

# Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights

by

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*Abstract: Over the past decades, transnational corporations (TNCs) have come under increasing public scrutiny for their involvement in human rights violations, particularly in developing countries. One may think of child and slave labour in the supply chain, cooperation with violent or corrupt regimes, and grand scale environmental pollution.*

*Legal protection for victims of human rights violations against TNCs is poor. Public international law protects the freedom of trade but does not regulate the way companies use this freedom. Moreover, it is disputed whether international human rights law can impose obligations on companies. This has triggered the question what role national tort laws can play to fill this protection gap.*

*This article first paints the factual background and the lack of international rules protecting victims of human rights violations (Section I). Section II lists the practical and legal problems victims face if they want to hold a TNC to account (such as fact-finding, forum, and applicable law). Section III provides an overview of tort law claims filed against TNCs in the United States and Europe. Finally, Section IV analyses the standard of care in tort law for a TNC to prevent its involvement in human rights violations, particularly through its subsidiaries and suppliers.*

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*‘Generally speaking, the law of tort protects the individual’s right to physical autonomy.’<sup>1</sup>*

## *I. Trade has been globalised – justice not yet*

### *A. Trade has been globalised...*

Over 60 years ago in Nuremberg, senior company officials were convicted for actively helping the Nazi regime to commit some of the worst war crimes

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<sup>1</sup> *Lord Bingham of Cornhill*, Tort and Human Rights, in: P Cane/J Stapleton (eds), *The Law of Obligations. Essays in Celebration of John Fleming* (1998) 4.

imaginable. These business leaders, often working through their companies, supplied poisonous gas to concentration camps knowing it would be used to exterminate people, actively sought slave labour to work in their factories and enriched their companies by plundering property in occupied Europe.

Around the same time, in 1948, the newly established United Nations adopted the Universal Declaration of Human Rights. The first paragraph of its preamble states that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>2</sup>

This was also the time of decolonisation when large parts of Asia and Africa gained independence. However, in many new countries, the colonial rule was replaced by the rule of corrupt regimes and transnational corporations (TNCs) where respect for human rights was and is crushed between commercial and political interests. This encroachment on 'the foundation of freedom, justice and peace in the world' is compounded by a number of factors.

First, host countries compete to bring TNCs within their boundaries. This is the race to the bottom. In 1995, the Philippine government advertised its attractiveness to foreign investors: 'To attract companies like yours . . . we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns . . . all to make it easier for you and your business here.'<sup>3</sup> Companies are offered business-friendly rules with regard to health and safety, the environment and labour rights.

Second, many governments are economically considerably less powerful than TNCs. For example, Shell's turnover is three times Nigeria's GDP.<sup>4</sup> Half of the world's 100 largest economies are TNCs. Parent companies are usually based in the western world and operate through an estimated one million foreign subsidiaries, most of them in developing countries.<sup>5</sup> TNCs own 90% of the world's technology and patents and are involved in 70% of world trade.<sup>6</sup>

Third, developing countries pay up to four times more to get their products on the western markets than western countries pay to get their products on the market in developing countries. Moreover, the western products are subsidised, which often forces local traders out of business.<sup>7</sup>

2 <[www.un.org/en/documents/udhr/index.shtml](http://www.un.org/en/documents/udhr/index.shtml)>.

3 *DC Korten*, *When Corporations Rule the World* (1995) 159.

4 See <[www.shell.com/annualreport](http://www.shell.com/annualreport)> and <[www.worldbank.org](http://www.worldbank.org)> under Data and Research.

5 UNCTAD World Investment Report 2006 <[www.unctad.org/wir](http://www.unctad.org/wir)>, Annex table A.1.6, p 270. In 2006, 44,922 (58%) of parent companies of TNCs were based in Europe and 10,568 (13.6%) in North America. See also *S Anderson/J Cavanagh*, *The Rise of Global Corporate Power*, Institute for Policy Studies, 1996.

6 *J Karliner*, *Corporate Planet* (1997) 5.

7 *Oxfam*, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty*, Oxfam, 2002, 5; *JH Dunning* (ed), *Making Globalisation Work* (2003).

Fourth, countries with natural resources like oil, gas or minerals, are often not using them as a building block for development but frequently end up blighted by inequality and bad governance. Despite increasing international recognition of this 'resource curse,' governments and corporations have failed to do enough to tackle it. In fact, they are often part of the problem.<sup>8</sup>

Finally, investment treaties require host countries to provide a range of privileges and guarantees to investing corporations. These usually include freezing or stabilisation clauses stipulating that existing legislation must not be changed to the detriment of the corporation until the end of the investment period. This may be decades and sometimes even half a century. This prevents the host country from upgrading its legislation in the areas of labour law, environmental law and human rights law.<sup>9</sup> Conflicts between the host government and the corporation remain confidential as they are subject to arbitration. Arbitration panels barely take human rights into account when adjudicating conflicts.<sup>10</sup>

These circumstances provide TNCs with ample opportunities to externalise their costs. Often this means that TNCs only comply with enforceable rules and even violate them as long as they can get away with it. This way they can argue that they comply with the law as long as public authorities do not fine them or courts do not allow damages claims against them. The result is that costs are shifted to the environment, the people living in the company's vicinity, and employees, including children who are deprived of their youth and their right to education. At a macro level, these market failures negatively affect the sustainable development of society and of the planet.<sup>11</sup>

8 Eg *P Maass*, *Crude World: The Violent Twilight of Oil* (2009). On the subject of corruption, see also the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997), and the UK Bribery Act 2010.

9 <[www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf](http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf)> (last accessed 1 August 2011).

10 *J Ruggie*, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, United Nations Human Rights Council, A/HRC/8/5, 7 April 2008, nos 24–27. See also *J Dine*, *Companies, International Trade and Human Rights* (2005) 10; *D Augenstein*, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (2010) 46–48.

11 Although this paper focuses on problems corporations are causing in the developing world, many considerations also apply to large-scale human rights violations in the western world; Deepwater Horizon and Fukushima are just two recent examples.

*B. ... justice not yet**1) WTO*

Freedom of trade is facilitated by international law: since 1948, by the General Agreement on Tariffs and Trade, and since 1995, by the World Trade Organisation (WTO).<sup>12</sup> The WTO's aim is to liberalise international trade, removing trade barriers, and adjudicate trade disputes.<sup>13</sup> This is an example of market regulation that does not limit but secures the freedom of trade. It is driven by the most powerful countries and the most powerful corporate lobbies with hardly any democratic control.<sup>14</sup>

The WTO's purpose is to prevent States from discriminating against trading partners that enjoy a certain comparative advantage, such as low labour costs. This means that western States can be precluded from restricting trade for non-protectionist reasons such as human rights and environmental protection. Particularly developing countries, concerned about their competitiveness, often resist interpretations or amendments of WTO rules that would give western countries a mandate to restrict trade to protect human rights and the environment extraterritorially.<sup>15</sup>

Although WTO members are entitled to regulate trade to protect public morals, and human, plant and animal health and welfare, and to conserve exhaustible natural resources, this is subject to strict conditions, particularly if the object of protection is outside the State's territory. In fact, WTO rules only allow for two types of measures to protect human rights against extra-territorial corporate abuse: first, conditions imposed upon preferential trade under free trade agreements and preference regimes that aim at ensuring human rights and environmental protection in third countries in which European corporations operate;<sup>16</sup> second, trade restrictions preventing corporations from exporting or importing goods harmful to human rights and the environment.<sup>17</sup> These measures, however, seem to be more con-

12 *JE Stiglitz*, *Globalisation and its Discontents* (2002) 9. See also *D Kinley*, *Civilising Globalisation. Human Rights and the Global Economy* (2009).

13 <[www.wto.org](http://www.wto.org)>.

14 *Oxfam* (fn 7) 5; *J Ruggie*, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, United Nations Human Rights Council, A/HRC/4/35, 9 February 2007, no 82. *G Monbiot*, *Captive State: The Corporate Takeover of Britain* (2000) 321.

15 *Augenstein* (fn 10) 12.

16 *Augenstein* (fn 10) 54. See for example, Regulation (EC) No. 980/2005 of the Council of 27 June 2005, applying a scheme of generalised tariff preferences, OJ L 169, 30. 6. 2005, 1–43.

17 Eg Regulation (EC) No. 2368/2002, implementing the Kimberley Process certification

cerned with protecting endangered animals and plants than endangered people.<sup>18</sup>

International law only provides a few rules that directly apply to the liability of corporations. They mainly concern environmental damage, such as the strict liability of the operator of a nuclear plant,<sup>19</sup> and the owner of a ship causing oil pollution.<sup>20</sup>

## 2) *Human rights law*

The involvement of corporations in human rights violations has a long history but it is only fairly recently that business came onto the human rights agenda and, subsequently, human rights onto the business agenda. The legal discussion began in the area of international human rights law, the main question being whether companies have human rights obligations. Traditionally, human rights are considered to be the citizen's shield against the State as the biggest power in society. Nowadays, however, many corporations are as strong or even stronger than States. Should human rights therefore protect not only against the power of the State but also against the power of the market? The official answer is that human rights apply only to corporations if they serve a public function such as a privatised state corporation.<sup>21</sup> There is an ongoing debate as to whether other corporations also owe human rights obligations. Therefore international human rights law currently only plays a modest role in holding corporations to account.<sup>22</sup>

scheme for the international trade in rough diamonds (20 December 2002). The required WTO waiver was given by General Council Decisions WT/L/518 and WT/L/676.

18 As to the relationship between the WTO and human rights, see *S Joseph*, *Blame it on the WTO? A Human Rights Critique* (2011).

19 Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 and Vienna Convention on Civil Liability for Nuclear Damage 1963. These Treaties are connected through the Joint Protocol 1988 <[www.iaea.org/Publications/Documents/Conventions/liability.html](http://www.iaea.org/Publications/Documents/Conventions/liability.html)>.

20 Convention on Civil Liability for Oil Pollution Damage 1969 and the 1992 Protocol <[www.imo.org](http://www.imo.org)> and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 <[www.iopcfund.org](http://www.iopcfund.org)>. See also the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1992). The annexed Protocol on Liability and Compensation provides for a strict liability regime but has not entered into force: <[www.basel.int](http://www.basel.int)>.

21 *P Alston* (ed), *Non-State Actors and Human Rights* (2005); *A Clapham* (ed), *Human Rights Obligations of Non-State Actors* (2006).

22 The same goes for international criminal law. Although it only applies to individuals (company directors) and not to companies, it can influence domestic tort claims against companies. It is also important to note that the International Criminal Court is not only competent to try individuals for international crimes but also to award damages to their victims (Art. 75 Rome Statute). The Court itself will develop the principles and norms it

The main focus in human rights law is on the State's duty to protect.<sup>23</sup> Obviously, this duty applies in the first place to the host States where the human rights violations take place. However, vis-à-vis TNCs, their enforcement powers may be limited. This begs the question whether home States (the State where the TNC has its domicile) have a duty to protect human rights outside their borders. The European Court of Human Rights has given the State duty an interpretation that includes both direct extraterritorial jurisdiction and domestic measures with extraterritorial implications. However, the relevance for corporate human rights violations committed outside the State's territory is limited, as it is required that the State exercised 'decisive influence' over the person outside its territory.<sup>24</sup> Despite the (limited) extraterritorial scope of the State duty to protect, it is nevertheless assumed that the potentials of this duty are not sufficiently used in order to regulate and control corporate activities relevant to human rights and environmental protection outside Europe.<sup>25</sup>

### 3) *Regulating corporate behaviour abroad*

It follows from the above that it is mainly domestic law that regulates the way corporations use their freedom of trade. Particularly in the developing world, these laws can be weak and governments may not be strong enough to enforce them against powerful companies. The result is that the disadvantages of a globalised economy disproportionately harm the least powerful countries and the most vulnerable people. Although international trade is also beneficial to the poor, or at least can be, the balance between free trade and human rights is fundamentally flawed.

Specific regulation in western countries with respect to corporate behaviour abroad is rare. It mainly concerns reporting obligations about the corporation's sustainability policy, including its policy regarding human rights. For example, France included such an obligation in its economic legislation albeit without a sanction in the event of non-compliance. In Sweden, state companies have an obligation to report according to the rules of the Global Reporting Initiative.<sup>26</sup> And in the United Kingdom, the Companies Act 2006 obliges company directors, inter alia, to take into consideration the impact of their company activities on the community and the environment.<sup>27</sup> Still, this legis-

will apply: <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation>> (last accessed 1 August 2011).

23 See for a brief overview, *Augenstein* (fn 10) 23–25.

24 European Court of Human Rights (ECtHR) *Issa and Others v Turkey*, 16. 11. 2004, no 31821/96, § 392; see also ECtHR *Öcalan v Turkey*, 12. 5. 2005, no 46221/99.

25 *Augenstein* (fn 10) 31; *Ruggie* (fn 10) nos 27–50.

26 *Ruggie* (fn 10) no 30.

27 Section 172(1)(d) Companies Act 2006.

lation does not go to the heart of the matter. Efforts to directly oblige companies to respect human rights abroad failed in the United States, the United Kingdom and Australia.<sup>28</sup>

Governments, including the European Union, take a very cautious approach with regard to legislation. Under the influence of the corporate lobby, their main mantra is 'voluntariness'. The European Commission calls upon corporations to respect human rights, the environment and labour standards, particularly in developing countries, but maintains that these goals are best achieved in close cooperation with the industry and with a major role for self-regulation.<sup>29</sup> This is remarkable for an institution that cherishes the universal values of human dignity, freedom, equality and solidarity.<sup>30</sup> This cherishing must not stop at the European Union's borders, particularly when extraterritorial activities affect the internal market: for example, when goods made with child labour are imported into the EU.<sup>31</sup> Without binding legislation corporations can continue applying double standards by conducting their business abroad in a manner that would not be accepted or possible at home.

In the end, public regulation is probably only conceivable with support from the corporate world, particularly from the growing number of companies that do take human rights and the environment seriously. They may increasingly see fair competition distorted because of companies that do not respect these fundamental values. Therefore, the most powerful drive for regulation is probably not the need to protect human rights but the need to eliminate unfair competition within the internal market and to create a level playing field.<sup>32</sup>

28 United States: Corporate Code of Conduct Act 2000/2006 (House Resolution 4596/5377) <[www.govtrack.us/congress/bill.xpd?bill=h109-5377](http://www.govtrack.us/congress/bill.xpd?bill=h109-5377)> (last accessed 1 August 2011). Australia: Corporate Code of Conduct Bill 2000 <<http://www.comlaw.gov.au/Details/C2004B01333>> (last accessed 1 August 2011). United Kingdom: Corporate Responsibility Bill, Bill 145 (2002): <[www.publications.parliament.uk/pa/cm200203/cmbills/129/03129.1-6.html#j006](http://www.publications.parliament.uk/pa/cm200203/cmbills/129/03129.1-6.html#j006)> (last accessed 1 August 2011).

29 Communication Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility (COM(2006) 136 def). A new Communication from the European Commission on corporate social responsibility (CSR) is expected to be adopted in early 2011: see *Augenstein* (fn 10) 7.

30 Charter of Fundamental Rights of the European Union (2007/C 303/01) Official Journal (OJ) C 303, 14. 12. 2007, 1–16.

31 In competition law, activities outside Europe can be relevant for the internal market. For example, a cartel in the United States is relevant if this can impede or distort the competition in the internal market. See ECJ case C-89/85, *A Ahlström Osaakeyhtiö and others v Commission (Wood pulp)* [1993] European Court Reports (ECR) I-1307. See also Art. 2(1)(a) Regulation (EC) No. 139/2004 of 20 January 2004 (Merger Regulation) OJ L 24, 29. 1. 2004, 1–22.

32 See also Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11. 6. 2005, 22–39.

## II. Litigation problems

### A. Introduction

Whilst victims of human rights violations can file a claim at a local court against the local company, there are a number of reasons to litigate against a (parent) corporation in a western country.

First, targeting the parent company exposes the heart of the company to its involvement in the human rights violations. This will help media coverage and also affect the reputation of the company in the optimal way.

Second, litigating against the western company means that victims have a solvent debtor when the entities that directly inflicted the harm may not be able to pay, particularly in the case of grand-scale human rights violations.

Third, litigating in non-western courts may lead to uncertainty, for example, if the judiciary is susceptible to corruption. Western courts also usually have a better and more reliable legal infrastructure, such as for cases with many victims (class actions), and they may provide better opportunities for legal aid,<sup>33</sup> even though not many law firms undertake such cases. They are complex, risky, hard-fought by the TNCs, resource-intensive, of uncertain duration and outcome, and have significant cash flow implications for the lawyers, who also tend to be at the less wealthy end of the legal profession. Corporate lawyers, by contrast, are funded on an ongoing basis irrespective of outcome.<sup>34</sup>

Claimants holding a western company to account face a number of other factual and legal problems. Some problems are of a kind that every personal injury victim faces. Other problems are more specific to business and human rights claims. Leaving aside problems like limitation and class action certification. I will briefly point out problems of fact-finding (B), forum (C) and applicable law (D).

### B. Fact-finding and funding

Perhaps the most fundamental problem for human rights claims against a corporation is fact-finding.

First, the harm is often suffered in a country with a weak infrastructure and it can be problematic to get to the area where the human rights violations took

33 See eg *Connelly v RTZ Corporation plc & Another* [1998] Law Reports, Appeal Cases (AC) 354 (House of Lords, HL).

34 *R Meeran*, Tort Litigation Against Multinationals ('MNCs') for Violation of Human Rights: an Overview of the Position Outside the US, 13 f (2011) <[www.business-humanrights.org/Links/Repository/1004892](http://www.business-humanrights.org/Links/Repository/1004892)> (last accessed 1 August 2011).

place. This may also be an area where violence is a common feature of daily life and where the country's central or local government bans foreigners.

Second, there may be communication problems when the victims do not have modern means of communication like telephone and internet or are not able to write. Communication and reporting cultures may differ from what is common in western countries. Also, victims may not feel free to speak out, either because of fear of the corporation or because of fear of the government.

Third, collecting evidence is time-consuming and costly, particularly when there are many victims. For example, in the *Trafigura*-case (See Section III.B below),<sup>35</sup> the claimants' lawyers recruited and trained dozens of staff to interview almost 30,000 potential victims about their experiences, health and damage, and to properly report on the results.

Finally, the claim of victims is often not that the company actively caused damage but that it was indirectly involved in human rights violations by others, such as the State or other companies or individuals. It may be difficult to find evidence supporting such claims.

These problems contribute to the high costs involved in preparing claims against western companies, costs that need to be pre-financed without any certainty as to whether enough evidence will be collected to start litigation against the company or not. Sometimes human rights organisations like Global Witness are prepared to finance fact-finding missions. In Anglo-American systems law firms may be prepared to pre-finance the fact-finding costs in the hope that they will be able to recoup them in a settlement or court case.

### *C. Forum*

In 1984, a leak of 40 tons of poisonous gas from a pesticide plant in Bhopal, operated by Union Carbide India killed 15,000 people and injured 50,000. The amount of the damage was such that the company did not have the means to pay compensation and the victims sued the parent company Union Carbide Corporation. Before the US courts, the latter successfully argued that the victims' claims were not admissible as the Indian legal system was adequate for their resolution and the Indian court therefore a convenient forum. The US court agreed.<sup>36</sup> The case moved to India where the Indian Supreme Court held

35 <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>> (last accessed 1 August 2011).

36 *In re Union Carbide Corporation Gas Plant Disaster at Bhopal India in December 1984*, 809 Federal Reporter, Second Series (F 2d) 195 (2d Cir 1987).

the company liable for \$ 470 million in damages.<sup>37</sup> Union Carbide then called this decision an example of the inadequacy of the Indian judicial system.<sup>38</sup>

If the victim files a claim against a European-based company (such as the parent of a subsidiary that violated human rights), this will usually be before a European court.<sup>39</sup> In order for the European forum to have jurisdiction a link is required between the forum and the claim. To establish this link the court may need to consider the merits of the claim at an early stage.<sup>40</sup> When a claim was brought before an English court against a parent company domiciled in the United Kingdom by employees in its South African subsidiary for health damage caused by exposure to asbestos, the House of Lords held that the English court had jurisdiction to hear the claim. It did so after it established that there was evidence to support the allegation that the parent company's own negligence was a cause of the harm.<sup>41</sup>

One of the victim's considerations for choosing a forum will be the procedural system. It is likely that the popularity of claims under the US Alien Tort Statute (ATS) (considered further in Section III.A below) is due to the fact that the US legal system provides for punitive damages and 'no win no fee' contingency fees, and that all parties bear their own costs. These elements limit the victim's financial risks.

An attractive feature of common law jurisdictions is the disclosure or discovery procedure.<sup>42</sup> This means that documents related to the facts of the case must be submitted to the court and the other party prior to the trial. These documents may be of crucial importance, particularly, because the fact-finding prior to the litigation usually does not turn over every stone.

37 *Union of India v Union Carbide Corporation* [1989] 1 Supreme Court Cases 674.

38 *J Cassells*, *The Uncertain Promise of Law: Lessons from Bhopal* (1994) 213. See also FHC/B/CS/53/05 Federal High Court, Benin Judicial Division (14 November 2005) in which a Nigerian court held that the gas flaring activities of Shell and its 100%-owned Nigerian subsidiary violated the applicants' fundamental rights to life and dignity as human persons.

39 Art. 2 Regulation (EC) No. 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) OJ L 12, 16. 1. 2001, 1–23.

40 See eg the Cape case before the English courts, considered in Section III.B below. Courts in the EU cannot refuse on the basis of the *forum non conveniencie* doctrine to exercise jurisdiction over companies seated in the EU, even if the harm occurred outside the EU: ECJ case C-281/02, *Andrew Owusu v NB Jackson* [2005] ECR I-1383, also if the victim is not an EU resident or national: ECJ case C-412/98, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* [2000] ECR I-5925.

41 *Lubbe v Cape plc* [2000] 4 All England Law Reports (All ER) 268.

42 This does not mean that a European continental court is not an attractive forum. See District Court The Hague 30 December 2009, Case 330891/HA ZA 09-579, *Oguru, Efanga, and Milieuddefensie v Royal Dutch Shell plc and Shell Petroleum Development Company Nigeria Ltd.*

Class actions US-style make it possible to file a claim on behalf of a group of people that do not have to be identified. The US *Khulumani*-case concerns a lawsuit against dozens of companies ‘on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damage as a result of apartheid.’<sup>43</sup> In Europe such class actions are not possible and it remains to be seen whether the ‘European-style class action’ that is currently the topic of political debate will be sufficiently effective and attractive.<sup>44</sup> Such class action will most probably be of an opt-in variety.

#### *D. Applicable law*

If a claim is filed against a European company before a European court, the Rome II Regulation will determine the applicable law.<sup>45</sup> The main rule is that this is the law of the country where the damage occurs (art 4(1)), that is, in the usual case, the law of the country of the victim rather than the law of the country of the company’s seat. There are a few exceptions to the main rule but it is uncertain whether they will help the victim much.

First, if the tort is manifestly more closely connected with another country, the law of that country can be applied (art 4(3)). It could be argued that failure of supervision of a subsidiary by a parent is manifestly more closely connected with the country where the parent took its management decisions. The applicable law would then be the law of the country of the parent’s seat. It is doubtful whether this argument can be maintained, however, as it is likely that art 4(3) may be invoked in exceptional cases only.<sup>46</sup> Hence, most cases will not be decided on the basis of a European tort law system.<sup>47</sup>

Second, in the case of environmental damage, the victim has a choice between the law of the place where the damage occurred and the law of the place where the event giving rise to the damage occurred (art 7). This event could, for example, be the active participation of a European parent in causing damage

43 *Khulumani v Barclay National Bank, Ltd, Ntsebeza v Daimler Chrysler*, 504 F.3d 254 (2007).

44 For the current state of affairs, see <[http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)>. Individual European countries like the United Kingdom and the Netherlands provide a more claimant-friendly infrastructure as regards group actions and the standing of NGOs than other countries.

45 Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31. 7. 2007, 40–49.

46 See COM(2003) 427 def, 13.

47 Eg *L Enneking*, *The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation* (2008) 16 *European Review of Private Law* (ERPL) 283.

by its subsidiary abroad. Whether art 7 provides for such a broader interpretation is uncertain.<sup>48</sup>

Third, the application of a foreign law provision may be refused if this is manifestly incompatible with the forum's public policy (*ordre public*) (art 26). It is not entirely clear how this exception will work out in practice but it can arguably be applied if a foreign domestic rule undermines human rights, such as allowing child labour.<sup>49</sup>

Fourth, 'mandatory provisions' of the law of the forum remain applicable irrespective of the law otherwise applicable to the dispute (art 16). These are '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.'<sup>50</sup> However, the requirement that there is a connecting factor between the claimant and the State exercising jurisdiction strongly reduces the scope of application of this rule with regards to corporate human rights violations.<sup>51</sup>

### III. Litigation

#### A. United States: Alien Tort Statute

Although the focus of this paper is on conventional tort law claims against TNCs, it is useful to make a brief reference to the US Alien Tort Statute (ATS). Over the past decades, the ATS has been seen as the most promising legal instrument to hold corporations to account for human rights violations in developing countries.<sup>52</sup> The ATS dates from 1789 but had been dormant for a long time. The first modern case dates from 1980 when it was held in *Filártiga* that a US court has jurisdiction to hear 'any civil action by an alien for a tort

48 Eg *AG Castermans/JA van der Weide*, *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights* (2009) 53.

49 See ECJ case C-7/98, *Dieter Krombach v André Bamberski* [2000] ECR I-1935, para 44. Cf art 6 Einführungsgesetz zum Bürgerlichen Gesetzbuch: 'Eine Rechtsnorm eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist.'

50 ECJ joint cases C-369/96 and C-376/96, *Arblade* [1999] ECR I-8453, para 30.

51 *Augenstein* (fn 10) 72.

52 Section 1350 of the US Code, included in the Judiciary Act of 1789, also called the Alien Tort Statute.

only, committed in violation of the law of nations.’<sup>53</sup> The subsequent decision in *Kadic*,<sup>54</sup> holding that ATS cases can also be brought against private persons, opened the way for the filing of claims against corporations. Thus far over 50 cases have been filed. In none of them has a final judgment been handed down. Notable successes, however, were two settlements.

In the *Unocal* case, Burmese villagers sued energy company Unocal for alleged complicity in human rights violations by the Burmese military, Unocal’s partner in a gas pipeline joint venture. In 2005, a confidential settlement was reached in which Unocal agreed to compensate the victims.<sup>55</sup>

In the *Wiwa* case, the claimants alleged that Shell had been complicit in supporting military operations against the Ogoni people in the Niger Delta, actively pursuing convictions and executions of nine Ogoni, including by bribing witnesses against them. In 2009, Shell agreed to settle the case by paying \$ 15.5 million. The sum was partly used for a trust to benefit the Ogoni people.<sup>56</sup>

Despite 30 years of case law, many questions about the ATS remain unanswered. For example, while the violation of international law provides a US court with jurisdiction, it remains disputed which law applies. Some argue that international criminal norms should be applied but this does not sit well with the character of the claim. Others argue that American federal tort law should be applied. It seems that the American Supreme Court supported the latter view in *Sosa*.<sup>57</sup> In this case, the Supreme Court also held that the ATS was intended to ‘provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.’<sup>58</sup> This implied that claims for environmental damage and for violation of socio-economic rights are excluded under the ATS.

A question triggered by *Sosa* is whether corporations can be liable under the ATS. In 2010, the US Second Circuit Court of Appeals held in *Kiobel* that customary international human rights law does not recognise the liability of corporations, and consequently TNCs cannot be liable under the ATS.<sup>59</sup>

53 *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir 1980). See *B Stephens*, Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, 27 *Yale Journal of International Law* (Yale J Int’l L) 1 (2002).

54 *Kadic v Karadzic*, 70 F 3d 232, 236–37 (2d Cir 1995).

55 <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocalawsuitreBurma>> (last accessed 1 August 2011).

56 <<http://www.earthrights.org/legal/wiwa-v-royal-dutchshell>>.

57 *Sosa v Alvarez-Machain*, 542 United States Supreme Court Reports (US) 692 (2004).

58 *Ibid*, 734.

59 *Kiobel v Royal Dutch Petroleum*, No. 06-4800-cv, 06-4876-cv, 2011 US App LEXIS 2200 (2d Cir 2011).

However, the Eleventh Circuit had come to the contrary conclusion and the Supreme Court may now finally resolve the issue.<sup>60</sup>

Even if the Supreme Court upholds the Second Circuit decision, this will not improve the atmosphere in the boardrooms because the result may very well be that claimants will instead file ATS-claims against CEOs and other responsible individuals in the company.

### *B. Europe*

In comparison to litigation in the United States, European litigation against TNCs is still in its infancy. The Business and Human Rights Resource Centre's website provides the following information on pending litigation.<sup>61</sup>

#### *Trafigura (in the UK, France and the Netherlands)*

One of Trafigura's ships, the Probo Koala, tried to dispose of its toxic waste in Amsterdam. When this appeared to be too expensive the ship sailed to the Ivory Coast where the waste was sold to Société Tommy, which dumped the waste at 18 places across the capital Abidjan causing death and personal injury to thousands of people. Société Tommy was established after the Probo Koala had left Amsterdam. It was allegedly well known that there was no capacity in the Ivory Coast to process this waste.

In 2006, the High Court in London agreed to hear a group action against Trafigura by about 30,000 claimants. In September 2009, the parties reached a settlement agreement in which Trafigura agreed to pay each of the 30,000 claimants approximately \$ 1,500.

In 2008, three French victims filed a complaint against Trafigura in Paris alleging corruption, involuntary homicide and physical harm leading to death. The case is still pending.

In 2010, Trafigura was fined €1 million by a Dutch court for illegally exporting tons of hazardous waste to west Africa, and for concealing the dangerous nature of the waste when it was initially unloaded from a ship in Amsterdam.

#### *Total (in Belgium)*

In 2002, four Burmese refugees filed a lawsuit against TotalFinaElf (now Total) and two of its directors. The refugees alleged that Total and its managers had

60 *Sinaltrainal v Coca-Cola*, 578 F.3d 1252, 1263 (11th Cir 2009); *Romero v Drummond*, 552 F.3d 1303 (11th Cir 2008).

61 <http://www.business-humanrights.org/LegalPortal/Home>, with further references.

been complicit in torture and forced labour committed by the Burmese military junta in the course of the construction and operation of the Yadana Gas Pipeline in Burma. The case collapsed in 2007 when the Cour de Cassation held that the claimants did not have standing.

*Lidl (in Germany)*

In 2010, the Hamburg Consumer Protection Agency filed a lawsuit against discount retailer Lidl. In an advertising campaign, Lidl claimed that it opposed child labour and other human and labour rights violations in its supply chain. The Agency alleged that the working conditions in Bangladeshi textile plants in Lidl's supply chain did not comply with ILO standards, claiming that employees worked excessive overtime with no overtime premium and were subjected to payroll deductions as a punitive measure. Within 10 days, Lidl agreed to withdraw the public claims.

*IBM (in Switzerland)*

In 2002, the Gypsy International Recognition and Compensation Action association filed a lawsuit against IBM in Geneva on behalf of five Roma claimants who were orphaned in the Holocaust. The lawsuit alleged that IBM assisted the Nazis in Holocaust killings by providing them with computer technology that resulted in the coding, tracking and killing of Gypsies. IBM argued that the parent company could not be held responsible for how its subsidiary's machines were used during this time. In 2005, the Court of First Instance found the claim was time barred, a ruling affirmed by the Supreme Court in 2006.

*Shell Nigeria (in the Netherlands)*

In the Niger Delta, oil spills from broken pipelines are a daily feature. They are partly caused by sabotage and partly by poor maintenance. It is alleged that, because of the leaks from Shell pipelines, farmers and fishers have lost their livelihood. In 2008, some of them, together with Friends of the Earth, filed three lawsuits in the Netherlands against Shell and its Nigerian subsidiary that is operating the pipeline. They seek compensation for the damage suffered and want Shell to clean up the oil. In 2009, the Hague district court ruled that it did have jurisdiction over the claimants' case. The case is on-going.

*BP Colombia (in the United Kingdom)*

In 2005, a group of Colombian farmers instituted proceedings in the English High Court against BP Colombia alleging that the construction of an oil pipeline by OCENSA (a consortium led by BP) caused severe environmental

damage to their lands. Further, they alleged that BP benefited from the activities of paramilitaries employed to guard the pipeline. In 2006, a settlement was reached. The amount paid by BP was not thought to be as high as the £15 million originally claimed, but probably ran to several million pounds. In 2008, a Colombian farmer who was not a party to the settlement filed a claim against BP with the English High Court. This claimant is part of group litigation which is on-going.

#### *Cape (in the United Kingdom)*

In 1997, five South Africans filed a claim against mining company Cape in the English High Court. The claimants, former Cape workers and individuals living in the vicinity of Cape's operations in South Africa, alleged that Cape exposed its workers to 30 times the British legal limit of asbestos dust. Cape applied to stay the claims on *forum non conveniens* grounds, arguing that the case should be tried in South Africa. In 2000, the House of Lords held that the case should be allowed to continue in the High Court because South African courts would not be a viable alternative forum as legal aid in South Africa had been withdrawn for personal injury claims and no reasonable likelihood existed for the claimants to acquire effective legal representation on a contingency fee basis for a case of such complexity.<sup>62</sup> In 2003, a settlement was reached in which the defendants made about £45 million available for compensation.

#### *Dalhoff, Larsen and Horneman (in France)*

In 2009, Global Witness, Sherpa, Greenpeace France, Amis de la Terre and Alfred Brownell, a Liberian activist, lodged a complaint before the Public Prosecutor at the Court of Nantes against Dalhoff, Larsen and Horneman (DLH). The complaint alleges that during the Liberian civil war (2002–2003) DLH bought timber from Liberian companies that provided support to Charles Taylor's government. DLH allegedly did so despite strong evidence of their involvement in corruption, tax evasion, environmental degradation, UN arms sanctions violations and human rights abuses. The case is on-going.

### *IV. Standard of care for companies*

#### *A. Introduction*

In principle, the applicable law will be the law of the country where the victim is domiciled (see Section II.D above). This will usually be of significant im-

62 *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL).

portance with regard to limitation periods and the level of damages, and in employment cases, which may be barred by workers' compensation law.<sup>63</sup> However, when it comes to the standard of care, differences may be less significant. In most legal systems the basic rule for liability is that of the *bonus pater familias*. Although these basic rules may be slightly differently framed, in essence they require proof of the same facts.<sup>64</sup> Moreover, many developing countries retained the legal systems that were imposed by the former colonial powers. For example, the legal systems of many former French colonies in Africa are to a great extent based on the Code civil. And most Commonwealth countries still enjoy the assumed blessings of the common law of England. The standard of care in tort law can therefore be seen as a universal rule that applies between people, businesses and public bodies. It is the universal standard for decent human behaviour; the basic rule of humanity.

It is well-known that the standard of care is differently framed in the various jurisdictions. In common law, the test consists of two elements (duty of care and breach of duty), in German law, three (*Tatbestand*, *Rechtswidrigkeit*, *Verschulden*), and, in French law, one (*faute*). The common feature is whether the defendant has acted like a 'reasonable man' (addressed under *faute*, *Verschulden* or breach of duty). The other elements (duty of care, *Tatbestand*) serve as control mechanisms, particularly in areas like governmental liability, mental harm, and omissions. In the framework of claims against corporations for involvement in human rights violations, the main issue is liability for omissions, that is, whether a corporation has a duty to prevent a third party (like its subsidiary or business partner) from causing harm.

When a western court needs to establish the standard of care according to the law of the country where the harm was suffered, there is likely to be hardly any case law applicable to situations where a corporation was involved in human rights violations. Corporations may therefore argue that they do not owe the victim a duty of care. However, likewise in western countries, courts have rarely, if ever, dealt with the responsibility of companies for involvement in human rights violations. In fact, we are in terra incognita.

This means that the courts need to rely strongly on general principles of tort law with respect to the standard of care. Before elaborating on this in Section IV.C ff below, I will explore developments in the area of soft law, self-regulation, governmental policies, and investors' preferences that will inform the court about what can be considered to be acceptable corporate behaviour.<sup>65</sup> For

63 Arts 4 and 15 Regulation (EC) No. 864/2007 (Rome II). The consequence of this provision is that recovery of success fees is effectively ruled out.

64 *Meeran* (fn 34) 8.

65 See also *Ruggie* (fn 10) no 46, who argues that the OECD Guidelines (soft law) need to be adjusted in order to remain in line with the developments in the area of self-regulation.

example, if a predominant part of an industry voluntarily sets higher standards, this will generally have an upward effect on what can be expected from a corporation as regards its standard of care.

## *B. Developments in society shaping the company's standard of care*

### *1) Soft law*

Over the past decades, international organisations have developed various soft law instruments such as guidelines, principles, and frameworks to help TNCs avoid the risk of being involved in human rights violations.<sup>66</sup>

In 1976, the Organisation for Economic Co-operation and Development (OECD) issued the first guidelines for multinational companies and adopted a revised version in 2000. These OECD Guidelines for Multinational Enterprises contain recommendations for globally responsible company behaviour.<sup>67</sup> The OECD's Committee on International Investment and Multinational Enterprises (CIME) is responsible for interpreting the Guidelines. So-called National Contact Points (NCPs) deal with complaints that corporations do not comply with the Guidelines. The way that these NCPs operate varies; thus far they do not seem to have been very effective although there are some positive exceptions.<sup>68</sup>

In 1977, the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>69</sup> This addresses not only business and labour organisations but also TNCs. It deals with promoting employment, equal treatment, wages and benefits, health and safety and rights for labour organisations, and the right to complain. The ILO's Committee on Multinational Enterprises supervises compliance and adjudicates disputes.<sup>70</sup>

In 2003, the UN Sub-Commission on the Promotion and Protection of Hu-

66 The term 'soft law' was first used in an international law context by *Lord McNair*, *The Law of Treaties* (1961).

67 See <[www.oecd.org/dataoecd/56/36/1922428.pdf](http://www.oecd.org/dataoecd/56/36/1922428.pdf)> (last accessed 1 August 2011).

68 See eg the UK NCP's statements on *Raid v Das AIR* (July 2008), *Global Witness v Afrimex* (August 2008), and *Survival International v Vedanta Resources plc* (September 2009/March 2010). For critical analysis see <[www.oecdwatch.org](http://www.oecdwatch.org)>.

69 See <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@emp\\_ent/documents/publication/wcms\\_101234.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf)> (last accessed 1 August 2011).

70 The ILO Declaration on Fundamental Principles and Rights at Work (1998) specifies five fundamental employee's rights: the freedom to establish trade unions, the right to collective negotiations, and the abolition of forced labour, child labour and discrimination. See <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>> (last accessed 1 August 2011).

man Rights adopted norms regarding multinational companies' responsibility with regard to human rights.<sup>71</sup> These norms were controversial, *inter alia* because they obliged companies not only to respect human rights but also to fulfil them, which is usually seen as the task of the State and not of private parties (see Section I.B.2 above). The norms did not progress further than the UN Sub-Commission and do not have formal status even as soft law.

Subsequently, John Ruggie was appointed as the UN Secretary-General's Special Representative on human rights and transnational corporations and other business enterprises. He developed the 'Protect, Respect and Remedy' Framework<sup>72</sup> and provided Guidelines to operationalise it.<sup>73</sup> The Framework consists of three pillars: the State's duty to protect, the corporation's duty to respect, and access to remedies. The UN Human Rights Council adopted the Guidelines in June 2011. Ruggie's mandate was very successful in putting the topic of business and human rights high on the corporate and political agendas, and in creating an operational soft law framework that is broadly supported and will be implemented in the forthcoming years.<sup>74</sup> Another activity worth mentioning is the United Nation's Global Compact Initiative, a platform to encourage institutional learning and to establish and disseminate good practices.<sup>75</sup>

Soft law instruments are by definition unenforceable. One of their functions is to make companies aware of their responsibilities and to help them shape policies with regard to respecting human rights. Another function is to illustrate how enforceable rules could look and their likelihood of being workable. Viewed in this light, soft law is an intermediate stage on the path leading to mature law.<sup>76</sup> Finally, soft law instruments may play a role in assessing today's standard of care. This may hold true, in particular, for the second pillar of John Ruggie's Framework: the corporation's duty to respect (see Section IV.D ff below).

## 2) *Self-regulation*

Self-regulation is often part of broader Corporate Social Responsibility (CSR)

71 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th session: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights: <[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument)>.

72 *Ruggie* (fn 10).

73 All documents produced during John Ruggie's mandate can be found at <[www.business-humanrights.org/SpecialRepPortal/Home](http://www.business-humanrights.org/SpecialRepPortal/Home)>. This website is also the major documentation centre for business and human rights in general.

74 Human Rights Council, 15 June 2011, Resolution A/HRC/17/L.17/Rev.1.

75 [www.unglobalcompact.org/AboutTheGC/index.html](http://www.unglobalcompact.org/AboutTheGC/index.html).

76 *Ruggie* (fn 10) no 49.

policies that usually focus on the ‘triple P’: profit (economic achievements), people (respect for human rights and social issues) and planet (respect for the environment).<sup>77</sup> CSR is considered to increase business value where it contributes to the brand value, encourages consumer loyalty, improves staff motivation and can contribute to a better reputation for stakeholders.<sup>78</sup> Although the protection of brand, reputation or market value is often mentioned as an important reason for self-regulation, much of such damage is usually short-lived<sup>79</sup> – in the modern era of daily information-bombardment, the negative impact of a story rarely lasts longer than the arrival of the next day’s newspaper.

CSR policies and codes of conduct<sup>80</sup> make companies look good but there is a tension between theory and practice.<sup>81</sup> A basic problem is that the company’s ‘always smiling’ public relations department usually runs CSR projects but, if there is a problem, the legal department will take over, showing the grimmer face of the company.

Another issue is the way that companies report about CSR.<sup>82</sup> Too often, the information is limited to anecdotal descriptions of separate projects and philanthropic activities. The reliability of company reports is unclear because very few companies apply recognised audit standards.<sup>83</sup> Globally, only 200 companies report according to the rules of the Global Reporting Initiative.<sup>84</sup>

77 For a detailed treatment, see *A Crane et al* (eds), *The Oxford Handbook of Corporate and Social Responsibility* (2009).

78 Codes are often drawn up in close dialogue between the industry and human rights organisations. The Danish Human Rights Institute has issued the most advanced guidelines: the Human Rights Compliance Assessment Tools <[http://humanrightsbusiness.org/?f=compliance\\_assessment](http://humanrightsbusiness.org/?f=compliance_assessment)>. Codes can also be found in the Clean Clothes Campaign <[www.cleanclothes.org](http://www.cleanclothes.org)> and Stop Child Labour <<http://stopchildlabour.concern.net/index.php>>.

79 Recently, Apple was criticised for labour conditions in Chinese factories where touch screens were manufactured and employees said they were exposed to chemicals: BBC News, 23 February 2011: <<http://www.bbc.co.uk/news/technology-12550429>> (last accessed 1 August 2011).

80 One may also think of SA 8000 certifications <[www.sa-intl.org](http://www.sa-intl.org)> and compliance with the ISO 26000 guidelines <[www.iso.org/iso/social\\_responsibility](http://www.iso.org/iso/social_responsibility)>.

81 An early critic of the new ‘green’ image of companies is *A Rowell*, *Green Backlash* (1996).

82 *Ruggie* (fn 14) nos 76–79.

83 Recognised audit standards are the International Standard on Assurance Engagements 3000 (ISAE 3000) <<http://www.ess-home.com/regs/isa-3000.aspx>> (last accessed 1 August 2011) and the AA1000 Assurance Standard Revision Process <<http://www.accountability.org/images/content/0/7/074/AA1000APS%202008.pdf>>.

84 See <[www.globalreporting.org](http://www.globalreporting.org)>. According to *Ruggie* (fn 14) no 78, 700 companies partly comply with the Global Reporting Initiative (GRI) guidelines, whereas other companies say they use it in an informal way. Of the 500 largest companies in the world (the Fortune Global 500) about a third report according to GRI standards.

Although a corporation is not bound by self-regulation as such, codes of conduct reveal what can be considered to be proper corporate behaviour in a certain industry and this has an impact on the way the standard of care in tort law is shaped.<sup>85</sup> The binding aspect of self-regulation is that a company can be liable if it does not do what it says that it does. European legislation provides for at least three risks.

First, the Unfair Commercial Practices Directive<sup>86</sup> bans a company from issuing false information about its products or services if this deceives the average consumer and is likely to cause him to buy a product or service which he would not have done otherwise. An example would be a company that does not comply with a code of conduct against child labour to which it has undertaken to be bound.<sup>87</sup>

Second, a prospectus for a public offering of securities must contain the necessary information for potential investors to make an informed decision about the company. This information must include the company's policies and practices with regard to human rights. If information is lacking or presented in an unjustifiably positive way, this can affect the company's value and investors may have a claim for damages against the company or the lead underwriter of the syndicate of investment banks underwriting the public offering.<sup>88</sup>

Finally, on the basis of the second Company Law Directive, company directors are jointly and severally liable if the company's annual or interim account, or the company's annual or interim report contains misleading information about the position of the company, unless the director proves that he is not to blame.<sup>89</sup>

### 3) Governmental policies

In a number of countries, such as the United Kingdom, Germany, France, the Netherlands and Belgium, governmental and parliamentary initiatives stimulate the debate on business and human rights and show commitment to work-

85 CSR is closely connected to Corporate Governance because many CSR aspects can only be implemented by corporate governance mechanisms. See also the OECD Principles of Corporate Governance 2004: <[www.oecd.org/dataoecd/32/18/31557724.pdf](http://www.oecd.org/dataoecd/32/18/31557724.pdf)> (last accessed 1 August 2011).

86 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11. 6. 2005, 22–39.

87 The American Nike-case provides for an interesting example: *Kasky v Nike, Inc, et al*, 45 Pacific Reporter, Third Series (P 3d) 243 (California 2002) and *Nike, Inc, et al v Kasky*, 539 United States Supreme Court Reports (US) 654 (2003).

88 Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, OJ L 345, 31. 12. 2003.

89 Second Council Directive 77/91/EEC of 13 December 1976, OJ L 26, 31. 1. 1977, 1–13.

ing on improving corporate respect for human rights. In this respect, it is remarkable that it is all relatively quiet on the eastern European front but this may be due to the fact that most of the 'new' Member States are on the suffering, rather than the directing, end of TNCs' activities.<sup>90</sup>

Some governments are linking the procurement of services and goods to compliance with ILO Treaties and OECD Guidelines.<sup>91</sup> For example, the aim of the Dutch government is to have sustainability as an important standard for all purchases and investments.<sup>92</sup> By linking procurement with human rights, governments effectively 'buy' social justice and help to enlarge the market for sustainable and fair goods and services.<sup>93</sup>

A similar policy is applied when corporations ask for benefits like participation in trade missions or export credit guarantees. Such guarantees are increasingly subject to human rights considerations. Respect for human rights is also a condition for funding by the International Finance Corporation (IFC), which is part of the World Bank.<sup>94</sup>

All these governmental policies contribute to the development of the standard of care in tort law when it comes to corporate respect for human rights.<sup>95</sup>

#### 4) *Investors and civil society*

It is not only governments that set the tone for developing standards of care in the area of business and human rights. Major investors like pension funds and investment funds also increasingly set standards for corporations in which they invest. According to the European Social Investment Forum the percentage of CSR proof investments increased in 2008 to over 15%.<sup>96</sup>

From the very early days human rights organisations have been trying to influence company policies regarding sustainability and human rights. Ini-

90 See for a brief overview *Augenstein* (fn 10) 7 f.

91 Art. 26 Directive 2004/18/EG on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, 114–240 allows a government to set social and environmental conditions for the performance of a contract.

92 Parliamentary motion Koopmans/De Krom, Parliamentary Papers (Kamerstukken) II, 2004–2005, 29 800–XI, no 130; Letter Minister of Housing, Spatial Planning and the Environment, 23 May 2008, Parliamentary Papers II, 2007/08, 30 196, no 33; Letter Minister of Housing, Spatial Planning and the Environment, 16 October 2009, Parliamentary Papers II 2009/10, 30 196, no 82.

93 See eg *C McCrudden*, *Buying Social Justice. Equality, Government Procurement & Legal Change* (2007).

94 *Ruggie* (fn 14) no 51; *Ruggie* (fn 10) no 40.

95 See for more examples *Augenstein* (fn 10) 41–46.

96 See <[www.eurosif.org](http://www.eurosif.org)>.

tially, they did so by protesting on the sideline, but more and more they enter the field by becoming shareholders and speaking at shareholder meetings and by direct contact with corporate directors. An increasing number of corporations actively seek to benefit from human rights organisations' knowledge about the risks of being involved in human rights violations and how to prevent them.

### *C. Human rights and tort law*

In principle, corporate conduct can affect all human rights – not only economic, political and labour rights, but also civil rights like the rights to life, freedom, safety, physical and mental health, privacy, protection from discrimination on grounds like disability, gender, religion, race, age or sexual orientation, and the freedoms of thought, speech, expression, religion, and movement.<sup>97</sup> One may also add the right to a fair trial, a legal remedy, and freedom of association.

It is the State's duty to ensure that human rights are respected, also by corporations, and to provide effective remedies in case these rights are infringed, regardless of whether this was due to governmental, corporate or an individual's conduct. One of the most important ways for a State to discharge its duty to provide for an effective remedy is tort law. Human rights issues have been clear in areas like the protection of privacy, honour and reputation, and the freedom of speech, but they also play a role in cases of death and personal injury.<sup>98</sup> In the end, it is immaterial from the victim's perspective who infringed his human rights: the State, a company or an individual.

While it is questionable whether corporations have obligations on the basis of international human rights law (see Section I.B.2 above), it is beyond doubt that in tort law they are obliged not to infringe (rather, to respect) the citizen's rights to life, physical integrity, health, property and freedom and other rights. Not all 'tort rights' are also 'human rights' and not all 'human rights' are also 'tort rights' but there is a big overlap, particularly when it comes to civil rights. They protect against both the power of the State and the power of the market. In this respect, human rights and tort law are brothers in arms.

The rights-approach in tort law is most obvious in Germany where § 823 *Bürgerliches Gesetzbuch* (BGB) protects a number of rights: the right to life, physical integrity, health, personal liberty, and property. These rights are the starting point for deliberations regarding a claim for compensation – they are

97 For a list of rights that a company can potentially affect, see *Ruggie* (fn 10) para 52. Quite remarkably, he does not expressly refer to environmental rights.

98 See ECtHR *Zavoloka c Lettonie*, 7 July 2009, no 58447/00 about the right to compensation for non-pecuniary loss for the loss of a loved one that is not caused by the State.

the golden gates through which the claimant enters the court where his case is heard. This starkly contrasts with common law tort law, particularly the tort of negligence, where the emphasis is not on the claimant's rights but the defendant's duty of care, and the principle of the freedom of action is a strong driving force.<sup>99</sup> French tort law, with its emphasis on strict liability rules that apply to cases of death and personal injury, is not explicitly rights-based but it is implicitly so, and de facto perhaps even more so than German tort law.<sup>100</sup>

#### *D. The reasonably acting corporation*

##### *1) Knowledge*

The general negligence test in tort law involves a comparison of the tortfeasor's conduct with that of the reasonable man (here: the reasonable corporation). This is a normative and not a factual concept: it is not 'average' or 'normal' behaviour that is decisive but careful behaviour.<sup>101</sup>

The first question to be answered is whether the corporation knew about the risk of being involved in violating human rights or ought to have known it. This knowledge may refer not only to the company's own violation of human rights but also its involvement in violation by others, such as business partners or government officials. It is not only the corporation's factual knowledge that is relevant but also what a reasonably acting corporation should have known about the risk.

Practically speaking, this means that a corporation must gather relevant information on the internet and from international and human rights organisations and government bodies. In more risky areas it will need to do research in the relevant country and scrutinise its own business relationships. Often, a corporation must conduct risk assessments with regard to the involvement in human rights violations of its subsidiaries, suppliers, customers, and (other) business partners. The higher the likelihood of such violations the more research needs to be done and the less important it will be that this research is burdensome, time-consuming and costly.<sup>102</sup>

John Ruggie's second pillar (see Section IV.B.1 above) focuses the corporation's responsibility on respect for human rights and implies that they need to carry out due diligence. This concept 'describes the steps a company must take

99 See eg *A Mason*, Human Rights and the Law of Torts, in: P Cane/J Stapleton (fn 1) 14. Cf *R Stevens*, Torts and Rights (2007).

100 *C van Dam*, European Tort Law (2006) no 610, with further references.

101 *Ibid*, no 811 f.

102 *Ibid*, no 807-3.

to become aware of, prevent and address adverse human rights impacts.<sup>103</sup> It implies that a corporation must conduct a proper survey into the factual context and background of the country in which it carries out activities. Subsequently, the corporation has to assess the impact its activities – as a manufacturer, an employer or a neighbour – may have on human rights of other people. Finally, the corporation has to assess whether its activities may contribute to human rights violations by business partners, governmental bodies and the like.<sup>104</sup>

Corporations have expressed concern that they increase their liability risks by carrying out due diligence.<sup>105</sup> Apparently, this concern is based on the idea that there is no liability for what one does not know and that ignorance is a defence against liability. This is, of course, not a proper understanding of tort law. The standard of care in tort law looks at what a corporation ought to have known. Therefore, carrying out due diligence is not a choice but a duty for the corporation. By discovering problems that might give rise to legal risks the corporation may be able to take measures at an early stage and prevent or limit liability.

Ruggie's soft law instrument of due diligence does not bring anything new in this respect. Corporations are bound by hard law to carry out due diligence to discover risks that their activities may directly or indirectly pose to others. It is therefore disappointing and on the brink of misleading that Ruggie consistently talks about the company's responsibility rather than the company's duty to carry out due diligence. By doing so he gained the support of the corporate world but ignored the legal reality.

## 2) *Balancing risk and care*

If the corporation concludes (or ought to have concluded) that there is a risk of being involved, directly or indirectly, in a human rights violation, it is bound to take appropriate steps to prevent this from happening and to redress the harm that has already occurred. 'As the danger increases, so must the precautions increase.'<sup>106</sup>

The level of risk can be determined by (1) the seriousness of the expected damage and (2) the probability that an accident will happen. And the level of care can be broken down into (3) the character and the benefit of the

103 *Ruggie* (fn 10) no 56.

104 *Ibid*, no 57.

105 *J Sherman/A Lehr*, Human Rights Due Diligence: Is It Too Risky? Corporate Social Responsibility Initiative Working Paper No. 55 (2010).

106 *Lloyds Bank Ltd v Railway Executive* (1952) 1 All ER 1248, 1253 (Denning LJ). See also Bundesgerichtshof (BGH) 21 April 1977, *Versicherungsrecht* (VersR) 1977, 817 f.

conduct and (4) the burden of precautionary measures.<sup>107</sup> Article 2:102 of the Principles of European Tort Law (PETL) holds that the higher the value of an interest, the more extensive its protection: life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection and extensive protection is granted to property rights. This means that precautionary measures will not easily be found to be too burdensome or costly for a company to take if they prevent human rights from being violated.

In many situations the corporation's involvement in human rights violations occurs indirectly through its business partners, particularly subsidiaries, co-venturers, customers and suppliers. This raises the question of whether a company has a duty to prevent those with which it has business dealings from violating human rights. Article 4:103 PETL holds in this respect: 'A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.' In other words: such a duty is conceivable. However, this 'negligence liability' for acts of others is a rather underdeveloped area of tort law.<sup>108</sup>

An important question is whether the corporation has authority over the business partner. However, even if it has not, this does not mean the corporation cannot do anything. Precautionary measures can also imply the refusal to purchase or to supply goods or to do so other than under controlled conditions.

It is also conceivable that a corporation has factual control over a business partner, for example because of its market power. In such a situation it will be able to prevent the business partner from acting in a certain way – for example, via provisions in the contract. Obviously, when only commercial interests and pure economic loss are at stake, there is less reason for a company to use its leverage to protect third parties. However, if the violation of human rights is at stake, it is clear that the corporation's freedom not to use its factual power is very limited.<sup>109</sup> This is also reflected in various soft law instruments, such as in sec II.10 of the OECD Guidelines, where it is said that companies 'should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.'<sup>110</sup> More generally, soft law and established codes of conduct

107 *Van Dam* (fn 100) no 805-2.

108 *Ibid*, no 808, with further references.

109 As regards the relationship of parent-subsidiary, see eg *Lubbe v Cape plc* [1998] Commercial Law Cases (CLC) 1559 (Court of Appeal, CA), affirmed by [2000] 1 WLR 1545 (HL). See also Section IV.E below.

110 One of the Global Compact principles holds: 'Make sure that they are not complicit in human rights abuses'; see <[www.unglobalcompact.org/AboutTheGC/index.html](http://www.unglobalcompact.org/AboutTheGC/index.html)>.

can provide important guidance in this respect. Such guidance can help to turn situations of factual control into a company's legal duty to control.

In the following sections I will analyse in more detail the company's standard of care vis-à-vis its subsidiaries and its suppliers.

### *E. Parent vis-à-vis subsidiaries*

Corporations are nowadays many-headed organisations, comprising many entities that are linked in a very complex way. Despite this complexity, many will regard the corporation as a unity. Corporations regard themselves similarly, provided that it suits their interests to do so, such as for marketing and brand reasons.

The classic principle in corporate law is that of the separation of corporate identity. This means that as a shareholder, a parent company is not liable for the conduct of the subsidiaries in which it invests.<sup>111</sup> This approach contrasts with areas like financial reporting and tax law – the taxman, for example, is allowed to look through the group and make the parent pay for the subsidiary's liabilities. However, in tort the only grounds for a parent's liability are its own negligent conduct vis-à-vis the subsidiary (duty of care) and identifying the subsidiary's conduct with that of the parent (piercing the corporate veil).<sup>112</sup>

The law of most EU Member States recognises the possibility of 'piercing the corporate veil'. This identification of parent and subsidiary usually requires an abuse of legal entities leading to fraud and is only accepted in very serious cases.<sup>113</sup> One of the reasons for this reluctance may very well be that the cases at hand are usually concerned with pure economic loss. It is, however, not self-evident that a court would take the same reluctant view in human rights cases that are about death and personal injury.<sup>114</sup>

111 See eg *Adams v Cape Industries* [1992] Law Reports, Chancery Division (Ch) 433. A company is liable for acts and omissions of its agents or branches as these will be per definition subordinate to the parent company.

112 See eg *PT Muchlinski*, Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case (2001) 50 International & Comparative Law Quarterly (ICLQ) 1; *J Dine*, The Governance of Corporate Groups (2000); *S Joseph*, Corporations and Transnational Human Rights Litigation (2004); *JA Zerk*, Multinationals and Corporate Social Responsibility (2006).

113 The exact criteria differ from country to country. See *Ruggie* (fn 14) no 29; *Augenstein* (fn 10) 62 f. For example, in Germany and France parent liability is only possible if the subsidiary has entered into an insolvency process such as liquidation.

114 *Van Dam* (fn 100) nos 711–714, with further references. An example is the decision of the United States District Court for the Northern District of Illinois *In Re Oil Spill by the Amoco Cadiz*, 1984 American Maritime Cases 2123 (Northern District of Illinois

In practice, the main basis for claims against corporations is not ‘piercing the veil’ but ‘duty of care’. The principle allegation is then that the parent breached a duty of care that it owed to individuals affected by its overseas operations such as workers employed by subsidiaries and local communities, and that this breach resulted in harm.<sup>115</sup> An illustration is the Cape case about employees who were exposed to asbestos in a South African factory (see Section II.C above).<sup>116</sup> When the South African company appeared to be insolvent, the employees sued the parent in England. The Court of Appeal held that the question was whether ‘a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.’<sup>117</sup>

In many European systems, for a duty of the parent to be accepted vis-à-vis its subsidiary it is required that the parent has a 100% stake or at least a supermajority stake in the subsidiary’s shares (2/3rds or 75%), and that it directs, controls, or coordinates the activities of the subsidiary. Often, additional requirements have to be met. Some jurisdictions (eg Germany and Italy) require that the exercise of control by the parent corporation results in prejudice or harm to the subsidiary, unlike other jurisdictions such as Poland, France and the Czech Republic. Some jurisdictions (eg France and Germany) impose parent liability as a matter of course where the parent has exercised actual control over the affairs of the subsidiary whereas others restrict it to circumstances where the parent company has the legal or economic power to exercise such control. In some jurisdictions (eg Germany, France and the Czech Republic) a creditor of a subsidiary will only be permitted to obtain a remedy from the parent where the subsidiary has entered into an insolvency process or is verging on insolvency.<sup>118</sup>

The European picture is therefore far from unequivocal. However, the general tenor is to recognise two requirements: a (super) majority stake and control. In modern group structures, the parent will often have de facto control over its

1984); see also *O de Schutter*, Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations (2006).

115 *Meeran* (fn 34) 4.

116 *Lubbe v Cape plc* [1998] CLC 1559 (CA), affirmed by [2000] 1 WLR 1545 (HL).

117 *Lubbe v Cape plc* [1998] CLC 1559, 1568. On appeal the House of Lords accepted that the case could go to trial (*Lubbe v Cape plc* [2000] 1 WLR 1545), but the case was settled before the trial. See also *Connolly v RTZ* [1998] AC 854; *Ngcobo v Thor Chemical Holdings Ltd* (1995) *The Times*, 10 November; *Sithole v Thor Chemical Holdings* (1999) *The Times*, 15 February.

118 *Augenstein* (fn 10) 63 f.

subsidiaries. One of the reasons for this is that the results of subsidiaries in which a parent has a majority stake need to be included in the group's consolidated accounts.<sup>119</sup> The fact that the parent holds a majority of shares in a subsidiary is a strong indication that it has control over the subsidiary's policies and operations.<sup>120</sup> The same goes for situations where the boards of parent and subsidiary are (almost) identical. There is no reason why control should require a super majority or sole shareholdership.<sup>121</sup>

The current soft law instruments do not assume the principle of separate legal entities but rather that a parent company does have control over its subsidiaries. Codes of conduct too are usually company-wide, applying to all group entities and internally enforced accordingly. Such codes are a strong indication of control by the parent over its subsidiaries. Generally, it would be hard for a parent to argue that the CSR policy applied to the whole group but that, at the same time, the parent did not have control over its subsidiaries.

With regards to the parent's duty, two situations can be distinguished. The first is where the parent has given the subsidiary instructions that were a direct cause of the human rights violation. An example is the Firestone case, that also grimly illustrates that capitalism and slavery can still go hand-in-hand today.<sup>122</sup> Firestone is a subsidiary of Bridgestone, the world's largest rubber company. In Liberia, it operates the world's largest rubber plantation where people have to work long days for very little money. In order to achieve their daily quota of rubber, employees are forced to let their children help them from a very young age. Rather than prevent the abuse from happening, the parent company instructed the subsidiary in such a way that made forced labour and child labour inevitable.<sup>123</sup>

119 Stock listed companies in Europe and the United States also have far-reaching obligations to report on subsidiary companies (eg under the European International Accounting Standards: IAS 24 and IAS 34).

120 This is the CJEU's approach in the area of competition law: see ECJ case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paras 26–28 and ECJ case 48/69, *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, para 132 f. See also *European Coalition for Corporate Justice (ECCJ)*, Fair law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses (2007) <[www.corporatejustice.org/IMG/pdf/ECCJ\\_FairLaw.pdf](http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf)> (last accessed 1 August 2011) 21 ff.

121 It is, of course, conceivable that the parent holds a (vast) majority of the subsidiary's shares without having control but these will be exceptions confirming the rule.

122 *John Roe I v Bridgestone Corporation*, 492 F Supp 2d 988 (Southern District of Indiana 2007). See also *E Williams*, *Capitalism and Slavery* (1994).

123 In the Bhopal case, the victims also argued that the Indian subsidiary acted according to the parent's instructions: see <[www.businesshumanrights.org/Categories/Lawlaw\\_suits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitre\\_Bhopal](http://www.businesshumanrights.org/Categories/Lawlaw_suits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitre_Bhopal)>.

The second situation is where the parent failed to prevent human rights violations by its subsidiary. This is the area of liability for omissions.<sup>124</sup> Provided that the parent has control over the subsidiary and knew or ought to have known of the risk it posed to the human rights of others, the question is whether the risk was such that it required the parent to interfere. This will depend on the magnitude of the risk that the subsidiary's conduct posed. There will be less reason to interfere if the risk is purely economic, but when human rights violations are at stake, there is more reason to assume that the principle of commercial freedom has to give way to a duty to interfere.

An example is the claim filed in the Netherlands by Nigerian farmers against Shell plc for the harm they suffered because of oil spills near Oruma (see Section III.B above).<sup>125</sup> The claim relates to the control of Shell's Nigerian operations, maintenance of the pipeline (run by a joint venture of which the operator is Shell Nigeria, Shell plc's subsidiary), and supervision of clean up of oil spills. In one of its memoranda, Shell argued that, even if it were to owe the claimants a duty of care (which it denied), the disputed oil spill was not serious enough for the parent to interfere in its subsidiary's business.<sup>126</sup> In other words: Shell considered it conceivable that if the spill had been more serious the parent may have had to interfere.

A recent domestic example is the English High Court case *Chandler v Cape*.<sup>127</sup> Between 1959 and 1962, David Chandler worked at Cape Building Products, an English company manufacturing incombustible asbestos board. In 2007, he was diagnosed with asbestosis but by then Cape Building Products no longer existed. Chandler pursued his claim against the parent company Cape plc. The judge held that Cape plc owed Chandler a duty of care. It had actual knowledge of his working conditions and the asbestos related injury was therefore foreseeable. There was also proximity as for at least six years parent and subsidiary had had common directors and the parent's employees also had responsibilities over the subsidiary company. Moreover, a group policy in relation to health and safety had existed from the mid 1970s and the parent had not adduced evidence that there was no such policy at the material time. These facts were sufficient for the trial judge to conclude that Cape plc owed Chandler a duty of care. He also found that Cape plc had breached this duty and awarded Chandler's claim.

Whereas in many legal systems parents are (almost) strictly liable for damage

124 See *van Dam* (fn 100) no 808 with further references.

125 <<http://business-humanrights.org/media/documents/timeline-shell-courtcase-apr-2011.pdf>> (last accessed 1 August 2011).

126 Incidentele conclusie en voorwaardelijke Conclusie van Antwoord, 13 May 2009, para 127 <<http://milieudefensie.nl/publicaties/brieven/antwoord-shell-op-dagvaardingen>> (last accessed 1 August 2011).

127 [2011] EWHC 951 (QB).

caused by their children,<sup>128</sup> this does not apply to parents for damage caused by their subsidiaries. The evolving practice of groups with group-wide policies is to make the subsidiary's position increasingly dependent and subordinate, and thus closer to the typical case of vicarious liability. This makes the question of the strict liability of a parent for its subsidiary less utopian. In fact, strict liability for parent companies would not amount to a revolution. The Seventh Company Directive on Consolidated Accounts<sup>129</sup> requires the parent to include financial information about its subsidiaries in its consolidated accounts if it has a right to exercise a dominant influence over the subsidiary based on ownership of shares or other (eg contractual) rights, or if it actually exercises such influence, such as by appointing the subsidiary's executive or management officers. From this perspective, the main factual consequence of strict liability for the parent would occur if the subsidiary has insufficient means to pay a damages bill. It is questionable whether this can be a decisive argument if the liability arises from a human rights violation.<sup>130</sup>

### *F. Suppliers*

Corporate policies to outsource work to developing countries because of their cheap labour have created a risk for many companies that they become involved in human rights violations through direct or even indirect suppliers. Global brands, in particular, outsource production and require contractors and sub-contractors to deliver fast, effectively and cheaply.<sup>131</sup> By doing so, they create a fertile ground for violations of human rights.<sup>132</sup>

Child labour is one of the biggest problems in business and human rights. It is estimated that over 20% of India's economy is dependent on children (specifically, at least 14 million children younger than 14 years of age). Worldwide, around 215 million children are affected.<sup>133</sup> The main problem is that the children's income is needed by the families concerned for survival. This means

128 See generally *M Martín-Casals* (ed), *Children in Tort Law, Part I: Children as Tortfeasors* (2006).

129 Art. 1 Seventh Council Directive 83/349/EEC of 13 June 1983, OJ L 193, 18. 7. 1983, 1–17.

130 See the European Coalition for Corporate Justice's proposal: *ECCJ* (fn 120) 11 ff.

131 See generally *N Klein*, *No Logo* (2000) and *Korten* (fn 3) 216 f.

132 Section II.10 of the OECD Guidelines recommends corporations to encourage, 'where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.'

133 *G Godbole*, *Corporate Social Responsibility and Children's Rights in South Asia* (2007) See for India: <<http://sca.savethechildren.se/upload/scs/SCA/Publications/Corporate%20social%20responsibility%20and%20childrens%20rights%20in%20South%20Asia.pdf>> (last accessed 1 August 2011). See for the figures worldwide: *International Labour Office*, *Accelerating Action Against Child Labour*. 5 <<http://>

that simply banning child labour is not a solution. Companies that discover children working for their suppliers could instead contribute to a more structural solution by enabling the child to go to school (part-time) and compensating the family for the loss of income.<sup>134</sup>

Not only child labour but also forced and slave labour practices pose risks. It is estimated that there are still about 27 million slaves worldwide,<sup>135</sup> including in the United States and Europe.<sup>136</sup> Refugees and illegal immigrants are easy targets for ruthless business people looking for cheap labour.

The 1998 ILO Declaration on Fundamental Principles and Rights at Work has become an important point of reference for TNCs.<sup>137</sup> It contains five internationally recognised labour principles: the freedom to establish trade unions, the right to collective bargaining, the abolition of all forms of forced labour, the effective abolition of child labour and a ban on the most serious forms of child labour,<sup>138</sup> and the abolition of discrimination. Companies need to comply with these principles and ensure that their suppliers do the same.

Active involvement in human rights violations occurs when a company imposes (contractual) duties on suppliers such as strict time limits or high volumes of products that increase the risk of human rights being violated.

If there is no such active involvement by the corporation, its duty very much depends on the circumstances of the case, such as the type of product purchased, the number of suppliers, the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers. The corporation's duty will particularly be relevant with regard to established or direct suppliers. The further down the supply chain, the less influence a corporation will generally have.

Factual knowledge about labour practices by suppliers is not always easy to

[www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_126752.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_126752.pdf) (last accessed 1 August 2011).

134 See eg <[www.stopchildlabour.eu](http://www.stopchildlabour.eu)>.

135 <[http://ngm.nationalgeographic.com/ngm/0309/feature1/online\\_extra.html](http://ngm.nationalgeographic.com/ngm/0309/feature1/online_extra.html)> (last accessed 1 August 2011).

136 *Korten* (fn 3) 230: in a clothing workshop in San Francisco people worked in rooms without windows, twelve hours a day, seven days a week with only a break for lunch. They were not allowed to speak with each other or to go to the toilet.

137 See <[www.ilo.org/declaration](http://www.ilo.org/declaration)>.

138 The Convention concerning Minimum Age for Admission to Employment 1973 (Convention 138) <[www.ilo.org/ilolex/cgi-lex/convde.pl?C138](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138)> sets the minimum age generally at 15 and for developing countries at 14 (for light work 13 and 12 years respectively). See also the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (Convention 182) <[www.ilo.org/ilolex/cgi-lex/convde.pl?C182](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182)> and art 32(1) Convention on the Rights of the Child <<http://www2.ohchr.org/english/law/crc.htm>>.

obtain. Particularly in the apparel industry, work may be sub-subcontracted to family businesses of which the corporation hardly has any knowledge. This requires the corporation to conduct due diligence and carry out risk assessments including inspections on the ground on a regular basis. Economically powerful corporations are able to impose rules on the supplier and its sub-contractors, for example if the company is (virtually) the only client of the supplier. Corporations like to consider contracts with exclusive suppliers as arm's length transactions but this is not in line with economic reality.<sup>139</sup> Corporations with global brands, in particular, can use their economic power to set terms and conditions. If it comes to combating child labour, they should.

The European Parliament has called on the Commission 'to implement a mechanism by which victims of child labour can seek redress against EU companies in the national courts of the Member States ... [and] to enforce supply-chain compliance and especially to come forward with mechanisms that make the main contractor liable in the EU in cases of violation of UN conventions on child labour in the supply chain.'<sup>140</sup> Such a rule would imply a form of strict liability regardless of whether the corporation knew of the human rights violations and regardless of whether it could have done anything about them. This rule would parallel the manufacturer's strict liability for defective products according to which the end producer or the EU importer is liable for safety defects caused by foreign manufacturers of components.<sup>141</sup>

An important difference is that product liability mainly protects the rights of people in Europe who suffer damage by the product as such, whereas liability for suppliers would protect the rights of people outside Europe who suffer damage because of the way the product is manufactured. A European interest in liability for suppliers is, however, that the products that have caused damage during manufacturing are brought onto the European market. This could also distort competition – for example, in that it gives manufacturers of child labour products an unfair advantage over manufacturers of child labour-free products.

## *V. Conclusion*

Litigation against TNCs for direct or indirect involvement in violations of human rights is taking shape, not only in the Anglo-American jurisdictions, but also, cautiously, in continental Europe. In Europe, this happens on the

139 *Ruggie* (fn 10) no 13.

140 European Parliament Resolution of 16 January 2008: Towards an EU strategy on the rights of the child (2008/0012) no 122.

141 Directive 85/374/EEC of 25 July 1985 on liability for defective products, OJ L 210, 7. 8. 1985, 29–33.

basis of negligence claims in tort, rather than under any equivalent of the ATS, where the language is usually not directly linked to human rights violations. Tort law claims are therefore sometimes regarded as diminishing the significance of the harm caused to victims. However, they provide for a viable and simpler route for redress, not only for violations of human rights under customary international law but also for violations of other rights such as socio-economic rights.

Although tort law does not use human rights terminology, it has been a pivotal protector of human rights since time immemorial. Whereas the State's duty to protect is the most important public route for human rights protection, tort law can be considered to be the most important private law enforcer of human rights and contributor to the privatisation of constitutional law. Tort law and human rights law are complimentary. In fact, they are brothers in arms.

The ongoing litigation against TNCs is a potentially powerful deterrent against corporate wrongdoing. Although it is still early days in litigation terms, the intertwinement between legal developments on the one hand, and the social, political and economic development of ideas about responsible business behaviour laid down in soft law and self-regulation on the other, makes this a challenging and exciting area of the law. It is also an area where peripheral and often highly technical legal questions can be as important as human rights and fundamental principles of tort law.

Legal aid for victims is mainly in the hands of idealistic lawyers who cooperate with human rights organisations and other NGOs. They have to take risks and be creative to finance long-running litigation against TNCs for which there are no financial limits. In other words: this is very much a fight of David against Goliath. And we all know how that fight ended.