumerated in Section 1, among them the right to life (Art. 2), the prohibition of torture (Art. 3), of forced labour and slavery (Art. 4), the right to a fair trial (Art. 6), no punishment without law (Art. 7), freedom of assembly and association (Art. 11), right to effective remedy (Art. 13) and prohibition of discrimination (Art. 14). The exclusion of economic and social rights had been a deliberate choice.⁴⁶ However, with ratification of the Lisbon treaty in 2009, the Charter of fundamental Rights of the European Union⁴⁷ came into force, containing political, economic, and social rights, among them labor rights, the right to social security, health care, and environmental protection under Title IV (Solidarity, Art. 27-38) and Citizen’s rights (Title V, Art. 39-46). The Treaty of Lisbon also includes the European Union’s obligation to accede to the ECHR,⁴⁸ although

⁴¹*Cf.* preamble of the Convention: “Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948”.

⁴²Schmidt, *supra* note 38, 37.

⁴³*Id.*, 38.

⁴⁴*Id.*, 40 *et seq.*

⁴⁵*Id.*, 41.

⁴⁶Pieter van Dijk and Yutaka Arai (eds.), *Theory and Practice of the European Convention on Human Rights*, 4 (4th ed. 2006).

⁴⁷European Union, Charter of Fundamental Rights of the European Union, 14 December 2007, (2007/C 303/01).

⁴⁸Article 6(2) TEU.

all Member States are already party to the Convention.⁴⁹

2.2 Individual Rights and corporate accountability

The International Bill of Rights' novel approach not only granted rights to individuals on an international level but at the same time created an obligation for private parties to observe these rights.⁵⁰ The preamble of the Universal Declaration of Human Rights proclaims that "every individual and every organ of society (...) shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance." Often quoted, Louis Henkin argued that "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all".⁵¹ Henkin's broad reading has however not yet been applied in practice, and the issue of corporate accountability under international law is far from being resolved.⁵²

The question of corporate responsibilities remains a pressing issue, especially since multinational corporations have become powerful economic actors with political influence on a global level,⁵³ approaching an almost state-like status.⁵⁴ The warranted question regarding a concurrent expansion of their accountability under international law is linked in particular to private corporations' status as legal subjects thereunder. Although respective discussions have been around at least since the 1970s,⁵⁵ it can be asserted that corporations do not have international legal

⁴⁹Schmidt, *supra* note 38, 63.

⁵⁰Antje Hennings, *Über das Verhältnis von multinationalen Unternehmen zu Menschenrechten: Eine Bestandsaufnahme aus juristischer Perspektive*, 67 (2009).

⁵¹Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 *Brook. J. Int'l L.* 17, 25 (1999).

⁵²see e.g. William S. Dodge, *Corporate Liability under Customary International Law*, 43 *Georgetown J. Int'l L.*, Legal Studies Research Paper Series, 1045 (2012).

⁵³*Cf.* Karsten Nowrot, *Nun sag, wie hast du's mit den Global Players? Fragen an die Völkerrechtsgemeinschaft zur internationalen Rechtsstellung transnationaler Unternehmen*, in: *Die Friedens-Warte, Journal of International Peace and Organization* 119 *et seq.* (2004).

⁵⁴Cristina Baez, Michael Dearing, Margaret Delatour and Christine Dixon, *Multinational Enterprises and Human Rights*, 8 *U. Miami Int'l & Comp. L. Rev.* 183, 138-338, 335 (2000).

⁵⁵See e.g. Heiner Geldermann, *Völkerrechtliche Pflichten Multinationaler Unternehmen* (2009).

personality and thus are not subjects of international law.⁵⁶

The conventional definition of an international law subject is that of an entity possessing international rights and obligations and having the capacity to a) maintain their rights by bringing international claims and b) to be responsible for their breaches of obligations by being subjected to such claims.⁵⁷ This definition is at least circular⁵⁸ in respect of the determination of an actor's obligations: Under international law, these obligations apply only to its subjects, which are determined, *inter alia*, by obligations applying to them under international law.

The capacity of private corporations to bring international claims (a) might be affirmed, as with the adoption of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,⁵⁹ and the foundation of the *International Centre for Settlement of Investment Disputes between States and Nationals of other States* (ICSID), juridical persons have at their disposal an institutional mechanism supporting the settlement of claims against states before an arbitration body.⁶⁰ This capacity, however, does not automatically entail according obligations, even though the debate regarding individual accountability in international law can be traced back as far as to the Nuremberg Trials. The International Military Tribunal (IMT) and the United States Military Tribunal (USMT) had not only furthered the notion of individual responsibility regarding war crimes, but also touched on the topic of corporations' involvement in these crimes. The defendants included industrial actors of companies *I.G. Farben*, *Flick* and *Krupp*. As the USMT did not have jurisdiction over legal persons, addressees had to be the executives,⁶¹ acting on behalf of the company. Notwithstanding, the USMT carved out the corporations' major role in the commitment of the crimes, emphasizing how charged individuals had used *Farben* as the "instrument by and through which" alleged crimes had been committed.⁶² Trial of *Farben's* executives was

⁵⁶James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law*, 122 (8th ed. 2012); Nowrot, *supra* note 53, 122 with further references.

⁵⁷Crawford and Brownlie, *supra* note 56, 115.

⁵⁸*Id.*

⁵⁹18th March 1965, ILM 4 (1965) 532.

⁶⁰August Reinisch, § 18 *Internationales Investitionsschutzrecht*, in: *Internationales Wirtschaftsrecht*, edited by Christian Tietje and Horst-Peter Götting, para. 27 (2009).

⁶¹Ramasastri, *supra* note 6, 106.

⁶²*U.S. v. Krauch, et al., "The I.G. Farben Case"*, United States Military Tribunal, Nuremberg

based on the *company's* liability for violation of Art. 47 of the Hague Regulations on the Law and Customs of war, and the individuals' respective affiliation with that company.⁶³ Regarding the Krupp firm⁶⁴ and alleged violation of Art. 46 of the Hague Regulations in seizing and confiscating property in occupied countries, the Tribunal, even more explicitly, wrote that "the Krupp firm, *through* defendants Krupp, Loeser, Houdremeont, Mueller, Janssen and Eberhardt, . . . participated in these violations".⁶⁵ The nuance of this observation regarding the relation between individual actors and the corporation in conduct of the crime should be kept in mind when Courts argue that it would always be possible to hold accountable the persons acting on behalf of the company.⁶⁶ It has correctly been noted that "While individuals may be prosecuted and removed from a corporation, the corporate entity continues to exist and might continue its misconduct. Prosecuting an individual may not deter the behavior of the corporation as a whole."⁶⁷ Although based on criminal liability, these cases presented important precedent for the establishment of private and corporate liability in the context of humanitarian law.⁶⁸ Application of the Alien Tort Statute (see 3.3) to transnational human rights violations, some forty years later, advanced this notion, bridging the "historical gap"⁶⁹ from criminal prosecution of individuals to civil prosecution of multinational corporations.⁷⁰ However, as long as the question remains unsettled internationally, a majority of cases will have to be based on conventional tort law.

14th August, 1947-29th July, 1948, Law Reports of Trials of War Criminals Vol. X, 35; Ramasastry, *supra* note 6, 106.

⁶³*Id.*, 107.

⁶⁴*United States v. Krupp*, United States Military Tribunal, Nuremberg 17th November, 1947-30th June, 1948, Law Reports of Trials of War Criminals Vol. X.

⁶⁵*United States v. Krupp*, Law Reports of Trials of War Criminals Vol. X, 139 (emphasis added), Ramasastry, *supra* note 6, 110.

⁶⁶see e.g. *Kiobel*, United States Court of Appeals, Second Circuit, 621 F.3d 111, 149.

⁶⁷Ramasastry, *supra* note 6, 96 with further references. This observation may be specifically relevant in the face of a general separation between control and dispersed shareholder ownership in modern corporations, promoting a structure in which abstract corporate interests, represented by shareholder value, are protected against individual interests.

⁶⁸*Id.*, 119.

⁶⁹*Id.*

⁷⁰*Id.*

2.3 Customary International Law

As there is no central legislative body in the international legal system, there is not one “book” of international law;⁷¹ instead, international human rights law must be derived from various sources. Art. 38 (1) of the statute of the International Court of Justice (ICJ Statute), although applying only to disputes brought before the ICJ, has long been accepted as providing the authoritative statement of their principle sources.⁷² Accordingly, these are “*a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*” Thus, the charter of the United Nations and the covenants are, although major ones, only the first sources of international human rights law. Customary international law, although unwritten, with limited exceptions is binding on all states.⁷³ Affirmed by the ICJ,⁷⁴ customary international law requires “an extensive and virtually uniform and consistent state practice and the belief that the practice is required by law (*opinio juris*),”⁷⁵ as also defined in Art. 38(1) lit. b of the ICJ statute. Uniformity is satisfied through consistent practice by a representative number of states, with single derogations to be qualified not as abandonment of the practice but as their violation.⁷⁶ To qualify as “general”, it does not suffice that norms are recognized by the parties to the dispute only.⁷⁷ An exact minimum number of states, on the other hand, cannot be defined but is to be specified according to the single case at hand.⁷⁸ The group of states serving as

⁷¹Christine Chinkin, *Sources*, in: International Human Rights Law, edited by Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and D. J. Harris, 75 (2010).

⁷²*Id.*

⁷³*Id.*, 81.

⁷⁴*North Sea Continental Shelf Cases (FRG v. Denmark) (FRG v. The Netherlands)*, Chinkin, *supra* note 71, fn. 24.

⁷⁵*Id.*, 81.

⁷⁶Heintschel von Heinegg, *Die weiteren Quellen des Völkerrechts*, in: *Völkerrecht: ein Studienbuch*, edited by Knut Ipsen, Volker Epping, Wolff Heintschel von Heinegg, Ulrich Haltern, Hans-Joachim Heintze and Eberhard Menzel, § 17 para. 10 (6th ed. 2014).

⁷⁷*Id.*, § 17 para. 11

⁷⁸*Id.*

exemplary practitioners should, as a minimum threshold, be representative of the different geographical and socio-political regions of the world to satisfy the requirement of generality.⁷⁹ The subjective element of *opinio iuris sive necessitatis* serves to differentiate customary international law from other acts,⁸⁰ motivated e.g. by protocol or ceremony.⁸¹ Thus, a critical element to determine customary international law is the consolidated belief of a certain behavior being obligatory because it corresponds with what subjects of international law *hold to be the law*.⁸² Rules that are generally recognized as binding customary international law are the prohibition of arbitrary killing, slavery, torture, detention and systematic discrimination, and also some economic and social rights of the UDHR, such as the right to free choice of employment, to form and join trade unions and to free primary education.⁸³ Some of these rules, i.e. those recognized as international crimes, do create individual liability for certain acts, among them slavery, genocide, other crimes against humanity, certain war crimes and torture.⁸⁴ Accordingly, it is customary international law which is often employed to hold non-state actors accountable under international law.⁸⁵

2.4 Jus Cogens

Jus cogens norms are peremptory norms, of the highest rank in international law and thus binding on all states, regardless of their express consent or lack thereof.⁸⁶ Art. 53 of the Vienna Convention on the Law of Treaties,⁸⁷ drafted by the International Law Commission (ILC) of the United Nations, defines *jus cogens* norms as those “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same

⁷⁹*Id.*

⁸⁰*Id.*, para. 12.

⁸¹*Cf.* ICJ, *supra* note 74, 44.

⁸²von Heinegg, *supra* note 76, § 17 para. 14.

⁸³Clapham, *supra* note 35, 86.

⁸⁴*Id.*, 244.

⁸⁵Clapham, *supra* note 35, 87.

⁸⁶Chinkin, *supra* note 71, 84.

⁸⁷23 May 1969, 1155 U.N.T.S. 332.

character.” Thus, although in comparison to customary international law, the requirement of *opinio juris* is not necessary,⁸⁸ the threshold for a norm to become *jus cogens* remains high. As there is no clear mechanism for the establishment of *jus cogens* norms, members of the ILC considered including examples when drafting the Vienna Convention, but eventually refrained, as not to give the impression of an enumeration being conclusive or exclusive of some norms.⁸⁹

However, references to peremptory norms, including exemplary enumerations, can be found in the commentary on chapter III of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts, stating that “Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”,⁹⁰ although for applicability, violation of these norms need to involve “a gross or systematic failure by the responsible State to fulfill the obligation”.⁹¹ Again, the ILC emphasizes that the given examples are not exhaustive and that peremptory norms may come into existence through the process of acceptance and development in accordance with Art. 64 of the Vienna Convention.⁹²

Some violations of *jus cogens* norms have triggered private accountability even in cases where those private actors did not have any state function. In the *Furundzija* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) did establish third-party liability based on aiding and abetting, the *actus reus* being “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”,⁹³ in the case at hand torture, prohibited under *jus cogens*. The court also held that among the consequences of a violation of the *jus cogens* prohibition of torture would be that “the victim could bring a civil suit for damage in a foreign court, which would be therefore asked *inter*

⁸⁸Clapham, *supra* note 35, 88.

⁸⁹von Heinegg, *supra* note 76, §16 para. 51.

⁹⁰Report of the ILC, GAOR, Supp. No. 10 (A/56/10) p. 208, Commentary to Art. 26, para. 5, Clapham, *supra* note 35, 88.

⁹¹Art. 40 (2), Clapham, *supra* note 35, 89.

⁹²Report of the ILC, GAOR, Supp. No. 10 (A/56/10) p. 208, Commentary to Art. 40, para 6.

⁹³*Prosecutor v. Furundzija*, Case IT-95-17/1-T, Judgement of 10 December 1998, para. 195-225 and 236-40.

alia to disregard the legal value of the national authorizing act”⁹⁴ and that “at the individual level, that is, that of criminal liability, (...) one of the consequences of the *jus cogens* character (...) is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”⁹⁵ These consequences underpin the character of *jus cogens* norms as part of an “international *ordre public*”⁹⁶ (cf. chapter 4.2.2) and emphasize the notion of a state’s jurisdiction over individuals within its territory in cases of international criminal law violations. As *jus cogens* shall be universally binding regardless of express consent, respective adjudication of violations is appropriate and necessary. Still, a state element must be given, as the judgment referred to “an authorizing act”, and liability was only vicarious. Art. 7 of the ICTY statute⁹⁷ accordingly establishes individual criminal liability for persons acting in concurrence with government authorities. In case of sole private conduct, even international law’s highest ranked norms do not provide for simple enforceability against private actors. To bring a civil law claim before a court on the basis of human rights violations, the violated norms would usually need an explicit cause of action⁹⁸ (see part 3 and 4). These jurisdictional requirements are not automatically overridden by determination of a norm enjoying *jus cogens* status.⁹⁹

2.5 Civil and political rights

The UDHR and the International Covenant on Civil and Political Rights (ICCPR) encompass, *inter alia*, the right to life, the protection of the individual’s physical integrity, the right to procedural fairness, equal norms in regard of religion, gender, racial and other terms, freedoms of belief, speech and association and

⁹⁴*Id.*, para. 153.

⁹⁵*Id.*, para. 156.

⁹⁶von Heinegg, *supra* note 76, § 16 para. 40.

⁹⁷Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended September 2009, [www.icty.org/x/file/Legal Library/Statute/statute_sept_09_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept_09_en.pdf), accessed on 1 July 2016.

⁹⁸Hailer, *supra* note 13, 24.

⁹⁹Chinkin, *supra* note 71, 85.

the right to political participation.¹⁰⁰ Typically for constitutional rights,¹⁰¹ the obligation to respect and not violate them is addressed at the state community. Moreover, state parties are obliged to non-discriminatorily “ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (Art. No. 1). This duty to protect and ensure the enjoyment of rights by the individuals creates only horizontal obligations of corporate actors, effected through states, which are obliged to control private entities within their jurisdiction.¹⁰² The necessity is obvious, as certain rights, such as to physical integrity and freedom of association, can be violated not only by state actors but corporations as well. With the state as primary duty bearer, the approach still remains highly unsatisfactory, as states may deny effective protection and remedy or corporations be complicit in the wrong-doings of government entities.¹⁰³

The European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰⁴ entered into force in 1953, guarantees a number of civil and political rights as well, e.g. the right to life, freedom from torture, inhuman or degrading treatment and punishment, freedom from slavery, right to liberty, security of person and due process of law, freedom of thought, conscious and religion as well as non-discrimination regarding the enjoyment of these rights.¹⁰⁵ Subsequent protocols have further expanded these rights, providing e.g. for freedom from involuntary exile, from collective expulsion of aliens and freedom of movement (Protocol No. 4), and right of due process for aliens subject to deportation or expulsion (Protocol No. 7),¹⁰⁶ to name just a few. In opposition to the UDHR, the European Convention, alongside the European Commission of Human Rights, created a corresponding Court for the enforcement of the Convention’s rights.¹⁰⁷ The Commission and the Court were merged into the new European Court of Hu-

¹⁰⁰Alston et al., *supra* note 26, 160.

¹⁰¹Henkin, *supra* note 23, 10.

¹⁰²Sarah Joseph, *The Human Rights Accountability of MNEs*, in: *Liability of Multinational Corporations under International Law*, edited by Menno T. Kamminga and Saman Zia-Zarifi, 77 (2000).

¹⁰³*Cf.* Dinah Shelton, *Remedies in International Human Rights Law*, 114 (2nd ed. 2005).

¹⁰⁴4 Nov 1950, 213 U.N.T.S. 221.

¹⁰⁵Shelton, *supra* note 103, 108.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

man Rights through Protocol No. 11 to the Convention in 1998.¹⁰⁸ The Court has jurisdiction over all cases brought against States that are parties to the Convention.¹⁰⁹

2.6 Labor Standards

A declaration, dedicated to labor standards and addressing not only corporations but governments, and employers' as well as workers' organizations, is the ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted in 1977¹¹⁰ and amended in 2000¹¹¹ and 2006.¹¹² Although the tripartite convention is stated to be voluntary, it can be considered as an authoritative interpretation of principles in already existing labor conventions, and, like the UDHR, as reflective of some binding obligations.¹¹³ The declaration also incorporates Human Rights through reference to the UDHR and the corresponding covenants.¹¹⁴

The amended declaration of 2000 did integrate an additional reference to the Declaration on Fundamental Principles and Rights at Work and its follow up from 1998,¹¹⁵ which recognizes as fundamental principles:

“(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”¹¹⁶

¹⁰⁸E.T.S. No. 155, in force Nov. 1998, Art. 19; Shelton, *supra* note 103, 108 *et seq.*

¹⁰⁹*Id.*

¹¹⁰*Official Bulletin* 1978, vol. LXI, Series A, no. 1.

¹¹¹*Official Bulletin* 2000, vol. LXXXIII, Series A, no. 3; Clapham, *supra* note 35, 211.

¹¹²Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006).

¹¹³Clapham, *supra* note 35, 212 *et seq.*

¹¹⁴No. 8 of the Tripartite Declaration, *supra* note 112.

¹¹⁵ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference in June 1998.

¹¹⁶*Id.*, no. 2.

Naming sources of those fundamental rights that pose obligations for all ILO members, the 1998 Declaration speaks of “Conventions recognized as fundamental both inside and outside the Organisation”.¹¹⁷ These fundamental ILO Conventions are the following: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182), Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).¹¹⁸ Regarding the responsibility of corporations, the Tripartite Declaration can be viewed as an important summary of core labor policies.¹¹⁹ Corporations are expected to improve standards and increase employment opportunities, promote the advancement of host country nationals and, in the case of developing countries, provide the best possible wages and working conditions, “at least adequate to satisfy basic needs of the workers and their families”.¹²⁰ However, a lack of implementation and enforcement is not only prevalent in many developing countries,¹²¹ but may even be considered as one of their main comparative advantages, regardless of any ethical questions.¹²² As a result, many corporations follow the strategy of voluntary codes of conduct in the context of *Corporate Social Responsibility* (CSR) to demonstrate responsible behavior.¹²³ Notwithstanding, it is the non-binding character of voluntary codes as well as of the conventions, that poses the main obstacle to their legal enforceability.¹²⁴ Enforceability in these cases remains largely dependent on national implementation, or, in case of the ATS, on respective labor standards being

¹¹⁷*Id.*, no. 1(b).

¹¹⁸<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>, last accessed: 3 June 2016.

¹¹⁹Clapham, *supra* note 35, 218.

¹²⁰No. 32 of the Tripartite Declaration, *supra* note 112, Clapham, *supra* note 35, 218.

¹²¹ILO, *World Employment Social Outlook – Transforming Jobs to end Poverty*, 2016, 128ff., available at http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_481534.pdf, last accessed: 22 June 2016).

¹²²*Cf.* Koebele, *supra* note 34, 149.

¹²³Hennings, *supra* note 50, 53 *et seq.*

¹²⁴*Id.*, 63; see discussion of the relevance of Soft Law in the case study, chapter 4.3.4.

sufficiently specific and accepted as part of international law¹²⁵ (*cf.* the case law in chapter 3.3 and discussion of influence on tort law in chapter 4.4).

Another strong effort to hold Corporations accountable for violations of human rights are the *Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*,¹²⁶ initiated by the UN Sub-Commission on the Promotion and Protection of Human Rights, published in 2003.¹²⁷ In its preamble, the Norms refer numerous treaties,¹²⁸ among them the ICCPR, the Covenant on Economic, Social and Political Rights, as well as the International Convention on the Elimination of All Forms of Racial Discrimination¹²⁹ and the Convention on the Prevention and Punishment of the Crime of Genocide.¹³⁰ Relevant to the case study (see 4.3), Art. 7 of the norms demands that “Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.” The article echoes similar provisions from the Covenant on Economic, Social and Cultural Rights (Art. 7 lit. b) and the Charter of fundamental Rights of the European Union (Art. 31).¹³¹

The Sub-Commission envisioned a complementing mechanism for NGOs to submit information about businesses not meeting the norms’ minimum standards, and even included an obligation for compensation, effected through the norms’ application by national courts or tribunals, “pursuant to national and international law”.¹³² The draft norms sought to present a comprehensive summary of many already existing norms and principles that would be binding on transnational corporations through incorporation into their contracts, to subject compliance to periodic monitoring and provide for their enforcement by courts, thereby far extending

¹²⁵Koebele, *supra* note 34, 124 *et seq.*

¹²⁶Res. 2003/16/2003, U.N. Doc E/CN.4/Sub.2/2003/12/rcv.2 (2003).

¹²⁷Shelton, *supra* note 103, 158 *et seq.*

¹²⁸Kristina Koeltz, *Menschenrechtsverantwortung multinationaler Unternehmen: eine Untersuchung “weicher” Steuerungsinstrumente im Spannungsfeld Wirtschaft und Menschenrechte*, 181 (2010).

¹²⁹UN General Assembly, 21 December 1965, 660 U.N.T.S. 195.

¹³⁰UN Commission on Human Rights, Res. 2005/62, U.N. Doc E/CN.4/RES/2005/62 (2005).

¹³¹Hennings, *supra* note 50, 95.

¹³²No. 18 of the draft norms, *supra* note 126.

efforts of voluntary codes and conduct.¹³³ Naturally, these efforts were met with strong opposition, and submissions by interested parties, collected by the Office of the United Nations High Commissioner for Human Rights (OHCHR), affirmed “deep disagreements” regarding corporate human rights responsibilities.¹³⁴ Further efforts by the United Nations Human Rights Committee resulted in the passing of a resolution in 2005, recommending to the UN Secretary-General the appointment of a Special Representative for Business and Human Rights, the mandate given to John Ruggie, former special adviser on the Global Compact initiative.¹³⁵ Asked to determine human rights standards applicable to corporations, clarify their and the roles of states, to develop an impact assessment methodology and collect best practices, Ruggie delivered his report to the UN Human Rights Council in 2008 in the form of a framework with recommendatory character.¹³⁶ The framework was approved unanimously by the Council, and Ruggie’s mandate was extended to operationalize the framework, resulting in the Guiding principles on Business and human Rights, endorsed by the Human Rights Committee in its resolution 17/4 of 16th June 2011.¹³⁷ The Principles consist of three pillars, with pillar one concerning “The State Duty to protect Human Rights”, pillar two “The Corporate Responsibility to respect Human Rights” and pillar three “Access to Remedy”.

The Guiding Principles on Business and Human Rights are certainly one of the most ambitious international instruments to advance a common framework regarding corporations’ obligations in relation to human rights; although having given up the effort of a universally binding instrument, the UN Working Group on business and human rights (UNWG) was mandated to further promote their implementation by States, encouraging the adoption of national action plans.¹³⁸

Whereas pillar one reaffirms the States’ duty to protect human rights, clarifying

¹³³Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap*, 227 (2015).

¹³⁴*Id.*

¹³⁵*Id.*, 228.

¹³⁶*Id.*

¹³⁷UN Human Rights Council, “*Guiding Principles on Business and Human Rights: Implementing the United Nations’ Protect, Respect and Remedy’ Framework*”, UN-doc. A/HRC/17/31 (21 March 2011), Commentary to Art. 17, *Id.*

¹³⁸*Id.*, 245.

this obligation with the use of mandatory wording (“1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”), pillar two adopts a recommendatory character, enumerating those principles corporations “should” follow.¹³⁹ No. 14, however, makes use of a wording less voluntary in nature, stating that “14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. (...)”. As corporations should respect *all* human rights, a respective enumeration had been refrained from;¹⁴⁰ Principle 12 determines, with reference to the International Bill of Rights as well as the ILO’s Fundamental Principles and Rights at work, the minimum human rights standard to be respected by corporations.¹⁴¹ Regarding issues of a “corporate veil” in the determination of liability, principle 26 of pillar three is specifically instructive: “26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”¹⁴²

Implementation of the Guiding Principles on a European level was advanced in 2012, when the European Commission and the Council of the European Union invited all Member States to develop respective national plans.¹⁴³ To date, such plans have been adopted by the UK, the Netherlands, Denmark, Finland and Lithuania, however, measures to facilitate access to legal remedy remain largely absent.¹⁴⁴ With only a minority of States having implemented the Guiding Principles, their recommendatory character remains a major weakness. At the same time, with their universal recognition and the inclusion of the Bill of Rights and core labor principles, the Guiding Principles are of undeniable relevance. Thus,

¹³⁹Baughen, *supra* note 133, 232.

¹⁴⁰*Id.*, 233.

¹⁴¹*Id.*

¹⁴²*Id.*

¹⁴³*Id.*, 245.

¹⁴⁴*Id.*, 246.

regardless of their “soft law” character, instruments such as the Guiding Principles are instructive in the delineation of corporations’ duties in the face of civil liability (see case study, chapter 4.3.3). In this context, however, judicial remedy remains largely dependent on an existing infrastructure supportive of the plaintiffs, and finally, the national judiciary and legislation. The prospects of litigation in connection with the basis of core human rights instruments before the national courts will be examined in the next two chapters.

3 Civil Human Rights Litigation in the USA

Part 3 outlines the general procedural requirements and options for litigation of human rights violations in the United States. The prevalence in the United States of human rights litigation in the civil courts can be attributed to several factors of its legal environment. The common utilization of civil lawsuits in cases where conflicts not only concern the sole relation of the parties to the dispute is a characteristic of its legal culture.¹⁴⁵ Although civil law suits have been criticized as presenting an insufficient answer in the face of human rights violations amounting to fundamental questions of international law,¹⁴⁶ civil “public interest” cases have long been a means to promote social and legal reform.¹⁴⁷ Abram Chayes once labeled these kinds of cases “public law litigation”¹⁴⁸ to emphasize their additional focus on more general public policy,¹⁴⁹ and public interest litigation has furthered its own supportive infrastructure in the form of specialized public interest and non-profit law offices.¹⁵⁰ Koh expanded the term by “transnational” to describe cases in which “[p]rivate individuals, government officials, and nations sue one another directly, and are sued directly”,¹⁵¹ invoking claims based on a “body of

¹⁴⁵Stephens, *supra* note 16, 13.

¹⁴⁶see e.g. Hailer, *supra* note 13, 336 *et seq.*, questioning the effect and appropriateness of civil tort litigation against the backdrop of egregious human rights violations; see also Stephens, *supra* note 16, fn. 36 for further references.

¹⁴⁷Stephens, *supra* note 16, 13 *et seq.*

¹⁴⁸Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976), Stephens, *supra* note 16, 13.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2348 (1991).

‘transnational’ law” that blends domestic and international law.¹⁵² As public law litigation, “transnational law litigation” would seek to “vindicate public rights and values through judicial remedies.”¹⁵³ This particularity in the United States legal culture may have furthered the progressive application of the ATS (see chapter 3.3) to the advancement of civil human rights litigation,¹⁵⁴ some 200 years after its enactment. As a U.S. federal statute with explicit reference to international law, the ATS remains a singularity,¹⁵⁵ bringing together civil tort litigation and international law before the domestic courts. Accordingly, adjudication under the ATS has to be differentiated from tort litigation solely under national law.¹⁵⁶ Due to its exceptional meaning, the major bulk of part 3 is dedicated to the ATS, including seminal case law (chapter 3.3). As ATS claims are based on international law, the diverse and complex choice of law rules and rules on legislative jurisdiction, applicable to “conventional” transnational litigation in the U.S., have been omitted.

3.1 Substantive Law and enforceability

The decisive question regarding direct litigation of human rights violations before national courts is that of international law’s relationship with, or status within the national legal system. Apart from that, a separate question regards the enforceability of that right, thus the conferral of a private cause of action.¹⁵⁷ To determine the relationship of international and U.S. law, it is useful to first distinguish between treaties and customary international law.¹⁵⁸ As outlined above (see part 2), most human rights are codified in international treaties, to some of which almost all states in the world are a party. The legal effect of such treaties, however, is far from universal across jurisdictions. In the U.S., although according to the Constitution, all treaties made under the authority of the United States “shall be the

¹⁵²*Id.*

¹⁵³*Id.*, 2347.

¹⁵⁴Stephens, *supra* note 16, 7 *et seq.*

¹⁵⁵*Id.*, 32.

¹⁵⁶Hailer, *supra* note 13, 335.

¹⁵⁷Bradley, *supra* note 18, 424.

¹⁵⁸*Id.*, 422; Gary Born, *International Civil Litigation in United States Courts: Commentary & Materials*, 19 (3rd ed. 1996).

supreme law of the land”,¹⁵⁹ this holds true only for “self-executing” treaties,¹⁶⁰ a status determined by the intention of the U.S. in ratifying respective treaty.¹⁶¹ These treaties enjoy the same status as federal law and create rights enforceable in U.S. courts, whereas non-self-executing treaties lack such binding force if not implemented by Congress.¹⁶² As the U.S. has either not ratified or otherwise declared most human rights treaties as non-self-executing,¹⁶³ the significance of customary international law as primary basis for human rights litigation¹⁶⁴ becomes apparent.

Customary international law as such is rarely applied directly,¹⁶⁵ but courts have referred to customary international law as “general federal common law”, applied in the absence of any valid federal legislation in diversity cases¹⁶⁶ and of any federal or state legislation to the contrary.¹⁶⁷ However, the application of customary international law as general federal common law was ended by the Supreme Court with its holding in *Erie*¹⁶⁸ that there *was no* general common law.

Notwithstanding, in its *Filártiga* decision (see 3.3.1), the Second circuit gave customary international law the status of post-*Erie* federal common law.¹⁶⁹ Understood as federal common law, U.S. courts can give effect to customary international law in the absence of any federal law regarding the case at hand.¹⁷⁰ However, the status as federal common law does also not entail an automatic private cause of action.¹⁷¹ In this context, the ATS as federal statute may have served as a gateway for its application – however, the ATS has also been determined as not providing its own cause of action. The issue regarding actionability of interna-

¹⁵⁹Art. VI of the U.S. Constitution, cl 2.

¹⁶⁰Gary Born, *International Civil Litigation in United States Courts: Commentary & Materials*, 20 (3rd ed. 1996).

¹⁶¹*Restatement (Third) Foreign Relations Law* § 111(4), Born, *supra* note 160, 20.

¹⁶²*Id.*

¹⁶³Bradley, *supra* note 18, 422.

¹⁶⁴*Id.*

¹⁶⁵Born, *supra* note 160, 21.

¹⁶⁶*Id.*, 13.

¹⁶⁷Bradley, *supra* note 18, 422.

¹⁶⁸*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), 78.

¹⁶⁹*Filártiga*, 630 F2d at 886, Bradley, *supra* note 18, 423.

¹⁷⁰*Restatement (Third) Foreign Relations Law* § 115, comment d (1987), Born, *supra* note 160, 21.

¹⁷¹Bradley, *supra* note 18, 424.

tional law has been resolved explicitly only in the context of the Torture Victims Protection Act (TVPA)¹⁷² (see chapter 3.3.2).

3.2 Procedural Requirements

3.2.1 Jurisdiction over transnational Corporations

For litigation before a United States Court against a certain defendant, the Courts must have jurisdiction over the subject matter, as well as personal jurisdiction over the defendant. These requirements might pose specific difficulties regarding transnational corporations, as the alleged violation might not be connected directly to e.g. the parent company or defendant company has no direct relations to the forum; even more so, as violations will have occurred extraterritorially in relation to the latter.

In general, federal Courts can adjudicate cases only according to the Constitution's limited grants of judicial authority as allocated to them by Art. III,¹⁷³ and if Congress has implemented jurisdiction through according statutes, such as the ATS (see chapter 3.3).¹⁷⁴ For international cases, the relevant grants include "federal question" jurisdiction, "alienage jurisdiction" and jurisdiction over specialized cases related to international issues.¹⁷⁵ According to federal question jurisdiction, federal courts can adjudicate "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made (...) under their Authority."¹⁷⁶ The establishment of subject matter jurisdiction also determines the applicable law: The Courts decide according to domestic law or as otherwise instructed by the statute, as in the case of the ATS with its reference to international law.¹⁷⁷

In comparison to federal courts, State Courts possess general jurisdiction over all categories of claims except for a few limitations.¹⁷⁸ Accordingly, to assume sub-

¹⁷²Cf. Bradley, *supra* note 18, 424.

¹⁷³Stephens, *supra* note 16, 11.

¹⁷⁴*Id.*

¹⁷⁵Born, *supra* note 160, 10.

¹⁷⁶Art. III, § 2, Born, *supra* note 160, 10.

¹⁷⁷Stephens, *supra* note 16, 11.

¹⁷⁸Born, *supra* note 160, 7.

ject matter jurisdiction, a state court does not need an explicit constitutional grant of authority. Notwithstanding, personal jurisdiction always remains a requirement.¹⁷⁹ To establish personal jurisdiction over the defendant, state courts are in need of legislative authorization, and exercise of jurisdiction under legislative authorization must be consistent with the Constitution's *due process* clause.¹⁸⁰ According to that, there are two kinds of personal jurisdiction: General and Specific jurisdiction.¹⁸¹ Whereas specific jurisdiction allows only adjudication of claims that "arise out of" or "relate to" a defendant's activities within the forum state,¹⁸² general jurisdiction allows Courts to adjudicate any claim against a defendant, including those arising out of activities unrelated to the Forum.¹⁸³ However, in accordance with the *due process* clause, the exercise of general jurisdiction over the defendant has to be grounded on their significant connections to the Forum, such as nationality, domicile, residence, incorporation or continuous and systematic business activities.¹⁸⁴ If personal jurisdiction is established, the respective forum is qualified as competent.

Regarding legislative authorization, all States have enacted respective statutes determining the scope of jurisdiction, including that over foreign defendants.¹⁸⁵ Allowing jurisdiction over parties located outside a state's territory (or outside the United States Territory) but with specified contacts with the State, are so called *long-arm statutes*.¹⁸⁶ The two legislative approaches permit either jurisdiction to the limits of the Constitution, or provide for a catalogue of the circumstances in which state courts may assert jurisdiction over foreign defendants.¹⁸⁷ According to the basic principle of corporations being distinct legal entities and not identical to their subsidiaries, even if 100 % owned, jurisdiction over that subsidiary will not automatically give courts jurisdiction over its parent.¹⁸⁸ And even in the case

¹⁷⁹Born, *supra* note 160, 67.

¹⁸⁰*Id.*

¹⁸¹*Id.*, 77.

¹⁸²*Restatement (third) Foreign relations law of the United States § 421* (1987), Helicopteros 466 U.S. 408. 414-15 (1984)), Born, *supra* note 160, 124.

¹⁸³*Id.*, 95.

¹⁸⁴*Id.*

¹⁸⁵*Id.*, 68.

¹⁸⁶*Id.*

¹⁸⁷*Id.*

¹⁸⁸*Id.*, 152.

of established jurisdiction over the parent, liability of its subsidiary does not automatically trigger liability of the parent company.¹⁸⁹ Regarding the statutory level to determine “alter ego”-based jurisdiction (see below, 3.2.2), state common law provides the only guidance on the issue, with state courts having looked to *due process* precedents to carve out state alter ego doctrines.¹⁹⁰

Regarding adjudication under the ATS (see 3.3), the issue of jurisdiction over corporations has been addressed only implicitly by the Supreme Court in *Kiobel* (see 3.3.4). Although the Court of Appeals for the Second Circuit referred a question regarding specifically the issue of corporate accountability for violations of the law of nations, the Supreme Court left the question unanswered.

3.2.2 Alter Ego and Agency relationships

The difficulty in affirming personal jurisdiction over a corporation is rooted in often complex corporate structures, including e.g. fully or partly owned subsidiaries or other affiliates, joint venture relationships, or mere connection to alleged violations through subcontractors. In *Cannon Manufacturing Company v. Cudahy Packing Company*,¹⁹¹ although wholly owned by its parent company, the subsidiary’s formally complete separation was considered sufficient by the Supreme Court to affirm dismissal of suit against the parent corporation on grounds of invalid service, which had been exercised upon the subsidiary.¹⁹²

However, even if formally independent of each other, foreign companies do not necessarily escape jurisdiction of U.S. Courts.¹⁹³ To assert jurisdiction, lower U.S. courts have utilized theories on “alter ego status” and agency relationships.¹⁹⁴ Alter-ego-based liability under most state laws would require “that both: (i) corporate formalities were wholly disregarded by a pervasively controlling parent; and (ii) fraud or its equivalent was perpetrated on third parties.”¹⁹⁵

¹⁸⁹*Id.*, 153.

¹⁹⁰*Id.*

¹⁹¹*Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 33 (1925).

¹⁹²Born, *supra* note 160, 154.

¹⁹³*Id.*

¹⁹⁴*Id.*, 152.

¹⁹⁵*Id.*, 153.

In a later decision¹⁹⁶ after *Cannon*, the Supreme Court had held that § 12 of the Clayton Act would permit personal jurisdiction over a foreign defendant because its intervention and supervision over its U.S. subsidiary exceeded normal exercise of shareholders' rights, even if corporate formalities were observed.¹⁹⁷ Subsequently, many lower court decisions determined an alter ego status based on a sufficient degree of control of the parent over its subsidiary, superseding formal corporate separations.¹⁹⁸ From the case-to-case analysis, some general rules for the determination of an alter-ego relationship can be derived: If the level of control in effect disregarded the subsidiary's independent corporate existence, the parent exercised dominion and control through continual supervision and intervention, the same conduct rendering the subsidiary a mere department of the parent,¹⁹⁹ or where parent and subsidiary are sufficiently integrated, jurisdiction may be affirmed over a parent through long arm statutes.²⁰⁰ Constituting another basis to establish jurisdiction, other courts have utilized "agency" tests.²⁰¹

3.3 ATS litigation

The Alien Tort Statute was enacted as part of the Judiciary Act of 1789,²⁰² the first statute establishing the judiciary on the federal level,²⁰³ and is codified in 28 U.S.C. § 1350:

„The district courts shall have original jurisdiction for 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.“

¹⁹⁶*United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

¹⁹⁷Born, *supra* note 160, 155.

¹⁹⁸*Roorda v. Volkswagenwerk AG*, 481 F.Supp. 868 (D.S.C. 1979), *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1962), *Clark v. Matsushita Elec. Indus. Co.*, 811 F. Supp. 1061; cited in Born 1996, *supra* note 160, 155, fn. 182, 183.

¹⁹⁹Born, *supra* note 160, 155 *et seq.* with further references.

²⁰⁰*Color Systems, Inc. v. Meteor Photo Reprographic Systems, Inc.*, 1987 WL 11085 (D.D.C. 1987), *Finance Co. of Am. v. Bankamerica Corp.*, 493 F.Supp. 895 (D. Md. 1980), cited in Born, *supra* note 160, 156.

²⁰¹*Id.*

²⁰²Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789).

²⁰³Koebele, *supra* note 34, 3.

Rediscovered in 1980 through the seminal case *Filártiga v. Peña-Irala*,²⁰⁴ the statute gave rise to numerous human rights cases and sparked an on-going debate about the enforcement of human rights through international civil litigation. Up to the latest Supreme Court decision on *Kiobel*,²⁰⁵ adjudication under the ATS has advanced a singular development regarding its application to Human Rights violations. Its significance can be attributed in particular to its application to cases with a third-country context,²⁰⁶ which was later extended to corporate actors. Because of its reference to the law of nations, initial cases demanded a “state action” element for the tort to be actionable under the ATS, however, in *Kadic v. Karadzic*²⁰⁷ the Court held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individual.”²⁰⁸ The obligation of private actors to respect certain human rights would accordingly qualify their violation as violating the law of nations.²⁰⁹ It was in *Doe I v. Unocal*²¹⁰ that the accountability of private actors was implicitly extended to corporations.²¹¹ On this basis, the ATS enabled litigation against corporations for violations having occurred outside of the United States.²¹² However, after the Supreme Court’s decision on *Kiobel*, application to extraterritorial incidents is restricted.

3.3.1 The Beginning: *Filártiga v. Peña-Irala*

The *Filártiga* case²¹³ was the first one to bring a claim of a fundamental human rights violation before a federal district court of the United States under the ATS. The defendant, Americo Norberto Peña-Irala, in 1976 allegedly tortured to death 17-year-old Joelito Filártiga in retaliation for his father’s political opposition to

²⁰⁴*Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁰⁵*Kiobel v. Royal Dutch Petroleum Co. et al.*, 569 U.S. ____ (2013) = 133 S.Ct. 1659 (2013).

²⁰⁶Hennings, *supra* note 50, 120 *et seq.*

²⁰⁷*Kadic v. Karadzic*, 70 F.3d 232 (1995).

²⁰⁸*Id.*, 239.

²⁰⁹Hennings, *supra* note 50, 122.

²¹⁰United States Court of Appeals (9th Circuit), *Doe I v. Unocal Corporation*, 248 F.3d 915 ff. (2002).

²¹¹Hennings, *supra* note 50, 122.

²¹²Jendrik Adam, *Die Strafbarkeit Juristischer Personen im Völkerstrafrecht*, 180, fn. 872 (2015).

²¹³*Filártiga v. Peña-Irala*, 630 F.2d 876 (1980).

President Alfredo Stroessner's military government in Paraguay.²¹⁴ It is interesting to notice that the first case to establish human rights litigation under the ATS not only concerned an extraterritorial tort but also did not involve a U.S. defendant. Proceedings began before the District Court for the Eastern District of New York but were dismissed for want of subject matter jurisdiction,²¹⁵ and plaintiffs appealed.

As plaintiffs did not "contend that their action arises directly under a treaty of the United States",²¹⁶ jurisdiction depended on the "threshold question (...) whether the conduct alleged violates the law of nations."²¹⁷ Whereas the District Court had held that a government's mistreatment of its own citizens would not qualify as a violation of the law of nations, the Court of Appeals for the Second Circuit reversed that notion.

Before conducting its own analysis of international law's stance on torture, the Court had to determine the appropriate sources to be consulted. The Court cited²¹⁸ the approach developed in *The Paquete Habana*,²¹⁹ affirming that "resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat".²²⁰ From *The Paquete*, the Court also derived that it "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."²²¹ Although the Court qualified the requirement of "general assent of civilized nations" as a stringent one,²²² it found that there were few "issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."²²³ Proof was given by way of reference to the United Nations Charter, the Universal Dec-

²¹⁴*Id.*, 878.

²¹⁵*Id.*

²¹⁶Judge Kaufman writing for *Filártiga*, *supra* note 213, 880.

²¹⁷*Id.*

²¹⁸*Id.*, 881.

²¹⁹*The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900).

²²⁰*Id.*, 700.

²²¹*Filártiga*, *supra* note 213, 881.

²²²*Id.*, 881.

²²³*Id.*

laration of Human Rights,²²⁴ the Declaration on the Protection of All Persons from Being Subjected to Torture,²²⁵ and numerous national treaties as well as a report by the U.S. State Department, indicating international consensus regarding the prohibition of torture.²²⁶ In summary, regarding the conferral of jurisdiction in case of a violation of the law nations, Judge Kaufman wrote: “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”²²⁷

Furthermore, the Court of Appeals had to affirm its jurisdiction over the extraterritorial tort, as defendant-appellee submitted jurisdiction would not be in conformity with grants of federal jurisdiction in Art. III of the Constitution.²²⁸ Notwithstanding, jurisdiction over the foreign tort in the case was derived from transitory jurisdiction over defendant Peña-Irala who had been served while present in the United States: “Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred,”²²⁹ thus, “whenever an alleged torturer is found and served with process by an alien within our borders, s 1350 provides federal jurisdiction.”²³⁰ Even more so, the Court found that “as part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, s 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue.”²³¹

3.3.2 Cause of action

As mentioned above, an international norm’s qualification as part of the domestic body of federal law does not necessarily provide for its enforceability (see chapter

²²⁴General Assembly Resolution 217 (III)(A) (Dec. 10, 1948).

²²⁵General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975).

²²⁶*Filártiga*, *supra* note 213, 881-85.

²²⁷*Id.*, 888.

²²⁸*Id.*, 885.

²²⁹*Id.*

²³⁰*Id.*, 878.

²³¹*Id.*, 885.

3.1). Thus, part of the debate surrounding the application of the ATS concerned the question if it would grant its own cause of action.²³²

Although *Filártiga* was the precedent for the subsequent development of human rights litigation under the ATS, the Second Circuit's interpretation of the statute was rejected by two of three judges in the decision on *Tel-Oren v. Libya Arab Republic*,²³³ the action being dismissed, *inter alia*, for lack of subject matter jurisdiction.²³⁴ Whereas Judge Robb brought forward reasons of political matter, Judge Bork, although in concurrence with Judge Robb, additionally held that the ATS would not grant plaintiffs a private cause of action,²³⁵ supporting his view by the *act of state* and the *political questions doctrine*.²³⁶

In part as a response to that holding, in 1992, Congress enacted the Torture Victims Protection Act (TVPA), creating an express cause of action for torture and extrajudicial killing,²³⁷ resolving the issue regarding actionability of these torts under the ATS. Although the TVPA's relation to the ATS has been subject of debate,²³⁸ the Supreme Court indirectly affirmed its character as complementing and not replacing the ATS.²³⁹ As there is little room left for debate if torture amounted to a violation of the law of nations, courts have maintained actionability of its prohibition, with one case brought forward even against corporations.²⁴⁰

Regarding the question of actionability outside of the TVPA, the Supreme Court had an opportunity to finally decide the issue in *Sosa*²⁴¹ after having repeatedly denied petitions for writ of certiorari.²⁴² It concluded that the ATS was of strictly jurisdictional nature, derived from its original wording and placement in § 9 of the Judiciary Act, "a statute otherwise exclusively concerned with federal-court

²³²Stephens, *supra* note 16, 8.

²³³*Tel-Oren v. Libya Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

²³⁴Born, *supra* note 160, 37.

²³⁵*Tel-Oren*, *supra* note 233, 811.

²³⁶*Id.*, 804.

²³⁷Bradley, *supra* note 18, 424.

²³⁸Philip Mariani, *Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. Pa. L. Rev 1383 (2008).

²³⁹Koebele, *supra* note 34, 84; see also *Kiobel* at 1677, concurring opinion of Justice Breyer.

²⁴⁰Koebele, *supra* note 34, 99.

²⁴¹*Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

²⁴²Koebele, *supra* note 34, 29.

jurisdiction”.²⁴³ At the same time, the Court took the view that Congress also did not enact the statute “as a jurisdictional convenience” without any practical effect, depending on a “future Congress”²⁴⁴ to take further action and “someday, authorize the creation of cause of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.”²⁴⁵ Instead, the ATS was meant to allow litigation of “a narrow set of common law actions derived from the law of nations”,²⁴⁶ with the power of recognition of these actions resting with the district courts.²⁴⁷ Accordingly, a certain standard for the determination of actionable torts would be desirable, however, the Court settled for demanding as a minimum threshold for a claim to be actionable that it should “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of 18th century paradigms”.²⁴⁸ The Court went on to urge for judicial caution in the consideration of individual claims that might confer jurisdiction according to the statute, emphasizing, *inter alia*, that the decision to create a private right of action was one better left to legislative judgment.²⁴⁹ In its reasoning, the Supreme Court also made reference to the Torture Victims Protection Act (TVPA), constituting a clear mandate through its provision of an “unambiguous and modern basis”²⁵⁰ for claims regarding torture and extrajudicial killing, thus however “confined to specific subject matter”.²⁵¹

3.3.3 Third-Party Liability: *Doe I v. Unocal Corp.*

Regarding non-contractual relationships, claims against corporations are often based on third-party or vicarious liability. Seminal cases under the ATS against corporations have involved perpetrations connected to oppressive regimes in Saudi

²⁴³*Sosa*, *supra* note 241, 2755.

²⁴⁴*Id.*, 2758.

²⁴⁵*Id.*

²⁴⁶*Id.*, 2759.

²⁴⁷*Koebele*, *supra* note 34, 32.

²⁴⁸*Sosa*, *supra* note 241, 2761 *et seq.*

²⁴⁹*Id.*, 2762.

²⁵⁰*Id.*, 2763.

²⁵¹*Id.*

Arabia, Burma and Nigeria, the corporations' places of business,²⁵² with allegations based on indirect or direct complicity.²⁵³ Accordingly, a crucial determinant in these cases is the actionability of an indirect involvement of private actors in alleged wrong-doings by state actors. In this context, a defendant corporation's liability depends on two aspects: Can a private actor be held accountable for another actor's human rights violations? And does the actor have to be a state entity? In the case, the Unocal Corporation was sued for aiding and abetting the Myanmar military government in subjecting resident villagers to forced labor, murder, rape and torture during construction of a gas pipeline.²⁵⁴ Whereas in prior proceedings action had been dismissed against the Myanmar government pursuant to the Foreign Sovereign Immunities Act (FSIA)²⁵⁵ and against french corporate defendant Total for lack of personal jurisdiction,²⁵⁶ subject matter jurisdiction under the ATS regarding remaining defendants was affirmed;²⁵⁷ however, the District Court for the Central District of California granted defendants' subsequent motion for summary judgement on Doe and Roe actions²⁵⁸ and plaintiffs appealed before the Court of Appeals for the Ninth District.

Unocal was involved in the pipeline project insofar as the corporation and its wholly owned subsidiary, Union Oil Company of California, acquired a 28 % interest from Total, which had been licensed by Myanmar Oil, a state owned company established by the military government, to produce, transport, and sell natural gas from the Yadana Field off the Myanmar coast.²⁵⁹ Total set up a subsidiary ("Total Myanmar Exploration and Production"), consisting of a Gas Production Joint Venture and a Gas Transportation Company.²⁶⁰ To hold its 28 % interest

²⁵²*Carmichael v. United States Technologies Corp.*, 835 F.2d 109, 111 (1988); *Doe I v. Unocal Corp.*, 395 F.3d 932 (2002); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

²⁵³*Cf. Ramasastry, supra note 6*, 131.

²⁵⁴*Doe I v. Unocal Corp.*, 395 F.2d 932 at 936; prior proceedings *Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329, 332 (C.D.Cal.1997), ("*Roe I*"); *Doe I. v. Unocal Corp.*, 963 F.Supp. 880, 883. (C.D.Cal.1997) ("*Doe I*").

²⁵⁵*Doe I. v. Unocal Corp.*, 963 F.Supp 880.

²⁵⁶27 F.Supp2d 1174.

²⁵⁷William J. Aceves, *Doe v. Unocal*. 963 F.Supp. 880, 92 American Journal of International Law, 309–14, 309, 963 F.Supp 880, 884.

²⁵⁸*Doe v. Unocal Corp.*, 110 F. Supp.2d 1294 (C.D.Cal.2000).

²⁵⁹*Doe I v. Unocal Corp.*, 395 F.3d 932 (2002), 937.

²⁶⁰*Id.*

in Total's Gas Transportation Company, Unocal also set up a wholly owned subsidiary, the "Unocal International Pipeline Corporation". It was in the construction of the gas pipeline, running through the Tenasserim region, that alleged human rights violations occurred.²⁶¹ Plaintiffs were villagers from that region, claiming to have been subjected to forced labor in the construction of the pipeline.²⁶² In the enforcement of the labor program, villagers were allegedly further subjected to rape as well as to murder, summary execution and torture in retaliation of attempted escapes.²⁶³

When granting Unocal's motion for summary judgement, the California District Court argued that Unocal was not individually liable for the Myanmar military's human rights violations. Citing *Kadic*,²⁶⁴ the court referred to guidance by the "color of law" jurisprudence of 42 U.S.C. § 1983 to determine whether a private defendant had engaged in official action for purposes of ATS jurisdiction.²⁶⁵ Applying the joint action test from *Dennis v. Sparks*,²⁶⁶ according to which "state action is present if a private party is a 'willful participant in joint action with the State or its agents'",²⁶⁷ the Court held that plaintiffs presented "no evidence that Unocal 'participated in or influenced' the military's unlawful conduct (...) nor (...) that Unocal 'conspired' with the military to commit the challenged conduct."²⁶⁸ Furthermore, plaintiffs presented "no evidence Unocal 'controlled' the Myanmar military's decision to commit the alleged tortious acts."²⁶⁹ Although reaffirming that forced labor, as a modern form of slavery, may establish individual liability under the ATS,²⁷⁰ the court held that plaintiffs failed to prove required fact "that Unocal sought to employ forced or slave labour."²⁷¹ After granting summary judgement on all federal claims, the Court declined to exercise supplemental ju-

²⁶¹*Id.*, 938.

²⁶²*Id.*, 939.

²⁶³*Id.*, 939 *et seq.*

²⁶⁴*Kadic v. Karadzic*, 70 F.3d 232 (1995).

²⁶⁵*Doe v. Unocal Corp.*, *supra* note 258, 1305.

²⁶⁶*Dennis v. Sparks*, 449 U.S. 24, 27-28, 101S.Ct. 183, 186, 66 L.Ed.2d 185 (1980).

²⁶⁷*Doe v. Unocal Corp.*, *supra* note 258, 1305.

²⁶⁸*Id.*, 1306-07.

²⁶⁹*Id.*, 307.

²⁷⁰*Id.*, 307-08.

²⁷¹*Id.*, 1310.

jurisdiction over any state law claims.²⁷² Plaintiffs appealed²⁷³ and the The United States Court of Appeals for the Ninth Circuit remanded the case to the District Court for further proceedings, reversing the District Court’s grant of summary judgement on plaintiffs’ claims of forced labor, murder and rape.²⁷⁴

In its decision, the court of appeals reaffirmed actionability of violations of international law norms that are “specific, universal and obligatory”.²⁷⁵ It found all alleged torts to be violations of *jus cogens* norms and thus of the law of nations, affording jurisdiction under the ATS.²⁷⁶

The next threshold question regarding ATS cases against private parties the Court addressed was “whether the alleged tort requires the private party to engage in state action for ATS liability to attach, and if so, whether the private party in fact engaged in state action.”²⁷⁷ Referring to Judge Edwards’ establishment of individual liability in *Tel–Oren v. Libyan Arab Republic*²⁷⁸ for a “handful of crimes”²⁷⁹ including slave trading, and its extension in *Kadic*,²⁸⁰ the Ninth Circuit reaffirmed the view that “even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach”.²⁸¹ Accordingly, for private liability under the ATS to attach, the crimes to which the actor’s alleged offenses have served as a means needed to be qualified as such to which the law of nations would attribute individual liability absent of state action. Reaffirming the view that “[f]orced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required”,²⁸² this requirement was satisfied. The deciding question

²⁷²*Id.*, 1311.

²⁷³Simultaneously, plaintiffs re-filed their state-law claims in California state court, <https://www.earthrights.org/legal/doe-v-unocal-case-history>.

²⁷⁴*Doe I v. Unocal Corp.*, *supra* note 259, 962-3.

²⁷⁵*Id.*, 944.

²⁷⁶*Id.*, 945.

²⁷⁷*Id.*

²⁷⁸*Tel-Oren*, *supra* note 233.

²⁷⁹*Id.*, 794-95.

²⁸⁰*Kadic*, *supra* note 264.

²⁸¹*Doe I v. Unocal Corp.*, *supra* note 259, 946.

²⁸²*Id.*, 946.

then was to what extent Unocal could be held accountable for the forced labor program of the Myanmar military: “Under what circumstances may a private entity doing business abroad be held accountable in federal court for international law violations committed by the host government in connection with the business activities of the private entity; and to what body of law do we look in order to determine the answer?”²⁸³

Thus, before discussing actionable modes of participation under the ATS, the court had to determine the appropriate branch of law, i.e. federal tort law or principles of international criminal law as federal law, that would apply.²⁸⁴ Plaintiffs argued that Unocal had aided and abetted the Myanmar military in their subjection to forced labor. However, whereas the District Court in *Doe I* had held that Unocal could not be found liable due to lack of active participation,²⁸⁵ the court of appeals emphasized that the court had incorrectly borrowed the “active participation” standard from the Nuremberg Military tribunals (NMT), where defendants’ “necessity defense” had to be overcome.²⁸⁶ Nonetheless, the court agreed²⁸⁷ that international law, as developed by international criminal tribunals such as the NMT, was the applicable substantive law from which liability standards had to be derived.²⁸⁸ The court accordingly referred to decisions by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to ascertain the current standard for aiding and abetting liability,²⁸⁹ the *actus reus* requirement being “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”²⁹⁰ and the *mens rea* requirement being “actual or constructive (i.e. reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.”²⁹¹

²⁸³Concurring opinion of Judge Reinhardt, *Doe I v. Unocal Corp.*, *supra* note 259, 965.

²⁸⁴Koebele, *supra* note 34, 253.

²⁸⁵*Doe v. Unocal*, *supra* note 258, 1310.

²⁸⁶*Doe I v. Unocal*, *supra* note 259, 947.

²⁸⁷The majority of the court elected to apply international law principles against the Judge Reinhardt’s opinion that, with reference to *Erie*, the Court was required to look to federal common law to resolve such ancillary issues as whether a third party may be held liable in tort for a governmental entity’s violation of the law of nations.

²⁸⁸*Doe I v. Unocal*, *supra* note 259, 948.

²⁸⁹*Id.*, 950.

²⁹⁰*Id.*, 952.

²⁹¹*Id.*, 953.

According to the facts of the case, Unocal was found liable to alleged violations, as there was little doubt that forced labor was used, that Unocal knew of and benefitted from the practice, gave practical assistance to the crime in hiring the Myanmar Military to provide security and build infrastructure and knew that its conduct would encourage the Military's actions.²⁹² The court remanded to the District Court for further proceedings and the case was eventually settled.²⁹³

Unocal was the first case to establish corporate liability under the ATS for violations of international law even in the absence of state action. Additionally, in the case at hand, the corporation was to be held accountable not for its own action but for indirect liability, based on the conduct of partners and joint ventures.²⁹⁴

3.3.4 Corporate Liability and the Presumption against Extraterritoriality: *Kiobel v. Royal Dutch Petroleum*

The *Kiobel* case,²⁹⁵ decided by the Supreme Court in 2013, regarded alleged violations by the Nigerian government against residents of Ogoniland, an area located in the Niger Delta.²⁹⁶ These allegations included extrajudicial killings, crimes against humanity, torture and cruel treatment, arbitrary detention, violations of the rights to life, liberty, security and association, forced exile and property destruction.²⁹⁷ The defendant was Shell Petroleum Development Company corporation (Shell), sued for aiding and abetting the Nigerian government in committing alleged violations of the law of nations. Respondent corporation, incorporated in Nigeria, was a joint subsidiary of Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., two holding companies incorporated in the Netherlands and England.²⁹⁸ The alleged violations occurred in the context of the subsidiary's engagement in oil exploration and production in Ogoniland.²⁹⁹ As residents began protesting the environmental effects of defen-

²⁹²*Id.*, 952-3.

²⁹³<https://www.earthrights.org/legal/doe-v-unocal>, last accessed: 15 July 2016.

²⁹⁴Aceves, *supra* note 257, 313.

²⁹⁵*Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

²⁹⁶*Id.*, 1662.

²⁹⁷*Id.*, 1663.

²⁹⁸*Id.*, 1662.

²⁹⁹*Id.*

dant's practice, Shell allegedly enlisted the Nigerian Government to violently suppress these demonstrations.³⁰⁰ Subsequently, Ogoniland residents were attacked by Military and Police Forces, subjected to beating, rape, killing and arrestments as well as destruction of property.³⁰¹ Two leading personalities of the Ogoni Movement, Ken Saro Wiwa and Dr. Barinem Kiobel, were arrested, sentenced to death and executed in 1995.³⁰²

Survivors filed a class action suit in the United States District Court for the Southern District of New York³⁰³ under the ATS, among them Barinem Kiobel's widow Esther Kiobel, then residing in the United States under political asylum.³⁰⁴ The District Court dismissed claims against corporate defendant in part regarding aiding and abetting property destruction, forced exile, extrajudicial killing and violations of the rights to life, liberty, security, and association;³⁰⁵ with remaining claims of aiding and abetting arbitrary arrest and detention, crimes against humanity and torture or cruel, inhuman, and degrading treatment, the District Court certified entire order for interlocutory appeal.³⁰⁶

The Court of Appeals for the Second Circuit affirmed and reversed in part,³⁰⁷ in conclusion dismissing the entire claim. As the ATS would confer jurisdiction over torts for violations of the law of nations (or treaties, not applicable in the case), i.e. norms of customary international law, according to the *Sosa* Test "specific, universal and obligatory",³⁰⁸ the scope of liability under the ATS would have to be determined according to the same standard.³⁰⁹ Although the Court, as in *Unocal*, referred to international law regarding the question of liability, the Court did not look to define the proper standard of aiding and abetting liability, but rather addressed the more general question of corporate liability being a norm of interna-

³⁰⁰*Id.*

³⁰¹*Id.*

³⁰²Miriam Saage-Maaß and Leander Beinlich, *Das Ende der Menschenrechtsklagen nach dem Alien Tort Statute?*, KJ 48, no. 2, 146–58, 148 (2015).

³⁰³*Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457 (S.D.NY 2006).

³⁰⁴*Id.*, 1663.

³⁰⁵see *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111(2nd Cir. 2010), 124.

³⁰⁶*Id.*

³⁰⁷*Id.*, 114.

³⁰⁸*Sosa v. Alvarez-Machain*, *supra* note 241, *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 305, 148.

³⁰⁹*Id.*, 118.

tional law.³¹⁰ It thus did not seek to determine under what circumstances a corporation could be held liable, but if it could be held liable at all. Referring decisions of international criminal tribunals such as the USMT and the ICTY,³¹¹ international treaties³¹² as well as the work of publicists,³¹³ the Court eventually held that “No Corporation has ever been subject to *any* form of liability (Whether civil, criminal or otherwise) under the customary international law of human rights.”³¹⁴ As several Courts in subsequent cases continued to permit actions against corporate actors under the ATS to proceed,³¹⁵ in 2011 the Supreme Court granted a writ of certiorari, *Kiobel* being the second ATS case after *Sosa* to reach Supreme Court level. More than 90 *amicus curiae* briefs were submitted, by corporations such as Chevron, BP and Coca-Cola, as well as by governments and legal scholars.³¹⁶ The issues presented by the Second Circuit were

“1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, is a merits question, (...) or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, (...), or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, (...)”³¹⁷

The Supreme Court, however, extended review to the question “whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory

³¹⁰*Id.*, 126.

³¹¹*Id.*, 132 *et seq.*

³¹²*Id.*, 137 *et seq.*

³¹³*Id.*, 42 *et seq.*

³¹⁴*Id.*, 148.

³¹⁵e.g. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011), *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011), *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), Michael Stürner, *Die Territorialen Grenzen der Human Rights Litigation in den USA*, JZ 69, no. 1, 13–23, 17, fn. 69 (2014); Sage-Maaß/Beinlich, *supra* note 302, 148.

³¹⁶*Id.*

³¹⁷Petition for Writ of Certiorari at i, *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 295.

of a sovereign other than the United States.”³¹⁸ and applied the *presumption against extraterritoriality*: “The presumption against extraterritorial application helps to ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”³¹⁹ Citing its own decision in *Benz v. Compania Naviera Hidalgo*,³²⁰ the Court explained that “For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.” However, the Court held that the ATS did not “evinced clear indication of extraterritoriality required to rebut presumption against extraterritorial application”.³²¹ Not only did the Court renounce the Second Circuit’s holding in *Filártiga* (see 3.3.1), but whereas in the latter case the Second Circuit had affirmed that Congress “provided, in the first Judiciary Act, (...) for federal jurisdiction over suits by aliens where principles of international law are in issue”,³²² the Supreme Court expressly stated that permission by Congress’ intention for ATS to apply extraterritorially was not apparent.

As the court did not apply the Act of State Doctrine, the facts of the case were not open to consideration of the balancing test that had been employed in *Unocal*. Instead, the court focussed on the extraterritorial applicability of the ATS, thus, “whether a claim may reach conduct occurring in the territory of a foreign sovereign”,³²³ in conclusion limiting its reach by application of the presumption against extraterritoriality. Although based on other questions than those originally referred to it, the Supreme Court affirmed the judgment of the Court of Appeals.

3.4 Discussion

The Supreme Court decision in *Kiobel* was criticized not only for its implications regarding human rights litigation but also for reasons of legal doctrine. The

³¹⁸*Id.*, 1662.

³¹⁹*Id.*, 1664.

³²⁰*Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (77 S.Ct. 699, 1 L.Ed.2d 709) (1957).

³²¹*Id.*, 1660.

³²²*Filártiga v. Peña-Irala*, *supra* note 213, see 3.3.1.

³²³*Id.*, 1664.

Supreme Court did reaffirm that the ATS was strictly jurisdictional,³²⁴ and the *Sosa* standard³²⁵ for determination of actionable violations of the law of nations remains applicable.³²⁶ Accordingly, causes of action can be established and extended as part of the common law,³²⁷ derived from customary international law. Although it had been remarked that the court had applied the presumption against extraterritoriality to a jurisdictional statute, it is the latter fact of evolving customary international law that, according to the court, would *a fortiori* warrant territorial restraint in the case of ATS litigation: “Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS.”³²⁸

Underlining the ATS’ jurisdictional nature as well, William Dodge, on the other hand, pointed out that the application of customary international law, binding on all states (see 2.3), would not amount to an exercise of “prescriptive jurisdiction”, i.e. application of substantive U.S. law to a given actors’ conduct³²⁹ – customary international law is per definition not a sole matter of U.S. law and thus shared by the international community.³³⁰ Others have argued that the spirit and purpose of the statute actually *was* to apply to extraterritorial conduct, or that extraterritorial reach was at least necessarily implied.³³¹ As it was undisputed that the ATS regulates federal jurisdiction in international law cases, its express reference to an international law body would underline the purpose of its extraterritorial application³³² – and even with reference to its historical roots, as emphasized in

³²⁴*Kiobel*, *supra* note 295, 1660.

³²⁵See *supra* chapter 3.3.2.

³²⁶*Kiobel*, *supra* note 295, 1670.

³²⁷Michael Stürmer, *Die Territorialen Grenzen der Human Rights Litigation in den USA*, JZ 69, no. 1, 13–23, 15 (2014).

³²⁸*Kiobel*, *supra* note 295, 1664

³²⁹William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int’l L.J., 37 (2010).

³³⁰The District Court of California gave a similar reasoning in *Doe v. Unocal Corp.*, *supra* note 255, 894, regarding the act of state doctrine: “Moreover, where jurisdiction is available for jus cogens violations, it is less likely that judicial pronouncements of a foreign sovereign’s actions will undermine the policies behind the act of state doctrine”. The Act of State Doctrine serves to secure separation of powers, (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-2 (1964)), as it may be invoked to prevent interference of the judiciary with the “political branches”, *Id.*, 428.

³³¹Stürmer, *supra* note 327, 19; Saage-Maaß/Beinlich, *supra* note 302, 155.

³³²Axel Halfmeier, *Transnationale Delikte vor nationalen Gerichten*, in: Festschrift für Ulrich Magnus zum 70. Geburtstag, 438 (2014).

the opinion of Justice Breyer, cases of piracy would have always concerned the territory of another sovereign.³³³

If it was the purpose of the presumption against extraterritoriality to constrain extraterritorial reach of substantive law where Congress has not so intended, the ATS would be precisely a manifestation of such limited allocation of jurisdiction over foreign-cubed cases.³³⁴ Thus, providing for judicial conflict resolution, the ATS may even be considered as a contribution to the prevention of foreign policy conflicts.³³⁵

In summary, it can be noted that the court did limit the ATS' extraterritorial reach, but has not resolved the issue of corporate liability. Interestingly, most lower courts concerned with corporate defendants have rarely explicitly addressed the question, but rather assumed its admissibility.³³⁶ Accordingly, by avoiding clarification, the Supreme Court did not explicitly reject the concept.³³⁷ On the contrary, clarifying the requirement to displace presumption against extraterritoriality, the Court explained that "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices",³³⁸ and thus contemplated the option.³³⁹ By acknowledging the actual possibility to displace the presumption where claims "touch and concern the territory of the United States (...) with sufficient force",³⁴⁰ an application to extraterritorial conduct is also not barred completely. Notwithstanding, the scope of the ATS is now substantially limited and many seminal ATS cases with a foreign-cubed context might not have proceeded after *Kiobel*.³⁴¹

Although there is no rule comparable to the ATS with direct reference to international law in Europe, civil litigation against corporations is possible under domestic tort law.³⁴² Thus, where ATS litigation is barred by *Kiobel*, another ap-

³³³*Kiobel*, *supra* note 295, 1672.

³³⁴Stürmer, *supra* note 327, 18.

³³⁵*Id.*, 19.

³³⁶Constantin Köster, *Die Völkerrechtliche Verantwortlichkeit Privater (multinationaler) Unternehmen Für Menschenrechtsverletzungen*, 52 (2010).

³³⁷Saage-Maaß/Beinlich, *supra* note 302, 151.

³³⁸*Kiobel*, *supra* note 295, 1669.

³³⁹Saage-Maaß/Beinlich, *supra* note 302, 151.

³⁴⁰*Kiobel*, *supra* note 295, 1660.

³⁴¹Stürmer, *supra* note 327, 20.

³⁴²*Id.*, 22.

appropriate forum may be found in the European Union. Regarding the *Kiobel* case itself, defendant corporations were Dutch and British, and consequently, Royal Dutch Shell was later sued in The Hague for the alleged oil pollution in the Niger Delta.³⁴³

Due to their transnational nature, private international, i.e. conflict of law rules, have to be applied,³⁴⁴ determining both jurisdiction as well as the applicable law (see chapter 4.2.1). Following Dodge's analogy to such conflict-of-law cases,³⁴⁵ ATS litigation reveals some similarities to transnational tort cases, at least as regards jurisdictional rules: Personal jurisdiction has to be properly acquired, is limited by principles of due process and subject to statutory implementation (see chapter 3.2.1); accordingly, limitation of litigation by way of strict application of personal jurisdiction³⁴⁶ rules might have conveyed a proper and sufficient restraint on U.S. courts; additionally, conflict of law rules would provide for an adequate balancing of conflicting interests.³⁴⁷ However, *Kiobel* may also be read as an embodiment of a general change of attitude in the U.S., with an increased orientation towards internal issues.³⁴⁸ It will depend on respective courts if human rights actions under the ATS will proceed according to the new premises, or if litigation of such cases will migrate to the state courts.

³⁴³*Oguru, Efang & Milieudéfensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, No. 330891/ HA ZA 09-579 2009, Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 CityU LR 1, 4 (2011); *Rechtbank*, 30.01.2013, (LJN) BY9854, Halfmeier, *supra* note 332, 440.

³⁴⁴Geert van Calster, *European Private International Law*, 366 (2nd ed. 2016).

³⁴⁵Criticizing Prof. M. Ramsey's view that ATS suits over foreign defendants would violate international law limits on "jurisdiction to prescribe", i.e. application of a state's substantive law to a given actor's conduct, William Dodge writes: "Courts do not apply U.S. substantive law in ATS cases; they apply customary international law. (...) In international law terms, the kind of jurisdiction courts exercise in ATS cases is not jurisdiction to prescribe but jurisdiction to adjudicate. It is the same kind of jurisdiction that courts exercise in conflict-of-laws cases when they apply law that is not made by their own sovereign to parties over whom they have personal jurisdiction.", Dodge, *supra* note 329, 37 (footnotes omitted).

³⁴⁶"Jurisdiction to adjudicate", Dodge, *supra* note 329, 38.

³⁴⁷*Cf. Filártiga*, *supra* note 213, 885.

³⁴⁸Halfmeier, *supra* note 332, 438.

4 Transnational Tort Litigation in the European Union

Again, the idea behind seeking industrialized home states as desirable forum for a plaintiff's claim is based on several observations and assumptions. First of all, it may be unavailing to look for relief in a victim's home state in cases where the alleged conduct took place in complicity with representatives of respective governments. Lax oversight over corporate entities and poor enforcement of protective laws or minimum standards might diminish overall trust in the governance system, including the judiciary.³⁴⁹

Additionally, victims may find it impossible to fund lawyers and experts; accordingly it may be more promising to sue corporations before their home state or the home state of the parent company, when specialized law offices and e.g. contingency fee agreements are available.³⁵⁰ As regards the KIK case, (see chapter 4.3), the lawsuit was strongly supported by the ECCHR, an internationally active NGO, together with local organizations in Pakistan.

The reasoning behind bringing the case before a German court, however, was not mainly guided by a forum-based choice, but determined by the addressee of the claim. Within the context of the European Union, rules on jurisdiction for transnational litigation are harmonized, providing for common rules throughout the Union regarding the determination of the proper forum. Thus, advancing the claim against KIK is a smart choice, also as it has the economic means and thus deeper pockets for the payment of possible damages. At the same time, the EU-level rules bar the concept of "universal jurisdiction", labelled as "exorbitant jurisdiction", in litigation among the Member States.³⁵¹ Jurisdiction based e.g. on "transitory" presence is thus not available in cases where respective regulations are applicable (see below, chapter 4.1).³⁵² Article 5 of the Brussels I recast regulation emphasizes its exclusive applicability (as specified in section 2-7 of chapter II) and lists objectionable rules of jurisdiction.³⁵³ As the defendant is the determi-

³⁴⁹Cf. Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 CityU LR 1, 14 (2011).

³⁵⁰*Id.*, 10.

³⁵¹Stephens, *supra* note 16, 23.

³⁵²*Id.*

³⁵³Wolfgang Hau and Hartmut Linke, *Internationales Zivilverfahrensrecht*, para. 4.19 (6th ed. 2015).

nant factor for the purpose of jurisdiction, he or she is protected against exorbitant claims of jurisdiction, albeit only if domiciled in the EU.³⁵⁴ Regarding other defendants, the opposite holds true: Art 6(2) stipulates that a plaintiff, domiciled in a Member State, may “avail himself in that Member State of the rules of jurisdiction there in force”, including even those rules that are usually unavailable in inter-EU litigation.³⁵⁵ However, in practice, most Member States since have abandoned such jurisdictional rules regarded as “exorbitant”.³⁵⁶

As has been shown above (see chapters 3.2 and 3.3), jurisdiction under the ATS as well as of state courts requires a certain nexus to the forum of the subject matter or the defendant (“touch and concern” test and *due process* clause regarding general jurisdiction, respectively). This now similar approach in both jurisdictions limits “universal” or “exorbitant” claims, meaning that defendants in industrialized home states have to be sued before the appropriate forum according to those rules (which will generally be a corporation’s home state).

Efforts of harmonization of rules determining jurisdiction in Europe were taken as early as the 1960s, when the six original Member States of the EEC, Belgium, Germany, France, Italy, Luxembourg and The Netherlands, started negotiating what resulted in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.³⁵⁷ The convention has since been replaced by the Brussels I regulation³⁵⁸ (with regard to the territories of the Member States covered by the TFEU), which came into force in 2002 and was superseded by the recast regulation in 2015 (see 4.1).³⁵⁹ Recital 3 and 4 of the Brussels I recast regulation emphasize the importance of unified rules on jurisdiction and judicial cooperation for the establishment of an area of freedom, security and justice and the sound operation of the internal market. Harmonized rules are especially important in regard of the fact that the appropriate forum will then usually determine the applicable substantive and procedural law according to the *lex*

³⁵⁴van Calster, *supra* note 344, 65.

³⁵⁵Hau/Linke, *supra* note 353, para. 4.19.

³⁵⁶van Calster, *supra* note 344, 67.

³⁵⁷C. M. V Clarkson and Jonathan Hill, *The Conflict of Laws*, 61 (4th ed.2011).

³⁵⁸Regulation (EC) No 44/2001, OJ 2001 L12/1.

³⁵⁹Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Clarkson/Hill, *supra* note 357, 62.

fori. Accordingly, to achieve neutrality in the identification of the applicable law as envisioned by *von Savigny*,³⁶⁰ the Rome regulations (see 4.2.1) provide for uniform rules on the applicable law on a European level. To that end, Art. 3 of the Rome II regulation on the law applicable to non-contractual obligations prescribes universal application, meaning “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.” The Rome I regulation on the law applicable to contractual obligations, on the other hand, is based on the contractual parties’ freedom of choice, with detailed additional rules on the applicable law in cases absent any choice.

As there is no statute comparable to the ATS in Europe, litigation of human rights violations usually has to be based on conventional tort law.³⁶¹ Due to the transnational nature of the cases, the applicable law must be determined according to conflicts of law rules, in the European context by either national or supranational (EU) law, depending on the particular case and the parties involved. Where a plaintiff seeks to sue the parent company, tort liability can be based e.g. on duty of care or negligence,³⁶² which may even include allegations of torture, based on neglectful control of a subsidiary’s response to environmental protests.³⁶³ Due to the strict legal separation between corporate entities, however, liability is not easily conveyed from daughter to parent company, solely based on corporate relations (*cf.* chapter 4.3.2).

4.1 Jurisdiction: Brussels I regulation (recast)

In the European Union, jurisdiction over matters with a cross-border element is determined by the Brussels I regulation (recast),³⁶⁴ which superseded the Brussels I regulation from 2000 with effect from 10 January 2015.³⁶⁵ The cross-border element is a precondition for applicability of the regulation, as the com-

³⁶⁰van Calster, *supra* note 344, 4.

³⁶¹Meeran, *supra* note 349, 3.

³⁶²*Id.*

³⁶³*Id.*, 7.

³⁶⁴Brussels I regulation (recast), *supra* note 359.

³⁶⁵“Subject to Articles 70 and 71, this Regulation shall, as between the Member States, supersede the conventions that cover the same matters as those to which this Regulation applies. In particular, the conventions included in the list established by the Commission pursuant to point (c) of Article 76(1) and Article 76(2) shall be superseded.”, Art. 69 of the Brussels I Regulation (recast).

petence of the European Union to regulate judicial cooperation is limited to civil matters transcending the domestic jurisdiction of single Member States (Art. 81 Para. 1 TFEU).³⁶⁶ Although in the first instance, the regulation binds the EU Member States in their internal relations, the regulation is also applicable where there is only one Member State and at least one third state involved.³⁶⁷ The ECJ in *Owusu*³⁶⁸ clarified that an “involvement of a Contracting State and a non-Contracting State (...) would also make the legal relationship at issue international in nature.”³⁶⁹ The regulation is thus also applicable in cases where a third country resident sues a defendant domiciled in the EU (see Art. 4 Brussels recast regulation),³⁷⁰ or where foreign plaintiffs sue an EU-based corporation. However, in the case of a defendant domiciled in a third country, jurisdiction of the courts of each Member State shall be determined by respective rules of that Member State’s law (Art. 6). The regulation specifies exclusive, general, special and residual jurisdiction and further provides rules on jurisdiction by appearance (Art. 26), for insurance, consumer and employment contracts (Art. 10-23), agreements on jurisdiction (Art. 25), loss of jurisdiction (Art. 29-32) and application for provisional or protective measures (Art. 35).³⁷¹

Exclusive jurisdiction is afforded by Art. 24, “regardless of the domicile of the parties”. According to Art. 4 No. 1, courts have general jurisdiction over persons at the place of their residence (*actor sequitur forum rei*), with Art. 63 determining the domicile of juridical persons by their statutory seat, central administration or principal place of business.

Articles 7-9, on the other hand, assign special jurisdiction over an enumerated number of instances, e.g. “in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;” (Art. 7(2)) and “as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;” (Art. 7(5)). Art. 6, then, provides for residual jurisdiction

³⁶⁶Linke/Hau, *supra* note 353, para 4.43.

³⁶⁷*Id.*, para 4.46.

³⁶⁸*Andrew Owusu v. NB Jackson*, Case C-281/92 (2005).

³⁶⁹*Id.*, para 26.

³⁷⁰Linke/Hau, *supra* note 353, para. 4.46.

³⁷¹van Calster, *supra* note 344, 25.

regarding defendants not domiciled in any Member State of the EU. Although Art. 4 No. 1 attributes jurisdiction to the courts of their domicile over persons regardless of their nationality, and irrespective of where the harm occurred, “European Courts will typically look for a territorial nexus with the forum”.³⁷²

4.2 Applicable Law

4.2.1 Rome regulations

Regarding the choice of law in international litigation, the essential rules for the European Union are laid down in the Rome regulations on the applicable law.³⁷³ Both Rome I and II apply to civil and commercial matters in cases where there is a conflict of laws, i.e. a foreign element transcending the domestic context of a Member State. Whereas Rome I applies to all contractual obligations, Rome II applies to torts and other non-contractual obligations, the scope of both regulations being subject to the exclusions of Art. 1(2) and (3) of each regulation. Applicability of the regulations is exclusive of each other,³⁷⁴ and e.g. Articles 10(1), 11(1) and 12(1) of Rome II link determination of the applicable law to the underlying relationship (contractual/pre-contractual or tort/delict) in cases of unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*, respectively, to which, in cases of contracts, the rules of Rome I apply.³⁷⁵

Rome I applies to contracts concluded after 17 December 2009 (Art. 28) and Rome II “to events giving rise to damage which occur after its entry into force” (Art. 31), which was the 11 January 2009 (Art. 32).

4.2.1.1 Regulation on the law applicable to non-contractual obligations

(Rome II) Article 1 of the Rome II regulation defines its scope, stating that

³⁷²Jan Wouters and Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 *Geo. Wash. Int'l L. Rev.* 4, 939–75, 941 (2009).

³⁷³Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

³⁷⁴Clarkson/Hill, *supra* note 357, 299.

³⁷⁵van Calster, *supra* note 344, 272.

“This regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. (...)” Apart from the exceptions enumerated in Art. 2(2), the regulation covers all non-contractual obligations in civil and commercial matters, with recital 11 emphasizing that “The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. (...)” However, the regulation does not provide for or refer to any definition of non-contractual obligations.³⁷⁶ Article 2(1) further specifies: “For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.” Although thereby unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* are incorporated into the regulation’s material scope, their specific articles 10(1), 11(1) and 12(1) each stipulate that in respective cases the applicable law should be that which governs an existing relationship between the parties, either arising out of a contract or a tort/delict, thus enabling applicability of either regulation.³⁷⁷

Following the basic pattern of EU private international law,³⁷⁸ the regulation defines a general rule in Article 4(1), determining as applicable law that of the place of tort (*lex loci delicti*), and specifying as “place of tort” the place where the damage occurs: “Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.” (*lex loci damni*). With this Article, the regulation explicitly determines non-applicability of the widely held concept of *lex loci delicti commissi* (in cases where the places of the event giving rise to and occurrence of the damage diverge), which will as a consequence most likely lead to the application of the law of the victim’s home.³⁷⁹ Although intended as favoring the plaintiff and thus striking “a fair balance between the interest of the person claimed to be liable and the persons sustaining the damage

³⁷⁶*Id.*, 244.

³⁷⁷*Cf. Id.*, 272.

³⁷⁸*Id.*, 239.

³⁷⁹*Id.*, 252.

(...)”,³⁸⁰ it most likely depends on the particular jurisdiction’s law in question, if this will necessarily be the case.³⁸¹

The general exception to the *lex loci damni* principle of Art. 4(1) is provided in Art. 4(2), stating: “However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.” (again, should place of occurrence and place of habitual residence diverge). Art. 23 then defines as habitual residence the place of central administration for companies and other incorporated or incorporated bodies (Art 23(1)) and for natural persons, acting in the course of his or her business activity, his or her principal place of business (Art. 23(2)).

An escape clause, overriding the determinations in Art. 4(1) and (2) is provided by Art. 4(3), according to which “Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. (...)” The paragraph goes on to give an example of such a “manifestly closer connection”, which “might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.” Here, again, the regulation links the law applicable to torts to an underlying relationship based on e.g. a contract.

Among the specific torts for which the regulation provides special choice of law rules, is environmental damage (Art. 7): “The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.” This rule favors the sufferers of environmental damage, as through provided choice, a higher level of protection may be achieved, e.g. in cases where the events that gave rise to the damage can be connected to a corporation’s home state, given that state provides for stricter environmental laws and enforceability. Should “a decision taken at a corporation’s headquarters” be “considered the

³⁸⁰Recital 16.

³⁸¹*Cf. van Calster, supra note 344, 252.*

‘event giving rise to the damage’”,³⁸² such a finding provides a plaintiff with the choice to have the law of that headquarter’s home state applied.³⁸³ Accordingly, recital 25 emphasizes that “Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. (...)”

Finally, the regulation provides for a general choice of law rule in Art. 14(1), effected “(a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.”, with the limitation of (b) to commercial actors protecting weaker parties,³⁸⁴ and subject to the exceptions laid down in Art 14(2) and (3).

4.2.1.2 Regulation on the law applicable to contractual relationships

(Rome I) As in Rome II, Art. 1 of Rome I determines the material scope of its applicability to situations involving a conflict of laws in civil and commercial matters, albeit to contractual obligations. Art. 1(2) lists exceptions from its applicability, e.g. “obligations arising out of dealings prior to the conclusion of a contract” (Art. 1(2)(i)), which are covered by Rome II.³⁸⁵ The basic principle of the regulation is freedom of choice,³⁸⁶ as stipulated in Article 3(1): “1. A contract shall be governed by the law chosen by the parties. (...)”. This freedom goes as far as allowing for choice of a law not having any connection with the parties or the contract, whatsoever.³⁸⁷ The chosen law, however, should not prejudice application of the law of the country in which “all other elements relevant to the situation at the time of the choice are located” which cannot be derogated from by

³⁸²*Id.*, 265.

³⁸³*Cf. Id.*

³⁸⁴*Id.*, 269.

³⁸⁵*Id.*, 207.

³⁸⁶*Id.*, 203.

³⁸⁷*Id.*, 212.

agreement, reaffirmed in Art. 3(3), the same applying to community law in cases where the forum is located in a Member State of the European Union (Art. 4(4)). In a similar way, Articles 6(2) and 8(1) proscribe derogations from protective laws that would have been applicable absent a choice in the case of consumer contracts and individual employment contracts, respectively.

By default, individual employment contracts are "governed by the law chosen by the parties in accordance with Article 3." (Art. 8 No. 1) or "by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract." (Art. 8 No. 2). Absent a choice, Article 4 determines the applicable law for various kinds of contracts in great detail (Art. 4(1)), e.g. for a contract for the sale of goods (Art. 4(1)(a)), or a contract for the provision of services (Art. 4(1)(b)), which shall be governed by the law of the country where the seller or the service provider have their habitual residence. "Habitual residence", according to Art. 19, for "companies and other bodies, corporate or unincorporated, shall be the place of central administration." and "of a natural person acting in the course of his business activity shall be his principal place of business" (Art 19(1)). In cases where "the contract is concluded in the course of the operations of a branch, agency or any other establishment, (...) the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence." (Art 19(2)).

The fall-back clause in Art 4(2) in the same manner provides that "the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence" in cases where the contract is not covered by paragraph 1. Accordingly, a court is required to characterize the contract in question and, where it not fits in one of the categories of Art. 4(1), apply the "characteristic performance" test from Art. 4(2); according to the escape clause of Art. 4(4), however, a "manifestly closer connection" may override paragraphs 1 and 2.³⁸⁸ Finally, "Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected." (Art. 4(4)).

³⁸⁸*Id.*, 219.

4.2.2 Ordre Public and overriding mandatory provisions

An important reserve clause regarding the application of foreign law is the *ordre public*, as codified in Art. 21 of the Rome I regulation and Art. 26 of the Rome II regulation in identical wording: “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”. Other functions of the *ordre public* regard the recognition of foreign judgments (e.g. Art. 45 Brussels I recast regulation) and the *ordre public* as a limitation to the fundamental freedoms of the European Union.³⁸⁹ In the present context, the relevant understanding of its different concepts³⁹⁰ is that of a defense against the application of foreign law, however permissible only where the *result* of its application “is manifestly incompatible with the public policy” of the forum state in the single case at hand.³⁹¹ A defense clause is deemed necessary in the face of the Rome regulations’ universal applicability even to third country circumstances, as well as the remaining legal diversity regarding non-contractual obligations within the European Union;³⁹² at the same time, its meaning recedes regarding international contractual law due to increasingly convergent rules.³⁹³

The wording however (“may be refused *only*”) clarifies that the *ordre public* objection can only be invoked in exceptional circumstances (see also recital 37 of Rome I). Mere legal differences leading to different outcomes in respective jurisdictions therefore do not suffice to deny application of the foreign law on grounds of public policy – its scope shall be a narrow one.³⁹⁴ As the clause operates with the open fact of a law’s application being *manifestly incompatible with public policy*, its content needs to be clarified in each respective context.

Before a German Court, an understanding of the *ordre public* according to the national legal culture will be applied, as will be the case with any domestic court

³⁸⁹Michael Frey and Laura Pfeifer, *Der Ordre Public – Die öffentliche Ordnung: Derselbe Begriff, Verschiedene Funktionen – Ein Rechtsprinzip?*, EuR 6, 721–734, 721 (2015).

³⁹⁰*Id.*, 723.

³⁹¹Dieter Martiny, *Art. 21 Rom I-VO*, in: MüKoBGB, para. 1, 3 (6th ed. 2015).

³⁹²Abbo Junker, *Rom II-VO Art. 26*, in: MüKoBGB, para. 1 (6th ed. 2015).

³⁹³Michael Stürner, *Rom II-VO Art. 26*, in: BeckOGK, para. 1 (2016).

³⁹⁴Clarkson/Hill, *supra* note 357, 237.

in the European Union.³⁹⁵ The *ordre public* principle is also part of the German Civil law by way of Art. 6 of the German introductory act of the civil code, stating that “A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights.” The German *ordre public* thus explicitly incorporates fundamental rights (“civil rights”) into its substance. However, due to Rome I and II being regulations and universally applicable, Art. 21 (Rome I) and 26 (Rome II) come first, leaving applicability of Art. 6 of the German introductory act of the civil code only to the exceptional contexts specified by the regulations.³⁹⁶ This means that in consideration of public policy, a European standard must be applied, including the “Convention for the Protection of Human Rights and Fundamental Freedoms”, the “Charter of fundamental Rights of the European Union” as well as the fundamental freedoms of the European Union.³⁹⁷ At the same time, national public policy considerations cannot be invoked if in conflict with the communitarian *ordre public*.³⁹⁸ In summary, the *ordre public* has a function of protecting human rights and ensuring their observation,³⁹⁹ and at the same time may specifically not be invoked in the pursuit of any purpose conflicting with the integrational aims of the Union.⁴⁰⁰

Another provision of the Rome regulations, connected to the *ordre public* defense, is Art. 16 (Rome II) or Art. 9 (Rome I), respectively, ensuring applicability of “overriding mandatory provisions” regardless of the regulations’ default determinations of Art. 4-8 (Rome I) and 4-9 (Rome II). The connectedness of both clauses, providing for exceptions to the general rules laid out in the regulations, is illustrated by recital 37 of Rome I and 32 of Rome II.⁴⁰¹ Both clauses are influenced by human and basic rights considerations and are thus value-based.⁴⁰²

³⁹⁵Martiny, *supra* note 391, para. 3.

³⁹⁶Stürmer, *supra* note 393, para. 13.

³⁹⁷Martiny, *supra* note 391, para. 3.

³⁹⁸*Id.*

³⁹⁹Raphaël Callsen, *Eingriffsnormen und Ordre public-Vorbehalt im internationalen Arbeitsrecht: ein deutsch-französischer Vergleich*, 308 (2015).

⁴⁰⁰Junker, *supra* note 392, para. 19.

⁴⁰¹*Id.*, para. 12.

⁴⁰²Callsen, *supra* note 392, 241.

Whereas the *ordre public* provisions allow for the disapplication of foreign law subsequent to the finding of a result manifestly incompatible with public policy,⁴⁰³ overriding mandatory provisions allow for the exceptional application of respective *lex fori* in any case.⁴⁰⁴ Thus, if national rules are applicable according to Art. 16 or 9 respectively, there is no need for control through reference to the *ordre public*.⁴⁰⁵ Contrary to the *ordre public*, the relevance of overriding mandatory provisions proves to be less relevant regarding contractual relationships due to, *inter alia*, the more detailed provisions of the Rome I regulation, taking account of various aspects to determine relevant connections to the case at hand.⁴⁰⁶

Again, although the qualification of a rule being an “overriding mandatory provision” according to Rome I and II needs to be constructed by way of respective rule itself,⁴⁰⁷ in the context of the regulations, a European standard needs to be looked at.⁴⁰⁸ According to the ECJ, “that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.”⁴⁰⁹ Derived from that (still open) qualification, the minimum requirements are the possession of *jus cogens* status,⁴¹⁰ and the norm having been enacted in pursuance of the public interest of respective state.⁴¹¹ Additionally required is a connection of the facts of the case to the forum.⁴¹²

⁴⁰³When necessary, the law of the forum state will also be applied in the first case to close any remaining gaps following the disapplication or modification of the otherwise applicable foreign law, Junker, *supra* note 392, para. 26.

⁴⁰⁴Abbo Junker, *Rom II-VO Art. 16*, in: MüKoBGB, para. 6 (6th ed 2015).

⁴⁰⁵Stürner, *supra* note 393, para. 6.

⁴⁰⁶Felix Maultzsch, *Rom II-VO Art. 16*, in: BeckOGK, para. 6.

⁴⁰⁷Junker, *supra* note 404, para. 20; Felix Maultzsch, *Rom I-VO Art. 9*, in: BeckOGK, para. 18.

⁴⁰⁸Junker, *supra* note 404, para. 11.

⁴⁰⁹Judgment of 23 November 1999, *Arblade* C- 376/96 ECR I-08453, para. 30.

⁴¹⁰Andreas Spickhoff, *VO (EG) 864/2007 Art. 16*, in: BeckOK BGB, para. 1.

⁴¹¹Felix Maultzsch, *Rom I-VO Art. 9*, in: BeckOGK, para. 17; Maultzsch, *supra* note 406, para. 9.

⁴¹²*Id.*, Junker, *supra* note 404, para. 20.

4.3 Case Study: *Jabir and others v. KIK*

On 13 March 2015, a case against a corporation, based on tort law and for damages having occurred extraterritorially in relation to the forum, was brought before the district court of Dortmund in Germany by four Pakistani plaintiffs.⁴¹³ This case is without precedent in Germany and presents a model example for the application of the default rules described above.

The compensation claim is addressed at non-food and textile corporation “KIK”, contractor of a textile factory run by Ali Enterprises, that burned down and killed 259 workers and injured 47 in Karachi, Pakistan.⁴¹⁴ As KIK only sub-contracted the factory and was not corporately affiliated with Ali Enterprises, there is no direct contractual relationship between KIK and the factory’s employees. Nonetheless, plaintiffs claim a joint responsibility of KIK regarding safety measures in the factory, based, *inter alia*, on vicarious tort liability. The case serves to illustrate the application of the rules discussed above and may present a lookout at the future of transnational tort litigation in Europe. Case documents such as the petition, a legal opinion on Pakistani tort law, the enquiry report on the fire site and KIK’s statement regarding plaintiffs’ application for legal aid (hereinafter “KIK Statement of defense”) have been kindly provided by the European Center for Constitutional Rights (ECCHR).

4.3.1 Facts of the case

KIK is a German textile and non-food company, owning around 3400 branches in 8 European countries and being famous for its extreme low-price policy.⁴¹⁵ Like most comparable clothing companies, its products are mainly manufactured by supplier companies in Asia, e.g. in Bangladesh, China, India and Pakistan.⁴¹⁶

⁴¹³ECCHR, *Case Report, Pakistan – cheap clothes, perilous conditions*, available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html (2016), last accessed: 30 September 2016.

⁴¹⁴Petition *Jabir et al. v. KIK*, prepared by Geulen & Klinger (hereafter *Petition*), 6.

⁴¹⁵<http://www.kik-textilien.com/unternehmen/de/ueber-uns/>, last accessed: 12 October 2016; *KIK sustainability report 2013*, http://www.kik-textilien.com/unternehmen/fileadmin/user_upload_de/Kategorien/Nachhaltigkeitsbericht/Nachhaltigkeitsbericht-2013.pdf, 6 (2013), last accessed: 12 October 2016.

⁴¹⁶KIK sustainability report 2013, *supra* note 415, 18, 25.

In September 2012, a fire broke out at one of its supplier factories in Karachi. There is no final clearance regarding the cause of the fire and claims against the Pakistani regulatory and law enforcement authorities are still pending, accusing the latter of negligence in respective investigations.⁴¹⁷ Regardless of the cause of the fire, the high death toll is attributed to atrociously insufficient safety measures. The factory was made up of three buildings and the three-storey main building was almost completely destroyed.⁴¹⁸ According to the Enquiry Report of the Federal Investigation Agency Sindh Zone Karachi, many of the factory's windows were barred, emergency exits locked⁴¹⁹ or lead nowhere, and only one exit unobstructed.⁴²⁰ Additionally, fire detectors were lacking⁴²¹ and the intermediate level above the repository, against Pakistani regulations, had a wooden floor,⁴²² leading to the immediate expansion of the fire, accelerated by subsequent collapse of that level.⁴²³ The intermediate floor and the two upper levels were accessible only via one staircase, absent any lightning, and a hoist,⁴²⁴ and the exits for the basement lead to the ground floor where the fire had started.⁴²⁵ It was thus almost impossible to exit the building in a situation of panic, with smoke and fire obstructing the view and possible escape ways, leading many workers to die from suffocation. Whereas some managed to break open barred windows on the second floor, people in the basement and the ground level were essentially trapped.⁴²⁶ The damage was exacerbated by missing equipment for fire suppression.⁴²⁷ After the incident, survivors and bereaved of the victims of the factory fire founded the Baldia Factory Fire Affectees Association (almost 200 families), from which four plaintiffs were chosen to bring a claim against KIK in representation of all

⁴¹⁷ECCHR, *supra* note 413, 1 *et seq.*

⁴¹⁸Petition, *supra* note 414, 11.

⁴¹⁹Federal Investigation Agency Sindh Zone Karachi (FIA), *Enquiry report Fire Incident Ali Enterprises S.I.T.E. Karachi On 11th September 2012*, 13.

⁴²⁰Petition, *supra* note 414, 13.

⁴²¹FIA, *supra* note 419, 11.

⁴²²*Id.*, 6.

⁴²³Petition, *supra* note 414, 12, 15.

⁴²⁴*Id.*, 11.

⁴²⁵FIA, *supra* note 419, 11.

⁴²⁶*Petition, supra* note 414, 14.

⁴²⁷*Id.*

the victims.⁴²⁸ The plaintiffs are one survivor and three bereaved of dead factory workers, claiming damages of 30,000 € each, with interest of 5 percentage points above the base interest rate, based on vicarious liability, tort of negligence and non-delegable duty of care.

4.3.2 Applicable Law

Regarding the applicable law, the relevant regulation is Rome II (see chapter 4.2.1.1), as plaintiffs have no contractual relationship with defendant company KIK and claims are based on tort. Although liability claims are also based on the defendant's duties towards the plaintiffs, derived from the contractual relationship between Ali Enterprises and the defendant (contract with protective effect for third parties), the majority view in the literature qualifies such claims as non-contractual.⁴²⁹ In accordance with respective provisions of Rome II (Art. 4(1)), the applicable law is thus Pakistani law, as the place of tort, or more specifically, where the damage occurred (*lex loci damni*), was Karachi. According to the German Code of Civil Procedure, the court should make inquiries into the foreign laws (only) insofar as it is not aware of them (section 293). Pakistan is a common-law system, largely based on British common law, with its tort law, according to Pakistani Courts,⁴³⁰ almost entirely corresponding to the English common law.⁴³¹ Regarding the claims, the Pakistani common law acknowledges two concepts: vicarious liability and tort of negligence.⁴³²

4.3.2.1 Vicarious liability Plaintiffs base their claims on vicarious liability, applicable in cases of an employment relationship or a relationship *akin* to an employment. In these cases, an actor can be held liable for another actor's tortious conduct, based on their relationship with the tortfeasor, in this case Ali Enter-

⁴²⁸ECCHR, *Press Release 30 August 2016: Factory fire lawsuit – German Court: Pakistani victims awarded legal costs in case against KiK*, available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html, last accessed: 12 October 2016.

⁴²⁹Petition, *supra* note 414, 29.

⁴³⁰*Khan v. Haleem*, (2012) CLD (SC) 6 (2011), 8 (Khilji Arif Hssain, J., concurring) (Pak.), *Petition, supra* note 414, 28.

⁴³¹*Id.*

⁴³²*Id.*, 29 *et seq.*

prises Textile Factory (“AE”). Initially, vicarious liability concerned an employer who could be held liable for his employees’ conduct (master-servant relationship), which, in a second constellation, was broadened by Pakistani courts to include relationships between independent contractors (principal-agent relationship).⁴³³ Very recently, the Supreme Court of the UK issued a judgment on vicarious liability regarding a master-servant relationship,⁴³⁴ stating that “Vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer’s act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer’s conduct.”⁴³⁵ In the judgment, the Court delivered an account of the origins and development of vicarious liability, attributing the latter, *inter alia*, to “(...) changes in the structure and size of economic and other (eg charitable) enterprises; and in part to changes in social attitudes and the courts’ sense of justice and fairness, (...)”.⁴³⁶

In the claim at hand against KIK, the crucial element is that of the defendant’s connection to the tortfeasor, regarding not so much its existence, but rather its kind. Defendant corporation KIK denies any liability for the conduct of AE, as the latter was merely a supplier of the defendant.⁴³⁷ Although vicarious liability initially regarded master-servant relationships, the concept underwent an established development. As the UK Supreme Court noted in *Mohamud*:

“[T]here have been developments in the law as to the type of relationship that has to exist between an individual and a defendant for vicarious liability to be imposed on the defendant in respect of a tort committed by that individual. These developments have been a response to changes in the legal relationships between enterprises and members of their workforces and the increasing complexity and sophistication of the organisation of enterprises in the modern world.”⁴³⁸

The seminal case referred to, *inter alia*, in the petition as well as in the legal opinion, is *E v English Province of Our Lady of Charity and another*⁴³⁹ from the UK

⁴³³*Id.*, 30.

⁴³⁴*Mohamud v. WM Morrison Supermarkets plc*, [2016] UKSC 11, [2016] A.C. 677.

⁴³⁵*Id.*, 681.

⁴³⁶*Id.*, 684.

⁴³⁷Aderhold Rechtsanwaltsgesellschaft mbH, *KIK Statement of defense*, 7.

⁴³⁸*Mohamud*, *supra* note 434, 695.

⁴³⁹*E v English Province of Our Lady of Charity and another*, [2012] EWCA Civ 938 [2013] 2

Court of Appeal. The case regarded liability of defendants English Province of Our Lady of Charity and the trustees of the Portsmouth Roman Catholic Diocesan Trust for the alleged child abuse by a priest. The alleged abuse took place in a children's home, run by the nuns of a convent, subject to the direction of the first defendant and regularly visited by the priest, who, according to the claimant, was the parish priest at the church of the second defendant, and thus in the service of the latter.⁴⁴⁰ Second defendant, the Roman Catholic Diocese of Portsmouth, denied having ever managed, operated or been responsible for the church in the sense that they had any control or functions of supervision over how it was run.⁴⁴¹ These responsibilities rested with the parish priest, who, moreover, was not in the service of the Diocese, but followed "his vocation and calling as a priest",⁴⁴² as holder of an office not being an "employee" of the defendant.⁴⁴³ However, as vicarious liability could be founded on a relationship other than employment,⁴⁴⁴ the main question regarded the existence of a relationship *akin to employment*, i.e. "if the relationship between the defendant and the tortfeasor were so close in character to one of employer and employee that it was just and fair to hold the defendant vicariously liable".⁴⁴⁵ The Court eventually employed a test⁴⁴⁶ consisting of five different aspects, namely (1) control by the "employer", (2) control by the contractor of himself, (3) how central the activity is to the enterprise (the organisation test), (4) if the activity is integrated into the organisational structure of the enterprise (the integration test) and (5) if the person is in business on his own account (the entrepreneur test).⁴⁴⁷ In conclusion, the court held that "having regard to the degree of control which the diocesan bishop could exercise over the priest, the centrality of the priest's activity to the objectives of the church and the extent to which the priest was integrated into the structure of the church, the re-

W.L.R. 958.

⁴⁴⁰*Id.*, 960 *et seq.*

⁴⁴¹*Id.*, 961.

⁴⁴²*Id.*, 962.

⁴⁴³*Id.*

⁴⁴⁴*Id.*, 965.

⁴⁴⁵*Id.*, 958.

⁴⁴⁶Taken from R. Kinder, *Vicarious liability: for whom should the 'employer' be liable?*, (1995) 15 LS 47, *E v English Province of Our Lady of Charity*, *supra* note 439, 991.

⁴⁴⁷*Id.*, 992 *et seq.*

relationship between the bishop and the priest was sufficiently akin to employment that it was just and fair that the trustees could be vicariously liable for his tortious actions".⁴⁴⁸ According to the five-stage test employed in *E v English Province of Our Lady of Charity*, plaintiffs argue that KIK is vicariously liable for the conduct of AE in the same manner.

4.3.2.2 Tort of negligence Plaintiffs secondly base their claims on KIK's negligence towards the employees of AE.⁴⁴⁹ The concept of "tort of negligence" first requires that the liable party had a duty towards the claimant and secondly breached that duty by an act of omission.⁴⁵⁰ Although there was no general duty to prevent third parties causing damage to another,⁴⁵¹ such "a duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party".⁴⁵² A more recent case, dealing with liability based on a duty of care, was *Chandler v. Cape plc*⁴⁵³ before the UK Court of Appeal. The case concerned the issue whether defendant company Cape owed a direct duty of care to its subsidiary's employees regarding provision of a safe working environment.⁴⁵⁴ The claimant had contracted asbestosis due to his exposure to asbestos dust, asbestos having been processed at the site where he had worked for defendant's subsidiary ("Cape Products"). The appeal had been instituted by Cape, as in the preceding trial, "the claimant had established a sufficient degree of proximity to the defendant company for it to be fair, just and reasonable to impose a duty of care on the defendant to protect the claimant from harm from the asbestos atmosphere."⁴⁵⁵ The appeal was dismissed, reaffirming that "a duty to intervene to prevent damage to another would arise where there was a relationship between the parties which gave rise to an imposition or assumption of responsibility on the part of the defendant".⁴⁵⁶ The court held that,

⁴⁴⁸*Id.*, 958.

⁴⁴⁹*Petition, supra* note 414, 37.

⁴⁵⁰*Id.*

⁴⁵¹*Cf. Legal Opinion on English Common Law Principles on Tort, Jabir and others v. Textilien und non-food GmbH*, 7 December 2015, 2.

⁴⁵²*Smith and Others Appellants v Littlewoods Organisation Ltd.*, [1987] A.C. 241, at 272.

⁴⁵³*Chandler v. Cape plc*, [2012] EWCA Civ 525.

⁴⁵⁴*Id.*, 3112.

⁴⁵⁵*Id.*, 3111.

⁴⁵⁶*Id.*

regardless of the fact that a subsidiary and its parent were two separate entities, a duty of care towards the subsidiary's employees may still exist where (i) the damage should be foreseeable, (ii) there is a relationship, characterised by the law as one of 'proximity' or 'neighbourhood' between the party owing the duty and the party to whom it is owed, and (iii) the situation is one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other,⁴⁵⁷ this three-stage test having been established in *Caparo Industries Plc v. Dickman*.⁴⁵⁸

Relevant to the KIK case, the court reasoned that health and safety issues were dealt with at both company and parent company level.⁴⁵⁹ Although the subsidiary had its own works doctor and safety committee, Cape appointed a group medical advisor to provide for better protection of its employees across the corporate group.⁴⁶⁰ The company also established its own medical surveillance and kept statistics for asbestos-related illnesses.⁴⁶¹ From these facts and on the basis of proof via an exchange of letters between Cape's work doctor and the HM Factory Inspectorate at the Ministry of Labour,⁴⁶² the conclusion was drawn that Cape knew of the risks associated with asbestos and that it was also involved in health and safety issues regarding its subsidiary's employees. Accordingly, Cape was found to have assumed responsibility for Cape Products' employees.⁴⁶³ The assumption of responsibility by Cape would satisfy the second and third part of the test,⁴⁶⁴ whereas the first requirement was met through evidence, showing that Cape did have actual knowledge of the claimant's working conditions, as well as on relevant aspects of health and safety in the particular industry.⁴⁶⁵ This judgment is of great importance to the KIK case, as in it, defendant was found liable for an own act, and moreover, one of omission. The parent company was found to have failed to advise its subsidiary on precautionary measures, which had resulted

⁴⁵⁷*Id.*, 3119.

⁴⁵⁸*Caparo Industries Plc v. Dickman*, [1990] 2 AC 605.

⁴⁵⁹*Chandler v. Cape plc*, *supra* note 453, 3116.

⁴⁶⁰*Id.*

⁴⁶¹*Id.*, 3117.

⁴⁶²*Id.*

⁴⁶³*Id.*, 3119.

⁴⁶⁴*Id.*, 3126.

⁴⁶⁵*Cf. id.*, 3111.

in the injury to the claimant.⁴⁶⁶

4.3.3 Assessment of KIK's potential liability

4.3.3.1 Vicarious Liability Regarding vicarious liability, the deciding threshold is the establishment of a relationship between KIK and Ali Enterprises *akin* to an employment, to be determined by the five factors⁴⁶⁷ applied in *E v English Province of Our Lady of Charity* (see chapter 4.3.2.1). These five factors would only be indicative and not present obligatory requirements each.⁴⁶⁸ The first two factors concern the level of control the “employer” exercises on the contractor, and the level of control of the latter of himself, or put differently, his independence. It is undisputed that KIK and AE did not have any corporate affiliation, however, specifying the aspect of control of the test, judge Ward in *Lady of Charity* wrote: “In my judgment the question of control should be viewed in a wider sense than merely inquiring whether the employer has the legal power to control how the employee carries out his work. It should be viewed more in terms of whether the employee is accountable to his superior for the way he does the work so as to enable the employer to supervise and effect improvements in performance and eliminate risks of harm to others (...).”⁴⁶⁹ Also, in the seminal *Cape* case (see 4.3.2.2), defendant was not found liable for its subsidiary's conduct *because* of its corporate affiliation,⁴⁷⁰ but regardless of it, as parent and subsidiary are legally separate entities.⁴⁷¹

In support of the plaintiffs' claim that KIK and AE in fact *have* a relationship akin to an employment, KIK's code of conduct plays a crucial role. According to the firm's policy, the code of conduct is incorporated into every purchase order, each of which constitutes a separate contract. The code of conduct by KIK was

⁴⁶⁶*Id.*, 3111 *et seq.*

⁴⁶⁷1) control by the “employer”, (2) control by the contractor of himself, (3) how central the activity is to the enterprise (the organisation test), (4) if the activity is integrated into the organisational structure of the enterprise (the integration test) and (5) if the person is in business on his own account (the entrepreneur test), *E v English Province of Our Lady of Charity*, *supra* note 439, 992 *et seq.*

⁴⁶⁸*Petition*, *supra* note 414, 32.

⁴⁶⁹*E v English Province of Our Lady of Charity and another*, *supra* note 439, 994.

⁴⁷⁰However, based on tort of negligence, see below.

⁴⁷¹*Chandler v. Cape plc*, *supra* note 453, 3111.

developed in 2006 and, according to the company's own statement, sets up minimum standards regarding working conditions in supplier factories, based on the ILO conventions as well as on the applicable standards developed by the UN.⁴⁷² KIK's revised code of conduct of 2015 can be retrieved online,⁴⁷³ and any changes to the original code of 2006 are likely to regard only details.⁴⁷⁴ In general, the code of conduct deals, *inter alia*, with rules on information and communication between business partners, compliance with the law and respective supervision, the working conditions at the factory, working hours, compensation, health and security issues, child labor, discrimination and freedom of association.⁴⁷⁵ Additionally, KIK emphasizes that their terms and conditions rest upon their code of conduct, demands full observation of the code by its suppliers (accountability) and "reserves the right to terminate business relations whenever serious breaches of this code or basic human rights, wilful violations of the standard or systematic forgery and/or persistent lack of cooperation are found."⁴⁷⁶ Naturally, these rules have a major impact on essential aspects of AE's business operations⁴⁷⁷ and thus minimize their respective independence, especially in the face of KIK being the main buyer of its products.⁴⁷⁸

Although KIK argues that its code of conduct is only of voluntary nature and does not enfold any legally binding force, the inclusion of the code into its contracts serves as evidence of KIK having assumed *de facto* control of the execution of (in this case) AE's business and an according responsibility towards the latter's

⁴⁷²<http://www.kik-textilien.com/unternehmen/verantwortung/lieferanten/>, last accessed: 9 September 2016.

⁴⁷³*KIK code of conduct 2015*, available at http://www.kik-textilien.com/unternehmen/fileadmin/user_upload_de/Tschechien/COC-Englisch.pdf, last accessed: 9 September 2016.

⁴⁷⁴*Cf.* KIK sustainability report 2010, http://www.kik-textilien.com/unternehmen/fileadmin/user_upload_de/Kategorien/Verantwortung/Nachhaltigkeitsbericht/Nachhaltigkeitsbericht_2010.pdf, last accessed: 14 October 2016, 25.

⁴⁷⁵*Petition*, *supra* note 414, 33.

⁴⁷⁶*KIK code of conduct*, *supra* note 473, 1.

⁴⁷⁷*Petition*, *supra* note 414, 33.

⁴⁷⁸*Id.*, 24.

employees.⁴⁷⁹ As stated in its second sustainability report,⁴⁸⁰ KIK controls its suppliers on a regular basis, through own visits as well as via independent audit firms.⁴⁸¹ The 2013 report already points out measures having been taken in the aftermath of industrial accidents in manufacturing countries, including the fire in Karachi. However, numbers from the years 2009 on show that KIK had already performed audits with its supplier factories before, with the highest number in 2010.⁴⁸² Apart from own visits to new contractors (so-called *pre scans*), KIK claims to follow a policy of continuous development, including regular check ups, elaboration on inadequate conditions as well as securing proposed rectifications.⁴⁸³ This speaks for a high level of control over AE's business operations. The obligation of the supplier to implement the rules set forth in KIK's code of conduct (ensured via contractual terms and conditions) and subsequent supervision through audits and follow up measures regarding security standards, satisfy factors one and two of the test.

Compared to that, the defendant in *E v English Province of Our Lady of Charity* had even less actual influence regarding the details of the tortfeasor's execution of his work. The Roman Catholic Diocese of Portsmouth did not exercise any true supervisory power, but merely had the option to impose sanctions, were the priest in breach of ecclesiastical law or would certain obligatory tasks not have been carried out.⁴⁸⁴

Having established a relationship akin to an employment, for liability to attach, the tortious conduct has to have occurred within the scope of that relationship.⁴⁸⁵ Evidently, AE's grossly insufficient security measures, constituting the tortious conduct (violation of the rules agreed upon and in part prescribed by the law), concerned its main duty in the relationship with the defendant, i.e. the manufacturing of clothing for KIK. As was the case, KIK took responsibility regarding

⁴⁷⁹Cf. *KIK code of conduct*, *supra* note 473, 1: "The supplier must observe and respect these regulations for any person working for the supplier and the companies of his sub-contractors, regardless of the contractual basis of employment. This includes explicitly contract workers."

⁴⁸⁰*KIK sustainability report 2013*, *supra* note 415.

⁴⁸¹*Id.*, 16 *et seq.*

⁴⁸²*Id.*, 17.

⁴⁸³*Id.*, 18; *KIK sustainability report 2010*, *supra* note 474, 25.

⁴⁸⁴*E v. English Province of Our Lady of Charity and another*, *supra* note 439, 993.

⁴⁸⁵*Petition*, *supra* note 414, 35.

AE's execution of that duty through its code, took measures of control and supervision, stated to otherwise terminate the business relationship and thus implicitly authorized AE's tortious conduct within the scope of their relationship.

4.3.3.2 Tort of negligence The second basis of the claim is KIK's alleged violation of its own duty of care. In this case, KIK could additionally be held liable for its *own* negligent conduct. Preconditions are that KIK *owed* an actual duty of care, violated that duty and that the violation lead to the damage (causation). As developed in *Caparo Plc. v. Dickman* (see chapter 4.3.2.2), a three stage test has to be employed to determine the existence of a duty of care, requiring (i) reasonable foreseeability of the damage, (ii) a close and direct relationship of 'proximity' between the parties and (iii) that it is fair, just and reasonable to impose liability.⁴⁸⁶ Regarding foreseeability, the circumstances of the case speak strongly against KIK. For KIK to have foreseen the damage which resulted from poor fire security measures, it first had to know about it. It is undisputed that KIK employed certified audit firms to ensure compliance with their code of conduct. However, KIK claims that it didn't know about the conditions at the factory and relied entirely on audit reports, one of which having certified AE in July 2012.⁴⁸⁷ In contrast, plaintiffs dispute that KIK didn't know about the deficiencies (many in plain sight), and additionally challenge KIK's ability to exculpate itself from responsibility through reference to the audit firms. Firstly, KIK had a non-delegable duty of care regarding security conditions and secondly, is vicariously liable for the audit firm's faulty certifications.⁴⁸⁸ For present purposes it shall suffice that KIK allegedly carried out its own visits to the factory and thus knew about the deficient conditions in the factory. Petitioners contend that KIK must have been aware of insufficient security measures at AE since at least 2007, as the official enquiry report from the fire site refers to respective deficiencies having been accounted in such reports at the time, with the former having apparently not been

⁴⁸⁶*Caparo Industries Plc. v. Dickman*, *supra* note 458, 609.

⁴⁸⁷*Petition*, *supra* note 414, 24.

⁴⁸⁸Reasons above, see 4.3.2.1, can be applied to the relationship between KIK and its audit firms, albeit regarding a principal-agent relationship; for discussion of non-delegable duty of care, see *Woodland v. Essex County Council* [1920] AC 956, Legal opinion, *supra* note 451, 17.

eliminated.⁴⁸⁹ Apart from that, it was testified that the company sent its own CSR representatives to assess working conditions on-site,⁴⁹⁰ which is also part of KIK's stated business practice.

According to the enquiry report by the Federal Investigation Agency Sindh Zone Karachi,⁴⁹¹ the store-room did not have any fire alarms, windows were barred, doors locked, additional escape routes non-existent and firefighting equipment lacking.⁴⁹² All these deficiencies would have been obvious even for a superficial observer.⁴⁹³ Additionally, it may be considered an CSR employee's specific responsibility to thoroughly check for these measures when visiting for a "pre-scan" or a regular check up. Adding up to KIK's responsibility regarding specifically fire security is the fact that factory fires are a known problem in Pakistani as well as Bangladeshi clothing factories, and moreover have occurred at AE factories before.⁴⁹⁴ Additionally, the construction of the building was in violation of Pakistani law, as the floors were wooden and the building had illegally been extended by an additional storey.⁴⁹⁵ Apparently, the factory site was not officially registered with responsible authorities and thus not subject to any prudential supervision.⁴⁹⁶

Regarding the second requirement of proximity, the findings in *Chandler v. Cape Plc.*⁴⁹⁷ (see 4.3.2.2) can be referred to almost entirely. As in *Chandler*, security issues were (although insufficiently) dealt with at the level of the defendant who, through all measures discussed above, assumed full responsibility regarding the execution of the supplier's work. In determining a relationship of proximity, although concerning vicarious liability, the elements of the five stage test from *E v English Province of Our Lady of Charity*⁴⁹⁸ can serve as guidance. As sufficient exercise of control by KIK can already be affirmed, the organisation test (3) as well as the integration test (4) are of additional utility. Regarding both aspects, a

⁴⁸⁹ *Petition*, *supra* note 414, 39.

⁴⁹⁰ *Id.*

⁴⁹¹ FIA, *supra* note 419.

⁴⁹² *Id.*, 11 *et seq.*

⁴⁹³ *Id.*, 14.

⁴⁹⁴ *Id.*, 12, *Petition*, *supra* note 414, 40.

⁴⁹⁵ FIA, *supra* note 419, 20.

⁴⁹⁶ *Id.*, 21.

⁴⁹⁷ *Chandler v. Cape Plc.*, *supra* note 453.

⁴⁹⁸ *E v English Province of Our Lady of Charity*, *supra* note 467.

relevant fact is AE's production volume of at least 75 %, having been manufactured exclusively for KIK.⁴⁹⁹ Allegedly, it was due to KIK's continuous and likely expanding orders that AE grew into the large company that it is today.⁵⁰⁰ To satisfy the demanded volume, AE expanded its production, its activity thus being central to KIK's business, and sufficiently integrated into the overall organisation. Not only did AE depend on KIK as its main buyer, but to a certain extent, KIK also depended on AE's timely execution of the contract to supply its stores.

The final question then is if the imposition of liability on KIK would be fair, just and reasonable. Plaintiffs argue that this is the case, as employers of AE almost entirely produced for KIK.⁵⁰¹ Additionally, a secure working environment presents only a minimum standard, the least, a large corporation with the means and the technical knowledge, should provide for when making use of the cost advantages of global supply chains.⁵⁰²

The remaining requirements are the actual breach of the duty and subsequent causation of the damage. Apparently, KIK failed to react to obvious findings gathered at visits to the factory or reported by audit firms (or otherwise, vicariously failed in respect of the audit firms' conduct, see *supra*). The third and final requirement is causation of the damage by the negligent party's breach of its duty. Causation of the damage by KIK's alleged tort is one of the main points disputed by their lawyers.⁵⁰³

The cause of the fire has not yet been resolved and most evidence to that end was only circumstantial. Although it had been proposed that arson was involved, the enquiry report found hardly any evidence supporting that claim.⁵⁰⁴ The report also ruled out mischief, sabotage or terrorism and several other possible causes of the fire.⁵⁰⁵ It concluded that the available evidence suggest an "accidental fire due to localized short circuiting or some other negligent act by some worker"⁵⁰⁶

⁴⁹⁹*Petition, supra* note 414, 41.

⁵⁰⁰*Id.*

⁵⁰¹*Petition, supra* note 414, 42.

⁵⁰²*Id.*

⁵⁰³*KIK statement of defense, supra* note 437.

⁵⁰⁴FIA, *supra* note 419, 14.

⁵⁰⁵*Id.*, 14 *et seq.*

⁵⁰⁶FIA, *supra* note 419, 19.

and confirms that safety and fire fighting measures were highly inadequate.⁵⁰⁷ Notwithstanding, attorneys on KIK's behalf insist on arson remaining a probability, which, if having caused the fire, would at the same time rule out causation by KIK's conduct.⁵⁰⁸ Attorneys additionally deny the possibility of defining an act of omission in a way that would give rise to liability. This would first demand determination of a precise benchmark for the assessment of sufficient fire security, according to which specific measures can be delineated to be able to define KIK's tortious omission having subsequently lead to the damage (e.g. how many fire alarms would have been necessary at which exact position).⁵⁰⁹ It is helpful to remember the delineation of duties from *Chandler*, holding that "it was appropriate to find that it had assumed a duty of care either to advise the subsidiary on what steps it had to take to provide employees with a safe system of work or to ensure that those steps were taken; and that, in those circumstances, a direct duty of care had been owed by the defendant to employees of the subsidiary company and there had been an omission to advise on precautionary measures which had resulted in injury to the claimant".⁵¹⁰ As has been shown, the duty of care, and with it, its scope have been confirmed; the general breach of that duty within its defined scope was sufficiently specific, and the damage a result of that breach according to regular circumstances. In their response to KIK's defense, plaintiffs outline the causal chain regarding every single claimant's damage. Accordingly, all three plaintiffs have suffered the damage due to the barred windows, which in two cases have lead to the death and in one case to severe smoke poisoning of the victims.⁵¹¹ In this case, the precise benchmark is the sole need to remove obvious obstructions to fire escape routes. The removal of such obstructions, in this case the grids in front of the windows, easily fell within the scope of basic security measures and was sufficiently specific – thus, KIK's failure to seek relief regarding the highly insecure working conditions, foreseeably, lead to the death and injury of the victims following the fire at the AE factory (regardless of its

⁵⁰⁷*Id.*, 22.

⁵⁰⁸*KIK statement of defense, supra* note 437, 3.

⁵⁰⁹*Id.*, 3 *et seq.*

⁵¹⁰*Chandler v. Cape plc, supra* note 453, 3111 *et seq.*, *cf.* ECCHR, *response to statement of defense*, 40.

⁵¹¹*Id.*, 42.

cause).

4.3.4 Relevance of international human rights and soft law instruments

Crucial aspects of the claim concern the relationship between KIK and Ali Enterprises, and respective duty of care, depending on the characterization of that relationship.

The guidelines for determination of a relationship of sufficient proximity have been established by respective case law, and in the KIK case, many obligations could be derived from their own public statements, such as the code of conduct. Although these are not legally binding, they should serve as proof of a given actor's actual obligations. Anticipating the dawn of stricter rules regarding corporations' obligations throughout their global supply chains, businesses have begun widely to adopt measures of "corporate social responsibility".⁵¹² These strategies supposedly embody a low-threshold and more flexible instrument to fill in regulatory gaps and can account for local specificities.⁵¹³ Public awareness, consumer decisions and best practice examples could create competitive pressure on other market players.⁵¹⁴ However, these aspects present valid arguments only if such codes have any real consequences regarding corporations' conduct and the situation of their (suppliers') workers. Thus, if corporations propose to take on responsibility, they should be taken at their word in cases of failure.

Regarding the facts of the case, KIK's claims of being a responsible actor are a slap in the face of the affected workers and their families. Allowing corporations to exculpate themselves through provision of such codes – written in a lofty language, purporting responsibility and often misleading the public – from any true accountability, would turn their purpose on its head. It would be a curious twist to construe the imposition of KIK's code of conduct onto its suppliers as freeing it from also ensuring their observation. Courts should accordingly consult these documents to delineate the scope of actual responsibility and when substantiating the elements of an offense.⁵¹⁵

⁵¹²Hennings, *supra* note 50, 54.

⁵¹³*Id.*, 61.

⁵¹⁴*Id.*

⁵¹⁵Grabosch, *supra* note 15, 97 with further references.

Without changing their legal nature, in the same way, soft law, and especially such universal instruments as the UN Guiding Principles (see chapter 2.6) should be enforced through their observation in the determination of corporate responsibilities.⁵¹⁶ According obligations can be found in UN guiding principle No. 17, defining the parameters for human rights due diligence⁵¹⁷ and No. 22, demanding that business enterprises should provide for remediation for caused adverse impacts on human rights. As internationally established rules, they also serve to qualify imposition of liability as being fair, just and reasonable.⁵¹⁸ In this way, these human rights instruments can be enforced, if not on a public international law basis, through adjudication of civil tort cases.

4.4 Unfair results – applicability of ordre public defense and overriding mandatory provisions

The Pakistani common law has shown to be favorable regarding liability of the defendant, even for the conduct of a supplier. Shortly after the German regional court in Dusseldorf granted legal aid to the plaintiffs, KIK negotiated a settlement and agreed to pay a sum of 5.15 Million US\$ to the victims of the fire.⁵¹⁹ This may come as no surprise, as hardly any case against a corporation has ever reached a final decision in court.⁵²⁰ The grant of legal aid in the case was based on the court's obligation to commission an expert legal opinion on Pakistani law; thus, the grant itself was no indication of the claim's probability of success, which was to be determined in a subsequent step.⁵²¹ Although by settling, KIK prevented a final ruling by the judiciary, the case is a promising signal regarding transnational tort litigation against corporations in Europe.

For the sake of completeness, a final question shall be considered: What if the

⁵¹⁶ Cf. *id.*, 90.

⁵¹⁷ Guiding Principles, *supra* note 137.

⁵¹⁸ Cf. Grabosch, *supra* note 15, 90.

⁵¹⁹ ILO press release of 10 September 2016, http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang-en/index.htm, last accessed: 27 September 2016.

⁵²⁰ Cf. Meeran, *supra* note 349, 1.

⁵²¹ Press release by the Regional Court in Dortmund of 30 August 2016, http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-KiK_docx.pdf, last accessed: 27 September 2016.

law had been different or simply was changed; e.g., what if Pakistan chose to enact a statute that would shield foreign investors from liability for the conduct of domestic supplier factories? What if this statute would also exclude liability for an own duty of care? Would relevant clauses in the Rome II regulation allow circumvention of such a provision through own law or the disapplication of that statute?

4.4.1 The *Ordre Public* defense (Art. 26 Rome II)

As discussed above (see chapter 4.2.2), an important reserve clause in the conflict of laws is the *ordre public* defense (Art. 26), as well as “overriding mandatory provisions” (Art. 16). To invoke an *ordre public* defense, the result of the application of the law determined by, in this case, Art. 4(1) of Rome II, has to be “manifestly incompatible with the public policy (...) of the forum”, i.e. the public policy of Germany, under observation of the European standard. Its application thus has to prove incompatible with substantial principles of the German law. The basis of the claim in the case is the defendant’s violation of its obligation to provide a safe working environment, the right to which is generally considered a basic human right.⁵²² This right, as codified in the Charter of Fundamental Rights of the European Union (e.g. Art. 31, Fair and just working conditions) and relevant ILO conventions,⁵²³ is undisputedly part of the German as well as the European *ordre public*.⁵²⁴ A law precluding liability for violations of these rights would certainly be in opposition to international efforts to enhance corporate accountability, and the forum state’s interest to regulate the conduct of actors domiciled in their jurisdiction, even for occurrences abroad, may play a role in public policy considerations. However, Human Rights bind private actors only in rare instances, who in this example would be free of any liability *by law*. A direct enforcement of human rights through the *ordre public* objection, on the other hand, is highly controversial, as their character as general principles of law may be unsuitable to manifest within or intervene with the civil liability system in such an immediate

⁵²²Eva Kocher and Johanna Wenkebach, *Recht und Markt. Ein Plädoyer für gesetzliche Pflichten von Unternehmen zur Offenlegung ihrer Arbeits- und Beschäftigungsbedingungen*, KJ 46, 1, 18-29, 18 (2013).

⁵²³Callsen, *supra* note 399, 44 *et seq.*

⁵²⁴Stürmer, *supra* note 393, para. 21.

way.⁵²⁵ The controversies regarding corporate liability in the context of public international law (*cf.* chapter 2.2) further contradict a reference to human rights to enforce corporate liability through public policy. As the imposition of liability, however, is based on civil tort law, public policy objections could be based on considerations of general liability principles.

Although the basic principle of compensation in liability law is a substantial legal principle in Germany,⁵²⁶ this, first of all, has to be read as precluding punitive damages (*cf.* recital 32 of Rome II) and not as necessarily demanding compensation to be paid under all circumstances. It should be kept in mind that not the law itself but the result of its application is subject to scrutiny under the *ordre public* objection. The question thus is: Is non-liability of an actor in certain circumstances permissible? This example concerns less the general regard of human rights, but rather the scope of liability and respective elements of an offense, which in doubt have to be determined according to the national standard. Thus, it had first to be determined, if KIK would be liable under German tort law (see chapter 4.4.3). However, according to Art. 15 of Rome II, the law determined by the regulation (in this case, the law of Pakistan) should govern in particular “(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (...)”. This would specifically include rules on juridical persons’ capability to be liable.⁵²⁷ Application, then, of respective German law through an *ordre public* objection would render that provision superfluous. Accordingly, the result of a law’s application leading to non-liability and thus lack of a basis for compensation is not considered sufficient to trigger applicability of the *ordre public* objection;⁵²⁸ an *ordre public* objection, envisioned as a last resort, may thus be potentially unsuitable (*cf.* chapter 4.4.3 for interaction of public policy considerations and overriding mandatory provisions).

⁵²⁵*Cf. id.*, para. 27.

⁵²⁶*Id.*, 19.

⁵²⁷J. Schmidt, *Rom II-VO Art. 15*, in: BeckOGK, para. 15 (2016).

⁵²⁸*Id.*, para. 27.

4.4.2 Rules of Safety and Conduct (Art. 17 Rome II)

In this context, another relevant provision is Art. 17 of Rome II, regarding “rules of safety and conduct”. According to that provision, “*In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.*” This rule will not disapply provisions of the *lex causae*, but may modify respective elements of offense through supplement of those rules in force where the event occurred that gave rise to the liability⁵²⁹ (in the case, and hereafter the forum state).⁵³⁰ Art. 17 serves to enable a balancing of interests and, again, the observation of the public interest of the forum state.⁵³¹ Thus, there is a certain relatedness to the considerations of Art. 26. Regarding cases where the place of events giving rise to (e.g. KIK’s negligent behavior), and where the damage occurs, diverge, the application of rules of safety and conduct of the forum may be appropriate where the standards of the latter are stricter than those of the *lex causae*, justified by liability law’s general control function and the public interest of the forum state’s legal order.⁵³² Accordingly, a corporation should not rely on exploiting severely lower standards by outsourcing when it would usually be subject to stricter standards “at home”.⁵³³ Regarding the case though, the applicable standards largely converge (the Pakistani common law and international instruments such as the UN guiding principles demand similar standards), meaning that there is no room for modification of the elements of the offense through respective rules of the forum law. The assumed problem in the case is that the illustrative provision does not envision *any* liability for the foreign investor; thus, the divergence does not concern the side of the elements of the offense but rather that of the legal consequences; and regarding rules on exculpation, Art. 17 might not be relevant at all.⁵³⁴ In the case of

⁵²⁹Felix Maultzsch, *Rom II-VO Art. 15*, in: BeckOGK, para. 2 (2016).

⁵³⁰For the present case, it is assumed that relevant decisions or negligence are attributed to the defendant, acting in the forum state; cf. Miriam Saage-Maaß, *Arbeitsbedingungen in der globalen Zulieferkette – wie weit reicht die Verantwortung deutscher Unternehmen?*, 8 (2011).

⁵³¹*Id.*, para. 5.

⁵³²Maultzsch, *supra* note 529, para. 75.

⁵³³Cf. Saage-Maaß, *supra* note 530, 9; see also recital 34 of Rome II, Abbo Junker, *Rom II-VO Art. 17*, in: MüKoBGB, para. 1 (2015).

⁵³⁴Maultzsch, *supra* note 529, para. 11.

such divergence on side of the consequences it may be more promising to look if any “overriding mandatory provisions” according to Art. 16 of Rome II would demand that KIK be held liable for alleged tort. Applicability of Art. 16 would also preclude an objection on the grounds of public policy.⁵³⁵

4.4.3 Overriding Mandatory Provisions (Art. 16 Rome II)

Should there be a provision in Pakistani law shielding KIK from any liability for the damages suffered in the factory fire in Karachi, is there an overriding mandatory provision in German law applicable according to Art. 16?

For Art. 16 to apply, there has to exist an overriding mandatory provision that satisfies its requirements, and which would impose liability on defendant corporation KIK for the alleged tort. The rule has to be mandatory, claim international validity and be enacted in pursuance of the public interest.⁵³⁶ The provisions of German labor law are not applicable in the case, as the plaintiffs do not have any contractual relationship to the defendant.⁵³⁷ Accordingly, liability has to be established based on tort law, as in the original claim. The basic provision on liability in damages is section 823 of the German Civil Code:

“(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.”

Paragraph 1 imposes liability in case of a violation of so-called absolute rights, protected against the infringement by anyone, i.e. the right to life, physical integrity (body), health, freedom, property or any other right of the same qualifica-

⁵³⁵Stürmer, *supra* note 393, para. 6.

⁵³⁶Saage-Maaß, *supra* note 530, 8.

⁵³⁷*Id.*, 7.

tion.⁵³⁸ Paragraph 2 extends liability to conduct which is in violation of certain provisions with the status of a protective law.⁵³⁹ The determination of liability according to section 823 is built up of three steps, namely the facts of the case, their unlawfulness and eventually, liability.⁵⁴⁰ The second step qualifies the conduct (facts of the case) as being unlawful, whereas in the last step the tortfeasor's fault in regard of the first two elements is determined.⁵⁴¹ Whereas unlawfulness in the case of para. 2 arises out of an infringement of respective provisions itself, para. 1 proscribes *any* conduct leading to a violation of the enumerated rights, except in the case of available exculpations.⁵⁴² Lastly, the conduct has to have caused the damage ("for the damage arising from this").

Regarding the case, the violated rights are protected by section 823(1) without difficulty, as the damage concerned the health and life of the victims, their violation being automatically unlawful.

The decisive question is if KIK is liable for that violation. Thus, did KIK violate a duty it had towards the plaintiffs which lead to the suffered damage?

More specifically, as the damage occurred not due to any action by KIK but rather their negligence, did KIK have an obligation to take measures that could have prevented or minimized the damage? Accordingly, the questions to be considered are not very different from those under the Pakistani common law (see 4.3.2). As in the case the damages considered the absolute rights of section 823(1), there is no dispute regarding their protection against infringement. However, for the determination of liability, the duties of the obligated have to be specified.

In the context of section 823, there are generally two different kinds of obligations, based on the relationship of the obliged to the vulnerable right or the potential source of danger.⁵⁴³ These are an obligation to control such potential sources of danger, or to take reasonable care in regard of the rights of third persons.⁵⁴⁴ Such obligations can only be assumed if respective actor has the actual and legal pos-

⁵³⁸Gerhard Wagner, § 823, in: MüKoBGB, para. 3.

⁵³⁹*Id.*

⁵⁴⁰*Id.*, para 1.

⁵⁴¹*Id.*

⁵⁴²*Id.*, para. 5.

⁵⁴³Wagner, *supra* note 538, para. 314.

⁵⁴⁴*Id.*, para. 315.

sibility to control that danger,⁵⁴⁵ and further have to be founded on a relationship that justifies the imposition of such an obligation.⁵⁴⁶ If the former is confirmed, these obligations encompass all means a reasonable person would consider necessary and sufficient.⁵⁴⁷ The fault of negligence regarding due diligence is then defined by the scope of section 276(2) of the Civil Code, stipulating that “(2) A person acts negligently if he fails to exercise reasonable care.”

For determination of liability, section 823 also opens a gateway for the consideration of human rights in the context of the civil law. Human rights are incorporated into the German basic law, furnished with the highest rank in the legal hierarchy.⁵⁴⁸ Accordingly, provisions of the civil law have to be interpreted in accordance with the basic law and thus the incorporated human rights.⁵⁴⁹ As such, relevant human rights instruments unfold binding effect through consideration in the construction of respective civil law provisions, in this case sections 823 *et seq.* Thus, international labor law standards as codified in the ILO Fundamental Principles and Rights at Work and specifically Art. 31 of the Charter of fundamental Rights of the European Union can be referred to in the delineation of the defendant’s duties.

Regarding the facts of the case in regard of the imposition of respective obligations and its premises, the above said can be referred to (see chapter 4.3.3). KIK outsourced a crucial part of its business to Ali Enterprises, to an extent that afforded it with a high level of influence; KIK itself provided for a contractual accord of all the obligations, as envisioned by the UN guiding principles (e.g. No. 16 and 17.). Thus, also under German law, the defendant corporation had a duty to organize its business (and its relationship with the supplier) in such a way that a safe working environment was ensured.⁵⁵⁰ KIK certainly violated that duty which subsequently lead to the damage. Although KIK made use of an audit company and delegated its obligations of control and supervision to an independent contractor, section

⁵⁴⁵*Id.*, para. 316.

⁵⁴⁶*Id.*, para. 317f.

⁵⁴⁷*Id.*, para. 337.

⁵⁴⁸See Art. 1 of the German Basic Law.

⁵⁴⁹Gerald Spindler, *BGB § 823*, in: BeckOGK, para. 15 (2016); the same applies to the EU norms enjoying a primacy of application.

⁵⁵⁰*Cf.* Saage-Maaß, *supra* note 530, 18.

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278 of the German Civil Code stipulates that “The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation, to the same extent as for fault on his own part. (...)”.

However, a final necessary qualification is that of liability according to section 823(1) as “overriding mandatory provision”. The examples in the literature mostly consider specific labor law provisions to which a mandatory character as well as international applicability can be attributed, such as prohibitions of forced labor, discrimination, or child labor.⁵⁵¹ In the context of section 823, it is possible to limit the scope of liability by contract, which contradicts its qualification as being mandatory in total. The lack of a clarification regarding provisions of the German civil code that may be qualified as overriding mandatory provisions further impedes application of Art. 16 for this case. Notwithstanding, the general function of the liability system, aligned with obligations specified through internationally established human rights provisions, should at least be considered as being fit to override a rule excluding liability. Although, as mentioned above, it had not been considered sufficiently “manifestly incompatible with public policy” if a provision’s application suspends liability and thus payment of any damages, the absolute exclusion of an actor from any liability at all, especially regarding the violation of absolute rights through breach of certain internationally acknowledged duties, may warrant consideration of the current application of section 823(1) as overriding mandatory provision. The provision’s public policy objective is undeniable, as its liability rules serve a control function,⁵⁵² its exercise on actors domiciled in the forum state being in the state’s interest also in an international context. In this way, considerations of public policy could be included in the determination of respective rule serving as overriding mandatory provision to hold KIK liable for its extraterritorial tort, thus enfolding an indirect effect through Art. 16 of Rome II. However, unless respective considerations will manifest in a statutory form, such an application is rather doubtful.

⁵⁵¹ Cf. Grabosch, *supra* note 15, 86; Saage-Maaß, *supra* note 530, 8.

⁵⁵² Spindler, *supra* note 549, para. 11.

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Regarding the protection of human rights, in summary, the main responsibility remains vested with the States. In the face of economic and political heterogeneity, the legal enforcement of universal human rights on an international basis seems far from being a feasible objective. Regulation of extraterritorial conduct of a state's own national or actor domiciled in their territory, based on domestic, or more accurate, international private law, for now remains the most pragmatic approach to hold corporations accountable.⁵⁵³ Without doubt, clear rules that codify corporate responsibilities and provide for compensation mechanisms on a global level are highly desirable, and the notion of corporate liability should to be further advanced through civil human rights and tort litigation, especially under consideration of respective international codifications.

As transnational human rights litigation has progressed through application of the ATS by U.S. Courts, the example of its development, by way of respective case law, has served as a starting point to delineate past and current possibilities of litigation against corporations. Fully justified by the idea of Human Rights' universality, and supported by specificities of the U.S. legal system, the ATS was utilized to litigate transnational violations that were only loosely connected to the United States.⁵⁵⁴ Due to its exceptional nature, however, "transnational human rights litigation" has remained a singular phenomenon, now additionally restricted by the latest Supreme Court decision on *Kiobel*. Beth Stephens' observation of the similarities between ATS and EU tort litigation, regardless of their different legal nature, may be even more accurate now:⁵⁵⁵ Extraterritorial application of the ATS has been restricted and similar "exorbitant jurisdiction" prohibited by the Rome regulations. These jurisdictional rules enhance predictability regarding the choice of forum in favor of the defendant: accordingly, defendant corporations will most likely be sued in the forum where domiciled. However, the establishment of jurisdiction over corporations operating internationally should be possible in a majority of industrialized economies – EU and U.S. courts thus may be able to continue the development that was ignited by ATS litigation and eventually pre-

⁵⁵³Grabosch, *supra* note 15, 87.

⁵⁵⁴*Cf.* Halfmeier, *supra* note 332, 434.

⁵⁵⁵Stephens, *supra* note 16.

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vent a regulatory vacuum.⁵⁵⁶ Whereas in ATS litigation, the presumption against extraterritoriality needs to be displaced, this will not be necessary in claims against EU corporations.

The main difficulty in these cases will then be the establishment of the company's accountability for the conduct of a tortfeasor, possibly a subcontractor, a subsidiary or even government representatives. As in the case of the EU, the applicable law is determined by the *lex loci damni* principle, the result depends mainly on the law of respective country. This should be considered when it comes to changes in domestic legislation regarding the regulation of corporate conduct.⁵⁵⁷

Although the material law basis for the ATS is public international law, in comparison to domestic tort law for EU litigation, the growing stance towards international human rights and an on-going debate about corporate responsibilities have advanced the evolution of liability principles to incorporate respective human rights provisions in the delineation of obligations and take account of the diverse corporate relations throughout the global supply chains. A similar development is desirable regarding the legal capacity of corporations in public international law. Regarding their economic power and extensive rights under diverse trade and investment treaties, respective adaptations are long overdue. However, for now solutions in that regard remain the responsibility of single jurisdictions.

Accordingly, Art. 16, 17 and 26 of Rome II present important reserve clauses, providing for the observance of respective rules of the forum, if applicable. In that context, a clarification regarding the qualification of domestic law provisions as overriding mandatory provisions is not only crucial, but would foster legal certainty (on a national basis) without interfering with the legal system of other jurisdictions. At the same time, the possible divergence of results (on an international level) underlines the importance of a common understanding regarding human rights obligations as codified e.g. in the UN Guiding Principles on Business and Human Rights and the ILO conventions. International efforts to enhance their enforcement should not be halted by a withdrawal of adjudication to the civil courts. Although the international economy seeks to enhance efficiency based on specializations and cost advantages, it is out of the question that corporations

⁵⁵⁶ Cf. Halfmeier, *supra* note 332, 440.

⁵⁵⁷ Saage-Maaß, *supra* note 530, 9.

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should be allowed to escape accountability by reference to “independent” suppliers and host state regulations when outsourcing major parts of their business. In that regard, proceedings in the KIK case hopefully sent a powerful message.

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Eidesstattliche Erklärung

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