Chapter 19:
Human Rights Obligations of Transnational Corporations in Domestic Tort Law

Cees van Dam

1. Introduction

The GLOTHRO project aims to fundamentally re-think a basic tenet of human rights law, i.e. that human rights obligations are primarily, if not exclusively, incumbent on the territorial state. One of the project's focuses is on human rights obligations of transnational corporations. Such obligations can be discussed from an international law perspective. This chapter, however, will look at the human rights obligations which transnational corporations may have under domestic tort law. Indeed, tort law is currently one of the main instruments for holding transnational corporations legally to account for their involvement in human rights violations. If a tort claim is successful, the corporation will be obliged to compensate for the harm suffered by individuals as a consequence of the violation of their human rights.

In the first part of this chapter I will compare rights protected by domestic tort law (Section 2) and rights protected by international human rights law (Section 3), particularly with respect to disputes between private parties. The second part of this chapter looks into practical problems victims of human rights violations face when holding transnational corporations to account on the basis of domestic tort law. These problems include fact-finding and funding (Section 4), the competent forum and the applicable law (Section 5), and the duty of care of parent companies *vis-à-vis* their subsidiaries (Section 6).

PART A: RIGHTS PROTECTED BY TORT LAW AND BY HUMAN RIGHTS LAW

2. Protection of individual rights in domestic tort law

2.1. Introduction

Just like national constitutions and international human rights conventions, domestic tort law protects the rights of individuals. This is not always apparent. In many national tort law systems the term "right" is virtually

absent. Traditionally, tort law is considered to provide compensation for the *damage* someone has suffered. The question of whether this damage is the consequence of the infringement of a right is usually disregarded as it is not necessarily material. As will be shown below, German tort law provides for an important exception. However, in French and English tort law, the concept of "rights" is also starting to surface, albeit in different ways. The following section provides an impressionistic bird's-eye view of the state of affairs in these three countries.

2.2. France

Article 1382 of the *Code civil* holds that someone who causes damage through his *faute* is obliged to compensate it.[1] Damage (*dommage*) is the key requirement: what is decisive is whether the victim has suffered damage, not whether this damage is related to the infringement of a right.[2]

However, rights do play a role in the first title of the *Code civil*, which lists a number of civil rights (*droits civils*). In 1970, the right to private life, which had already been protected by the case law, was codified in Article 9 in a general wording that is typical of the French legislator: 'Chacun a droit au respect de sa vie privée'. In 1994, the legislature explicitly protected a number of other personality rights: human dignity and respect for the person from the moment s/he is born (Article 16), the integrity of the human body (Article 16(1)) and the integrity of the human body with respect to medical interventions (Article 16(3)). This development illustrates the increasing role of "rights" in French tort law.

In this respect, mention can be made of a decision of the *Cour de cassation* of 2010 about the infringement of the right to information in a medical context.[3] Such an infringement often does not lead to liability because it is hard to prove a causal connection with the damage: even if the patient had been informed timely and properly s/he would often have taken the same decision.[4] This makes the duty to inform an empty shell. In its decision, the *Cour de cassation* made clear that the sole infringement of the duty to inform constitutes non-pecuniary loss for which the patient must be compensated. The decision illustrates that the right to self-determination in medical cases is enforced as an independent right, even when the patient does not suffer any other pecuniary or non-pecuniary loss.

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1 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'

2 See: Cees van Dam, *European Tort Law* (2nd edition) (Oxford: Oxford University Press, 2013), Chapter 3.

3 Civ. 1re 3 June 2010, JCP 2010, 1453, note S. Porchy-Simon.

4 Cees van Dam (2013), *Op.cit*, Section 1107.

Apart from these examples, French tort law is fairly modest when it comes to the terminology of individual rights. Under the surface, however, rights play an important role. This is particularly apparent from the high number of strict liability rules developed by both the legislator and the *Cour de cassation*. The effect of this is that someone who suffers personal injury or property loss often does not have to rely on the fault liability rule of Article 1382, but can benefit from a much lower threshold for compensation. These strict liability rules are often linked to the French preference for victim protection, but one could just as well say that it reveals the importance they attach to the protection of individual rights. This does not come as a surprise because French civil law (which is still embodied in the *Code civil* of 1804) is the fruit of the same Revolution that led to the Declaration of the Rights of Man and of the Citizen.

2.3. England

English tort law does not put the individual's right at its centre, but the individual's remedy.[5] According to Samuels, claimants in the English system 'can assert that they have in such or such a situation an action against some public or private body - and they can probably assert that they have a "legitimate interest" or "expectation". What they cannot claim is a right to the actual substance, or object, of the action itself - they cannot claim a right, as a citizen, to succeed'.[6]

Generally speaking, Samuels' analysis is still correct, although the role of rights has cautiously surfaced over the past years. One may think of cases regarding the award of a "lump sum" to parents in a case of wrongful birth and to a patient in a case of incorrect information prior to a surgery.[7] These cases acknowledge aspects of the right to family life and the right to self-determination. Additionally, in the legal literature the concept of "rights" has become a topic for discussion.[8]

In a more indirect way, the "trespass torts" (trespass to the person, to goods, and to land) can be seen as a way to protect individual rights against interference by others, even though it is usually not perceived in these

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5 See: Cees van Dam (2013), *Op.cit*, Chapter 5.

6 Geoffrey Samuel, '"Le droit subjectif " and English Law' (1987), *Cambridge Law Journal* , 264, 286.

7 See: *Rees* v. *Darlington Memorial Hospital* [2003] UKHL, 52; *Chester* v. *Afshar* [2004] UKHL, 41.

8 Most notably, see: Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007). See, also: Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007); Donal Nolan and Andrew Robertson (eds.), *Rights and Private Law* (Oxford: Hart, 2011).

terms. An example of trespass to the person is battery: someone commits a battery if he touches another person.[9] For example, a surgery by a medical doctor constitutes a battery unless he can prove that the patient had given his informed consent. The scope of this tort is, however, limited because the touching (not the consequences) has to be intended.[10]

For this reason, accidents are not decided on the basis of battery, but on the basis of the tort of negligence. However, in the tort of negligence, individual rights also play an implicit role, particularly because the case law more readily adopts a duty of care for the defendant in case of personal injury or property loss than in cases of pure economic loss. This indicates that the protection of life, body and property is a relevant point of consideration. This consideration is not linked to the protection of rights (like in Germany) or victim protection (like in France), but to the typical English concept of *fairness*. This concept usually generates more consideration for potential defendants than a similar concept would do in continental Europe. In the same vein, English law has only few rules of strict liability, thus keeping the (implicit) protection of rights at a lower level than in France and Germany.[11]

2.4. Germany

Unlike in France and England, rights play an explicit and crucial role in German tort law.[12] The general rule § 823 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) of 1900 puts individual rights at the forefront: 'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.'[13] Hence, German tort law explicitly protects the rights to life, bodily integrity, health, freedom, and property against infringements by other private parties.[14]

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9 To prevent the London Tube from coming to a grinding halt, bodily contact as a consequence of the usual jostling on trains and platforms is not considered to constitute a battery: *Collins* v. *Wilcock* [1984] WLR, 1172, 1177.

10 Cees van Dam (2013), *Op.cit*, Section 504-2.

11 *Ibid*, Sections 606-610.

12 See: *ibid*, Chapter 4.

13 'Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.'

14 Damage caused by an act or omission of a public body is covered by § 839 of the BGB, which does not require a right to be infringed: Cees van Dam (2013), *Op.cit*, Section 1803-2.

The legislator's purpose with this list was to set limits to a general fault liability rule, such as the one adopted in Article 1382 of the French Civil Code, thus leaving less freedom for the courts. Hence, the scope of application of the general rule of § 823 was restricted to cases in which one of the mentioned rights was infringed. It is significant for the German legal culture that § 823 used the concept "right" and not "type of damage". German tort law includes a variety of strict liability rules, that mostly aim to protect against personal injury and property loss, thus protecting similar rights as in § 823 although the terminology is more indirect. Here, the protection of rights remains more implicit.

Initially the term "right" primarily concerned the idea of a "subjective right", rather than the contemporary idea of a human right or a fundamental right. This focus rapidly changed after World War II when the German Federal Supreme Court (BGH) linked the fundamental rights in the German constitution (Basic Law, 1949) with tort law. For example, in 1954, the court acknowledged the general personality right with reference to rights enshrined in the Basic Law, particularly the right to free development of one's personality and the right to human dignity.[15]

Later, the BGH applied the same rights to the award of damages for non-pecuniary loss to unconscious victims of accidents.[16] Until this decision, the BGH Court was of the opinion that damages in these cases could only serve as symbolic reconciliation; the amounts did not exceed 20,000 DM (€10,000). But in 1992, the BGH fundamentally changed its course by considering that unconsciousness constitutes a destruction of the personality and that this must be fully compensated.

These examples illustrate the importance of fundamental rights in the development of German tort law. The rights protected by the Basic Law permeate national law at many levels, including tort law.

2.5. Conclusion

In most legal systems the emphasis in tort law is on the compensation of damage: the rights of the individual are only indirectly or implicitly present. In Germany rights have traditionally played an important role, firstly because of the rights listed in § 823 of the BGB, and subsequently because of the link the courts made with the fundamental rights in the Basic Law.[17]

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15 BGH 25 May 1954, BGHZ 13, 334 = NJW 1954, 1404 = JZ 1954, 698 (Dr. Schacht).

16 BGH 13 October 1992, NJW 1993, 781.

17 Although substantial developments in France do not differ much from those in

Since the end of the last century, the influence of the broader human rights debate has become more apparent in domestic tort law. This dialogue may become even more intense with the EU Charter of Fundamental Rights, with some rights that are also protected by tort law, but not yet (directly) by the ECHR. One may particularly think of the rights to physical and mental integrity as protected by Article 3 of the Charter. The influence of human rights on tort law is also visible in cases between private parties, as was illustrated above with the rights to human dignity, private life, family life and self-determination. However, the manner in which the national laws shape the protection of fundamental rights against other individuals differ strongly.

Rights protected by tort law are the same rights that are protected by international human rights conventions. A right does not get a different colour when it is violated by the state rather than a private party: in both cases the same fundamental part of a human being's personality is negatively affected. However, two differences can be identified.

Firstly, a state is free to draw the lines of a fundamental right broader than is required on the basis of international human rights law. Therefore, the extent of the scope of protection differs in each jurisdiction. An example of this is the right to human dignity, which is more extensively protected by German case law than by the ECHR.

Secondly, the *level of protection* also differs in each jurisdiction, particularly with respect to the conduct of others against which it aims to protect the individual. To a large extent this is due to variations in the love for strict liability rules in the national laws. Strict liability rules apply more often in horizontal than in vertical relationships and they provide a lower threshold remedy in many cases where someone's right to life or to physical or mental integrity is infringed.

3. Human rights in disputes between private parties

3.1. National fundamental rights and international human rights

At the national level, fundamental rights were and are protected by written and unwritten constitutions. Early examples were the English Magna

Germany, the discussion in France is conducted more in terms of victim protection, whereas in Germany it is conducted more in terms of rights protection. Culturally, this may be explained by the less masculine French culture in comparison with the German culture. See, on this: Cees van Dam, 'Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law', (2009) 20, *King's Law Journal*, 281-308.

Carta (1215) and the Bill of Rights (1689), although these protected the nobility, rather than citizens, against the King. The Age of Enlightenment strengthened the idea that all individuals have fundamental rights, as was particularly demonstrated by the United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789). In the 19th century, similar developments occurred in other countries on the European continent. National constitutions are very diverse, but they typically contain a mix of political rights and rights to protect citizens against interference of their freedom by the state. Until fairly recently, however, the enjoyment of rights was primarily for white people and much less so for people of other ethnic backgrounds.[18]

After the Second World War, lessons were learned and the universality of fundamental rights was acknowledged, notably by the United Nations Universal Declaration of Human Rights in 1948, followed in 1966 by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These three documents are known as the International Bill of Human Rights, which brought fundamental rights to the international stage. At the same time, these international human rights influenced the further development of fundamental rights at the national level, including in domestic tort law.

International human rights conventions are enforced at the national stage. This happens in different ways depending on the constitutional traditions. In most European countries international conventions apply directly in national law (provided the provisions are duly implemented). This means they can be enforced at the national level. Most conventions lack an *international* legal enforcement mechanism and rely for compliance on international political control. An important exception is the European Convention on Human Rights, which is enforced by the Council of Europe.[19]

Where the protection of fundamental rights went international after World War II, the protection of individual rights under tort law has remained a domestic matter.[20] Even though tort law is playing an

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18 See, *inter alia*: Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2008).

19 See, *inter alia*: Helen Keller and Alec Stone Sweet, *A Europe of Rights: the Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008).

20 Criminal law has also been internationalised, notably since the Nuremberg process after the Second World War. This was later followed by various conventions defining international crimes. Additionally, special international criminal courts and tribunals were established, which eventually culminated in the establishment of the International Criminal Court in The Hague.

increasingly important role in providing a remedy against the violation of an internationally recognised human right, this remedy is essentially a domestic one.

There are only a few examples of international tort law norms (barring European Union law) that directly address the conduct of individuals and companies. Treaties on international crimes address individuals and oil pollution treaties address companies, but other areas (such as international transport by air, sea and land) are less typical for the issues arising in the area of business and human rights.[21]

3.2. Where tort law meets fundamental rights and human rights

Traditionally, fundamental rights and human rights focus on the vertical relationship between private parties and the state. This assumption is, however, challenged by the plea that certain non-state actors (such as international organisations and transnational corporations) should also be bearers of international human rights obligations. However, so far this plea has had limited practical results.[22] This is illustrated by the recent discussion on human rights obligations of transnational corporations that resulted in the Ruggie Framework and Guidelines.[23] This is only a soft law instrument and is not legally enforceable (although it may be an intermediate step towards the accountability of non-state actors for human rights violations under international law). The focus of this chapter is the private law accountability of transnational corporations or, more specifically, the question of which legally enforceable obligations follow from domestic tort law and how these obligations are related to fundamental rights and human rights.

In the 19th century, tort law gained ground in vertical relationships by holding public bodies legally to account, either to prevent them from taking certain actions (through court injunctions), or to make them pay compensation for damage caused. The fundamental breakthrough was the

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21 For a brief overview of international tort law rules, see: Cees van Dam (2013), *Op.cit*, Section 101-3.

22 See, *inter alia*: Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

23 SRSG, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 2008; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/17/31, 21 March 2011.

abolition of the principle of state immunity, which the United Kingdom only accepted in 1945.Although public bodies still enjoy certain immunities, the role of fundamental rights at a domestic level and human rights at an international level have considerably restricted these areas. This has strengthened the rights of individuals, in many situations by providing a remedy on the basis of tort law.[24]

Moreover, fundamental rights and human rights are not only relevant in vertical relations, but increasingly also in disputes between private parties. Whereas the state remains the addressee of fundamental rights and human rights obligations, the impact of such obligations may be that the state has to provide for tort law rules that provide an effective remedy for infringement of those rights by other individuals or companies.

Many internationally recognised human rights have been invoked in tort law disputes between private parties, albeit to different levels and in different ways. One may think of the right to life, to human dignity, to equal treatment, to privacy, and to freedom and safety, as well as the freedoms of religion, of expression, and of association. The human right to physical and mental integrity is not usually mentioned in human rights conventions, but it plays a major role in domestic tort law to deal with the consequences of accidents of all sorts. Interestingly, the EU Charter of Fundamental Rights includes this right in Article 3.[25]

When it comes to internationally recognised economic, social and cultural rights, the link with horizontal relationships and tort law is more mixed. Over the past decades, the *right to health* has been gradually developed in domestic tort law, such as with respect to illnesses caused by medicines, pollution or labour conditions.[26] The private enforcement of many *labour rights* is usually a matter of contract law (including applicable mandatory statutory provisions), but tort law can also play a role as is demonstrated by the English case of *Chandler* v. *Cape* (see Section 6).[27] The *right to education* is not often invoked in domestic tort law (in the Western world

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[24] See: Cees van Dam (2013), *Op.cit,* Chapter 18.

[25] Charter of Fundamental Rights of the European Union, (2000/C 364/01), OJ 18.12.2000, C 364/1.

[26] It should be noted that the ECtHR is cautiously developing the right to a healthy environment under Article 8; ECtHR 27 January 2009, Appl. 67021/01 (*Tatar & Tatar* v. *Romania*). See: Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23, *European Journal of International Law* 23, 613-642.

[27] This goes more generally for the ILO Declaration on Fundamental Rights and Principles at Work, concerning four fundamental labour rights: freedom from child labour, forced labour, and discrimination, and the freedom of association and the right to collective bargaining.

the dispute is usually about the scope of compulsory education), but there is, in principe, no reason why a child in India or Bangladesh could not invoke the violation of this right against the company s/he works for or its parent company.

Hence, tort law and human rights law virtually protect the same rights. The difference lies in the obligation not to infringe other people's rights. Such obligations for the state may be based both on national tort law and international human rights law, but obligations for individuals and companies only follow from domestic tort law.

3.3. Indirect horizontal effect of the European Convention on Human Rights

The horizontal effect of human rights can be illustrated with the impact of the European Convention on Human Rights (ECHR) on conflicts between private parties. The Convention and the Protocols thereto contain a range of rights and freedoms such as rights with respect to the person (life, human dignity, privacy, family life, home and marriage) and democratic and judicial rights (fair trial, freedom of assembly and freedom of expression). According to Article 1, the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Every person (including, to some extent, a legal person) is entitled to the enjoyment of these rights.

Although the rights in the ECHR protect *everyone*, Article 1 also makes it clear that its obligations only rest on the *state*. The ECHR nevertheless has an impact on the rights and duties of private parties in the sense that the state must ensure that legislature and judiciary provide sufficient protection to individuals in private disputes.[28] This is called indirect horizontal effect and means that the claimant can call upon the judge, as an organ of the state that is bound by the ECHR, to provide him adequate protection in the enjoyment of his rights against a private defendant. The judge can provide this protection by imposing such tort law obligations on the private defendant as are necessary to bring the protection of the claimant in line with the ECHR. This means that private parties may also have a legal and enforceable obligation not to infringe another person's human rights, not on the basis of the ECHR itself but on ECHR-proof national tort law.

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[28] At a domestic level, the German courts have taken a similar view. In BVerfG 15 January 1958, BVerfGE 7, 198 (*Lüth*), the Constitutional Court held that a dispute between private individuals about their rights and obligations under constitutionally influenced civil law norms remains a civil law suit, both from a substantive and procedural point of view.

An example of this is the Court's case law on Article 3 on the right to human dignity, which protects against torture and inhuman or degrading treatment. Most cases concern vertical relationships, in particular claims of individuals against inhuman or degrading treatment by prison authorities, the police or child protection authorities. There are, however, some cases concerning disputes between private parties.[29]

The first example concerned a seven-year-old boy who was subjected to corporal punishment at a private English boarding school. The United Kingdom recognised that such degrading treatment should not occur and accepted that it had violated Article 3.[30] Another British case surrounded a young boy who was beaten by his stepfather with a cane. Here, the ECtHR held that states should take measures '… to ensure that individuals within their jurisdiction are not subject to degrading treatment or punishment including such ill-treatment administered by private individuals'.[31]

This consideration clearly shows that an individual can infringe the ECHR right of another person. However, the individual's obligation not to do this is not based on the ECHR but on national tort law that must adequately protect the ECHR rights of individuals. The result is that cases in which human dignity was at stake and that previously fell outside the tort law system (often due to a lack of legally relevant damage) are now to be heard in a court of law to assess liability.

Although the ECHR and national tort law are becoming increasingly intertwined, one should not lose sight of the fact that the Convention only provides for minimum standards. The protection of individual's rights, including *vis-à-vis* private parties, is still primarily based on domestic tort law and its development in the hands of domestic courts. This is well illustrated by litigation against private parties like transnational corporations for involvement in human rights violations. Victims of such violations need to look carefully at which jurisdiction provides them with the best prospects for a successful claim, both from a procedural and a substantive point of view, and which court will be willing to develop its tort law for cases between private parties in line with the increasing body of conventions and case law protecting human rights. As will be shown, however, rules of private international law are fairly rigid and virtually exclude any choice for the victim (Section 5).

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29 See, also: Cees van Dam (2013), *Op.cit*, Section 1808-1.

30 *Costello-Roberts* v. *United Kingdom*, ECtHR 25 March 1993, Appl. 13134/87.

31 *A* v. *United Kingdom,* ECtHR 23 September 1998, Appl. 25599/94, § 21–22.

PART B: TORT LITIGATION ISSUES AGAINST CORPORATIONS

4. Fact-finding and funding problems

In this part, I will briefly analyse some specific issues with regard to domestic tort litigation against transnational corporations: fact-finding and funding (this section), procedural problems (Section 5) and the parent-subsidiary responsibility (Section 6).

Fact-finding is perhaps the most practical problem of litigation against transnational corporations. Firstly, 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 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.

Secondly, there may be communication problems when the victims do not have modern means of communication like telephones and the 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 of the government.

Thirdly, collecting evidence is time-consuming and costly, particularly when there are many victims. For example, in the *Trafigura* case,[32] the claimants' lawyers recruited and trained dozens of staff to interview almost 30,000 potential victims about their experiences, health and damages suffered, and to properly report on the results.

Finally, the claim of victims is often not that the corporation 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 transnational corporations; costs that need to be pre-financed without any certainty as to whether enough evidence will be collected to start litigation against the company. Victims often rely on NGOs to finance fact-finding missions. In legal systems allowing success fees or contingency fees, 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.

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[32] http://business-humanrights.org/en/trafigura-lawsuits-re-côte-d'ivoire#c9344 (last accessed 31 October 2014).

5. Procedural problems: forum and applicable law

5.1. Forum

If a victim of human rights violations files a claim against a transnational corporation it may want to bring the claim to the parent (the company at the heart of the corporation) for being involved in human rights violations. In Europe, the court of the parent's seat will have jurisdiction to hear the case.[33] An example is the *English Cape* case about a claim 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.[34]

In the Dutch case of *Nigerian farmers and Milieudefensie NGO* v. *Shell Plc (parent) and Shell Nigeria (subsidiary),* the District Court was competent to hear the case against the parent company as its seat was in The Hague. The Court held that it was also competent to hear the case against Shell Nigeria because the claims against parent and subsidiary were linked in such a way that for reasons of efficiency they could be heard jointly.[35]

Outside Europe, the US Alien Tort Statute (ATS) has become the basis for dozens of cases against companies for involvement in human rights violations. So far, none of these cases have led to a victory for claimants, although two settlements were reached.[36] The recent decision of the US Supreme Court in *Kiobel* v. *Royal Dutch Shell, Plc.* has considerably limited the possibility to bring cases that do not have a clear link with the United States.[37] However, if these limitations do not apply, the US procedural

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33 Brussels I, Article 2, Regulation (EC) No 44/2001.

34 *Lubbe* v. *Cape Plc* [2000] 4 All England Law Reports (All ER) 268. Courts in the EU cannot refuse on the basis of the *forum non convenience* doctrine to exercise jurisdiction over companies seated in the EU, even if the harm occurred outside the EU: *Andrew Owusu* v. *N B Jackson*, ECJ Case C-281/02 [2005] ECR I-1383.

35 *Oguru a.o.* v. *Royal Dutch Shell plc and Shell Petroleum Development Company Nigeria Ltd.*, District Court The Hague 30 December 2009, LJN BK8616. The applied test is based on Article 7(1) of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering).

36 See the *Unocal* case: available at: http://business-humanrights.org/en/unocal-lawsuit-re-myanmar#c9309 (last accessed 31 October 2014). And the *Ken Saro-Wiwa* case: available at: http://www.earthrights.org/legal/wiwa-v-royal-dutchshell (last accessed 31 October 2014).

37 *Kiobel v Royal Dutch Petroleum*, Docket No. 10-1491, Decided 17 April 2013, http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf (last accessed 31 October 2014).

system provides for a number of advantages for claimants, such as punitive damages, contingency fees, and that all parties bear their own costs. All these elements limit the victim's financial risks.

Moreover, US-style class actions 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 damages as a result of apartheid'.[38] In Europe, such class actions are not possible and there is no prospect that they will be possible any time soon.[39]

An attractive feature of common law jurisdictions generally is the disclosure or discovery procedure. 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 if the fact-finding prior to the litigation has not turned over every stone.

More generally, victims will take many other aspects into consideration such as limitation periods, the level of damages, and, in employment cases, whether the claim is barred by workers' compensation law.[40]

5.2. Applicable Law

If a claim is filed against a company before a European court, the Rome II Regulation will determine the applicable law.[41] The main rule is that this is the law of the country where the damage occurs (article 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.

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38 *Khulumani* v. *Barclay National Bank, Ltd*., 504 F.3d 254 (2007).

39 European harmonisation in this area is weak. See: Communication from the Commission 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401/2, and the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, COM(2013) 3539/3. Individual European countries like the United Kingdom and the Netherlands provide a more claimant-friendly infrastructure than other countries as regards group actions and the standing of NGOs.

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

41 *Ibid*.

Firstly, if the tort is manifestly more closely connected with another country, the law of that country can be applied (Article 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 Article 4(3) may only be invoked in exceptional cases.[42] Hence, most cases will not be decided on the basis of a European tort law system.[43]

Secondly, 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 (Article 7). This event could, for example, be the active participation of a European parent in causing damage by its subsidiary abroad. Whether Article 7 provides for such a broader interpretation is uncertain.[44]

Thirdly, the application of a foreign law provision may be refused if this is manifestly incompatible with the forum's public policy (*ordre public*) (Article 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.[45]

Fourthly, "mandatory provisions" of the law of the forum remain applicable irrespective of the law otherwise applicable to the dispute (article 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'.[46] 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

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42 See: COM(2003) 427 def, 13.

43 See, for example: Liesbeth Enneking, 'The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation' (2008) 16, *European Review of Private Law*, 283.

44 See, for example: Alex G. Castermans and Jeroen A. van der Weide, *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights* (Leiden: Leiden University, 2009), 53. Available at: http://ssrn.com/abstract=1626225 (last accessed 31 October 2014).

45 See: *Dieter Krombach* v. *André Bamberski*, ECJ Case C-7/98, [2000] ECR I-1935, para.44.

46 *Arblade*, ECJ Joint Cases C-369/96 and C-376/96, [1999] ECR I-8453, para.30.

regards to corporate human rights violations.[47]

In the above-mentioned case of Nigerian farmers against Shell Plc and Shell Nigeria, the Court in The Hague decided on the basis of Rome II that Nigerian law applied to the case.[48] The disadvantage of applying foreign law is that the court will usually follow the status quo, which makes the interpretation static rather than dynamic. The court will not develop foreign law as it could do with the forum's law and this is usually disadvantageous for claimants because tort liability of transnational corporations for involvement in human rights violations is a new area in which there is hardly any precedent.

PART C. CORPORATE HUMAN RIGHTS OBLIGATIONS UNDER DOMESTIC TORT LAW

6. The Universal Standard of Care

After having discussed the formal requirements for an international tort claim in a domestic court, the question is which substantive human rights obligations arise for transnational companies on the basis of domestic tort law. Although the applicable law (Section 5) is most relevant for aspects such as disclosure, limitation periods and the level of damages, this is much less the case when it comes to the standard of care. In most legal systems this standard of care is that of the *bonus paterfamilias*. Although this standard may be differently framed, in essence they require proof of the same facts.[49] 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.[50]

When establishing this standard of care in a relatively new area like corporate responsibility for human rights abuses, the courts may need to

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47 Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (Edinburgh: University of Edinburgh, 2010), 72.

48 *Oguru a.o.* v. *Royal Dutch Shell Plc and Shell Petroleum Development Company Nigeria Ltd.*, District Court The Hague 30 December 2009, LJN BK8616.

49 Richard Meeran, *Tort Litigation Against Multinationals ("MNCs") for Violation of Human Rights: an Overview of the Position Outside the US* (2011), 8. Available at: http://business-humanrights.org/sites/default/files/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf (last accessed 31 October 2014).

50 Regarding the various ways in which this standard of care is framed in France, Germany and England, see: Cees Van Dam (2013), *Op.cit.*, Section 604-607.

rely strongly on general principles of tort law with respect to the standard of care. The general standard of care 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.[51]

The first question to be answered is whether the corporation knew or ought to have known about the risk of being involved in human rights violations. Hence, 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. In the framework of human rights, this essentially means that a corporation must conduct risk assessments with regard to its involvement in violations either directly, or through its subsidiaries, suppliers, customers, and (other) business partners. The higher the likeliness of such violations the less important it will be that this research is burdensome, time-consuming and costly.[52]

A comparison can be drawn with the John Ruggie Framework's second pillar (see Section 3), which focuses corporations' responsibility to respect human rights and implies that they should carry out due diligence. The concept of due diligence 'describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.[53] This not only concerns a corporation's own activities - as a manufacturer, an employer or a neighbour - but also those of its business partners, governmental bodies and the like.[54] The concept of due diligence does not differ substantially from the risk assessment that is required by the standard of care in tort law. Hence, carrying out due diligence is not a *choice* but a *duty* for the corporation and 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 human rights risks that their activities may directly or indirectly pose to others. It is therefore somewhat 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.

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,

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51 *Ibid*, Sections 811 f.
52 *Ibid*, Section 807-1.
53 SRSG, *Op.cit*, No.56.
54 *Ibid*, No.57.

the second question is which measures need to be taken to prevent the risk from materialising and to redress the harm that has already occurred. 'As the danger increases, so must the precautions increase.'[55]

The level of risk can be determined by the seriousness of the expected damage and the probability that an accident will happen. The level of care can be broken down into the character and the benefit of the conduct and the burden of precautionary measures.[56] Practically, 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. Also, here the parallel with the Ruggie Framework is apparent where it asks corporations to address the company's negative impact on human rights. It shows once again that the Ruggie Framework follows a similar path as domestic tort law, albeit that it is not legally enforceable.

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. Such a duty is indeed conceivable, but the standard of care for acts of others is a rather underdeveloped area of tort law.[57] An important issue is whether the corporation has authority over the business partner. But even if it has not, precautionary measures can still 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. More generally, soft law and established codes of conduct can provide important guidance in this respect. Such guidance can help to turn situations of factual control into a legal duty to control.[58]

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

56 Cees van Dam (2013), *Op.cit*, Section 805-2.

57 *Ibid*, Section 808 and 1601.

58 See, for example, one of the Global Compact principles: 'Make sure that they [businesses, CvD] are not complicit in human rights abuses'. Available at: https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last accessed 31 October 2014).

In the following section I will analyse in more detail a corporation's standard of care *vis-à-vis* its subsidiaries.

7. Parent *vis-à-vis* subsidiaries

One would think that the universal tort law standard also applies to transnational corporations because many will regard the corporation as a unity. Indeed, corporations regard themselves as such, provided that it suits their interests to do so, particularly for marketing and branding reasons. When it comes to legal accountability, however, corporations like to take a different view and argue that they are many-headed organisations, comprising many entities that are independent of one other. This position is based on the corporate law principle of the separation of legal entities. This means that the starting point is that, as a shareholder, a parent company is not liable for the conduct of the subsidiaries in which it invests.[59]

This approach contrasts with areas like financial reporting and tax law - the tax man, 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 identifying the subsidiary's conduct with that of the parent (piercing the corporate veil) and its own negligent conduct *vis-à-vis* the subsidiary (duty of care).[60]

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.[61] One of the reasons for this reluctance may very well be that the cases at hand are usually concerned with pure economic loss, liability for which is hard to establish. It is, however, not self-evident that a court would take the same reluctant view in cases that are about serious human rights violations.[62]

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59 See, for example: *Adams* v. *Cape Industries* [1992] Law Reports, Chancery Division (Ch), 433.

60 See, *inter alia*: Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (London: Hart, 2004); Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006).

61 The criteria differ from country to country. See, John 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.29; Daniel Augenstein, *Op.cit.*, 62 f. See, also: *Akpan a.o.* v. *Royal Dutch Shell Plc and Shell Petroleum Development Company Nigeria Ltd.*, District Court The Hague 30 January 2013, LJN BY9854, BY9850, and BY9845, holding that under Nigerian law a parent company does not owe a duty *vis-à-vis* its subsidiary companies.

62 Cees van Dam (2013), *Op.cit*, Section 710.

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.[63] An illustration is the *Cape* case about employees who were exposed to asbestos in a South African factory.[64] 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.[65]

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 super-majority 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 (e.g. 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 (e.g. 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 (e.g. 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.[66]

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63 *Richard Meeran*, *Op.cit*, 4ff.

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

65 *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 began. See, also: *Connelly* 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, 2000 WL 1421183.

66 Daniel Augenstein, *Op.cit.*, 63 f.

The European picture is therefore far from unequivocal. However, the general tenor is to recognise two requirements for a duty: a (super) majority stake and control. In modern group structures, the parent will often have *de facto* control over its 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. 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.[67] 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.[68]

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, which also grimly illustrates that capitalism and slavery can still go hand-in-hand today.[69] 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.

The second situation is where the parent failed to prevent human rights violations by its subsidiary. This is the area of liability for omissions.[70] Provided that the parent had 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

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67 This is the ECJ's approach in the area of competition law. See: *Stora Kopparbergs Bergslags AB* v. *Commission* [2000], ECJ Case C-286/98 P, ECR I-9925, paras. 26–28; *Imperial Chemical Industries Ltd.* v. *Commission* [1972], ECJ Case 48/69, 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). Available at: www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf (last accessed 31 October 2014), 21 f.

68 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.

69 *John Roe I* v. *Bridgestone Corporation*, 492 F Supp 2d 988 (Southern District of Indiana, 2007).

70 See: Cees van Dam (2013), *Op.cit*, Section 808.

reason to assume that the principle of commercial freedom has to give way to a duty to interfere.

A recent domestic example is the English case *Chandler* v. *Cape*. 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 and Chandler pursued his claim against parent company Cape Plc. The trial judge held that Cape Plc owed Chandler a duty of care and that Cape had breached its duty.[71] The Court of Appeal dismissed the appeal. It held that the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees, such as in a situation where, as in the present case: (i) the business of parent and subsidiary are the same; (ii) the parent has superior knowledge on the relevant aspects of health and safety in the industry; (iii) the parent company knows or ought to know that the subsidiary's system of work is unsafe; (iv) the parent knows or ought to foresee that the subsidiary or its employees rely on using its superior knowledge for employees' protection.[72]

This is a fine illustration of how a court can hold a parent liable for damage primarily caused by its subsidiary. However, it also illustrates how strong the old adage is that legal entities are independent even though they are part of an enterprise which often unifies policies and practices to a very high degree. In practice, group-wide policies make subsidiaries increasingly dependent and subordinate; a duty of the parent *vis-à-vis* its subsidiary is therefore in line with modern corporate practices.

8. Conclusion

Today, human rights are heralded as the most valuable of rights and the Universal Declaration of Human Rights is sometimes seen as the mother of all rights. This, however, fails to appreciate that, to a considerable extent, human rights are part of a shared heritage that is rooted in the domestic laws of many countries. Indeed, domestic tort law has protected individual rights from time immemorial. In comparison, international human rights are the spring chickens of the rights family.

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71 [2011] EWHC 951 (QB).

72 [2012] EWCA Civ 525. In *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, the Court of Appeal held that on the facts the parent company did not owe a duty of care towards its subsidiarity employee. Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2014/635.html (20 October 2014).

Nonetheless, international human rights have had a considerable influence on domestic law. For example, the right to human dignity was not only adopted in the European Convention of Human Rights as an answer to the atrocities caused by fascist and totalitarian regimes, but was also included in the German Basic Law (Constitution). Later, it was acknowledged in the United Kingdom as applying in national law and it was codified in the French *Code civil*.

As there are hardly any international tort law obligations. Victims need to take refuge in domestic tort law. Litigating in the country of the victim may run the risk of being in a less efficient or even partial court. Litigating in the country of the headquarters of the transnational corporation implies other hurdles, such as forum, applicable law, the disentanglement of the complex structure of the many legal entities of which a transnational corporation exists, and assessment of obligations the parent may have *vis-à-vis* these entities.

Tort law and international human rights law pursue similar goals: assessing when a person's right is violated and an effective remedy should be provided. In tort law, this is called an individual right, civil right or subjective right, in national constitutional law it is often known as a fundamental or constitutional right, and in public international law as a human right. This divergent terminology does not mean that they point to different rights. In essence, they are all about the same rights protecting various aspects of a human being. In pursuing this aim, international human rights law and domestic tort law are complimentary, at the same time mutually influencing each other in assessing content and scope of human rights. Indeed, they are brothers in arms for the defence of the rights of every human being, not only as a shield against the state, but also against private parties, including transnational corporations.