

**Constructing Accountability in Business and Human Rights:
An Investigation of the Development of
Foreign Direct Liability Litigation
and Feasibility in Ireland**

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Declaration

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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Rachel Widdis

Trinity College Dublin, 20th October 2020

Summary

This thesis is situated within the field of business and human rights. The context is an on-going failure to render multinational corporations accountable for negative impacts on human rights linked to their subsidiaries and to provide effective remedy for victims. It is concerned with the direct involvement, or complicity, of commercial legal entities in a wide spectrum of abuses, *inter alia*: violations of the right not to be subject to inhuman or degrading treatment; modern slavery; forced land dispossession; rape; extrajudicial killings; and pollution or environmental destruction which affects health and livelihoods. At the core is the reality that multinational groups structured into separate legal entities and splintered across jurisdictions, experience effective impunity from legal accountability.

Whereas policy and soft law initiatives have dominated developments in this field, this thesis focuses on levers of accountability in law. Foreign Direct Liability (FDL) litigation is developing primarily in common law jurisdictions, and judiciaries are confronted with applying and developing principles of substantive and procedural law. The central research question investigates whether actions against a parent company in the tort of negligence for the negative impacts of its foreign subsidiaries are feasible in Ireland. Although no FDL case has yet been taken in Ireland, a synthesis of comparative jurisprudence and of the legal context for FDL litigation in the English and Irish courts enables an identification of principles which may prove persuasive. This thesis concludes with an assessment of feasibility and presents a model for adjudicating foreign direct liability litigation in Ireland.

Research Methods

The thesis combines a doctrinal analysis of the evolution of a cause of action in negligence, and a comparative analysis of FDL jurisprudence. The doctrinal content commences with the existing framework and normative issues. It proceeds to explore systemic barriers to the legal accountability of business for negative human rights impacts. Complimentary and reinforcing routes to legal accountability in domestic systems are examined, including exploring the primary liability of corporate entities for offences of failure to prevent human rights abuses in Ireland. It assesses normative issues and practical factors driving the continued rise of civil causes of action, and benchmarks progress. On the basis of greatest instructive value and stage of development, a comparative analysis of FDL litigation focuses on the jurisprudence of the English courts. Feasibility in Ireland is assessed from substantive, procedural and practical aspects. Avenues to leverage the role of the Irish Constitution in the protection of human rights and access to justice are explored.

Major Findings

To progress towards an effective framework of vertical and horizontal accountability, requires instrumental means and political will. This thesis concludes that the implementation of international soft law initiatives is welcome and required, yet a focus primarily on soft law may draw impetus away from evolution to a balanced system of governance, and inadvertently enable multinational corporations to continue to evade legal accountability. Regulating corporations at a transnational level is challenging. The inadequacy of existing mechanisms at the international level reinforces that routes to accountability are most valuable in domestic systems. States which have assumed obligations to protect must act to stand on the right side of history, including Ireland. Accountability in criminal and civil law, working effectively and in tandem, is necessary to counteract the risk of denial of access to justice for victims, and to balance the benefits accruing to business with negative impacts on rights holders. This thesis concludes that states should construct responses spanning criminal law, tort law, and regulation with extraterritorial effect including mandatory human rights due diligence. Acknowledging that the cause of action it investigates is a ‘proxy’ to remedy human rights violations, this thesis argues tort law occupies a crucial role in the protection of human rights in domestic systems. It concludes FDL litigation advances victims’ prospects of compensation and includes elements of public interest and moral censure while delivering regulatory benefits.

The synthesis of comparative jurisprudence highlights principles, trends, and recurrent issues. This thesis presents a succinct model for adjudicating FDL cases according to jurisdiction, duty of care, applicable law, and practical circumstances. Within this context, it identifies relevant commonalities and divergences between the English and Irish systems and argues that the bright line differentiating factor is the potential influence of the Irish Constitution. It concludes that from a substantive perspective, FDL litigation is feasible in Ireland and that, on balance, settled comparative jurisprudence will prove persuasive. It anticipates that the existing procedural and practical inhibitors to litigation, lack of adequate mechanisms of collective redress and means of funding, will ease in the short to medium term thereby opening possibilities for FDL litigation and underpinning the pertinence of this research. To the author’s knowledge, the feasibility of FDL litigation in Ireland has not been previously considered, and this thesis makes an original contribution to advancing scholarship. It is a significant effort to investigate this issue and is novel in its span of fields of law. It sits within a critical juncture in the development of an effective system of accountability. There is much to play for.

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I have endeavoured to state the law as of 20th October 2020. Any errors and omissions are my own.

With Ray and Paddy Widdis

To

Eoin, Pierce, Iseult

Cambay d'Irlande

The GCB

‘Sing yourself to where the singing comes from’

At the Wellhead

Seamus Heaney

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ATS	US Alien Tort Statute 1789
ARP	Accountability and Remedy Project
BHR	Business and Human Rights
Brussels I	EU Regulation Brussels I (recast)
CFA	Conditional Fee Arrangement
CPR	Civil Procedure Rules
CRFEU	Charter of Fundamental Rights of the European Union
ECtHR	European Court of Human Rights
ECHR	European Convention on Fundamental Rights and Freedoms
CJEU	European Court of Justice
DPA	Deferred Prosecution Agreement
EU	European Union
FDL	Foreign Direct Liability
GLOs	Group Litigation Orders
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ILO	International Labour Organisation
ICC	International Criminal Court
MNCs	Multinational corporations
MPAs	Multi-Party Actions
NAP	National Action Plan
NFRD	Non-Financial Reporting Directive
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OCHCR	Office of the High Commissioner for Human Rights

Rome II	EU Regulation Rome II
SFO	Serious Fraud Office
RSC	Rule of the Superior Courts
SRSG	Special Representative of the Secretary General of the United Nations
TPR	Transnational Private Regulation
UN DHR	United Declaration of Human Rights
UN CERD	United Nations Committee for Elimination of Racial Discrimination
UN CESCR	United Nations Committee on Economic Social and Cultural Rights
UN CRC	United Nations Committee for the Rights of the Child
UN Framework	United Nations Framework on Business and Human Rights
UN GPs	United Nations Guiding Principles on Business and Human Rights
UN HRC	United Nations Human Rights Council

PRIMARY SOURCES

CONSTITUTIONAL PROVISIONS

The Irish Constitution

Preamble

Article:

15.1

29.6

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Act No.108 of 1996 S.39(2) Article 8(2)

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PART I INTRODUCTION TO CONTEXT AND ACCOUNTABILITY

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1.1. INTRODUCTION

The background to this thesis combines the force of economic globalisation with systemic structural, procedural, and practical barriers to remedy for victims¹ of human rights abuses by multinational corporations.² Constructing accountability of multinational corporations is challenging. Corporations are an ‘inherently difficult regulatory target’.³ Regulators and courts are grappling with fundamental questions of legal personality, attribution of liability and corporate criminality in complex organisations with widely varying decision making structures.⁴ In the absence of human rights based causes of action, legal accountability of multinational corporations is based on a cause of action in the tort of negligence. Foreign

¹ European Union Agency for Fundamental Rights, Opinion 1/2017 ‘Improving Access to remedy in the area of business and human rights at the EU level’ ‘Key Terms’: ‘The victim of business-related human rights abuse, the right holder, is referred to as victim, and as claimant or plaintiff where damages are sought in reparation of the harm incurred (in civil litigation or as part of a criminal prosecution against the defendant company)’ <<http://fra.europa.eu/en/opinion/2017/business-human-rights>> accessed 10 December 2019.

² A Multinational Corporation is taken to be any commercial firm (legal entity) which owns in whole or in part, controls and manages income generating assets in more than one country. Business is a generic term to capture the meaning of labels such as corporation, company, and firm. Where a distinction is required between a company headquarter and its (wholly or partly owned) subsidiary, ‘parent company’ and ‘subsidiary’ (a legally separate entity) are used.

³ Beth Stephens, ‘The Amoralism of Profit: Transnational Corporations and Human Rights’ (2002) 20 Berkeley Journal of International Law 45, 54. See also Stephen Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111(3) The Yale Law Journal 443; Grietje Baars, ‘It’s not me, it’s the corporation: the value of corporate accountability in the global political economy’ (2016) 4(1) London Review of International Law 127; Gwynne Skinner, Robert McCorquodale and Oliver De Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (2013) 1 <<http://icar.ngo/wpcontent/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-byTransnational-Business.pdf>> accessed 10 December 2019; International Commission of Jurists (ICJ), ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (2014) <<https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights>> accessed 10 December 2019; Anna Grear and Burns H. Weston Burns H, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a post-Kiobel Lawscape’ (2015) 15 Human Rights Law Review 21. Concerning embedding the duty of care standard in an appropriate accountability framework, see Rolf H. Weber and Rainer Basich ‘Liability of Parent Companies for Human Rights Violations of Subsidiaries’ (2016) European Business Law Review 669.

⁴ Caroline Kaeb, ‘The Shifting Sands of Corporate Criminal Liability under International Criminal Law’ (2016) 49 The Geo. Wash. Int’l Law Review 351, 352.

direct liability litigation is based on breach of direct parent company duty of care, and actions are pursued in the jurisdiction in which the parent company is domiciled.

Section 1.2 provides an overview of corporate abuses of human rights and the existing accountability gap. Section 1.3 outlines expert comment on themes relevant to this thesis. Section 1.4 will introduce the context in Ireland, outlining the nature of business activity, including both foreign direct investment and the extensive activities of Irish companies overseas. It will highlight evidence of abuses overseas related to corporations domiciled in Ireland, including Irish state-owned entities, underpinning the potential relevance of foreign direct liability litigation. Section 1.5. presents the central research question, the research methodology, and an outline of development of themes within the thesis. The scope, objectives and original contribution of this thesis are set out. In the quest for legal accountability which lies at the core of the research question, it considers concepts of regulation and parameters appropriate to this field which are adopted in the thesis. Working from the issues outlined in the chapter, a pathway to legal accountability will be introduced.

1.2. CONTEXT

1.2.1. Corporate Abuses of Human Rights

The negative impact of business on human rights is of growing concern.⁵ The issue itself is not new, far from it. Multinational corporations which remain widely respected and successful have long been implicated. Deutsche Bank financed the construction of the Auschwitz Concentration camp, Allianz insured it, and IBM provided the records systems.⁶ Farther back in international commerce lies the horror of the transatlantic slave trade.⁷ The legacy in human impacts lives on, the facts are largely known. Such perspective renders yet more incomprehensible our hesitation to prise open the door and look into the face of the abuses of our day. This thesis fits into a larger movement shining a light on how corporations generate their profits and advocating prevention of, and comprehensive accountability for, negative impacts occurring out of sight and out of mind. Litigation in

⁵ Business is a generic term to capture the meaning of labels such as corporation, company, and firm. Where a distinction is required between a company headquarter and its (wholly or partly owned) subsidiary, ‘parent company’ and ‘subsidiary’ (a legally separate entity) are used.

⁶ Stephens, ‘The Amoral of Profit’ (n 3).

⁷ Nadia Bernaz, *Business and Human Rights; history, law, and policy – Bridging the accountability gap* (Routledge 2017), 15-78.

home states is bringing the harm inflicted closer to home. The words of Beth Stephens highlight the reality that corporations routinely profit from abusive conduct:

From oppressive working conditions to slavery and even genocide, from pollution to environmental destruction, corporations are capable of extracting economic gain from harms inflicted on people and on the environment in which we live.⁸

How big is the problem? The oil slick from the British Petroleum Deepwater Horizon spill into the Gulf of Mexico was visible from space. It covered 25,000 square miles.⁹ British Petroleum reportedly set aside US\$43 billion to cover fines, legal settlements and clean-up costs¹⁰ related to inadequate over-sight of environmental and safety issues in its operations.¹¹ Three decades before Deepwater, protests by local communities against oil

⁸ Stephens 'The Amoral of Profit' (n 3) 4.

⁹ Philip Sherwell and David Lawler, 'BP oil spill five years after worst environmental disaster in US history – how bad it really was' *The Telegraph* <www.telegraph.co.uk/news/worldnews/northamerica/usa/11546654/BP-oil-spill-Five-years-after-worst-environmental-disaster-in-US-history-how-bad-was-it-really.html> accessed 31 December 2019.

¹⁰ Terry Macalister, 'BP fined further 25bn over Deepwater Horizon' *The Guardian* (14 July 2016) <www.theguardian.com/business/2016/jul/14/bp-fined-further-25bn-over-deepwater-horizon-spill> accessed 30 November 2019.

¹¹ *The Financial Times* (London, 26 October 2014) stating: 'The explosion was not an isolated incident. It was preceded by a series of environmental and safety issues, including breaches of safety laws at Grangemouth in 2000, the Texas City refinery explosion, the subsequent Alaska oil spill and Azerbaijan gas leak, along with several violations of the US Clean Water Act and penalties from the Occupational Safety and Health Administration. There were risks that were clearly affected value at BP (shame analysts didn't notice). It would clearly have made sense for trustees to weigh them up when considering an investment in the company'.

pollution in the Niger Delta¹² led to the trial and execution of the ‘Ogoni 9’.¹³ Their deaths were declaimed across the world as judicial murder.¹⁴ In the late 1990s a series of suits were brought in the US federal courts against extractive companies including Shell,¹⁵ Unocal,¹⁶ Chevron,¹⁷ and Exxon¹⁸ for alleged complicity in human rights violations including coercive appropriation of land, torture, extrajudicial killing, rape, arbitrary detention, forced labour, and infringement of rights to peaceful assembly and association. It is an arresting image of multinational corporations, which are so invested in reputational assets.¹⁹ It is also far from a tidy European Union regime where lorry drivers are obliged by law to stop and rest for health and safety reasons. This thesis relates to accountability

¹² For a full discussion on the human rights impact of oil pollution in the Niger Delta, see Amnesty International ‘Petroleum, Pollution and Poverty in the Niger Delta’ (June 2009)

<www.amnesty.org/en/documents/AFR44/017/2009/en/>; ‘Negligence in the Niger Delta’ <www.amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF> accessed 30 November 2019. The main human rights impacts documented include violations of: the right to an adequate standard of living, including the right to food as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries; the right to water which occur when oil spills pollute water used for drinking and other domestic purposes; the right to health which arise from the failure to secure the underlying determinants of health, including a healthy environment, and the failure to enforce laws to protect the environment and prevent pollution; the right to ensure access to effective remedy for people whose human rights have been violated; the right to information of affected communities relating to oil spills and clean-up. See also UN Environment Programme ‘Environmental Assessment of Ogoniland’ (2011) 10-11 <www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx> accessed 30 November 2019.

¹³ Author and playwright Ken Saro-Wiwa, Saturday Dobee, Nordu Eawo, Daniel Gbooko, Paul Levera, Felix Nuate, Baribor Bera, Barinem Kiobel, and John Kpuine.

¹⁴ BBC <http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 10 December 2019.

¹⁵ <www.earthrights.org/legal/wiwa-v-royal-dutchshell> accessed 13 December 2019.

¹⁶ *Doe v Unocal Corp.* F.3d. 932 (9th Cir. 2002).

¹⁷ *Bowoto v. Chevron Corp.* 481 F. Supp. 2d 1010 (2007) (N.D. Cal. 2007).

¹⁸ *Doe v Exxon Mobil Corporation* 654 F.3d 11 (DC Cir. 2011).

¹⁹ Edelman Trust Barometer, ‘Global Report’ (2019) <www.edelman.com/sites/g/files/aatuss191/files/2019-03/2019_Edelman_Trust_Barometer_Global_Report.pdf?utm_source=website&utm_medium=global_report&utm_campaign=downloads> accessed 10 December 2019. See also Economist Intelligence Unit, ‘The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights’ (2015), 12 <<https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice>> accessed 10 December 2019.

for the impacts which lie behind getting the fuel and goods into those same lorries. From 1995 to today, those impacted by commercial extractive activities in the Niger Delta continue to seek justice in the home states of the multinational corporations involved. In the Niger Delta alone, oil pollution clean-up costs are estimated at US\$520 million. If started today, rectification to restore affected livelihoods and the local environment would take a quarter of a century to complete.²⁰

For more than thirty years the victims of the Bhopal industrial disaster in India have sought to hold US parent company Union Carbide Corporation accountable.²¹ Activists claim that in the aftermath of the gas leak 25,000 people lost their lives.²² A further 100,000 people exposed to toxic emissions continue to suffer illnesses such as cancer, visual and respiratory impairment, immune system and neurological disorders.²³

The repercussions of the on-going failure of the world community to establish an international regulatory framework to prevent corporate human rights abuses and to provide effective redress for victims are manifest.²⁴ In 2013 an eight-storey building collapsed in the industrial outskirts of Dhaka in Bangladesh killing more than 1,100 workers and seriously injuring many more. The Rana Plaza complex housed five garment factories supplying numerous global fashion brands, allegedly including Auchan, Zara and

²⁰ UNEP; Amnesty International Reports (n 12).

²¹ History of the Bhopal disaster <www.bhopal.org/history-of-the-criminal-case-outstanding-against-union-carbide-in-relation-to-the-1984-bhopal-disaster/> accessed 18 October 2019.

²² Nita Bhalla, 'US India Bhopal anniversary demands justice 30 years after deadly industrial disaster' (2 December 2014) Reuters <www.reuters.com/article/us-india-bhopal-anniversary/bhopal-demands-justice-30-years-after-deadliest-industrial-disaster-trfn-idUSKCN0JH01I20141203> accessed 18 October 2019.

²³ Bhopal Medical Appeal activist Sanitath Sarangi stating: '(...) what is most pronounced is the number of children with birth defects. Children are born with conditions such as twisted limbs, brain damage, musculoskeletal disorders... this is what we see in every fourth or fifth household in these communities' 'Bhopal toxic legacy lives on 30 years after industrial disaster' (28 November 2014) Reuters <<https://uk.reuters.com/article/us-india-bhopal-widerimage/bhopals-toxic-legacy-lives-on-30-years-after-industrial-disaster-idUKKCN0JC0WD20141128>> accessed 18 October 2019.

²⁴ Rina Chandran, 'US Bangladesh garments lessons analysis – three years after Rana Plaza disaster has anything changed' (21 April 2016) Reuters <www.reuters.com/article/us-bangladesh-garments-lessons-analysis/three-years-after-rana-plaza-disaster-has-anything-changed-idUSKCN0XJ02G> accessed 18 October 2019.

Primark.²⁵ Although cracks were already evident in the structure, the owner and managers forced workers to enter the building. Shortly after, it collapsed. There is no evidence of accountability. The pattern is non-accountability, and it persists. Six years on, the murder charges against those involved have yet to come to trial.²⁶ Facing public outrage and pressure from civil society after the collapse of Rana Plaza, certain global brands signed the Accord on Fire and Building Safety in Bangladesh.²⁷ Under this binding agreement signatories are compelled to fund necessary improvements in safety standards. By 2017 some of these brands were already before the International Court of Arbitration for non-compliance with the Accord.²⁸

The scale of the negative impacts of business on lives and livelihoods globally is mesmerizing. In the past eight years alone Human Rights Watch has published damning exposés alleging host state²⁹ government inaction for alleged abuses related to business *inter alia*: in India while mining operations fuel corruption and harm communities;³⁰ in Bangladesh while the tannery industry runs roughshod over environmental, health and safety laws poisoning and maiming its workers and spewing pollutants into nearby

²⁵ Michael Safi and Dominic Rushe, 'Bangladeshi police target garment workers union Rana Plaza five years on' (24 April 2018) *The Guardian* <www.theguardian.com/global-development/2018/apr/24/bangladeshi-police-target-garment-workers-union-rana-plaza-five-years-on> accessed 18 October 2019.

²⁶ Mahmud Hossain Opu 'Rana Plaza trial stuck in limbo after five years' (8 December 2018) *Dhaka Tribune* <www.dhakatribune.com/bangladesh/court/2018/12/08/rana-plaza-trial-stuck-in-limbo-after-five-years> accessed 18 October 2019.

²⁷ <<https://bangladeshaccord.org/>> accessed 18 October 2019.

²⁸ Accord on Fire and Building Safety in Bangladesh <http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf> accessed 18 October 2019.

²⁹ The 'host state' is the state in which the relevant business activities of a subsidiary of a multinational corporation occur. In general terms, the 'home state' of a multinational corporation is the state in which the parent corporation of the concerned group is incorporated. For the purposes of this thesis, the default rule in Article 4 of the Brussels I (recast) regime is that the courts in the country where the defendant is domiciled (habitual residence) has jurisdiction. Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993), 169: definition of home country extraterritoriality as the 'extension of the scope of the home country's laws to foreign subsidiaries that are subject as well to the laws of the host country under which they are incorporated or have their siege'; host country extraterritoriality as the situation by which a 'host country applying enterprise principles to a domestic subsidiary of a foreign-based multinational group asserts jurisdiction over, or imposes liability upon, the foreign parent or affiliates of the group'.

³⁰ Human Rights Watch, 'Out of Control, Mining Regulatory Failure and Human Rights in India' (2012) <www.hrw.org/sites/default/files/reports/india0612ForUpload_0.pdf> accessed 18 October 2019.

communities;³¹ abuses related to the 2022 World Cup in Qatar;³² women gang-raped by private security guards employed by Canadian-owned Barrick Gold at a Papua New Guinea mine,³³ and forced labour in mines in Eritrea.³⁴ There is reason to believe gross human rights violations are endemic across the tiers of supply chains of everyday items, *inter alia*, consumer electronics, toys, coffee, tomatoes, and palm oil.³⁵ For the first time in 2019, proceedings were issued in the US on behalf of fourteen child plaintiffs alleging tech firms Google, Apple, Dell, Microsoft and Tesla aided and abetted abuses related to mining for cobalt used to power smartphones, laptops and electric cars in which the children were killed or maimed.³⁶ It is alleged that the defendant companies had ‘specific knowledge’ that the cobalt they use in their products is linked to child labour performed in hazardous

³¹ Human Rights Watch, ‘Toxic Tanneries The Health Repercussions of Bangladesh’s Hazaribagh Leather’ (2012) <www.hrw.org/report/2012/10/08/toxic-tanneries/health-repercussions-bangladeshs-hazaribagh-leather> accessed 18 October 2019.

³² Human Rights Watch, ‘Building a Better World Cup; Protecting Migrant Workers in Qatar ahead of FIFA 2022’ (2012) <www.hrw.org/report/2012/06/12/building-better-world-cup/protecting-migrant-workers-qatar-ahead-fifa-2022> accessed 18 October 2019.

³³ Human Rights Watch, ‘Gold’s Costly Dividend, Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine’ (2011) <www.hrw.org/sites/default/files/reports/png0211webwcover.pdf> accessed 18 October 2019.

³⁴ Human Rights Watch, ‘Hear No Evil: Forced Labour and Corporate Responsibility in Eritrea’s Mining Sector’ (2013) <www.hrw.org/report/2013/01/15/hear-no-evil/forced-labor-and-corporate-responsibility-eritreas-mining-sector> accessed 18 October 2019.

³⁵ See for example Amnesty International, ‘The Great Palm Oil Scandal’ (2016) <www.amnesty.org/en/documents/asa21/5184/2016/en/> accessed 18 October 2019.

³⁶ Case Complaint District Court of Columbia <<http://iradvocates.org/sites/iradvocates.org/files/stamped%20-Complaint.pdf>> accessed 1 January 2020. The plaintiffs are seeking damages for forced labour and further compensation for unjust enrichment, negligent supervision, and intentional infliction of emotional distress. See also Annie Kelly ‘Apple and Google named in US lawsuit over Congolese child cobalt mining deaths’ *The Guardian* (16 December 2019) stating: ‘Cobalt is essential to power the rechargeable lithium batteries used in millions of products sold by Apple, Google, Dell, Microsoft and Tesla every year. The insatiable demand for cobalt, driven by desire for cheap handheld technology, has tripled in the past five years and is expected to double again by the end of 2020. More than 60% of cobalt originates in DRC, one of the poorest and most unstable countries in the world.’ <www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths> accessed 1 January 2020.

conditions, and were complicit in the forced labour of the children.³⁷ The persistent abuse of children in cobalt mines has been well documented in the world media.³⁸

This thesis is not concerned with whether business or multinational corporations are overall a force for good or evil. It simply advances on the basis that the violation of human rights, whether at home or in some far-flung and psychologically distant place, is unacceptable. To place the need to advance accountability in context, a 2014 study found that over half of the companies listed on the UK FTSE 100, French CAC 40, and the German DAX 30 had been identified in allegations or concerns regarding adverse human rights impacts.³⁹ The KIK case illustrates in practical terms the complexity of issues involved. In 2012, 260 workers died in a fire in a textile factory producing goods for German retailer KIK in Pakistan. Litigation in Germany alleged KIK breached its duty of care to ensure its supplier in Pakistan had adequate fire safety measures in place. The action was financed by NGOs.⁴⁰ The claimants alleged the building had no fire alarms, no emergency exits and no fire extinguishers. KIK maintained it had charged an independent auditing company with monitoring the factory and was provided with three audit reports indicating that fire safety

³⁷ *ibid* Case Complaint para 15 stating: ‘There is no question that Defendants have specific knowledge that the cobalt mined in DRC they use in their various products includes cobalt that was produced by children working under extremely hazardous conditions, that serious mining accidents are common due to the primitive conditions and complete lack of safety precautions in the mines, and that hundreds, if not thousands, of children have been maimed or killed to produce the cobalt needed for the world’s modern tech gadgets produced by Defendants and other companies’.
<<http://iradvocates.org/sites/iradvocates.org/files/stamped%20-Complaint.pdf>> accessed 1 January 2020.

³⁸ Amnesty International ‘Democratic Republic of Congo: “This is what we die for”: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt’ (19 January 2016) <www.amnesty.org/en/documents/afr62/3183/2016/en/> accessed 1 January 2020. See also Siddharth Kara, ‘Is your phone tainted by the misery of the 35,000 children in Congo’s mines?’ (12 October 2018) *The Guardian* <www.theguardian.com/global-development/2018/oct/12/phone-misery-children-congo-cobalt-mines-drc#img-1> accessed 1 January 2020.

³⁹ IPIS, ‘The Adverse Human Rights Risks and Impacts of European Companies: Getting a glimpse of the picture’ <http://corporatejustice.org/documents/ahrri_report_final-2.pdf> accessed 18 October 2019.

⁴⁰ Christopher Patx, ‘Consumer is King? Of class actions and who matters in EU law: The European Commission proposes that consumers should be able to take class actions in future, in the wake of the VW Dieselgate scandal. But it has forgotten other victims of corporate harm’ <www.opendemocracy.net/en/openjustice/consumer-is-king-of-class-actions-and-who-matters-in-eu-law/> accessed 18 October 2019.

was adequate.⁴¹ In 2019 a German court ruled that the claims were time-barred under Pakistani law.⁴² It is apparent there is a long road ahead to effective accountability of multinational corporations. As Baughen's survey of criminal proceedings against corporations or corporate officers illustrates,⁴³ cases taken in Europe against RIWAL (Holland),⁴⁴ Danzer (Germany)⁴⁵ and Argor-Heraeus (Switzerland)⁴⁶ all foundered.⁴⁷

The crux here is how accountability for the scale of negative impacts remains unattainable over decades. In practice the legal pathway for victims, such as those in Bhopal, illustrates typical substantive, procedural, conceptual and practical barriers to holding non-state actors

⁴¹ Philipp Wesche and Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*' 16 (2016) Human Rights Law Review 370, 373 outline that 'according to KiK's own statements, it develops correction plans, supervises their implementation and conducts on-site qualification programmes, if such monitoring reveals any shortcomings.' They highlight 'another important aspect is how the court will assess the fact that KiK had charged an independent auditing company with monitoring the factory, which provided KiK with three, obviously incorrect, audit reports indicating that fire safety was adequate'.

⁴² *Muhammad Jabir and Others v KiK Textilien und Non-Food GmbH* Case No. 7 O 95/15. See also <www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf> accessed 18 October 2019.

⁴³ Simon Baughen, *Human Rights and Corporate Wrongs, Closing the Governance Gap* (Elgar 2015), 36 stating that 'a survey of criminal proceedings to date against corporations or corporate officers shows there has been only a handful of convictions against individuals'.

⁴⁴ In 2010, Al-Haq filed a complaint against Riwal in the Netherlands for its participation in constructing the separation wall that the International Court of Justice has ruled illegal. In May 2013, the Dutch Public Prosecutor dismissed the case. See <www.business-humanrights.org/en/riwal-lawsuit-re-separation-wall-between-israel-palestine> accessed 18 October 2019.

⁴⁵ In 2013 the NGOs European Centre for Constitutional and Human Rights (ECCHR) and Global Witness filed a criminal complaint in Germany against Olof von Gager, a senior manager of Danzer Group, alleging he was complicit in human rights abuses committed during the attack on the village of Bongulu in the DRC by failing to prevent it. Under German law, corporations cannot be prosecuted for crimes. Senior managers may have criminal responsibility arising from a duty of care towards those affected by the actions of their employees. In 2015, the public prosecutor's office discontinued the investigations. See <www.business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo> accessed 18 October 2019.

⁴⁶ In 2015 the Swiss Federal Prosecutor's Office decided to terminate criminal proceedings opened in October 2013 against the Swiss refinery, Argor-Heraeus SA, denounced by the NGO, TRIAL, for having refined dirty gold originating from the Democratic Republic of Congo. See <www.business-humanrights.org/en/swiss-general-attorney-not-to-prosecute-argor-heraeus-over-refining-of-alleged-pillaged-gold-by-illegal-armed-group-in-rep-dem-of-congo#c123969> accessed 18 October 2019.

⁴⁷ Baughen (n 43) 36.

accountable at a transnational level.⁴⁸ At the centre is a stark and enduring disconnect. On the one hand multinational corporations trade and reap benefits worldwide, while on the other they enjoy a certain ‘juridical elusiveness’.⁴⁹ The result, as one activist states is ‘(...) the so-called borderless world remains cruelly re-bordered for the violated victims’.⁵⁰

1.2.2. The Accountability Gap

The activities of corporations can in principle affect all human rights,⁵¹ yet there is no general international legal regime on corporate liability for human rights abuses.⁵² Despite nearly fifty years of reports, working group meetings, initiatives and draft codes of conduct,⁵³ no binding international mechanism exists.⁵⁴ Alongside a ‘cacophony’⁵⁵ of

⁴⁸ Surya Deva, ‘Bhopal; the saga continues 31 years on’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights, From Principles to Practice* (Routledge 2016), 24. See also Amnesty International, ‘Clouds of Injustice: Bhopal Disaster 20 years on’ <www.amnesty.org/en/documents/ASA20/015/2004/en/> accessed 18 October 2019.

⁴⁹ Grear and Weston (n 3) 28.

⁵⁰ Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2002), 136-7.

⁵¹ Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 JETL 221, 243 arguing corporate conduct affects: ‘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. One may also add the right to a fair trial, a legal remedy, and freedom of association’.

⁵² Specific provisions include *inter alia*; The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography (OPSC) (adopted 18 January 2002) UNTS vol.2171, 227 art 3(4); Council of Europe Convention on the Protection of the Environment through Criminal Law (opened 4 November 1998) ETS No.172 art 9 for a regime of corporate liability (not yet in force).

⁵³ The history of initiatives is discussed in chapter 2 section 2.2.

⁵⁴ In 2018 on behalf of the Chairmanship of the Open Ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights established by the UN HRC, the Permanent Mission of Ecuador presented the Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (July 2019) (Revised Draft) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 18 December 2019.

⁵⁵ Justine Nolan, ‘All Care, No Responsibility?’ in Lara Blecher, Nancy Kaymar Stafford, & Gretchen C. Bellamy (eds.) *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014) 3, 15.

voluntary codes of corporate conduct⁵⁶ and transnational private regulation,⁵⁷ avenues for concrete legal remedy for victims are either inoperative or significantly inhibited in practice.⁵⁸ As explored below, legal entities are not subjects of international human rights law. There is no international criminal court with jurisdiction over legal entities, and even when provided for, corporate criminal liability at national level is challenging to establish and enforce.

Multinational corporations represent a challenging target for both regulation and litigation due in part to the disassociation of the ‘group’ which is splintered into separate legal entities operating across multiple domestic legal regimes.⁵⁹ This disconnect is illustrated by Augenstein’s study indicating key patterns in abuses allegedly committed by corporations domiciled in and operating outside the EU.⁶⁰ It found that the vast majority of abuses concern subsidiaries or contractors of European corporations domiciled or resident in the country of harm and subject (only) to its regulatory and enforcement regime. Structurally,

⁵⁶ For present purposes soft law includes all international instruments defined as codes, guidelines, or principles (excluding treaties), and codes of conduct both developed at international level and at the level of companies or sectors whether by individual corporations, NGOs, or multi-stakeholder groups. For performance of companies against 2018 Human Rights Benchmark see <www.ihrb.org/focus-areas/benchmarking/2018-corporate-human-rights-benchmark>; Business & Human Rights Resource Centre <www.business-humanrights.org/en/company-policysteps/policies>; Danish Institute of Business and Human Rights <www.humanrights.dk/tools/human-rights-indicators-business> Shift Project <www.ungpreporting.org/database-analysis/explore-disclosures/>; International Corporate Accountability Roundtable <https://www.icar.ngo/> all accessed 25 October 2019.

⁵⁷ Examples include; Extractive Industry Transparency Initiative <<https://eti.org/>>; GoodWeave International <<https://goodweave.org/>>; Fair Labour Association <www.fairlabor.org/> ; Fairtrade <www.fairtrade.net/> ; Forest Stewardship Council <<https://fsc.org/>> ; Global Network Initiative <<https://globalnetworkinitiative.org/>>; International Code of Conduct for Security Providers <www.icoca.ch/> ; Kimberley Process <www.kimberleyprocess.com/> Roundtable on Sustainable Palm Oil <<https://rspo.org/>> all accessed 25 October 2019. For more on transnational private regulation see Nicola Jägers, ‘Will transnational private regulation close the gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 295.

⁵⁸ See generally International Commission of Jurists (n 3).

⁵⁹ Stephens ‘The Amoralism of Profit’ (n 3).

⁶⁰ See Executive Summary Daniel Augenstein, Alan Boyle and Navraj Singh Ghaleigh, ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European enterprises operating outside the European Union’ (2010) <<https://www.business-humanrights.org/en/pdf-study-of-the-legal-framework-on-human-rights-and-the-environment-applicable-to-european-enterprises-operating-outside-the-european-union>> accessed 18 October 2019.

this pattern is enabled as long as multinational corporations are not subject to direct obligations to protect under international human rights law.⁶¹

Within the host states in which subsidiaries of multinational corporations operate, governance gaps⁶² foster both potential abuses and barriers to remedy.⁶³ The regulatory system in host states may be unequal to the power and reach of multinational corporations operating within it. Protection of human rights may be side-lined in order to prioritize inward investment by multinational corporations.⁶⁴ The host state may not consider regulating for higher standards to be in its immediate self-interest⁶⁵ unless the multinational group exhibits, or its home⁶⁶ state obliges, commitment to standards of protection of human rights throughout its operations.⁶⁷ Within zones of weak governance, the vulnerability of the local population to ‘dysfunctional legal systems and power differentials’⁶⁸ is exacerbated by the twin doctrines of separate legal personality⁶⁹ and limited liability.⁷⁰

⁶¹ Stephens ‘The Amoralism of Profit’ (n 3); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University press 2006).

⁶² This term was first used in this context by Georgette Gannon, Audrey Macklin, and Penelope Simons, ‘Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy’ (2003) University of Toronto Pub. L. Res. Paper No. 04-07.

⁶³ Baughen (n 43); Office of the High Commissioner for Human Rights, ‘Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses’ (2016), para 4 <www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> accessed 18 October 2019.

⁶⁴ Chris Albin-Lackey, ‘Without Rules: A Failed Approach to Corporate Accountability’ Human Rights Watch, (2013) 2 World Report, 6 (emphasis in original) <www.hrw.org/sites/default/files/related_material/business.pdf> accessed 18 October 2019.

⁶⁵ See further Nolan, ‘All Care, No Responsibility?’ (n 55) 12.

⁶⁶ (n 29).

⁶⁷ See Surya Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat’ (2004) 5 Melb. J. Int’l L. 37.

⁶⁸ Radu Mares, ‘A Gap in the Corporate Responsibility to Respect’ (201) 36 Monash U.L. Rev. 36,72 stating that ‘rights holders in developing countries such as local communities and worker are often in a state of clear vulnerability given dysfunctional legal systems and power differentials ... Business activities, when undertaken irresponsibly, carry well documented risks of abuse of the entire catalogue of human rights, as Ruggie correctly noted; this *situation of peril* is palpable for workers, trade unionists, local communities’.

⁶⁹ See *Aron Salomon v A. Salomon & Company Limited* (1897) A.C.22.

⁷⁰ Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22(1) Business Ethics Quarterly, 146; Radu Mares, ‘Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights’, in

Multinational corporations may well encompass hundreds or thousands of legal entities, each separate and distinct in law.⁷¹ Indeed, groups are deliberately structured, *inter alia*, to both hive off and silo risk with a view to protecting the parent company.⁷² It is common practice for multinational companies to structure group operations such that risks remain both outside the jurisdiction where the parent is domiciled, and claims are corralled within the ambit of a thinly capitalised foreign subsidiary.⁷³ In practice, these doctrines enable a parent company to ringfence risk and limit its downside exposure, including to claims from victims impacted by the operations of its subsidiary.⁷⁴ Commentators perceive company law operating as a ‘shield’ enabling a parent company to deny, avoid, or delay legal liability for human rights violations involving its subsidiaries.⁷⁵ In this manner, the operation of the twin doctrines is characterised as ‘encouraging irresponsibility way of increasing moral hazard’.⁷⁶ As Morgan emphasises, there is scope to game limited liability.⁷⁷ Courts may

R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers 2012), 10-12. For a similar view see Nora Mardirossian, ‘Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of their Foreign Subsidiaries’ (2016) <<https://ssrn.com/abstract=2607592>> accessed 18 October 2019.

⁷¹ Tort law uses the doctrine of separate legal personalities but, for example, EU competition law uses the single economic entity doctrine. For more Richard Whish and David Bailey, *Competition Law* (8th edn Oxford University Press 2015), 99-100. A similar approach to abuses of human rights action taken in private law as in competition law would have huge impacts. It was weakly suggested in the Opinion of the European Union Agency for Fundamental Rights (n 1), but limited merely to suggesting the enhanced capacity of the European Commission should be kept in mind, for instance, in relation to dissuasion (deterrence) through damages in a business and human rights context.

⁷² See also Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 387.

⁷³ See further Weber and Basich (n 3).

⁷⁴ Surya Deva, ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ in Amnesty International, ‘Injustice Incorporated, Corporate Abuses and the Human Right to Remedy’ (2014), 24 <www.amnesty.org/en/documents/POL30/001/2014/en/> 18 October 2019; Weber and Basich (n 3).

⁷⁵ Surya Deva, ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ (n 74).

⁷⁶ Muchlinski (n 70), 152. See generally; Gwynne Skinner, ‘Parent Company Accountability: Ensuring Justice for Human Rights Violations’ (2015) ICAR 7-8.

⁷⁷ Philip Morgan, ‘Vicarious liability for group companies: the final frontier of vicarious liability?’ (2015) 31(4) *Journal of Professional Negligence*, 297.

step in with veil piercing, but the circumstances in which they may do so are considered limited and uncertain.⁷⁸ A stark normative issue underlies the operation of such principles of corporate law, as exposed by McMurray and Rice:

What is the proper role of limited liability within a corporate group in relation to claims in respect of persons killed or physically injured as a result of wrongs committed by a company in the group?⁷⁹

As ‘push’ factors drive litigation away from host state courts, it is pulled to the home states of multinational groups.⁸⁰ While litigating in a home state may be attractive if access to justice is a concern in host states, or to access home states for strategic reasons, remedy in the home state is not readily obtainable. Cases may either fall at the hurdle of establishing jurisdiction in the home state, or spend years and even decades seeking to ground jurisdiction.⁸¹ In the course of the *forum non conveniens* dispute alone in *Lubbe v Cape plc*, 1,000 of the 7,500 claimants died.⁸² Even if a home state provides a forum of necessity, there is evidence this is restrictively interpreted.⁸³ In turn, the question of the right to a fair

⁷⁸ *ibid.* In Ireland, the veil can be lifted by the courts (*inter alia*, implied agency, single economic entity or where the company was formed for fraudulent or illegal purposes or is being used to perpetrate a fraud or an injustice against minority shareholders) or under statutory provision. See generally Sharon Sheehan ‘Pulling Back the Curtain – Separate Legal Personality and Lifting the Veil’ <www.cpaireland.ie/CPAIreland/media/Education-Training/Study%20Support%20Resources/2019%20Articles/P1CLPulling-Back-the-Curtains-Separate-Legal-Personality-and-Lifting-the-Veil.pdf> accessed 25 October 2019.

⁷⁹ Sophie McMurray and Simon Rice, ‘Lifting the Veil: Human Rights Law and Tort Law in Australia’ (2005) 70 *Precedent* 27, 30.

⁸⁰ Liesbeth Enneking, ‘Judicial Remedies: The issue of applicable law’ in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017). For a detailed study see L F H Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012). See also Peter Muchlinski and Virginie Rouas, ‘Foreign direct-liability litigation’ in Lara Blecher, Nancy Kaymar Stafford, & Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014).

⁸¹ Meeran, ‘Access to Remedy’ (n 72) 385.

⁸² [2000] 1 WLR 1545.

⁸³ A forum of necessity is dependent on private international law in EU Member States. See *Nait-Liman v Switzerland* (Grand Chamber) App no 41615/07 (6 July 2010) <<http://hudoc.echr.coe.int/eng?1=001-181786>>. See also Burkhard Hess and Martina Mantovani, ‘Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation’

trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁸⁴ validly arises in academic writing.⁸⁵ Trends in a number of factors favouring greater access to domestic courts are exerting influence, such as relaxation of the common law jurisdictional rule of *forum non conveniens*.⁸⁶ Such welcome increased access is interpreted to be a function of courts' 'willingness to focus on outcome rather than procedural pedantry'.⁸⁷ While the doctrine of *forum non conveniens* is no longer operative within the EU,⁸⁸ national rules determining jurisdiction remain a significant hurdle for claimants to overcome.⁸⁹ Legal accountability is falling between stools both at the international and domestic levels, and across human rights law, criminal law and private law. The structural issue is heightened by questionable motivation to address it, as Nolan summarises:

The chain connecting corporations with international human rights law seems to be missing several crucial links...What is missing in the international arena is the political courage to connect legal obligations with corporate responsibilities.⁹⁰

(January 29, 2019) MPILux Research Paper 2019 (1) <<https://ssrn.com/abstract=3325711>> accessed 18 October 2019.

⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) ETS No. 005 213 UNTS 222 art. 6 <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 11 December 2019

⁸⁵ Arnaud Nuyts, 'Study on Residual Jurisdiction' (2007) <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed 12 November 2019; Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: The issue of jurisdiction' in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 29–30.

⁸⁶ See *Connelly v RTZ Corp. Plc.* (No. 2) [1997] All E.R. 335; *Lubbe and Others v. Cape Plc.* (No.2) [2000] 4 All E.R. 268; *Garcia v Tahoe Resources Inc.* [2017] BCCA 39.

⁸⁷ David Kinley and Juno Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 VJIL 944.

⁸⁸ Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) [2012] OJ L 351 as interpreted by the European Court of Justice in C-281/02 *Osuwu v Jackson* [2005] ECR I 1383.

⁸⁹ *ibid* Brussels I recast Article 6(1) provides: 'If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2), and Articles 24 and 25, be determined by the law of that Member State'.

⁹⁰ Nolan, 'All Care, no Responsibility' (n 55) 25.

The system of accountability for human rights abuses linked to multinational corporations is fundamentally flawed. One manifestation of this is the absence of human rights-based causes of action within domestic systems.⁹¹ As it stands reference is to: international human rights law obligations which were conceived as uniquely obligations between states; to voluntary measures; soft law; or leveraging crossover aspects from criminal or tort law.⁹² Actions in the tort of negligence against multinational corporations are a proxy when human rights law fails to provide a cause of action.⁹³ As the number of foreign direct liability actions taken in EU Member States continues to increase,⁹⁴ this thesis seeks to contribute to scholarship by projecting the application of principles of parent company duty of care in comparative jurisprudence to Ireland, adapted to its particular context.

1.3. REVIEW OF RELEVANT THEMES IN LITERATURE

A review of literature relevant to this thesis reveals dominant themes which form the background to the cause of action in the central research question. Overall, the themes are illustrative of the complex interaction of human rights obligations assumed by States and the responsibilities of non-state actors, as they impact upon corporate accountability and the availability of viable routes to remedy.

1.3.1. Human Rights Obligations of States

States assume obligations under International human rights law (IHRL) regarding labour, civil, political, economic, social, and cultural rights. The International Bill of Minimum Rights Guaranteed to All Peoples encompasses the Universal Declaration of Human Rights (UDHR),⁹⁵ the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁶ the eight

⁹¹ Stephens (n 3) 41.

⁹² See Nolan, 'All Care, no Responsibility' (n 55) 25.

⁹³ See generally Mark Hirschboeck, 'Conceptualizing the Relationship between International Human Rights Law and Private International Law' (2019) 60 HILJ 181.

⁹⁴ Enneking, 'Judicial Remedies' (n 80).

⁹⁵ Broadly the UDHR contains six groups of rights: security rights; due process rights; liberty rights; political rights; equality rights; and social rights. See Nien-he Hsieh, 'Should business have human rights obligations?' (2015) 14(2) Journal of Human Rights 18.

⁹⁶ UDHR (adopted 1 December 1948) UNGA Res 217 A(III) <www.un.org/en/universal-declaration-human-rights/> accessed 25 November 2019; ICCPR (adopted 16 December 1966, entry into force 23 March 1976) <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 11 December 2019; ICESCR (adopted

core ILO Conventions,⁹⁷ and customary international law which is binding on states.⁹⁸ In addition, regional human rights treaties include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁹⁹ the American Convention on Human Rights,¹⁰⁰ the African Charter on Human and Peoples Rights,¹⁰¹ and the Charter of Fundamental Rights of the European Union (CFREU).¹⁰² These instruments and related

entry into force 3 January 1976) <www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 25 November 2019; Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) (ILO No. 29) 39 UNTS 55; Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950) (ILO No. 87); Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951) (ILO No. 98) 96 UNTS 257; Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953) (ILO No. 100), 164 UNTS 303; Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) (ILO No. 105), 320 UNTS 291; Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960) (ILO No. 111), 362 UNTS 31, ratified 1999; Convention concerning Minimum Age for Admission to Employment adopted 26 June 1973, entered into force 19 June 1976) (ILO No. 138) UNTS 297; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) (ILO No.183), 40 ILM 2, ratified 1999; and customary international law which is binding on states.

⁹⁷ Ireland has ratified the Optional Protocols allowing for individual communications to the UN ICCPR, Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1985, entry into force 26 June 1987) UNTS vol. 1465 ratified by Ireland 2002; Convention for Elimination of all Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entry into force 3 September 1981) UNTS vol. 1249 13; Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entry into force 2 September 1990) UNTS vol. 1577 3 but has not yet ratified the Optional Protocol on the ICESCR which allows for individual complaints.

⁹⁸ Additional UN Treaties cover, *inter alia*, racial discrimination, protection of vulnerable groups including women, children, migrant workers, persons with disabilities, as well as specific rights not to be subjected to torture or enforced disappearance. See <<https://treaties.un.org/>> accessed 7 December 2019.

⁹⁹ ECHR (n 84).

¹⁰⁰ American Convention on Human Rights (adopted 22 November 1969 , entered into force 18 July 1978)

OAS	Treaty	Series	No.	36	1144	UNTS	123
< www.cidh.oas.org/basicos/english/basic3.american%20convention.htm > accessed 25 November 2019.							

¹⁰¹ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982) <www.achpr.org/instruments/achpr/> accessed 25 November 2019.

¹⁰² Charter of Fundamental Rights of the European Union (adopted 26 October 2012, entered 1 December 2009) O.J. C 303 of 14 December 2007 (CFREU) <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en.>.

bodies such as the European Court of Human Rights (ECtHR) and the United Nations Committee against Torture form part of IHRL.¹⁰³

Fundamental human rights are rooted in the dignity of individuals and as a matter of normative philosophy arguably have superior status.¹⁰⁴ In Dworkin's words, rights are 'trumps'.¹⁰⁵ The system of IHRL is designed to place two sets of obligations on states, direct (vertical) obligations for their own actions, and indirect (horizontal) obligations to protect individuals within their jurisdiction against violations by non-state actors. Well-established principles oblige states to engage all reasonable measures, in accordance with international law, to prevent conduct from non-state actors which may lead to violations of human rights.¹⁰⁶ This position regarding positive obligations to protect human rights in horizontal relations is affirmed by the UN Human Rights Committee (HRC) under the ICCPR,¹⁰⁷ and the UN Committee on Economic Social and Cultural Rights (CESCR).¹⁰⁸

¹⁰³ Other mechanisms include the UN Special Procedures and the Universal Periodic Review System. See also <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 7 December 2019.

¹⁰⁴ See John Rawls, *A Theory of Justice*, (Harvard University Press 1971), 114-115; Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Social Economic and Cultural Rights* (2nd edn, Brill 2001); Henry Shue, *Basic Rights* (Princeton University Press 1980); Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 317; Onora O'Neill, 'The Dark Side of Human Rights' (2005) 8 *Int. Affairs*, 427-439; Jack Donnelly, 'The Concept of Human Rights' in *Universal Human Rights in Theory and Practice* (Cornell Paperbacks 2013).

¹⁰⁵ Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1985).

¹⁰⁶ Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1(1) *Business and Human Rights Journal* 44.

¹⁰⁷ UN Human Rights Committee (HRC) General Comment No. 16 'Nature of the General Legal Obligations Imposed on State Parties to the Covenant' CCPR//C/21/Rev.1/Add.13 (26 May 2004) para 8 stating: 'The positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by them, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application by private persons or entities' <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txxg3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D>> accessed 14 December 2019.

¹⁰⁸ UN Committee on Economic Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' E/C.12/2000/4, para 39 <www.ohchr.org/documents/hrbodies/cescr/discussions/2017/e-c-12-60-r-1.docx> accessed 14 December 2019.

The ECtHR has confirmed that the ECHR creates positive obligations on states party to act to prevent possible abuses by third parties, including private parties.¹⁰⁹ Similarly, other regional human rights courts and expert bodies have affirmed that a state's obligation to protect rights holders within its territory or jurisdiction against violations by third parties also includes a duty to prevent such abuses.¹¹⁰ In this way, IHRL may hold states liable if it fails to regulate the activities of private actors to prevent violations.¹¹¹ All EU Member States are bound by obligations to protect rights and to provide effective remedy under the ECHR.¹¹² Within the scope of application of EU law, the right to access to justice in Article 47 of the CFREU is binding on EU Member States.¹¹³

Access to remedy is a right widely recognized under international human rights law and national laws.¹¹⁴ The right remedy imposes a duty upon states to respect, protect and fulfil this right.¹¹⁵ The UN Working Group on the issue of human rights and transnational

¹⁰⁹ *Lopez Ostra v Spain* (Merits) App no 16798/90, A/303-C (1995) 20 EHRR 277. A similar stance was taken by the ECtHR in *Osman v United Kingdom* (Merits) App no 23452/94 (1998) 29 EHRR 245, 305. The court held that Article 2(1) of the ECHR: '(...) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'. As a result, the state may be compelled '...[t]o take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual' and compliance of a state with its duty to protect human rights depends on what it knew or ought reasonably have known about the risk and what it that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." On the basis of the nationality principle, home states have jurisdiction over multinational corporations in respect of the overseas activities of such corporations incorporated under their jurisdiction. See also *Barcelona Traction, Light and Power Company Limited, Belgium v. Spain* (1958) Order ICJ 49; European Union Fundamental Rights Agency 'Opinion on improving access to remedy in the context of business and human rights at the EU level' (2017) Annex, 70 <<http://fra.europa.eu/en/opinion/2017/business-human-rights>> accessed 25 September 2020.

¹¹⁰ In *Velásquez Rodríguez v Honduras* (1988) Series C 4 [172] the Inter-American Court of Human Rights. Similarly, the African Commission for Human and Peoples' Rights in *Centre for Economic and Social Rights v Nigeria African Commission African Commission*, Communication No 155/96 (2001).

¹¹¹ See Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings Int'l & Comp. L. Rev.* 341, 346-47.

¹¹² Article 13 ECHR (n 8499).

¹¹³ CFREU (n 102).

¹¹⁴ *inter alia*: UDHR art. 8; ICCPR art. 2(3); CAT arts. 13 and 14; CERD art. 6; CRC art. 39 (n 97);; ECHR arts. 5(5), 13 and 41 (n 8499); CFREU art. 47 (n 102).

¹¹⁵ A/HRC/72/162 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (July 2017) <https://documents-dds->

corporations and other business enterprises (UNWG) has issued extensive guidance on effective rights-compatible, remedy.¹¹⁶ It is recognised that women,¹¹⁷ vulnerable or marginalised groups, and human rights defenders face additional impediments and barriers to remedy.¹¹⁸ States are expected to take positive and affirmative action to provide access to effective remedies across State judicial, non-judicial, non-State and operational grievance mechanisms to women,¹¹⁹ vulnerable or marginalised groups such as children,¹²⁰ migrants, minority ethnic groups, indigenous peoples, and persons with disabilities.¹²¹

1.3.2 Responsibilities of Non-State Actors

The role of a corporation is no longer perceived as uniquely to maximise profit for shareholders.¹²² Notwithstanding clear evolution in expectations of corporations, in practice multinational corporations which violate human rights remain ‘practically immune to conventional methods of regulation’.¹²³ The imposition of direct obligations on multinational corporations to protect human rights is a central doctrinal debate in this area. At the core is the conundrum that unless corporations are considered ‘subjects’ of

ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement; A/HRC/41/43 ‘Gender dimensions of the Guiding Principles on Business and Human Rights - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (23 May 2019) https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43; UNGA resolution 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (Basic Principles) annex 2(c) and paras 11-25 https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf. See also EU FRA (n 1); EU Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 - February 2019 ‘Access to legal remedies for victims of corporate human rights abuses in third countries’ (EU Access to Remedy) available at [www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) accessed 11 September 2020.

¹¹⁶ A/HRC/72/162 (n 115).

¹¹⁷ CEDAW general recommendation No.33 (2015) paras. 3, 8-10 and 13.

¹¹⁸ A/72/162 (n 115) para 26-30.

¹¹⁹ CEDAW (n 117); A/HRC/41/43 (n 115) para 51-61.

¹²⁰ Committee on the CRC, General Comment No 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, 6 2nd sess, UN Doc CRC/C/GC/16 (17 April 2013) available at https://www.unicef.org/csr/css/CRC_General_Comment_ENGLISH_26112013.pdf

¹²¹ EU FRA (n 1) Opinion 5; A/72/162 (n 115) para 25.

¹²² ‘Edelman Trust Barometer 2017’ (n 19).

¹²³ Deva ‘Who Should Bell the Cat’ (n 67). See also Kinley and Tadaki (n 87).

international law,¹²⁴ international human rights treaties cannot apply to them.¹²⁵ The default position is that international human rights treaties bind only states.¹²⁶ Although scholars agree there is no doctrinal impediment to imposing direct obligations on corporations,¹²⁷ a perspective that uniquely states are parties to, and duty bearers under, international human rights treaties persists. The result, as Ratner persuasively argues, is that the ‘non-status’ of corporations under international law allows them to enjoy rights yet not assume duties, and thus to ‘have it both ways’.¹²⁸ The notion that IHRL was directly applicable to corporations contributed to the failure of the 2003 UN Draft Norms,¹²⁹ prompting the Special Representative to the UN Secretary General (SRSG) John Ruggie to seek to avoid a similar ‘train wreck’ in developing the UNGPs.¹³⁰

However, the scope and content of obligations on states concerning non-state actors continue to evolve, both conceptually and structurally.¹³¹ A cogent argument has been

¹²⁴ Ian Brownlie, *The British Yearbook of International Law* (Oxford University Press 1984), 51 stating: ‘One main characteristic defining the subject of international law is that it is an entity capable of possessing rights and duties under international law’.

¹²⁵ Clapham (n 61) 76 and ff.

¹²⁶ See UN HRC General Comment No. 31 ‘Nature of General Legal Obligations Imposed on States Parties to the Covenant’ para 8 concerning article 2 ICCPR, CCPR/C/21/Rev.1/Add.13 (24 May 2008) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D>> accessed 14 November 2019.

¹²⁷ ICJ ‘Needs and Options for a new treaty on business and human rights’ (n 3), 19 stating: ‘In principle, it may be argued that the legal framework should also cover business enterprises and contemplate grounds for their liability. This doctrinal formulation has, however, not been met with consistent practice’.

¹²⁸ Ratner (n 3) 519. See also Clapham (n 61), 53 noting ‘Corporations which are not treated as subject to direct obligations under international human rights treaties can and do defend certain rights under the very same treaties’.

¹²⁹ UN ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (UN Norms) (2003) UN Doc. E/CN.4/Sub.2/2003/39/Rev.2 <http://repository.un.org/bitstream/handle/11176/246034/E_CN.4_2004_2%3BE_CN.4_Sub.2_2003_43-EN.pdf?sequence=3&isAllowed=y> accessed 11 September 2020.

¹³⁰ SRSG remarks delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany (14 June 2006) <<https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>> accessed 14 December 2019.

¹³¹ See Kinley and Tadaki (n 87) 935.

advanced by Clapham that to the extent that the global community requires protection from the negative impacts of business on human rights, obligations should be placed directly upon non-state actors.¹³² Focusing on the reality of the existing capacity of non-state actors to act on the international plane,¹³³ Clapham is clear that corporations have ‘limited international personality’ rather than full legal personality on a par with states.¹³⁴ His analysis exposes the fundamental asymmetry displayed in *Sunday Times v United Kingdom*¹³⁵ and *Pine Valley Development v Ireland*.¹³⁶ Legal persons can and do engage proceedings against states for violations of their ‘human’ rights, yet do not possess sufficient international legal personality to bear concomitant obligations.¹³⁷

This is a fundamental issue which drives at the status of rights *qua* rights with significant normative ramifications, as ‘to deny the applicability of human rights law to powerful non-state actors is to deny the empowerment which accompanies human rights claims’.¹³⁸ From another angle, Bilchitz logically argues that a state can only be required to enforce an obligation that is already recognised, either expressly or implicitly, by the international treaties themselves.¹³⁹ Although there is currently no *general* international legal regime concerning corporate liability for human rights abuses, obligations are imposed on non-state actors via a growing suite of international treaties requiring the prosecution of legal persons while leaving states party to determine the means of rendering corporations accountable.¹⁴⁰ In selected policy areas the European Commission has adopted measures to

¹³² Clapham (n 61) Chapter 2.

¹³³ *ibid* 64.

¹³⁴ *ibid* 78. See also Kinley and Tadaki (n 87) 945.

¹³⁵ (1979) 2 EHRR 245.

¹³⁶ *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319.

¹³⁷ Clapham (n 61) 82. See further Kinley and Tadaki (n 87) 947.

¹³⁸ Clapham (n 61) 53.

¹³⁹ Bilchitz, ‘A critique of the normative foundations of the SRSF’s Framework and the Guiding Principles’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 112 stating: ‘The logic of the state “duty to protect” at international law necessarily thus entails the notion that non-state actors, including corporations, in fact have binding legal obligations with respect to the human rights contained in these treaties’.

¹⁴⁰ (n 52); also UN Convention on the Suppression of Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197; The UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) G.A. Res. 25, annex 1, U.N. GAOR, 55th Sess. Supp. No. 49 44 UN Doc. A/45/49 (Vol. 1) (2001) art. 5; The Bamako Convention on the

ensure that victims of corporate-related harm have access to judicial remedies, including Article 5 of EU Directive 2011/36/EU¹⁴¹ concerning trafficking in human beings. Failing direct obligations to protect human rights under international human rights treaties or another general international legal regime, the lever of protection of victims against private parties is horizontal, mediated via nation states.¹⁴²

1.3.3. Corporate Liability under Customary Law and General Principles of International Law

An approach encompassing both accountability of the corporate entity and the responsible individual(s) within the firm is considered imperative to advance accountability.¹⁴³ In practice, routes to accountability at the international level focus on natural persons, and not on legal persons.¹⁴⁴ This is persuasively argued to be a procedural matter concerning the construction of jurisdiction under specific instruments rather than one of substantive law.¹⁴⁵ However, flowing from it, whether corporations can be liable under customary international law and general principles of international law featured in litigation for civil remedy in the

Ban of the Import into Africa and the Control of Transboundary Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177.

¹⁴¹ Council Directive on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>> accessed 5 December 2019.

¹⁴² Most European States accept the indirect application of fundamental rights between private parties. See Anita Ramasastry, Robert C. Thompson, 'Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law' in *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse* (Oxford Pro Bono Publico 2008).

¹⁴³ Kaeb (n 4), 'The Shifting Sands of Corporate Criminal Liability under International Criminal Law' (2016) 49 The Geo. Wash. Int'l Law Review 351, 383.

¹⁴⁴ Rome Statute of the International Criminal Court 2002 (last amended 2010) (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS No. 38544 art. 25(1) provides: 'Individual criminal responsibility 1. The Court shall have jurisdiction over natural persons pursuant to this Statute. The ICC has jurisdiction over crimes only if they are committed in the territory of a state party or if they are committed by a national of a state party. It is a court of last resort; competent only if the competent domestic jurisdictions are unable or unwilling to investigate and prosecute, and when the alleged crimes are of sufficient gravity' <www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed 14 March 2019.

¹⁴⁵ Yale Law School as Amicus Curiae Supporting Petitioners in *Kiobel II*, 5 <www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/> accessed 14 March 2019.

US under Alien Tort Statute (ATS).¹⁴⁶ Although the ATS is recognised as unique,¹⁴⁷ the exploration of principles in ATS litigation influenced the development of global norms concerning corporate liability for human rights violations.¹⁴⁸ By 2003, the position of liability of legal persons appeared established,¹⁴⁹ however US courts commenced reining in remedy under the ATS.¹⁵⁰ The watershed came in 2010 in *Kiobel v Royal Dutch Petroleum Co. (Kiobel I)*, a case which is emblematic of the nature and scale of negative impacts on human rights from the operations of multinational corporations in developing countries.¹⁵¹ The court concluded that the concept of corporate liability for violations of customary international law had not even begun to ‘ripen’ into a norm of international law.¹⁵² The reasoning behind this decision has validly been extensively criticised.¹⁵³ In

¹⁴⁶ ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’ (June 25, 1948) ch. 646 62 Stat. 934. From the 1990s the ATS route offered a possibility for foreign nationals to claim compensation relating to torts which are also violations of ‘the law of nations’ or emanating from an international treaty to which the US is a party. See Baughen (n 217) 46.

¹⁴⁷ Beth Stephens, ‘Corporate Liability: Enforcing Human Rights Through Domestic Litigation’ (2001) 24 Hastings Int’l & Comp. L. Rev., 409. The Torture Victims Protection Act 1992 (US) Pub.L.No. 102-256, 106 Stat. 73 (TVPA) is limited to torture and extrajudicial killing, and provides a cause of action similar to the ATS. In *Mohamad v. Palestinian Authority* 132 S.Ct. 1702, 1710-11 (2012) the Supreme Court held that individual officers or employees may be subject to suit but not an organisation.

¹⁴⁸ See Baughen (n 43) 46 stating that ‘In litigation under the United States Alien Tort Statute of 1789 (ATS) US federal courts transplanted the principles under which international law imposes criminal liability on individuals into the field of civil liability in tort’.

¹⁴⁹ *Doe v Unocal* 395 F.3d. 932 (9th Cir. 2002) in which the Ninth Circuit held that aiding and abetting human rights violations was itself a violation of customary international law, and therefore actionable under the ATS; *The Presbyterian Church of Sudan v Talisman Energy Inc. Republic of the Sudan*, Civil Action 01 CV 9882 (AGS) US District Court for the Southern District of New York at 47 of the Order of 19 March 2003; [2005] WL 1385236 (SDNY) Opinion and Order of 13 June 2005.

¹⁵⁰ *Sosa v Alvarez-Machain* 542 US 692 (2004), 723–724.

¹⁵¹ 621 F.3d. 111 (2d Cir. 2010) (*Kiobel I*) concerned extensive environmental damage from extractive activities in Ogoniland in the Niger Delta. In 1995 the Government of Nigeria executed nine protesters, including playwright Ken Saro-Wiwa and Dr Barinem Kiobel. The claimants alleged that Shell group companies were complicit in torture, extra-judicial killing, arbitrary detention, and other violations by the Nigerian government.

¹⁵² *Kiobel I* (n 151) 33.

¹⁵³ *ibid* (Leval J) dissenting [4-5]. See also Amicus Curiae Brief of International Human Rights Organisations and International Law Experts in Support of Petitioners No. 10-1491 (December 2011) <www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum>; Brief of UN OHCHR

Kiobel II the Supreme Court left the question of corporate liability in tort for violations of the law of nations unresolved,¹⁵⁴ resulting in multiple cases against multinational corporations concerning alleged egregious human rights abuses being dismissed.¹⁵⁵ The US Supreme court directly addressed the question of corporate liability in *Jesner v Arab Bank plc*, and decided against.¹⁵⁶ The decision is a lost opportunity to make a statement on the impunity of legal persons. Both the decisions in the *Kiobel* and *Jesner* cases are extensively critiqued. On balance, the dissenting judgments of Leval J in *Kiobel I*¹⁵⁷ and Sotomayor J in *Jesner*¹⁵⁸ are reflective of the weight of academic commentary and amici curiae submissions concerning corporate liability under international law.¹⁵⁹ From the viewpoint of corporations, Zerk considers the result of these decisions was to prolong uncertainty as to their obligations.¹⁶⁰

In 2020, the Supreme Court of Canada affirmed that rules of customary international law can also bind corporations in *Nevsun Resources Ltd. v Araya*.¹⁶¹ The majority considered

<www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_navipillay.authcheckdam.pdf>; Ambassador David Scheffer, Northwestern University School of Law as Amicus Curiae in Support of the Petitioners 13 <www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_scheffer.pdf> accessed 16 December 2019; William A. Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017), 211.

¹⁵⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (*Kiobel II*) [14] basing its decision in on jurisdictional grounds and holding that the presumption against extraterritoriality applies to claims under the ATS, it decided that such claims must ‘touch and concern’ the territory of the United States ‘with sufficient force’ to displace that presumption.

¹⁵⁵ Post *Kiobel* a line of jurisprudence interpreting the ‘touch and concern’ test caused a circuit split. See for example *Doe I v. Nestle USA* 766 F.3d 1013 (9th Cir. 2014); *Balintulo v Daimler AG* 796 F.3d 160 (2015), [166].

¹⁵⁶ *Jesner v Arab Bank plc* No. 16-499 584 U.S. (2018) concerning terrorist attacks in the Middle East and allegations that Arab Bank plc, headquartered in Jordan, financed the attacks through its New York branch.

¹⁵⁷ (n 151).

¹⁵⁸ (n 156) with whom Justices Ginsberg, Breyer and Kagan join.

¹⁵⁹ See Amicus Brief of Comparative Law Scholars in *Jesner* 11 available at www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/ accessed 9 August 2019.

¹⁶⁰ Jenifer Zerk, ‘Corporate liability for gross human rights abuses; towards a fairer and more effective system of domestic law remedies,’ for the Office of the High Commissioner for Human Rights (2014) 24 <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> accessed 9 August 2019.

¹⁶¹ 2020 SCC 5, [104]-[113].

that whether a particular rule of international law is binding on corporations is merely a matter of determining whether or not is of a strictly interstate character.¹⁶² Opening her judgment for the majority Abella J stated that international legal norms protecting human rights ‘were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities.’¹⁶³ Although the decision is limited on certain aspects, as a decision of a top common law court, it can be expected to carry weight. Notably, concerning routes to remedy and causes of action, Abella J began from the principle that ‘where there is a right, there must be a remedy for its violation.’¹⁶⁴ Moreover, the majority considered that existing conventional common law torts may be inadequate to redress wrongs so severe that they breach core norms of customary international law.¹⁶⁵

1.3.4. Extraterritorial Reach of Human Rights Protections

Typically, domestic law applies within the territorial state alone.¹⁶⁶ A parent company may be duly regulated in its home state, including to the standard of provisions of international treaties transposed into domestic law concerning protection of human rights. Equally, as far as the home state is concerned, subsidiaries of the parent company operating across the world are outside the net and may be left to their own devices. As part of an integrated theory of legal responsibility Deva considers that home states should ‘bell the cat’¹⁶⁷ and act on extra-territorial regulation of human rights obligations for multinational corporations. The debate concerns the difference in scope, if any, of jurisdiction as generally understood in public international law and ‘human rights jurisdiction’.¹⁶⁸ Relying

¹⁶² *ibid* [105].

¹⁶³ *ibid* [1].

¹⁶⁴ *ibid* [120]-[121].

¹⁶⁵ *ibid* [129].

¹⁶⁶ ICJ ‘Needs and Options for a new treaty on business and human rights’ (n 3) 20 stating: ‘The state duty to protect is premised upon horizontality, as well as territoriality, nationality and personality’.

¹⁶⁷ Deva (n 67). See also Robert McCorquodale and Penelope Simmons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *Modern Law Review* 598; Cedric Ryngaert, ‘Accountability for Corporate Human Rights Abuses: Lesson from the possible exercise of Dutch National Criminal Jurisdiction over Multinational Corporations’ (2018) 29(1) *Criminal Law Forum* 5.

¹⁶⁸ Augenstein and Jägers, (n 85), 9. See also Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8(3) *Human Rights Law Review* 411; Ibrahim Kanalan, ‘Extraterritorial State Obligations beyond the Concept of Jurisdiction (2018) 19 *German*

on emanations of the UN Treaty bodies,¹⁶⁹ and the jurisprudence of the European Court of Human Rights¹⁷⁰ Augenstein and Kinley consider that the human rights jurisdiction of states extends beyond *de jure* jurisdiction.¹⁷¹ However, the approach taken by the UN

L.J. 43; Claire Methven O'Brien, 'Are European States Responsible' in Angelica Bonifanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Glawcal 2019).

¹⁶⁹ UN CESCR 'The Right to the Highest Attainable Standard of Health' (n 108) para 39; General Comment No. 15 (2002) 'The Right to Water' E/C.12/2002/11 para 31 <https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf> accessed 14 November 2019; United Nations Human Rights Committee General Comment 31 'Nature of General Legal Obligations Imposed on States Parties to the Covenant' para 13; 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights' para 5 E/C.12/2011/1 (20 May 2011) <www.ohchr.org/documents/hrbodies/cescr/discussions/2017/e-c-12-60-r-1.docx> accessed 14 March 2019; UN CESCR General Comment No. 24 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' para 32 (10 August 2017) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0SzaB0oXTdImnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbW6ujInCawOrJx3hlK8Odk6DUwG3Y>> accessed 14 November 2019. See also International Commission of Jurists (n 3) 29–31.

¹⁷⁰ *Cyprus v Turkey* (2002) 35 EHRR 30 [81]; *Ilascu and Others v Moldova and Russia* (2005) 40 EHRR 46 partly dissenting opinion of Judge Loucaides [139]; *Isaak and Others v Turkey* Admissibility Decision of 28 September 2006 [21] confirmed at the merits stage 24 June 2008; *Al-Skeini and Others v United Kingdom*, Grand Chamber Judgement of 7 July 2011 ECtHR. See also Barbar Miltner, 'Extraterritorial Jurisdiction under the European Convention on Human Rights: An Expansion under *Isaak v Turkey*?' (2007) 2 European Human Rights Law Review 181; Max Schaefer 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 5 EHRLR 566.

¹⁷¹ Daniel Augenstein and David Kinley, 'Beyond the 100 Acre Wood, 'In which international human rights law finds new ways to tame global corporate power' (2015) 19(6) Int'l Journal of Human Rights 828; de Schutter (n 106) 45 stating the International Court of Justice affirmed the extraterritorial reach of human rights instruments in the Genocide case on the Srebrenica massacre, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) 2007 ICJ 140 (February 26, 2007) <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijjudgment_20070226_frame.htm>. See further *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* ICJ (9 July 2004) [34] <www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; *Armed Activities on the Territory of the DRC v Uganda* Judgement of 19 December 2005 [216] <www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf> accessed 14 November 2019. De Schutter also cites jurisprudence of the Inter American Court of Human Rights *Lopez Burgos v Uruguay*, Comm. No. 52/1979, CCPR/C/OP/1, Judgement of 29 July 1981 HR; Articles 9 and 25 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. The Maastricht Principles were issued in 2011 by 40 international law experts from all regions of the world, including current and former members of international human rights treaty

Guiding Principles on Business and Human Rights (UNGPs) is that the extraterritorial application of the state duty to secure human rights against abuses by corporations remains ‘unsettled’ in international law.¹⁷² While reaching this conclusion was explained as based on UN treaty bodies commentaries and jurisprudence under the core UN human rights instruments,¹⁷³ substantial commentary rejects this stance, characterising it as ‘clearly below the current state of international human rights law’.¹⁷⁴ Commentators agree that as a result of this position, the potential extra-territorial scope of existing territorial state obligations to protect human rights against corporate violations remains underexplored.¹⁷⁵ Wide support for a more expansive approach to states’ human rights jurisdiction and positive obligations on home states to regulate conduct is evident from the UN treaty bodies

bodies, regional human rights bodies, as well as former and current Special Rapporteurs of the United Nations Human Rights Council, <www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 14 November 2019.

¹⁷² UN HRC ‘Business and Human Rights: Towards Operationalising the ‘Protect, Respect and Remedy’ Framework’ A/HRC/11/13 (22 April 2009) (SRSG 2009 report) para 15; Commentary to UNGP 2 distinguishing between ‘direct extraterritorial regulation’ and ‘regulation with extraterritorial effects’ <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 11 November 2019.

¹⁷³ *ibid* stating: ‘Within these parameters some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction’.

¹⁷⁴ De Schutter (n 106) 45. See also Daria Davitti, ‘Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles’ (2016) 16 Human Rights Law Review 60 stating ‘the SRSGs approach to extra-territorial obligations, although clearly in line with his diplomatic stance, appears to fly in the face of current developments in international law’.

¹⁷⁵ Daniel Augenstein and David Kinley, ‘When human rights “responsibilities” become “duties”: the extra-territorial obligations of states that bind corporations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 273.

concerning ICCPR,¹⁷⁶ ICESCR,¹⁷⁷ and CESC.¹⁷⁸ For example, CERD has issued a series of comments and concluding observations encouraging states including Australia,¹⁷⁹ and Canada¹⁸⁰ to regulate concerning extra-territorial extractive activities in the traditional territories of indigenous peoples, and to hold accountable the home state corporations allegedly involved in violations of the Convention. Although non-binding, the UN Treaty bodies observations and comments carry weight as the interpretive bodies of the relevant treaties, yet stand in contrast to the ‘not-required/not-prohibited’ UNGP position.¹⁸¹

This debate extends to whether there is a positive obligation on EU States to regulate with extraterritorial effect. Scholars remain divided on the issue of whether the obligations of home states under international human rights treaties include the prevention of human rights abuses beyond territorial borders.¹⁸² Ganesh remarks wryly that ‘while academics and activists invoke these statements promiscuously, courts and governments have always remained more sceptical of them’.¹⁸³ The ECtHR has interpreted jurisdiction as predicated

¹⁷⁶ UN Human Rights Committee General Comment No. 31 ‘Nature of General Legal Obligations Imposed on States Parties to the Covenant’, para 13 stating that while the human rights obligations imposed by the ICCPR ‘are binding on state parties and do not as such have direct horizontal effect as a matter of international law’, they nevertheless require states to ‘take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by... private persons or entities’. Further, ‘a state party must respect and ensure the rights laid down in the ICCPR to anyone within its power or effective control... even if not situated within the territory of that state party... and regardless of the circumstances in which power or effective control was obtained’.

¹⁷⁷ UN CESC General Comment No. 14 ‘The Right to the Highest Attainable Standard of Health’ (n 108) para 39; General Comment No. 15 ‘The Right to Water’ (n 169); ‘Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights’ para 5 (n 169).

¹⁷⁸ UN CESC General Comment No. 24 ‘State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ (n 169) para 32 makes it clear States Parties would be in breach of their obligations under the Covenant if there is a failure by the State to take reasonable measures to prevent, if a violation was reasonably foreseeable.

¹⁷⁹ Augenstein and Kinley (n 175) 290.

¹⁸⁰ ‘Concluding Observations/Comments: Canada’ (25 May 2007) CERD/C/CAN/CO/18 para 17 <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_80_83_02_E.pdf> accessed 14 December 2019.

¹⁸¹ Others argue comprehensive and general extraterritorial state obligations mainly build upon the normative idea of human rights, such as Kanalan (n 168). See also Aravind Ganesh, ‘The European Union’s Human Rights Obligations towards Distant Strangers, (2016) 37 Mich. J. Int’l L 485.

¹⁸² De Schutter (n 106) 45.

¹⁸³ See Ganesh (n 175) 483.

on factual power over persons or territory. The corollary is lack of effective control is a lack of jurisdiction, such that there are no human rights obligations for states outside of such jurisdiction.¹⁸⁴ Augenstein argues that the failure of home states in the EU to prevent or control harmful extraterritorial effects can amount to breaches of domestic, European, or international law by the EU and/or EU Member States.¹⁸⁵ However, Methven O'Brien cogently refutes that positive obligations exist under the ECHR. She maintains that such positive obligations on states are limited, *inter alia*, on the basis of a 'sufficient nexus'¹⁸⁶ between the state and the abuse of the human right in question, and that the requisite chain of causation is interrupted by the regulatory framework in the host state.¹⁸⁷

Proceeding on the basis that 'jurisdiction' functions as a threshold criterion for treaty obligations to arise in the first place,¹⁸⁸ Methven O'Brien maintains that jurisdiction is predicated upon factual power or control, and that under IHRL it is an established assumption that control exists within the territorial boundaries of a state. This assumption is, in her view fixed, but 'occasionally rebuttable'.¹⁸⁹ While contested, the weight of commentary indicates that the existence of positive obligations remains limited primarily to circumstances of factual power or control.

¹⁸⁴ Milanovic (n 168) 417 arguing: "jurisdiction" is meant to denote solely a sort of factual power that a state exercises over persons or territory. It is not a legal competence, nor is it, as we shall see, that notion of jurisdiction in general international law which delimits the municipal legal orders of states'. At 418 considers that similarly the ICCPR and I-ACHR 'are extraterritorially applicable if there is an effective control over a territory, an area, or a specific person, but that under the wording of Article 2(1) of the ICESCR 'it is widely accepted that its applicability is not limited to a special territory or exercise of jurisdiction'.

¹⁸⁵ Augenstein et al Study (n 60) 9. See also Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Clarendon Press 1983), 160-3 stating: 'State responsibility may be engaged if the State breaches of the duty to exercise due diligence in controlling private persons'; *Velasquez-Rodriguez v Honduras*, Inter-American Court of Human Rights, Decisions and Judgments (Ser.C No. 4 1988) [151].

¹⁸⁶ *Fadeyeva v Russia* App no 55723/00, [2005] ECHR 376 [92].

¹⁸⁷ Methven O'Brien (n 168) 69 is firm in her rebuttal concerning a positive legal basis for a duty on states to regulate with extraterritorial effect and 'anything else is overstatement'. See also *Soering v United Kingdom* App no 14038/88 1989 (1989) 11 EHRR 439; *Rantsev and Others v Cyprus*, App no 25965/04, Judgement of 7 January 2010, ECtHR.

¹⁸⁸ Milanovic (n 168) 417 stating: 'The purpose of the doctrine of jurisdiction in international law is precisely to establish whether a claim by a state to regulate some conduct is lawful or unlawful'.

¹⁸⁹ Methven O'Brien (n 168) 53.

1.3.5. Home State Regulation and Extraterritorial Effects

Home states have exhibited little interest in regulation with extra-territorial effects which is relevant to business and human rights.¹⁹⁰ Scholars highlight that although domestic statutes regulating anti-trust, securities, and criminal law apply extraterritorially, statutes with near identical language in the areas of environmental or labour regulation are denied extraterritorial application.¹⁹¹ This is a conscious choice indicating where regulatory interest lies, in light of the attention that financial violations of corporate entities command from legislators.¹⁹² Examples include legislation concerning bribery,¹⁹³ facilitation of tax evasion,¹⁹⁴ and money laundering.¹⁹⁵ The lack of home state regulation with extraterritorial effect relevant to human rights may flow from concerns over international comity, or the possible loss of states' competitive advantage as a location which is attractive for business including multinational corporations.¹⁹⁶ It should be not assumed that business and business leaders are comfortable with this scenario. Traidcraft notes that sixty-nine percent of business leaders in the UK agree that companies should be accountable for harms caused abroad.¹⁹⁷ It is welcome that isolated states are considering regulations of mandatory human rights due diligence¹⁹⁸ for corporations throughout their supply chains following the

¹⁹⁰ The Modern Slavery Act 2015 (UK).

¹⁹¹ Stephens, 'The Amoralism of Profit' (n 3) 39. See also Jonathan Turley, 'When in Rome: Multinational Misconduct and the Presumption Against Territoriality' (1990) 84 NW. U. L. REV. 598. See generally Celia Wells, 'Corporate failure to prevent economic crime – a proposal' (2017) Crim LR 6; Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 58.

¹⁹² Stephens, 'The Amoralism of Profit' (n 3) 38.

¹⁹³ Bribery Act 2010 (UK)

¹⁹⁴ Criminal Finances Act 2017 (UK).

¹⁹⁵ Sanctions and Anti-Money Laundering Act 2018 (UK)
<www.legislation.gov.uk/ukpga/2018/13/contents> accessed 11 December 2019.

¹⁹⁶ Enneking, 'Judicial Remedies: The issue of applicable law' (n 80) 44–54.

¹⁹⁷ Traidcraft, 'Two-thirds of British Business Leaders Agree', Press Release (27 November 2015)
<www.traidcraft.co.uk/campaign-blog-entry/two-thirds-of-british-business-leaders-agree-with-us> accessed 14 November 2019.

¹⁹⁸ Explained as: 'An ongoing risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed'
<www.ungpreporting.org/glossary/human-rights-due-diligence/> accessed 18 October 2019.

leadership of the ground breaking French Duty of Vigilance law.¹⁹⁹ The Netherlands progressed from voluntary to instrumental measures on child labour in supply chains in 2019,²⁰⁰ although the level of reporting and regulatory enforcement under the Dutch Child Due Diligence law have yet to be specified.²⁰¹ As such it remains to be seen if it will avoid the well-founded criticism levelled at the UK Modern Slavery Act.²⁰² As discussed in chapter 2, mandatory human rights due diligence merits expansion, and there is evidence of impetus in this direction including from the European Union.²⁰³

¹⁹⁹ Human rights due diligence is explored in chapter 2. *loi* n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: JO 28 March 2017, texte n° 1 (France Duty of Vigilance Law). See also European Coalition for Corporate Justice 'French Corporate Duty of Vigilance Law: Frequently Asked Questions' (23 February 2017), 4 <www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf> accessed 14 November 2019.

²⁰⁰ <www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet> accessed 2 January 2020. See also Australian Modern Slavery Bill 2018 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6148> accessed 2 January 2020.

²⁰¹ See MVO Platform 'Frequently asked questions about the Dutch Child Labour Due Diligence Law' (3 June 2019) outlining that aspects of interpretation and especially implementation of the law are still to be determined via an instrument known as a General Administrative Order or GAO ('Algemene Maatregel van Bestuur', AMvB) which will have to be approved by both houses of the Dutch parliament. As yet there are no specifications as to the frequency of statements which companies must make concerning their assessment of their supply chains nor on their plans to address if investigation indicates that there is a reasonable presumption that child labour has contributed to the product or service. <www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 2 January 2020.

²⁰² (n 190). The UK Parliament's joint Committee on Human Rights consider as too weak to actually hold companies to account. The Committee has urged the UK Government to bring forward revised legislation making reporting on all human rights risks compulsory for large businesses and provide for an effective monitoring and enforcement procedure. See House of Lords House of Commons Joint Committee on Human Rights Human Rights and Business 2017, 'Promoting responsibility and ensuring accountability' <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>> accessed 14 November 2019.

²⁰³ Discussed in chapter 2 section 2.3. See European Coalition for Corporate Justice, 'Evidence for mandatory HRDD legislation' (2018) <<http://corporatejustice.org/policy-evidence-mhrdd-september-2018-final.pdf>> accessed 14 November 2019; EU Council 'Conclusions on Business and Human Rights' (20 June 2016) <https://ec.europa.eu/anti-trafficking/publications/council-conclusions-business-and-human-rights-foreign-affairs-council_en> accessed 14 November 2019; European Parliament 'Report on the impact of international trade and the EU's trade policies on global value chains' (2016/2301(INI))

1.3.6. Corporate Criminal Liability

Accountability gaps in corporate criminal liability at the international level are manifest.²⁰⁴ In principle, universal criminal jurisdiction may be available if a corporate actor (natural or legal person) is implicated in international crimes such as genocide,²⁰⁵ crimes against

<http://www.europarl.europa.eu/doceo/document/A-8-2017-0269_EN.html?redirect>, accessed 14 November 2019; Council of Europe, ‘Human Rights and business Recommendation of the Committee of Ministers to member states’, paras 20-21 CM/Rec(2016) 3 <<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>> accessed 14 November 2019; EU FRA 2017 Opinion (n 1); Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 ‘Access to legal remedies for victims of corporate human rights abuses in third countries’ (2019) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>.

²⁰⁴ Discussed further in chapter 2. Ramasastry and Thompson (n 142); International Commission of Jurists, ‘Final Report of the Expert Panel on Corporate Complicity & Legal Accountability Vol 2 Criminal Law and International Crimes’ (2009) <www.icj.org/report-of-the-icj-expert-legal-panel-on-corporate-complicity-in-international-crimes/> accessed 14 March 2019; Joanna Kyriakakis, ‘Corporate Criminal Liability and the Comparative Law Challenge’ (2009) Neth. Int’l L. Rev. 333; Zerk (n 160); Kaeb (n 4) 351; Amnesty & ICAR Corporate Crime Principles (October 2016) <www.amnesty.ie/corporate-crime-new-principles-will-help-governments-law-enforcement-tackle-corporate-abuse/> accessed 14 November 2019.

²⁰⁵ Universal criminal jurisdiction is accepted under customary international law, see *Prosecutor v Tadic* (Appeal Jurisdiction) IT-94-1 AR72 [62] (Oct 2, 1995); (Appeal Judgement) IT-94-1- (15 July 1999) and is confirmed by state practice although not provided for under the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 6. The UN Security Council adopted the definition of genocide contained in Third Geneva Convention International Committee of the Red Cross (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 art. 2 in the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 UNSC Res 955 (8 November 1994) UN Doc. S/Res/955 (ICTR); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY).

humanity,²⁰⁶ war crimes²⁰⁷ and torture,²⁰⁸ including aiding and abetting such crimes.²⁰⁹ On the basis that ‘the starting assumption is that jurisdiction in all its forms is territorial’,²¹⁰ the exercise of extraterritorial jurisdiction is to be justified by reference to established bases such as active nationality,²¹¹ passive personality,²¹² or universality.²¹³ Of the three general bases of intervention, two can be considered established, the exercise of universal jurisdiction and the extraterritorial application of Rome Statute offences criminalised under domestic law.²¹⁴ Both concern violations recognised as crimes under international law or under treaty.²¹⁵ In jurisdictions which have criminalised Rome Statute offences,²¹⁶ the domestic offences have the potential to be applied extraterritorially on the basis of the nationality of the offender or on the basis of universal jurisdiction.²¹⁷ However, the exercise

²⁰⁶ Universal criminal jurisdiction over crimes against humanity is recognised in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 82 UNTS 279, (entered into force Aug. 8, 1945) art. 6(2)(c) including murder, extermination, enslavement, deportation, and other inhumane acts.

²⁰⁷ Universal criminal jurisdiction is obligatory for States Parties in respect of grave breaches of the four Geneva Conventions; Rome Statute (n 144) art. 8(2)(a).

²⁰⁸ See *Prosecutor v Furundzija* ICTY IT-95-17/1-T (Dec 10, 1998).

²⁰⁹ See *Prosecutor v Tadic* (n 205205) [220] in which the ICTY recognised that co-perpetrators could be held liable as participants in a joint criminal enterprise in three cases.

²¹⁰ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) 456.

²¹¹ Crimes committed by a state's nationals.

²¹² Crimes committed against a state's nationals

²¹³ Ryngaert (n 167) 5 fn 18: ‘The nationality principle normally grounds jurisdiction over domestically incorporated corporations regardless of the place of misconduct, whereas the territoriality principle triggers jurisdiction over any corporation whose conduct can be linked to the forum's territory. The universality principle could trigger jurisdiction over any corporation, regardless of the connection to the forum, but only in relation to a limited number of treaty-based offences and core crimes against international law.’

²¹⁴ Rome Statute (n 144).

²¹⁵ Augenstein and Jägers (n 85) 12.

²¹⁶ The Rome Statute (n 144) re genocide art. 6; war crimes art 8.; crimes against humanity art. 7(1). For Rome Statute offences, consistent with the principle of complementarity, the principal means for prosecuting international crimes is before national courts.

²¹⁷ For example, International Crimes Act 2001 (UK) section 5(1) concerning genocide, crimes against humanity and war crimes. See further Zerk (n 160) 42. It is noted that while scholars consider the doctrine of state responsibility for internationally wrongful acts has gained the status of a general principle of international law, it is unlikely they will provide practical assistance. See International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, as contained in Report of the International Law Commission on the Work of its 53rd Session UN Doc A/55/10 (2000) art. 2. See also

of universal criminal jurisdiction cannot be considered widespread in practice. Several factors influence this objectively low level of occurrence, including political will and control.²¹⁸ Further, in the main a defendant individual must be physically present where jurisdiction is asserted for prosecution to proceed. For corporations, Zerk notes that criminal complaints under universal jurisdiction appear to be based on nationality jurisdiction,²¹⁹ subjective territoriality,²²⁰ and active personality.²²¹ Even if universal jurisdiction concerning international crimes holds a certain recognition in principle, proceedings against both corporate executives or corporations are limited in practice.²²² Proceedings were taken based on active personality in France against LafargeHolcim, *inter alia*, for complicity in war crimes and crimes against humanity committed by the so-called Islamic State in Syria.²²³ In 2019 a French appeal court rejected the preliminary charges,

Damwood Mzikenge Chirwa 'The Doctrine of State Responsibility as a potential means of holding private actors accountable for human rights' (2004) 5(1) Melbourne Journal of International Law 1; McCorquodale Penelope Simmons (n 167) 612; Baughen (n 43) 10-12; 13 stating 'the chances of a host state acting against a home state for aiding and abetting corporations outside its territory, is seen as virtually nil'.

²¹⁸ Trial International, 'Make way for Justice #3: Closing the Net on Impunity' (2017) <<https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>> accessed 25 November 2019. See also Baughen (n 43) 24-40. For example, in Canada, prosecutions on the basis of universal criminal jurisdiction can only be brought in the name of, and with consent of, the Attorney General.

²¹⁹ Forum state as the place of incorporation.

²²⁰ To the extent that the alleged criminal offences could be said to have been commenced in or directed from the territory of the forum state. See Zerk (n 160) 42.

²²¹ The 2017 Trial report (n 218) details nine cases in France, based on active personality concerning corporations aiding and abetting in crimes against humanity.

²²² For more on corporate executives, see Jenifer Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17(2) Chicago Journal of International Law 447.

²²³ In 2016, eleven former Syrian employees Sherpa and ECCHR filed a criminal complaint as civil parties before the investigating judge at the Paris Tribunal against Lafarge, Lafarge Cement Syria, a current CEO and two former, for financing the terrorist group IS and complicity in that group's crimes committed in Syria. French investigative judges issued a series of indictments between December 2017 and June 2018. See Claire Tixeire, Legal Advisor, European Centre for Constitutional and Human Rights 'Can the Lafarge case be a game changer for French multinational company indicted for international crimes in Syria' stating: 'Strategic human rights litigators know too well the limits of law in regulating corporate actors' responsibility. In particular when activities of subsidiaries are involved, but also given powerful influences on political willingness to prosecute, a case is likely to be dismissed before it can even start' <www.business-humanrights.org/en/can-the-lafarge-case-be-a-game-changer-french-multinational-company-indicted-for-international-crimes-in-syria> accessed 12 December 2019.

but the investigation into charges of financing terrorism, endangerment of peoples' lives and violation of sanctions continues.²²⁴

It is evident there is a need and a failure to leverage available routes to accountability. A 2019 study of cases in EU Member States found a wide variation in the nature of abuses of rights by business, ranging from allegations of gross human rights abuses such as murder and complicity to murder, war crimes and crimes against humanity to environmental justice.²²⁵ Similarly, universal civil jurisdiction not widely used or mandated, despite the possibilities it holds for victims. As Baughen persuasively argues, no mandatory universal civil jurisdiction does not mean no permissive universal civil jurisdiction.²²⁶ Diverging attitudes diverge concerning the exercise of universal jurisdiction in civil cases are detectable in a study conducted as part of the OHCHR's Accountability and Remedy Project (ARP).²²⁷ It indicates that, concerning 'crimes of universal concern', amicus briefs reveal quite wide tolerance for the home states of multinational companies to exercise universal jurisdiction, and afford means of civil recovery, where there is a nexus to that state and no access to effective remedies in the alternative jurisdiction. in many typical

²²⁴ *Reuters* 'France's Lafarge has charge of crimes against humanity lifted' (7 November 2019) <<https://www.reuters.com/article/us-lafargeholcim-syria-appeal/frances-lafarge-has-charge-of-crimes-against-humanity-lifted-lawyers-idUSKBN1XH14X>> accessed 28 November 2019.

²²⁵ EU 'Access to legal remedies' (n 115) 19-20 stating: 'Out of the 35 cases concerning allegations of human rights abuses in third countries by EU based companies, 12 cases were dismissed (2 of which were partially settled), 17 are still ongoing (1 of which was partially settled), 4 cases were fully settled out of court with payments of compensation, and only 2 cases led to a successful outcome for the claimants'. See also Rachel Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional dilemma raised/created by the use of the extraterritorial techniques' (2018) 14(2) *Utrecht Law Review* 22.

²²⁶ Baughen (n 43) 46.

²²⁷ OHCHR Working Paper #2, 'Business and Human Rights: Enhancing Accountability and Access to Remedy Project 2: Roles and Responsibilities of Interested States State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases 2000-2015' (April 2015) <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf> accessed 3 December 2019.

FDL cases. Notwithstanding, neither the EU nor Member States are providing mechanisms to leverage civil recovery.²²⁸

From inception, the jurisdiction of anchor international institutions such as the International Criminal Court (ICC) left major impunity gaps. The ICC has jurisdiction over natural persons, which may include executives of corporate entities in their personal capacity.²²⁹ It does not have jurisdiction over legal persons. The inclusion of legal persons within the jurisdiction of the ICC was discussed during negotiation of the Rome Statute in 1998. The weight of commentary argues that it was not rejected in principle, but was abandoned due to concerns of time and complementarity.²³⁰ Despite the context and accountability gap, and evolution in provisions in national criminal law, this has not been revised in the decades since the Rome Statute.²³¹ Although the jurisdiction of the ICC could be reconfigured,²³² and the Court has expanded upon the issues it will consider,²³³ it is unlikely the ICC has the resources to include legal persons in the foreseeable future.²³⁴ Excluding legal persons from the jurisdiction of the ICC contributed to the US courts concluding that corporate criminal liability is not a discernible norm of customary international law,²³⁵ with impacts on access to civil remedies.²³⁶

²²⁸ The doctrine of *forum necessitatis* is discussed chapter 4. In *Nait-Liman* (n 83) [218]-[220] the Grand Chamber noted that of the thirty nine Member States of the EU, only the Netherlands recognizes universal civil jurisdiction for torture.

²²⁹ Rome Statute (n 144) art. 25 concerning extra-territorial aspects of the state ‘duty to protect’.

²³⁰ See Scheffer (n 153) 31 stating that ‘no negotiator disputed corporate civil liability as a general principle of law or suggested that corporations should not be accountable for their commission of torts, including particularly egregious torts (...)’.

²³¹ Under Rome Statute (n 144) art 15(1) investigations *proprio motu*. In 2016, the ICC announced it would assess existing offences coming within its jurisdiction, ‘in a broader context to include consideration of destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’. See John Vidal & Owen Bowcott, Guardian <<https://business-humanrights.org/en/intl-criminal-court-widens-remit-to-cases-on-destruction-of-environment-exploitation-of-natural-resources-illegal-dispossession>> accessed 5 November 2019.

²³² As it was to include definition of crimes of aggression in 2010. See also Kaeb (n 4).

²³³ See ICC, ‘Policy Paper on Case Selection and Prioritisation’ <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 12 December 2019.

²³⁴ Kyriaksis (n 204) 365.

²³⁵ *Kiobel I* (n 151).

²³⁶ *Kiobel II* (n 154); *Balintulo* (n 155); *Doe I v Nestle* (n 155); *Jesner* (n 156) 3. See also Kyriakakis (n 204) 334-339; . Ramasastry and Thompson (n 142); ICJ (n 3); Zerk (n 160); Kaeb (n 4).

As outlined,²³⁷ there is a welcome evolution in provisions for corporate criminal liability ‘on paper’.²³⁸ However, prosecutorial discretion and difficulties with attribution of liability to the corporate entity have stymied the development of accountability in practice.²³⁹ Many other states still do not, or only partially, provide for corporate criminal liability.²⁴⁰ Despite positive evolution overall in state practice concerning corporate criminal liability, the International Commission of Jurists cogently argues that it remains ‘a patchy system of legal accountability that leads to protection gaps that are more acute in certain jurisdictions than in others.’²⁴¹

1.3.7. Private Law: Actions in the Tort of Negligence

Apart questions of efficacy in delivering remedy for victims,²⁴² scholars actively debate normative concerns surrounding employing private law remedies for human rights violations.²⁴³ As Stephens asks, ‘do tort remedies fit the crime?’²⁴⁴ For others, human rights standards and liability in domestic tort law share a common purpose, which is to protect people from harm by deterring others from certain types of conduct.²⁴⁵ The purposes of tort

²³⁷ Kyriakakis (n 204) 334-335.

²³⁸ *ibid* 333.

²³⁹ Amnesty International & ICAR (n 204) 8.

²⁴⁰ International Commission of Jurists, ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (n 3) 17.

²⁴¹ *ibid* 20.

²⁴² Janet Dine, ‘Jurisdictional Arbitrage by Multinational Companies; A National Law Solution?’ (2013) 3 *Journal of Human Rights and the Environment* 44, 55. See also Michael D. Goldhaber, ‘Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard’ (2013) 3 *UC Irvine Law Review*, 132. For a detailed study see Enneking *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (n 80).

²⁴³ Nathan J. Miller, ‘Human Rights Abuses as Tort Harms: Losses in Translation’ (2016) 46 *Seton Hall L. Rev.* 564. See also Beth Stephens, ‘Corporate Liability: Enforcing Human Rights Through Domestic Litigation’ (2001) 24 *Hastings Int’l & Comp. L. Rev.* 401; ICJ, ‘Final Report of the Expert Panel on Corporate Complicity & Legal Accountability Vol 2 Civil Remedies’ (2009) <www.icj.org/report-of-the-icj-expert-legal-panel-on-corporate-complicity-in-international-crimes/> accessed 14 December 2019; Muchlinski (n 70); Mares ‘Responsibility to Respect’ (n 68) 10-12; Skinner et al (n 3); Deva, ‘Fictitious Separation’ (n 74) 24; Skinner, ‘Parent Company Accountability: Ensuring Justice for Human Rights Violations’ (n 76).

²⁴⁴ See Beth Stephens, ‘Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?’ (1997) 60 *ALB. L. REV.* 579, 581–87; Skinner, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (n 76) 1848.

²⁴⁵ Sophie McMurray and Simon Rice (n 79). Normative and practical concerns with causes of action in

law, its regulatory role, and the role of tort law in the protection of human rights in domestic systems remains actively debated, as explored in chapter 3.²⁴⁶

1.3.8. Foreign Direct Liability Litigation

Foreign Direct Liability (FDL) cases are cross border civil claims taken against parent companies in their home state courts alleging breach of a duty of care and harm related the operations of subsidiaries, often in developing countries.²⁴⁷ These cases frequently involve seeking to join non-EU domiciled co-defendants to proceedings against the ‘anchor’ EU domiciled defendant in the forum state, rather than proceeding with the whole case in the alternative jurisdiction. Other approaches seek to pursue the parent relating its control over suppliers as in the KIK case,²⁴⁸ or use other bases in tort.²⁴⁹

Actions based on foreign direct liability are occur principally in common law jurisdictions.²⁵⁰ Litigation continues to test the parameters and push forward the development of legal principles based on a parent company duty of care approach.²⁵¹

private law are explored in chapter 3 section 3.3.

²⁴⁶ Discussed in Chapter 3. Morgan (n 77); William Binchy ‘Tort Law in Ireland: A Half Century Review’ (2016) 56 Irish Jurist 199, 203; Judith Schrempf-Stirling and Florian Wettstein, ‘Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies’ (2017) 145(3) Journal of Business Ethics, 545, 70. See also Robert Stevens, *Tort and Rights* (Oxford University Press 2007); Val Corbett ‘The promotion of human dignity: a theory of tort law’ (2017) 58 Irish Jurist 121. On the relationship between tort law theory and human rights law see Jane Wright, *Tort Law & Human Rights* (Hart Publishing 2017), 27.

²⁴⁷ Enneking, ‘Judicial Remedies: The issue of applicable law’ (n 80) 47. Enneking summarises as litigation in which foreign victims seek remedy under tort or criminal law in the corporations’ home states either for their involvement in human rights violations committed by their subsidiaries, or for the negligence of the parent company with regard to effectively preventing such violations.

²⁴⁸ Application of Article 4(1) Brussels I recast (n 88) based on a supply contract between the EU domiciled company and a supplier allegedly involved in the damage as in *Muhammad Jabir and Others v KiK Textilien und Non-Food GmbH* (n 42).

²⁴⁹ Based on common law property *Saúl Luciano Lliuya v RWE AG* Case No. 2 O 285/15 Essen Regional Court. See also Wesche and Saage-Maaß (n 41); Madhav Mohan, ‘The Road to *Song Mao*: Transnational Litigation from Southeast Asia to the United Kingdom’ (2014) AJIL Unbound <doi:10.1017/S2398772300009661>.

²⁵⁰ Enneking, ‘Judicial Remedies: The issue of applicable law’ (n 80) 42.

²⁵¹ Ibid Enneking 47. See also Daniel Augenstein, Mark Dawson, and Pierre Thielbörger, ‘The UNGPs in the European Union: The Open Coordination of Business and Human Rights?’ (2018) Business and Human Rights Journal <<https://doi.org/10.1017/bhj.2017.30>> accessed 12 December 2019.

Arguments for the existence of such a duty of care on a parent company arise, *inter alia*, where the parent leverages its superior knowledge, influence, or control over group operations.²⁵² Where the parent through its behaviour has assumed a duty of care to the subsidiaries' employees or persons affected by its operations, it may be held liable if harm occurs.²⁵³ This is direct as opposed to vicarious liability.²⁵⁴ It is conceptually different from veil piercing.²⁵⁵ Following tightening of jurisdictional standards in the US in ATS litigation,²⁵⁶ an increasing number of FDL cases are being brought before EU Member States courts against EU parent companies in relation to their harmful impacts internationally.²⁵⁷ For over three decades the principles of parent company duty of care have been under development in English courts.²⁵⁸ From *Lubbe*²⁵⁹ to *Dominic Liswaniso Lungowe v Vedanta Resources Plc*,²⁶⁰ considerations of access to justice in the alternative jurisdiction are significant. Using the on-going *Vedanta* case to illustrate, under consideration is whether, and on what basis, an English court might consider a parent company domiciled in the UK owes a duty of care to members of a community whose lives and livelihoods have been affected by pollution from its Zambian subsidiary. In a ruling on jurisdiction in 2019, the UK Supreme Court held that the claimants had established an arguable case that the parent company owed a duty of care, and that its Zambian subsidiary was a necessary and proper party to proceedings in the English courts. On the basis of connecting factors to each jurisdiction, the English courts would not have been the 'proper place' to bring proceedings, but for the separate and distinct question of access to justice in Zambia.²⁶¹ These issues are explored in detail in chapter 5.

²⁵² *Chandler v. Cape plc* [2012] EWCA Civ. 525 (Arden LJ) [80].

²⁵³ *ibid.*

²⁵⁴ *ibid.*

²⁵⁵ de Schutter (n 106171) 41-67.

²⁵⁶ Discussed in section 1.3.3. *Kiobel I* (n 151); *Sosa* (n 150); *Balintulo*; *Nestle* (n 155); *Jesner* (n 156).

²⁵⁷ See Enneking, 'Judicial Remedies: The issue of applicable law' (n 80).

²⁵⁸ Shubnaa Srinivasan, 'Current trends and future effects in transnational litigation against corporations in the United Kingdom' in in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014). See also Meeran (n 72).

²⁵⁹ (n 86). The House of Lords held the case of 3,000 South African plaintiffs for injuries sustained in South Africa could proceed to trial. As no legal aid or appropriate legal expertise would be available, requiring the case to be brought in South Africa would amount to a denial of justice. The case was settled prior.

²⁶⁰ [2017] EWCA Civ 1528 (CA). *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (*Vedanta SC*).

²⁶¹ *Vedanta (SC)* (n 260) [88].

Do foreign direct liability claims represent the sharp end of corporate accountability, and what is their value in advancing it?²⁶² Schrempf-Stirling and Wettstein’s review of forty foreign direct liability cases illustrates notable regulatory ‘side-effects’ effects flowing from litigation,²⁶³ notwithstanding that the results for claimants may be viewed as disillusioning.²⁶⁴ Further, this line of litigation aligns with a normative case for responsibilities owed by those reaping benefits to those affected by consequent negative impacts.²⁶⁵ They press for the law to exact a cost on multinational corporations for their impacts on ‘involuntary creditors’.²⁶⁶ As Enneking validly argues, foreign direct liability cases have a unique role due to their transnationality and distinct public interest nature, which places them at the intersection of public and private law.²⁶⁷

1.4. INTRODUCTION TO THE IRISH CONTEXT

Ireland is reputed as an open economy, which is increasingly knowledge based. The major sectors of activity are tech, pharma, life sciences, financial services and agribusiness including agrifood. Its success has been linked to membership of the EU single market, successful promotion of Ireland as a location for FDI, and its educated workforce.²⁶⁸ The country has experienced marked social change, including towards a more ethnically diverse population. Economic activity has long been associated with Foreign Direct Investment (FDI) in Ireland by major multinational corporations. The position of the Irish State in relation to the taxation of multinational corporations domiciled in Ireland continues to generate controversy.²⁶⁹ Of the Forbes 2000 (2020), around 18 companies are

²⁶² Discussed in chapter 3 section 3.5. Halina Ward, ‘Foreign Direct Liability’: A New Weapon in the Performance Armoury?’ (2000) The Royal Institute of International Affairs.

²⁶³ Schrempf-Stirling and Wettstein (n 246).

²⁶⁴ Enneking, ‘Judicial Remedies: The issue of applicable law’ (n 80) 38.

²⁶⁵ Muchlinski (n 70) 146. See also Mares (n 68).

²⁶⁶ Muchlinski (n 70) 150.

²⁶⁷ Enneking, ‘Judicial Remedies: The issue of applicable law’ (n 80) 43-45.

²⁶⁸ https://ec.europa.eu/ireland/news/key-eu-policy-areas/economy_en.

²⁶⁹ For example, *Irish Times* ‘Ireland still facilitating multinational tax avoidance, commission says’ (26 February 2020) <<https://www.irishtimes.com/business/economy/ireland-still-facilitating-multinational-tax-avoidance-commission-says-1.4185570>>; *Irish Examiner* ‘Top 10 companies account for 40% of corporation tax revenues’ (25 June 2020) <<https://www.irishexaminer.com/business/arid-31007467.html>>; *Irish Times* “‘effective” tax rate paid by firms in Ireland 12%, OCED finds’ (8 July 2020) <<https://www.rte.ie/news/business/2015/0713/714415-today-in-the-press/>> accessed 20 October 2020.

headquartered in Ireland.²⁷⁰ According to the Irish Industrial Development Authority, ‘Ireland is home to many of the world’s leading high-performance companies’, including ‘the top five global software companies, 14 of 15 top medical tech companies, 18 of 25 top financial services companies, 10 of 10 top pharma companies, and 8 of 10 industrial automation companies’.²⁷¹ Headlines concerning FDI tend to obscure the extensive commercial activities overseas of Irish multinationals via their foreign subsidiaries and affiliates. According to the Central Statistical Office, in 2016 ‘Irish multinationals employed over 856,000 persons abroad, generating revenue of €192.6 billion. Foreign multinationals employed 293,100 persons in their affiliates in Ireland, generating Turnover of €345.0 billion.’²⁷²

Ireland has a National Action Plan on Business and Human Rights (NAP) 2017-2020 with the mission:

To promote responsible business practices at home and overseas by all Irish business enterprises in line with Ireland’s commitment to the promotion and protection of human

²⁷⁰ See <<https://www.forbes.com/global2000/>> list of 2000 largest publicly traded companies ranked based on a mix of four metrics: sales, profit, assets, and market value.

²⁷¹ IDA ‘why invest in Ireland’ on 6 September 2020 states: ‘Ireland’s performance as a hub for Foreign Direct Investment is unrivalled. Ireland has a proven track record as a successful location for world leading established and high growth multinational companies from around the world. One third of multinationals in Ireland have had operations in the country for over 20 years, illustrating the longevity, resilience and commitment of these companies to Ireland’ <<https://www.idaireland.com/invest-in-ireland>> accessed 20 October 2020.

²⁷² Central Statistics Office ‘Business in Ireland, Multinationals: An Irish Perspective’ <<https://www.cso.ie/en/releasesandpublications/ep/p-bii/businessinireland2016/multinationalsanirishperspective/>> accessed 12 September 2020. See also EU Commission ‘Country Report Ireland - 2020 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011’ COM(2020) 150 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1584543810241&uri=CELEX:52020SC0506>>; <<https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Trade-Policy/OECD-Guidelines-for-Multinational-Enterprises/>> accessed 12 September 2020. See also ‘Ireland Connected: trading and investing in a dynamic World’ http://www.merrionstreet.ie/merrionstreet/en/imagelibrary/20170308_ireland_Connected.pdf accessed 12 September 2020..

rights globally and to being one of the best countries in the world in which to do business.²⁷³

There is reason to believe that a cause of action in civil law would assist victims overseas of negative impacts of business seeking redress in Ireland. Issues with access to remedy in Ireland were recognised in the Baseline Assessment of the Legislative and Regulatory Framework of the Irish National Action Plan on Business and Human Rights. Conducted in 2019, it urges a ‘...thorough review of remedies which focuses chiefly on meaningful access to remedies is therefore an important step in advancing remedies in the Irish context.’²⁷⁴ Pursuant to a recommendation within the Baseline Assessment, the Department of Foreign Affairs and Trade commissioned a Review of ‘how best to ensure remedy for potential victims of human rights abuses by companies domiciled in Ireland.’²⁷⁵ This Review of Access to Remedy focuses on legal, procedural, or financial barriers to justice. Authored by the writer, it will be published in late 2020.

There is evidence of abuses overseas related to corporations domiciled and incorporated in Ireland, including State-owned entities. For example, links are drawn between the State-owned Electricity Supply Board (ESB) and coal sourced from the Cerrejón mine in Colombia.²⁷⁶ The Latin America Solidarity Centre (LASC) has called for the ESB to

²⁷³ <www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf> The NAP was developed by the Department of Foreign Affairs and Trade and launched by the Tánaiste (Deputy Prime Minister) in 2017 following a consultation process with stakeholders including civil society and business. For example, submissions from Amnesty International, Christian Aid Ireland, FLAC, IBEC and Trócaire <www.ihrec.ie/documents/submission-irelands-national-action-plan-business-human-rights/> accessed 12 September 2020. To oversee implementation of the plan, a Business and Human Rights Implementation Group was established in 2018.

²⁷⁴ ReganStein, Leading Edge, and Department of Foreign Affairs and Trade, ‘National Plan on Business and Human Rights; Baseline Assessment of Legislative and Regulatory Framework’ (March 2019) (Baseline Assessment) Recommendation 15 pages 51, 52 pursuant to NAP <<https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Baseline-Study-Business-and-Human-Rights-v2.pdf>> accessed 12 September 2020.

²⁷⁵ Department of Foreign Affairs and Trade, Business and Human Rights Unit, ‘Review of Access to Remedy’ (forthcoming), by independent legal consultant Rachel Widdis. Within this review c.80 persons or entities including State services, representative associations, civil society organisations, commercial entities, and expert commentators were approached to participate in a consultation on remedy in Ireland.

²⁷⁶ Christian Aid investigation of the relationship between the ESB, and the Cerrejón mine (February 2020) <<https://www.christianaid.ie/resources/undermining-human-rights-ireland-esb-and-cerrejon-coal>> accessed 12 September 2020.

immediately divest from Colombian coal.²⁷⁷ The mine is a joint venture involving Glencore plc, which has investments in mining interests in Ireland.²⁷⁸ In another example, a complaint was filed before Ireland's National Contact Point (NCP) for the Organisation for Economic Cooperation and Development (OECD)²⁷⁹ by the Global Legal Action Network (GLAN) concerning the oil exploration activity of Dublin based San Leon Energy plc in Western Sahara, reportedly without seeking the consent of those occupying the land.²⁸⁰

The Irish Constitution is the supreme source of human rights protections.²⁸¹ The Constitution is based on natural law philosophy²⁸² whereby, parallel with the normative underpinnings of human rights, rights inhere in people by virtue of their humanity.²⁸³

²⁷⁷ Greennews 'Legal action in Colombia against ESB coal supplier' <<https://greennews.ie/legal-action-in-colombian-against-esb-coal-supplier/>> accessed 12 September 2020.

²⁷⁸ Discussed further in chapter 6. Via an 11.58% stake in Group Eleven Resources, see <<https://www.groupelevenresources.com/resources/presentations/corporate-presentation.pdf>>; <<https://www.mining.com/glencore-backs-canadian-junior-zinc-project-in-ireland/>> accessed 10 October 2020. CETIM report to UN HRC, 'Workers' Human Rights Violations By Glencore Around The World' (2018) <<https://www.business-humanrights.org/en/latest-news/ngo-reports-raise-allegations-against-glencore-over-workplace-safety-environmental-damage/>>. See also Glencore, Human Rights Report 2019 <<https://www.glencore.com/dam/jcr:d1c81b2f-32bd-41ba-a3d7-fa10337c657e/2019-Glencore-Human-Rights-Report.pdf>> accessed 17 October 2020.

²⁷⁹ See also Ciara Hackett, Ciaran O'Kelly and Clare Patton, 'The case of the Irish National Contact Point for the OECD Guidelines for Multinational Enterprises: challenges and opportunities for the business and human rights landscape in Ireland' (2019) *Irish Jurist* 61, 99-121; Shane Darcy 'Embedding Business & Human Rights in Ireland: Legislating for Human Rights Due Diligence' available at <<https://ssrn.com/abstract=3506384>>.

²⁸⁰ Complaint available at <<https://www.glanlaw.org/single-post/2018/10/24/GLAN-files-complaint-against-Irish-oil-companys-dealings-in-annexed-Western-Sahara>> accessed 12 September 2020. San Leon plc is headquartered in Dublin. The complaint alleges that the company failed to ensure that it has the consent of the Western Saharan people before drilling for oil on their land. The four complaints which have been made to the Irish NCP are accessible via the OECD <<http://mneguidelines.oecd.org/database/instances/ie0004.htm>> accessed 12 September 2020.

²⁸¹ Gerard Hogan, Gerard Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn Bloomsbury Professional 2018) Forward stating: 'The fact that the Constitution must always remain the fundamental touchstone of fundamental rights protection...signalled by the Supreme Court in *YY v Minster for Justice Equality and Law Reform* [2017] IESC 61'.

²⁸² See further Oran Doyle, *Constitutional Law: Text Cases and Materials*, (Clarus Press 2008) Chapter 4. II.

²⁸³ See Bryan MacMahon and William Binchy, *The Law of Torts* (4th ed Bloomsbury Professional 2013) 1.114 stating: 'They are not the gifts of a positive legal system that are conferred from above by the State on its

Scholars maintain that the Constitution ‘continues to dominate the space in which legal advocacy and judicial thinking is concerned with human rights’.²⁸⁴ Notably, and relevant to FDL litigation in this thesis, it is acknowledged that ‘central to our understanding of the aims of [Irish] tort law is the Constitution’.²⁸⁵ Further, the Irish courts have held that the fundamental rights and principles recognised by the Irish Constitution are capable of being applied directly to private individuals,²⁸⁶ and to legal entities such as corporations.²⁸⁷ How the Irish Constitution, tort law and FDL litigation may interact remains to be seen.²⁸⁸ Obligations to protect human rights have been assumed by the Irish State stemming from ratification, *inter alia*, of the core United Nations human rights treaties,²⁸⁹ the ECHR,²⁹⁰ and other international instruments relevant to business and human rights including the eight fundamental conventions of the International Labour Organisation.²⁹¹ The ECHR was incorporated into Irish domestic law by the European Convention on Human Rights Act

subjects. These rights, on this approach, predated the promulgation of the Constitution, which recognised rather than created them’. See also Hogan, Whyte, Kenny, and Walsh (n 281) chapter 7.

²⁸⁴ Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional 2015) 1.03.

²⁸⁵ William Binchy ‘Tort Law in Ireland: A Half Century Review’ (n 246246) 2. Discussed in chapter 6.

²⁸⁶ *Educational Company of Ireland v Fitzpatrick (No.1)* [1961] IR 323; *Meskeil v CIE* [1973] IR 121; *Glover v BLN Ltd* [1973] IR 388. Hogan, Whyte, Kenny and Walsh (n 281) 7.1.132 stating: ‘Neither the Constitution itself nor any other law prescribes any particular procedure as appropriate for remedying a breach of constitutional rights (...)’

²⁸⁷ Colm O’Cinnéide, ‘Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?’ in *Human Rights in the Private Sphere: A Comparative Study*” (Vol 1) Oliver and Fedtke (eds) (Routledge Cavendish, 2007) 213, 214.

²⁸⁸ Discussed further in chapter 6. See Donal O’Donnell, ‘International Aspects of the Constitution: Skibbereen Eagle or a shaft of dawn for the despairing wretched everywhere’ 59 (2018) *Irish Jurist* 1; Alistair Richardson ‘Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights’ (2018) 21 *Trinity College Law Review* 159.

²⁸⁹ ICCPR ratified by Ireland 1989 except arts. 10(2) and 20(1); ICESCR ratified by Ireland in 1989; CAT ratified by Ireland 2002; CEDAW ratified by Ireland 1985; CERD ratified 2000; CRC ratified by Ireland 1992 (n 97); Convention on the Rights of Persons with Disabilities UN General Assembly A/RES/61/106 ratified by Ireland 2018. Ireland has ratified the Optional Protocols to ICCPR (1989), CRC (2014), CEDAW (2000) and CAT (2002) allowing for individual communications but has not yet ratified the Optional Protocol to ICESCR. UN treaties ratified by Ireland do not form part of its domestic law. See further <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=83&Lang=EN> accessed 12 September 2020.

²⁹⁰ (n 84).

²⁹¹ (n 96).

2003.²⁹² Ireland is bound by the CFREU.²⁹³ While in principle, a robust infrastructure for human rights protection is established in Ireland, issues are apparent. For example, significant procedural barriers to remedy persist. Despite recommendations from the Law Reform Commission²⁹⁴ and the introduction of a private members bill on Multiparty actions in 2017,²⁹⁵ Ireland does not have an appropriate mechanism for mass harm litigation.²⁹⁶ It remains outside the 2013 EU Recommendations on collective redress.²⁹⁷ In combination with existing restrictions on access to funding for litigation, practical barriers negatively affect access to justice.²⁹⁸ For example, the High Court in *Friends of the Irish Environment CLG v Ireland and the Attorney General* in 2020 ruled that civil legal aid can only be

²⁹² <www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html> accessed 11 November 2019. See also Gerard Hogan, 'Ireland - The European Convention of Human Rights Act 2003' (2005) 12 Eur. Pub. L. 332; Egan et al (n 284); Suzanne Kingston and Liam Thornton, 'A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review' (2016) <www.lawsociety.ie/globalassets/documents/committees/hr/echrreport30july2015.pdf> accessed 11 November 2019; Hogan, Whyte, Kenny and Walsh (n 281) 5.3.136 stating: 'The European Convention on Human Rights Act 2003 also gives some effect in domestic law to arts 2 to 14 of the Convention and Protocol Nos 1,4,6 and 7 thereto'.

²⁹³ (n 102).

²⁹⁴ Law Reform Commission 'Multi-Party Litigation' (LRC 76-2005). The 2005 report followed the 'Multi-Party Litigation (Class Actions) Consultation Paper' (LRC CP 25-2003).

²⁹⁵ Private members Bill <www.oireachtas.ie/en/bills/bill/2017/130/> accessed 11 November 2019.

²⁹⁶ British Institute of International and Comparative Law (BIICL), 'State of Collective Redress in the EU in the context of the Commission Recommendation' 680 <www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf> accessed 11 November 2019.

²⁹⁷ Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>>; Communication to the European Parliament and Council, 'Towards a European Horizontal Framework for Collective Redress' COM (2013) 401/2; 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law' (2013/396/EU) COM/2018/040 final 1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0040:FIN>>; BIICL (n 296). See also Council of Europe Recommendation CM/Rec(2016)3 <<https://fra.europa.eu/en/law-reference/recommendation-cmrec20163-human-rights-and-business>> accessed 11 November 2019; EU FRA Opinion (n 1).

²⁹⁸ *Persona Digital Telephony Limited Sigma Wireless Networks Limited v The Minister for Public Enterprise Ireland and The Attorney General and Denis O'Brien and Michael Lowry* [2016] IESCDT 106.

granted to ‘natural persons’, excluding ‘legal persons’ such as a non-governmental organisation.²⁹⁹ Issues with existing avenues to judicial and non-judicial remedy, and the potential value of foreign direct liability litigation in Ireland, are examined in detail in chapters 2, 5 and 6.

1.5. CENTRAL RESEARCH QUESTION

This thesis is a doctrinal and comparative study of accountability for the negative impacts of multinational corporations and their foreign subsidiaries on human rights. It will focus on levers of legal accountability and seek to establish whether Ireland could become a forum for foreign direct liability (FDL) litigation. The cause of action is in the tort of negligence, based upon the concept of a duty of care owed by a parent company to third parties negatively impacted by the activity of a subsidiary. FDL proceedings are pursued in the jurisdiction in which the parent company is domiciled, headquartered, or has significant operations. The thesis will seek to answer the central question:

Whether actions against a parent company in the tort of negligence related to negative impacts of its foreign subsidiaries are feasible in Ireland.

It will assess the current accountability framework and avenues to remedy. A general approach to the common problem is advocated, while acknowledging the particular parameters pertaining in selected jurisdictions. The thesis will identify principles, themes, and trends in actions, synthesise their impact on accountability, and propose future directions. A model for adjudicating FDL actions will be presented based on analysis of comparative jurisprudence, primarily of the English courts. Building from this, a synthesis of points of convergence and divergence will enable a model of parameters for FDL actions in Ireland to be presented. The interaction between the Irish Constitution, tort law, and human rights protections will be explored, and enhancements proposed. The impact of practical circumstances in Ireland on feasibility, and future directions will be assessed. This pathway to responding to the central research question involves:

- i. Outlining the context and drivers of the accountability gap;
- ii. Assessing frameworks and existing mechanisms of accountability including in criminal law;
- iii. Exploring the role of civil remedies in accountability;

²⁹⁹

See

https://www.courts.ie/acc/alfresco/fe3f46ca-1aab-4a57-9c49-0aeeb6ad6d3c/2020_IEHC_454.pdf/pdf#view=fitH accessed 1 October 2020.

- iv. The normative justifications for direct parent company liability;
- v. Factors affecting the feasibility of litigation in the tort of negligence;
- vi. The development of foreign direct liability litigation in comparative jurisprudence;
- vii. Factors affecting the feasibility of foreign direct liability litigation in Ireland;
- viii. Assessing procedural and practical considerations for litigation in Ireland;
- ix. The potential role of the Irish Constitution

This thesis has two objectives, one primary and one secondary. The primary objective is to draw insights from existing challenges concerning the accountability of business for negative impacts on human rights, and to link these to the development of FDL litigation and its feasibility in Ireland. The focus is to connect the impact of multinational corporations on human rights to hard law consequences. Legal remedies in the home states of multinational corporations based on direct liability of the parent company are under development. There are few instances of judgments on the merits.³⁰⁰ As yet there are no judgments on the merits in EU Member States which are common law jurisdictions. The English courts have driven significant development in the concept and parameters of parent company duty of care. Proceedings are on-going and judgments on the merits in landmark cases in the English courts are awaited.³⁰¹

It is timely and relevant to investigate whether FDL litigation is feasible in Ireland on the basis of the increase in FDL litigation within the EU, in combination with Brexit and in light of Ireland's positioning as a destination for foreign direct investment. Where and how far FDL litigation will ultimately go in advancing accountability is unknown. Its study in this thesis holds challenges as it requires spanning areas of expertise that can be perceived as quite distinct, siloes even. Until the rise of FDL cases, it is arguable scholars of human rights and tort law did not generally overlap or perceive a benefit to combining scholarship concerning litigation. While this span is a challenge, engaging it is valuable. Secondly, this

³⁰⁰ *Akpan v Royal Dutch Shell Plc* ECLI:NL: RBSGR:2011: BU3529 (14 September 2011); ECLI:NL:RBSGR:2013:BY9854 (30 January 2013); ECLI:NL: GHDHA: 2015:3587 (17 December 2015) (CA). See further Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10(1) *Utrecht Law Review* 44; Cees van Dam, 'Preliminary Judgements Dutch Court of Appeal in the Shell Nigeria Case' (2016) <www.ceesvandam.info/default.asp?fileid=643> accessed 11 November 2019.

³⁰¹ *Vedanta SC* (n 260); *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 was cleared for appeal to the UK Supreme Court in July 2019.

thesis aims to focus attention on the fundamental ways in which the field of human rights intersects with business. Although interacting on a daily basis around the world, they have been surprisingly slow to intersect in law, as well as in business and legal practice. This is changing. As the system of governance in business and human rights matures, it is hoped that it will evolve from emphasis on policy/soft law based initiatives towards a comprehensive system which has legal accountability firmly positioned at its core. Further, it is hoped that the interaction of business and human rights will be mainstreamed, and yield a new generation of leaders in law, in business and in finance who will consider human rights concerns as a core element in their operational stock in trade. This thesis aims to make a positive contribution to this much needed progression.

To the author's knowledge, this is the first thesis investigating the feasibility of FDL litigation in Ireland.³⁰² This investigation of the dynamics, drivers, and the feasibility of FDL litigation in Ireland makes an original contribution to this emerging area. The model for adjudicating litigation against a parent company based in negligence in the Irish courts will offer a new way of thinking regarding a cause of action to leverage the protection of human rights in the Irish context. In the context of FDL litigation, this thesis offers fresh consideration of the role of the Irish Constitution. To move forward, impacts on human rights, as on the environment, cannot be perceived as the preserve of specialised advocates exiguous to the world of business. Commercial law, constitutional law, private international law, tort law, and criminal law relate to the protection of human rights. A new way of linking these disciplines would be a useful point of departure for future work for students and advocates of human rights protections in domestic law.

1.5.1. Research Methodology

The premise is that as it stands the most promising path to legal accountability lies in litigation based on direct liability in negligence in the jurisdiction where the parent company is domiciled for harms caused in the course of its global operations.

³⁰² There is research on the impact of soft law, the NAP, and UN Treaty on Business and Human Rights. See Irish Human Rights and Equality Commission, 'Submission on Ireland's National action Plan on Business and Human Rights' (March 2015) <www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Irish-Human-Rights-and-Equality-Commission.pdf>;

Trócaire 'Analysis of Ireland's National Action Plan on Business and Human Rights' (December 2017) <www.trocaire.org/news/analysis-irelands-national-action-plan-business-and-human-rights> accessed 2 January 2020.

The level of investigation and research methods are adapted to fit with the span of the research, and to respond to the core research question. This thesis is based upon doctrinal research, including a comparative approach. A purely doctrinal approach is not appropriate to the emerging area of business and human rights which encompasses relatively little ‘black letter’ law by comparison to other areas, for example contract law. The doctrinal element of the thesis primarily concerns the structure of norms concerning business-related abuses of human rights, issues with existing mechanisms of accountability, and the law of torts as it pertains to the research question.³⁰³ It involves the identification, and analysis of the application, of relevant primary sources of law. Primary sources include: the Irish Constitution; Irish case law; Irish legislation; European Union legislation; international and regional treaties. It refers to decisions of the Court of Justice of the European Union; European Court of Human Rights; International Court of Justice; and international criminal tribunals.

Where existing mechanisms exhibit gaps in accountability, the comparative approach focuses on the legal responses adapted to address the common problem in selected jurisdictions.³⁰⁴ The development of relevant legal principles in selected jurisdictions is examined. The thesis evaluates the implications of such development, and demonstrates their relevance to the feasibility of foreign direct liability litigation in Ireland. At points, it considers recommendations for law reform in Ireland.³⁰⁵ Secondary sources listed in the bibliography include international secondary legislation, books, contributions to edited books, journal and online articles, Law Reform Commission reports, amicus curiae briefs, United Nations documents, European Union documents, Dáil debates, conference papers, newspaper articles, websites, blogs, and one personal interview. The path to responding to the central research question follows the advice of Mares:

³⁰³ See Kyle Graham, ‘The Diffusion of Doctrinal Innovations in Tort Law’ (2015) 99 Marq. L. Rev. 75.

³⁰⁴ Geoffrey Wilson "Comparative Legal Scholarship" in Mike McConville and Wing HongChui (eds) *Research Methods for Law*(Edinburgh University Press, Edinburgh, 2007) 87.

³⁰⁵ For normative purpose, see Chris Dent, ‘A Law-Student Oriented Taxonomy for Research in Law’, (2017) 48(2) *Victoria University of Wellington Law Review* 371-388, 387.

The foundation offered by reasoning in the shadow of negligence law could be further elaborated by taking a closer look at the main legal systems and delv[ing] deeper in the theories used, tensions encountered and promising ways forward.³⁰⁶

This thesis adopts a functional method and seeks to explore the nature of a common problem involving competing interests. The core research question implies inclusion of comparative research on the basis that development has and is occurring in jurisdictions other than Ireland. Why is comparison useful? Comparing treatment of an issue in domestic law with the way the same issue has been approached in one or more other jurisdictions has become almost compulsory in doctrinal legal research.³⁰⁷ Further, considering the ‘Aims of Comparative Law’, even in more open, pluralist and less constructivist comparative research, Glenn concludes the [mentioned] aims are still largely valid.³⁰⁸

While referring to national legislation as relevant, the assessment of feasibility to which the research question relates primarily engages with comparative jurisprudence as it stands. The approach is to consider which legal approaches are adopted to address common problem in selected systems, and future directions. In practice, actions are primarily pursued in common law jurisdictions. The early development of principles in the United States (US) will be considered. For the central research question, the themes of interest in this line of US case law are whether corporate liability has developed into a general principle of international law, and judicial interpretation of theories of attribution to corporate entities. Litigation in the US was principally based on a unique cause of action under the Alien Tort statute,³⁰⁹ which has since been significantly curtailed. Litigation in other jurisdictions, where no such statutory basis exists, has primarily followed a parent company duty of care approach. The development of legal principles, and cross-fertilisation of tests, and precedents is examined. This thesis will assess whether they will prove persuasive and may also be adopted for Ireland, adapted to the case and particularities of this forum.

³⁰⁶ Radu Mares, ‘Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights’ <https://doi.org/10.1163/9789004225794_008> 21 accessed 4 October 2019.

³⁰⁷ Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) <www.researchgate.net/publication/291373684_Methodology_of_Comparative_Legal_Research>.

³⁰⁸ Patrick H. Glenn, ‘The Aim of Comparative Law’ in *Elgar Encyclopaedia of Comparative Law* Jan Smits (ed) (Edward Elgar Publishing 2006).

³⁰⁹ Stephens, ‘The Amoral of Profit’ (n 3) 41.

Legal principles in emerging jurisprudence in Canada and the Netherlands based on the duty of care approach is of precedential value and will be highlighted where pertinent. Greater emphasis will be placed on solutions developed to the common problem in the English courts. This focus is justified by reason of nearest common law jurisdiction; commonalities of concepts in private law of the same ‘legal family’; common language; similar socio-economic background in Western Europe; and familiarity with historical and socio-economic context. It is relevant that the United Kingdom (UK) is a capital exporting country and, similar to Ireland, is a significant jurisdiction of domicile for multinational companies.³¹⁰ As a Member State of the EU, the UK is bound by two EU Regulations concerning jurisdiction in non-contractual disputes³¹¹ and applicable law,³¹² which is relevant due to the impact of both Regulations on the outcome of individual cases and the development of precedent.³¹³

Important divergences of context between the UK and Ireland will be considered. For example, the UK has integrated the ECHR into domestic law via legislation³¹⁴ in a manner different to Ireland,³¹⁵ indicating areas of divergent application within a common context.³¹⁶ Further, the UK does not have a Constitution as Ireland has, infused with principles of natural law,³¹⁷ or a cause of action for infringement of constitutional rights as in Ireland.³¹⁸ As the horizontal application of human rights to non-state actors is an evolving

³¹⁰ Concerns as to whether the ends of justice are ultimately served by bringing these cases in any forum other than the state of harm are recognised.

³¹¹ Brussels I recast (n 88).

³¹² Council Regulation (EU) No 864/2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199.

³¹³ Other themes relevant to the central research question in the United Kingdom are recent legislation concerning corporate criminal liability in analogous areas with extra-territorial effect, certain of which also envisage defences based on due diligence.

³¹⁴ Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland].

³¹⁵ European Convention on Human Rights Act 2003.

³¹⁶ See generally Kingston and Thornton (n 292).

³¹⁷ MacMahon and Binchy (n 283) 1.114 stating: ‘They are not the gifts of a positive legal system that are conferred from above by the State on its subjects. These rights, on this approach, predated the promulgation of the Constitution, which recognised rather than created them’. See also Doyle (n 282282) Chapter 4. II; Hogan, Whyte, Kenny, and Walsh (n 281) 7.126

³¹⁸ For example, *Meskeil v CIE* [1993] IR 121 (SC); *Hanrahan v. Merck, Sharpe & Dohme Ltd* [1988] I.L.R.M. 629; *Louis Blehein v The Minister for Health and Children, Ireland and the Attorney General* [2018]

and contested legal area, including in Ireland, ‘domestic experiences constitute a key evidence base’.³¹⁹ The solutions adopted to the common problem are also influenced by forum specific practical and procedural considerations including the availability of funding, legal expertise, and mechanisms for collective redress. Hence in this thesis, the functional method includes at least to some extent a law-in-context approach.³²⁰

Chapter 1 introduces the context, relevant themes in literature, and a concept of accountability. The central research question, research methodology, and objectives of the thesis are presented. The context in Ireland and the potential relevance of foreign direct liability litigation is outlined. A legal accountability pathway, developed over the themes in the thesis, is outlined. Chapter 2 is doctrinal. It will explore gaps in accountability, grounding the rationale for FDL litigation. It will consider the potential of FDL litigation, working in combination with appropriate provision in criminal law and home state regulation of human rights due diligence, to address such gaps in Ireland. Chapter 3 will place the role of FDL litigation as a cause of action in context. It explores conceptual considerations relating to the role of private law in accountability for human rights abuses. FDL litigation is based on direct parent company liability, and its normative justification, benefits, challenges, and contribution will be assessed. Chapter 4 will address the procedural issues arising in FDL litigation. The interaction of EU Regulations and national rules upon jurisdiction and applicable law, will be areas of focus. The feasibility of actions is explored using a structure of five factors. This structure will be carried through to the examination of the development of legal principles within comparative jurisprudence in chapter 5, and the assessment of feasibility of litigation in Ireland in chapter 6.

Chapter 5 will take a comparative approach. It will examine the development of principles and themes within FDL litigation. For the reasons outlined, it will focus primarily on the jurisprudence of the English courts, but will also consider relevant developments in the Netherlands and Canada. As the parameters regarding jurisdiction applied by the English courts are markedly similar to procedural rules in Ireland, this analysis has high informative and indicative value. Emerging themes impacting whether a duty of care is owed, such as

IESC 40. See also O’Cinnéide (n 287) 213-252, 214; William Binchy, ‘*Meskill*, The Constitution and Tort Law’ (2011) 18 DULJ 339.

³¹⁹ Aoife Nolan ‘Holding non-state actors to account for constitutional economic and social rights violations: experiences and lessons from South Africa and Ireland’ (2014) 12(1) ICON, 74.

³²⁰ Van Hoecke (n 307) 16.

the role of corporate group policies, will be highlighted. Chapter 5 will conclude with a model for adjudicating FDL cases synthesised from comparative jurisprudence according to; jurisdiction, an arguable case a duty of care is owed, applicable law, and the procedural and practical circumstances of the forum.

Chapter 6 is doctrinal with comparative elements. Building from the foregoing, it will aim is to respond fully to the central research question. It will commence with the context in Ireland concerning human rights protection, including the role and potential of the Irish Constitution. It will examine the substantive context, and procedural and practical circumstances for FDL litigation in Ireland. It will assess whether principles of parent company duty of care in comparative jurisprudence could find traction in Ireland, and project how the Irish courts might address the issues arising. Procedural and practical circumstances in Ireland will be examined, and recommendations presented concerning multi-party actions and third-party funding of litigation. Throughout Chapter 6 the influence of the Irish Constitution is considered in the context of FDL litigation including: access to justice; the possible relevance of actions for infringements of constitutional rights; and thoughts for the development of Irish tort law. It will present a model for adjudicating FDL litigation in Ireland according to jurisdiction, an arguable case a duty of care is owed, applicable law, and the procedural and practical circumstances of the forum. Chapter 7 will present the major findings of the thesis. Appropriate to this fast developing field, it will look forward, and scan the horizon to project the future evolution of accountability for business related human rights harms.

1.5.2. Scope

For practical purposes it is necessary to delimit the scope of this thesis. The central research question concerns multinational corporations, privately held or publicly listed, which are headquartered, domiciled or have significant business activities in Ireland, and subsidiaries operating outside the EU.³²¹ It is based on an investment nexus as opposed to addressing affiliates, downstream business relationships, or suppliers on a contractual basis. While it considers the scope of the responsibility of states to regulate home state corporations throughout their operations, the obligations of states concerning state owned or controlled corporations and state supports to corporations are outside the scope. Discussion of the philosophical basis of perfect and imperfect duties and obligations is limited.³²² The

³²¹ Analysis of comparative jurisprudence covers multiple jurisdictions.

³²² Referred to in discussion in chapter 2 section 2.2.2.

influence of trade and investment treaties on human rights protections,³²³ and trends in public interest climate litigation are noted as related but discussion is outside the scope.³²⁴

The central research question focuses on the tort of negligence, in particular the concept of a duty of care owed by a parent company to third parties negatively impacted by the activity of a subsidiary. In order to respond to the research question, and given practical limitations in advancing this original research, issues concerning contractual relationships with suppliers and value chains are noted but are not examined. Issues of jurisdiction and applicable law are discussed throughout but conflicts of laws more widely is outside the scope. Universal jurisdiction (criminal and civil), and corporate criminal liability under national law are considered in order to assess if existing mechanisms of accountability are robust. Related areas which are not given specific consideration in this thesis include corporate liability for financial crimes, reporting requirements, and corporate governance theory. Support for injecting human rights considerations into all stages of corporate law decision making processes and indirect pathways forming part of the wider goal of ‘humanising corporate law’ are noted.³²⁵ Other relevant areas which are noted but not considered in detail include the reflexive dimension of the relationship between international human rights discourse and corporate practice.³²⁶ Given its stage of development, the Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises of 2019 is noted but not examined.³²⁷ Existing mechanisms for collective redress in Ireland are considered not fit for purpose in this context and are therefore not considered. On the

³²³ See Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (n 51) 221 stating: ‘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 prevents the host country from upgrading its legislation in the areas of labour law, environmental law, and human rights law. Conflicts between the host government and the corporation remain confidential as they are subject to arbitration’.

³²⁴ For example, the decision of the Supreme Court of the Netherlands in the *Urgenda* case <https://www.urgenda.nl/en/themas/climate-case/> accessed 1 October 2020.

³²⁵ Deva, ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ (n 74) 24.

³²⁶ See generally Christian Scheper, ‘From naming and shaming to knowing and showing’: human rights and the power of corporate practice’ (2015) 19(6) *The International Journal of Human Rights* 737.

³²⁷ ‘The Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (n 54).

basis of that this thesis focuses on causes of action, practical limitations, and a lack of judgments on the merits, damages are briefly outlined but not considered. While the potential utility of exceptions under Rome II in litigation arises, this thesis does not consider the question of the possible interaction of such exceptions with the Irish Constitution or tort law.

1.5.3. A Concept of Accountability

A quest for accountability begins by determining with whom lies the duty to protect human rights, and the scope and content of such duties. For example, what obligations, if any, are placed on states and non-state actors to respect human rights abroad? Are host states left to their own devices or does home state regulation have a greater role to play in preventing violations of human rights from occurring? There is no pincer movement between home and host states to ensure human rights are respected by multinational corporations. This is part of the challenge of rendering protection and accountability operational and effective in practice. In progressing the accountability of corporations, many questions arise. What is the conceptual basis of accountability? How can accountability be advanced and achieved? Is it to be driven by home and/or host states, international organisations, civil society, investors, or by a combination of the above? Who and what can be regulated, and who will enforce any such regulation?³²⁸ These issues affect accountability and thread throughout this thesis. In order to assess the current scope and level of accountability, it is instructive to first consider what accountability resembles. As Bovens highlights, the concept of has been diminished through over extension, resembling ‘a dustbin filled with good intentions, loosely defined concepts and vague images of good governance’.³²⁹ The thesis adopts a narrow definition with appropriate constitutive elements:

Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain, and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.³³⁰

This approach is appropriate on the basis that it provides dimensions of accountability based on the nature of actor, forum, conduct and obligation upon which each accountability

³²⁸ See Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat’ (n 67).

³²⁹ Mark Bovens, ‘Analysing and Assessing Accountability’ (2007) 13(4) European Law Journal, 449.

³³⁰ *ibid* 450.

relation may be classified.³³¹ It is sufficiently flexible in that it allows that the actor can be an individual or organisation. It is consistent with the wide range of approaches in the field of business and human rights. Sanctions may be imposed based on legal standards of civil, criminal, or administrative statutes or precedent, premised on vertical accountability. Appropriately for this field, ‘consequences’ do not necessarily issue exclusively from a formal forum. Actors may also face consequences in social accountability,³³² such as from multi-stakeholder initiatives, investors, and a range of ‘new stakeholders’ such as customers, civil society, the media, and social media. Thus, even when an actor does not formally report to or enter into dialogue with such fora, there may be horizontal accountability of significance, including loss of reputation with attendant consequences.³³³ Further, the constitutive elements distinguish this concept from a broad definition of accountability encompassing dimensions such as transparency, responsiveness, and participation which lack elements of justification, judgement and consequences.³³⁴

This thesis necessarily highlights deficits in the existing regulatory framework, and considers what progress is required along which dimensions in order to move towards a functioning accountability regime. It is acknowledged that the existing levers include an amalgam of initiatives with different bases, *inter alia*, horizontal, soft law and legal accountability. Consistent with the multi-faceted and evolving character of this field, the regulatory pyramid of Ayres and Braithwaite,³³⁵ incorporating the evolution of Kolieb to a regulatory diamond³³⁶ is appropriate. Business and human rights interacts with a wide range of legal, policy, and regulatory areas.³³⁷ It is concerned with access to civil, criminal, and

³³¹ *ibid* 461.

³³² *ibid* 457.

³³³ European Commission, ‘European Governance: A White Paper’ COM (2001) 428 <http://ec.europa.eu/governance/white_paper/index_en.html> accessed 11 November 2019.

³³⁴ Bovens (n 329) 453 argues: ‘Mechanisms of control are not mechanisms of accountability *per se*, because they do not in themselves operate through procedures in which actors are to explain and justify their conduct to the forums...’.

³³⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

³³⁶ Johnathan Kolieb, ‘When to Punish, when to persuade and when to reward: Strengthening Responsive Regulation with the Regulatory Diamond (2015) 41(1) *Monash Law Review* 150.

³³⁷ Including but not limited to human rights law, labour law, environmental law, anti-discrimination law, international humanitarian law, investment and trade law, consumer protection, commercial and corporate law.

non-judicial remedies for violations of human rights by corporations. The accountability of the corporate entity itself is at the core in the light of the Fisse and Braithwaite's normative account of the shortcomings of individual liability with respect to corporate misconduct.³³⁸

The dynamism inherent in responsive regulation is consistent with the evolving system of governance in business and human rights. For example, whether regulation re-routes into a more interventionist mode moving from the UNGPs³³⁹ to hard law is under debate within the negotiations on a legally binding international treaty on business and human rights,³⁴⁰ and initiatives regarding mandatory human rights due diligence. Law is at the centre of business and human rights and differentiates it from the field of corporate social responsibility.³⁴¹ Kolieb's diamond explicitly places codified legal standards as the minimum at the centre of the regulatory framework.³⁴² Beyond law, the regulatory diamond is appropriately flexible. The position of Kolieb is, cogently, that 'rule compliance' with a certain legal standard is often not an endpoint but 'a crucial waypoint to improved behaviour'.³⁴³ It allows for norms making claims on the behaviour of regulated actors, such as codes of conduct reflective of corporations 'social licence to operate',³⁴⁴ which continue to be influential in the field of business and human rights. This conceptualisation is consistent with the view that an effective regulatory regime implies a framework which can pre-empt human rights violations, as well as deliver timely and adequate remedies.³⁴⁵ Realisation of this would involve corporations reaching into the aspirational half of the regulatory diamond and 'embracing behavioural change that positively contributes to the problem or issue being regulated'.³⁴⁶ Means which encourage business to adhere to behavioural standards may derive from law, even if no law is as such directly applicable. For example, with the mid-line of law absent in the trade in conflict diamonds, aspirational

³³⁸ Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney L. Rev. 483. See generally Ratner (n 3).

³³⁹ UNGPs (n 172).

³⁴⁰ (n 327).

³⁴¹ See Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) Journal of Human Rights 237.

³⁴² Kolieb (n 336) 152.

³⁴³ *ibid* 137.

³⁴⁴ HRC 'Towards Operationalizing the 'Protect, Respect and Remedy Framework' (n 172) paras 46-49.

³⁴⁵ Deva, 'Fictitious Separation, Real Injustice' (n 74) 39 fn 7.

³⁴⁶ Kolieb (n 336) 154 applying the regulatory diamond 'market for virtue' to transnational business regulation.

standards became the industry norm within the Kimberley Certification Scheme.³⁴⁷ Kolieb's regulatory diamond envisages responsive regulation and continuous improvement. It provides an appropriate theoretical and practical model for a spectrum of responses to accountability for the impacts of multinational corporations on human rights.

1.5.4. Advancing Accountability

By reference to what standard should we hold multinational corporations accountable? Corporations are a legal fiction with 'neither bodies to be punished, nor souls to be damned'.³⁴⁸ They are creatures of national state regulation. It is precisely at the transnational level that multinational corporations, which are splintered into legal entities and operate across jurisdictions, represent challenging targets to regulate and to render accountable. This thesis reflects the view that the Universal Declaration of Human Rights encompasses '[E]very individual and *every organ of society*', excluding 'no one, no company, no market, no cyberspace'.³⁴⁹ Scholars agree that lack of enforceable remedies does not negative the existence of an obligation,³⁵⁰ echoing Wettstein's view of non-violation of human rights as a perfect duty rather than a lesser responsibility:

It is owed by all of us to everyone at all times and to the fullest extent. It is not merely a standard of expected conduct but a duty of justice. ... The mere fact that positive law does not stipulate such a duty at the time being does not reduce its normative significance to that of a responsibility. In other words, it is not *de facto* legal codification that implies the adequacy of the term used but the underlying normative concept that does or does not call for such codification in the first place.³⁵¹

³⁴⁷ *ibid* 162.

³⁴⁸ Lord Baron Thurlow Lord Chancellor of England cited by John C. Jr. Coffee, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich. L. Rev. 459.

³⁴⁹ Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brook J. Int'l L. 25 (emphasis in original).

³⁵⁰ See Clapham (n 61) 468-470.

³⁵¹ Florian Wettstein 'Normativity, ethics, and the UN guiding principles on business and human rights: A critical assessment' (2015) 14(2) Journal of Human Rights 162, 169.

As is explored, Clapham cogently argues that corporations can be bearers of duties under international law.³⁵² While corporations should not be expected to evade accountability, the human right to access to remedy³⁵³ is negated by significant legal and practical obstacles in a transnational context.³⁵⁴ The challenges are multi-pronged. They include legal regimes which are not adapted to provide for accountability or are insufficiently leveraged, combined with the structural complexities of large corporations, and practical challenges with activating proxy mechanisms including actions in tort.³⁵⁵

To progress towards an effective regulatory system Deva makes a well-founded proposition for conjoint efforts within an ‘integrated theory of legal responsibility’.³⁵⁶ It is premised on employing different modes of implementation and sanction (civil, criminal, administrative, social) at various levels of operation (institutional, national, regional and international).³⁵⁷ Within such a context, responsive regulation includes coordination of the vertical arm at domestic level in home and host states involving legislators, regulators and the judiciary. It involves development and enforcement, including providing a necessary level of expertise and resources. At the supranational level, it requires re-thinking existing systems which inhibit access to remedy, for example the impact of rules determining applicable law in litigation.³⁵⁸ The central research question focuses on the tort of negligence, in particular the concept of a duty of care owed by a parent company to third parties negatively impacted by the activity of a subsidiary. The following representation summarises the progress of this thesis through the building blocks: an appropriate cause of action; appropriate defendants; addressing barriers to justice; and grounding legal liability.

³⁵² Clapham (n 61) 267 citing *ICTY Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) 2 October 1995 (IT-94-1) [94], [143] as demonstrating individuals were bound by existing international law and not to any law-making exercise of the Security Council itself.

³⁵³ *inter alia*: Universal Declaration of Human Rights (adopted 1 December 1948) UNGA Res 217 A(III) art. 8 <www.un.org/en/universal-declaration-human-rights/> accessed 11 December 2019; ICCPR art. 2(3); CAT arts. 13 and 14; CERD art. 6; CRC art. 39, CFREU art. 47, all (n 97); ECHR (n 84) arts. 5(5), 13 and 41.

³⁵⁴ Van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (n 51); International Commission of Jurists, ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (n 3); Policy Department for External Relations Directorate General ‘Access to legal remedies’ (n 203).

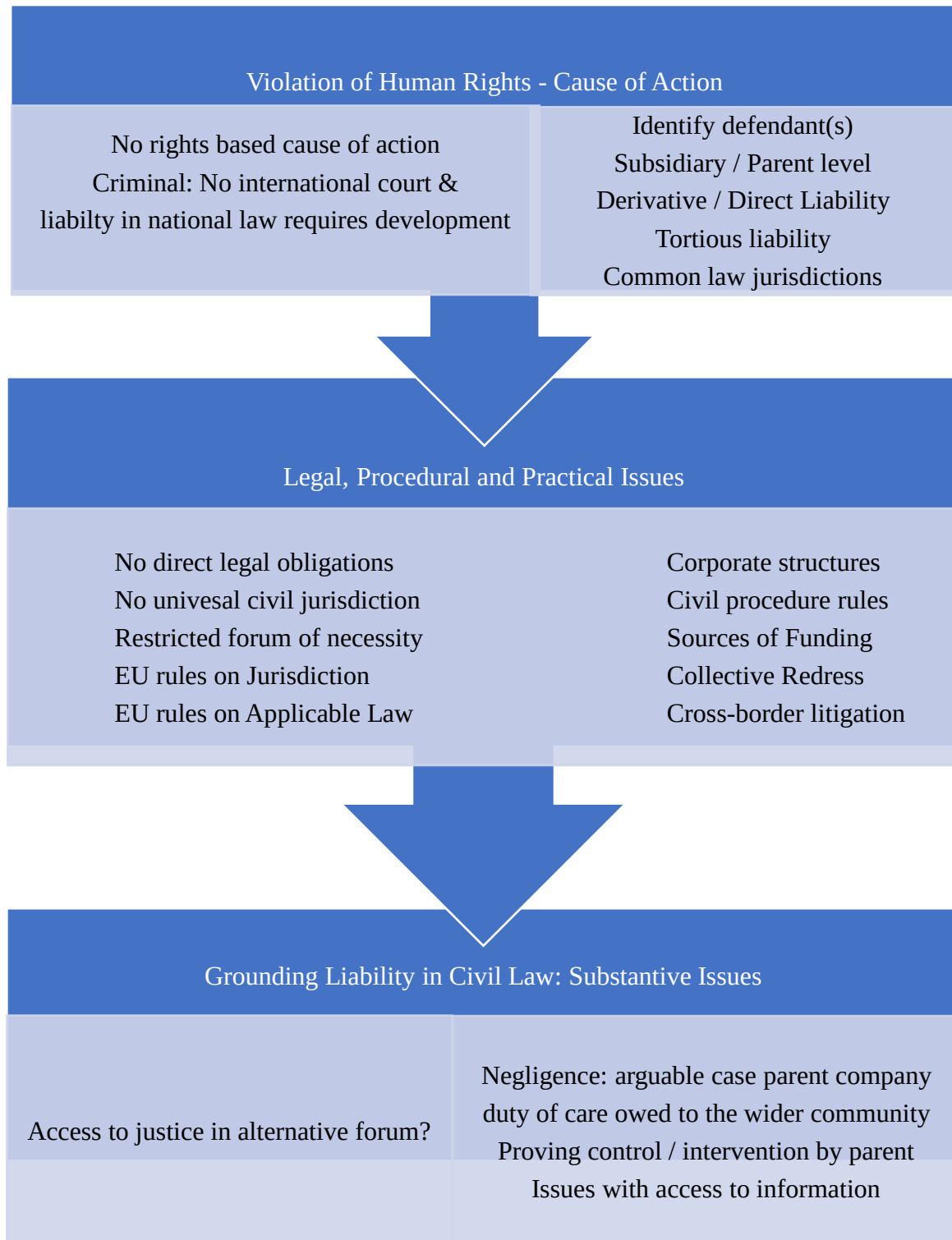
³⁵⁵ OHCHR, ‘Accountability and Remedy Project’ (n 63) para 4.

³⁵⁶ Deva, ‘Acting Extraterritorially’ (n 67) 41 ff.

³⁵⁷ *ibid* fn 16.

³⁵⁸ See Enneking, ‘Judicial Remedies: The issue of applicable law’ (n 80) 38.

1.5.5. A Legal Accountability Pathway



1.6. CONCLUSION

This chapter outlined the context. It outlined the involvement, or complicity, of multinational corporations in a wide spectrum of abuses, *inter alia*: violations of the right not to be subject to inhuman or degrading treatment; modern slavery; forced land dispossession; rape; extrajudicial killings; pollution and environmental destruction which also affects livelihoods. The scale of abuses of human rights is mesmerizing. It reviewed themes which influence the accountability of multinational corporations for human rights impacts. The crux of the matter is a persistent accountability gap, enabling abuses to occur and recur. Systemic issues militate against rendering multinational corporations accountable for the negative impacts on human rights linked to the operations of their foreign subsidiaries. It is pertinent to corporations which operate in Ireland and Irish companies operating overseas, supporting that a civil cause of action would be valuable to those who will seek redress in Ireland.

The central research question focuses on foreign direct liability litigation, which is based upon the concept of a duty of care owed by a parent company to third parties negatively impacted by the activity of a subsidiary. The pathway to respond to this question within this thesis was presented. An appropriate research methodology was adopted. The primary and secondary objectives of the thesis were presented. Its scope was defined and its original contribution explained. Concepts of accountability appropriate to this field were adopted.

This chapter concluded that progressing to an effective regulatory system requires responsive regulation, with legal accountability at the core. Sanctions should encompass legal (civil and criminal), administrative and social means at institutional, national, regional, and international levels.

A pathway to legal accountability was presented, illustrating procedural, substantive and practical parameters, and substantive issues in grounding liability. The aim is to contribute to scholarship in this emerging field by investigating trends in accountability for abuses of human rights by the subsidiaries of multinational companies in comparative jurisprudence, and to project forward to assess the feasibility of foreign direct liability litigation in the Irish context.

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2.1 INTRODUCTION

Whereas the *raison d'être* of human rights law was directed at abuses by states and their agents, it has since evolved to encompass protection by states against violations from private actors.¹ Within business and human rights what occurs in one system, or not, may have devastating impacts elsewhere. The obligation to protect the basic rights of all human persons is owed *erga omnes*.² The lens is the inalienable human rights of individuals.³ Prevention is manifestly better than cure, on the basis that human rights violations are often by their very nature irremediable. The system of governance concerning the impact of business upon human rights is evolving, and proposals are made to contribute to this discussion.

Chapter 1 concluded that protections against abuses of human rights by business are most valuable within national legal systems because it is there that they are most readily enforceable. Yet state and business self-interest militates against accountability. In this way, adequate legislation concerning environmental protection in a host state such as Nigeria will fail to deliver in practice in the face of soft soaping on enforcement in order to garner economic advantage related to the operations of foreign extractive or manufacturing corporations.

The central research question concerns legal accountability, and focuses on foreign direct liability litigation (FDL) as a potential route to remedy for victims. The development of FDL litigation is connected to how other pathways to accountability and remedy are, or are not, deficient. This chapter will consider how deficiencies in such mechanisms, co-existing with continuing harm to rights holders, has provided impetus to FDL litigation as a channel

¹ See Silvia Danialov, 'The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations' (1998) 82 <www.lawanddevelopment.org/docs/transnationalcorps.pdf> accessed 14 November 2019.

² Marc G Pufong, 'State Obligation, Sovereignty, and Theories of International Law' (2001) 29 Politics & Policy 478, 506. See also *Barcelona Traction case (Belgium v Spain) (Second Phase)* Judgment of 5 February 1970, [1970] ICJ Rep 3 [33-34].

³ Thomas Pogge, *World Poverty and Human Rights* (Cambridge Polity Press 2002); Graham Finlay, 'The Philosophical Development of Human Rights' in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional 2015). See also HLA Hart, 'Are there any natural rights?' (1955) 64(2) *Philosophical Review* 175; Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1985); Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 317, 329-340.

to redress. It will assess the impact of soft law frameworks, non-financial reporting requirements, and issue specific regulation. It will evaluate the contribution of human rights due diligence (HRDD) to date, and explore how mandatory HRDD would enhance the protection of rights holders. It will identify issues with the functioning of corporate criminal liability. At that juncture, having assessed existing mechanisms and illustrated the need for alternative channels, it will consider the benefits of appropriate provision in criminal law, working in conjunction with foreign direct liability litigation, to propel accountability forward.

Routes to accountability are not mutually exclusive. For the same business-related harm, claimants may engage FDL litigation seeking remedies such as compensation, and in addition, a public prosecutor may pursue the corporate entity, and officers or employees in criminal law. While recognising Stephens' motivation in stating that 'the exact category to which accountability of non-state actors is assigned is not material',⁴ it is acknowledged that categories of sanctions are not interchangeable in experience, deterrent effect, or consequences for victims.⁵

To advance requires leveraging the obligations which home states have assumed to protect against abuses, including by multinational corporations throughout their global operations.⁶ Any state can enact and enforce regulations in that state obliging corporations linked to it to respect human rights both within its territory and with extraterritorial effect.⁷ Further, each state can facilitate access to justice via national rules on jurisdiction, provision of a forum of necessity, practical supports for litigation, access to information, and support non-judicial remedies.⁸ As Human Rights Watch pinpoints:

⁴ Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law 45, 68.

⁵ Normative questions are discussed in chapter 3 section 3.2 and 3.5.

⁶ United Nations Guiding Principles on Business and Human Rights <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 30 November 2019.

⁷ For more Beth Stephens, 'The Amoral of Profit' (n 4) 45.

⁸ Procedural issues are discussed in chapter 4, and within comparative jurisprudence in chapter 5..

It would at least end an indefensible status quo where governments refuse to find out whether their corporate citizens are credibly implicated in serious human rights abuses abroad.⁹

Section 2.2 will explore the contribution of soft law initiatives, non-financial reporting requirements, and regulation concerning specific issues, in advancing accountability. Section 2.3 will discuss the concept of human rights due diligence, and the drive towards regulation of human rights due diligence, at EU and at state level. Section 2.4 will assess how corporate liability in national criminal law functions, in provision and enforcement. Having identified shortcomings in criminal law when facing large complex organisations, Section 2.5 presents an alternative scenario, in which FDL litigation works in tandem with appropriate criminal offences, and will present the benefits of failure to prevent offences. In Section 2.6, the impact of failings in current mechanisms upon accountability will be summarised, grounding the justification for a cause of action in foreign direct liability litigation.

2.2. SOFT LAW AND OTHER FRAMEWORKS

Extensive developments in international soft law instruments and policy frameworks are evidence of augmented normative expectations upon both states and non-state actors.¹⁰ Initiatives over the past two decades include the UN Global Compact launched in 2000,¹¹ the UN Guiding Principles on Business and Human Rights¹² and OECD Guidelines for

⁹ Chris Albin-Lackey, 'Without Rules: A Failed Approach to Corporate Accountability' Human Rights Watch World Report (2013). 6 <www.hrw.org/sites/default/files/related_material/business.pdf> accessed 15 December 2019.

¹⁰ For present purposes, soft law includes all international instruments defined as codes, guidelines, or principles (excluding treaties), and codes of conduct both developed at international level and at the level of companies or sectors whether by individual corporations, NGOs, or multi-stakeholder groups. For indications of performance of companies against 2018 Human Rights Benchmark see <www.ihrb.org/focus-areas/benchmarking/2018-corporate-human-rights-benchmark>; Business & Human Rights Resource Centre <www.business-humanrights.org/en/company-policysteps/policies>; Danish Institute of Business and Human Rights <www.humanrights.dk/tools/human-rights-indicators-business> Shift Project <www.ungpreporting.org/database-analysis/explore-disclosures/>; International Corporate Accountability Roundtable <<https://www.icar.ngo/>> accessed 28 November 2019.

¹¹ United Nations Global Compact <www.unglobalcompact.org/what-is-gc/mission/principles> accessed 11 December 2019.

¹² (n 6).

Multinational Enterprises¹³ in 2011, and the 2014 International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.¹⁴ Yet consistent calls for binding norms on multinational corporations to respect human rights date back to the 1970s.¹⁵ After a half century of ‘false dawns’,¹⁶ concern amongst supranational institutions is coalescing. This is evidenced by increased guidance to states, including in the Office of the United Nations High Commissioner for Human Rights Accountability and Remedy Project (OHCHR ARP) launched in 2014,¹⁷ and 2016 Committee of Ministers of the Council of Europe Recommendation to Member States on human rights and business.¹⁸ Similar trends in increased focus upon the impact of business on human rights are apparent within European Union (EU) structures. Two decades ago the European Parliament called on the Commission to develop a legal basis for establishing a multilateral European framework governing European enterprises operating in developing

¹³ The 2011 revision to the OECD Guidelines for Multinational Enterprises includes a dedicated human rights chapter IV <<http://mneguidelines.oecd.org/2011HumanRights.pdf>> accessed 11 December 2019.

¹⁴ <www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> accessed 11 December 2019.

¹⁵ Intergovernmental Commission on Transnational Corporations and Centre for Transnational Corporations established in 1974 <www.world-economy-and-development.org/downloads/hummelunandtnacs2005.pdf> accessed 11 December 2019; OECD Guidelines on Multinational Enterprises 1976 <www.oecd.org/investment/mne/1903291.pdf> accessed 11 December 2019. See also Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the accountability gap* (Routledge 2017) 163 and ff.

¹⁶ David Bilchitz and Surya Deva, ‘Business and Human Rights: A Critical Framework’, in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 4-10.

¹⁷ Office of the High Commissioner for Human Rights, ‘Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses’ (2014) (OHCHR ARP) <www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> accessed 11 December 2019.

¹⁸ Council of Europe Committee of Ministers ‘Recommendation on human rights and business’ CM/Rec(2016)3. See also Explanatory Memorandum CM(2016)18-additional <www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-busine-1> accessed 25 November 2019. Under para 13 states should apply measures to require ‘business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad’; para 34 states should ensure access to remedies for victims of corporate abuses abroad; para 35 confirms this includes recommending states ensure inter domestic courts have jurisdiction over civil claims, including over foreign subsidiaries when such claims are closely connected with civil claims against corporations domiciled within their jurisdiction.

countries.¹⁹ Subsequent initiatives include the European Commission Corporate Social Responsibility Action Plan 2011-2014 and 2015 Staff Working Document (EU State of Play)²⁰ on the implementation of the United Nations Guiding Principles (UNGPs).²¹ In 2017 the European Union Agency on Fundamental Rights issued its robust opinion on improving access to remedy in the area of business and human rights at the EU level,²² and the EU Council conclusions on priorities for that year²³ included a commitment to the United Nations Guiding Principles on Business and Human Rights and the guidance contained in the OHCHR ARP.²⁴ These supranational initiatives combine with a marked expansion of transnational private regulation²⁵ within an evolving regulatory eco-system.

For present purposes, the question is the extent to which soft law frameworks are effective in advancing accountability, and whether they are a steppingstone to more prescriptive and binding regulation. Kirkebo and Langford refer to ‘the current jungle’ of global business and human rights regulation, and argue that commitment and consensus must precede international hard law regulations.²⁶ The conclusion of their study of the commitment curve in global regulation of business and human rights is plausible. The behaviour of corporations and states exhibits resistance to the adoption of strong and broad standards.²⁷

¹⁹ European Parliament, ‘Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct’ EU Doc A4-0508/98, OJ 104 (14 April 1999) 180-84.

²⁰ EU Commission Staff Working Document on implementing the UNGPs: State of Play’ (14 July 2015) SWD(2015) 144 final <file:///C:/Users/Acer/AppData/Local/Temp/SWD_2015_144_F1_STAFF_WORKING_PAPER_EN_V2_P1_818385.PDF> accessed 22 October 2020.

²¹ (n 6).

²² European Union Fundamental Rights Agency ‘Opinion on improving access to remedy in the context of business and human rights at the EU level’ (2017) (EU FRA) Annex, 70 <<http://fra.europa.eu/en/opinion/2017/business-human-rights>> accessed 25 November 2019.

²³ Council of the European Union, ‘Council Conclusions on EU Priorities at UN Human Rights in 2017’ 5689/17 <www.consilium.europa.eu/en/press/press-releases/2017/02/27/eu-priorities-human-rights-2017/> accessed 25 November 2019.

²⁴ OHCHR ARP (n 17).

²⁵ For more on transnational private regulation see Nicola Jägers, ‘Will transnational private regulation close the gap?’, in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 295.

²⁶ Tori Loven Kirkebo and Malcolm Langford, ‘The Commitment Curve: Global Regulation of Business and Human Rights’ (2018) 3(2) *Journal of Business and Human Rights* 157.

²⁷ *ibid* 160.

2.2.1. The UN Guiding Principles on Business and Human Rights

The single most influential international policy instrument in this field is the UN Framework, operationalised in the Guiding Principles on Business and Human Rights (UNGPs).²⁸ The standing of the UNGPs is underpinned by their unanimous endorsement by the UN Human Rights Council (UN HRC) in 2011.²⁹ They are regarded by the EU as ‘the authoritative policy framework by which states, business and civil society are meant to act with respect to a quest for closing governance gaps and remedying corporate harms’.³⁰ As Human Rights Watch validly highlights, this is problematic on the basis that many corporations see the UNGPs as the definitive one-stop standard for good human rights practice.³¹ Whilst attractive and convenient, this engenders a ‘risk companies will simply ignore standards the Guiding Principles do not echo’.³² Further, it belies the potential of the UNGPs, as soft law, to ground advances in accountability.

In overview, the UNGPs are structured in three pillars which are conceived as ‘distinct but complimentary’:³³ the state duty to protect; the corporate responsibility to respect; and access to remedy for victims. Broadly, the state duty to protect in Pillar I reflects a traditional state-centric understanding of human rights obligations. As outlined, the UNGPs take a regrettably ‘non-determinative’³⁴ stance on state action regarding the extraterritorial impacts of corporations.³⁵

Under Pillar II the corporate responsibility to respect human rights is primarily based on the premise that corporations should ‘do no harm’. Businesses are expected and encouraged to engage in due diligence throughout their operations so as to prevent violations of human

²⁸ (n 6).

²⁹ Human Rights Council ‘Human rights and transnational corporations and other business enterprises’ A/HRC/RES/17/4 (2011).

³⁰ EU State of Play (n 20).

³¹ See Albin-Lackey (n 9) 5.

³² *ibid.*

³³ OHCHR, ‘Frequently asked questions about the United National Guiding Principles on Business and Human Rights’ <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 15 December 2019.

³⁴ See Justine Nolan, ‘All Care, No Responsibility?’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014) 3,12.

³⁵ Section 1.3.4

rights occurring. They are encouraged to take action to mitigate identified risks and, within certain parameters, to engage in remediation where adverse human rights impacts occur.³⁶ This implies a welcome widening of approach to avoiding harm to rights holders and society generally. Under what impetus, or on the basis of what norms, should business invest and engage in such measures? The UNGPs refer to the International Bill of Rights³⁷ but neither include a defined set of rights nor direction on identifying which rights are to be respected.³⁸ This rhymes with the rationale underpinning the UNGPs. Avoiding harm is a good for business, but businesses are under no substantive obligation to do it.³⁹

Pillar III construes access to remedy as a shared responsibility under the state obligation to protect and the corporate responsibility to respect.⁴⁰ With justification, it is referred to as ‘the forgotten pillar’.⁴¹ The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) has highlighted that ‘a fundamental shift towards the remedy pillar is required.’⁴² As part of their duty to protect ‘states must take appropriate judicial, administrative, legislative or other steps to ensure

³⁶ UNGPs (n 6) 13; 17-19; 22-24; 29-31.

³⁷ *ibid* Commentary to UNGP 12.

³⁸ Carlos Lopez, ‘The “Ruggie Process”: A move towards CSR?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 66.

³⁹ *ibid* 65.

⁴⁰ Bilchitz and Deva (n 16) 16.

⁴¹ Amnesty International and the BHRCC, ‘Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse’ (September 2017) available at <https://www.amnesty.org/en/documents/pol30/7037/2017/en/>.

⁴² A/HRC/41/43 ‘Gender dimensions of the Guiding Principles on Business and Human Rights - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ para 83 (23 May 2019) <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43> accessed 15 September 2020.

access to an effective remedy’.⁴³ If a business enterprise itself identifies⁴⁴ that it has caused or contributed to adverse impacts, it should provide for, or cooperate in, remediation through legitimate processes.⁴⁵ For adverse impacts which are directly linked to its operations, products or services by a ‘business relationship’,⁴⁶ an enterprise is not required to provide for remediation, though it may take a role in doing so.⁴⁷ However, responsibility remains on the business to ‘use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence.’⁴⁸ The significant contribution of the concept of human rights due diligence within the UNGPs is discussed in section 2.3.

⁴³ UNGP 25-31 (n 6). The principles refer to State and non-State based mechanisms. Non-state are private in nature and include company-based grievance mechanisms. Judicial processes available through State’s judicial system can refer to both private claims for remedies for personal injury or loss and to criminal law processes and non-judicial processes, supported by operational principles relating to judicial remedies. Non-judicial processes refer to dispute resolution mechanisms that operate outside the domestic judicial system such as ombudsman services and mediation. The principles include criteria of effectiveness for non-judicial grievance mechanisms relating to accessibility, transparency, fairness, and compatibility with internationally recognised human rights standards. States obligations are outlined in section 1.3.1.

⁴⁴ Through its own process of human rights due diligence or via, for example, input from stakeholders, operational level grievance mechanisms, and judicial or non-judicial mechanisms. See A/HRC/72/162 ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (July 2017) para 67 <<https://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx#hrc>> accessed 22 October 2020 . See also OCHCR ‘An Interpretive Guide’ (n 33) Q 63.

⁴⁵ UNGP 22, Commentary (n 6) explaining it is limited to situations where the enterprise itself recognizes that it has caused or contributed to an adverse human rights impact.’; OCHCR ‘An Interpretive Guide’ (n 33) 10 noting that In conducting their defence, corporations should not ‘...create a chilling effect on the legitimate exercise of such remedies; UN Committee on Economic, Social and Cultural Rights (CESCR) General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities para 44 (10 August 2017) E/C.12/GC/24 <<https://www.refworld.org/docid/5beaecba4.html>>; A/72/162 (n 44) para 36-37.

⁴⁶ OCHCR ‘An Interpretive Guide’ (n 33) Q 27 ‘Business relationships’ as defined in the Guiding Principles refer to relationships with “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.’

⁴⁷ UNGP 22, Commentary (n 6).

⁴⁸ OCHCR ‘An Interpretive Guide’ (n 33) 23.

2.2.2. Duty and Responsibility

Although the UNGPs infer that ‘the protection of human rights is no longer exclusively a matter of concern for states’,⁴⁹ states remain forefront and central in the system of protection. The structure of the UNGPs reflects this analysis of the state duty to protect, and that whether business enterprises have direct and independent obligations is contested. It is regrettable that the non-legal standard of responsibility upon non-state actors therein was endorsed by the UN Human Rights Council.⁵⁰ Wettstein correctly characterises the distinction in the UNGPs between a duty upon states and a responsibility on business as ‘momentous’.⁵¹ Similarly Nolan considers it ‘a deliberate demarcation’, effectively drawing a line between legal obligation and moral responsibility.⁵² How was this ersatz version of corporate responsibility arrived at? It is evident that the principal author of the UNGPs, Special Representative to the UN Secretary General (SRSG) John Ruggie, perceived his role as ‘pushing the envelope, but not out of reach’.⁵³ It appears he accepted he was drafting a politically acceptable formula, and made a judgment call on what progress could be made at that point in time.⁵⁴

Expectations of accountability have moved forward in many aspects in the intervening ten years, yet the UNGPs have not been updated. While perhaps the SRSG’s approach was a sound read of what was politically achievable at the point of drafting, scholars justly argue

⁴⁹ See further Florian Wettstein, ‘Normativity, ethics, and the UN guiding principles on business and human rights: A critical assessment’ (2015) 14(2) *Journal of Human Rights* 162, 164.

⁵⁰ A/HRC/RES/17/4 (n 29).

⁵¹ Wettstein (n 49) 166.

⁵² Nolan, ‘All Care, No Responsibility?’ (n 34) 12.

⁵³ John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company 2013), 107.

⁵⁴ See David Bilchitz, ‘A chasm between “is” and “ought”? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles’; David Bilchitz and Surya Deva ‘Business and Human Rights: A Critical Framework’; Justine Nolan, ‘The corporate responsibility to respect human rights: soft law or not law’; Karin Buhmann ‘Navigating from “train wreck” to being “welcomed”: negotiation strategies and argumentative patterns in the development of the UN Framework’, all in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013); Robert McCorquodale, ‘International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights’ in Lara Blecher Nancy Kaymar Stafford and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014).

that the instrumental logic at the heart is in ‘fundamental contradiction to human rights-based thinking’.⁵⁵ The SRSG’s approach is appraised as conceptually flawed.⁵⁶ For example, Wettstein draws on a compelling parallel with Kant’s discussion of perfect and imperfect obligations:

Perfect obligations are obligations of justice; they correlate with rights and thus can be claimed by the rights holders and, correspondingly, are owed by the obligation bearers. For perfect obligations, who owes what to whom can be fully specified.... In contrast, imperfect obligations are obligations of beneficence. They are neither owed nor can they be claimed. That is, they do not correlate with rights.⁵⁷

As such, the SRSG did not proceed from a normative rights case. The UNGPs portray the responsibilities of companies as flowing from social expectations, not as rooted in international obligations or by reference to another legal standard.⁵⁸ They are in essence a pitch to business leaders to comply with the UNGPs, and may be seen as positioned as a tool for husbanding a corporation’s ‘social licence to operate.’⁵⁹ As conceived, the responsibility placed on business lacks the specificity required to give rise to any claim-rights.⁶⁰ The UNGPs are positioned to engage and attract business via avoidance of downside reputational risks, and the potential upside commercial benefits of avoiding

⁵⁵ Wettstein (n 49) 176.

⁵⁶ *ibid* 169 arguing that this approach is at its core akin to the neoclassical concept of the corporation as espoused by the like of Milton Friedman (1962,1970) in which the sole purpose of the corporation is to generate profits.

⁵⁷ *ibid* 168 referencing Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge University Press 1996) 31-32. See also Jilles L.J. Hazenberg ‘Transnational Corporations and Human Rights Duties: Perfect and Imperfect’ *Hum Rights Rev* 17 (2016), 479 considering the scope of duties on non-state actors, from a multidisciplinary perspective. Hazenberg refutes that multinational corporations are corresponding bearers of perfect duties, providing the source of bindingness for claim rights. Thus, due to the ‘centrality of the state as the only specified duty-bearer...it presently remains impossible, legally speaking, for TNCs to violate human rights under international human rights law’.

⁵⁸ Lopez (n 38) 59.

⁵⁹ Human Rights Council, ‘Business and Human Rights: Towards Operationalising the “Protect, Respect and Remedy” Framework’ A/HRC/11/13 (22 April 2009) in which the SRSG suggests that the ‘social’ responsibility to respect has a normative value. Under this approach companies have to respect human rights because that is what society expects of them, as a condition to obtain their ‘social licence to operate’ and not because they have such an obligation under international law.

⁶⁰ Wettstein (n 49) 168 referencing Joel Feinberg, *Rights, Justice, and the Bounds of Liberty. Essays in Social Philosophy* (Princeton University Press 1980) 153.

negative human rights impacts.⁶¹ The promotion of allied benefits to business has both foundation and value, but is not the thrust of rights. As Nolan states, the UNGPs are ‘the latest in a long line of soft regulatory techniques used to encourage, but not require, a corporation to comply with human rights’.⁶²

The UNGPs are to be implemented in domestic systems via National Action Plans (NAPs). In summary, the content of published NAPs lacks both ambition in design and specificity in implementation.⁶³ Moreover, adoption and compliance with NAPs tends to be dependent on voluntary means such as ‘market forces, peer pressure, governmental encouragement, NGO or consumer activism’.⁶⁴ Multinational corporations publicly profess to adhere to the UNGPs, frequently in corporate policy documents. However, such public statements will ground a culture and practice of rights respect only if operationalised via concrete measures, such as human rights impact assessments, training, and incentive measures such as links to employee advancement. The call is out for business leaders to galvanise and incentivise their operations to make this journey. As it stands, the burden largely remains with stakeholders or civil society to publicly shame corporations which fail to ‘walk their talk’.⁶⁵ It is welcome that additional levers of accountability are being actioned should statements committing to respect human rights fail to match reality on the ground. A group of NGOs

⁶¹ See commentary to UNGP 17 (n 6).

⁶² Justine Nolan, ‘The corporate responsibility to respect human rights: soft law or not law?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 140.

⁶³ A discussion of the development and content of NAPs is outside the scope of this thesis. See European Coalition for Corporate Justice, ‘A Critical Assessment of National Action Plans on Business and Human Rights’ <www.corporatejustice.org/news/2245-a-critical-assessment-of-national-action-plans-on-business-and-human-rights-2017-update> accessed 25 November 2019.

⁶⁴ Nolan, ‘All Care, No Responsibility?’ (n 34) 14. See also Human Rights Watch ‘Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance’ (June 16, 2011) <www.hrw.org/news/2011/06/16/unhuman-rights-council-weak-stance-business-standards> accessed 25 November 2019; Albin-Lackey (n 9).

⁶⁵ See generally Judith Schrempf-Stirling and Florian Wettstein, ‘Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies’ (2017) 145(3) *Journal of Business Ethics*, 545. On stakeholder activism, for example, ‘Urgent Appeal sent to Auchan, Benetton and Carrefour on 24 March this year and passed on by more than 100,000 people’ <http://appels-urgents.peuples-solidaires.org/appeal-urgent/bangladesh-ranaplaza?constituent=0&canal=sitetime&utm_source=sitetime&utm_campaign=AU370>; <<https://avaaz.org/page/en/media/>> accessed 18 December 2019.

in France filed a complaint against the Auchan group for misleading commercial practice, which is punishable under criminal law, on the basis of its published commitment to responsible sourcing yet labels for one of its brands were discovered in the ruins of the collapsed Rana Plaza complex in Bangladesh. In its defence Auchan claimed it was the victim of hidden outsourcing, while the complaint maintained this practice is widely acknowledged and therefore was foreseeable as a risk.⁶⁶ A complaint of misleading advertising was also filed against Samsung on the basis its published ethical commitments⁶⁷ did not match evidence produced by NGOs regarding workers' rights violations across its supply chain, including use of underage labour and toxic chemicals causing injury and death.⁶⁸

Developments in comparative jurisprudence can be expected to add momentum to the pressure on companies behave in a manner coherent with public statements and undertakings.⁶⁹ In *Vedanta v Lungowe*, the UK Supreme Court implied that courts may consider a parent company liable if it publicly proclaims a level of supervision or control over its subsidiaries but failure to implement negatively impacts third parties.⁷⁰ It implies that, for instance, if a parent company publishes commitments within group policies in areas such as supply chain due diligence and sustainability, its behaviour subsequently will be subjected to granular examination by the courts should harm occur. It is to be hoped this statement of the UK Supreme Court will be confirmed in future cases, and its promise for

⁶⁶ See 'Charges filed against French group Auchan for misleading practices after Rana Plaza collapse' <www.asso-sherpa.org/charges-filed-french-group-auchan-misleading-commercial-practices-rana-plaza-collapse> accessed 25 November 2019.

⁶⁷ <www.samsung.com/levant/aboutsamsung/vision/philosophy/business-principles/> accessed 18 December 2019.

⁶⁸ 'Sherpa and ActionAid France file a second lawsuit following the closing of the case by the public prosecutor' (June 25 2018) <www.asso-sherpa.org/samsung-sherpa-and-actionaid-france-file-a-second-lawsuit-following-the-closing-of-the-case-by-the-public-prosecutor> accessed 15 December 2019. Samsung has been indicted by the investigating judge in France for misleading advertising. See also 'Commentary: Samsung's Indictment in France: Fighting Transnational Corporation's Human Rights' Violations Through Consumer Law' (4 September 2019) <<https://freedomfund.org/blog/samsungs-indictment-in-france-fighting-transnational-corporations-human-rights-violations-through-consumer-law/>> accessed 18 December 2019.

⁶⁹ Explored in chapter 5.

⁷⁰ *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (Briggs LJ) [53] stating: '(...) the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken'.

enhanced accountability realised. As discussed further below, the inclusion of failure to act is potentially a powerful lever upon corporate behaviour, within a suite of mechanisms of accountability.

2.2.3. Contribution of the UNGPs to the Regulatory System

If the UNGPs have ‘shaped the last decade’⁷¹ of efforts to hold corporations accountable for the impacts of their conduct overseas, what measure of accountability has been promoted? As soft law, the UNGPs do not respond to the pressing need for enforceable obligations, extended accountability for corporations, nor improved access to remedy for victims. The approach adopted entrenched the dichotomy between obligations on states and mere responsibilities on business. Although the contribution of the UNGPs to legal accountability is minimal, their contribution is not dismissed. They may best be seen as ‘the end of the beginning’ in the ongoing process of clarifying norms.⁷² As a marker on the road to rights respect by business. They did serve to stimulate the conversation, and to pitch it into the international sphere. The UNGPs promoted welcome development in one significant area, conceptualising and promoting human rights due diligence (HRDD).⁷³ The risk is that the UNGPs are perceived or adopted as *the* answer, an end point for business to get to. In reality, states and business can and have used the implementation of the UNGPs to delay advancing accountability, *inter alia*, via a binding treaty.⁷⁴ Continued arguments

⁷¹ Caroline Kaeb, ‘The Shifting Sands of Corporate Criminal Liability under International Criminal Law’ (2016) 49 The Geo. Wash. Int’l Law Review 351, 356.

⁷² John G Ruggie, ‘Presentation of Report to United Nations Human Rights Council’ Special Representative of the Secretary-General for Business and Human Rights Geneva, 30 May 2011 <www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf> accessed 4 December 2019.

⁷³ Discussed in section 2.3 below. See Cees Van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 JETL, 245 arguing that this responsibility on the reasonable company exists under its duty of care in tort law, and ‘Ruggie’s soft law instrument of due diligence does not bring anything new in this respect... 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..’

⁷⁴ Kamil Omoteso and Hakeem Yusuf, ‘Accountability of transnational corporations in the developing world: The case for an enforceable international mechanism’, (2017) 13(1) Critical Perspectives on International Business, 61 stating: ‘Business organisations, especially TNCs, have consistently used CSR to prevent the introduction of “mandatory international regulation” of their activities’.

to the effect that treaty discussions will interfere with, or indeed impair, the advances of the UNGPs are evident in discussions concerning the Zero Draft Treaty.⁷⁵ This narrative is adjudged to have softened in the Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.⁷⁶

2.2.4. National Contact Points

While it is judicial remedy that is most frequently sought, state-based non judicial mechanisms under international initiatives could play a more significant role in advancing accountability and remedy.⁷⁷ In this, the effectiveness criteria set out in the UNGPs set a standard to guide and advance.⁷⁸ For example, simply improving information regarding available state-based non judicial mechanisms would aid those seeking redress. EU research conducted in 2019 found that ‘...in none of the 30 countries covered ... was there

⁷⁵ In 2017 on behalf of the Chairmanship of the Open Ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights established by the UN HRC, the Permanent Mission of Ecuador presented the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises <www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf> accessed 25 November 2019.

⁷⁶ In 2018 on behalf of the Chairmanship of the Open Ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights established by the UN HRC, the Permanent Mission of Ecuador presented the Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (July 2019) (Revised Draft) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 18 December 2019.

⁷⁷ See European Agency for Fundamental Rights (EU FRA), ‘Business-related human rights abuse reported in the EU and available remedies’ (2019) Figure 3. Judicial remedy (73%), with NCP’s just 6%, and NHRIs (3%) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf> accessed 22 October 2020..

⁷⁸ UNGP 31 (n 6) being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on dialogue and engagement.

government-provided, publicly available online guidance for how to access remedy in cases of business and human rights violations.’⁷⁹

The OECD Guidelines for Multinational Enterprises are non-binding principles for responsible business conduct. States which adhere to the Guidelines have made a binding commitment to them, and as part of this are required to set up a National Contact Point (NCP).⁸⁰ The role of NCPs includes to promote the OECD Guidelines, deal with queries, and to make a contribution to the resolution of issues via a bespoke grievance mechanism. For present purposes, the interest is in the impact of a NCP on access to remedy, and how well this functions. Although NCPs can provide a contribution to remedy, data indicates a low level of incidents are addressed to NCPs.⁸¹

Ireland has adopted the OECD Guidelines and has established a National Contact Point (NCP).⁸² Just four complaints which have been made to the Irish NCP, which are accessible via the OECD.⁸³ Commentators highlight that the performance of the Irish NCP could be enhanced by referring back to the core criteria of ‘functional equivalence’, visibility, accessibility, transparency and accountability.⁸⁴ Information from the OECD indicates that

⁷⁹ EU FRA 2019 (n 77) 3. Further citing the example of the Belgian NAP which provided for an information hub providing details on access to remedy in cases of business-related human rights abuse, subsequently provided for by the Federal Institute for Sustainable Development in 2018.

⁸⁰ (n 13). The most recent Guidelines adopted in 2011 were adopted by 42 governments.

⁸¹ EU FRA 2019 (n 77) 2.7; EU FRA 2017 (n 22) Opinion 14.

⁸² It is in the Trade Policy Unit within the Department of Business, Enterprise and Innovation <<https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Trade-Policy/OECD-Guidelines-for-Multinational-Enterprises/>>. For assessment of indicators under procedures, organisations and communication of the Irish NCP see <<https://www.oecdwatch.org/ncp/ncp-ireland/>>; <<https://dbei.gov.ie/en/Publications/Publication-files/Procedures-for-handling-the-OECD-Guidelines-for-Multinational-Enterprises-MNEs-.pdf>> accessed 15 September 2020.

⁸³ <[http://mneguidelines.oecd.org/database/searchresults/?q=\(NCP:\(Ireland\)\)](http://mneguidelines.oecd.org/database/searchresults/?q=(NCP:(Ireland)))>; <http://mneguidelines.oecd.org/database/instances/ie0004.htm>> accessed 15 September 2020.

⁸⁴ See also Ciara Hackett, Ciaran O’Kelly, and Clare Patton, ‘The case of the Irish National Contact Point for the OECD Guidelines for Multinational Enterprises: challenges and opportunities for the business and human rights landscape in Ireland’ (2019) *Irish Jurist* 61, 99-121, 107. stating ‘Unfortunately, the Irish Government, and the Irish NCP have not been active in developing the business and human rights infrastructure domestically. Despite the publication of the NAP, for example, the failure to implement this to date emphasises the apparent and ongoing unwillingness to engage beyond the bare minimum on such issues that cut across the corporate/state landscape.’. See also Shane Darcy ‘Embedding Business & Human Rights in

structure is part of the challenge for the effective operation of NCPs. For example, the Irish NCP is within a small number of NCPs which are hosted within one government department,⁸⁵ a factor which is identified by the OECD as running risks, *inter alia*, of ‘lack of connection with other ministries and external stakeholders, perception of a lack of impartiality, and an obstacle to visibility.’⁸⁶ As Hackett et al recommend for the Irish NCP, there should be ‘comprehensive engagement with the legal, business and civil society sectors in Ireland and beyond.’⁸⁷ Further, the utility of the NCP for Irish business and for stakeholders could be enhanced by it promoting links to the extensive sectoral guidance and best practice sharing available from the OCED.⁸⁸

While recognising that ‘specific instances’ raised via NCPs are not legal cases and NCPs are no judicial bodies, more could be achieved with improved structure, funding and

Ireland: Legislating for Human Rights Due Diligence’ <<https://ssrn.com/abstract=3506384>> accessed 15 September 2020.

⁸⁵ OECD Meeting at Ministerial Level ‘Progress Report on National Contact Points for Responsible Business Conduct..’ (May 2019), 7 listing Ireland as one of eight NCPs ‘based in one single ministry that do not involve other ministries in the work of the NCP and also do not involve stakeholders in their structure’ <[https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf)> accessed 15 September 2020.

⁸⁶ *ibid* re structure and impact on activity 8 paras 20-22. For comparison to the UK NCP see <<https://www.gov.uk/government/organisations/uk-national-contact-point/about/our-governance#steering-board>>. While the UK NCP is also hosted within a government department, it has a steering committee including external board members from stakeholder groups such as business, trade unions and NGOs, representatives from relevant government departments, and an independent unaffiliated member. It has a dedicated budget and ‘a small team of permanent civil servants who work exclusively on the priorities of the UK NCP’. The website of the UK NCP holds links to the minutes of its steering committee, reports to the UK Parliament, links direct to existing complaints, and how to ‘make a complaint against a multinational enterprise’.

⁸⁷ See also Hackett et al (n 84) 9.

⁸⁸ For example, <<http://mneguidelines.oecd.org/duediligence/>>; <<http://mneguidelines.oecd.org/factsheet-working-together-national-human-rights-institutions-and-OECD-guidelines-for-MNEs.pdf>>. Further, it could be active in attending events, and provide conferences or training for dissemination of best practices, see ‘Progress Report’ (n 85) 12. Ireland is listed as one of five NCPs which carried out no promotional activities in either 2018 or 2017 (Egypt, Estonia, Iceland, Ireland, and Jordan). See also ‘Annual Report on the OECD Guidelines for Multinational Enterprises 2018’, 3 <<https://mneguidelines.oecd.org/2018-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 15 September 2020.

approaches.⁸⁹ A peer review of the Irish NCP is planned for 2021. Going forward, it is crucial that the Irish NCP is structured, resourced, and funded in a manner enabling it to impact in a manner commensurate with its role. As the OECD notes:

NCPs have a huge potential to affect change, both through their promotional work and through the handling of cases. Limitations in NCP activities are not for lack of willingness from the staff involved but stem from the challenges faced in obtaining political commitment and financial support.⁹⁰

International initiatives such as the OECD Guideline and NCPs have value and are not discounted. It is recognised that they have a distinct role to play. Their limitations have been outlined alongside suggestions for improvement. In particular, the contribution of the UNGPs to the emerging norm of human rights due diligence is significant, and is discussed in detail below.

2.2.5. Non-Financial Reporting Requirements

It is acknowledged that there is a welcome trend towards increased non-financial disclosure in individual jurisdictions. At national and international level there are initiatives which are broadly aimed at improving transparency.⁹¹ Termed ‘second generation’, they are noted, but are not aligned with concepts of accountability lying at the core of the research question.

⁸⁹ See Annex 1 <[https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf)> accessed 15 September 2020.

⁹⁰ See Progress Report (n 85) paras 47-49.

⁹¹ Currently, the most common form of mandatory non-financial reporting requires companies to supplement financial reporting with information on ‘social’ or corporate social responsibility issues, known as ‘integrated reporting’. For example under s. 1502 Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (US) obliging companies listed in the USA must disclose to the US Securities and Exchange Commission and to the public whether conflict materials in their products originate in the DRC, and also report on the due diligence exercised down their supply chain; the California Transparency in Supply Chains Act 2012 (US) requiring large retailers and manufacturers in to disclose verification of product supply chains to address risks of slavery, forced labour and human trafficking; Danish Financial Statements Act Amendment (2013) obliging companies of a certain size to explicitly account for their policies on both human rights and climate change.

At the EU level, under Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertaking and groups (NFRD),⁹² large companies and groups are required to disclose information on policies, risks and results as regards respect for human rights, anti-corruption, bribery issues, environmental matters, social and employee-related aspects, as well as the diversity on boards of directors.⁹³ The NFRD follows a ‘comply or explain’ model, and there is no sanction for non-compliance. While the Directive emphasizes that companies should report risks of severe adverse impacts, the audit of such reporting is limited to whether information has been provided,⁹⁴ and does not extend to whether the information submitted relates to reality or outcomes. Further, if disclosure would be ‘seriously prejudicial’ to a company’s commercial interest, states may permit it to withhold information on impending developments, notwithstanding that this could feasibly be prejudicial to communities potentially affected.⁹⁵ Companies engaging in the process under the NFRD may gain insights, in turn stimulating self-regulation to adapt to societal expectations, prompting Buhmann to consider the NFRD part of reflexive law.⁹⁶ However, she correctly characterises its focus on disclosure as indicative of a compliance

⁹² Council Directive 2014/95/EC of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups with EEA relevance [2014] OJ L 330, 1–9 (NFRD). As examples of information to be disclosed in non-financial reporting the Directive cites corporate actions taken to ensure; gender equality; implementation of fundamental ILO Conventions; and the prevention of human rights abuses.

⁹³ *ibid* para 7. The Directive covers c.6,000 companies incorporated within the EU such as large publicly listed companies, credit institutions and insurance enterprises of more than 500 employees. Notably, the UNGPs are specifically referred to as one of the international frameworks that companies may rely on when complying with this Directive. The Commission is tasked to report back on the implementation of the Directive in EU Member States in 2018. Recital 8 and art 1(d) of the Directive emphasize that companies should report risks of severe adverse impacts.

⁹⁴ *ibid* art 1(1)5.

⁹⁵ Guidelines on the implementation of the Directive the EU Commission explains due diligence as processes that relate to ‘policies, risk management and to outcomes’ undertaken ‘in order to identify, prevent and mitigate existing and potential adverse impacts’. EU Commission. ‘Guidelines on non-financial reporting (methodology for reporting non-financial information)’ 11. June 2016 (2017/C 215/01) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0705\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0705(01)&from=EN)> accessed 2 December 2019.

⁹⁶ Karin Buhmann, Presentation to the Irish Centre for Human Rights, Galway (2 April 2019) referring to legal autopoiesis, discussing ‘reflexive law’ in Gunther Teubner, ‘Substantive and reflective elements in modern law’, (1983) 17(2) *Law and Society Review* 239.

mindset.⁹⁷ Consistent with its genus in the aftermath of the financial crisis, the NFRD is driven by long term concerns about sustainable finance.⁹⁸

While recognising that the NFRD has a role to play in a ‘smart mix’ of national, international, mandatory and voluntary measures regulation, it is not in the nature of proactive regulation required to prevent abuses of human rights from occurring.⁹⁹ In this respect as a regulatory approach, it is not in sync with the proactive thrust of mandatory human rights due diligence.¹⁰⁰ The NFRD was scheduled for review at the end of 2018. Anticipated in 2021, it should provide an opportunity for assessment and adjustment, and to examine the results achieved so far against the objective of securing greater understanding of companies’ existing and potential human rights impacts. An assessment of the sustainability disclosures of 1,000 European companies found widespread shortcomings in how companies report on their environmental, social and governance (ESG) impacts, suggesting the NFRD is not meeting its objective of ensuring business transparency around ESG challenges and risks.¹⁰¹ It is to be hoped any resultant revisions will adopt a more prescriptive approach to addressing human rights risks.¹⁰²

Broader developments in ‘disclosure’ or ‘transparency’ on supply chains contained in EU second-generation initiatives are also welcomed, such as on extraction of natural resources

⁹⁷ For example, the focus on KPIs in Guidance Document (n 95).

⁹⁸ The EU established a ‘Technical Expert Group’ on Sustainable Finance in 2018. See further <https://ec.europa.eu/info/publications/sustainable-finance-technical-expert-group_en> accessed 2 December 2019.

⁹⁹ Karin Buhmann, ‘Neglecting the proactive aspect of human rights due diligence? A critical appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One avenue for promoting Pillar Two action’ (2018) 3(1) Business and Human Rights Journal 25.

¹⁰⁰ *ibid* 43.

¹⁰¹ See Alliance for Corporate Transparency Report (2019) <[https://www.allianceforcorporatetransparency.org/assets/2019_Research_Report%20Alliance for Corporate Transparency-7d9802a0c18c9f13017d686481bd2d6c6886fea6d9e9c7a5c3cfafea8a48b1c7.pdf](https://www.allianceforcorporatetransparency.org/assets/2019_Research_Report%20Alliance%20for%20Corporate%20Transparency-7d9802a0c18c9f13017d686481bd2d6c6886fea6d9e9c7a5c3cfafea8a48b1c7.pdf)> /> accessed 22 October 2020.

¹⁰² The recommendations for reassessment of the European Coalition for Corporate Justice include that the NFRD must: clarify a legislative duty to undertake Human Rights Due Diligence and the manner of reporting; oblige companies to report on their adverse human rights risks and impacts; what they are doing to prevent and mitigate those adverse human rights impacts; as well as what they do to remedy human rights violations they have caused or contributed to. Further, the scope of the NFRD must be expanded to private companies. <<http://corporatejustice.org/news/8490-review-of-eu-non-financial-reporting-framework>> accessed 11 December 2019.

via CBCR.¹⁰³ Notwithstanding, disclosure style reporting does not provide sufficient incentive or rigour to advance the substantive legal accountability of corporations.¹⁰⁴

2.2.6 Issue Specific Regulation

Reporting initiatives concerning single issues, such as trafficking in human beings in individual states, are to be broadly welcomed. However, provision is nonetheless fragmented, with initiatives varying in application to rights, sectors, or companies of a certain size.¹⁰⁵ Moreover, enforcement within such measures may relate only to compliance with reporting itself,¹⁰⁶ and experience indicates a low level of both coverage and compliance. For example, in a study by NYU Stern Center for Business and Human Rights, indications are that of 12,000 firms covered by concerning the UK Modern Slavery Act (MSA) over the period 2016-2018, 28% published disclosures, but 72% are missing.¹⁰⁷

¹⁰³ By requiring disclosure of payments at project level, local communities will have insight into the sums paid by EU companies to governments for exploiting local oil/gas fields, mineral deposits, and forests. This will also allow these communities to better hold governments to accounts for how money has been spent locally. Civil society will be in a position to question whether the contracts entered into between governments and extractive and logging companies have delivered adequate value to society and government.

¹⁰⁴ Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?' (2018) *Brazilian Journal of International Law* UNSW Law Research Paper no. 18-63, 10-18. Nolan's arguments concerning substantive compliance with recall the limitations raised by Buhmann (n 99) concerning the NFRD. Nolan examines the new interest in the regulatory role of Government and whether disclosure and due diligence requirements are capable of linking transparency with accountability and generating substantive (not just procedural) human rights compliance.

¹⁰⁵ See Ingrid Landau, 'Human Rights Due Diligence and the risk of Cosmetic Compliance', *Melbourne Journal of International Law*, Vol 20, Issue 1, July 2019 221. See also Marcia Narine, 'Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts' (2015) 47(1) *Columbia Human Rights Law Review* 84; Robert McCorquodale and Lise Smit and Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 *BHRJ* 195, 202.

¹⁰⁶ See Directorate-General for Justice and Consumers (European Commission), (2020) 'Study on due diligence requirements through the supply chain' (EU 2020 Study), 154 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>> accessed 15 September 2020.

¹⁰⁷ NYU Stern Center for Business and Human Rights, 'Research Brief: Assessing Legislation on Human Rights in Supply Chains: Varied Designs but Limited Compliance' (19 June 2019) Figure 1, 4. Noting 'it is likely that there are some firms which have produced disclosures that are not represented in the database. However, given the data available, they are our best estimates and highlight a relatively low level of compliance.' <<https://bhr.stern.nyu.edu/blogs/2019/6/19/research-brief-assessing-legislation-on-human->

Similarly, research by the Business and Human Rights Resource Centre suggests a majority of firms have not engaged with reporting under the Act.¹⁰⁸ It is apparent that the reporting requirements within the MSA are too weak to effectively hold companies to account.¹⁰⁹ Further, the statements which are produced are criticised, *inter alia*, as listing policies rather than explaining the risk assessment process and, failing to detail actions to investigate and manage risks.¹¹⁰ It is to be hoped the trend is toward wider and more effective regulation.¹¹¹ Notably, the House of Commons Joint Committee on Human Rights and Business has urged the UK Government to bring forward revised legislation making reporting on all human rights risks compulsory for large businesses, and to provide an effective monitoring and enforcement procedure.¹¹²

[rights-in-supply-chains](#)> accessed 15 September 2020. See also ‘Modern Slavery Registry’ available at <https://www.business-humanrights.org/en/uk-modernslavery-act-registry>; Oxfam, ‘What are supermarkets doing to tackle human suffering in their supply chains’ (3 July 2019) <<https://views-voices.oxfam.org.uk/2019/07/supermarkets-supply-chains/>> accessed 15 September 2020.

¹⁰⁸ ‘FTSE 100 and the UK Modern Slavery Act: From disclosure to action’, BHRCC (2018) 3-6 <<https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf>> accessed 13 December 2019.

¹⁰⁹ Requires businesses with a turnover of £36m or more p.a. to publish an annual statement concerning modern slavery within their supply chains. Section 54 requires companies to prepare an annual statement describing steps taken to ensure that slavery and human trafficking is not present in the company’s operations or in any of its supply chains, and to publish it on the company’s website <www.legislation.gov.uk/ukpga/2015/30/section/54/enacted> accessed 13 December 2019. See also Home Office, Transparency in Supply Chains: A practical guide (October 2015).

¹¹⁰ See UK Joint Committee on Human Rights 38-40 <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>> accessed 15 September 2019. See similar concerns raised re Dutch Child Labour Due Diligence law in chapter 1 section 1.3.3 <www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet>; Australian Modern Slavery Bill 2018 <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6148> accessed 2 January 2020.

¹¹¹ See Business and Human Rights Resource Centre and CORE, ‘Register of slavery & human trafficking corporate statements released to date to comply with UK Modern Slavery Act’ (March 2016) <https://business-humanrights.org/sites/default/files/documents/CORE%20BHRRC%20Analysis%20of%20Modern%20Slavery%20Statements%20FINAL_March2016.pdf> accessed 13 December 2019.

¹¹² UK Joint Committee on Human Rights (n 110).

Widespread problems with single issue style legislation indicate it is not effective to advance corporate accountability.¹¹³ Notwithstanding that such regulation has served to raise awareness including at Board level, the debate has moved on. A different approach is now required:

‘...an essentially voluntary approach to reporting encapsulated in the MSA, with recommended rather than mandated content and with monitoring and scrutiny left to civil society and shareholders, may have reached its limit for many companies’.¹¹⁴

2.3. HUMAN RIGHTS DUE DILIGENCE

Human rights due diligence is, as expressed by the UNWG, the ‘primary expectation of behaviour’ for business’.¹¹⁵ The foundational principle in UNGP 17 lays down that business enterprises should carry out HRDD to ‘identify, prevent, mitigate and account for’ human rights impacts. The UNGPs specify that the HRDD process should include both negative impacts the business enterprise ‘may cause or contribute to through its own activities’, and those ‘directly linked to its operations, products or services, by its business relationships (...)’.¹¹⁶ This formulation expresses a positive obligation on a business enterprise to act to avoid harm occurring throughout its supply chain, and to remediate if harm occurs.¹¹⁷ The standard of conduct to be discharged is interpreted as strict regarding the adverse impacts of the corporation’s own activities, and a due diligence responsibility to prevent impacts

¹¹³ NYU Stern (n 107) 7.

¹¹⁴ Ergon Associates ‘Modern Slavery Reporting: Is there Evidence of Progress?’ (21 October 2018), 21 <https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739> accessed 15 September 2020.

¹¹⁵ A/73/163 Report of the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises concerning human rights due diligence (16 July 2018) para 16 <<https://digitallibrary.un.org/record/1639520?ln=en>> accessed 15 September 2020.

¹¹⁶ (n 6).

¹¹⁷ The relationship between due diligence and duty of care is discussed in section 2.3.3. See Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22(1) Business Ethics Quarterly, 146; Amy Lehr and John F. Sherman, ‘Human Rights Due Diligence: Is It Too Risky?’ (2010) 55(4) Corporate Social Responsibility Initiative; McCorquodale et al (n 105); Sandra Cossart, Jerome Chaplier, Tiphane. Beau De Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ 2 Business and Human Rights Journal (2017) 317.

linked to impacts by its business relationships.¹¹⁸ Moreover, as a standard of care, Principle 17 expressly refers to a process that extends beyond risks to the company itself and includes ‘risks to rights-holders’.¹¹⁹ The process drives at companies engaging in proactive monitoring to ensure respect for human rights:¹²⁰

‘In the context of the [UNGPs], human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.’¹²¹

It extends over all human rights,¹²² and applies to all enterprises regardless of their size, sector, operational context, ownership, and structure.¹²³ The process includes four proactive elements which are to be executed effectively: identifying actual and potential human rights impacts; assessing and acting on the findings; engaging in tracking responses; and communicating how impacts are addressed.¹²⁴ HRDD is expected to reflect the risk of

¹¹⁸ See Johnathan Bonnitcha and Robert McCorquodale, ‘Is the Concept of “Due Diligence” in the Guiding Principles Coherent?’ (2013) 10 arguing that the UNGPs conflate two different meanings of the term due diligence; due diligence as a process for risk management purposes and due diligence as the standard of conduct to be discharged, for instance, to avoid infringing the rights of others <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588>. See also David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 12 SUR International Journal on Human Rights 199, 205; Bjorn Fasterling, ‘Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk’ (2016) 31 BHRJ 1, 11.

¹¹⁹ Commentary to UNGP 17 (n 6).

¹²⁰ See also Sabine Michalowski, ‘Due diligence and complicity: a relationship in need of clarification’, in Surya Deva & David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 218-243; Erika R. George, ‘Influencing the Impact of Business on Human Rights’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014) 12.

¹²¹ OCHCR ‘An Interpretive Guide’ (n 33) 11.

¹²² UNGP 17 and Commentary (n 6); OCHCR ‘An Interpretive Guide’ (n 33) 4.

¹²³ *ibid* UNGP 14; OCHCR 23.

¹²⁴ Available at <www.ungpreporting.org/glossary/human-rights-due-diligence/> accessed 15 September 2020.

severe impacts, as well as the nature and context of the operations of the business,¹²⁵ and is expected to vary in complexity with the size of the business enterprise.¹²⁶

Notably, UNGP 4 makes clear that ‘additional steps’ are expected of states concerning business enterprises which are under State ownership or control, or which ‘receive substantial support and services from State agencies’. This formulation is duly reflected in the Baseline Assessment of Ireland’s National Action Plan on Business and Human Rights,¹²⁷ which states that ‘Human rights due diligence ought to be considered as a minimum requirement for State companies, businesses that obtain government contracts through the public procurement process...’.¹²⁸

Experience of abuses highlights certain sectors including, for example, agribusiness, extractive activities, manufacturing, and fast fashion.¹²⁹ The definitive issue is severity of the actual and potential human rights impact, relative to scale, scope, and ‘irremediable nature’ of the harm.¹³⁰ Recalling also that a study conducted for the EU Commission in 2020 confirmed ‘there is no sector of business which does not pose any potential risks to human rights or the environment.’¹³¹ The responsibility to conduct HRDD is linked to an independent but complementary role for business in the remediation of adverse impacts. Under the UNGPs, if a business itself identifies¹³² that it has caused or contributed to

¹²⁵ UNGP 19 and Commentary(n 6); OCHCR ‘An Interpretive Guide’ (n 33) 23. What action is appropriate will depend on the ‘leverage’ a business has over an entity causing harm to influence a change in its practices.

¹²⁶ UNGP 17 (b). UNGP 14 (n 6); OCHCR ‘An Interpretive Guide’ (n 33) 24-25.

¹²⁷ National Plan on Business and Human Rights 2017-2020 (NAP)___available at <<https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>> accessed 15 September 2020.

¹²⁸ ‘Baseline Assessment of the Legal and Regulatory Framework’ by ReganStein was published in March 2019, 20 <www.dfa.ie/our-role/policies/international-priorities/human-rights/business-and-human-rights/nationalplanonbusinessandhumanrights2017-2020/>.

¹²⁹ See also Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; *Vedanta* (SC) (n 70) (Briggs LJ) [51].

¹³⁰ UNGPs 14 and 24 (n 6).

¹³¹ EU 2020 Study (n 106) 226.

¹³² Through its own process of human rights due diligence or via, for example, input from stakeholders, operational level grievance mechanisms, and judicial or non-judicial mechanisms. See also A/HRC/72/162 (n 44) para 67; OCHCR ‘An Interpretive Guide’ (n 33) Q 63.

adverse impacts, it should provide for, or cooperate in, remediation through legitimate processes.¹³³ For adverse impacts which are directly linked to its operations, products or services by a ‘business relationship’,¹³⁴ an enterprise is not required to provide for remediation, though it may take a role in doing so.¹³⁵ However, in such circumstances, responsibility remains on the business to ‘use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence.’¹³⁶ Although the UNGPs do not envisage that conducting HRDD will provide a complete defence to corporations should violations occur, it is clear that the process drives at pressing parent companies to engage in proactive monitoring of their subsidiaries to ensure that they respect human rights.

The potential impact of HRDD on enhanced legal accountability should not be equated with other measures aimed at disclosure, transparency, or non-financial reporting requirements.¹³⁷ Nonetheless, after ten years, the implementation of HRDD cannot be considered widespread or effective, even amongst large and sophisticated corporations. The 2018 Corporate Human Rights Benchmark report¹³⁸ of 101 publicly traded companies¹³⁹ indicated ‘an alarming 40% of companies score no points at all across the five indicators of assessment’.¹⁴⁰ The 2019 Benchmark shows that 49% of the 200 companies assessed scored

¹³³ UNGP 22 Commentary (n 6). See also OCHCR ‘An Interpretive Guide’ (n 33) 10 noting that in conducting their defence, corporations should not ‘...create a chilling effect on the legitimate exercise of such remedies; UN CESCR General comment No. 24 (n 45) A/72/162 (n 44) para 36-37.

¹³⁴ OCHCR ‘An Interpretive Guide’ (n 33) Q 27 ‘Business relationships’ as defined in the Guiding Principles refer to relationships with “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.’

¹³⁵ UNGP 22, Commentary (n 6).

¹³⁶ OCHCR ‘An Interpretive Guide’ (n 33) 23.

¹³⁷ See EU FRA (n 22).

¹³⁸ <www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf> accessed 16 December 2019. The Benchmark is grounded in the UNGPs, as well as additional standards and guidance focused on specific industries and specific issues.

¹³⁹ Selected based on size (market capitalisation) and revenues, as well as geographic and industry balance

¹⁴⁰ Similarly, a survey of 152 companies by Norton Rose Fulbright and the British Institute of International and Comparative Law found that over 50% of companies surveyed had never undertaken a specific human rights due diligence process <<https://human-rights-due-diligence.nortonrosefulbright.online/>> accessed 16 December 2019. For more, Business & Human Rights Resource Centre <[www.business-](http://www.business-humanrights.org/)

zero against every human right due diligence indicator.¹⁴¹ Thus, there are clear indications that the identification and management of risks to rights holders is severely underdeveloped, and evidently not ingrained in business practice.¹⁴² In the financial sector, the 2019 BankTrack Report found that implementation of the Guiding Principles is ‘alarmingly poor among the great majority of banks’. Of the fifty banks covered, forty achieved a score of 6 or less out of 14, indicating that they are implementing less than half of the requirements of the UNGPs. Further, while it is acknowledged most banks in the survey have a statement of policy that includes a high-level commitment to respect human rights, BankTrack concluded that reporting remains ‘critically underdeveloped’, and accountability mechanisms are ‘entirely lacking’.¹⁴³ While promoting HRDD within soft law and in guidelines is welcome,¹⁴⁴ it is apparent that a solely voluntary governance model has proven ill-adapted to advance ‘public’ goals such as the protection of human rights from business-related harms and advancing corporate accountability.¹⁴⁵

[humanrights.org/en/company-policysteps/policies](https://www.humanrights.org/en/company-policysteps/policies)>; Danish Institute of Business and Human Rights <www.humanrights.dk/tools/human-rights-indicators-business>; Shift Project <www.ungpreporting.org/database-analysis/explore-disclosures>; International Corporate Accountability Roundtable <<https://www.icar.ngo/>>.

¹⁴¹ <<https://www.corporatebenchmark.org/>> accessed 22 October 2020.

¹⁴² (n 138) 7.

¹⁴³ BankTrack Human Rights Benchmark 2019 (November 2019) details that only 12 banks out of 50 were able to demonstrate both senior-level sign-off of their policy commitment to respect human rights as well as specific governance of human rights at Board level. Just four banks ‘gave any indication’ they had conducted an assessment of their actual or potential human rights impacts and none described the process engaged for doing such assessment <www.banktrack.org/download/the_banktrack_human_rights_benchmark_2019_summary_and_key_findings/191125humanrightsbenchmark_summary.pdf> accessed 28 December 2019.

¹⁴⁴ For example, European Commission Communication, ‘A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries’ 3 COM (2014)263 final of <https://ec.europa.eu/europeaid/european-commission-communication-com2014263-stronger-role-private-sector-achieving-inclusive-and_en> accessed 12 December 2018.

¹⁴⁵ Similarly, a survey of 152 companies by Norton Rose Fulbright and the British Institute of International and Comparative Law found that over 50% of companies surveyed had never undertaken a specific human rights due diligence process available at <https://human-rights-due-diligence.nortonrosefulbright.online/>. For more, Business & Human Rights Resource Centre www.business-humanrights.org/en/company-policysteps/policies; Danish Institute of Business and Human Rights www.humanrights.dk/tools/human-rights-indicators-business; Shift Project www.ungpreporting.org/database-analysis/explore-disclosures; International Corporate Accountability Roundtable <https://www.icar.ngo/>.

2.3.1. Low Implementation, Mandatory Regulation

From the outset the UNGPs envisaged a ‘smart mix’ of both legislative and voluntary measures to achieve lasting change. To advance and institutionalise accountability requires attaching legal consequences to failure to conduct effective HRDD. As the Vice-President of the European Parliament Heidi Hautala has stated:

There is more and more understanding that the smart mix prescribed by the [UNGPs] means that there needs to be legislation in order to reach the stated aims¹⁴⁶

Legislation which is ‘stringent’, and includes defined standards and attendant sanctions appears to underpin changes in corporate practice. LeBaron and Rühmkorf’s investigation of the impacts of the UK Bribery Act 2010 upon 25 FTSE 100 companies found it appears to have resulted in ‘significant changes to corporate policy and practices’ and that these higher standards were also notified to suppliers of enterprises.¹⁴⁷ Conversely, they found that it does not appear that the UK Modern Slavery Act 2015 resulted in similar changes to policy and practices in the supply chains of multinational corporations.¹⁴⁸ Acknowledging that the study is limited, arguably mandatory regulation with defined standards and attendant sanctions will be more effective.¹⁴⁹

The risk of superficial compliance,¹⁵⁰ is evident from experience of the operation of the UK Modern Slavery Act.¹⁵¹ Further, research supports distinct benefits to applying a human rights lens in conducting dedicated HRDD, and failure to do so could result in human rights

¹⁴⁶ <<https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/>>.

¹⁴⁷ Genevieve LeBaron and Andreas Rühmkorf ‘Steering CSR Through Home State Regulation:

A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ Global Policy 8:3 (2017). The Bribery Act provides for corporate criminal liability, with extraterritorial reach, binding public standards, and sanctions for non-compliance.

¹⁴⁸ *ibid* 2.

¹⁴⁹ See Ireland- Baseline Assessment (n 128) 20; submissions into the Irish NAP from, *inter alia*, the Irish Human Rights and Equality Commission, Amnesty International, Trócaire, FLAC, and Christian Aid Ireland <<https://www.dfa.ie/our-role/policies/international-priorities/human-rights/business-and-human-rights/nationalplanonbusinessandhumanrights2017-2020/>>.

¹⁵⁰ A/73/163 (n 115) 8 [25(c)], 9 [28], 19 [73(c)]. See also Landau (n 105); ECCJ ‘Key Features of Mandatory Human Rights Due Diligence Legislation’ (June 2018) t <http://corporatejustice.org/documents/publications/eccj/2018eccj-position-paper-mhrdd-final_june2018.pdf> accessed 15 December 2019; OCHCR, ‘interpretive guide’ (n 33).

¹⁵¹ Similarly, the California Transparency in Supply Chains Act and the US Dodd-Frank Act

risks being overlooked.¹⁵² The Modern Slavery Act formula is not considered apt, and should not be adopted as conceivably could be proposed, for Ireland.

2.3.2 Centrality of Rights Holders

The centrality of rights holders lies at the core of HRDD.¹⁵³ The process is aimed the protection of ‘rights holders’,¹⁵⁴ as distinct from the management of risks to the enterprise within commercial due diligence.¹⁵⁵ The potential for adverse impacts to rights holders is heightened in certain instances, for example, development or extractive projects raising risks of destruction of indigenous lands and culture,¹⁵⁶ or infrastructure projects which cause water scarcity impacting livelihoods. Operating in situations of conflict or occupation may heighten risks further,¹⁵⁷ such that entities doing so should provide for, and be held to, a higher standard in their provision for prevention and assessments of potential impacts. Further, certain groups of rights holders are recognised to be subject to additional risks. In recognition of this, states are expected to take positive and affirmative action to ensure access to effective remedies across state judicial, non-judicial, non-state and operational grievance mechanisms for women,¹⁵⁸ vulnerable or marginalised groups such as

¹⁵² See McCorquodale et al (n 105) 221-222

¹⁵³ See A/72/162 (n 44) paras 18-25 for discussion of the centrality of rights holders in the entire remedy process. See also paras 48-49.

¹⁵⁴ UN Human Rights Council (HRC), ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, A/HRC/8/5 (7 April 2008), para 6; UNGP 17 Commentary.

¹⁵⁵ See A/HRC/38/20/Add.2, ‘Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability’, (1 June 2018) para 8; OCHCR ‘An Interpretive Guide’ (n 33) Q 35 stating ‘an enterprise’s human rights risks are the risks that its operations pose to human rights.’

¹⁵⁶ *Financial Times* ‘Rio Tinto CEO quits after backlash from destruction over Aboriginal site destruction’ (10 September 2020) <<https://www.ft.com/content/dd75d6da-f047-49d4-9b2e-cfc2ef95df00>> accessed 10 September 2020.

¹⁵⁷ See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals for Conflict-Affected and High-Risk Areas’ <<https://www.oecd.org/corporate/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-high-risk-areas-9789264252479-en.htm>> accessed 10 September 2020.

¹⁵⁸ Noting CEDAW General Recommendation No. 28, fn 12, para 18 concerning intersectionality; CEDAW General Recommendation No.33 paras 8-10; A/HRC/41/43 (n 42) paras 51-61; A/72/162 (n 44) para 28; UN CESCR general comment No 24 (n) para 8 stating ‘Women are disproportionately affected by the adverse impact of business activities’.

children,¹⁵⁹ migrants, minority ethnic groups, indigenous peoples,¹⁶⁰ and persons with disabilities.¹⁶¹ This includes protections from victimisation or re-traumatisation of victims.¹⁶² Consultations identify the distinct impacts on women of, *inter alia*, discrimination, situations of conflict, environmental pollution, and illustrate specific gender related risks to human rights defenders.¹⁶³ Groen and Cunha highlight that ‘gender-blind due diligence is a dangerous trap’,¹⁶⁴ and that failing to adopt a gender perspective engenders risks of missing, underestimating, or at worst exacerbating existing gender inequalities.¹⁶⁵ A key recommendation of the UNWG is the integration of a gender perspective in due diligence regulation.¹⁶⁶ Regarding gender as a cross-cutting issue, the

¹⁵⁹ CRC General Comment No 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights 17-18, UN Doc CRC/C/GC/16 (17 April 2013) <https://www.unicef.org/csr/css/CRC_General_Comment_ENGLISH_26112013.pdf> accessed 10 September 2020.

¹⁶⁰ UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly on Thursday, 13 September 2007 <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 10 October 2020.

¹⁶¹ UN Convention on the Rights of Persons with Disabilities (24 January 2007) A/RES/61/106 <<https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx>> accessed 10 October 2020. See also EU FRA (n 22) Opinion 5; A/72/162 (n 44) para 25.

¹⁶² A/HRC/41/43 (n 42) para 81; UNGA resolution 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ <https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf> para 10 accessed 10 September 2020.

¹⁶³ See A/HRC/41/43 (n 42) paras 11-21 summarising the UNWG consultations; A/73/163 (n 115) para 25: (c). It may include impact assessments, such as with indigenous communities and human rights defenders. EU FRA 2019 (n 77) examined incidents over the seven years after the adoption of the UNGPs, involving abuses that both occurred within the EU and in third countries, and that are linked with businesses based in the EU and operating abroad (directly or through supply chains). It found that the incidents of abuse mainly concerned environmental rights and working conditions, followed by cases of discrimination, incidents affecting the right to life and to remedy.

¹⁶⁴ Kelly Groen and Lis Cunha of Action Aid, ‘Due diligence laws must not leave women behind’ BHRCC (25 June 2019) <<https://www.business-humanrights.org/en/due-diligence-laws-must-not-leave-women-behind>> accessed 20 September 2020.

¹⁶⁵ See Gender-Sensitive Human Rights Due Diligence 7th UN Forum on Business and Human Rights, <<https://www.ohchr.org/Documents/Issues/Business/Gender/GenderRoundtableDueDiligence.pdf>> accessed 20 September 2020.

¹⁶⁶ A/HRC/41/43 (n 42) para 5. See also EU Gender Action Plan 2016-2020 <<https://op.europa.eu/en/publication-detail/-/publication/62f7aa16-c438-11e7-9b01-01aa75ed71a1>> accessed 20 September 2020; *ibid* paras 82 and 61 ‘All effectiveness criteria for non-judicial grievance

UNWG has provided a three-step framework: gender-responsive assessment, gender-transformative measures and gender-transformative remedies.¹⁶⁷ The drive from voluntary implementation of HRDD and towards mandatory regulation should be taken as an opportunity to integrate these considerations and provide for the centrality of rights holders within HRDD.

2.3.3. Statutory Mandatory Human Rights Due Diligence

Support for a transition to mandatory HRDD is clear from the emanations of various EU institutions, *inter alia*, the EU Council in its Conclusions on Business and Human Rights¹⁶⁸ and Conclusions on Global Value Chains (2016).¹⁶⁹ The European Parliament has repeatedly recommended binding HRDD regulations, *inter alia*, in its: 2016 Report on

mechanisms should be interpreted in a gender-responsive manner, considering especially the intersectional nature of discrimination faced by women in accessing such mechanisms and in enforcing effective remedies against business enterprises.’ See generally Gender-Sensitive Human Rights Due Diligence (n 165) referring to Due Diligence Guidance for Responsible Business Conduct, 2018; The Women’s Empowerment Principles (WEPs), developed by UN Women and UN Global Compact including a WEPs Gender Gap Analysis Tool; The UNDP Gender Equality Seal certification; The Gender Equality in Codes of Conduct (2017) and Gender Equality in Social Auditing(2018) guidance documents; UN Foundation publication (2017) Private Sector Action for Women’s Health and Empowerment. See also Gender and Development Network (GADN) and Corporate Responsibility Coalition (CORE), ‘Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women’s Human Rights’ (November 2015) <<https://www.business-humanrights.org/en/big-issues/gender-business-human-rights/research-analysis/>>; The Danish Institute for Human Rights (DIHR), ‘Women in Business and Human Rights: A Mapping of Topics for State Attention in United Nations Guiding Principles on Business and Human Rights Implementation Processes’, (November 2018) <<https://www.humanrights.dk/publications/women-business-human-rights>>; Joanna Bourke Martignoni and Elizabeth Umlas, ‘Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches’ Geneva Academy, Academic Briefing No 12 (December 2018), 26; 53, noting that ‘gender inequality can be even more pronounced in [conflict affected zones] than in other operating environments.’ <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2012-interactive-V3.pdf>>; accessed 20 September 2020.

¹⁶⁷ A/HRC/41/43 (n 42) para 5, framework and Annex.

¹⁶⁸ EU Council ‘Conclusions on Business and Human Rights’ (20 June 2016) <https://ec.europa.eu/anti-trafficking/publications/council-conclusions-business-and-human-rights-foreign-affairs-council_en> accessed 12 December 2019.

¹⁶⁹ EU Council ‘Conclusions on the EU and Responsible Global Value Chains’ (12 May 2016) <www.consilium.europa.eu/en/press/press-releases/2016/05/12/conclusions-on-responsible-global-value-chains/> accessed 12 December 2019.

Corporate Liability for Serious Human Rights Abuses in Third Countries;¹⁷⁰ 2017 Report on Global Value Chains;¹⁷¹ 2017 Report on EU Flagship Initiative for the garment sector;¹⁷² 2018 Report on Sustainable Finance;¹⁷³ and 2018 Report on Indigenous Peoples.¹⁷⁴ Support is also evident in the European Fundamental Rights Agency 2017 Opinion on Improving Access to Remedy in the area of Business and Human Rights¹⁷⁵; and the Council of Europe 2016 Recommendation on Human Rights and Business.¹⁷⁶ This support is mirrored at the global level, *inter alia*, in: UN CESCR General Comment 24;¹⁷⁷ UN CRC General Comment 16 on State obligations regarding the impact of the business sector on children's rights;¹⁷⁸ the 2016 UN OHCHR Accountability and Remedy Report;¹⁷⁹ 2018 UN Working Group on Business and Human Rights Report to the UN General Assembly;¹⁸⁰ and the 2016 OCED Report on the Implementation of the Recommendation on Due Diligence Guidance

¹⁷⁰ European Parliament 'Report on corporate liability for serious human rights abuses in third countries' (2015/2315(INI)) <www.europarl.europa.eu/doceo/document/A-8-2016-0243_EN.html?redirect> accessed 12 March 2019.

¹⁷¹ European Parliament 'Report on the impact of international trade and the EU's trade policies on global value chains' (2016/2301(INI)) <www.europarl.europa.eu/doceo/document/A-8-2017-0269_EN.html?redirect>, accessed 12 December 2019.

¹⁷² European Parliament 'Report on the EU flagship initiative on the garment sector' (2016/2140(INI)) <www.europarl.europa.eu/doceo/document/A-8-2017-0080_EN.html?redirect> accessed 12 March 2019.

¹⁷³ European Parliament 'Report on Sustainable Finance' (2018/2007(INI)) <www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html> accessed 12 December 2019.

¹⁷⁴ European Parliament 'Report on violation of the rights of indigenous peoples in the world, including land grabbing' (2017/2206 (INI)) <www.europarl.europa.eu/doceo/document/A-8-2018-0194_EN.html?redirect> accessed 12 December 2019.

¹⁷⁵ EU FRA 'Opinion on improving access to remedy in the context of business and human rights at the EU level' (n 22).

¹⁷⁶ Council of Europe (n 18) paras 20-21. See further European Coalition for Corporate Justice, 'Evidence for mandatory HRDD legislation' (20 May 2019) <<https://corporatejustice.org/eccj-publications/15144-evidence-for-mandatory-hrdd-legislation-updated-may-2019>> accessed 16 September 2019.

¹⁷⁷ <www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-16_en.doc> accessed 20 December 2019.

¹⁷⁸ CRC General Comment No. 16 (n 159).

¹⁷⁹ UN OHCHR, 'Improving accountability and access to remedy for victims of business-related human rights abuse' (10 May 2016) UN Doc. A/HRC/32/19 <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_II_Consultation.pdf> (ARP II) accessed 12 December 2019.

¹⁸⁰ A/73/163 (n 115) recommended to states 'the use of legislation to create incentives to exercise due diligence, including through mandatory requirements'.

for Responsible Supply Chains of Conflict Materials.¹⁸¹ Influenced by the UNGPs, the revision of the OECD Guidelines for Multinational Enterprises in 2011 includes a new human rights chapter requiring corporations to promote HRDD.¹⁸² Similarly, in 2017 the ILO revised its Declaration on Multinational Companies to reflect new standards.¹⁸³

Investors are placing increasing emphasis on mandatory HRDD, and actively allying with civil society to lobby for progress in the EU.¹⁸⁴ The support of consumers, trade unions and civil society are increasingly evident.¹⁸⁵ Business is anticipating regulatory intervention, and certain have publicly expressed support.¹⁸⁶ For example, a grouping of large companies including Mars, Aldi, ABN AMRO and Ericsson have issued a letter of Support for an EU framework on mandatory human rights and environmental due diligence.¹⁸⁷ In 2020, a study instituted by the EU Commission on due diligence through supply chains surveyed

¹⁸¹ OECD, 'Report on the implementation of the recommendation on due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas' (n 157).

¹⁸² OECD Guidelines (n 13) 3-4.

¹⁸³ https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf accessed 15 September 2020.

¹⁸⁴ Investor Alliance for Human Rights 'The Investor Case for Mandatory Human Rights Due Diligence' available at <https://investorsforhumanrights.org/sites/default/files/attachments/2019-12/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL%20for%2011.25%20launch.pdf>; 'The Investor case for Due Diligence' (<https://www.business-humanrights.org/en/blog/interview-the-investor-case-for-mandatory-human-rights-due-diligence/>).

¹⁸⁵ See ECCJ 'Over 100 civil society organisations demand human rights and environmental due diligence legislation' (2 December 2019) <https://corporatejustice.org/news/16800-over-100-civil-society-organisations-demand-human-rights-and-environmental-due-diligence-legislation> accessed 15 January 2020.

¹⁸⁶ The Business and Human Rights Resource Centre portal maintains a list of large businesses (>1 bn € turnover), associations & investors with public statements & endorsements in support of mandatory due diligence regulation <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/> accessed 15 September 2020.

¹⁸⁷ https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf accessed 1 October 2020. The European Brands Association AIM representing 2,500 consumer products brands released a position paper in support of HRDD legislation <https://www.business-humanrights.org/en/latest-news/european-brands-association-aim-representing-2500-businesses-releases-paper-on-mandatory-due-diligence-addresses-liability-question/> accessed 20 October 2020.

stakeholders and examined regulatory options for HRDD.¹⁸⁸ A significant majority, 73% of stakeholder respondents, supported the introduction of an EU level requirement for companies to conduct HRDD in their own activities and through their supply chains, coupled with civil or criminal liability and/or fines, as the most effective regulatory option.¹⁸⁹

The process has begun on a legislative initiative at EU level, to be introduced in 2021. Commissioner for Justice Didier Reynders indicated that the initiative would be across all sectors, would include provisions for corporate liability, and that the EU would seek to ensure access to remedy for victims of abuses.¹⁹⁰ The expectation is for a substantive due diligence model.¹⁹¹ In terms of operationalising HRDD, extensive and sound guidance on designing regulation is available, *inter alia*, in the European Coalition for Corporate Justice outline of ten common principles for effective, comprehensive mandatory HRDD legislation.¹⁹² A formulation which applies HRDD obligations to all types of organisations, regardless of sector, form or location is contained in soft law provisions,¹⁹³ and the ILO

¹⁸⁸ EU 2020 Study (n 106). The study examined 4 (main) regulatory options : Option 1: No policy change (baseline scenario); Option 2: New voluntary guidelines / guidance; Option 3: New regulation requiring due diligence reporting; Option 4: New regulation requiring mandatory due diligence as a legal duty of care (plus various sub-options).

¹⁸⁹ *ibid* 154. At 242, unless instituted [at EU Level] ‘Victims will still continue to face a lack of access to remedies, apart from in those countries where mandatory due diligence measures is introduced and rights to civil remedies are thereby created.’

¹⁹⁰ EU Commissioner for Justice Didier Reynders, Webinar available at <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>> accessed 3 April 2020.

¹⁹¹ Policy Department for External Relations Directorate General for External Policies of the Union PE 603.495 - June 2020 ‘Human Rights Due Diligence Legislation - Options for the EU’, Briefings 1 and 2 (EU Policy Options <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI\(2020\)603495_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf)>; Committee on Legal Affairs to EU Parliament Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (11 September 2020) <https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.docx> accessed 11 September 2020.

¹⁹² ECCJ Position Paper, ‘Key Features of Mandatory Human Rights Due Diligence Legislation’ (June 2018) <http://corporatejustice.org/documents/publications/eccj/2018eccj-position-paper-mhrdd-final_june2018.pdf> accessed 20 December 2019; ECCJ <<https://corporate-responsibility.org/wp-content/uploads/2019/10/2020-Legal-Brief.pdf>> accessed 15 September 2020.

¹⁹³ For example, UNGP 14 (n 6).

Tripartite Declaration.¹⁹⁴ It is supported in the EU Policy Directorate study of Human Rights Due Diligence Legislation - Options for the EU.¹⁹⁵ Whether and to what extent HRDD regulation should apply to small and medium sized enterprises (SMEs) is debated.¹⁹⁶ The Commentary to UNGP 14 acknowledges that SMEs may have less capacity than larger companies, as they still may risk severe human rights impacts, appropriate measures are expected. Similar conclusions were reported in the EU 2020 study in which survey respondents overall preferred a single standard applying irrespective of size, and while the potential burden for SMEs was noted, other respondents signalled that often ‘the risks in their supply chain relate to the activities of SMEs.’¹⁹⁷ As development of regulation advances, the practical challenges of ensuring compliance with HRDD in supply chains is acknowledged.¹⁹⁸ However, advances in technology employing geo-location technology are anticipated to assist, for example in palm oil, and platforms employing blockchain technology.¹⁹⁹ Increasingly, discussions of HRDD across media, civil society at lobbying and at political levels refer to mandatory Human Rights and Environmental Due Diligence (mHR&EDD).²⁰⁰

¹⁹⁴ (n 183) See Aim and Scope, para. 6; General Policies, para. 10.b. applies to all ‘multinational or other enterprises, regardless of their size, sector, operational context, ownership and structure’.

¹⁹⁵ EU Legislation Options 1; Committee on Legal Affairs to EU Parliament (n 191) 7.

¹⁹⁶ Ibid EU Study Legislation – Options 1, 9.

¹⁹⁷ (n 6). See also OCED Guidelines examples of how due diligence can be adapted to the resources of SMEs. Committee of Legal Affairs (n 191) 7 ‘Considers that small, medium-sized and micro-enterprises may need less extensive and formalised due diligence processes, and that a proportional approach could take into account, amongst other elements, the sector of activity, the size of the undertaking, the context of its operations, its business model, its position in value chains and the nature of its products and services’; page 12; 16; articles 16 and 17.

¹⁹⁸ EU Legislation Options 1 (n 191) 10-11; EU 2020 study (n 106) Problem solving section 214 ff p. 218; Sherpa Vigilance Plan Reference Guide (VPRG) 34 <<https://www.asso-sherpa.org/vigilance-plans-reference-guidance-legal-analysis-on-the-duty-of-vigilance-pioneering-law>> accessed 15 September 2020.

¹⁹⁹ ‘Unilever to use geo-location technology to track palm oil supplies’ (18 August 2020) available at <https://www.irishtimes.com/business/manufacturing/unilever-to-use-geo-location-technology-to-track-palm-oil-supplies-1.4333426>.

²⁰⁰ Second Revised Draft UN Binding Treaty (n 76) art. 1.2 ‘Human rights abuse’ is defined as including environmental rights. See also <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 1 September 2020.

2.3.3.1. State Level

At Member State level, the 2017 French ‘Duty of Vigilance Law’ provides a generally robust model.²⁰¹ It requires certain French companies to implement due diligence in respect of their own activities, those of companies they control, and of suppliers and contractors with whom they have an established commercial relationship.²⁰² The scope of the general duty of vigilance in the law is threefold including the elaboration, disclosure and effective implementation of a ‘Vigilance Plan’.²⁰³ In establishing a Vigilance Plan, companies must be able to ‘identify the risks and [...] prevent serious infringements of human rights and fundamental freedoms, risk and serious harm to health and safety, and the environment’.²⁰⁴

A two-step compliance mechanism is provided and companies which fail to fulfil their obligations penalties including periodic payments. While the law does not, as originally campaigned for, include criminal liability,²⁰⁵ the duty upon companies is linked to general principles of liability within tort.²⁰⁶ If a company covered by the Duty of Vigilance Law does not publish and implement an effective plan, victims of human rights violations can sue for damages for the harm that due diligence would have permitted it to avoid.²⁰⁷ In the first action under the regime, six environmental groups issued proceedings against French energy group Total seeking an order to oblige Total to revise its vigilance plan and address its oil project in Lake Albert and Murchison Falls, a protected natural park in Uganda.²⁰⁸

²⁰¹ *loi* no 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre: JO 28 March 2017, texte no. 1 (French Duty of Vigilance Law).

²⁰² The meaning of each term in law is defined within the Act. See Sherpa VPRG (n 198) 33.

²⁰³ Tiphanie Beau de Loménie et al, ‘The French Law on Duty of Vigilance’ in Angelica Bonifanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Glawcal 2019).

²⁰⁴ France Duty of Vigilance Law (n 201) art.1, para 3. Paras 4-9 indicate five types of measures that the Plans shall contain; (i) a risk mapping that identifies, analyses and ranks risks; (ii) procedures to assess the situation of subsidiaries, subcontractors or suppliers with whom an ‘established commercial relationships’ are maintained; (iii) actions to prevent and mitigate risks and serious harms; (iv) an alert mechanism, and; (v) a monitoring scheme to follow up the implementation and efficiency of measures. This is interpreted as an indicative rather than exhaustive checklist as it can be further complemented or other measures added at a future stage.

²⁰⁵ *Conseil Constitutionnel* Decision No. 2017-750 DC 23.

²⁰⁶ French Civil Code Articles 1240 and 1241.

²⁰⁷ Article 2 of the Duty of Vigilance law (n 201).

²⁰⁸ ‘Total sued under France’s new Duty of Vigilance Law’ stating: ‘Total plans to drill over 400 wells in the park, extracting around 200,000 barrels of oil per day. A 1,445km (900 mile) long giant pipeline is planned

It is positive for enhancing accountability that standing is widely conceived under the Law. Any person whose human rights are allegedly affected as a result of a lack of vigilance on the part of a company has standing to bring a civil claim against it before French courts, including victims, NGOs, trade unions and competitors. However, the range of companies captured by the law is narrowly defined, such that it is expected to apply to only circa 100 to 150 of France's largest companies.²⁰⁹ This leads to valid commentary that the scope of the French Law, is too narrow. The NYU Stern Center for Business and Human Rights, estimates of the number of firms covered by the French Law constitute 3.2% of 'large firms' and just 0.03% of total firms. Further, the duty of vigilance is a duty of conduct rather than of result.²¹⁰ Commentators highlight that concerns over proving breach and causation may result in the law falling short of the goal of remediation for victims in tort, but they nonetheless consider the statutory penalties within the Act will constitute an effective deterrent.²¹¹ Validly, Sherpa identifies transversal consultation as fundamental to the development of, and delivery upon, a Vigilance Plan and by extension to compliance with the obligation.²¹²

The French Duty of Vigilance Law is significant as the first EU Member State law establishing an express duty on companies to take action to prevent human rights abuses both domestically and abroad, and placing a statutory obligation upon them to account for the steps taken to achieve this objective.²¹³ It was referenced in the *amicus curiae*

to transport the oil, impacting communities and the environment in Tanzania as well as Uganda.' <<https://en.newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/>> accessed 27 November 2019. Proceedings have been taken against Samsung (2019) and Casino, Perenco and Teleperformance (2020), see <<https://www.asso-sherpa.org/category/strategic-litigation>> accessed 12 October 2020.

²⁰⁹ Duty of Vigilance law (n 201). The law only covers companies that have their registered office in France and that, at the end of two consecutive financial years, employ at least five thousand employees within their company and subsidiaries in France or that employ at least ten thousand employees within their company and subsidiaries both in France and abroad.

²¹⁰ Cossart, Chaplier, and Beau de Loménie (n 117).

²¹¹ Stéphane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance: What Penalties are Businesses Likely to Face' <www.herbertsmithfreehills.com/latest-thinking/frances-corporate-duty-of-vigilance-law-what-penalties-are-businesses-likely-to-face> accessed 28 March 2019.

²¹² Sherpa VPRG (n 198) 45.

²¹³ See further European Coalition for Corporate Justice 'French Corporate Duty of Vigilance Law: Frequently Asked Questions' (23 February 2017), 4 <www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf> accessed 7 December 2019.

submission by Comparative Law Scholars and Practitioners in *Jesner v Arab Bank plc*²¹⁴ in support of their argument that corporate liability is a general principle of law recognised by legal systems around the world.²¹⁵ In the evolving governance system concerning the impact of business on human rights, it will assist in the definition of parameters in academic debate for and against mandatory HRDD such as; definition of the basis of liability, establishing control, defences,²¹⁶ and enforcement. Scholars validly argue that a statutory duty to conduct HRDD implies a duty of care owed by the company to victims of human rights abuses, which corresponds with the extent of the HRDD and should give rise to a cause of action under both common and civil law.²¹⁷ In time, the French duty of vigilance regime will provide valuable insight as to how breach and causation are assessed based on the general law of tort.

The concerns which underlie the introduction of the French Duty of Vigilance Law are mirrored in a number of other European jurisdictions.²¹⁸ In 2018, proposals for the introduction of mandatory HRDD in Finland were supported by a coalition of over 140

²¹⁴ No. 16-499 584 U.S. (2018) discussed in section 1.3.3.

²¹⁵ Brief of Amici Curiae of Comparative Law Scholars and Practitioners in Support of Petitioners, *Jesner v Arab Bank PLC* No. 16-499 <www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-499-amicus-pet-comparative-law-scholars.authcheckdam.pdf> accessed 29 November 2019.

²¹⁶ The trade-off in the French law, reversal of burden of proof for ‘a sincere and exhaustive publication of measures’ is validly criticised by Sherpa VPRG (n 198) 11. See also Amnesty International, ‘Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse’ 7 stating that UNGP 17-21 and attendant Commentary provide guidance to assess liability to the extent that they elaborate on what ‘reasonable steps’ might look like in particular circumstances <www.amnesty.org/en/documents/pol30/7037/2017/en/> accessed 29 December 2019.

²¹⁷ See Cees Van Dam and Filip Gregor, ‘Corporate Responsibility to respect human rights vis-à-vis duty of care’ in Juan José Rubio and Katerina Yiannibas (eds), *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 134.

²¹⁸ For a summary see ECCJ <http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final.pdf>; www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries. See also Umlas, ‘Human Rights and Due Diligence: Swiss Civil Society Pushes the Envelope’ <www.business-humanrights.org/en/human-rights-due-diligence-swiss-civil-society-pushes-the-envelope> accessed 29 November 2019; Saskia Wilkes, Business & Human Rights Resource Centre ‘High hopes for mandatory human rights due diligence in 2020’ (17 December 2019) stating ‘Since the French law was introduced a dozen European countries are discussing mandatory HRDD legislation’ <<https://www.business-humanrights.org/en/high-hopes-for-mandatory-human-rights-due-diligence-in-2020-0>> accessed 29 November 2019.

civil society organisations, companies, and trade unions. The Social Democrat-led Finnish government committed to mandatory HRDD in its official programme in 2019. In Luxembourg, the introduction of mandatory HRDD is supported by a coalition of 16 civil society organisations. Similarly, it is supported in Denmark by more than 100 NGOs, the FH Danish Trade Union Confederation, Danish Consumer Council, and companies. Initiatives from civil society and associated groupings have emerged also in the Netherlands,²¹⁹ Belgium, and Austria.²²⁰

The German Supply Chain Due Diligence Act is under discussion.²²¹ In Switzerland, a referendum on the Responsible Business Initiative is tabled for late 2020.²²² In the UK 25 civil society organisations have called for the introduction of mandatory human rights and environmental due diligence.²²³ In Ireland the Irish Coalition on Business and Human Rights commissioned the author to prepare a proposal for outline mandatory Human Rights and Environmental Due Diligence legislation, to be launched in 2021.²²⁴ It is evident that there is a groundswell of support for mandatory HRDD.²²⁵ Arguably, at Member State and at EU level, it is the way forward.

²¹⁹ A policy on corporate accountability was launched in the Dutch Parliament in October 2020 <<https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/documenten/kamerstukken/2020/10/16/kamerbrief-over-beleidsnota-internationaal-maatschappelijk-verantwoord-ondernemen>> accessed 22 October 2020.

²²⁰ <www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries> accessed 12 December 2019.

²²¹ See ‘Legislative Proposal: Corporate responsibility and Human Rights: Legal Text and Questions and Answers on the Human Rights Due Diligence Act proposed by German NGOs’ <<https://corporatejustice.org/news/mhrdd-lawproposal-and-faq.pdf>> accessed 17 August 2020.

²²² Swiss Coalition for Corporate Justice ‘The Initiative Text with Explanations’, available at: <https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf> accessed 17 August 2020.

²²³ See Corporate Responsibility (CORE) <<https://corporate-responsibility.org/towards-mandatory-human-rights-due-diligence-uk/>> accessed 22 October 2020.

²²⁴ Irish Coalition on Business and Human Rights members: Trócaire, Trinity Centre for Social Innovation, Trinity Business School, Comhlámh, Front Line Defenders, Fairtrade Ireland, GLAN, Centre for Business and Society (CeBaS) UCD, Oxfam, LASC, Christian Aid, Irish Congress of Trade Unions, Friends of the Earth, NWCI Academics: Rachel Widdis Observers: ESCR-NET, Shift project, Action Aid Ireland, TerraJusta, and Save Our Sperrins <www.icbhr.ie>

²²⁵ Juliane Kippenberg, Human Rights Watch <www.hrw.org/news/2019/09/10/chance-curtail-abuse-germanys-supply-chains> accessed 12 December 2019.

2.3.3.2. Impact on Accountability

If EU Member States follow the lead of the French law and legislate for statutory based mandatory HRDD, how would it advance accountability? Crucially, as with failure to prevent offences discussed in section 2.5 below, mandatory HRDD is home state regulation with extraterritorial effect.²²⁶ The obligation is placed on the entity in the state, and the impacts outside the national territory are indirect, circumventing concerns of overreach and international comity.²²⁷ As Ryngaert and Wouters argue ‘home-state regulation then becomes cooperative rather than antagonistic’.²²⁸ From the perspective of states, imposing an obligation on state owned entities and parent companies to monitor the human rights risks and impacts of its subsidiaries and supply chain is a low cost, low risk, high impact method of acquitting states’ obligations to protect human rights. In the face of widespread support and examples of leadership in regulation by certain EU states, it is hoped that regulation of HRDD will be introduced at EU and at Member State level.

2.3.4. Due Diligence and Duty of Care

Business and human rights is concerned with negative impacts related to *how* the profits of corporations are generated throughout their operations. Its focus is on how rights holders and the environment may be adversely impacted in this process. HRDD is premised upon a fundamental shift from a narrower focus on the interests of shareholders to an approach acknowledging the interests of all stakeholders. A duty of care flowing from HRDD differs from the concept of a duty of care based on corporate law in this fundamental manner. As outlined by Keay, the standard of duty of care in corporate law is a standard of conduct under which the duty on a director is to advance the activities of the corporation while

²²⁶ In this model, statutory obligations are imposed on the parent company by the state of which it has the ‘nationality’ or is domiciled.

²²⁷ Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1(1) Business and Human Rights Journal 44, 52 stresses: ‘Direct liability approaches hold an advantage over “derivative liability” because they can be based upon the territoriality principle, combined with the criminal principle of ubiquity where the extraterritorial legislation is of a criminal nature, or at least on the active personality principle, and since the connection to the forum will be stronger if the parent company is sued directly for its own actions, rather than for those of its subsidiary, so these approaches facilitate overcoming the barrier represented by the doctrine of *forum non conveniens*’.

²²⁸ Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction’ (2009) 40 Geo. Wash. Int’l L. Rev., 956.

acting in good faith and exercising ‘reasonable care, skill and diligence’.²²⁹ Within this conception, damage to others which may result is pertinent only in so far as it might affect the success of the company by, for example, the potential or realised negative financial or reputational impacts upon it. While outside the scope of this thesis, it is noted that scholars argue that the interaction between the concept of HRDD and the possible emergence of a binding duty of care to observe human rights for directors²³⁰ may lead to real legal consequences.²³¹ Similarly, it is noted that there is a movement to extend fiduciary duties to include reasonable care, skill and diligence in the prevention of human rights abuses to those affected by the company’s operations.²³²

The duty of care which individual directors owe under company law is distinguished from duty of care under HRDD.²³³ The concept of due diligence in the UNGPs is cogently considered by Bonnitcha and McCorquodale to refer ‘interchangeably to a process and a standard of care expected of companies’.²³⁴ Within regulation of HRDD, it is expected to

²²⁹ Andrew Keay, ‘Moving towards Stakeholderism Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little’ (2011) 22 Eur. Bus. L. Rev. 24.

²³⁰ Defining the duties of directors under the corporate law of various countries could arguably pave the way for a more direct consideration of human rights in corporate decision making. Section 172 of the Companies Act 2006 (UK) amended the main duties of directors from a duty to act in the best interests of the company and its shareholders to a ‘duty to promote the success of the company’ which includes ‘having regard’ for the community and the environment in which the company operates. It raised hopes, but is criticised by Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22(1) Business Ethics Quarterly 146, 146-148 as so vaguely worded that a director is arguably not required to take any action, even in the case of involvement in human rights violations.

²³¹ See Daria Davitti, ‘Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles’ (2016) 16 Human Rights Law Review 69. See also Muchlinski (n 230) addressing three questions; should corporate directors have a duty of care based on human rights due diligence in relation to addressing the human rights responsibilities of their corporations; should those affected have enforceable rights and remedies against directors *and* the corporation; and does the extension of human rights responsibilities to corporate actors challenge the dominant agency costs theory of corporate governance and necessitate a shift towards stakeholder approaches.

²³² For further discussion UNPRI ‘Principles for Responsible Investment, ‘Fiduciary duties in the 21st century’ <www.unpri.org/fiduciary-duty/al-gore-introduces-fiduciary-duty-in-the-21st-century/245.article> accessed 28 November 2019. The EU Legal Affairs advice (n 191) refers to ‘human rights, environmental or governance risks’.

²³³ See EU 2020 study (n 106) 157.

²³⁴ Bonnitcha and McCorquodale (n 118) 900.

include a legal duty of care. The obligations within mandatory HRDD should require each entity to conduct due diligence to the required standard in order to prevent potential or actual adverse impacts to rights holders. The content of the duty is a procedural compliance duty, and a legal duty of care. The standard expected is reasonable diligent and prudent conduct.²³⁵ This standard would be breached if an entity mismanages the elements of the HRDD process, resulting in failure to identify risks to those potentially impacted, and culminating in harm to rights holders.²³⁶ The company is not expected to have breached its legal duty of care if the damage was not reasonably foreseeable through adequate due diligence, or would have occurred in any case.

It is to be hoped that regulation of mandatory due diligence will place the burden of proof upon the entity. As highlighted in the EU 2020 ‘Study of Due Diligence’, a legal standard of care underpins business acting to prevent and mitigate human rights risks, as ‘rather than simply create processes.’²³⁷ Differences between the concept of duty of care under common law and the ‘duty of vigilance’ contained in the French Law are noted.²³⁸ The concept of parent company duty of care within FDL litigation the common law tort of negligence is explored in chapters 3, 5 and 6.

2.4. THE ROLE OF CRIMINAL LIABILITY IN ACCOUNTABILITY

Under international human rights law (IHRL) well-established principles oblige states to engage all reasonable measures in accordance with international law to prevent conduct from non-state actors which may lead to violations of human rights. As outlined in chapter 1 section 1.3, principle and practice diverge. Even for international crimes, use of universal jurisdiction concerning corporate entities is not widespread, and mechanisms for victims to access civil recovery are available in principle but not provided in practice. Further,

²³⁵ See discussion of the French Duty of Vigilance Law in section 2.3.3.1

²³⁶ UNGP 18 (b); A/HRC/38/20/Add.2 (n 155) para 8 stating ‘...As such, human rights due diligence demands methodologies that are informed, in scope and procedural terms, by internationally recognised human rights standards, and should ‘involve meaningful consultation with potentially affected groups and other relevant stakeholders.’ In addition, In addition, provisions concerning consultation, transparency, and time defined disclosure and documentation subject to sanctions.

²³⁷ EU 2020 study (n 106) 155.

²³⁸ Andreas Rühmkorf and Lena Walker, ‘Assessment of the concept of ‘duty of care’ in European legal systems for Amnesty International’, European Institutions Office (September 2018), 5 considering that the “‘duty of vigilance” is based upon ‘much more specific, codified conditions than the very general duty of care’.

litigation seeking civil remedy has been pushed away from the US and primarily towards FDL litigation within other jurisdictions. Whether corporations have direct obligations to respect human rights is contested, and the structure of major international initiatives in soft law, such as the UNGPs, are premised upon state obligations.²³⁹

Within the broad issue of how corporations may be held to account in international law, it is apparent that corporate entity criminal liability at international level suffers from manifest issues and gaps. The question arises whether corporate criminal liability is any more effective at national level, where it is potentially easiest to enforce. For present purposes, the development of corporate criminal liability within national systems is pertinent to the role of FDL litigation. It is optimum for both criminal sanctions and civil remedy to operate effectively, in order to ensure corporate accountability and access to remedy for victims.²⁴⁰ However, in circumstances in which one route does not operate effectively, the need access remedy will, as with any other force, funnel activity in the direction of whichever mechanism does function.

2.4.1. Corporate Criminal Liability in National Law

It is recognised that there is evolution of corporate criminal liability in domestic systems. This is primarily via the enactment of domestic criminal legislation which, in principle, permits the prosecution of legal persons for international crimes.²⁴¹ It has been in part driven by incorporation of the Rome Treaty into domestic law,²⁴² as many jurisdictions did

²³⁹ Section 2.2 and chapter 1 section 1.3.1.

²⁴⁰ Ideally, states to permit civil claims for compensation linked to criminal prosecution as is provided for in several EU Member States such as Belgium, France, and Spain. See Beth Stephens, 'Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?' (1997) 60 Albany Law Review 579, 602.

²⁴¹ See Kaeb (n 71) 381. See also Joanna Kyriakxis, 'Corporate Criminal Liability and the Comparative Law Challenge' (2009) *Neth. Int'l L. Rev.* 333.

²⁴² See Anita Ramasastry and Robert C. Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries' <www.fafo.no/index.php/en/publications/fafo-reports/item/commerce-crime-and-conflict> accessed 12 December 2019. In 2006 the FAFO study found that most of the sixteen countries surveyed did not make a distinction between natural and legal persons when incorporating international criminal law into their domestic statutes, thereby eliminating in domestic law one of the main limitations Rome Statute.

not distinguish between natural and legal persons when transposing the Treaty.²⁴³ To progress accountability in practice requires that states provide for, and enforce, corporate criminal liability for the commission of, or participation in, offences constituting serious human rights abuses.²⁴⁴ However, as overall state provision for corporate criminal liability has evolved, practical barriers to enforcement come into sharper focus. The weight of commentary exposes significant issues with commitment and resources in evidence gathering, prosecution, and enforcement of corporate criminal liability.²⁴⁵ Allied to this, more could be done at the supranational level to lead in advancing accountability. The EU possesses the means to lead, to advance accountability and to underpin enforcement, yet the ‘State of Play’ position is lacklustre:

Member States should consider applying such legislative and other measures as may be necessary to ensure that business enterprises can be held liable under their criminal law or other equivalent law for the commission of; crimes under international law caused by business enterprises; offences established in accordance

²⁴³ The result is a quixotic situation whereby many States Party to the Rome Treaty provide for corporate criminal liability in domestic law, yet the jurisdiction of the ICC itself remains limited *ratione personae* and *ratione materiae*. See Kyriakxis (n 241) 334; 336-343 discussion the evolution of corporate criminal liability in common and civil traditions, which previously held to the principle of *societas delinquere non potest*. See further Kaeb (n 71) 376. Further in Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, STL-14-05/PT/AP/ARI26.1 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, (Special Trib. for Leb. Oct. 2, 2014) STL- 14- 05/ PT/ AP/. ARI26.1 [67] the Appeals Panel of the STL held that: ‘(...) indeed, corporate liability for serious harms is a feature of most of the world’s legal systems and therefore qualifies as [a] general principle of law’.

²⁴⁴ Notably, in its 69th session in 2017 the International Law Commission decided to include in its long-term programme of work two new topics, namely (a) general principles of law; and (b) evidence before international courts and tribunals <www.legal.un.org/ilc/sessions/69/> accessed 12 December 2019.

²⁴⁵ See Amnesty and International Corporate Accountability Roundtable (ICAR) Corporate Crime Principles (October 2016) <www.amnesty.ie/corporate-crime-new-principles-will-help-governments-law-enforcement-tackle-corporate-abuse/> accessed 5 December 2019. In a well-founded argument, consider that under IHRL there is a duty on states to prosecute alleged offenders of human rights violations which are crimes.

with treaties;²⁴⁶ other offences constituting serious human rights abuses involving business enterprises.²⁴⁷

The Lisbon Treaty provides a specific legal basis to adopt criminal legislation at an EU level.²⁴⁸ Under Article 83, which concerns the regulation of substantive criminal law, the EU Council and the European Parliament may establish minimum rules on the definition of criminal offences and sanctions in an area of ‘particularly serious crimes with a cross-border dimension’.²⁴⁹ Can it be attributed to oversight or to a failure of political will within the EU that ‘particularly serious crimes with a cross-border dimension’ have not yet been deemed to include egregious abuses linked to the worldwide operations of EU based multinational companies? The EU State of Play is indicative of legislative interest;

²⁴⁶ For example; Council of Europe Criminal Law Convention on Corruption ETS No. 173 (1 July 2002); Council of Europe Convention on Cybercrime ETS No. 185 (23 November 2001); Council of Europe Convention on Action against Human Trafficking ETS No. 197 (16 May 2005); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201 (12 July 2007); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence CETS No. 210 (November 2014). Also, UN Convention against Transnational Organised Crime; UN Convention against Corruption; and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

²⁴⁷ EU State of Play (n 20) para 44. Further under para 46: ‘Irrespective of whether they are directed against natural or legal persons, investigations must satisfy the effectiveness criteria under the European Convention on Human Rights, namely that they must be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation...’ It advises Member States measures should ensure that business enterprises can be held liable for their participation in the commission of such crimes.

²⁴⁸ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (13 December 2007) 2007/C 306/01 <<https://www.refworld.org/docid/476258d32.html>> accessed 1 October 2020.

²⁴⁹ *ibid* art. 83(1) provides: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph.’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E083>> accessed 12 December 2019.

There are a number of policy areas which have been harmonised and where it has been established that criminal law measures at EU level are required. This concerns notably measures to fight serious damaging practices and illegal profits in some economic sectors in order to protect activities of legitimate businesses and safeguard the interest of taxpayers²⁵⁰

The EU could promote much needed consistency amongst EU Member States regarding the definition of criminal offences and sanctions.²⁵¹ This would arguably serve the EU in decisively moving forward its policies, *inter alia*, the Renewed EU Strategy 2011-14 for Corporate Social Responsibility,²⁵² into the appropriate realm of rights and obligations. Principally, it would advance the role of public law in corporate accountability, and work in tandem with foreign direct liability litigation.

As it stands, limitations of provision and/or failings of enforcement in criminal law feeds into a trend of causes of action in private law, and in particular FDL litigation, remaining forefront in accountability and remedy.²⁵³ Noting the recommendation regarding the anticipated EU HRDD legislative initiative:²⁵⁴

‘Criminal law and criminal justice are indispensable means of human rights protection against severe human rights violations; ... [recommends that EU legislation] include criminal liability provisions for companies and directors and management that are held responsible in the event of severe violations of human rights.’²⁵⁵

²⁵⁰ *ibid.* EU State of Play (n 20): ‘This clause does not list specific crimes but makes the fulfilment of certain legal criteria a precondition for the adoption of criminal law measures at EU level.’

²⁵¹ Jenifer Zerk, ‘Corporate liability for gross human rights abuses; towards a fairer and more effective system of domestic law remedies,’ for the Office of the High Commissioner for Human Rights (2014) 24 <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> accessed 9 August 2019. See also International Commission of Jurists (ICJ), ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (2014) <<https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights>> accessed 10 December 2019; Kaeb (n 71).

²⁵² European Commission, ‘2 COM (2011) 681 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0681>> accessed 11 December 2019.

²⁵³ The normative aspects of this issue are discussed in chapter 3.

²⁵⁴ Discussed in section 2.3.

²⁵⁵ EU Committee of Legal Affairs (n 191). See also UN CESCR General Comment No. 24 (n 45) 15.

In addition to the existing barriers to effective accountability at national level, corporate accountability is hampered by lack of appropriate mechanisms for attribution of liability. For business-related harms, there is justification to reconsider methods of attribution of liability to corporate entities.

2.4.2. Re-thinking Attribution of Liability to the Corporate Entity

As it stands, the methods employed are not adapted to the complexity of the modern corporate form and its workings. This renders criminal prosecutions challenging.²⁵⁶ Typically FDL cases concern allegations of corporate complicity in human rights abuses perpetrated by others, rather than as primary perpetrators.²⁵⁷ The two principal approaches to attribute liability to a corporate entity are the identification theory (including organisational approaches)²⁵⁸ and the doctrine of *respondeat superior*.²⁵⁹ For present purposes, a major advantage of the identification approach is that it drives at establishing culpability of the corporation as an entity. It allows for the acts and mental state of officers of the corporation to be ‘identified’ as acts of the corporate entity, and is typically used where the offence involves proof of *mens rea*.²⁶⁰ The identification method is used, *inter*

²⁵⁶ International Commission of Jurists (n 251) 58.

²⁵⁷ Zerk (n 251) 8; 24 identifies the main categories in which businesses can become implicated in gross human rights abuses: as primary perpetrators; supplying equipment or information utilised in abuses; and doing business with regimes with poor human rights records or with known rights abusers.

²⁵⁸ Originally set out in *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co* [1915] AC 705. See Irish Law Reform Commission, ‘Report on Regulatory Powers and Corporate Offences’ Volume 2 (LRC 119-2018) 364-378 (ILRC Corporate Offences) <www.lawreform.ie/fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pdf> accessed 19 December 2019.

²⁵⁹ In Ireland, see *In re the Employment Equality Bill 1996* [1997] 2 IR 321; *CC v Ireland* (No. 2) [2006] IESC 33, [2006] 4 IR 1. See also ILRC Corporate Offences (n 258) 364-378.

²⁶⁰ ILRC Corporate Offences (n 258) 356 stating: ‘Using this doctrine, the courts attempted to underpin the imputation of fault onto the corporate body, by ascribing human attributes to it... This fiction allowed the courts to attribute direct criminal liability to the corporate body..’ Knowledge is a realistic *mens rea* standard for corporate complicity in serious human rights abuses. See Kaeb (n 71) 372. See also *Public Prosecutor v Van Anraat* (2005) LJN AX 6406 [17]. It is adopted in UNGP 17 concerning aiding and abetting (n 6).

alia, in the United States,²⁶¹ Ireland,²⁶² United Kingdom,²⁶³ Australia,²⁶⁴ Canada,²⁶⁵ and France.²⁶⁶ However, within large corporate structures it is often challenging to identify one individual whose acts can be attributed to the corporate entity. Flowing from this is an acknowledgement that identification theory may be either unhelpful, or ‘works best when least needed, in small businesses, and works worst where needed most, that is in large organisations’.²⁶⁷ Such larger organisations are typically those involved in FDL litigation.

Organisational approaches also target the corporate entity and focus on whether a corporate culture may be permissive or conducive to the commission of an offence,²⁶⁸ and are considered more appropriate for offences requiring proof of criminal intent.²⁶⁹ Under the second approach, *respondeat superior*, crimes committed by an agent within the scope of his authority in order to benefit the corporation may create criminal liability for the

²⁶¹ Section 2.07 of the American Law Institute’s Model Penal Code (MPC) provides for a general scheme of corporate liability incorporating 4 different models of liability. See ILRC Corporate Offences (n 258) 414.

²⁶² ILRC Corporate Offences (n 258) 364. Footnote 20 details cases in which the identification doctrine has been applied by the Irish courts in civil actions for damages. At 832, the Commission notes that: *Re Employment Equality Bill 1996* and *CC (No 2)* (n 259) demonstrate that vicarious liability is not suitable for offences that are serious in nature, as the imposition of serious liability and opprobrium should generally only result where culpability is identified directly within the offender.

²⁶³ The UK recognises organisational approaches in the Corporate Manslaughter and Corporate Homicide Act 2007 section 1. ILRC Corporate Offences (n 258) 398-401.

²⁶⁴ Australian Criminal Code 1995 section 12. See also ILRC Corporate Offences (n 258) 408-414.

²⁶⁵ Canadian Criminal Code RSC 1985, c C-46, section 2, section 22(1) and 22(2). See also ILRC Corporate Offences (n 258) 408-414.

²⁶⁶ The Penal Code of 1994 section 121-2 introduced the concept of corporate criminal liability in French law, extended to all offences as from 31 December 2005 by Law No 2004-204.

²⁶⁷ Liz Campbell, ‘Corporate Liability and the Criminalisation of Failure’ (2018) 12(2) Law and Financial Markets Review 58. See also ILRC Corporate Offences (n 258) 357 stating: ‘This approach has proved overly simplistic and not fit for all purposes when considering many modern corporate structures if it was ever truly a faithful analysis of the decision-making processes of a corporate body’; 366 stating it creates ‘a paradox of size’.

²⁶⁸ Kaeb (n 71) 385 suggests this is a more accurate reflection of corporate wrongdoing which are often a function of systemic issues throughout the culture of the organisation.

²⁶⁹ Examples include Australian Criminal Code 1995 (n 264) and the UK Corporate Manslaughter and Corporate Homicide Act 2007 (n 263). For an analysis of organisational models in other jurisdictions see ILRC Corporate Offences (n 258) 392-416.

corporation. It is less appropriate for present purposes, as for the corporation it is ‘no fault’.²⁷⁰

From the foregoing, it is apparent that there are deficiencies in the provision for and enforcement corporate criminal liability under national law. These deficiencies are relevant to the liability of types of entities which are frequently involved in FDL litigation. A dual criminal/civil ‘tandem’ accountability effect is supported as appropriate and as required. Flowing from this, FDL litigation in conjunction with appropriately designed criminal offences, rather than alone, is considered.

2.5. EXTENDING ACCOUNTABILITY: FAILURE TO PREVENT OFFENCES

Appropriate provision for corporate criminal liability would advance accountability in Ireland, and reinforce a cause of action in FDL litigation. As the Baseline Assessment of the Irish National Action Plan on Business and Human Rights highlighted, ‘action on law reform proposals in relation to corporate criminal responsibility is long awaited.’²⁷¹ To achieve this would require the design of offences which overcome the issues with attribution in large organisations outlined above. Secondly, it requires offences which drive at deterrence and compliance in corporate behaviour. Appropriate models are considered and the introduction of an offence of failure to prevent human rights abuses in Ireland is explored.

2.5.1. Enhancing Corporate Entity Liability

In 2018 Irish Law Reform Commission (ILRC) recommended fundamental changes to corporate criminal liability.²⁷² It recognised that use of the identification method may favour complex organisations either avoiding liability, or incentivise management to ‘turn a blind eye’.²⁷³ Further, it has concluded that a level of uncertainty exists concerning tests

²⁷⁰ See Kaeb (n 71) 384; generally, Zerk (n 251); Campbell (n 267) 58. It is noted that interesting arguments concerning corporate vicarious liability which relate to notions of control in comparative FDL jurisprudence, and are explored in chapter 3 section 3.5.4.

²⁷¹ Baseline Assessment of Legislative and Regulatory Framework’ (n 128) 25. See also Law Reform Commission, Report on Corporate Killing LRC 77-2005 (October 2005).

²⁷² ILRC Corporate Offences (n 258) 364-378; 433. As the law stands in Ireland corporate bodies generally have the same capacity to commit a criminal offence as a natural person.

²⁷³ ILRC Corporate Offences (n 258) 366. See also Campbell (n 267) 57.

for holding corporate entities criminally liable.²⁷⁴ The recommendations of the ILRC a for new statutory scheme of derivative criminal liability centred on control or authority are briefly outlined.²⁷⁵ For the conduct element, it is the complicity model, including failure to prevent the offence.²⁷⁶ The construction is recommended as apt to the modern corporation because, correctly, it focuses on those persons with delegated operational control over a relevant policy area as opposed to the person simply executing the relevant policy.²⁷⁷ Acknowledging a reticence to ground liability in criminal law on the basis of ‘failure to prevent’ or omissions liability, the ILRC nonetheless legitimately considers omissions liability may be justified on the basis of the authority and control wielded by certain corporate agents.

Concerning primary liability of a corporate entity, as outlined, the identification doctrine is not adapted to, or appropriate for, large complex organisations such as multinational corporations, in which decision making is diffused and dispersed. The same complicating factors of diffuse decision making and control in large multinational corporations represent barriers to legal accountability for human rights abuses. The ILRC specifically recommends that conduct by way of an omission be attributed to the corporate body in the same way as it is to a natural person.²⁷⁸ The proposed scheme includes a rebuttable presumption that the

²⁷⁴ See ILRC Corporate Offences (n 258) 433. At 391, the main approaches for attribution are identified as: strict identification; rules of attribution; expanded identification; vicarious/strict liability; and failure to prevent. Due diligence, discussed in section 2.3, is identified by the ILRC as ‘another concept that can be used in a corporate liability regime modelled on the main approaches’.

²⁷⁵ *ibid* R 9.01. Under Recommendation R 9.05: ‘... the derivative scheme should provide for derivative liability to be imposed where a managerial agent’s culpable contribution to corporate offending is accompanied by one of the following fault elements: (1) intention or knowledge; (2) subjective recklessness or wilful blindness; (3) gross negligence; or (4) simple negligence or constructive knowledge. Per R 9.09 and 9.10, though proof of the corporate body’s offending will be a condition precedent for derivative liability, the scheme will not require proof of either a prosecution or conviction of the corporate body (or prescribed undertaking) for the substantive offence’. See also, 510.

²⁷⁶ *ibid* R 9.12 stating: ‘The conduct element of complicity by the agent includes positive acts of agreement to or approval, acquiescence, or failing to prevent the substantive offending..’ This construction is considered by the ILRC to be consistent the Supreme Court description in *The People (DPP) v Hegarty* [2011] IESC 32; [2011] 4 IR 635, 644: ‘Certain influential position holders... essentially those without whose involvement the offending conduct could not be endorsed or approved’.

²⁷⁷ See ILRC Corporate Offences (n 258) R 9.02.

²⁷⁸ *ibid* R 8.23. At 435, the report separates levels of culpability can be broken into three types (highest and most difficult to prove to lowest): subjective fault; objective fault; no fault (strict liability offences and

conduct element of the offence has been satisfied,²⁷⁹ placing the onus on the corporate defendant to demonstrate it took ‘all reasonable steps to prevent’.²⁸⁰ In order to render strict liability offences²⁸¹ constitutionally permissible, it advises a due diligence style defence may need to be provided.²⁸² As noted by the ILRC the use of a due diligence defence is supported,²⁸³ and is employed in other jurisdictions, for example, as a mitigating factor in sentencing.²⁸⁴

Working from these welcome recommendations forward, and in the context of the accountability gap explored in chapter 1, the deficiencies identified in routes to accountability provide justification for the further development of failure to prevent offences to be considered. For present purposes, extension of the failure to prevent model could respond to the deficiencies identified in existing mechanisms, and make a significant contribution to a holistic advance of criminal and civil mechanisms targeting the persistent gap in accountability for business-related harms.

absolute liability offences) For subjective fault-based offences it proposes a reformulated model of the identification model that involves proof of knowledge, intention, or recklessness and specifies that an employee or agent must have acted, at least in part, ‘for the benefit of’ or ‘within the scope of his or her activity’ for the corporate body. For objective fault-based offences which involve proof of gross negligence, negligence, unreasonableness, or comparable terms, the ILRC recommends liability on the model of *The People (Attorney General) v Dunleavy* [1948] IR 95. ILRC Corporate Offences (n 258). See also ILRC Report (Corporate Killing) (n 259) para 2.09 which recommended the introduction of a statutory offence of corporate manslaughter, concluding that the elements for gross negligence outlined in *Dunleavy* were suitable to apply to an ‘undertaking’ (a definition which includes corporate bodies) ‘without major alteration’.

²⁷⁹ ILRC Corporate Offences (n 258) 427.

²⁸⁰ *ibid* 426-427.

²⁸¹ *ibid* 566-567 states: ‘The distinction between strict and absolute liability is that, while neither category of offence requires the prosecution to prove fault on the part of a defendant, strict liability offences will include a defence, which will allow a defendant to demonstrate his or her lack of culpability in order to avoid liability, whereas absolute liability offences will not provide any such offence’.

²⁸² *ibid* 570.

²⁸³ *ibid* 392 confirming a due diligence defence is in use in Ireland in relation to statutory strict liability offences, citing Keane J in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267 quoted with approval by the Supreme Court in 2016 in *Waxy O’Connors Ltd v Riordan* [2016] IESC 30.

²⁸⁴ The United States Sentencing Commission provides that having an effective compliance and ethics program with which an organisation exercises due diligence to prevent and detect criminal conduct will act as a mitigating factor in the assessment of sentence. See The United States Sentencing Commission 2014 Guidelines Manual <<http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8>> accessed 31 December 2019.

2.5.2. Benefits of Failure to Prevent Offences

Attaching primary liability to the corporate entity for failure to prevent an offence is recommended as appropriate to address the issues with the identification model which inhibit enforcement.²⁸⁵ In recognition of its benefits, use of the failure to prevent model has been expanded in Ireland²⁸⁶ and in the UK.²⁸⁷ It is cogently argued to be more likely to be effective than orthodox criminal prosecution.²⁸⁸ The model drives at grounding responsibility of the corporate entity to ensure ‘offences are not committed in its name or on its behalf’.²⁸⁹ As such, considerations lying at the core of the failure to prevent model arguably support and bear symmetry with the development of legal principles of duty of care in FDL litigation.

Failure to prevent offences involve a fundamental change which approaches influencing changes to behaviour from proactive and preventative means.²⁹⁰ Such a prevent and protect model is at the basis of human rights provisions contained in IHRL, in soft law initiatives such as the UNGPs, and in the concept of HRDD. Rendering corporations liable for failure to exercise supervision in their commercial operations is validly considered to ‘more accurately target the real nature of corporate culpability’.²⁹¹ It offers a much needed, and appropriately designed, hard law route to change behaviour in order avoid human rights violations occurring in the first place.

²⁸⁵ *ibid.* See also Campbell (n 267) 57.

²⁸⁶ ILRC Corporate Offences (n 258) 592 referring to the enactment of The Criminal Justice (Offences Relating to Information Systems) Act 2017 and The Criminal Justice (Corruption Offences) Act 2018 <www.irishstatutebook.ie/eli/2018/act/9/section/18/enacted/en/html> accessed 16 December 2019.

²⁸⁷ *ibid* 570 referencing variations in; Penal Code of Finland, chapter 7 section 2; Swiss Penal Code Article 102.1 and 102.2; Canadian Criminal Code (n 265) section 22.2(c).

²⁸⁸ *ibid* stating arguing that a failure to prevent model is more straightforward than both the identification method and the gross negligence approach. On the gross negligence approach see also Law Reform Corporate Offences (n 258) 399 explaining that the approach of rendering the corporate body criminally liable for failure to observe a duty of care in the UK Corporate Manslaughter and Corporate Homicide Act 2007 (n 263) involved a cultural shift in how corporate bodies are treated in criminal law in the UK.

²⁸⁹ ILRC Corporate Offences (n 258) 570.

²⁹⁰ Campbell (n 267) 59. See also ILRC Corporate Offences (n 258) 574.

²⁹¹ *ibid* 570. From a similar perspective concerning economic crime, see also UK Ministry of Justice, ‘Corporate Liability for Economic Crime: Call for Evidence’ (2017) 17 <www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence> accessed 8 December 2019.

2.5.3. Models of Failure to Prevent Offences: UK Bribery Act 2010

An established and successful example of the failure to prevent approach is contained in Section 7 of the Bribery Act 2010 (UK), which introduced an extraterritorial offence under which a company may be liable for its omissions in failing to prevent bribery by persons associated with it. Appropriately, the corporate body is the principal offender, based on subjective fault requirements, for its failure to prevent an officer, employee, agent or subsidiary committing the offence.²⁹² Notably, the Act includes the rider that the offence must be committed with the intention of obtaining or retaining business for body corporate, or an advantage for it in the conduct of its business.²⁹³ As it is not necessary for the prosecution to prove fault on the part of the corporate body, it is a strict liability offence.²⁹⁴ Under the Act, the onus is on the organisation to prove it had ‘adequate procedures’ to prevent the conduct.²⁹⁵ In Ireland, a similar offence is contained in section 18 of the Criminal Justice (Corruption Offences) Act 2018. Under the Irish Act, a defence is available if the corporate body can prove it ‘took all reasonable steps and exercised all due diligence to avoid the commission of the offence.’²⁹⁶ This is a better designed formulation,

²⁹² ILRC Corporate Offences (n 258) 387 stating: ‘(....) section 7 does not require proof of knowledge, intent or subjective recklessness on the part of the corporate body’, thereby potentially resulting in the conviction of directors or senior officers who would otherwise have avoided liability due to an inability to prove intention or knowledge.

²⁹³ Section 12 (d) Criminal Justice (Corruption Offences) Act 2018 (n 286).

²⁹⁴ ILRC Corporate Offences (n 258) 385.

²⁹⁵ Article 7(2). The UK Ministry of Justice Guidance on the Act outlines 16 factors to be considered including the level of control over the activities of the associated person and the degree of risk that required mitigation. At 20-28, it includes six principles concerning procedures to prevent which ILRC Corporate Offences (n 258) 573 terms ‘flexible and outcome focused’: proportionate procedures, top level commitment, risk assessment, due diligence, communication and training and monitoring and review <www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed 6 December 2019.

²⁹⁶ See ILRC Corporate Offences (n 258) 592 noting that similar to section 7, liability under section 18 of the 2018 Act is based on organisational faults in a corporate body’s systems or policies and ‘may therefore be more effective in ensuring compliance and incentivising good governance’. The Report concludes that The Criminal Justice (Offences Relating to Information Systems) Act 2017 gives rise to identification doctrine concerns as the scope of the fault which leads to offending is confined to errors in supervision by persons at the high end of a corporate body’s managerial structure.

and appropriately demands corporations to meet a higher standard than the ‘adequate procedures’ formula under section 7 of the UK Bribery Act.²⁹⁷

After seven years of experience with the operation of the Bribery Act, the UK legislature extended the model in the Criminal Finances Act 2017, which targets failure to prevent facilitation of both UK and foreign tax evasion.²⁹⁸ Both offences are strict liability, with a defence based on having all ‘reasonable’ preventative procedures in place.²⁹⁹ In the Criminal Finances Act, the person must be providing services for or on behalf of the corporation. However, there is no requirement for the offence to be for the benefit of the corporate body, as was contained in section 7 of the Bribery Act. This feature of the 2017 Act is plausibly interpreted as both ‘augmenting accountability and favouring adoption of effective preventative policies’.³⁰⁰ In this aspect, it is arguably a better construction than s.18 of the Criminal Justice (Corruption Offences) Act 2018 in Ireland. Notably, the UK legislature do not seem concerned with arguments raised by the ILRC, that a formulation which does not require the offence to be for the benefit of the corporation, may lead to unfairness.³⁰¹ From the foregoing, in order to progress the development of appropriate offences, it is considered that failure to prevent offences could feasibly both hold corporations to the higher standard of ‘all reasonable steps and exercised all due diligence to avoid the commission of the offence’ in s.18, and not require the offence to be for the benefit of the corporate body.³⁰²

²⁹⁷ *ibid* 597 the ILRC recommends that a failure to prevent liability model should feature a general form of due diligence defence which will be satisfied if ‘a relevant person had taken all reasonable steps and to exercise all due diligence to prevent any relevant criminal activity’.

²⁹⁸ The guidance document on the Act, HM Revenue & Customs, ‘Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion’ (2016), para 1.3. explains that the policy objective of extending the ‘failure to prevent model’ was to ‘overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act on their behalf’.

www.tax.org.uk/system/files_force/file_uploads/160715%20Corporate%20offence%20of%20failure%20to%20prevent%20the%20criminal%20facilitation%20of%20tax%20evasion%20-%20CIOT%20comments.pdf?download=1 accessed 29 December 2019.

²⁹⁹ Campbell (n 267) 61 noting that It has been noted as odd that the ‘adequate procedures’ model of Section 7 of the Bribery Act was not continued, and the introduction of an arguably less onerous standard in the 2017 Act compared to the Bribery Act is attributed to lobbying by financial institutions.

³⁰⁰ Campbell (n 267) 61.

³⁰¹ ILRC Corporate Offences (n 258) 593 stating: ‘in circumstances in which the model does not require the contingent offending to be for the benefit of the corporate body, this may result in unfairness’.

³⁰² Section 2.5.2.1 above.

The question becomes why the failure to prevent model is not extended beyond economic style crimes.³⁰³ After a decade of failure to prevent in use, the benefits of this model should be extended to other areas,³⁰⁴ and in particular to abuses of human rights. Existing failure to prevent offences are using instrumental means to induce positive changes to corporate behaviour or ‘cooperation *through* criminalisation’.³⁰⁵ In a parallel, it is a grounding tenet in the field of business and human that commercial and other business enterprises engage in human rights due diligence (HRDD) to prevent the occurrence of violations. Imposing criminal liability for failure to prevent human rights abuses would align with, and forcefully underpin, corporate accountability. It responds to the opacity of decision making in multinational corporations which, as illustrated, continue to enjoy a certain ‘juridical elusiveness’.³⁰⁶

2.5.4. Extending to Failure to Prevent Human Rights Abuses

An offence of failure to prevent human rights abuses is advocated as a necessary component in any adequate response to the accountability challenges explored in this thesis. The particular value of this proposal will be illustrated using the model in the UK Bribery Act. In significant elements, it offers enhancements which relate directly to the challenges of accountability for corporate abuses of human rights.³⁰⁷ Crucially, subsidiaries are included in the ambit of the Act.³⁰⁸ A similar formulation concerning human rights abuses would impact upon the major challenge of separate legal personality in accountability.³⁰⁹ Secondly, the failure to prevent model fits with another key mechanism to enhance accountability, home state regulation with extra territorial effects.³¹⁰ Thirdly, it is consistent

³⁰³ Campbell (n 267) 66 considers the model is a logical route in that it replicates systems of compliance and due diligence in the AML and financial worlds generally.

³⁰⁴ *ibid* 2. Celia Wells, ‘Corporate failure to prevent economic crime – a proposal’ (2017) Crim LR 6 cogently argues that the failure to prevent model could ‘pave the way for the wholesale adoption of failure to prevent as a model for corporate liability’.

³⁰⁵ Campbell (n 267) 66.

³⁰⁶ Anna Grear and Burns H. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) Human Rights Law Review 28.

³⁰⁷ Section 8 of the Act provides that the capacity under which a person performs services on or behalf of the organisation is irrelevant.

³⁰⁸ ILRC Corporate Offences (n 258) 573.

³⁰⁹ Discussed in chapter 3.

³¹⁰ Discussed in sections 2.3 and chapter 1 section 1.3.5.

with widely accepted international initiatives such as the UNGPs,³¹¹ and would complement both existing corporate rights respect initiatives and causes of action in private law.³¹²

For Ireland, the ILRC has acknowledged the benefits of the failure to prevent model, including in deterrence and the promotion of compliance.³¹³ However, it considers the failure to prevent model should be used only in circumstances where it is not feasible to hold a corporate body or its directing minds liable for a substantive offence.³¹⁴ This stance is surprising, particularly as the ILRC Report confirms that:

It is also substantially easier to prosecute a corporation for failing to prevent criminal activity than prosecuting for carrying out the substantive criminal act itself, as the identification doctrine issues are avoided and the reverse burden provision under the failure to prevent model eases the burden on the prosecution.³¹⁵

Regarding use of failure to prevent as a generic scheme of corporate liability attribution, the ILRC concludes that to apply this model generally would place ‘an extremely onerous, strict liability general duty on the corporate body to prevent all offending’.³¹⁶ It considers that this could result in unfairness, particularly if the model does not require offending to be for the benefit of the corporate body. Respectfully, this is to tread too lightly. As discussed, there was no difficulty in removing this requirement from the UK Criminal Finances Act 2017. While it is valid to argue that there is a balance to be achieved in the responsibilities placed on corporations, the concerns raised by the ILRC have not inhibited the growing use of this model in the UK as a response to a well-documented need for more

³¹¹ UNGP 11 (n 6).

³¹² Discussed in chapter 3.

³¹³ ILRC Corporate Offences (n 258) 593.

³¹⁴ *ibid* 594.

³¹⁵ *ibid* 593.

³¹⁶ *ibid* 600 makes clear that in the event a general failure to prevent model of liability is adopted, it recommends it should focus on imposing criminal liability for organisational failings or failures in supervision of any ‘relevant person’ with policy making responsibilities within the corporation’s managerial structure. Further, it recommends that a corporate body should be held criminally liable for failures to prevent criminal activity only where such activity was carried out for the benefit of the corporate body or for the benefit of a ‘relevant person’ or a client of the corporate body.

effective mechanisms of corporate liability.³¹⁷ and potentially means prosecutors can use civil recovery procedures to freeze and then seize assets which are the product of gross human rights abuses. It is recognised that a level of ‘aversion’ to omissions liability concerning individuals is signalled by scholars.³¹⁸ Concerning business enterprises, it is reasonable to acknowledge that the modern corporation is typically well resourced and highly sophisticated. As such, it is well positioned to put in place procedures to prevent abuses. Indeed, as the Irish Law Reform Commission comments, ‘one could ask who or what else would have the opportunity to prevent such criminality’.³¹⁹

Regarding concerns voiced of the effectiveness of sanctions and enforcement under the failure to prevent model, it appears that with experience, these are being addressed.³²⁰ Perhaps due to a tendency to employ Deferred Prosecution Agreement (DPAs),³²¹ the first time that Section 7 of the Bribery Act was considered at trial was in 2018 in *R v Skansen*

³¹⁷ Extensions such as section 13 of the Criminal Finances Act 2017 (UK) cover any company which holds assets in the UK which are the direct or indirect product of gross human rights abuses. See UK Home Office Circular 004/2018, ‘Criminal Finances Act: unlawful conduct, gross human rights abuses or violations’ <www.gov.uk/government/publications/circular-0042018-criminal-finances-act-unlawful-conduct-gross-human-rights-abuses-or-violations> accessed 17 December 2019. See also Campbell (n 267) 60.

³¹⁸ Campbell (n 267) 63.

³¹⁹ Law Reform Corporate Offences (n 258) 580-581.

³²⁰ Campbell (n 267) 63-65; See Wells (n 304) 3 regarding the record of effectiveness of the offence of failure to prevent bribery in the UK. See *SFO v Standard Bank plc* Case No: U20150854 (2015) resulting in a DPA; *R v Sweett Group PLC*, Southwark Crown Court, 19 February 2016. See also UK Serious Fraud Office, ‘Sweett Group PLC ordered to pay £2.25 million after conviction’ <www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/> accessed 26 December 2019; *SFO v Rolls Royce Plc and Rolls-Royce Energy Systems Inc.* Case No: U20170036. The SFO website states that its investigation led to the company taking responsibility for corrupt conduct spanning three decades, seven jurisdictions and three businesses, for which it paid a fine of £497.25m. The investigation resulted in a DPA with the company and one of its subsidiaries in respect of bribery and corruption to win business in Indonesia, Thailand, India, Russia, Nigeria, China, and Malaysia. See UK Serious Fraud Office, ‘SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals’ (22 February 2019). <www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/> accessed 26 December 2019.

³²¹ Campbell (n 267) 64-66; Wells (n 304) 3. Up until 2018 charges were made or DPAs obtained by the UK Serious Fraud Office in nine cases against Standard Bank, Rolls Royce, GSK, Barclays, G4S and Serco, GPT, Alstom, ENRC and Airbus.

Interiors Limited.³²² A step up is evident in investigations and charges by the UK Serious Fraud Office under the Bribery Act.³²³ Notably, the 2019 report of the House of Lords *ad hoc* Select Committee on the Bribery Act³²⁴ termed it ‘much praised.’³²⁵ The recommendations of the Committee focus on implementation and enforcement issues, as opposed to fundamental alterations to the Act.

It is argued that the use of DPAs would not be appropriate in any extension of the failure to prevent model to human rights abuses.³²⁶ Campbell validly points to the opportunity which DPAs offer business interests both ‘to define, or at least influence legality’, by effectively offering a route of avoiding criminal prosecution.³²⁷ As regards failure to prevent human rights abuses, the nature of the harm, chronic lack of accountability and phase of development of corporate business rights respect would support the use of public prosecution, where deemed feasible. It is arguable that high profile cases against corporations for failure to prevent human rights abuses would have positive norming effects to deter and improve corporate culture. This would be logical to infer, on the basis of a study supporting that foreign direct liability litigation has positive regulatory effects.³²⁸ Other critiques of indirect omissions offences include possible concerns with due process

³²² *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018. Although this small company had adopted anti-bribery measures, they were viewed as insufficient and the defence of ‘adequate procedures’ was rejected by the jury in that case. Two individuals were also convicted and received custodial sentences. Law Reform Corporate Offences (n 258) 576 noting that no judicial direction or interpretation was provided on the meaning of ‘adequate procedures’ during the case.

³²³ The SFO has continued to extend its activity <www.sfo.gov.uk/2017/09/04/cambridge-symposium-2017/> and <www.sfo.gov.uk/category/news-releases/> accessed 26 December 2019.

³²⁴ ‘The Bribery Act 2010: Post Legislative Scrutiny’ (14 March 2019) <www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/> accessed 11 December 2019.

³²⁵ *ibid* 107.

³²⁶ The ILRC has recommended that DPAs should apply to similar offences as in the UK, so in principle DPAs could be applied to failure to prevent offences in Ireland. Law Reform Corporate Offences (n 258) 585.

³²⁷ Campbell (n 267) 64 stating: ‘This resonates with “responsive” regulatory theory which posits that regulation is most effective and legitimate where it is cooperative and engenders a perception that regulation is in the interests of the regulated’; 65 stating: ‘The option of a DPA might be regarded as a second bite of the cherry, so to speak, in that the corporate entity can still negotiate away from prosecution, after admitting the offence by virtue of not having adequate or reasonable procedures’. Allied to this is the issue that DPAs are not judicially reviewable in England and Wales.

³²⁸ Schrempf-Sterling and Wettstein (n 65).

rights for corporations and endorse use of a reverse burden defence of adequate procedures to prevent.³²⁹ Notably, neither are considered to be barriers by the ILRC, which concludes that the reverse onus does not compromise obligations under Article 6 ECHR.³³⁰ Independently of the recommendation in this thesis, the British Institute of International and Comparative Law has recommended a failure to prevent mechanism for Corporate Human Rights Harms for the UK,³³¹ and a corporate offence of failure to prevent is also envisaged in the Second Revised Draft UN Treaty.³³² The UK House of Lords House of Commons Joint Committee on Human Rights³³³ has recommended the introduction an offence of failure to prevent human right abuses.³³⁴ It is to be hoped scholars and advocates in Ireland may adopt a similar view and that the Oireachtas³³⁵ may consider the issue.

³²⁹ Campbell (n 267) 61-63. See also Wells (n 304) 6. Further, Law Reform Corporate Offences (n 261) 579.

³³⁰ Law Reform Corporate Offences (n 258) 580.

³³¹ British Institute of International and Comparative Law (BIICL), Peter Hood, Julianne Hughes-Jennett, Dr Irene Pietropaoli, Lise Smit 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms' (February 2020) <<https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms>> accessed 16 August 2020.

³³² Article 8(7) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>

³³³ UK Joint Committee on Human Rights and Business See 'Promoting responsibility and ensuring accountability' (2017) para 193 stating: 'We recommend that the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human right abuses for all companies, including parents companies, along the lines of the relevant provision of the Bribery Act 2010. This would require all companies to put place effective human rights due diligence processes (as recommended by the UN Guiding Principles,) both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided. It should include a defence for companies they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate this has been done'. At 15, it reports that in its response to the report, the UK Government, stated it 'has no immediate plans to legislate further in this area'.

³³⁴ This reference did not go unheeded by corporate law firms. See Herbert Smith Freehills, 'UK Government pushed to impose a duty to prevent corporate human rights abuse' (6 April 2017) <www.herbertsmithfreehills.com/latest-thinking/uk-government-pushed-to-impose-a-corporate-duty-to-prevent-human-rights-abuse> accessed 20 December 2019.

³³⁵ Legislative arm of government <www.oireachtas.ie/en/visit-and-learn/how-parliament-works> accessed 19 December 2019.

2.6. DEFICIENCIES IN EXISTING MECHANISMS & CONCLUSION

Existing mechanisms are no panacea for the magnitude of issues of accountability and access to remedy. This is exacerbated by the failure of all relevant actors, host states, home states, international institutions, and business, to leverage mechanisms to protect human rights and provide access to remedy for victims. As concerns non-state actors, international initiatives are in soft law, based on a non-legal responsibility standard and, ultimately, are non-enforceable. Provision within disclosure or reporting style regulation, for example non-financial reporting requirements, is not apt. Similarly, issue specific regulation in individual states, such as the Modern Slavery Act, have insufficient coverage, and are inadequate to ensure compliance within even that specific issue. The concept of HRDD in the UNGPs is an appropriate basis to work forward from. However, relying upon voluntary implementation of HRDD by commercial and other organisations has not delivered.

A sound rebalancing of competing interests is justified by the status and normative underpinnings of human rights. To progress, regulation of HRDD is required. As home state regulation with extraterritorial effect, it is proactive, appropriate, and proportionate. In the interests of both speed and consistency, it is welcome that a legislative initiative for HRDD has been instigated by the EU. While the form is as yet unclear, it seems likely to be a Directive. This underpins the need for Member States, including Ireland, to commence discussions on legislation for HREDD at national level. The protection of rights holders should be central, including specific provision for vulnerable communities, including indigenous communities and human rights defenders. It should be gender-responsive, and recognise that the risk of adverse impacts is further heightened in zones of conflict. It is fundamental that the movement is towards legal accountability, and that regulation of HRDD is linked to civil remedies and public enforcement measures. As home state regulation with extraterritorial effect including subsidiaries, linked to an appropriately designed due diligence defence, it would respond to a number of identified challenges to accountability and compliment recommendations in this thesis.

To render corporations are accountable in criminal law is fundamental. At international and at national level, there is a failure to do so.³³⁶ This spans the use of universal criminal jurisdiction; recognition of corporate liability under customary international law; and provision for corporate criminal liability under national law. Advances in state practice

³³⁶ Campbell (n 267) 57.

concerning corporate criminal liability at national level are counterbalanced by practical challenges with attribution of liability to the corporate entity. It is recognised to be particularly problematic in large complex organisations such as multinational corporations, which are typically the organisations involved in FDL litigation.

The introduction of an offence of failure to prevent human rights violations in Ireland was recommended, as a necessary component in any adequate response to the challenges of accountability. A decade of positive experience supports the use of a failure to prevent model. It is appropriate for extension to beyond economic crimes.³³⁷ Extending the successful failure to prevent model to human rights abuses responds to the need for more effective mechanisms of remedy, and supports states existing obligations to prevent abuses by private actors. In this way, it would work with the thrust of widely accepted international standards such as the UNGPs, developments in mandatory HRDD, and FDL litigation.

While the primary route to remedy is FDL litigation, a dual criminal/civil ‘tandem’ accountability effect is supported as appropriate and as required. Appropriate provision for corporate criminal liability would advance accountability in Ireland, and would reinforce a cause of action in FDL litigation.

³³⁷ A/HRC/41/43 (n 42) para 78, ‘...there are no sound reasons why [States] should hesitate to do so in the field of business and human rights’.

**PART II ACCESS TO REMEDY IN PRIVATE LAW AND
THEMES IN COMPARATIVE FDL JURISPRUDENCE**

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3.1. INTRODUCTION

It has been illustrated that multiple potential levers and avenues to accountability are either inoperative or significantly inhibited in practice. Chapter 2 concluded that initiatives within soft law are valuable in building awareness and normative acceptance. However, purely voluntary means have proven to be insufficient to substantially advance protection and protection. This is apparent in the low level of implementation of human rights due diligence (HRDD). It was argued that to progress, the EU should advance the introduction of mandatory HRDD. As outlined, an EU legislative initiative is anticipated in 2021. Concurrently, several EU Member States are progressing with the development of human rights due diligence legislation. Chapter 2 advocated that initiatives should be based on a substantive HRDD model, linked to remedies in civil law and underpinned with robust public enforcement provisions.¹ In national criminal law, problems were identified with attributing liability within large complex corporations, which are typically those implicated in foreign direct liability (FDL) litigation. The benefits of failure to prevent models in legislation were considered. The introduction of an offence of failure to prevent human rights abuses was recommended to address existing deficiencies, and work in tandem with FDL litigation.

As illustrated in chapter 2, the deficiencies in other mechanisms underpin the role and significance of foreign direct liability litigation (FDL). This chapter will consider normative and conceptual issues regarding the role of private law as a route to remedy for human rights harms. It will discuss how remedy for human rights came to dwell in private law, and the translation of human rights harms into the language of the law of tort. Recalling that the International Commission of Jurists considers private law to be ‘a highly imperfect tool that

¹ Increasingly, discussions of HRDD across media, civil society at lobbying and at political levels refer to mandatory Human Rights and Environmental Due Diligence (mHR&EDD). For example, the Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (July 2019) art. 1.2 ‘Human rights abuse’ is defined as including environmental rights.

<www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>
accessed 18 December 2019. See also
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>
accessed 1 September 2020.

is used for lack of a suitable alternative under public law’,² this chapter will consider the benefits of public law. As it stands, FDL litigation is the primary route for potential remedy, and this chapter will consider the normative basis, benefits, and challenges of parent company liability.

Section 3.2 will outline how it came to be that victims of human rights abuses are seeking remedy in civil law, and whether tort is apt at all. Section 3.3 will assesses the normative arguments for direct parent company liability, including the manner in which corporate law operates, and balancing benefits with accountability to the involuntary creditors negatively impacted. Section 3.4 will evaluate the risks to claimants of taking litigation in hosts states and the pull towards litigation in home states. The development of parent company duty of care, the role that FDL litigation inhabits within tort law, and its contribution to changing the behaviour of business is explored in 3.5.

3.2. HUMAN RIGHTS AND CIVIL LITIGATION: CONTEXT

Valid normative concerns are raised concerning employing private law as a means to redress human rights abuses by business. While claims in private law overlap with international human rights standards, they are justifiably criticised for failure to align with the normative underpinnings of human rights.³ In context, this is not unexpected. Even the line of litigation under Alien Tort Statute (ATS), which provided for civil damages for violations of international law, is criticised.⁴ At the core of such criticism is a view that private law remedies ‘do not fit the crime’,⁵ and the law of torts is ill-matched to remedy

² International Commission of Jurists, ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (2014), 18 <<https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights>> accessed 29 December 2019.

³ *ibid* International Commission of Jurists. See also Nathan J Miller, ‘Human Rights Abuses as Tort Harms: Losses in Translation’ (2016) 46 Seton Hall L. Rev. 505, 564. On the increasing role of private international law in global governance see Laura Pineiro and Xandra Kramer, ‘The Role of Private International Law in Contemporary Society: Global Governance as a Challenge’, (2014) 7(3) Erasmus Law Review 110.

⁴ Caroline Kaeb, ‘The Shifting Sands of Corporate Criminal Liability under International Criminal Law’ (2016) 49 The Geo. Wash. Int’l Law Review 351, 386.

⁵ Beth Stephens, ‘Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime’ (1997) 60 Alb. L. Rev. 579, 581–87 concluded that much of the resistance in other legal systems outside of the United States to impose compensatory damages (rather than criminal penalties) on corporate wrongdoers relates to the notion that ‘tort remedies [do not] fit the crime’.

the scale and nature human rights violations by business.⁶ Or is it? The response may be nuanced. Before turning to discuss whether tort law is apt, the question arises how litigation for human rights harms came to dwell in tort law. It is outlined, including indicating its relevance to the themes explored later in this thesis.

As outlined in chapter 1, human rights obligations are owed *erga omnes*.⁷ In litigation under the Alien Tort Statute (ATS), the torturer and slave trader were characterised as ‘*hostis humani generis*’ in *Filartiga v Pena Irala*.⁸ All states have an interest in the protection and enforcement of human rights. To fail to do so holds the potential to revert to the utter horrors of an Auschwitz or a Srebrenica. In the factual circumstances which are typical within FDL litigation, there are no viable human rights based causes of action.⁹ This is, of itself, problematic. To progress, a UN binding treaty would be significant.¹⁰ As it stands, it is not available to ground a cause of action.

Does it fall then to engineering causes of action in private law, such as in the tort of negligence, to step in and function as a ‘proxy’ pathway to remedy for rights holders? For as long as it lasted, the ATS permitted ‘foreign-cubed’ cases. These were civil proceedings taken by foreign citizens against foreign defendants for harms which occurred in a foreign state, on the basis the acts violated the ‘law of nations’. Koh characterises such ‘transnational public litigation’ as:

⁶ Steven Roper, ‘Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations’ (2018) 24(1) *Global Governance* 103 acknowledges that ‘for core crimes, the notion that these crimes could be monetized and views, essentially as a tort is repugnant to many in the human rights community. However, for over fifty years, the European Court of Human Rights has engaged in this very practice of providing a forum for civil redress for citizens of Council of Europe member states involving allegations of torture and other gross violations of human rights’.

⁷ Affirmed by the International Court of Justice in *Concerning Barcelona Traction Light & Power Co. Ltd* (Belgium v Spain) [1970] ICJ Rep. 3 at 32.

⁸ 630 F.2d 876 (CA, 2nd Cir. 1980) at 96 concerning the torture to death of 17 year old Joel Filartiga by a former Paraguayan police officer.

⁹ The conduct in question may breach norms of international treaties, but the obligations are not directly applicable against non-state actors as discussed in chapter 1 section 1.3. Related routes to remedy may be unavailable to victims in host states. For example, prior state consent is required to complaints from individuals under international treaties or bodies. Similarly, the limitations regarding jurisdiction of the International Criminal Court, with prosecution through national systems regarded as the primary mechanism for enforcement of international criminal law are discussed in chapter 1 section 1.3.6.

¹⁰ (n 1).

[...] the coupling of a substantive notion – individual state responsibility – with a familiar process – adjudication – and a normative goal – the promotion of universal norms of international conduct¹¹

As outlined, the ATS was unique. In effect, a 200 year old statute was re-engineered by human rights advocates desperately seeking a route to accountability and remedy for victims. It offered a statutory basis for a cause of action for human rights abuses violating customary international law. Notably, litigation under the ATS also arose in propitious surrounding circumstances in the United States, including an active tradition of public interest litigation.¹² ATS cases are characterised by Riponi as a ‘fusion’ of ‘international legal rights, with domestic adjudication and domestic judicial remedies’.¹³ Subsequently, the ATS route was closed off to foreign claimants.¹⁴ In practice compensation for victims in ATS litigation was not significant.¹⁵ Nonetheless, a crucial element for victims was public acknowledgement of the wrong inflicted:

[...] a means for providing a measure of self-respect, vindication, and recognition for the victims of serious violations of international human rights¹⁶

ATS litigation provided a means of seeking vindication, and placing pressure upon states, which fail to enforce their obligations to protect human rights.¹⁷ As such, third country claims in tort are considered to promote both inter-party and international justice,¹⁸ and to contribute to the interpretation of the content of international human rights norms in

¹¹ Harold Hongju Koh, ‘Transnational Public Litigation’ (1991) 100 Yale Law Journal 2372.

¹² John Terry ‘Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 109, 110. + others

¹³ See Sandra Riponi, ‘Grounding a Cause of Action for Torture’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 373. See also Miller (n 3).

¹⁴ See chapter 1 section 1.3.3. outlining that for decades claimants utilised the ATS to seek remedy. Direct parent negligence liability for harm caused by a subsidiary has yet to be recognized as a valid cause of action in the United States.

¹⁵ Terry (n 12) 112; See also Michael D. Goldhaber, ‘Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard’ (2013) 3 UC Irvine Law Review, 132.

¹⁶ Terry (n 12) 112.

¹⁷ Anne C. McConville ‘Taking Jurisdiction’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 157, 176.

¹⁸ See Riponi (n 13) 374.

national courts.¹⁹ For three decades between 1990 and 2018, litigation concerning alleged human rights abuses was brought in the United States (US) under the Alien Tort Statute (ATS).²⁰ Still, no other state has developed a civil recovery regime specifically for gross human rights abuses.²¹ Notably, on the basis of the challenges that private law would face in the future, Moran, argued that the inattentiveness of tort theorists to ATS cases was a mistake, stating:

¹⁹ *ibid* 381; At 380 discussing the application of international law standards as the rules of decision in domestic courts.

²⁰ 28 U.S. Code § 1350 (June 25, 1948, Ch. 646 62 Stat. 934) (ATS), ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The Alien Tort Statute offered a possibility for foreign nationals to claim compensation in the US Federal Courts relating to torts which are also violations of international law or emanating from an international treaty to which the US is a party’. See further Beth Stephens, ‘Corporate Liability: Enforcing Human Rights Through Domestic Litigation’ (2001) 24 *Hastings Int’l & Comp. L. Rev.*, 409; Anita Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their impact on the Liability of Multinational Corporation’, (2002) 20 *Berkeley J. Int’l L.* 91; David Kinley and Juno Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *VJIL* 931; Robert C. Thompson, Anita Ramasastry, and Mark B. Taylor ‘Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes’ (2009) 40 *Geo. Wash. Int’l. L. Rev.* 841; Jenifer Zerk, ‘Corporate liability for gross human rights abuses; towards a fairer and more effective system of domestic law remedies’ Report prepared for the Office of the High Commissioner for Human Rights, (2012) <<http://www.ohchrhumanrights.org>>.

Beth Stephens, ‘Human Rights Litigation in U.S. Courts against Individuals and Corporations, from 1789 to the Present’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014); Anna Grear and Burns H. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) 15 *Human Rights Law Review*; Gwynne Skinner, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (2015) 72 *Washington and Lee Law Review* 1769; Nora Mardrossian, ‘Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of their Foreign Subsidiaries,’ (2015) <<https://ssrn.com/abstract=2607592>> accessed 17 December 2019; Kaeb (n 4).

²¹ See Stephens, ‘Enforcing Human Rights Through Domestic Laws’ (n 20) 409 emphasising that no other country has a statute that creates a specific statutory claim for human rights violations.

They should rank among the most interesting of all contemporary tort cases, but tort theorists don't write about them...and leading and comprehensive textbooks on the law of torts don't even mention them. But this is only the beginnings of the puzzle.²²

For this thesis, and its exploration of the development of legal principles and assessment of the feasibility of FDL litigation in Ireland, Moran makes a seminal point.²³ Her analysis of the courts' reasoning in *Filartiga* highlights that it referred to the 'innate superiority' of international law, while also admitting that for sources of normativity, it could have equally relied on American constitutional law,²⁴ or could have reached the same result applying the tort law of Massachusetts.²⁵ Further, writing in 2001, she envisaged such transnational cases as pulling towards a more cosmopolitan world, in which the approach within the tradition of common law was well adapted. The process Moran identifies includes having regard to principles or norms of international law, the development of the common law, interpretation, and application of the law of the forum of harm, and judicial reference to the values enshrined within a Constitution.²⁶ There are parallels within this thesis. Emerging norms and legal principles, the development of tort law, and the influence of the Irish Constitution and will be explored in chapters 5 and 6.

²² Mayo Moran, 'An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law' in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001), 661-662.

²³ Ibid 670-675.

²⁴ Ibid 671 fn. 57.

²⁵ Ibid 675 citing Woodcock DJ in *Xuncax v Gramajo* 886 F.Supp. 162 (D.Mass. 1995) 182 n.22; 675 discussion on conflicts and US ratification of the UN Convention against Torture and interpretations of the Fifth, Eighth and Fourteenth Amendments to the US Constitution; 678-680.

²⁶ Discussed further in the context of Ireland in chapter 6. See also Riponi (n 13) 384, citing PC Jessup, *Transnational Law* (Yale University Press 1956) 113; Edward M. Hyland 'International Human Rights Law and the Tort of Torture: What Possibility for Canada' in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 401, 423-424. In the context of development of the common law by reference to national constitutions, Hyland identifies that while the Canadian Supreme Court has not recognised that private parties do not owe each other constitutional duties, the development of the common law to allow for a tort of torture, 'depends, in part, on the degree to which judges will be moved to develop the common law to ensure that it conforms to the values of the Charter'; at 428 on the 'development of the common law under the influence of Charter values.' Further at 437 stating '...we may have no choice but to appeal to, and place faith in, the evolution of a more cosmopolitan judicial culture in Canada'.

3.2.1. Is Tort Law Concerned with Human Rights?

At the core of the research question is the interface of human rights and tort in domestic legal systems.²⁷ As discussed below, human rights standards and liability in domestic tort law can be seen to share a common purpose, ‘to provide redress for harm and deter others from certain conduct’.²⁸ This thesis advocates that in leveraging private law remedies to remedy human rights violations, we are in the realm of the imperfect but not in the realm of the incompatible. It goes firstly to, a cause of action or no cause of action, and secondly to re-thinking the role of tort in the protection of human rights.

Human rights protections are included in national constitutions or bills of rights and in domestic laws, including those which transpose international treaties and instruments into national law. Writing on the relationship between human rights and private international law, Hirschboeck reflects that in Europe there is a ‘rich interplay’.²⁹ He attributes this to, firstly, the Charter of Fundamental Rights of the European Union (CFREU)³⁰ which applies when Member States are implementing EU-wide private law rules.³¹ Secondly, to ‘a broad jurisdiction grant which has been interpreted expansively’.³² The fundamental rights in the European Convention on Fundamental Rights and Freedoms (ECHR) form part of the general principles of EU law.³³ Thus EU courts are bound by Article 1 of the ECHR when

²⁷ Discussed further in chapters 5 and 6.

²⁸ Sophie McMurray and Simon Rice ‘Lifting the Veil: Human Rights Law and Tort Law in Australia’ (2005) 70 Precedent 27.

²⁹ Mark Hirschboeck, ‘Conceptualizing the Relationship between International Human Rights Law and Private International Law’ (2019) 60(1) HILJ 181.

³⁰ Charter of Fundamental Rights of the European Union (CFREU) (adopted 26 October 2012, entered 1 December 2009) O.J. C 303 of 14 December 2007, art. 51.

³¹ Including Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) [2012] OJ L 351; Council Regulation (EU) No 864/2007 on the law applicable to non-contractual obligations [2007] (Rome II).OJ L 199 (Rome II).

³² Hirschboeck (n 29) 189.

³³ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, 213 UNTS 222. Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114. See Paul Craig and Gráinne de Búrca *The Evolution of EU Law* (2nd edn Oxford University Press 2011) 397-398 stating that ‘under article 53 of the CFREU the level of protection provided by the Charter must be at least as high of that of the ECHR’. See also Cees van Dam, *European Tort Law* (2nd edn, Oxford University Press 2013) 33 stating that ‘in addition to the rights contained in the ECHR, the

applying foreign law, including in foreign direct liability litigation.³⁴ Thirdly, Article 6 of the ECHR has influenced approaches to jurisdiction, as evident for instance in European states which have adopted *forum necessitatis* rules under domestic law.³⁵ The implication drawn conceptualises international human rights law as a source of normative guidance in domestic legal orders.³⁶

While the ECHR does not contain tort rules,³⁷ States Party are required to provide access to effective remedy under national law.³⁸ Tort is one of the avenues utilised by states to comply with their obligations under the ECHR. In effect, within national systems ‘human rights are to a great extent protected by tort law rules’.³⁹ Thus, tort law and human rights are considered to be ‘brothers in arms’.⁴⁰ This aspect of tort law is arguably under aired. Van Dam takes this further, arguing that the standard of care in tort law can be viewed as a ‘universal standard for decent human behaviour; the basic rule of humanity’.⁴¹ While this may initially appear to be misalignment or overstatement, inherent in tort is a measure of debate as to purpose encapsulated by Binchy:

There is huge uncertainty as to what tort law is trying to achieve. Judges are circumspect and academics completely divided. Is the goal of imposing tort liability

Charter includes other rights and principles resulting from the common constitutional traditions of EU Member States, ECJ case law, and other international instruments’.

³⁴ Hirschboeck (n 29) 188.

³⁵ *ibid* 189 stating: ‘These provisions grant jurisdiction to otherwise unavailable national courts when bringing the proceedings abroad would be “unreasonable” or unacceptable’.

³⁶ *ibid* 191.

³⁷ (n 33) arts 2-18 define the rights and freedoms to be secured by the Contracting Parties within their jurisdiction. Additional Protocols to the Convention only apply for the States for which the Protocols have entered into force. The framework of tort law particularly concerns art. 2 (right to life), art. 3 (protection against torture or inhuman or degrading treatment or punishment), art. 5 (right to a fair trial and access to justice), art. 8 (right to private life and home), art. 10 (Freedom of expression) and art. 1 of the First Protocol regarding the protection of property.

³⁸ *ibid* art. 13 provides that everyone whose Convention right or freedom is violated shall have an effective remedy before a national court. In part states discharge this duty by maintaining a national tort law system.

³⁹ Van Dam *European Tort Law* (n 33) 26 stating: ‘If national law does not provide an effective remedy, the victim has a free-standing and separately actionable right under the ECHR, as in an *arguable claim* with respect to the violation of a Convention right’.

⁴⁰ Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 JETL, 243.

⁴¹ *ibid* 237.

to sanction wrongdoing? To compensate victims? To engage in a process of distributive justice, or, more radically, social justice?⁴²

Tort law offers flexibility, including potentially providing a cause of action when human rights-based causes of action are quite simply not available. It is pertinent to recall that the genus of tort law was ambitious. Laplante's analysis of the history of tort law in the context of vindication of rights⁴³ concludes that 'the concept of rights is deeply embedded in tort law'.⁴⁴ She identifies that early in its development it was apparent that 'the wrong in tort lawsuits relates back to the violation of a primary right'.⁴⁵ For example, the tort 'false imprisonment' arises out of the general primary right of liberty. Laplante argues that this conception of tort law later declined, as 'history buried the foundational core of tort law as a victim-focused system of rights protection'. In agreement with her view, there is, appropriately, a 'rights revival' in tort law,⁴⁶ which (re)positions tort not to 'repair', but to vindicate a primary right *via* a secondary right to an action. Foreign direct liability cases potentially operate in such a manner, where no rights based cause of action is available. This is not to assert that causes of action in tort are a perfect response to violations of a primary right.

3.2.2 Are Tort Remedies Apt?

It is cogently argued that criminal prosecutions are more effective routes to accountability and deterrence than civil proceedings for which compensation is the primary tangible 'output'.⁴⁷ On this more common interpretation, at a binary level private law is more

⁴² William Binchy 'Tort Law in Ireland: A Half Century Review' (2016) 56 *Irish Jurist* 199, 203. See also Robert Stevens, *Tort and Rights* (Oxford University Press 2007); Val Corbett 'The promotion of human dignity: a theory of tort law' (2017) 58 *Irish Jurist* 121 stating 'Existing theories such as corrective justice and distributive justice paint part of the tort picture but fail to account for the whole'. On the relationship between tort law theory and human rights law see Jane Wright, *Tort Law & Human Rights* (Hart Publishing 2017), 27.

⁴³ Linda Laplante, 'Human Torts' (2017) 39(1) *Cardozo Law Review* 245.

⁴⁴ *ibid* 280.

⁴⁵ *ibid* 285 citing as an example *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 99 (N.Y. 1928).

⁴⁶ *ibid* 292.

⁴⁷ Jan Wouters and Cedric Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction' (2009) 40 *Geo. Wash. Int'l L. Rev.*, 956, 961. See also Brief of the European Commission on Behalf of the EU as Amicus Curiae in support of Neither Party in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165345 18 At 18 the brief arguing

concerned with redressing the balance of harm between defined parties *ex ante*, using monetary compensation as the medium of exchange. Stein gives pause concerning how domestic legal systems position harm across a spectrum. In his view, ‘a low level of public interest... will explain the migration of crimes into the torts area’.⁴⁸ Ideally, as advocated in chapter 2, human rights protections and remedy are not lodged uniquely in one or the other sphere, and public and private law work in reinforcing combination. Thus, where claims for compensation may be allied to criminal trials as in France,⁴⁹ this is considered to obviate the need for FDL type actions in that system.⁵⁰ This is also a function of access to an established public law remedy, given that France provided for the criminal liability of legal persons before the revolution of 1789.⁵¹

Whether tort remedies can be considered apt also goes to a perception that ‘public and private law differ in process, remedy, and moral censure’.⁵² If we accept the position that the element of moral censure is lacking in private law, how does tort as a vehicle of redress align with the normative underpinnings of human rights? As ‘maximally weighty moral claims’ owed *erga omnes*, human rights merit and require robust means of protection and

that national courts should use the full ambit of their powers to provide remedy, including non-pecuniary elements of compensation such as injunction, apologies, rehabilitation and restitution *in integrum* to affected environments <www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/> accessed 3 December 2019.

⁴⁸ Alex Stein, ‘The Domain of Torts’ (2017) 117(3) *Columbia Law Review* 535, 601.

⁴⁹ An action civile can only be successful if the criminal case is successful.

⁵⁰ Peter Muchlinski, and Virginie Rouas, ‘Foreign direct-liability litigation’ in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014), 377 citing Vivian Grosswald Curran, ‘Globalisation, Legal Transplantation and Crimes against Humanity: The Liepitz Case’ (2008) 56 *Am. J. Comp. L.* 363, 379.

⁵¹ See further Guy Stessens, ‘Corporate Criminal Liability: A Comparative Perspective’ (1994) 43(3) *The International and Comparative Law Quarterly* 493.

⁵² Van Dam *European Tort Law* (n 33) 146-147 considers French law as more concerned with the question of damages with mainly strict liability rules in the area of death, personal injury and property damage. Fault pays hardly any role in this area and the whole system is intended to provide distributive justice: ‘In other words, the German and French systems are primarily based on notions of equality and solidarity and are more inclined to the neighbourhood principle that made Lord Atkin famous in England’. See also Malcolm Evans and Rod Morgan ‘Torture: Prevention versus Punishment?’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 135 considering that tort actions involve *de facto* punishment objectives as much as restitutionary ones.

redress.⁵³ With cause, Miller argues that in ATS proceedings seeking to package human rights abuses as tort harms to gain access to courts, much worth pursuing is ‘lost in translation’.⁵⁴ It is validly to argue that torture cannot be mapped onto assault and battery without losing in essence. He considers that framing human rights abuses as tort harms may disempower victims and is less likely to advance precedent and support change in practices.⁵⁵

It is relevant to victims that egregious harms are not characterised in law in a manner which duly reflects the impacts upon them. In criminal law, the relevance of symbolism is recognised in the notion of ‘fair labelling’, rendering it appropriate, for example, to pursue a charge of grievous bodily harm over the tort of battery, though both may have occurred.⁵⁶ As Scott expresses, claims relating to human rights can be expressed directly, for example based on the right not to be tortured,⁵⁷ or indirectly, relying on a recognised cause of action, for example in the tort of battery.⁵⁸ Notably, a more apt nominate tort, for example a tort of torture, is typically not available.⁵⁹ Flowing from this, Stephens has argued that domestic common law courts are able to recognise tort liability for violations of international criminal law or human rights norms,⁶⁰ and it is not relevant if the forum of harm does not recognise such a tort.⁶¹

Such concerns regarding the use of private law remedies are not without value or foundation. Advancing legal accountability lies at the centre of this thesis, and it is

⁵³ See Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015).

⁵⁴ Miller (n 3) in the context of litigation under ATS (n 20).

⁵⁵ *ibid.*

⁵⁶ See Graham Virgo, ‘Characterisation, Choice of Law and Human Rights’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 325, 335.

⁵⁷ See Craig Scott in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) Introduction 6 stating ‘the prohibition on torture was selected as both a focus and as an exemplar for other core human rights’.

⁵⁸ Craig Scott, ‘Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 45, 62 distinguishes between indirect claims as ‘surrogate’ or ‘instrumental’.

⁵⁹ Note Virgo (n 56) 241-342 considers that the effect of the UK Human Rights Act 1998 is the ‘springboard for the recognition of a nominate tort of torture’, and therefore in England torture is a tort.

⁶⁰ Stephens Tort/Crime 587.

⁶¹ See Virgo, (n 56) 331; Jennifer A. Orange ‘Torture, Tort Choices of Law and *Tolofson*’ in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001) 291, 311.

recognised there are significant arguments in favour of public law solutions for human rights violations.⁶²

A clear advantage of criminal law in practical terms is that costs are borne by the organs of the state rather than by victims, or are not dependent on NGO funding as test cases. Further, criminal law is local law. In tort proceedings, applying the law of the *locus delicti* under private international law rules may adversely impact claimants.⁶³ In private law, it is will of the claimant drives the process. In principle, the standard in a tort case is less onerous than the standard of beyond reasonable doubt in criminal cases. The nature of the battle to advance such cases in practice is explored further in later chapters. Criminal law is apt to advance accountability, assuming that an appropriate offence exists and that both prosecution and enforcement are pursued. Herein lies the rub. As stated in the OCHCR Accountability and Remedy Report:

Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions.⁶⁴

As illustrated in chapter 2, despite welcome evolution in provisions for corporate criminal liability in domestic systems, significant challenges persist. Allied to this, it was argued that there is a disproportionate and unjustifiable focus on economic crimes by multinational corporations combined with a regrettable lack of attention to bolstering corporate criminal liability for abuses of human rights. In this context, the crux of the matter is less whether tort is deemed to be the perfect answer, but whether suitable alternatives exist. The availability of an appropriate cause of action has been illustrated to be problematic. For example, to advance in *Guerrero v Monterrico Minerals plc*, thirty Peruvian litigants based their claim against the Peruvian police, allegedly operating under instruction from the corporation, in the tort of trespass to persons as opposed to torture.⁶⁵

⁶² As argued in Chapter 2.

⁶³ Applicable law is discussed further in chapter 4.

⁶⁴ Office of the High Commissioner for Human Rights, 'Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses' (2014) (OHCHR ARP) www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx accessed 11 December 2019.

⁶⁵ [2009] EWHC 2475 (QB).

From the foregoing, combined with the conclusions concerning gaps in accountability in chapter 2, it is apparent that causes of action in private law represent the only potential route to legal accountability.⁶⁶ FDL litigation concerns litigation against a parent company, as the anchor defendant in a home state, concerning the activities of a subsidiary located in another state.⁶⁷ The normative arguments supporting such parent company liability in FDL litigation are outlined.

3.3. PARENT COMPANY LIABILITY: NORMATIVE MATTERS

3.3.1. Corporate Law

The twin corporate law concepts of separate legal personality and limited liability have significant practical consequences for holding corporations accountable for human rights violations. In complex multinational organisations these effects are multiplied. As Grear and Weston highlight multinational corporations ‘present a structural density that makes accountability extremely difficult to construct, granting them a juridical elusiveness’.⁶⁸ Multinational corporations may well encompass hundreds or thousands of legal entities, each separate and distinct in law.⁶⁹ Indeed, corporate groups are deliberately structured,

⁶⁶ See generally UN Human Rights Council ‘Improving Accountability and Access to Remedy for Victims of Human-Rights Related Abuses: Report of the United Nations High Commissioner for Human Rights’; A/HRC/32/19 (10 May 2016) para 22; Amnesty International, ‘Injustice Incorporated, Corporate Abuses and the Human Right to Remedy’ (2014) <www.amnesty.org/en/documents/POL30/001/2014/en/> accessed 10 December 2019. See also Surya Deva, ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ in Amnesty International, ‘Injustice Incorporated, Corporate Abuses and the Human Right to Remedy’ (2014), 24 <www.amnesty.org/en/documents/POL30/001/2014/en/> 18 October 2019.

⁶⁷ See Scope chapter 1, section 1.5.2.

⁶⁸ Grear and Weston (n 20) 28.

⁶⁹ Tort law uses the doctrine of separate legal personalities but, for example, EU competition law uses the single economic entity doctrine. For more Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 99-100. A similar approach to abuses of human rights action taken in private law as in competition law would have huge impacts. It was weakly suggested by the European Union Agency for Fundamental Rights, but limited merely to suggesting the enhanced capacity of the European Commission should be kept in mind, for instance, in relation to dissuasion (deterrence) through damages in a business and human rights context. European Union Agency for Fundamental Rights ‘Improving Access to Remedy in the area of Business and Human Rights (2017) <<https://fra.europa.eu/en/opinion/2017/business-human-rights>> accessed 29 December 2019.

inter alia, to both hive off and silo risk with a view to insulating the parent company.⁷⁰ In this manner, the corporate group form facilitates the evasion of accountability, enabling parent companies to ‘avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct’, as recognised in General Comment 24 of the UN Committee on Economic, Social and Cultural Rights (CESCR).⁷¹

3.3.2. Involuntary Creditors

The quest for economic advantage underpins the establishment of subsidiaries in other markets by a parent company. Business is motivated by arbitrage opportunities which yield access to cheaper materials, labour or other benefits compared to the home state. The result is often subsidiaries lodged in developing host states. Host states requiring investment inflows and hard currency may be either unwilling or unable exercise their duty to protect human rights. Effectively, they are often zones of weak governance relative to the home state of the parent company. As Mares emphasises, within such zones of weak governance which are characterised by ‘dysfunctional legal systems and power differentials’, the twin doctrines exacerbate systemic vulnerability.⁷² If lives and livelihoods are negatively impacted by the operations of the subsidiary in the host state, the parent company is insulated from claims.⁷³ In law, such structuring is above board. It is common commercial

⁷⁰ See further Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 378, 387.

⁷¹ ‘State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ para. 42. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawQrJx3hlK8Odk6DUwG3Y> accessed 29 December 2019.

⁷² See Radu Mares, ‘A Gap in the Corporate Responsibility to Respect’ (201) 36 Monash U.L. Rev. 36,72 stating ‘rights holders in developing countries such as local communities and worker are often in a state of clear *vulnerability* given dysfunctional legal systems and power differentials ... Business activities, when undertaken irresponsibly, carry well documented risks of abuse of the entire catalogue of human rights, as Ruggie correctly noted; this *situation of peril* is palpable for workers, trade unionists, local communities’. See also Deva ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ (n 66).

⁷³ If the parent company operates via a branch in the home state, the home state has jurisdiction on the basis of nationality. Rachel Chambers, ‘An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional dilemma raised/created by the use of the extraterritorial techniques’ (2018) 14(2) Utrecht Law Review 30.

practice for multinational companies to structure group operations such that risks remain both outside the jurisdiction where the parent is domiciled, and claims are limited within the ambit of a thinly capitalised foreign subsidiary.⁷⁴ Multiple mechanisms may be employed within groups to maximise benefits and limit liability, such as simply regular profit-taking from a subsidiary, loading costs from the parent to reduce subsidiary profits, or structuring inter-company loans.⁷⁵ In agreement with Morgan, in such circumstances limited liability ‘endorses a corporation’s ability to have its cake and eat it’.⁷⁶

Thus, scholars validly perceive company law operating as a ‘shield to deny, avoid, or delay legal liability’ of a parent for human rights violations involving subsidiaries.⁷⁷ The fully loaded cost of operations is channelled away from shareholders who have consciously and willingly entered into a risk/return investment contract, and potentially foisted onto third parties. Those most exposed are the ‘involuntary creditors’ such as a local community directly affected by corporate activities, whether as individuals or as a group.⁷⁸ As is evident from the English Court of Appeal decision in *Adams v Cape plc*,⁷⁹ in the absence of clear evidence of fraudulent abuse of the corporate form courts will respect the doctrine of separate legal personality.⁸⁰ The operation of the twin doctrines of corporate law in this field is appropriately characterised as ‘encouraging irresponsibility by way of increasing moral hazard’.⁸¹ It can be expected to not have passed unnoticed by the legal advisers of

⁷⁴ See further Rolf H. Weber and Rainier Basich ‘Liability of Parent Companies for Human Rights Violations of Subsidiaries’ (2016) EBLR 669.

⁷⁵ For example, through dividend distribution, substantial charges for intellectual property, services provided by the parent, or high cost inter-company loans.

⁷⁶ Philip Morgan, ‘Vicarious liability for group companies: the final frontier of vicarious liability?’ (2015) 31(4) *Journal of Professional Negligence* 280.

⁷⁷ Deva ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ (n 66) 21.

⁷⁸ Peter Muchlinski ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22(1) *Business Ethics Quarterly* 146, 152 explaining that the employees (both of the company and of its suppliers and distributors) are the closest example as they are most likely to be exposed to violations of fundamental rights in the workplace.

⁷⁹ [1990] Ch 433 (CA). See also Simon Baughen, *Human Rights and Corporate Wrongs, Closing the Governance Gap* (Elgar 2015) 180-181.

⁸⁰ For discussion see Baughen (n 79) 180-182.

⁸¹ Muchlinski (n 78) 152. See also Deva ‘Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?’ (n 66); Gwynne Skinner, ‘Parent Company Accountability: Ensuring Justice for Human Rights Violations’ (2015) *ICAR* 7-8.

sophisticated corporations that in *Chandler v Cape plc*, group structuring proved ineffective in that it did not successfully neutralise the risk of direct action against the parent company.⁸² From the perspective of a multinational corporation and its advisers, it is foreseeable that one response is simply more effective structuring to guarantee to hive off risk.

3.3.3. Benefits and Accountability

For present purposes, it is assumed that investment decisions are rational and multinational corporations enter foreign markets with the aim of accessing benefits which increase return on investment.⁸³ A well-founded position advocates balancing such benefits with accountability.⁸⁴ As Skinner argues, in circumstances where corporations reap benefits from the operations of subsidiaries while simultaneously ‘externalising environmental and human rights costs’, a strong ethical argument can be made that victims are provided with a remedy.⁸⁵ Multinational corporations can be considered expert at pricing risk. They have not ‘priced in’ the full extent of the cost of their operations on human rights, as on the environment, nor has the law compelled them to do so.

This juxtaposition of benefits and accountability is illustrated in *Dominic Liswaniso Lungowe v Vedanta Resources Plc (Vedanta)*.⁸⁶ The claim is primarily based in the tort of negligence, against a parent company domiciled in the United Kingdom (UK) and its majority owned Zambian subsidiary concerning waste from a mine operated by the subsidiary which allegedly caused pollution to local waterways, personal injury to local residents, damage to property and loss of income. In the English High Court⁸⁷ Coulson J was presented with a parent company with significant resources, and a subsidiary with limited assets which was potentially unable to compensate claimants in a mass tort action. On the basis that the parent company had greatly profited from its subsidiary’s activities,⁸⁸

⁸² *Chandler v. Cape plc* [2012] EWCA Civ. 525 (Chandler CA). In this case, the subsidiary Cape Products was judgement proof and its employer’s liability insurance did not cover asbestosis. Discussed further in chapter 5 section 5.2.

⁸³ For a similar view see Mardirossian (n 20).

⁸⁴ Stephens, ‘Enforcing Human Rights Through Domestic Laws’ (n 20).

⁸⁵ See generally Skinner, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (n 20).

⁸⁶ *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 (Vedanta CA).

⁸⁷ *Lungowe v Vedanta Resources Plc* [2016] EWHC (TCC) 975 (Vedanta HC).

⁸⁸ On this theme see Grosswald Curran (n 50) 427.

and a perceived risk it might put its subsidiary into liquidation in order to avoid compensating nearly 2,000 claimants,⁸⁹ Coulson J stated, ‘since it is [parent] Vedanta who are making millions of pounds out of the mine, it is Vedanta who should be called to account’.⁹⁰ Another factor in parent company behaviour is ‘conduct by commission’,⁹¹ where a parent grants autonomy to a subsidiary in situations of vulnerability of which the parent should reasonably have been aware,⁹² and the parent company was well placed to intervene to prevent the harm from occurring. When the corporate veil operates to nullify liability ‘as a matter of routine’,⁹³ as UN CESCR highlights, it is the normative underpinnings of human rights that are subverted.

These normative arguments support imposing liability on the parent company. They legitimately seek equity for rights holders negatively impacted by the operation of the twin doctrines of corporate law, and to mitigate against structuring which may externalise risks and impacts. They highlight the necessity to reinject balance between the benefits accruing to parent companies from foreign subsidiaries and accountability when involuntary creditors are negatively impacted. They are consistent with trends towards increased transparency and growing investor concern.⁹⁴ They relate to states’ horizontal obligations under IHRL to prevent abuses by non-state actors. Having outlined the normative

⁸⁹ *Vedanta* (HC) (n 87) [13].

⁹⁰ *ibid* [78].

⁹¹ Radu Mares, ‘Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe on Human Rights’ in R Mares (ed), *The UN Guiding Principles on Business and Human Rights - Foundations and Implementation* (Martinus Nijhoff 2012), 10-12. See also (n 72).

⁹² *ibid* 9. While the position foreign subsidiaries as opposed to affiliates is the focus of this research, Mares argues in favour of parent liability for negligence should the parent company elect to work with a contractor which poses foreseeable risks of human rights abuse, or the parent company fails to take particular precautions when its contractor is involved in abnormally dangerous activities.

⁹³ UN CESCR General Comment No. 24 ‘State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ para 42 (10 August 2017) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Sza b0oXTdImnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zS Ubw6ujlnCawQrJx3hlK8Odk6DUwG3Y>> accessed 14 November 2019.

⁹⁴ See generally E&Y, ‘Is your nonfinancial performance revealing the true value of your business to investors?’ (2017) <[www.ey.com/Publication/vwLUAssets/EY_-_Nonfinancial_performance_may_influence_investors/\\$FILE/ey-nonfinancial-performance-may-influence-investors.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Nonfinancial_performance_may_influence_investors/$FILE/ey-nonfinancial-performance-may-influence-investors.pdf)> accessed 29 December 2019. See also chapter 2 section 2.3 concerning corporate performance against human rights benchmarks.

arguments for parent company liability, adopting an approach of direct parent company liability will be explored and justified.

3.4. PARENT COMPANY LIABILITY: CONSIDERATIONS

In attempting to render a parent company accountable for negative human rights impacts linked to the activities of a subsidiary, there are two general approaches. Firstly, on the basis of derivative or indirect liability, whereby the faults of the subsidiary are attributed to the parent. The second approach is based upon the direct liability of the parent company, for its involvement in the negative impacts of its subsidiary located in another state.

The derivative liability approach seeks to prove the subsidiary was acting as the agent of the parent company.⁹⁵ Under this approach claimants face a heavy burden, and scholars agree that in practice very few succeed.⁹⁶ To ground agency involves a close examination of the factual relationship between the parent and the subsidiary,⁹⁷ or courts considering that the separation of legal personalities does not correspond to economic reality. Grear and Weston highlight that ‘there is no closed list of circumstances allowing ‘piercing of the veil’ nor are they hierarchized’.⁹⁸ For present purposes, it is not anticipated that the doctrines of separate personality and limited liability will be reconfigured. Moves in this direction would be likely to face stiff opposition from business interests.⁹⁹ The second approach seeks to hold the parent company liable based on its own primary breach of a duty

⁹⁵ See Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1(1) Business and Human Rights Journal 41, 48 stating: ‘Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company, if the parent exercises such a degree of control on the operations of the subsidiary that the latter cannot be described to have any will or existence of its own, and that treating the two entities as separate, thus allowing the parent to shield itself behind the subsidiary would sanction fraud or lead to an inequitable result. The corporate veil may be disregarded, and parent and subsidiary treated as one when a subsidiary is held to have been the “alter ego,” where the subsidiary is found to have acted as its agent regarding the conduct giving rise to proceedings, or where the courts find that parent and subsidiary acted as a single economic enterprise’.

⁹⁶ See Baughen (n 79) 158-171.

⁹⁷ See de Schutter (n 95) 48 confirming the focus in on factual control by the parent, such that majority or complete ownership, or shared officers and directors will not be sufficient.

⁹⁸ Grear and Weston (n 20) 28. Noting that command responsibility was referenced in cases under the Alien Tort Statute in the United States, *inter alia*, *Kadic et al v Karadzic* 70 F3d. 232 (2nd Cir. 1995). See also *Prosecutor v Furundzija* ICTY Case No. IT-95-17 (10 December 1998) [250].

⁹⁹ Commentators argue that the approach of the courts may be both less predictable and could possibly generate incremental change over time. Deva, ‘Fictitious Separation, Real Injustice’ (n 66) 24.

of care. It is grounded in a duty on the parent company to ensure its actions/inactions or policies do not cause foreseeable harm.

3.4.1. Why a Direct Parent Company Duty of Care Approach?

In terms of impact upon the behaviour of a parent company, and by extension on compliance, derivative and direct approaches to liability can be distinguished. An approach based on derivative liability of the parent arguably disincentivises it to monitor subsidiaries in order to ensure human rights are respected.¹⁰⁰ By contrast, under a direct liability approach, a parent company has an interest in actively monitoring the potential human rights impacts of its subsidiaries.¹⁰¹

A significant advantage of a direct liability approach is it does not involve piercing of the corporate veil,¹⁰² thereby circumventing the uncertainties and challenges which that involves.¹⁰³ The alleged actions or omissions of the parent company occur in the home state of its domicile, such that national courts can exercise jurisdiction on the basis of nationality and territoriality. This facilitates establishing jurisdiction over the parent and concerns of international comity associated with the exercise of extraterritorial adjudicatory jurisdiction.¹⁰⁴ In this way, the concept of duty of care operates to connect liability to the parent company in the home state.¹⁰⁵

3.4.2. Factors Impacting Forum

Anchoring claims in the home state of a parent company offers strategic advantages for claimants, such as relative forum advantages and depth of assets of the parent company. As illustrated below, this route is more attractive than the alternative of pursuing a thinly capitalised subsidiary, in a zone of weak governance involving barriers with access to

¹⁰⁰ De Schutter (n 95) 52.

¹⁰¹ *ibid.* Further, de Schutter argues the proposed approaches can be relatively easily transposed to the other modes of trans nationalisation of a company's activities which are based on contractual relationships with suppliers, sub-contractors, franchisees, other than an investment nexus.

¹⁰² *Chandler (CA)* (n 82) (Arden LJ) [81]. See also de Schutter (n 95) 50.

¹⁰³ See section 3.2 and 3.3 above.

¹⁰⁴ Ekaterina Aristova, 'Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction' (2018) 14(2) *Utrecht Law Review* 6, 10 considers it debatable whether tort liability claims constitute a true example of extraterritorial adjudicatory jurisdiction; Wouters and Ryngaert (n 47) 952 consider foreign direct liability cases as in the nature of 'domestic measures with extraterritorial implications'.

¹⁰⁵ Aristova (n 104) 8.

justice.¹⁰⁶ However, proceeding with FDL litigation in the home state is not pushing against an open door. In assessing jurisdiction, the courts of home states of multinational corporations give weight to nexus to the that state and potential conflicts arising with parallel cases relating to the same issues, as well as the risk of denial of justice.¹⁰⁷ These issues, and the challenges of joining the foreign defendant to proceedings in the home state are explored further in later chapters.

3.4.3. Litigation in Host States

The risk of denial of justice in the host state has weighed heavily in comparative jurisprudence, and is discussed further in chapter 4 and 5. Even when cases succeed in host states, the battle to enforce judgments against multinational corporations obtained in a host state may prove insurmountable. The *Aguinda v Chevron* case is an emblematic example. This long running and complex series of cases in multiple jurisdictions is outlined in summary to illustrate.

The background is damage to the Ecuadorian Amazon rainforest from the discharge of toxic waste during oil extraction by Texpet, a wholly owned subsidiary of Texaco Inc. Over the period 1964 to 1990, Texpet dumped over 18 billion gallons of toxic waste into the Amazon, amounting to 30 times more than the crude oil released in the Exxon Valdez disaster.¹⁰⁸ Open air storage and burning of debris caused air contamination, and permanent contamination to farmland, forests, and water. The Cofan, Secoya, Siona, Kichwa, and Huaorani indigenous communities are reported to have lost c.95% of their ancestral land, suffered cancer and other health related issues, and seen dramatic declines in their populations.¹⁰⁹

Over a period, the Ecuadorian State acquired the Texpet interests, and it was nationalised in 1992. As part of this, Texpet was released from responsibility for its environmental

¹⁰⁶ See *Vedanta* (CA) (n 86) (Simon LJ) [96].

¹⁰⁷ *ibid* [118-131], [133]. A further layer of concern is added when domestic tort law is the vehicle to redress harm suffered in another state, raising concerns over the advisability of remote justice. See also Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: The issue of jurisdiction' in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 29.

¹⁰⁸ See 'The lawsuit behind *Crude*', <<https://amazonwatch.org/documents/crude-press-kit/sundance-q-and-a.pdf>> accessed 20 October 2020.

¹⁰⁹ *ibid*.

impacts and the costs of remediation. In 1993, a group of 30,000 indigenous citizens from Ecuador took the *Aguinda* case under the ATS.¹¹⁰ At the time, procedures for class actions were not available in Ecuador, and there was no legal basis in Ecuador for a claim for compensation and remediation of environmental damage. In 2002, the case under the ATS was dismissed based on *forum non conveniens* in the US, under the condition that Chevron agreed to litigate the issues in Ecuador.¹¹¹ In 2003, a related group of claimants commenced the *Lago Agrio* complaint in 2003 in Ecuador, when the 1999 Environmental Management Act rendered class actions possible. In 2011 an Ecuadorian court found Chevron, which had merged Texaco in 2001, liable for damages and penalties and ordered it to issue an apology.¹¹² Chevron appealed the ruling and in 2014, Ecuador's highest court deemed Chevron to be at fault for the environmental pollution and fined it \$9.5 billion.¹¹³ For present purposes, the issue is enforcement. In a series of actions in Canada, Brazil, and Argentina, the claimants attempted to enforce the judgement. Chevron sought a pre-emptive order against its enforcement in the US, and commenced an Investor State Dispute Settlement arbitration. The Investor State Dispute Settlement aspect continues.¹¹⁴ The history of the related proceedings in multiple countries includes claims of fraud, and undermining of the Ecuadorian justice system. Chevron has never apologised to the communities, nor paid the \$9.5 billion judgement against it by the Supreme Court of Ecuador. The human rights lawyer for Ecuador's Frente de Defensa de la Amazonía in the 2011 proceedings remains under house arrest in New York. Twenty eight years of litigation, including judgment obtained in Ecuador, has failed to yield compensation or satisfactory remediation of the lands in the view of the indigenous communities concerned.¹¹⁵

¹¹⁰ Seeking compensation and punitive damages for human rights violations and environmental damages

¹¹¹ *Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002).

¹¹² *Aguinda v. Chevron Corp.*, No. 002-2003, Super. Ct. of Nueva Loja (Feb. 14, 2011) (Ecuador).

¹¹³ *Maria Aguinda Salazar y otros v Chevron Corporation*, Corte Nacional de Justicia (11 December 2013) (Ecuador).

¹¹⁴ See <<https://www.business-humanrights.org/>> accessed 20 October 2020. The communities' case in Canada was rejected in 2019. In September 2020, the District Court of The Hague rejected the request from the Government of Ecuador to annul the arbitral award which invalidated the judgment against Chevron. In 2014, Ecuador filed a complaint with the International Criminal Court (ICC), claiming that Chevron's presence and environmental destruction in South American was a crime against humanity, but the ICC did not accept the case.

¹¹⁵ See Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, (2013) 1(2) *Stanford Journal of Complex Litigation* 429; Tineke Lambooy,

3.4.4. Transplanting Litigation

While most impactful upon the communities and their environment, the *Aguinda* case is indicative of the tensions and barriers involved in litigation spanning host and home states. It is an example of the potential issues with litigating cases in a host state, and indicates that obtaining a judgment against a subsidiary of a multinational corporation in a host state may be possible. However, ultimately, justice may be more realisable in a home state. Like ATS cases, in FDL litigation the forum moves from the host state to the home state of the defendant parent company. It is not self-evident that host states may take issue with litigation in home states, indeed the contrary. In cases against corporations alleged to have aided and abetted the apartheid regime, the incumbent South African President Thabo Mbeki initially objected to courts in the US hearing claims which were subject to South African domestic remedies.¹¹⁶ The South African Government later withdrew its objections,¹¹⁷ and the Minister of Justice and Constitutional Development wrote to the concerned US court stating:

The remaining claims are based on aiding and abetting very serious crimes, such as torture and extra judicial killing committed in violation of international law by the apartheid regime... The Government of South Africa... is now of the view that this [US] Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.¹¹⁸

Aikarerini Argyrou and Mary Varner, 'An analysis and practical application of the Guiding Principles on providing remedies with special reference to oil companies' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 329, 337-341.

¹¹⁶ President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation tabling of the Report of the Truth and Reconciliation Commission (15 April 2003) <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030610presrec.htm>> accessed 29 December 2019.

¹¹⁷ OHCHR 'Business and Human Rights: Enhancing Accountability and Access to Remedy Project 2: Roles and Responsibilities of Interested States', 15 <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf> accessed 29 December 2019.

¹¹⁸ *ibid* referencing letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development of the Republic of South Africa (September 2009) to the Honourable Judge Shira A. Scheindlin US District Court.

It is arguable that in the context of business related human rights violations, concerns over international comity may be overstated or objections influenced by economic or political self-interest. Concerning the alleged dumping of toxic waste in the Ivory Coast in the Trafigura scandal, Wouters and Ryngaert highlight ‘there is no evidence whatsoever that [the Ivory Coast] considered the court action in England on behalf of the 12,500 Ivory Coast citizens to raise sovereignty concerns’.¹¹⁹ Indeed, they maintain that developing countries such as the Ivory Coast ‘have no interest in protecting the Western corporation in the dock’.¹²⁰ It is apparent that the perspective of the forum of litigation may differ. For example, in *Jesner* the Supreme Court of the United States repeatedly stressed the case had caused diplomatic tensions with the Kingdom of Jordan.¹²¹

From one perspective, allowing cases to proceed in home states is an escape valve, a potential route to avoid denial of justice *per se*,¹²² yet there are some warning bells in comparative jurisprudence that time will be called on access to remote justice. Although allowing the *Vedanta* case to proceed in the English Court of Appeal, Simon LJ acknowledged that ‘exporting cases’ is ultimately neither ideal nor sustainable.¹²³

Until the building blocks of access to justice, including technical and legal expertise and funding are accessible for victims’ in host states, it can be considered that exporting remedy will remain a cross cutting issue. The requirement of exhaustion of local remedies recognises that ‘in-country’ justice as opposed to ‘remote justice’ may be more likely to support necessary change.¹²⁴ If litigation occurs in a forum far from the physical location

¹¹⁹ Wouters & Ryngaert (n 47) 955.

¹²⁰ *ibid.*

¹²¹ *Jesner v Arab Bank plc* No. 16-499, 584 U.S. (2018).

¹²² Discussion of *Garcia v Tahoe Resources Inc* [2017] BCCA 39 in section 3.6.2. Practical considerations are also pertinent, as OHCHR (n 66) highlighted ‘(…) there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary’s activities, such as where the subsidiary has been dissolved, is insolvent or has insufficient resources to meet a legal claim for damages’.

¹²³ *Vedanta* (CA) (n 86) [133].

¹²⁴ See further Donald Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 Am. J. Int’l L. 142, 147 and 157. In practice the EU has pointed to *forum necessitatis* grounds to draw jurisdictional limits in situations where local redress is either unavailable or obviously futile. As discussed in chapter 1 section 1.3.3. See Brief of the European Commission on Behalf of the EU as Amicus Curiae in support of Neither Party *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165345, 33-34.

of victims, there is arguably scant incentive for regimes in zones of weak governance to take the necessary measures to improve domestic systems of accountability. On the one hand is the question of how the ends of justice are best served, and on the other, the balance between exporting remedy and a real risk of denial of justice. In practice, there can be no justice for victims if they cannot access justice in host states and home states will not adjudicate such cases.

Transplanting proceedings engenders a need for national courts in both host and home states to respond, and to adjust in a reflective and structured manner. As Grosswald Curran argues concerning *M. A. et consorts Lipietz ci Préfet de la Haute-Garonne et Société nationale des chemins de fer français*, (*Liepitz*):¹²⁵

Where trans nationalization of law leads courts to alter national law in order to salvage it from becoming hostage to other countries' usurpations, the price of national control becomes national change, and national sovereignty considerations may overshadow important countervailing considerations to change that merit attention and deliberation.¹²⁶

As portrayed, there is a risk that this process within national courts occurs as reactive rather than proactive, such that the courts system in a jurisdiction may fail to do justice to itself. For example, the dissenting judgment of Sotomayor J in *Jesner v Arab Bank plc*, in jurisprudence in the United States under the ATS, points to the extent to which territorial reasoning and national interest has trumped advancing accountability and the vindication of fundamental rights.¹²⁷

Within FDL litigation in home states, an appropriate response would be for advocates, legislatures, and national courts to proactively come together to reflect on the avenues of legal accountability for human rights harms linked to commercial organisations operating in that state. This would be a route for parties in Ireland to adopt. It is to be hoped that in Ireland, the Oireachtas will engage across a number of fronts including mandatory HRDD, offences of failure to prevent human rights abuses,¹²⁸ and advancing legal accountability

¹²⁵ No. 0104248, Tribunal administratif de Toulouse, 6 juin 2006 <[www.ta-toulouse.juradm.fr/ta/toulouse/index ta ac.shtml](http://www.ta-toulouse.juradm.fr/ta/toulouse/index%20ta%20ac.shtml)> accessed 29 December 2019.

¹²⁶ Grosswald Curran (n 50) 379.

¹²⁷ Chapter 1 section 1.3.3.

¹²⁸ Discussed in chapter 2.

for human rights violations by business, *inter alia*, as a jurisdiction for FDL litigation.¹²⁹ This would require the engagement of the judiciary, practitioners, and academics in legal accountability, and can be expected to be all the more pressing as the UK leaves the EU.

Finally, as cases continue to arise predominantly in common law jurisdictions, it is relevant to ask whether they are more supportive fora for FDL litigation, and equally whether a civil law character in a legal system is a barrier to transplantation of FDL cases. A study of FDL cases by Muchlinksy and Rouas concludes that the civil law nature of a system is not decisive of itself.¹³⁰ Rather, influential factors ‘pull’ proceedings towards common law jurisdictions. These factors include the strength and motivation of activist lawyers, non-governmental organisations (NGOs) and prosecutors to support such claims.¹³¹ A further positive factor identified in common law jurisdictions is the use of public interest litigation as a route to social justice which in turn is, amongst other things, considered to be heavily influenced by the composition of the bench and its underlying beliefs.¹³² The themes of denial of justice and forum of proceedings are developed further in the discussion of procedural and practical barriers and comparative jurisprudence in chapters 4, 5 and 6.

3.5. FDL LITIGATION AND PARENT COMPANY DUTY OF CARE: REFLECTIONS

3.5.1. Shared Purposes of Tort and Foreign Direct Liability Litigation

It is cogent to conclude that human rights abuses with transnational elements are operating under tort law by default of fit for purpose and robust remedies in domestic criminal law allied to avenues for compensation or restitution for victims.¹³³ Both normative and practical issues flowing from this have been presented.¹³⁴

A more nuanced view, supported in this thesis, is that to deem tort not apt is to understate and to undervalue the role of private law remedies in human rights violations.¹³⁵ Firstly, to recall Laplante, it is to revisit tort in the light of its role in vindicating primary rights.

¹²⁹ Discussed in chapter 6.

¹³⁰ Muchlinski and Rouas (n 50).

¹³¹ *ibid* 377.

¹³² *ibid* 380.

¹³³ See section 3.2.

¹³⁴ Chapters 2 and 3. Procedural and practical barriers are discussed in chapter 4.

¹³⁵ See Stephens, ‘Do Tort Remedies Fit the Crime’ (n 5).

Secondly, tort performs a regulatory function in society, characterised by Morgan as, *inter alia*, ‘to improve standards, help eliminate at least some poor practices and operators, and correct harm where individual rights have been violated’.¹³⁶ Faced with the reality of complex multinational groups tort law must adjust in order to acquit this regulatory role, and has the flexibility to do so.¹³⁷ FDL litigation supports in this regulatory function. The crux here is that although it does not use traditional human rights language, civil litigation has a role to support and vindicate human rights standards. It provides a much needed cause of action, including for harms under public international law, against corporations. It operates to influence behaviour,¹³⁸ consistent with Schrempf-Stirling and Wettstein’s review of fifty-five FDL cases which identified regulatory ‘side-effects’ effects flowing from these actions.¹³⁹ The study findings support the proposition that the threat of FDL litigation operates both as a deterrent to abuses and drives beneficial changes in corporate respect for human rights.¹⁴⁰

Consistent with actions in tort, FDL litigation drives at financial compensation for harm and restitution. In practice, these cases are functioning to press multinational corporations to adopt and sustain a standard of care for employees, communities, and the local environment where their subsidiaries operate which is coherent with standards in home states. Increasingly courts internationally are justifiably investigating dissonances if they discover lower standards are applied by a corporation in its operations outside the confines of the territorial home state.¹⁴¹ The thinking behind FDL litigation aligns with significant

¹³⁶ Morgan (n 76) 278.

¹³⁷ *ibid* 279. For a similar view see John Tully, *Tort Law in Ireland* (Clarus Press 2014), 4.

¹³⁸ See further Chambers (n 73) 25.

¹³⁹ Judith Schrempf-Stirling and Florian Wettstein, ‘Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies’ (2017) 145 *Journal of Business Ethics* 545.

¹⁴⁰ *ibid* 549 stating firstly that no corporation in the sample published a CSR report before the first corporate human rights lawsuit. According to the Centre for Business and Human Rights, 68 % of companies sued for human rights violations have issued public documents addressing human rights, compared to an overall percentage of 7% .

¹⁴¹ *Choc v Hudbay* Superior Court of Justice Ontario (June 29, 2015) (Graham J) [9] concerning determination of the standard of applicable to the defendant’s management of their security personnel in Guatemala could plausibly be based on its policies governing such personnel at their Canadian based mining operations. The Court ordered that Hudbay also reveal its security policies at other Canadian based mining operations.

and increasing trends towards increased transparency in business¹⁴² and investor focus.¹⁴³ Growing awareness of the responsibilities of home states to regulate the transboundary activities of multinational companies operating out of their territories is a further supporting factor.¹⁴⁴ One much needed practical manner for governments to encourage respect for human rights is to open channels for legal accountability. In the widest regulatory sense, the EU and Member States should not have to be reminded to do so. As US Supreme Court Justice Sotomayor advocated if markets fail to, the law must exact a price,¹⁴⁵ in this case to affirm that lives and communities are not a zero-cost externality of international business. As Enneking argues, FDL cases have a unique role due to their transnationality and distinct public interest nature which places them at the intersection of public and private law.¹⁴⁶

In comparative jurisprudence there is a growing subset of FDL actions, based on the tort of negligence, which include elements of public interest, of moral censure, and deliver regulatory benefits. These actions are based upon the principle that a parent company duty owes a of care to third parties negatively impacted in the course of its operations. The principles of duty of care in tort are widening their embrace. Without purporting to be a perfect or total solution to access to remedy for human rights violations, section 3.2. concluded that these actions are compatible with the multiple purposes of tort law.

It is recognised that rising numbers of FDL cases has not translated into rulings on compensation for victims. The vast majority of cases have been dismissed pre-trial or

¹⁴² Recent examples include Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (NFRD) [2014] OJ L 330, 1–9; French loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (French Duty of Vigilance Law) <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=I> accessed 2 December 2019.; Swiss initiative available at <<http://konzern-initiative.ch/?lang=en>> accessed 2 December 2019.; Proposed German legislative initiative available at <<https://germanwatch.org/de/download/14745.pdf>> accessed 29 December 2019.

¹⁴³ EY, 'Tomorrow's Investment Rules' (n 94).

¹⁴⁴ United Nations Guiding Principles on Business and Human Rights <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 29 December 2019.

¹⁴⁵ *Jesner* (n 121) [34].

¹⁴⁶ Liesbeth Enneking, 'Judicial Remedies: The issue of applicable law' in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 46-47.

settled out of court.¹⁴⁷ This pattern gives support to scholars' views that (Western) courts demur in taking jurisdiction on the basis of the 'complex and novel tort claims' in such litigation.¹⁴⁸ There are next to no judgments on the merits allowing the development of workable precedent.¹⁴⁹ Within the EU the vast majority of cases have been taken in the English courts.¹⁵⁰ While the development of legal theory underpinning such claims over two decades is considered impressive,¹⁵¹ recent rulings on jurisdiction in three major cases in the English Court of Appeal delivered contrasting results as to whether an arguable case had been made that the parent company owed a duty of care.¹⁵² Two were appealed to the UK Supreme Court.¹⁵³ Judgment in the first, *Vedanta*, was handed down in 2019,¹⁵⁴ and supports the view that legal principles concerning parent company duty of care are gaining in coherence.¹⁵⁵

3.5.2. The Contribution of Foreign Direct Liability Litigation

FDL litigation is best to be seen as a thread within a holistic search for prevention, mitigation, and remedy of corporate abuses of human rights. It is not the whole answer, and

¹⁴⁷ See Liesbeth Enneking, 'Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability' (2012), 117 <www.wodc.nl/404.aspx?aspxerrorpath=/onderzoeksdatabase/2531-maatschappelijkverantwoord-ondernemen-in-het-buitenland.aspx> accessed 29 December 2019. In the best interests of claimants, the advice of litigators will also influence settling of cases and as a result there is a lack of workable precedent.

¹⁴⁸ Skinner 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' *Violations of International Human Rights Law* (n 20) 1843. A related chilling factor in Skinner's view is: 'The law of when and how a duty of care is created is in flux and appears to be in turmoil'. The principles concerning when and how a duty of care on a parent company arises are, in effect, under construction. Until precedents are established and settled, flux creates both uncertainty and opportunity.

¹⁴⁹ Discussed in Chapter 5. *Alfred Friday Akpan v. Royal Dutch Shell plc (Akpan)* ECLI:NL: GHDHA: 2015:3587 (17 December 2015) (CA). See also Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' *Utrecht Law Review* 10 (2014), 47 <www.utrechtlawreview.org/articles/abstract/10.18352/ulr.256> accessed 29 December 2019.

¹⁵⁰ Wouters and Ryngaert (n 47) 949.

¹⁵¹ See Goldhaber (n 15) 132.

¹⁵² Jurisdiction denied in *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 (*Okpabi* CA) and *AAA v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 (*Unilever* CA). Jurisdiction allowed in *Vedanta* (CA) (n 86).

¹⁵³ The *Okpabi* case was cleared for appeal to UK Supreme Court July 2019.

¹⁵⁴ *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (*Vedanta* SC)

¹⁵⁵ See further discussion in chapters 4 and 5.

its use engenders detractors.¹⁵⁶ However, with so few channels of redress even potentially viable,¹⁵⁷ it is unsurprising that FDL litigation in EU Member States is markedly on the rise.¹⁵⁸ Nonetheless, it remains valid to question what more than thirty years of arduous and costly litigation has contributed.

One measure of value is the range and scale of abuses tabled in the overall course of litigation in this field generally. Under the ATS, US courts found that corporations could be held responsible for complicity in the slave trade, genocide, war crimes, and other offences of universal concern. Courts accepted the principle of corporate liability for complicity in state acts of torture, summary execution, crimes against humanity, cruel, inhuman, or degrading treatment, prolonged arbitrary detention, and violation of rights to life, liberty, security of person, and peaceful assembly. In the course of litigation amici curiae briefs were filed by NGOs, churches, victim support groups, trade associations and legal scholars as well as governments.¹⁵⁹ Equally, three decades of litigation under the ATS evidence a stop-go, meandering, and in the end arguably circular journey as this unique route to remedy ultimately faltered.

Claimants in FDL cases remain subject to disproportionately lengthy, complex, and costly jurisdiction battles.¹⁶⁰ For litigators, these cases are challenging and unwieldy from a practical perspective as they generally involve advising thousands of victims in physically distant and possibly remote locations. Although the majority of cases have been dismissed pre-trial or settled out of court,¹⁶¹ there is evidence that victims taking

¹⁵⁶ See Skinner 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (n 20) 1848.

¹⁵⁷ See Mardirossian (n 20).

¹⁵⁸ Enneking 'Judicial Remedies' (n 146) 41-43.

¹⁵⁹ Grietje Baars, 'It's not me, it's the corporation: the value of corporate accountability in the global political economy' [2016] 4(1) London Review of International Law 127.

¹⁶⁰ On the pressing need for proportionality, see *Vedanta* (SC) (n 154) (Briggs LJ) [6]-[14].

¹⁶¹ A study by the Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 - February 2019 'Access to legal remedies for victims of corporate human rights abuses in third countries

<[www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>

accessed 27 December 2019, 19-20 stating: 'Out of the 35 cases concerning allegations of human rights abuses in third countries by EU based companies, 12 cases were dismissed (2 of which were partially settled), 17 are still ongoing (1 of which was partially settled), 4 cases were fully settled out of court with payments

proceedings have better prospects of financial compensation overall.¹⁶² This served to underpin the crucial nature of the jurisdiction battle in FDL litigation as corporations may be motivated to settle only when jurisdiction has been decided in favour of the claimants in the home state.¹⁶³ At that point, negative public relations and other potential consequences of an eventual judgment against the parent company in its home state will motivate it to settle, and litigators will take instruction should claimants not wish to continue the battle in court.¹⁶⁴

Schrempf-Stirling and Wettstein's study reveals that in not one case were the forty-one multinational companies involved sanctioned by the courts.¹⁶⁵ This anaemic record of accountability is echoed in the OCHCR Accountability and Remedy Report:

Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of "adequate, effective and prompt" reparation for harm suffered.¹⁶⁶

Is this an 'interim' balance sheet of FDL litigation as a route to advance accountability? Is there another lens or metric with which to assess its value? By the nature of human rights abuses, they are much better prevented than remedied. This leads into another issue highlighted by Dine, that litigation strategies *in toto* may ultimately divert attention from the fundamental reforms necessary to change legal regimes comprehensively.¹⁶⁷ While recognising concerns over the ground gained by FDL as warranted, litigation has

of compensation, and only 2 cases led to a successful outcome for the claimants'. See further Enneking 'Judicial Remedies' (n 146).

¹⁶² Enneking 'Judicial Remedies' (n 146). See also Goldhaber (n 15); Aristova, 'Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction' (n 104) 9 stating: 'The compensational nature of Tort Liability Claims is what makes them most valuable for the claimants'.

¹⁶³ See also Aristova, 'Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction' (n104) stating: 'The latter outcome may be indicative on its own because it demonstrates that corporations are only willing to negotiate a settlement once the first test (i.e. decision on the acceptance of jurisdiction) is resolved in the claimants' favour'.

¹⁶⁴ Personal interview with Richard Meeran (17 September 2018) Offices of Leigh Day London.

¹⁶⁵ (n 139) 546.

¹⁶⁶ OCHCR, 'Improving accountability and access to remedy for victims of business-related human rights abuse' (n 66).

¹⁶⁷ Janet Dine, 'Jurisdictional Arbitrage by Multinational Companies; A National Law Solution?' (2013) 3 *Journal of Human Rights and the Environment* 44, 55.

nonetheless delivered in significant aspects. Traction is evident in evolving judicial approaches, raising perceived or potential litigation risk for corporations. For example, outside the EU, precedents concerning the doctrines of *forum necessitatis*¹⁶⁸ and *forum non conveniens*¹⁶⁹ are being closely watched by multinational companies concerned about increasing litigation risk.¹⁷⁰ As a bellwether within the EU, alerts from large corporate law firms in the UK to their clients regarding litigation and increased risks are an indicator strongly suggesting momentum is being gained.¹⁷¹

The implication is that FDL litigation should not be judged by its litigation function alone. It has raised public awareness. It has moved human rights risks onto the radar of multinational companies and positively impacted changes to behaviour.¹⁷² From this lens, Schrempf-Stirling and Wettstein's research indicating the educational and regulatory function of FDL cases supports facilitating human rights litigation in domestic legal systems. Contrary to Dine's perspective, it concludes that human rights litigation may

¹⁶⁸ *Garcia v Tahoe Resources Inc.* (n 122). In January 2017, The British Columbia Court of Appeal rejected efforts by Tahoe Resources Inc. to dismiss a lawsuit brought by seven Guatemalan men for injuries they suffered during the violent suppression of a peaceful protest at Tahoe's mine in Guatemala. The ruling represents the first time that a Canadian appellate court has permitted a lawsuit to advance against a Canadian company for alleged human rights violations committed abroad.

¹⁶⁹ In October 2016, Eritrean plaintiffs overcame a *forum non conveniens* challenge in their slave labour lawsuit against Vancouver based Nevsun Resources Ltd, *Araya v Nevsun Resources Ltd*. (2016) BCSC 1856. Discussed in chapter 5 section 5.4.1.5.

¹⁷⁰ See concerning litigation risk <www.mining.com/web/guatemalans-lawsuit-against-tahoe-resources-to-go-to-trial/> accessed 29 December 2019. See also Council on Atmospheric Affairs, 'Canadian Mining in South America: Exploitation, Inconsistency and Neglect' (11 June 2014) <www.coha.org/canadian-mining-in-latin-america-exploitation-inconsistency-and-neglect/> accessed 29 December 2019 estimating that Canadian mining corporations control 50 to 70 percent of the mining industry in Latin America, putting them at the forefront of a sector that has been linked to breaches of indigenous rights and a disregard for nature reserves.

¹⁷¹ See generally Clifford Chance, 'Access to Remedy Developments and Trends' (November 2017) <<https://onlineservices.cliffordchance.com>> accessed 29 December 2019; Freshfields Bruckhaus Deringer <<http://risk.freshfields.com/post/102e2c0/high-court-issues-new-judgment-on-parent-company-liability>> accessed 29 December 2019; Norton Rose Fulbright, UK Supreme Court clarifies issues on parent company liability in *Lungowe v Vedanta* (April 2019) <www.nortonrosefulbright.com/knowledge/publications/158040/emlungowe-v-vedantaem-appeal-highlights-important-points-regarding-parent-company-liability> accessed 29 December 2019.

¹⁷² See Schrempf-Sterling and Wettstein (n 139).

become ‘a key driver for change in human rights matters’.¹⁷³ Schrempf-Stirling and Wettstein consider their research findings are consistent with insights from a social movements perspective indicating that companies manifest a ‘striking’ increase in adherence to soft-law initiatives and/or multi-stakeholder initiatives after proceedings are issued.¹⁷⁴

It is apparent there is a newfound interest in publishing human rights policy statements, human rights audits, training for employees, and engagement with NGO’s once proceedings have issued.¹⁷⁵ Moreover, this positive regulatory effect increases with the perceived risk of companies to be drawn into litigation, as norming and conforming effects also extend to non-targeted non-defendant companies. In effect, despite the actual probability of a ruling against a corporation being low, both defendant and non-defendant corporations responded to litigation risk with improved behaviour and engagement with human rights concerns.¹⁷⁶ Further, FDL litigation has a role in pressing a hard law edge to international soft law instruments such as the UN Guiding Principles on Business and Human Rights¹⁷⁷ and their implementation in National Action Plans within the EU and

¹⁷³ *ibid* 546.

¹⁷⁴ Mary Hunter McDonnell, Brayden G King and Sarah A Soule, ‘A dynamic process model of private politics: Activist targeting and corporate receptivity to social challenges’ *American Sociological Review*, (2015). 80(3) 654, 690. Their findings ‘suggest that activism and increased corporate social responsibility reinforce one another through a feedback cycle of activist activity and increased receptivity to activists, mediated by the adoption of social management devices. These social management devices elicit increased social commitments from organizations, as well as instituting and empowering internal and external monitors who can enforce social expectations of appropriate corporate behaviour. In this way, activist challenges can provoke a more generalizable, longer lasting change in corporations’ receptivity to social challenges than has been previously recognized. Although not explored in our paper, it is possible that sustained activist challenges may actually begin to change the strategic mindset of executives, leading them to become increasingly sensitive to stakeholder and social issues’.

¹⁷⁵ Schrempf-Stirling and Wettstein (n 139) 554 finding that of the c.5,000 companies tracked by the Business and Human Rights Resource centre, only 341 have a human rights policy whereas more than 2/3 of the sample introduced specific human rights policies and corporate statements shortly after lawsuits were filed against them, 2/3 also introduced employee human rights training and human rights audits or assessments after lawsuits were filed, and over 70% joined soft-law initiatives or MSIs.

¹⁷⁶ *ibid* 558.

¹⁷⁷ (n 144).

globally.¹⁷⁸ Concurrently, the deliberations of the UN Intergovernmental Working Group established to consider a binding international treaty on business and human rights are on-going.¹⁷⁹ As these related initiatives unfold, FDL litigation puts the finger on persistent issues with accountability.

If home or host states engage with greater accountability, is there the risk that one response of multinational companies would be simply to relocate to deeper darker jurisdictions? While this is indeed possible, on balance a more likely response can be expected to be that parent companies ‘dial up’ the shield provided by corporate law, and structure the group and its relations with subsidiaries in order to insulate the parent company. In parallel corporations may contract out the parts of their operations which are risk intensive, an example being oil companies contracting out shipping of crude.¹⁸⁰ From a business perspective, the disadvantage with ratcheting up parent-subsidiary ‘distance’ is that possibilities to leverage the competitive and economic advantages of the relationship, such as synergies and knowledge transfer, may be reduced or nullified. On balance, there is a legitimate concern that multinational companies may seek to engineer their contact and level of control of the relevant activities of subsidiaries to mirror the parameters emerging in jurisprudence in order to avoid direct parent liability. Related questions of whether parent company duty of care will actually encourage parent companies to adopt a more ‘hands on’ approach in order to prevent human rights violations, or alternatively will prompt parent companies to distance and adopt ‘hands off’ behaviours in an effort to avoid direct parent liability are explored in chapter 5.

¹⁷⁸ See generally Daniel Augenstein, Mark Dawson, and Pierre Thielbörger, ‘The UNGPs in the European Union: The Open Coordination of Business and Human Rights?’ (2018) *Business and Human Rights Journal* <<https://doi.org/10.1017/bhj.2017.30>> accessed 29 December 2019.

¹⁷⁹ (n 1). On 26 June 2014, the UNHRC adopted resolution A/HRC/RES/26/9 ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human right’ by which it decided ‘to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’. <www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx> accessed 29 December 2019.

¹⁸⁰ Beth Stephens, ‘The Amoral of Profit: Transnational Corporations and Human Rights’ (2002) 20 *Berkeley Journal of International Law*, 45.

3.5.3. Parent Company Duty of Care: Benchmarking Development

A parent company is not generally liable in tort for the conduct of its subsidiaries by virtue alone its shareholding.¹⁸¹ However, where a parent company leverages its superior knowledge, influence, or control over group operations, the corollary is an expectation the parent exercises due care, and liability should attach to breaches of due care. Where a parent company involves itself in the activities of its subsidiary relevant to an ensuing harm, it has arguably assumed a duty of care to the subsidiaries' employees and/or persons affected by its operations. In Skinner's view 'the law of when and how a duty of care is created is in flux and appears to be in turmoil'.¹⁸² Yet based on extensive experience in major FDL cases against parent companies in the English courts Richard Meeran of Leigh Day¹⁸³ considers that even where settled before trial, the line of cases running from *Lubbe*,¹⁸⁴ *Connelly*¹⁸⁵ and *Thor*,¹⁸⁶ and culminating in *Chandler*¹⁸⁷ provide a striking illustration of progressive development of the law on multinational companies' liability.¹⁸⁸ In *Chandler*, the court held that a duty of care was owed by the parent company to employees of its subsidiary. By 2018 in *Vedanta*, in responding to the defendant's submission there was no prior authority for widening of the duty of care to a person affected by the operations of a subsidiary, Simon LJ recalled to counsel:

¹⁸¹ *Chandler* (n 82) [69-70].

¹⁸² Skinner 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (n 20) 1843.

¹⁸³ Richard Meeran conducted litigation against RTZ (*Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1998] AC 854, [1997] 4 All ER 335, [1997] 3 WLR 373); Thor Chemicals Holdings Limited (*Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley*) Times L Rep 10 November 1995; *Sithole v Thor Chemicals Holdings & Desmond Cowley* [2000] WL 1421183; Cape plc (*Lubbe v Cape Plc* [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL), *Monterrico Metals (Guerrero v Monterrico Metals Plc* [2009] EWHC 2475; [2010] EWHC 3228), *Anglo American (Vava v Anglo American South Africa Ltd)* case [2012] EWHC 1969; *Royal Dutch Shell Plc & Shell Petroleum Development Company (Nigeria) Ltd (Bodo Community v Royal Dutch Shell Plc & Shell Petroleum Development Company (Nigeria) Ltd* [2014] EWHC 1973 (TTC).

¹⁸⁴ *Lubbe* (n 183).

¹⁸⁵ *Connelly* (n 183).

¹⁸⁶ *Sithole v Thor* (n 183).

¹⁸⁷ *Chandler* (n 82).

¹⁸⁸ Richard Meeran 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City University of Hong Kong Law Review 1, 24.

That may be true, but it does not render such a claim unarguable. If it were otherwise the law would never change¹⁸⁹

We have entered the next phase of development and the direction of travel is towards both increasing clarity in principles and recognition that parent company duty of care can be established. We await judgments on the merits concerning parent company duty of care in significant cases in the United Kingdom,¹⁹⁰ Canada¹⁹¹ and the Netherlands.¹⁹²

3.5.4. Corporate Vicarious Liability and Control

It is notable that few cases relating to the negative impacts of business on human rights centre on notions of vicarious liability in tort.¹⁹³ In the English courts, vicarious liability of natural persons was raised in the early *Connelly* case concerning a supervisor employed in the defendant company RTZ Corporation Plc.¹⁹⁴ *Kesabo v African Barrick Gold plc*¹⁹⁵ concerned injuries and deaths at a mine in Tanzania allegedly perpetrated by private security agents and the police. Law firm Leigh Day initially entered claims alleging that Barrick Gold were vicariously liable but later amended the pleadings on the basis of Barrick

¹⁸⁹ The *Vedanta* case (CA) (n 86) [88].

¹⁹⁰ *Vedanta* (merits); The *Okpabi* case was cleared for appeal to UK Supreme Court July 2019.

¹⁹¹ *Choc v Hudbay* [2013] ONSC 1414. The statements of claim in the *Hudbay* cases: *Choc v HudBay Minerals* (CV-10-411159) <www.chocversushudbay.com/wp-content/uploads/2010/11/Choc-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf>; *Chub v HudBay Minerals* (CV-11-435841) <www.chocversushudbay.com/wp-content/uploads/2010/11/Chub-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf> and joint claims of the plaintiffs in *Caal v HudBay Minerals* (CV-11-423077) <<http://www.chocversushudbay.com/wp-content/uploads/2010/11/Amended-Statement-of-Claim-Caal-v-HudBay-FILED.pdf>> accessed 22 December 2019. The claims were joined for the purposes of the defendants' motions to dismiss.

¹⁹² The Dutch Shell Nigeria cases Court of Appeal The Hague (17 December 2015) ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell).

¹⁹³ Morgan (n 76) 267 explains as: 'Vicarious liability makes one party, A, strictly liable for the torts of another, B. There are two stages to establishing vicarious liability. First, there must be a relationship between A and B which is sufficient to trigger the doctrine; secondly, the tort committed by B must be sufficiently connected with that relationship to render A vicariously liable for the tort'.

¹⁹⁴ *Connelly* (n 183).

¹⁹⁵ *Kesabo v African Barrick Gold plc* [2013] EWHC 4045 (QB).

Gold's direct liability in tort.¹⁹⁶ Regarding legal persons, it is pertinent to outline Morgan's argument that the current understanding of the English courts points towards vicarious liability for companies.¹⁹⁷ It is focused on relevant features of control, which Morgan argues are not restricted to the relationship of a natural/legal person employing a natural person.¹⁹⁸ Arguing from analogy, he maintains that the factors employed by the courts in assessing whether or not an individual stands in a sufficient relationship to trigger vicarious liability could equally be used to assess inter-corporate relationships.¹⁹⁹ In Morgan's conception, it is the plus element of the ability to control, whether exercised or not, in liability,²⁰⁰ and corporate vicarious liability fully respects the doctrine limited liability of a company.²⁰¹

Morgan's approach is consistent with arguments in this thesis that the regulatory role of tort is re-established when the 'profiting' parent company which reaps benefits may be rendered accountable. Arguing there is potential for corporate vicarious liability to reduce the efficacy of corporate structuring designed to prevent the parent from paying for the negative externalities of its operations, Morgan highlights the impact of institutional deterrence by involving the parent company in the true costs of its enterprise.²⁰² With cause

¹⁹⁶ The opinion of litigation expert Richard Meeran is that vicarious liability is dependent on the circumstances, necessitating a person on the payroll of the subsidiary but operating under the control of the parent company. Source: personal interview with Richard Meera, offices of Leigh Day London 17 September 2018.

¹⁹⁷ Morgan (n 76) 289 refers to the UK Supreme Court judgement in *Various Claimants v Catholic Child Welfare Society (CCWS)* [2012] UKSC 56, [2013] 2 AC 1 (Philips LJ) [34]–[35] invoking justifications for the doctrine of vicarious liability, *inter alia*, loss spreading and insurance, a deep pockets argument, acting on behalf of employer, enterprise and risk creation, and control.

¹⁹⁸ *ibid* Morgan stating: 'Thus, the factors *inter alia*, the degree of managerial control and integration into the organisation was highlighted: to what extent is there subjection to managerial control over such matters as performance, work quality, and productivity considered by Ward LJ in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, an approach approved by the Supreme Court in *CCWS* [2012] EWCA Civ 938, [2013] QB 722. At [72]'.

¹⁹⁹ *ibid* 294.

²⁰⁰ *ibid* 291 stating: 'There is a moral notion underpinning the doctrine of vicarious liability that where I assign a purposeful role to another, I am liable for that other if I have the power (legal or factual) to control exactly how they carry out this role (even if I do not exercise this power and would never exercise it), and I can exercise sufficient control over the day-to-day side'.

²⁰¹ *ibid* 296.

²⁰² *ibid* 293.

he considers that deterrence at the parent level is efficient on the basis of the resources it will have for enhanced risk assessments, planning capabilities, and superior knowledge of industry safety.

The justifications Morgan adduces in favour of corporate vicarious liability rhyme with and support themes explored in sections 3.2 and 3.3. These include, *inter alia*: parent company influence in relevant areas; a view that control and integration of a subsidiary is incompatible with doctrines of corporate law which operate to repulse access to justice for those negatively affected; benefits accruing to the parent company yet avoidance of the cost of negative impacts; and the parent company's own stance in leveraging a hands-off approach when it was in a position to intervene and prevent harm. As previously noted, the approach of a group constituting a single enterprise is also considered in competition law,²⁰³ in group accounting, and in taxation for some purposes. Appreciating the contribution of Morgan, vicarious corporate liability has not been the basis upon which cases in this field have been pleaded and, beyond highlighting shared themes, further consideration is outside the scope of this thesis.

3.6. CONCLUSION

This chapter explored normative and conceptual issues which relate to the role which tort law has assumed in remedy for human rights harms, and situate the contribution and relevance of FDL litigation.

It concluded that normative arguments support attribution of liability to the parent company. They legitimately seek equity for rights holders and are consistent with trends in increased transparency and investor concern.²⁰⁴ An argument was made for balancing benefits and accountability to counteract the impact of embedded doctrines of corporate law. Multinational corporations have not priced in the full extent of the cost of their operations, and the law has not compelled them to do so. Approaches to parent company liability were outlined. A significant advantage of direct parent liability is that it does not

²⁰³ C-73/95 P *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457, [1997] 4 CMLR 419.

²⁰⁴ See generally E&Y (n 94).

involve piercing of the corporate veil. By comparison to derivative liability, the parent has an interest in actively monitoring the potential human rights impacts of its subsidiaries.²⁰⁵

Rethinking the role of private law in the protection of human rights in domestic systems led to the conclusion that, consistent with the role of tort law, FDL actions seek to vindicate a primary right *via* a secondary right to an action. In leveraging private law to seek remedy for human rights abuses, we are in the realm of the imperfect but not in the realm of the incompatible. While it is acknowledged that judged on its judicial function alone, the interim balance sheet of FDL litigation can be considered to be disappointing, these actions include elements of public interest, moral censure, and deliver regulatory benefits.

It is apparent that propelled in part by barriers to remedy in host states and the relative promise of alternative fora, victims are seeking remedy in the courts of home courts of multinational corporations. However, choice of, and access to a particular forum is impacted by jurisdiction, applicable law, substantive law, and the procedural and practical circumstances of the forum.²⁰⁶ Chapter 4 examines the procedural parameters of FDL litigation, as a prelude to examining development of legal principles and FDL litigation as it operates against the feasibility factors comparative jurisprudence in Chapter 5.

Detailed examination of conditions for liability and access to remedy in FDL litigation is presented in chapters 5 and 6.

²⁰⁵ *ibid.* De Schutter (n 95) argues the proposed approaches can be relatively easily transposed to the other modes of transnationalisation of a company's activities which are based on contractual relationships with suppliers, sub-contractors, franchisees than on an investment nexus.

²⁰⁶ Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (n 149) 47.

**PART II ACCESS TO REMEDY IN PRIVATE LAW AND
THEMES IN COMPARATIVE JURISPRUDENCE**

**Chapter 4 PRIVATE LAW: PROCEDURAL AND PRACTICAL
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4.1. INTRODUCTION

Chapter 3 concluded that normative arguments support attribution of liability to the parent company. Rethinking the role of private law in the protection of human rights in domestic systems led to the conclusion that consistent with tort, FDL actions seek to vindicate a primary right *via* a secondary right to an action.

Propelled in part by barriers to remedy in host states and the relative promise of alternative fora, victims are seeking remedy in the courts of home courts of multinational corporations. However, choice of, and access to, a particular forum is impacted by jurisdiction, applicable law, substantive law, and the procedural and practical circumstances of the forum.¹

The aim is to explore the procedural and practical parameters of (FDL) litigation as a prelude to examining comparative FDL jurisprudence in Chapter 5. Detailed examination of conditions for liability and access to remedy in FDL litigation is presented in chapters 5 and 6.

Sections 4.1 to 4.5 consider the feasibility of private law cases based on five factors:²

- i. Whether the home country seized of the matter has jurisdiction to hear the claim;
- ii. Whether the parent company can be held accountable for foreign subsidiaries actions;
- iii. Conditions for liability relating to the legal basis on which the claim is brought;
- iv. Which national system of tort law the court will apply in determining the validity of the claim and apportioning damages;
- v. To what extent the procedural rules and practical circumstances of the forum are conducive to the pursuit of this type of litigation.

¹ Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' *Utrecht Law Review* 10 (2014), 47 <www.utrechtlawreview.org/articles/abstract/10.18352/ulr.256> accessed 29 December 2019.

² This structure has been adapted for present purposes from a version proposed by Liesbeth Enneking, 'Judicial Remedies: applicable law' in Juan José Álvarez Rubio, Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 43.

4.2. WHETHER THE HOME COUNTRY SEIZED HAS JURISDICTION

The parameters affecting feasibility will be explored and carry through to chapters 5 and 6.

4.2.1. Jurisdiction under the Alien Tort Statute in the United States

The United States was the forum of choice for litigation, driven, *inter alia*,³ by the availability of a specific cause of action under the Alien Tort Statute.⁴ At the outset the ATS was mainly used against individual perpetrators of international human rights violations or international crimes. The high hopes concerning corporate accountability under the ATS engendered by *Doe v Unocal*⁵ were dashed by the decision of Court of Appeal in *Kiobel v Royal Dutch Petroleum Co.*⁶ As discussed, the reasoning of the Court of Appeal is considered unpersuasive or insufficient to overturn the preceding three decades of precedent under the ATS.⁷ Subsequently, lower courts in the US split over applying the

³ Choice of the US as a forum was also influenced relatively flexible rules on personal jurisdiction, the availability of class actions, a legal culture encouraging pro bono services, contingency fees, flexible rules on standing, favourable procedural rules regarding discovery, jury trials in civil cases, potentially generous compensation awards and the possibility of punitive as well as compensatory damages.

⁴ The ATS offered a possibility for foreign nationals to claim compensation in the US Federal Courts relating to torts which are also violations of international law or emanating from an international treaty to which the US is a party.

⁵ In *Doe v Unocal* F.3d 932 (9th Cir. 2002) the US Ninth Circuit held that ‘aiding and abetting’ human rights violations was itself a violation of customary international law and therefore actionable under the ATS.

⁶ *Esther Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d. 111 (2d Cir. 2010) (CA) (*Kiobel I*); *Esther Kiobel v Royal Dutch Petroleum Co.*, 133 S Ct 1659 (2013) (SC) (*Kiobel II*) in which the majority determination of the US Supreme Court was that a presumption against extra-territoriality applied to claims under domestic legislation including the ATS such that a case which did not ‘touch and concern’ the US with sufficient force to displace the presumption. On the facts, this presumption was not overcome. The foreign defendants had no more than a ‘corporate presence’ in the USA and since ‘corporations are often present in many countries and it would reach too far to say that mere corporate presence suffices’ [to displace the presumption]. In its Amicus brief in *Kiobel II*, the European Commission argued in favour of universal civil jurisdiction for victims of violations of human rights, which would also attract universal criminal jurisdiction 16-23. The UK and Australia brief argued ATS claims against corporations were based on violations of international law to which corporations were not subject

<www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.pdf> 2-3 accessed 29 December 2019.

⁷ Discussed in chapter 1 section 1.3.3.

test of ‘touch and concern’ articulated by the majority in *Kiobel II*.⁸ As argued in chapter 2, this line of litigation sits at the nexus of competing pressures between extra-territorial human rights violations and political anxieties concerning the foreign policy costs accruing when sovereign states are seen as too ‘interventionist’.⁹

This tension around accepting jurisdiction is plainly evident in a series of ATS cases post *Kiobel* which reflect a retreat to territorially based reasoning. In *Daimler AG V Baumann*¹⁰ the US Supreme Court held that corporations are subject to general jurisdiction in only two states, the state of incorporation and the state of principal place of business.¹¹ The case concerned the alleged collaboration of Daimler’s subsidiary Mercedes-Benz in Argentina with the 1976-1983 dictatorship in the kidnapping, torture and killing of a number of its workers. The plaintiffs were twenty-three Argentine citizens who sought to establish personal jurisdiction in a California federal court against the German parent company Daimler AG, based upon the presence in California of two Mercedes-Benz marketing offices. Drawing upon her opinion in *Goodyear Dunlop Tires Operations S.A. v. Brown*,¹² Ginsburg J rejected the argument that general jurisdiction is proper in every state in which a corporation engages in a substantial, continuous, and systematic course of business as ‘unacceptably grasping’.¹³

To be subject to general jurisdiction, a corporation must be ‘at home’, which she considered is not synonymous with ‘doing business’ in a state.¹⁴ The Court assessed the activities of Daimler’s activity in California in the context of its overall activities ‘nationwide and

⁸ See further *RJR Nabisco Inc. v European Community*, 136 S. Ct. 2090, 2100-01 (2016) (Alito J) [9]; *Adhikari et al v Kellogg Brown & Root* No. 15-20225 (5th Cir. 2017) majority opinion, written by Judge Prado and joined by Judge Higginbotham; *Doe v Nestle*, Case 2:05-cv-05133-SVW-MRW Doc. 249 Filed 03/02/17 (Wilson J), 7 <<http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/05/17-55435.pdf>> accessed 29 December 2019.

⁹ Anna Grear and Burns H. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) 15 Human Rights Law Review 35.

¹⁰ 134 S. Ct. 746 (2014).

¹¹ Overturning an earlier decision of the Ninth Circuit, the Court of Appeals that had found that Mercedes-Benz USA (MBUSA) was an agent of Daimler and that MBUSA had the requisite level of activity in California such that Daimler could be sued in California as its home.

¹² 131 S. Ct. 2846 (2011).

¹³ *Daimler* (n 10) [19].

¹⁴ *ibid* [20].

worldwide’.¹⁵ The presence of two marketing offices did not suffice. This approach effectively closed the door to so-called ‘foreign cubed’ cases.¹⁶

The point of ATS litigation was its extra-territorial reach, and post the *Kiobel II*¹⁷ and *Jesner v Arab Bank plc*¹⁸ cases the role of the ATS has been played out.¹⁹ Within this, what access to justice for victims? Viewed by the International Commission of Jurists the claimants in *Kiobel*, who are relatives of the Nigerian victims of alleged summary execution by security forces in which Shell are accused of being complicit, have practically no chance of effective redress in their own country.²⁰ In applying the *Kiobel* doctrine lower courts in the United States dismissed multiple suits under the ATS.²¹ For an appreciation of the impact of narrowed standards, cases were dismissed against Occidental Petroleum alleging complicity in a 1998 bombing attack in Colombia; Cisco over supplying spyware to the Chinese Government; and Drummond alleging complicity in killing a Colombian labour leader.²² In isolated cases, courts have ruled that a case sufficiently touched and concerned

¹⁵ *ibid* [25]. Although specific jurisdiction is still available against foreign defendants, this ‘at home’ standard is expected to exclude most cases concerning conduct abroad involving foreign defendants from US courts. See Daniel Augenstein and Nicola Jägers, ‘Judicial Remedies: The issue of jurisdiction’ in Juan José Rubio and Katerina Yiannibas (eds) *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 25 concerning specific jurisdiction stating: ‘where a forum is still available against foreign defendants, is alleged to have jurisdiction over a defendant because the defendant’s activities in that forum give rise to the claim itself’.

¹⁶ *Daimler* (n 10) [27].

¹⁷ (n 6).

¹⁸ No. 16-499, 584 U.S. (2018).

¹⁹ See Enneking ‘Judicial Remedies’ (n 2) 50-51.

²⁰ International Commission of Jurists, ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (2014), 12 <<https://business-humanrights.org/en/pdf-needs-and-options-for-a-new-international-instrument-in-the-field-of-business-and-human-rights>> accessed 29 December 2019.

²¹ For example, in *Balintulo v. Daimler AG* 727 F.3d 174 (2d Cir. 2013), 20 the Court of Appeals ordered the lower court to dismiss the case <www.ca2.uscourts.gov/decisions/isysquery/751866d1-2b45-4b53-a311-933413280fc5/1/doc/092778_opn.pdf>. Similarly, in *Sarei et al v. Rio Tinto Plc et al* No. 02-56256 (9th Cir. 2011) in which 10,000 residents of Papua New Guinea sought to hold Rio Tinto responsible for its alleged complicity in human rights abuses committed by the Government, the Court of Appeal upheld dismissal of the case citing the Supreme Court’s reasoning in *Kiobel II*. See also <<https://business-humanrights.org/en/rio-tinto-lawsuit-re-papua-new-guinea>> accessed 29 December 2019.

²² See Business and Human Rights Resource Centre <www.business-humanrights.org/> accessed 29 December 2019.

the United States such as in *Doe I v Exxon Mobil Corporation*,²³ in which the Court of Appeals for the District of Columbia focused on relevant decisions taken in the United States by executives of the company to ground jurisdiction.²⁴

4.2.2. Jurisdiction in the European Union

Conflicts over jurisdictional are to a large extent inevitable when adjudicating upon the impacts of multinational corporations in private law.²⁵ In general terms, private law grants jurisdiction based on a nexus to the forum state,²⁶ and is impacted by the operation of the doctrines of *forum non conveniens*²⁷ and *forum necessitatis*.²⁸ As outlined in chapter 1 section 1.3, no domestic court in the European Union (EU) has *per se* civil jurisdiction over violations of international law committed abroad by corporations.²⁹

As a result of the controversy which surrounds the regulation of multinational corporations throughout their operations, Aristova aptly refers to parent companies benefitting from a ‘jurisdictional veil’.³⁰ Grounding litigation is a primary challenge in FDL litigation, and the nature of these cases arguably merits a distinct set of rules.³¹ In addition to proposals

²³ *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

²⁴ See also Augenstein and Jägers (n 15) 24.

²⁵ Ekaterina Aristova, ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (2018) 14(2) *Utrecht Law Review* 6, 9 stating: ‘The territorial nature of state jurisdiction implies that none of these states will be able to exercise public control over the TNC as one unit without triggering various jurisdictional conflicts’.

²⁶ Augenstein and Jägers (n 15) 9 stating: ‘Jurisdiction in private international law determines the competence of state courts to hear private disputes involving a foreign element. In most cases, the determining factor is whether there exists a sufficiently close nexus between the facts of the case and the forum state’.

²⁷ In common law states, under the doctrine of defendants may apply for proceedings to be stayed despite tests for jurisdiction being met on the basis it is not the most appropriate forum based on a range of discretionary factors. The doctrine of *forum non conveniens* operates as a means of limiting so-called forum shopping, and the exercise of extra-territorial jurisdiction.

²⁸ Civil law states may recognise the doctrine of under which courts may decide to hear a case, even where conditions for exercise of jurisdiction may not all be met, but where it appears there is no other adequate forum available to victims.

²⁹ Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction’ (2009) 40 *Geo. Wash. Int’l L. Rev.*, 956944.

³⁰ Aristova (n 25) 10.

³¹ *ibid* 21 proposes framing uniform jurisdictional rules for tort liability claims at the international level, in order balance the regulatory impact of jurisdictional rules.

emerging at the EU level,³² it is for each national government to address barriers and to facilitate litigation for business-related human rights abuses in its courts, as explored further in chapters 4 and 5.

4.2.2.1. The Human cost of the Doctrine of *forum non conveniens*

In this field, where claimants often have no real prospect of obtaining justice in the host state, the doctrine of *forum non conveniens* can gift to multinational corporations the possibility to avoid justice altogether,³³ as is confirmed by UN CESCR in its General Comment 24:

Practice shows that claims are often dismissed under [*forum non conveniens*] in favour of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction.³⁴

³² A study by the Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 - February 2019 ‘Access to legal remedies for victims of corporate human rights abuses in third countries’ <[www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)> accessed 27 December 2019, 106-111; European Parliament Committee on Foreign Affairs, ‘Report on corporate liability for serious human rights abuses in third countries’ (2015/2315(INI)), 33 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0243+0+DOC+PDF+V0//EN> accessed 11 December 2019. The International Civil Litigation for Human Rights Violations’ (2012) 2.3(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1118&StorageFileGuid=59f7e403-7733-4f8c-822d-e58b9be0d02b>> accessed 16 December 2019.

³³ Richard Meeran of Leigh Day highlights the contrast to commercial cases in which forum disputes will usually reflect the parties’ thinking on the anticipated differences in the outcome of the litigation in the two competing venues in question with regard to the amount of damages payable if the case succeeds. Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 378, 383.

³⁴ UN CESCR General Comment 24 State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ para. 43. <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawQrJx3hlK8Odka6DUwG3Y>> accessed 29 December 2019.

From the outset, the significance of repudiation of the defence of *forum non conveniens* is evident in litigation. The principle that even if another forum was more appropriate, a stay on proceedings might cause injustice to the plaintiff has been used to effect in the English courts.³⁵ In *Connelly v RTZ Corporation plc*³⁶ the House of Lords held that although Namibia was *a priori* a more appropriate venue for the claim as the locus of alleged harmful exposure to uranium, it would not be in the interests of justice to for Mr. Connelly to bring proceedings there due to a lack of appropriate resources potentially impacting access to justice.³⁷

Notwithstanding the possibility to overcome the jurisdictional hurdle if claimants can demonstrate a substantial risk of denial of justice,³⁸ the reality for claimants is stark. In the course of the *forum non conveniens* dispute alone in *Lubbe*, 1,000 of the 7,500 claimants died. Thus, as Meeran highlights by comparison to commercial cases, the doctrine of *forum non conveniens* is particularly pointed when human rights violations are at issue.³⁹ Since the decision of the European Court of Justice in *Osuwu v Jackson*,⁴⁰ the doctrine of *forum non conveniens* is no longer a barrier in EU Member States. Jurisdiction is mandatory once

³⁵ Based on principles in *Spillada Maritime Corporation v Consulex*. [1987] AC 460. See also *Thor Chemicals Holdings Limited (Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley)* Times L Rep 10 November 1995; *Sithole v Thor Chemicals Holdings & Desmond Cowley* [2000] WL 1421183;

³⁶ *Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1998] AC 854, [1997] 4 All ER 335, [1997] 3 WLR 373).

³⁷ Similarly concerns relating to access to resources in the state of harm were decisive in jurisdictional hearings in *Lubbe v Cape Plc* [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL).

³⁸ Shubhaa Srinivasan, 'Current trends and future effects in transnational litigation against corporations in the United Kingdom' in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014), 337.

³⁹ Meeran (n 33) 385.

⁴⁰ Case – C282/02 *Owusu v Jackson* [2005] ECR I 1383.

a corporate defendant is domiciled in an EU country.⁴¹ It remains in other jurisdictions which are a forum FDL litigation such as Canada.⁴²

4.2.2.2. The Brussels I (recast) Regulation

FDL cases involve assessing jurisdiction in civil actions alleging tortious by an EU domiciled corporation in its global operations. Rules on jurisdiction within the EU are partially harmonized through the Brussels I Regulation (recast) concerning civil or commercial disputes of a cross border nature, including disputes concerning violations of human rights (Brussels I).⁴³ Under Article 4:

Transnational corporations, if they commit human rights violations, can be sued before the courts of the EU Member State where the company has its seat, central administration, or principal place of business, even for violations of human rights committed outside the EU.⁴⁴

⁴¹ Under articles 33 and 34 of Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) [2012] OJ L 351, the courts have discretion to stay proceedings in favour of non-EU Member State courts where two sets of proceedings involve the same cause of action, or where the proceedings are related if; proceedings in the non-Member State were started first; the non-Member State judgement is capable of recognition and enforcement in the Member State; and the Member State court considers that a stay is required for the proper administration of justice.

⁴² Explored in chapter 5 section 5.4.

⁴³ In 2012 the recast Brussels I Regulation (n 41) replaced Regulation 44/2001 (Brussels I Regulation) with effect from 10 January 2015. See also <https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do> accessed 29 December 2019. Brussels I ensures that judgements are recognised and enforced among EU Member States. According to art 4(1) the Regulation applies *ratione personae* to all procedures against persons domiciled in one of the EU Member States; conversely in procedures against persons not domiciled in an EU Member State, in principle the national rules on jurisdiction of the state where the case is brought apply. For the purposes of the UK and Ireland, 'statutory seat' is defined in art 63(2) as: 'the registered office, or where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place'.

⁴⁴ European Commission, 'Staff Working Document on Implementation of the UN Guiding Principles on Business and Human Rights – State of Play' SWD(2015) 144 final, 24 (State of Play) <https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-implementing-un-guiding-principles-business-and-human_en> accessed 11 December 2019.

The definition of domicile of a corporation under Brussels I is recognised as yielding broad possibilities to take proceedings before the European courts.⁴⁵ Notably, in the interests of certainty, the definition of domicile in Article 63 is ‘autonomous’ and not contingent on the domestic law of Member States.⁴⁶ To take proceedings a claimant need not have the nationality of an EU member state, nor does the alleged violation *prima facie* need to have occurred on the territory of an EU member state.⁴⁷ While *a priori* positive for accountability, there are nonetheless significant swings and roundabouts. On the one hand Brussels I opens opportunities for proceedings against the parent company of EU based multinationals in their home states for violations of human rights committed abroad.⁴⁸ On

⁴⁵ *ibid.* Alternatively, a claim against an EU domiciled company could be brought in disputes relating to tort or non-contractual obligations in the national courts of a Member State of the place where the harmful event occurred; or in disputes related to contractual obligations, before the courts of the place of performance of the contractual obligation in question.

⁴⁶ Recitals 14 and 15 Brussels I (recast) (n 41). Art 63 provides that for the purposes of the Regulation: ‘a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business’. Under art 63(1)(a) ‘statutory seat’ refers to place of incorporation; ‘central administration’ to the place where the company takes its ‘essential business decisions’ and ‘principal place of business’ involves determining where the major commercial activities occur, and concentration of employees and assets. Under 63(2), for the purposes of Ireland, Cyprus and the United Kingdom, ‘statutory seat’ means ‘the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place’. See also Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany, and McGrath on Civil Procedure* (4th edn, Thomson Reuters Ireland 2018), 1-169; Lucas Roorda, ‘Foreign Direct Liability and Jurisdiction’ in Angelica Bonifanti (ed) *Business and Human Rights in Europe: International Law Challenges* (Glawcal 2019), 199-200.

⁴⁷ As the International Commission of Jurists (n 20) 17 confirms: ‘In practice, most claims against business enterprises make use of the framework provided by private law in domestic jurisdictions and the corresponding rules set out by private international law on jurisdiction, choice of law and recognition and enforcement of judgements in civil and commercial matters’. Further, that although many of the principles under the regime created by Brussels I in civil and commercial matters are recognised beyond the EU, it is binding only on EU Member States. As the ICJ highlights, ‘related international legal regimes have limited geographical scope’ for example, The Hague Conference on Private International Law’s 1980 Convention on International Access to Justice has been ratified by 26 of the 87 States which are members of the Conference.

⁴⁸ Wouters & Ryngaert (n 29) 939. Recent jurisprudence suggests that where a subsidiary is joined as a defendant with the parent company, should the claims against the parent company prove unfounded, jurisdiction over the foreign subsidiary in the home state may subsist. Discussed below the English Court of Appeal judgment in *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 (Vedanta CA). See also Augenstein and Jägers (n 15) 33.

the other, EU Regulation Rome II concerning applicable law⁴⁹ has a generally negative impact on access to remedy as discussed below.

4.3. WHETHER THE PARENT COMPANY CAN BE HELD ACCOUNTABLE

Although a parent company domiciled in an EU Member State falls within Brussels I, typically the subsidiary at issue is located in a non-EU state. The principal routes to assert jurisdiction over such subsidiaries are outlined below and explored from the perspective of national civil procedure rules in comparative jurisprudence in chapters 4 and 5.

4.3.1. Joining of Foreign Defendants

Under limited conditions, Brussels I applies to third-state incorporated subsidiaries. Article 8(1) allows for the joining of defendants in one proceeding, under the condition that ‘the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of unreconcilable judgements resulting from separate proceedings’.⁵⁰ National rules of civil procedure may also permit joining of defendants. In the English and Irish courts, claims against foreign subsidiaries can be joined with claims against locally domiciled parent companies over which a court has jurisdiction under Brussels I or under the common law.⁵¹

⁴⁹ Council Regulation (EU) No 864/2007 on the law applicable to non-contractual obligations [2007] (Rome II). OJ L 199 (Rome II).

⁵⁰ See European Commission ‘State of Play’ (n 44) para 35 explaining that the ECJ has made joining of defendants under art 8 of Brussels I subject to two conditions; the parent company cannot be sued with the exclusive aim of bringing the foreign subsidiary/contractor within the European jurisdiction; and a prior relation must exist between the defendants to be joined – a condition that will always be fulfilled when suing a corporate group. The Commission advises Member States ‘should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction when such a connection exists’. See also Augenstein and Jägers (n 15) 31 citing C-145/10 and C-616/10 *Eva Maria Painier v Standard Verlags GmbH* (2011) STJUE in which the ECJ ruled that joining defendants is possible provided it was foreseeable by the defendants that they might be sued in a Member State where at least one of them is domiciled.

⁵¹ UK Civil Procedure Rules (1998) S.I. 1998/3132
<www.legislation.gov.uk/ukSI/1998/3132/contents/made> accessed 22 December 2019.

In the UK and in Ireland the claimants must effectively demonstrate that there is a ‘good arguable case’ against the parent company, that the foreign defendant is a ‘necessary and proper party’ to proceedings, and that the forum is the proper place to bring the claim. Grounding an arguable claim against the parent company establishes jurisdiction over the foreign subsidiary,⁵² even if the factual basis of the claim occurs mainly outside the forum. In other EU jurisdictions, such as the Netherlands, claims can also be joined if the court has ordinary jurisdiction over one of the defendants and there is a factual connection between the claims.⁵³ These parameters are explored in action within comparative jurisprudence in chapter 4.

4.3.1.1. Foreseeability of Litigation

On the basis of jurisprudence, it should be foreseeable to EU based multinational corporations that they may be named as defendants. In *Alfred Friday Akpan v Royal Dutch Shell plc*,⁵⁴ the Court of Appeal of the Hague considered that recent litigation against parent companies rendered it foreseeable that parent company Royal Dutch Shell (RDS) would be named as a defendant,⁵⁵ and also that its Nigerian subsidiary the Shell Petroleum

⁵² Aristova ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (n 25) 13.

⁵³ Netherlands Article 7(1) Code of Civil Procedure <www.dutchcivillaw.com/legislation/civilprocedure044.htm> accessed 22 December 2019.

⁵⁴ ECLI:NL:GHDHA:2015:3587 (17 December 2015).

⁵⁵ Five procedures were brought before the District Court of the Hague by four Nigerian villagers and NGO Milieudefensie against Royal Dutch Shell plc (RDS), a company incorporated in the UK and headquartered in The Hague, and its Nigerian subsidiary Shell Petroleum Development Company Nigeria (SPDC). In 2010 the District Court of the Hague accepted jurisdiction over RDS (incorporated in the UK and headquartered in the Hague) and its Nigerian subsidiary Shell Petroleum Development Company (SPDC) in litigation concerning oil spills in Nigeria on the basis the two companies were co-defendants, and the claims against them had the same legal basis, the tort of negligence under Nigerian law. In 2013 it dismissed the claims against RDS, upholding only Mr. Akpan’s claim against SPDC. The ‘Dutch Shell Nigeria Case’ Hague District Court (30 January 2013) ECLI:NL: RBDHA:2013:BY9845 (oil spill near Goi); ECLI:NL:RBDHA:2013:BY9850 (oil spill near Oruma), ECLI:NL: RBDHA:2013:BY9854 (oil spills near Ikot Ada Udo); ECLI:NL: RBSGR:2011: BU3535 (Oguru-Efanga/Shell); ECLI:NL: RBSGR:2011: BU3538 (Dooh/Shell); ECLI:NL: RBSGR:2011: BU3529 (Akpan/Shell). Augenstein and Jägers (n 15) 33 state the District Court maintained that ‘the mere possibility that the Dutch parent company could be held liable was sufficient to attract a foreign subsidiary to the Dutch jurisdiction. Furthermore, jurisdiction over the foreign subsidiary was maintained even if the claims against the parent company eventually proved unfounded’. Further, at 36 stating: ‘On the basis that litigation is foreseeable, commenters argue that EU Member States’ courts should reverse the ECJ’s test in the *Painier* case for joining actions on different legal bases in cases

Development Company (SPDC) might be summoned in the Netherlands concerning its alleged liability for the oil spills.⁵⁶ The Court ruled it had jurisdiction to hear the case against parent RDS on the basis of Article 2 of Brussels I⁵⁷ and accepted jurisdiction to hear the cases against SPDC under Article 7(1) of the Dutch Code of Civil Procedure regarding plurality of defendants.⁵⁸

4.3.1.2. Central Administration

A further route to bring a third-state incorporated subsidiary under Brussels I is to prove that the subsidiary's central administration lies with its parent company rather than within its state of incorporation. In *Vava v Anglo American South Africa*⁵⁹ the claimant argued that although the defendant was incorporated in South Africa, it was nevertheless subject to the personal jurisdiction of the English Courts as decisions relating to its central administration were in reality taken by its parent company from England. The English High Court rejected the notion that 'central administration' within the meaning of Article 60(1)(b) of Brussels I referred to the place where the decisions relating to the company's central administration were taken.⁶⁰ Declining to refer the question to the European Court of Justice for interpretation,⁶¹ it found the question depended upon 'where the company itself carries out

where parents and subsidiaries are joined together. Placing the burden on the defendant company to prove that it was unforeseeable that the parent may be held jointly liable with the subsidiary on the basis it would assist access to justice'.

⁵⁶ The judgement of the Court of Appeal is not available in English. Augenstein and Jägers (n 15) 36 validly recommend that 'EU Member States' courts should reverse the ECJ's test in the *Painier* case for joining actions on different legal bases in cases where parents and subsidiaries are joined together. Placing the burden on the defendant company to prove that it was unforeseeable that the parent may be held jointly liable with the subsidiary on the basis it would assist access to justice'.

⁵⁷ Brussels I (recast) (n 41) art 2.

⁵⁸ (n 53) allowing a court to hear a case against a defendant that is not within its jurisdiction provided the claim is in such a way related to the claim of the defendant over which the court does have jurisdiction (here: the claims against RDS) that reasons of efficiency justify a joint hearing. See further Cees van Dam, 'Preliminary judgments Dutch Court of Appeal in Shell Nigeria case' (14th January 2016) <www.ceesvandam.info/default.asp?fileid=643> accessed 14 December 2019.

⁵⁹ *Vava v Anglo American South Africa Ltd and Young v Anglo American South Africa Ltd* 9 (No.2) [2013] EWHC 2131 (QB). See also Augenstein and Jägers (n 15) 19.

⁶⁰ Brussels I Regulation (n 41).

⁶¹ *Vava* (n 5959) [75].

its functions, not about where others carry out functions that affect it’.⁶² The Court found that the claims filed against Anglo American South Africa by South African miners who contracted silicosis were connected to South Africa, such that the English court had no obligation ‘to assume jurisdiction over claims that have little if anything to do with this country’.⁶³ Scholars remain divided as to whether the argument of central administration could be successfully raised.⁶⁴

4.3.2. Denial of justice and *forum necessitatis*

Jurisprudence both inside and outside the EU clearly indicates that the risk a victim may not be able to access to justice in the state of harm may be a deciding factor influencing courts in determining jurisdiction.⁶⁵ An illustration of a new balance higher courts are striking is the decision of the British Columbia Court of Appeal in *Garcia v Tahoe Resources*. Garson J focused on the ‘measurable risk’ of tangible obstacles to a fair trial in Guatemala in circumstances where corporate interests are allied with state interests, which ‘points away from Guatemala as the more appropriate forum’.⁶⁶ The Court disagreed with the lower court that the plaintiff must prove that ‘justice could never be done’ in the host

⁶² Ibid (Smith J) [71] held: ‘The question where a company has its central administration clearly depends upon where the company itself carries out its functions, and unless the company can properly be said to act through another person or entity because of agency or delegation or on some other legally recognised basis, the actions of others do not determine the question’.

⁶³ Ibid [76].

⁶⁴ Augenstein and Jägers (n 15) 19 argue that although central administration could be raised it requires extensive knowledge of internal corporate decision making processes, and also the concept of central administration has not been clarified in a ruling of the CJEU. At 37, they recommend that EU Member States consider a rebuttable presumption that a wholly owned or majority owned subsidiary is presumed to have its central administration with the parent and the onus would be on the parent company to prove the subsidiary takes its decisions independently and has no ties to the parent company’s place of incorporation. Roorda (n 46), 201 notes the Court in *Vava* [41-42] referenced opinions which make it likely it will be hard to raise similar arguments in another case.

⁶⁵ *Araya v. Nevsun Resources Ltd.* (2016) BCSC 1856. The Supreme Court of British Columbia in Canada dismissed the appeal by Nevsun Resources Ltd in a claim for alleged collusion with the Eritrean government in the forced labour and torture of Eritrean refugees while working at the company’s Bisha mine. The court concluded that there was a real risk that the plaintiffs would not be provided with justice in Eritrea based on evidence pointing at systemic and procedural impediments and a lack of integrity of the legal system. See further <<https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mineeritrea>> accessed 18 December 2019.

⁶⁶ *Garcia v Tahoe Resources Inc.* [2017] BCCA 39 [30].

state, and applied a more realistic test of whether there is a ‘measurable risk’ of an unfair trial in that forum.⁶⁷ Notably, the Court added that assessment should include due consideration of the ‘broader context’, for example:

In characterizing the appellants’ claim as a personal injury case, the judge was insufficiently attentive to the context in which the conflict arose. This claim is not akin to a traffic accident. Rather, it arose in a highly politicized environment surrounding the government’s permitting of a large foreign-owned mining operation in rural Guatemala. The protest that led to the battery at issue in this case was not an isolated occurrence (...)⁶⁸

Such statements indicate that the appeal court recognised, *inter alia*, the host state government’s agenda, and a patent inequality of arms between large multinational corporations backed by governments and affected local communities. The approach of the Court is to be welcomed. It actively engaged to take a closer look at broader barriers to justice in host states in practice, including down to structural problems affecting the judiciary and the political context of the dispute.⁶⁹

In EU Member States the doctrine of *forum necessitatis* remains ‘an exceptional ground of jurisdiction’.⁷⁰ An EU Commission proposal for revision of the original Brussels I Regulation⁷¹ in 2010 included a forum of necessity⁷² to provide access to courts in EU Member States in civil and commercial disputes even if the defendant is domiciled in a third State, and opened the possibility to establish subsidiary jurisdiction on the basis of a

⁶⁷ *ibid* paras [128]-[129] finding that contrary to the lower court’s conclusions that procedural factors such as limited discovery proceedings available in relation to a foreign defendant pointed away from Guatemala as an appropriate forum.

⁶⁸ *ibid* [109].

⁶⁹ *inter alia*; stalled criminal proceedings in that jurisdiction, limited discovery procedures, the expiration of the limitation period for a civil suit and the real risk that the appellants would not obtain justice in the country.

⁷⁰ Augenstein and Jägers (n 15) 28-29.

⁷¹ (n 41).

⁷² Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Regulation and Enforcement of Judgements in Civil and Commercial Matters, COM (2010) 748 final (14 December 2010) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>> accessed 4 December 2019. The proposed Article 26 provided for access to the European courts in civil and commercial disputes even if the defendant is domiciled in a third State and opened the possibility to establish subsidiary jurisdiction on the basis of a sufficient connection.

sufficient connection. This proposal was correctly characterised by commentators as indispensable to harmonisation of rules in a European context,⁷³ and supportive of the right to a fair trial under Article 6 ECHR.⁷⁴ However, Member States were reluctant to endorse the proposed forum of necessity. The reasoning was primarily that the aim of Brussels I is not to create new routes to ground jurisdiction, but rather it is ‘a road map for civil litigants’.⁷⁵

As it stands Brussels I (recast) does not contain a forum of necessity, although it does provide member state courts with some discretion to stay proceedings in favour of a court in a third state provided that it is necessary for the ‘proper administration of justice’.⁷⁶ Thus, the existence of a forum of necessity is dependent on the private international law of EU Member States. As discussed, several EU Member States do provide for jurisdiction over third state defendants when some connection to the Member State concerned exists on the basis of *forum necessitatis* rules⁷⁷ or under the discretion of the courts within national civil procedure rules.⁷⁸

4.3.3. Article 6 ECHR and *forum necessitatis*

It is plausible to consider that provision of a *forum necessitatis* flows from, or is mandated by, the obligations of EU Member States’ under Article 6 ECHR. For example, in the light of Article 6 and the prohibition on denial of justice, Spain and France have recognised

⁷³ Johannes Weber, ‘Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation’ (2011) 619, 641 stating: ‘Art. 26 guarantees a right of access to justice and is indispensable in an instrument of full harmonisation’. See also Arnold Nuyts, ‘Study on Residual Jurisdiction. Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations’ (1 September 2007) <http://ec.civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed 4 December 2019; Augenstein and Jägers (n 15) 29 arguing a forum of necessity is also linked to the prohibition of a denial of justice as a requirement of national constitutional law and as a principle of public international law.

⁷⁴ Augenstein and Jägers (n 15) 28.

⁷⁵ *ibid*, 29. See also EU State of Play (n 44) 25.

⁷⁶ Article 33 (n 41).

⁷⁷ Statutory based in Austria, Belgium, Estonia, Netherlands, Portugal, Romania, and Spain. Case law based: France, Germany, Luxembourg, and Poland.

⁷⁸ Including in the United Kingdom and Ireland.

forum necessitatis.⁷⁹ In practice the application of domestic law permitting a forum of necessity appears to be excessively formalistic, and arguably insufficiently supportive of accepting jurisdiction in cases of violations of human rights. In France, it was recognised in the COMILOG case, an unfair dismissals case against a Gabonese logging company subsequently acquired by a French multinational corporation.⁸⁰ However, the finding of the Cour de Cassation on appeal⁸¹ is justifiably criticised as an excessively formalistic interpretation which disregards the objective and rationale of a forum of necessity.⁸² A similarly hard line approach is evident in the Swiss Federal Court judgment in *Naït-Liman*.⁸³ It concerned a Tunisian national surrendered by the Italian police to the authorities of Tunisia, and allegedly subjected to torture before escaping and taking up residence in Switzerland.⁸⁴ The ECtHR Grand Chamber ruled that the interpretation and application of a forum of necessity by the Swiss Court did not involve a violation of Article 6(1) ECHR.⁸⁵ The Grand Chamber concluded that public international law did not impose an obligation on domestic courts to offer a forum, on the basis of either universal civil jurisdiction, on

⁷⁹ French and Spanish courts have recognised *forum necessitatis* in the light of art 6 ECHR and the prohibition on denial of justice. In 2015 Spain revised its private international law to recognise a statutory basis for *forum necessitates*.

⁸⁰ As illustrated in the COMILOG case, Cour d'Appel de Paris, (10 September 2015) S11/05955-60 ordered compensation of 857 Gabonese workers for their unfair dismissal in the Congo in 1992. Accepting jurisdiction the court considered that the Gabonese workers' suit for compensation against the Gabonese subsidiary of a French company lasting 25 years with no imminent expectation of a ruling on the merits amounted to a denial of justice <www.asso-sherpa.org/affaire-comilog-victoire-pour-les-857-travailleurs-victimes-dun-deni-de-justice> accessed 4 December 2019.

⁸¹ Cour de cassation [Cass.]14 September 2017, Rev. sociétés 2018 ruling that as the workers could take a case in the Congo, albeit the case was unresolved after 25 years, there was not an 'impossibility' of access to justice.

⁸² Burkhard Hess and Martina Mantovani, 'Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation' (January 29, 2019) MPILux Research Paper 2019 (1) <<https://ssrn.com/abstract=3325711>> accessed 15 December 2019.

⁸³ Federal Supreme Court (22 May 2007) 4C379/2006.

⁸⁴ Mr. *Naït-Liman* was allegedly beaten and subjected to the so-called 'roast-chicken' method position whereby the victim is naked, his hands tied and his legs folded between his arms and an iron bar placed behind his knees. He is then suspended between two tables and beaten, typically on the soles of his feet, his knees, and his head.

⁸⁵ *Naït-Liman v Switzerland* App no 51357/07 (2018) (Grand Chamber) <<http://hudoc.echr.coe.int/eng?1=001-181786>> accessed 15 December 2019.

the basis of customary or treaty law, or a forum of necessity.⁸⁶ This case turned not on the right to access to a court *per se*, but on the margin of appreciation of domestic courts to limit the right, and the proportionality of any such limitation. As Hess and Mantovani highlight, in practice this effectively grants states:

(...) almost unlimited margin of appreciation in deciding both *if* they should provide a forum of necessity and *how* they should make it available on a case-by-case basis.⁸⁷

It is apparent that the *jus cogens* nature of the violation does not have a positive impact on the application of domestic rules concerning accepting or declining jurisdiction. It is unlikely to give much comfort to victims of human rights abuses that the Grand Chamber did see fit to encourage to states party to the ECHR to provide for a forum of necessity.⁸⁸

With cause, Enneking argues there is a potential role for Article 6 in FDL cases taken in EU states by victims facing extensive barriers to remedy in host states, *inter alia*, non-availability of legal aid, market based funding mechanisms, or availability of class actions to provide ‘minimum guarantees to host country plaintiffs’.⁸⁹ Indeed, that a refusal to exercise jurisdiction could breach the ‘right of access to a court’ was recognised in *Golder v United Kingdom* as forming part of the right to a fair trial under Article 6(1).⁹⁰ Notwithstanding the foregoing, although Article 6 has been raised in comparative FDL litigation, it has not been with the force or impact which might be anticipated and justified, as discussed in chapters 4 and 5.

⁸⁶ Concerning treaty law, the Grand Chamber examined the *travaux préparatoires* to Article 14 UN CAT and found that Switzerland had no legal obligation to open its domestic courts to the applicant’s claim.

⁸⁷ Hess and Mantovani (n 82) section 2 (emphasis in original).

⁸⁸ *Naït-Liman* (n 85) [218]-[220].

⁸⁹ Enneking ‘Judicial Remedies’ (n 2) 70.

⁹⁰ Hess and Mantovani (n 82) citing *Golder v United Kingdom* App no 4451/70, [1975] 1 EHRR 524. Para [35] states: ‘The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles’. See also Cedric Ryngaert, ‘From Universal Civil Jurisdiction to Forum of Necessity: Reflections on the Judgment of the European Court of Human Rights in *Naït-Liman*’ 100(3) *Rivista di diritto internazionale* (2017) 782, 805.

4.4. WHICH NATIONAL SYSTEM OF TORT LAW

Effective access to remedy in FDL litigation is dependent upon, *inter alia*, which system of law is applied in determining the merits, burden of proof, and damages. In early cases in the English courts such as *Connelly*,⁹¹ *Lubbe*,⁹² and *Ngcobo v Thor*⁹³ the claimants argued that English law should apply on the basis that the relevant acts of the parent company occurred in that jurisdiction. Since 2009, the issue of applicable law in EU Member States is largely determined by EU Regulation Rome II.⁹⁴

4.4.1. Applicable Law in the EU: Rome II

Rome II takes as its point of departure in art. 4(1) the applicability of the *lex loci damni*.⁹⁵ The applicable law to a dispute is the law of the country where the damage occurred, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect consequences of that event occur. The result is that in litigation concerning a multinational corporation in a home state of the EU, the laws of the third State govern the establishment of liability,⁹⁶ damages,⁹⁷ limitation periods,⁹⁸ presumptions of law, and rules on burden of proof.⁹⁹ To illustrate, Rome II effectively reversed the *status quo ante* under English law whereby such issues were dealt with under the law of the forum.¹⁰⁰ Notwithstanding, judicial interpretation is relevant. As explored in chapters 4 and 5, the *lex loci damni* may share roots and be

⁹¹ (n 36).

⁹² (n 37).

⁹³ (n 35).

⁹⁴ Rome II (n 49). Until the coming into force of the Rome Regulation on 11 January 2009, the issue of applicable law was governed by the Private International (Miscellaneous Provisions) Act 1995.

⁹⁵ *ibid.* The general rule is contained in Article 4(1). Article 4(3) provides: 'Where it is clear from all of the circumstances of the case that the tort/delict is manifestly more closely associate with a country other than indicated in paragraphs 1 or 2, the law of that country shall apply', which commentators consider might, for example, be based on a pre-existing relationship between the parties such as a contract closely associated with the tort/delict in question. See Simon Baughen, *Human Rights and Corporate Wrongs, Closing the Governance Gap* (Elgar 2015) 193.

⁹⁶ Rome II (n 49) art. 15(a).

⁹⁷ *ibid* art. 15(c).

⁹⁸ Rome II builds in certain safeguards which allow exceptions to the obligation to apply foreign law when it is necessary to take into account considerations of public interest.

⁹⁹ Rome II (n 49) art. 20(1).

¹⁰⁰ Baughen (n 95) 194.

influenced by the law of the forum, offering opportunities of interpretation in FDL litigation.

The overall effect of Rome II is to restrain the development of legal principles within FDL jurisprudence in EU Member States.¹⁰¹ Thus in practice, ‘the resolution of these cases may be affected by the application of an apparently innocent conflict rule, generally referring the subject-matter to the *lex loci damni*’.¹⁰² As Wesche and Saage-Maaß note, whether the application of the *lex loci damni* constitutes an advantage or a disadvantage for the claimants depends on the legal systems involved. It was an advantage in *Jabir and Others v KiK*¹⁰³ on the basis that the application of Pakistani tort law, which is influenced by English common law, by a German court provided precedent on parent company liability and opened the possibility for claims of damages for pain and suffering for loss of life, which do not exist in the German system.¹⁰⁴

It is, *a priori*, possible for the laws or legal principles of the forum state to be applied in FDL cases if the case can be brought within one of the exceptions contained in the Rome II Regulation. One such possibility is article 4(3) which provides for the law of the forum to apply where it is clear from all the circumstances of the case that the tort/delict is ‘manifestly more closely connected’ with a country other than the place where the harm occurred, and other than the one in which the parties have their joint habitual residence.¹⁰⁵ In practice this is considered an unlikely scenario in most human rights violations underlying FDL actions.¹⁰⁶ Leveraging other exceptions within Rome II depends to an extent on the domestic system. For example, Wesche and Saage-Maaß make a plausible case that the German courts may consider German rules of safety and conduct under Article 17 Rome II, in assessing the conduct of the parent or buying company; under Article 7 where the parent company’s conduct in Germany caused environment-related abuses abroad; and under Article 16 where the application of the *lex loci damni* would be

¹⁰¹ See Enneking ‘Judicial Remedies’ (n 2) 62.

¹⁰² Laura Pineiro and Xandra Kramer, ‘The Role of Private International Law in Contemporary Society: Global Governance as a Challenge’, (2014) 7(3) Erasmus Law Review 109.

¹⁰³ Case No. 7 O 95/15.

¹⁰⁴ Philip Wesche and Miriam Saage-Maaß, ‘Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*’ (2016) 16 Human Rights Law Review 370, 375.

¹⁰⁵ (n 49).

¹⁰⁶ Enneking ‘Judicial Remedies’ (n 2) 51.

incompatible with Germany's public policy as overriding mandatory provisions.¹⁰⁷ It is to be hoped that similar supporting arguments are made elsewhere and that the exceptions explored below under Rome II are potentially applicable to FDL litigation in EU States.

4.4.2. Rome II: Exception on Environmental Damage

For FDL cases, the exception on environmental damage in Article 7 is potentially relevant.¹⁰⁸ If it can be established that the event giving rise to the environmental damage took place in the home state of the corporate defendant, claimants would have the option to choose the law of that state.¹⁰⁹ At the crux of whether this would be workable is how transnational private law interprets direct and indirect consequences in distant geographical locations.¹¹⁰ Pending clarification by the Court of the Justice of the EU (CJEU) on the application of Article 7, scholars validly question whether 'transboundary' damage will stretch to include damage in a non-EU country.¹¹¹ In agreement with Enneking, from a pragmatic perspective it would appear logical that the interpretation of 'transboundary' would be delimited to a proximate area, for example, where pollution in one state of a river which flows into another and causes damage there.¹¹²

This question has arisen at Member State level. The plaintiff in *Lluyia v RWE* sought the application of German law under Article 7, arguing it was the locus of events giving rise to the damage. The argument was that greenhouse gas emissions occurred in Germany, where environmental regulation was higher than in Huaraz Peru the locus of the alleged resulting flood risk from a glacial lake.¹¹³ After the case was dismissed by the District Court in

¹⁰⁷ See Hess and Mantovani (n 82) 373.

¹⁰⁸ The term 'environmental damage' is defined in Recital 24 of Rome II as: 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms'.

¹⁰⁹ Under Rome II (n 49) art. 7 the law applicable to a non-contractual obligation arising out of environmental damage is the law of the country where the damage occurred 'unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred'.

¹¹⁰ See Hess and Mantovani (n 82).

¹¹¹ Enneking 'Judicial Remedies' (n 2) 54.

¹¹² *ibid.*

¹¹³ The substantive law is § 1004 I 1 of the German Civil Code (BGB) claim for removal and injunction. Under § 32 a ZPO (German Procedure Code), local jurisdiction in environmental cases lies with the courts at the place of origin of damage.

Essen,¹¹⁴ the plaintiff appealed to the Higher Court of Hamm which recognized the complaint as sufficiently plausible and therefore admissible. The case is in the evidentiary stage and experts have been appointed to advise the court.¹¹⁵ It time it may provide valuable precedent. Pressing for a wider interpretation of a transboundary tort, Enneking argues that this would be consistent with EU environmental policies.¹¹⁶ This appears plausible on the basis that in the drafting process, the EU Commission justified inclusion of this exception as aligning with EU interests ‘as a whole to deter environmental damage and accord a choice of laws subjecting the polluter to a higher standard’.¹¹⁷

Further, from the perspective of EU policy coherence the argument is valid. Interpreting the scope of Article 7 in such a way would underpin, and be consistent with, EU and EU Member States’ policies on ‘polluter pays’, the EU Strategy on Corporate Social Responsibility,¹¹⁸ and its support for the UN Framework on business and human rights.¹¹⁹ Scholars identify a further interesting possibility if the Article 7 exception could be applied to circumstances where the corporate defendant in the home country failed to implement or adhere to its own published policies, or failed to oversee the activities of subsidiaries in a host country that resulted in the environmental damage.¹²⁰ Taking this forward, as will be argued in chapter 4, there is momentum opening the possibility for those affected to leverage this exception and potentially to opt for the law of the forum.¹²¹

¹¹⁴ Case No. 2 O 285/15 Essen Regional Court Germany <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf> accessed 28 December 2019.

¹¹⁵ An unauthorised translation of the judgment by Germanwatch <<https://germanwatch.org/sites/germanwatch.org/files/announcement/20812.pdf>> accessed 28 December 2019. See also <www.lse.ac.uk/GranthamInstitute/litigation/liiuya-v-rwe/> accessed 28 December 2019.

¹¹⁶ Enneking ‘Judicial Remedies’ (n 2) 53.

¹¹⁷ *ibid* 54 citing Recital 25 Rome II ; 53 citing Explanatory Memorandum Rome II, 19.

¹¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ COM/2011/0681 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>> accessed 14 December 2019.

¹¹⁹ State of Play (n 44) 2.

¹²⁰ Enneking ‘Judicial Remedies’ (n 2) 53-55 arguing that on the basis of the ‘polluter pays’ principle for environmental damage, it would be inconsistent to allow the tortfeasor to derive economic benefits of the harmful activity resulting in human rights or health and safety related damage.

¹²¹ See Wesche and Saage-Maaß (n 104).

4.4.3. Rome II: Overriding Mandatory Provisions

States can potentially apply public policy style regulations as overriding mandatory provisions,¹²² which arguably could include human rights standards as part of the *ordre public* of the forum under Article 16. This avenue could be opened if, as advocated in chapter 2 section 2.7, the EU or individual Member States introduce mandatory HRDD. Although Recital 32 of Rome II specifies this exception is to be applied only ‘in exceptional circumstances’,¹²³ in agreement with Enneking, statutory HRDD would arguably come within Article 16.¹²⁴ If, for example, the French Duty of Vigilance Law of 2017¹²⁵ is characterised as an overriding mandatory provision in domestic law, this would enable claimants to choose for the laws of France to be applied to both the substantive and procedural aspects of the case. Extending this argument, EU wide mandatory HRDD would fundamentally alter the complexion of accountability by disassembling the negative effects of Rome II on the applicable law in FDL litigation.

4.4.4. Rome II: Evolving Behavioural Standards

The application of evolving standards is another route under Article 17 concerning rules of safety and conduct.¹²⁶ It is interpreted as directing a court in an EU Member State, ‘in so far as is appropriate’ to take into account home country behavioural standards.¹²⁷ Beyond

¹²² EU State of Play (n 44) 26 confirms that: ‘Irrespective of the applicable law in a given dispute, the court will be able to apply the overriding mandatory provisions of the law of the forum’.

¹²³ Rome II (n 49) Recital 32: ‘Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum’.

¹²⁴ Enneking ‘Judicial Remedies’ (n 2) 56

¹²⁵ *loi* n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés meres et des entreprises donneuses d’ordre: JO 28 March 2017, texte n° 1.

¹²⁶ European Coalition for Corporate Justice, ‘Key Features of Mandatory Human Rights Due Diligence Legislation’ (June 2018) <http://corporatejustice.org/documents/publications/eccj/2018eccj-position-paper-mhrdd-final_june2018.pdf>, accessed 31 January 2019> accessed 14 December 2019.

¹²⁷ Rome II (n 49) art. 17 provides: ‘In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability’.

¹²⁸ Enneking ‘Judicial Remedies’ (n 2) 58.

is the wider question of reference to the standards contained in international soft law instruments as adopted in Member States. As such, even when the applicable law is that of the host country, the norms and standards contained in instruments such as the OCED Guidelines, the UNGPs, Member State National Action Plans, and mandatory human rights due diligence¹²⁸ are arguably relevant to the consideration of national courts. To this end, it is regrettable that evolving norms and standards, which are widely accepted in EU Member States, have not proven more influential in judgements in FDL cases. With the benefit, *inter alia*, of amici submissions, courts in forum states are well informed but are failing to accord sufficient weight to such standards. In *Choc v Hudbay*¹²⁹ the amicus brief of Amnesty International Canada invoked states' duties under IHRL to prevent both public and private actors abusing human rights, the interest of the state in its international reputation, and the strong interest of Canadian society in ensuring its corporations respect human rights.¹³⁰ In parallel, for EU Member States, these arguments are consistent with, *inter alia*, commitments undertaken concerning multinational parent companies,¹³¹ with EU policy,¹³² and with the position of the Council of Europe.¹³³ Amnesty International referenced these standards and instruments in its submissions to the UK Supreme Court in the *Okpabi* case,¹³⁴ but scant regard was accorded to them in the judgement of the Court of Appeal.¹³⁵ The courts of EU Member States should, of their own volition, have regard to

¹²⁸ See chapter 2 section 2.3.

¹²⁹ *Choc v Hudbay* [2013] ONSC 1414.

¹³⁰ Amicus curiae submission of Amnesty International Canada in the Hudbay cases stating: 'Canada has endorsed standards such as the Guiding Principles, the OECD Guidelines for Multinational Enterprises, and the Voluntary Principles on Security and Human Rights, its courts should have no difficulty in recognizing these principles and drawing upon international norms and standards of conduct' <www.amnesty.ca/legal-brief/angela-choc-v-hudbay-minerals> accessed 14 December 2019.

¹³¹ See generally National Action Plans on Business and Human Rights <<https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>> accessed 22 December 2019; <www.humanrights.dk/projects/national-action-plans-business-human-rights> accessed 22 December 2019.

¹³² See generally EU State of Play (n 44).

¹³³ See Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016) 'Human Rights and Business' <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4> accessed 22 February 2018.

¹³⁴ Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International in *Okpabi v Royal Dutch Shell plc* UKSC 2018/0068 (April 2018) <www.amnesty.org/download/Documents/AFR4483212018ENGLISH.PDF> accessed 15 December 2019.

¹³⁵ *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 (*Okpabi CA*) (Simon LJ) [130]-[131].

the evolution in standards on business and human rights, and it is argued to become an increasing theme in jurisprudence as explored in chapter 4.

4.5. PROCEDURAL AND PRACTICAL CIRCUMSTANCES OF THE FORUM

FDL litigation is heavily influenced by the procedural rules and practical circumstances of the forum, and the barrier to remedy these may represent to claimants.

4.5.1. Particularities of the United States Forum

The reasons why the US was the forum of choice for human rights go beyond the specific attributes of the ATS, to general characteristics of litigation. As discussed, an influential factor was relatively liberal rules regarding general personal jurisdiction.¹³⁶ In the *Wiwa* case,¹³⁷ concerning acts which occurred in Nigeria, personal jurisdiction over Shell was upheld on the basis of an investor relations offices of the group in New York city.¹³⁸ Subsequently, the rules on general personal jurisdiction were restricted in the so-called ‘at home’ test.¹³⁹

Unlike the United States, most jurisdictions did not recognize the ‘doing business’ basis of jurisdiction over corporations, and instead focus on the place of incorporation of a corporate defendant, or the location of the acts at issue when considering nexus to the forum. As outlined, this is generally the position in the EU under the Brussels I regime.¹⁴⁰ A further factor favouring the United States as a forum is the conception of civil litigation as a generally accepted means of promoting social reform and public policy development, such

¹³⁶ Section 4.2.1.

¹³⁷ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d. 88, 94-99 (2nd Cir. 2000).

¹³⁸ *ibid Wiwa* [19]-[22].

¹³⁹ *Daimler* (n 10).

¹⁴⁰ The Brussels regime (n 41); the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; and the Lugano Convention (revised) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (21 December 2007, entry into force in relation to all states on 01 May 2011) OJ L 339/3 making the regulation applicable to Iceland, Lichtenstein, and Norway as well as Denmark.

that Stephens' considers the use of civil litigation in the US is accepted and leveraged as a means to develop international principles of accountability.¹⁴¹

4.5.2. Procedural and Practical Circumstances in the EU: United Kingdom

To illustrate the impact of procedural and practical circumstances, and as foregrounding to chapter 4, an outline of circumstances in the UK is instructive. There is no cause of action for violations of international law equivalent to the ATS, and the UK does not explicitly recognise a forum of necessity. The Human Rights Act 1998 (Eng.) (HRA) does not provide a cause of action against a company for human rights abuses abroad.¹⁴² On this basis, there is no statutory provision under which a company can be held to account in civil law for human rights abuses committed abroad.¹⁴³ A corporation may be held liable just as a natural person and may be convicted of common law and statutory offences. Although criminal law has introduced two new offences for corporations, these provisions are not expected to be effective in addressing FDL style harms on the basis of lack of extraterritorial reach, difficulties with attribution to a corporation or political will.¹⁴⁴ Universal criminal jurisdiction applies to certain crimes,¹⁴⁵ but there have been no proceedings against corporations. On balance, scholars consider it highly unlikely that the relevant statutory

¹⁴¹ Beth Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' (2001) 24 *Hastings Int'l & Comp. L. Rev.*, 409, 413. Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their impact on the Liability of Multinational Corporation', (2002) 20 *Berkeley J. Int'l L.* 91.

¹⁴² According to S.6(1), the Act only applies to acts of public authorities. Under section 6(3)(b), it will not apply to a company unless that company is exercising functions of a public nature.

¹⁴³ Rachel Chambers and Katherine Tyler, 'The UK Context for Business and Human Rights' in in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014) 301,303.

¹⁴⁴ *ibid* 309 Chambers and Tyler argue that while the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) significantly changed the standards of corporate accountability, had the act been extraterritorial in its application it would have provided an important method for regulating the acts of companies abroad. Although The Serious Crime Act UK 2007 theoretically provides a mechanism under which companies could be prosecuted for actions abroad, including that might constitute human rights harms, Chambers and Tyler consider it unlikely an offence could be made out due to difficulty in proving *mens rea*. Further, prosecution requires the consent of the Attorney General, which may politicise the application of extraterritorial principles.

¹⁴⁵ Including genocide, torture, crimes against humanity and war crimes under the International Criminal Court Act 2001 and Criminal Justice Act 1988.

provisions ‘will ever offer any form of remedy to the victims of corporate human rights abuses committed abroad’.¹⁴⁶

As discussed in chapter 2 sections 2.5, advancing accountability requires the introduction of a new offence of failure to prevent human rights abuses. There are no decisions in which an English court has ‘pierced the corporate veil’ in a tort case.¹⁴⁷ As discussed, cases taken against corporations concerning corporate-related harm which occurred outside the UK are primarily brought in tort, seeking to impose direct liability for actions or omissions breaching the parent company’s duty of care.¹⁴⁸ Having reviewed six such cases taken in the period 2005-2014¹⁴⁹ Chambers and Tyler correctly stress the importance of these cases as the only effective method in the United Kingdom of holding companies accountable for harms committed abroad.¹⁵⁰ Class actions are possible under national civil procedure rules.¹⁵¹ As FDL litigation typically involves large number of claimants, such established provisions are an advantage.¹⁵² Although regulation concerning costs introduced in 2012¹⁵³ has significantly adversely impacted funding in FDL cases,¹⁵⁴ third-party funding of litigation is permitted, available and used. Thus, there is no specific human rights based cause of action, no appropriate offence under criminal law, no forum of necessity and no

¹⁴⁶ Chambers and Tyler (n 143) 309.

¹⁴⁷ Baughen (n 95) 180.

¹⁴⁸ See Richard Meeran, ‘Multinationals will Profit from the Government’s Civil Litigation Shake-up’ The Guardian (24 May 2011) <www.theguardian.com/commentisfree/libertycentral/2011/may/24/civil-litigation-multinationals> accessed 8 December 2019.

¹⁴⁹ Six cases, of which four resulted in a settlement; BP (2005 and 2008) (not tort of negligence, breach of contract part claim), *Yao Essaie Motto v Trafigura Ltd. And Trafigura Beheer BV* HQ06X03370 (Nov. 2006), *Motto v Trafigura* [2011] EWCA Civ. 1150; *Guerrero v Monterrico Minerals plc* [2009] EWHC 2475 (not tort of negligence, wrongful imprisonment), *Okpabi* (2011) and *Vava* (2011) (n 59).

¹⁵⁰ Chambers and Tyler (n 143) 320.

¹⁵¹ Rule 19.10 concerns group litigation <www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.4A> accessed 15 December 2019.

¹⁵² See Shubnaa Srinivasan (n 38) 335 fn 16.

¹⁵³ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). See also Meeran ‘Access to Remedy: The UK Experience’ (n 33) 397-399.

¹⁵⁴ Prior to 2013 legal costs during a case could be funded under conditional fee arrangements and insurance allowing recovery of the premium recoverable from the losing party. The potential effects of LASPO on litigation were clearly flagged in advance. J.G. Ruggie wrote to the UK Minister of Justice arguing that the contents would constitute ‘an effective barrier to legitimate business-related claims being brought before UK courts in situation where alternative sources of remedy are available’, attached to Meeran (n 148).

leveraging of either universal criminal or civil jurisdiction against corporations. The primary route to accountability is based on parent company direct liability under the tort of negligence, and practical circumstances are, relatively speaking, favourable.

4.6. REMEDIES: OUTLINE

As indicated, discussion of remedies is outside the scope of this thesis. It is noted that there is a disconnect between the breadth of remedies recommended by the UNGPs,¹⁵⁵ which include apologies, restitution and financial or non-financial compensation and the remedies utilised in tort cases in domestic systems.¹⁵⁶

4.6.1. Compensation

The award of monetary damages in cases related to business abuses of human rights in the English courts exhibits three trends identified by Vos: ‘the ‘covert’ award of non-compensatory damages; the rise of remedies offered for non-pecuniary loss; and growing protection for the loss of a (mere) infringement of a right or interest’.¹⁵⁷ Notably, Vos recognises the importance of a trend in EU countries supporting protection of infringement of a right or interest, inter alia, right to life, liberty, dignity, physical and mental integrity and privacy.¹⁵⁸

This theme of vindication of personal rights will be explored in detail concerning rights identified under the Irish Constitution in chapter 6. Exemplary damages are in principle available in English courts,¹⁵⁹ and in other EU Member states including France, Germany, Spain, Switzerland, Greece, and Slovakia.¹⁶⁰ However, as noted above, as compensation is rarely achieved, deterrence and restitution are remote possibilities. Even in cases where

¹⁵⁵ Commentary to UNGP 25 ‘(...) including apologies, restitution, financial or non-financial compensation and punitive sanctions (whether criminal, or administrative such as fines), as well as the prevention of harm through, for example, injunctions and guarantees of non-repetition’ United Nations Guiding Principles on Business and Human Rights <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 30 November 2019.

¹⁵⁶ Florentine Vos, ‘European Trends in Tort Law Remedies’ in Angelica Bonifanti (ed.) *Business and Human Rights in Europe, International Law Challenges*, (Glawcal 2019), 243.

¹⁵⁷ *ibid* 237.

¹⁵⁸ *ibid* 240.

¹⁵⁹ *Rooks v Bernard* [1964] A.C. 1129, 21 January 1964.

¹⁶⁰ See Vos (n 156), 237-239.

settlements are agreed before trial in which restitution of affected areas is a feature, it has not been realised.¹⁶¹

4.6.2. Non-pecuniary Loss

The regulatory effect of tort law, discussed in section 3.4, is supported by the availability of remedies for non-pecuniary loss.¹⁶² Bolstering non-compensatory damages which recognise the unacceptable impacts of multinational corporations on human rights and stand behind deterrence. Although domestic tort laws allow for specific performance orders or injunctions, Vos argues that they are underutilised by the courts, and highlights there appears to have been little reflection on creative possibilities suitable to the abuses in a business and human rights context.¹⁶³ While her concern is valid, in several cases EU courts have been requested to order the defendant to issue an apology, make declaratory orders or issue injunctions.¹⁶⁴ For example, in 2019 the District Court in The Hague accepted jurisdiction in *Kiobel et al v Royal Dutch Shell plc et al*. The plaintiffs seek, inter alia, an apology from Shell.¹⁶⁵

4.7. CONCLUSION

This chapter explored the challenges of procedural and practical circumstances in FDL litigation. If jurisdiction can be established, litigation offers claimants better chances of financial compensation. However, jurisdictional conflicts are significant and to an extent inevitable. While Brussels I (recast) opens possibilities for proceedings against the parent

¹⁶¹ *Bodo Community v The Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 1973 (TTC).

¹⁶² Vos (n 156) considers such remedies both recognise the vulnerability of victims and act as a deterrent they particularly valuable for victims of human rights abuses.

¹⁶³ *ibid* 241.

¹⁶⁴ Discussed in Chapter 5. In the District Court of the Hague, the claimants sought a declaratory judgement that Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria acted unlawfully. They also sought injunctions ordering; the repair and maintenance of the oil pipelines and wellheads; clean-up of the contaminated areas; due diligence in future operations in the area; the adoption of contingency plans in order to limit the risks and consequences of future oil spills. In *Kiobel v Shell* ECLI:NL: RBDHA:2019:6670 the District Court of The Hague confirmed jurisdiction against UK based parent company Royal Dutch Shell plc, two of its UK incorporated subsidiaries and its Nigerian subsidiary the Shell Petroleum Development Company of Nigeria.

¹⁶⁵ Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1(1) Business and Human Rights Journal 41.

company of EU based multinational corporations in their home states, claimants face the challenge of joining foreign subsidiaries to litigation.

A discussion of the doctrine of forum of necessity led to the conclusion that Article 6 ECHR could be expected to figure more prominently in litigation. Similarly, the exceptions to application of the *lex loci damni* under Rome II can be expected to increasingly feature. The most promising routes are if statutory human rights due diligence can be argued to be an ‘overriding mandatory provision’ within Rome II, or a court can be convinced to apply higher behavioural standards in the forum state.

An overview of procedural and practical circumstances in the UK served to illustrate that FDL litigation offers the only potential means of holding multinational corporations to account.

Having framed the normative considerations in chapter 3, and the procedural and practical issues in this chapter, chapter 5 proceeds to examine recent comparative jurisprudence, as it operates against the feasibility factors.

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5.1. INTRODUCTION

It is apparent that existing regulatory regimes and mechanisms of accountability are inadequate to prevent the negative impacts of business on human rights and to render corporations accountable. While it is argued that as long as zones of weak governance persist the home state of multinational corporations should fill the resultant regulatory vacuum,¹ this remains a politically and economically sensitive issue. Chapter 3 advocated that foreign direct liability litigation (FDL) is a primary potential route to remedy and is performing an essential function in seeking to vindicate human rights in domestic systems.

The aim of this chapter is to synthesise the progression of comparative FDL jurisprudence, which may be considered as a prelude to the development of FDL litigation in Ireland in chapter 6. Consistent with the research methodology, this chapter analyses solutions developed to the common problem with accountability.² The feasibility of actions is examined using the framework of five factors introduced in chapter 4, though the lens of comparative jurisprudence. Consistent with the preponderance of litigation, this analysis will focus on common law jurisdictions, primarily the UK. It will also refer to the development of precedent in Canada, and relevant developments in litigation in the Netherlands.

To respond to the central research question and investigate the feasibility of FDL litigation in Ireland, it is most instructive to look to the courts of England and Wales (English courts). The United Kingdom (UK) is the nearest common law jurisdiction and has commonalities with Ireland of concepts in private law; ‘legal family’; language; socio-economic background in Western Europe; and historical context.³ Like Ireland, the UK is a significant jurisdiction of domicile or principal place of business for multinational corporations. Similarly, to circumstances in the UK, commercial organisations domiciled and headquartered in Ireland are being linked to abuses of human rights abroad.⁴ As such, concerns around the effect of grounding direct liability of parent companies on foreign direct investment can be expected to also resonate in Ireland. While the UK remains in the European Union (EU), the English courts are subject to two EU Regulations concerning

¹ Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Human Rights Abuses in the European Union, The Challenges of Jurisdiction’ (2009) 40 Geo Wash. Int’l Law Rev. 939.

² Chapter 1 section 1.5.

³ Chapter 1 section 1.5.

⁴ Chapter 1 section 1.4.

jurisdiction in civil disputes and applicable law which impact individual FDL cases and the development of precedent.⁵ Further, in FDL cases courts in the EU are applying the law where the harm occurred, which in many cases has been influenced by English common law. The English courts are particularly active in the development of the concept of parent duty of care and consequently offer insights into the manner in which legal principles and relevant concepts are considered and applied. It is acknowledged there are also significant divergences of context between the UK and Ireland to be taken into consideration. The UK has integrated the European Convention on Human Rights in a manner different to that in Ireland. Further, the UK does not have a Constitution as Ireland has, infused with principles of natural law or a cause of action for infringement of constitutional rights as in Ireland. Although commentators note that little commonality amongst transnational cases thwarts a meaningful analysis of how effective the current mechanisms are for litigants, it is recognised that there are common ‘congenital’ obstacles faced by claimants. These may be substantive, procedural, or practical.⁶ Developments in certain civil jurisdictions are noted.⁷

This chapter will identify threads and themes in comparative jurisprudence. It will focus on three major cases which came before the English Court of Appeal in 2017 and 2018. Jurisdiction was refused in *Okpabi v Royal Dutch Shell Plc (Okpabi)*⁸ and *AAA v Unilever*

⁵ Regulation (EU) No 1215/2012 of 20 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351 (Brussels I recast); Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199. (Rome II).

⁶ Shubnaa Srinivasan, ‘Current trends and future effects in transnational litigation against corporations in the United Kingdom’ in in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New Expectations and Paradigms* (ABA Book Publishing 2014), 343, 342.

⁷ See Agence France Presse, ‘Lafarge charged with complicity in Syria crimes against humanity’ Guardian (28 June 2018) <www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity> accessed 31 December 2019. For this thesis, it is premature to render an assessment of the operation and impact of *loi* n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre: JO 28 March 2017 texte n° 1 (France Duty of Vigilance Law). In November 2019, a French appeal court rejected the preliminary charge of but the investigation into charges of financing terrorism, endangerment of people’s lives and violation of sanctions continues Reuters ‘France’s Lafarge has charge of crimes against humanity lifted’ (7 November 2019) <www.reuters.com/article/us-lafargeholcim-syria-appeal/frances-lafarge-has-charge-of-crimes-against-humanity-lifted-lawyers-idUSKBN1XH14X> accessed 28 November 2019.

⁸ *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC) (*Okpabi* HC); [2018] EWCA Civ 191 (*Okpabi* CA).

PLC and Unilever Tea Kenya Limited (Unilever),⁹ but was allowed in *Lungowe v Vedanta (Vedanta)*.¹⁰ The judgment of the UK Supreme Court in *Okpabi* is anticipated in late 2020 or early 2021. For present purposes, the judgement of the UK Supreme Court in *Vedanta* handed down in 2019 is the most instructive.¹¹ This chapter will track the development of legal principles. At the end of the chapter, a synthesis will be presented in a model. It will summarise the issues arising in the process of adjudication of FDL cases, grouped under the headings of grounding jurisdiction, establishing an arguable case that a duty of care is owed, and factors relating to procedural and practical circumstances of the forum. The utility of this model is its synthesis, and as a springboard to chart future directions including the potential development of FDL litigation in Ireland.

Section 5.2. will outline development of parent company duty of care in English jurisprudence. Section 5.3. will analyse developments and clarifications in the *Vedanta* case. In the context of civil procedure rules in the English courts, this involves: summary judgment as to whether there is an arguable case that the parent company owes a duty of care; joining of foreign defendants; assessment of connecting factors to alternative jurisdictions; risk of irreconcilable judgements; and access to justice in the alternative jurisdiction. Section 5.4. will consider the legal principles and precedent from Canada and the Netherlands. Section 5.5. will synthesise themes which are indicative of the way forward in FDL litigation, including the influence of corporate group policies, control, the role of evolving international standards, and the challenges of EU rules on applicable law. Section 5.6 will synthesis relevant principles from comparative FDL jurisprudence and section 5.7 will present a model for adjudicating FDL cases from comparative jurisprudence as a prelude to considering litigation in the Irish context in chapter 6.

5.2. DUTY OF CARE: EVOLUTION OF PRINCIPLES IN THE ENGLISH COURTS

The majority of claims in the English courts have been pleaded on the basis of the parent company's primary liability, rather than derivative liability¹² or vicarious liability.¹³ The

⁹ *AAA v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 (*Unilever CA*). In 2019 the Supreme Court refused the claimants' application to appeal the judgment of the Court of Appeal.

¹⁰ *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528 (*Vedanta CA*).

¹¹ *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (*Vedanta SC*).

¹² Discussed in chapter 3 section 3.4.

¹³ Discussed in chapter 3 section 3.5.4.

foundation of these claims is not for a breach of international law.¹⁴ They are grounded in principles of domestic tort law, mainly the law of negligence.¹⁵

5.2.1 From a Duty of Care to Employees to Parent Company Duty of Care

The concept of parent company duty of care developed in the *Connelly*¹⁶ and *Thor*¹⁷ cases in the English courts, to the point of conceptualising and acknowledging that it was arguable a parent company may owe a duty of care to employees of subsidiaries. The possibility that a duty of care may also be owed to a wider community based on *de facto* control over the operations of a foreign subsidiary was first raised in *Lubbe v Cape plc*.¹⁸ In 2009 in *Guerrero v Monterrico Metals plc*,¹⁹ the claim alleged the parent company exercised effective control over the subsidiary's management, and also that the two companies in fact operated as one body. Although these early cases were interlocutory decisions and were either settled before trial or struck out for other reasons, a body of

¹⁴ Discussed in chapter 3 section 3.3 including litigation under the Alien Tort Statute of 1789 28 U.S. Code § 1350. (June 25, 1948) ch. 646.

¹⁵ Discussed in chapter 3 section 3.3. It is noted that transnational litigation claims have also been brought under the law of contract, such as *Pedro Emiro Florez Arroyo v Equion Energia Limitada* Claim No. HQ08X00328, a claim by 73 Colombian rural farmers for alleged breach of contracts and negligence against a former British Petroleum subsidiary. See also Madev Mohan, 'The Road to *Song Mao*: Transnational Litigation from Southeast Asia to the United Kingdom' (2014) AJIL Unbound <doi:10.1017/S2398772300009661>.

¹⁶ In *Connelly v RTZ Corporation plc* (No.2) [1997] UKHL 30, [1999] CLC 533 Wright J stated the conclusions drawn from the pleadings as: '(...) the first defendant had taken into its own hands the responsibility for devising an appropriate policy for health and safety to be operated at the Rossing mine and either the first defendant or one or other of its English subsidiaries implemented that policy and supervised the precautions necessary to ensure so far as reasonably possible, the health and safety of the Rossing employees through the RTZ supervisors ... The situation would be an unusual one but if the pleading represents the actuality then, as it seems to me, the situation is likely to comprehend the three elements of proximity, foreseeability and reasonableness required to give rise to a duty of care (...)'

¹⁷ In *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* Times L Rep (10 November 1995) Kay J considered it was arguable that a claim for breach of duty of care existed against the parent company, stating: 'The fact that the law does not impose liabilities upon companies in respect of the acts or omissions of other companies in the same group simply by reason of their common membership of the same group does not mean that circumstances cannot arise where in more than one company in the same group each incurs liabilities in respect of damage caused to a particular plaintiff'.

¹⁸ *Lubbe v Cape plc* [1998] CLC (CA) (Bingham LJ) 1551A.

¹⁹ [2009] EWHC 2475; [2010] EWHC 3228.

principles was emerging. By 2012, a parent duty of care owed to employees of its subsidiaries was recognised by the Court of Appeal in *Chandler v Cape plc*.²⁰ The claimant David Chandler contracted asbestosis as a result of contact with asbestos dust while working with Cape Building Products Limited (CPL), a subsidiary of Cape Plc (UK).²¹ Mr. Chandler alleged Cape Plc owed him a duty of care, *inter alia*, because the UK parent company employed a medical and scientific officer responsible for overseeing health and safety across the group, including at CPL.

The parameters established in *Chandler* represent crucial markers in the process of development of legal principles. These carried through in subsequent cases, until the clarifications introduced by the UK Supreme Court in *Vedanta*.²² Firstly, the trial court applied the three-stage test of duty of care set out in *Caparo Industries plc v Dickman*.²³ The elements of the *Caparo* test are: (a) was the harm foreseeable; (b) that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised in law as one of ‘proximity’ or ‘neighbourhood’; and (c) the situation is one in which the court considers it fair, just and reasonable that the law should impose a duty upon one party for the benefit of the other.²⁴ On appeal, the same approach was applied. Secondly, the court held that Cape plc was liable to Mr. Chandler ‘on the basis of the common law concept of assumption of responsibility’.²⁵ Thirdly, Arden LJ acknowledged

²⁰ [2012] EWCA Civ 525 (*Chandler CA*).

²¹ *ibid*. It was not possible to seek damages against CPL as the company had been dissolved and there was no relevant policy of employer’s liability insurance. Arden LJ [4] noted that as asbestosis was an exception under the employer’s liability insurance policy there was no point in seeking to have the dissolution of CPL set aside so as to be able to enforce rights against its employer’s liability policy.

²² Discussed in section 5.3.2. As discussed in chapter 6 concerning FDL litigation in Ireland, the position the Irish courts may adopt is as yet unknown, and discussion of the application of the *Caparo* test within FDL litigation remains potentially relevant.

²³ [1990] 1 All ER 568 (HL).

²⁴ *ibid* 618.

²⁵ *Chandler (CA)* (n 20) (Arden LJ) [1], [70]-[71]. Notably, the court rejected the parent company’s submissions that the duty of care could only exist if the parent company had absolute control of the subsidiary. At [60] it also held that in determining whether there had been an assumption of responsibility by a parent company, the court was confined to considerations of ‘matters which might be described as not being normal incident of the relationship between the parent and the subsidiary company’.

that development of the law of negligence has to be incremental,²⁶ by reference to analogous cases based ‘on the duty of a person to intervene to prevent damage to another’.²⁷

5.2.2. Duty of Care: The Four Indicia in *Chandler*

To assess whether the parent company had assumed direct responsibility, the Court of Appeal developed a four-prong test which remained the guiding tenet. As described by the court, a parent company may assume a duty of care in circumstances where: the parent and the subsidiary are involved in businesses that are the same in a relevant aspect; the parent has or should have possessed ‘superior’ knowledge in some relevant aspect of the business of the subsidiary; the parent knew or should have known that aspects of the systems or operations of the subsidiary carry risks; and it should have been foreseeable by the parent company that the subsidiary and the protection of those employed by it would rely on its superior knowledge.²⁸ Notably, in order to establish the fourth factor, the court was willing to consider the relationship between parent and subsidiary ‘more widely’, for instance a practice of the parent intervening in the trading operations and funding of its subsidiary.²⁹ On the facts in *Chandler*, in view of the parent company’s superior knowledge about the nature and management of asbestos risks, the Court was in ‘no doubt’ Cape had assumed a direct duty of care to advise CPL as to how to render the working environment for employees at the subsidiary’s operations safe and ensure itself that this was the case.³⁰ When the parent failed to do so, the result was harm to an employee.³¹

Albeit the duty of care assumed by the parent company was limited to employees in this case, the Court proceeded to lay down parameters which became the framework upon which subsequent jurisprudence developed. Firstly, it clarified that assumption of

²⁶ In *Caparo* (n 23) the House of Lords signalled a retreat from *Anns v Merton Borough Council* (*Anns*) [1978] AC 728. In *Anns* Lord Wilberforce moved away from categories and a requirement to bring the facts of the case to within circumstances in which a duty of care had already been held to exist. Lord Wilberforce formulated a two-step test. Under the first part of the test a prima facie duty of care arises based on damage where the parties are in a relationship of proximity, and a secondary consideration of whether this is limited or negated by policy considerations. The court formally overruled *Anns* in *Murphy v Brentwood District Council* [1991] AC 398, 480 (HL).

²⁷ *Chandler* (CA) (n 20) (Arden LJ) [63].

²⁸ *ibid* [80].

²⁹ *ibid*.

³⁰ *ibid*.

³¹ *ibid* [79].

responsibility is not imposed by ownership alone, and considered there was no support for Cape's submission that duty of care is predicated on absolute control of a subsidiary.³² Secondly, the Court 'emphatically reject[ed] any suggestion that [it had been] in any way concerned with what is usually referred to as piercing of the corporate veil'.³³

5.2.3. Jurisprudence post *Chandler*

Post *Chandler*, parent company liability continued to develop in *Kesabo v African Barrick Gold plc*,³⁴ *Bodo Community v Shell Petroleum Development Company of Nigeria*³⁵ and the *Trafigura* case.³⁶ In 2014 the Court of Appeal considered the *Chandler* indicia³⁷ for assumption of responsibility in *Thompson v The Renwick Group plc*.³⁸ Tomlinson LJ regarded the four indicia of *Chandler* as illustrations of ways in which the requirements of *Caparo* may be satisfied to find the parent company owed a duty of care to employees of the subsidiary. This conclusion that the indicia were intended to 'descriptive' rather than an 'exhaustive',³⁹ opened the door to development the widening of circumstances in which the courts might ground parent company duty of care.

In 2017 and 2018 three cases came before the Court of Appeal concerning jurisdiction for third country claimants to bring proceedings in the English courts against both a UK parent company and its foreign subsidiary. Each case concerned the wider community affected by

³² *ibid* [66].

³³ *ibid* [69].

³⁴ *Kesabo v African Barrick Gold plc* [2013] EWHC 4045 (QB).

³⁵ *Bodo Community v Shell Petroleum Development Company of Nigeria* Case No. HQ11XO00328.

³⁶ *Yao Essaie Motto v Trafigura Ltd. and Trafigura Beheer BV* HQ06X03370 (*Trafigura*). In 2006, Leigh Day represented 30,000 claimants from Cote d'Ivoire against oil trader Trafigura over dumping of allegedly toxic waste in capital Abidjan. The waste was offloaded to a local contractor in Abidjan in August 2006 and dumped at 12 different sites releasing foul-smelling gases that enveloped much of the city. Over 100,000 Ivoirians attended local hospitals complaining of health problems ranging from headaches and skin rashes to severe respiratory problems after exposure to the fumes. The claims were settled out of court in September 2009, resulting in £30m compensation for the claimants. Notably, this case involved the UK head office company as the defendant rather than a subsidiary.

³⁷ *Chandler* (CA) (n 20) [80].

³⁸ *Thompson v The Renwick Group plc* [2014] EWCA Civ 635. Tomlinson LJ found that none of the particular factors establishing duty of care outlined by Arden LJ in *Chandler* [80] were present.

³⁹ *ibid* [33].

the operations of a subsidiary outside the UK.⁴⁰ Jurisdiction was refused in *Okpabi*⁴¹ and in *Unilever*⁴² but allowed in *Vedanta*.⁴³

As the seminal ruling on jurisdiction in FDL litigation in the English courts, *Vedanta* merits detailed examination. The claimants are 1,826 Zambian villagers alleging harm and loss of income and amenity due to environmental pollution against Zambian company Konkola Copper Mines plc (KCM) and Vedanta plc its UK domiciled parent. KCM is the largest private employer in Zambia at the Nchanga mine located adjacent to the river and waterways concerned in the claim. The claim alleges Vedanta owed a duty of care to the claimants based on its assumption of responsibility for ensuring that KCM's mining operations do not cause harm to the environment or local communities, turning on its level of control and direction over the operations of KCM, and over KCM's compliance with health, safety and environmental standards.⁴⁴

A parent company may prefer that a case with FDL style facts is heard entirely in the alternative jurisdiction where the subsidiary at issue is located, to the potential detriment of claimants. Significant challenges with litigation in a host state, as regards enforcement of judgments against multinational corporations and their subsidiaries, was discussed in the context of the *Aguinda* case in chapter 3 section 3.4.3. As this battle over nearly thirty years illustrates, depending on whether the subsidiary has assets in the host state, and where the alternative forum is, the parent may or may not be subject to recognition or enforcement of decisions of that court in its home state. Recalling also that the ATS action in *Aguinda* was dismissed under the condition that Chevron agreed to litigate the issues in Ecuador.

Persistent barriers and challenges are evident in the case of *Garcia v Tahoe Resources Inc.*⁴⁵. The seven plaintiffs alleged serious injury by private security guards who opened fire using shotguns, pepper spray, buckshot and rubber bullets on protesters gathered in

⁴⁰ In the English courts, claims against foreign-domiciled subsidiaries can be joined with claims against locally domiciled parent companies over which an English court has jurisdiction under Brussels I or under the common law, and the foreign defendant is a necessary and proper party to the claim.

⁴¹ *Okpabi* (CA) (n 8).

⁴² *Unilever* (CA) (n 9). On 17 July 2019, the Supreme Court refused the claimants' application for permission to appeal the judgment of the Court of Appeal.

⁴³ *Vedanta* (CA) (n 10).

⁴⁴ *Vedanta* (HC) (n 10) (Coulson J) [31]; (CA) (n 10) [20].

⁴⁵ 2017 BCCA 39. Discussed below section 5.4.1.2.

front of the Escobal mine.⁴⁶ Prosecutors in Guatemala charged the former head of security at the mine, Alberto Rotondo, with assault, aggravated assault and obstruction of justice. Rotondo was placed under house arrest but escaped to Peru, and it appears that proceedings against Rotondo in Guatemala never advanced to conclusion.⁴⁷ The multiple and manifest challenges to access to justice for the plaintiffs in Guatemala underpinned Garson J for the Court of Appeal of British Columbia reaching ‘the inescapable conclusion that the extant Guatemalan criminal proceeding – to which the appellants’ civil compensation claims have been joined – is not a more appropriate forum for adjudicating the dispute’.⁴⁸

5.3. MOVING FORWARD: THE ANALYSIS IN VEDANTA

In bringing the case in an EU Member State, claimants can use Article 4 of Brussels I (recast)⁴⁹ and the so-called ‘necessary and proper’ gateway under national jurisdiction rules together to pursue the parent, and the foreign defendant, in the EU.⁵⁰ The potential strategic responses of multinational corporations to FDL cases proceeding in home states will be considered in the analysis of comparative jurisprudence, and synthesis of emerging themes.

5.3.1. The Process under National Civil Procedure Rules

To bring proceedings in the English courts, the claimants in the *Okpabi*, *Unilever*, and *Vedanta* cases relied on the ‘necessary and proper party’ gateway under national civil

⁴⁶ Court documents (June 18 2014) <www.documentcloud.org/documents/1754076-notice-civil-claim.html> accessed 22 December 2019. See also Amnesty International ‘Wiretap transcripts raise troubling questions about Tahoe Resources’ militarized security detail’ (7 April 2015) <www.amnesty.ca/news/public-statements/joint-press-release/wiretap-transcripts-raise-troubling-questions-about-tahoe> accessed 22 December 2019.

⁴⁷ Breaking the Silence ‘Tahoe Resources Continues to face Pressure in Guatemala and Abroad’ (3 February 2015) <www.breakingthesilenceblog.com/general/tahoe-resources-continues-to-face-pressure-in-guatemala-and-abroad/> accessed 22 December 2019.

⁴⁸ (n 45) [71]

⁴⁹ Discussed in chapter 4 section 4.2.2.2.

⁵⁰ *Vedanta* (SC) (n 11) (Briggs LJ) [28c].

procedure rules.⁵¹ The approach of the courts to determining jurisdiction, set out in six steps, is settled law. As applied in *Vedanta*, the approach of the courts is to assess:⁵²

- i. Whether the claim against subsidiary has a real prospect of success;⁵³
- ii. If so, whether there is a real issue between the claimants and anchor defendant *Vedanta*;
- iii. Whether it is reasonable for the court to try that issue;
- iv. Whether the ‘foreign defendant’ is a necessary or proper party to the
- v. claims against the anchor defendant; and
- vi. Whether England is the proper place in which to bring that claim.⁵⁴

The grounds to establish the personal jurisdiction of the English courts over the anchor defendant and over the foreign subsidiary are classified as broad. For example, as there does not have to be any territorial connection with the foreign subsidiary. With this in mind, the English courts are thus considered to have approached this ‘gateway’ with caution and in a measured fashion.⁵⁵ The second step in the process entails a summary assessment of whether the parent company owed a duty of care.

⁵¹ Leave to serve the foreign defendant out of the jurisdiction was sought under [UK] Practice Direction 6B 3.1(3). It provides: ‘A claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim’. <www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b#3.1> accessed 20 December 2019.

⁵² (n 10) (CA) (Simon LJ) [44].

⁵³ Ibid [54] citing Lord Collins in *Altimo Holdings and Investment Ltd., v Kyrgyz Mobil Tel Ltd.* [2012] 1 WLR at 71 stating: ‘The three requirements as test for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction; First the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgement, namely whether there is a real prospect of success’. See also Leigh Day Legal Briefing confirming it was common ground between the parties that the claims against KCM had a real prospect of success <www.leighday.co.uk/News/2019/April-2019/Supreme-Court-rules-Zambian-villagers-case-against> accessed 15 December 2019.

⁵⁴ *Vedanta* (CA) (n 10) (Simon LJ) [43].

⁵⁵ Ekaterina Aristova, ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (2018) 55(2) *Utrecht Law Review* 6, 22 stating: ‘Establishment of jurisdiction under this basis of jurisdiction could be exceptionally wide as it does not require the existence of any territorial connection between England

In *Vedanta*, at first instance in the English High Court, Coulson J concluded that justice would almost certainly be unobtainable in Zambia and the claims should proceed in the English courts.⁵⁶ The Court of Appeal upheld this determination.⁵⁷ Both *Vedanta* and KCM appealed jurisdiction to the UK Supreme Court, the principal ground being that there was no real triable issue against the anchor claimant *Vedanta*.⁵⁸ Judgment was handed down in 2019, with Lord Briggs giving the leading judgment to which Lady Hale, Lord Wilson, Lord Hodge and Lady Black agreed in a unanimous decision.

5.3.2. A Real Issue between the Claimants and Anchor Defendant?

The ‘gateway’ under national civil procedure depends on whether it is arguable that a duty of care was owed to the claimants by the parent company.⁵⁹ Expressed as ‘whether there is a real issue between the claimants and the anchor defendant’, it is equated with ‘a properly arguable case or serious issue to be tried’.⁶⁰ Notably, this is a summary judgment test⁶¹ which typically occurs at an early stage of the proceedings⁶² when the evidence sufficient to establish a duty of care may not be available.⁶³ The burden rests on the claimants to

and the joined defendant’. Further noting that as a result the English courts have approached claims brought under the ‘necessary or proper party’ gateway carefully to ensure that a specious claim against an anchor defendant is not used as a device to bring a foreign defendant within the jurisdiction.

⁵⁶ *Vedanta* (TCC) (n 10) [198].

⁵⁷ Simon LJ, Jackson LJ and Asplin LJ concurring.

⁵⁸ *Vedanta* (SC) (n 11) (Briggs LJ) [17] Mandatory jurisdiction under Article 4(1) of Brussels I (recast) and *Osuwu v Jackson* [2005] EUECJ C-281/02 ‘does not prevent any defendant from seeking to have a claim struck out as an abuse of process or as disclosing no reasonable cause of action, or contending the claim discloses no triable issues against the defendant’.

⁵⁹ (n 51).

⁶⁰ *Vedanta* (n 10) (CA) (Simon LJ) [63].

⁶¹ *Vedanta* (n 11) (SC) (Briggs LJ) [42] citing *Altimo* (n 53) ‘(...) the assertion by a foreign defendant seeking to set aside permission to serve outside the jurisdiction under the necessary and proper gateway that the claim against the anchor defendant discloses no real issue to be tried, involves, as is now agreed, a summary judgement test’.

⁶² *Ibid* [43].

⁶³ See further Gwynne Skinner. Robert McCorquodale, Olivier de Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (2013), 52. See also Jenifer Zerk, ‘Corporate Liability for Gross Human Rights Abuses – Towards a Fairer and More Effective System of Domestic Law Remedies’ (2014).

demonstrate that the case should not be decided against them without a trial.⁶⁴ This, Simon LJ in the Court of Appeal in *Vedanta* noted, ‘gives rise to a paradox’ as a case which involves more complex legal issues which are more challenging for the claimants to prove, may render it easier to establish jurisdiction.⁶⁵

5.3.2.1. Duty of Care: Principles from *Vedanta*

In *Vedanta*, the Court of Appeal derived a statement of principles concerning whether a duty of care is owed by the parent company to those affected by the operations of its subsidiary.⁶⁶ These principles are accepted as settled law in the English courts:⁶⁷

(1) The starting point is the three-part test of foreseeability, proximity, and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary’s employee. (5) The first of the four indicia in *Chandler v. Cape Plc* [80], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary.

⁶⁴ *Vedanta* (n 11) (SC) (Briggs LJ) [45]. The claimant is required to show that the cause of action is not ‘bound to fail’ *AAA v Unilever Plc* (n 9) [76]. Aristova, ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (n 55) 14 considers the ‘real issue to be tried’ test is not a high one’.

⁶⁵ *Vedanta* (n 10) (CA) (Simon LJ) [32].

⁶⁶ *ibid* [91] concluding that as the claim was arguable in English law, it was arguable that the relevant duty would follow English law and impose the relevant duty. See also *Caparo* (n 23); interlocutory decisions in *Thor* (n 17); *Connelly* (n 16); *Lubbe* (n 18); *Chandler* (n 20); and *Thompson* (n 38).

⁶⁷ *ibid* in *Vedanta* counsel for both accepted that the general statement of Simon LJ reviewing prior authorities as correct, or ‘arguably correct’. In *Okpabi* (CA) (n 8) (Vos LJ) [192] confirming ‘It was not in dispute that Fraser J applied the correct test for the existence of a duty of care in this situation, by considering the factors identified in *Chandler v. Cape Plc* [2012] EWCA Civ 525 (“Chandler”) and *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635 (“Thompson”) in the context of the three-stage test set out in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605. This approach remains correct following this court’s decision in *Vedanta*’.

If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary. (7) The evidence sufficient to establish the duty may not be available at the early stages of the case.⁶⁸

This statement of principles by the Court of Appeal illustrates an openness in conceptualising direct parent liability which has become characteristic of the English courts. Most telling for future development within it is the recognition that precedent is descriptive of ‘some’ of the circumstances in which a duty of care may be assumed. It was expressly envisaged that a duty of care may be owed by a parent company, beyond the employees of a subsidiary, to a party directly affected by the operations of that subsidiary.

In its appeal to the UK Supreme Court, Vedanta claimed that such a widened duty of care would be ‘novel and controversial extension of the boundaries of the tort of negligence, beyond any established category’.⁶⁹ In a crucial marker, the Court clarified that the principles determining whether one party owes a duty of care to another party ‘are not novel at all’. In its view, these principles are identifiable ‘back as far as the decision of the House of Lords in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (...)’.⁷⁰ The court rejected the view it necessitate supplemental analysis to extend the existing categories of negligence.⁷¹ As such, the UK Supreme court in *Vedanta* did not directly apply the *Caparo* test as it was not required assess a novel category of duty according to these principles.⁷²

⁶⁸ *Vedanta* (n 10) (CA) (Simon LJ) [83].

⁶⁹ *Vedanta* (SC) (n 11) [46].

⁷⁰ *ibid* [54], [56].

⁷¹ *Ibid* [60].

⁷² In *Darnley v Croyden Health Services NHS Trust* [2018] UKSC50 delivered by LORD LLOYD-JONES:(with whom Lady Hale, Lord Reed, Lord Kerr and Lord Hodge agreed [15] states ‘...it is, normally, only in cases where the court is asked to go beyond the established categories of duty of care that it will be necessary to consider whether it would be fair, just and reasonable to impose such a duty’. Previously, the English courts moved away from the test set down by Lord Wilberforce in *Anns* (n 26), which was formally overruled in *Murphy v Brentwood District Council* (n 26).

Having ruled out ‘novel’ extensions beyond established categories and established that the general principles of duty of care were at issue, the Court further rejected an approach pre-limiting the circumstances in which parent company duty of care may arise, and to whom such a duty may be owed. Firstly, it referred to the *Chandler* indicia as an ‘unnecessary straitjacket’.⁷³ Secondly it rejected the view there were two basic types of cases where the parent might incur a duty of care to third parties, being if it had in substance taken over the management of the subsidiary, or given the subsidiary advice regarding a risk relevant to the alleged harm.⁷⁴ Briggs LJ made a point of expressing reluctance to ‘shoehorn’ parent company liability into specific categories. On the contrary, he considered there is ‘no limit to the models of management and control which may be put in place within a multinational group of companies’.⁷⁵

The approach of the Supreme Court to parent company duty of care is to be welcomed. At a doctrinal level, its approach to duty of care is coherent with tort law principles. It is pragmatic in recognising the wide spectrum of management approaches in complex multinational corporations. It brought valuable clarity as to how the courts perceive parent company duty of care within the tort of negligence.

Concurrently, it conceivably brought unease to multinational corporations who may have anticipated the Court would consider parent company duty of care as a ‘novel’ extension, which it would reject outright, or expressly place within strictures. As the *Okpabi*⁷⁶ and *Vedanta* cases continue to proceed through the English courts, there have been calls for the UK Parliament to reform the law and clarify parent companies’ responsibilities and liabilities for human rights abuses.⁷⁷ It is anticipated that the position of Briggs LJ will influence the English High Court in assessing whether a duty of care arises in the trial of *Vedanta* on the merits.

⁷³ *ibid* [56].

⁷⁴ *ibid* [51] *re Sales LJ Unilever* (n 9) (CA).

⁷⁵ *ibid*.

⁷⁶ The *Okpabi* case was cleared for appeal to UK Supreme Court July 2019.

⁷⁷ See William Meade, CORE Coalition stating: ‘Recent decisions in the UK on parent company liability cases show the need for law reform’

<<https://corporate-responsibility.org/recent-decisions-uk-parent-company-liability-cases-show-need-law-reform/>> accessed 20 May 2019.

5.3.2.2. Proximity

The doctrines of corporate law of limited liability and separate legal personality operate to shield the parent company.⁷⁸ As Vos LJ stated in *Unilever* '[T]he corporate structure itself tends to militate against the requisite proximity'.⁷⁹ As clarified by the Court of Appeal in *Chandler*, the relationship of parent-subsidary proves nothing.⁸⁰ Hence the focus for the courts is, correctly, assessing how the parent company approached and dealt with its opportunity to intervene regarding its subsidiary. Thus, 'everything depends' as Briggs LJ stated, 'on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'.⁸¹ This formulation laid down by the UK Supreme Court will become the standard for analysis. It can reasonably be expected to be persuasive in FDL cases in other jurisdictions, including Ireland.

5.3.2.3. The Role of Group Policies in Proximity

In establishing proximity, jurisprudence indicates that the courts will draw a first distinction between standardised general corporate group policies and policies which are imposed as mandatory. The key element is evidence of enforcement or intervention to realise group policies by the parent company. This approach acknowledges, as emphasised by Simon LJ in *Okpabi*, the fundamental difference in approach between a parent company whose 'concern was to ensure that there were proper controls and not to exercise control'.⁸² With welcome pragmatism, he remarked:

The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.⁸³

⁷⁸ Discussed in chapter 3 section 3.3.

⁷⁹ *Okpabi* (CA) (n 8) (Vos LJ) [196].

⁸⁰ (n 20) (Arden LJ) [1], [70]-[71].

⁸¹ *Vedanta* (SC) (n 11) [40].

⁸² *Okpabi* (CA) (n 8) [125].

⁸³ *ibid* [89]. In his dissenting opinion Sales LJ [141] took the behaviour of parent company RDS went beyond the mere setting of group-wide standards by the group's central management view and that it exercised a degree of real control in relation to relevant areas, in this case the operation and security of an oil pipeline

The position is thus, mandatory group-wide policies do not give rise to a duty of care to third parties *per se*. The grounding of proximity will turn on the behaviour of the parent company. It is apparent that the courts will assess based on whether the parent takes active steps, such as by training, supervision and enforcement aimed at implementation of policies at subsidiaries.⁸⁴ The Supreme Court deduced an arguable case a duty of care was owed on the basis that Vedanta intervened in the operations of the subsidiary sufficiently to ground the requisite duty of care,⁸⁵ to be substantiated by materials subject to disclosure at the trial on the merits. The approach of the court on this aspect is consistent with the Court of Appeal judgment in *Unilever*.⁸⁶ This decision turned on whether the parent had control of, or gave advice to, the subsidiary in relevant areas. On the facts, the court considered that parent company Unilever PLC had not taken direct responsibility for the relevant areas.⁸⁷ It considered that throughout the violence at the time of elections allegedly affecting workers on tea plantations in this case, relevant areas of policy such as risk management were within, and remained, the sole responsibility of its subsidiary Unilever Tea Kenya Limited.⁸⁸

A second significant statement on corporate group policies by the UK Supreme Court in *Vedanta* should reverberate through corporations. The court implied that if a parent makes

and facilities. From this position in *Okpabi*, counsel for Vedanta in the Supreme Court [52] sought to extract a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines and expecting the management of each subsidiary to comply with them.

⁸⁴ *Vedanta* (SC) ((n 11) [53].

⁸⁵ *ibid* [59] including consideration by the Court of the Appeal of the Management Services Agreement between Vedanta and KCM and a witness statement by Mr. Kakangela concerning changes implemented when Vedanta took acquired a majority shareholding in KCM. The Court also considered ‘additional circumstances’ pertaining to a properly arguable claim Vedanta owed a duty of care. Vedanta is a holding company of a group which includes the operator of the Nchanga mine, KCM, but argued it neither owned the mine licence nor controlled the material operation of the mine. In support of the existence of a duty of care owed by Vedanta, the claimants relied on factors including; Global sustainability report stressing oversight of all Vedanta’s subsidiaries ultimately rests with Vedanta board; Management agreement under which Vedanta provides training and other services to KCM, including in relation to environment, health & safety; Public statement by Vedanta about managing environmental risk; Witness statement on degree of oversight and control exercised by Vedanta personnel.

⁸⁶ *Unilever* (CA) (n 9).

⁸⁷ *ibid* (Sales LJ) [38].

⁸⁸ *ibid* [13]-[24]. Given its finding in relation to proximity, the Court decided that it was unnecessary to revisit Laing J.’s findings in relation to the duty of care; namely the lack of foreseeability and that it would not be fair, just and reasonable to impose a duty of care.

public statements concerning its supervision and control over its subsidiaries, it will be held to account for failure to do so impacting third parties:

(...) the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.⁸⁹

The inclusion of failure to enact public undertakings concerning control over subsidiaries is potentially a very powerful lever upon corporate behaviour. It is to be hoped this statement will be confirmed in future cases and its promise upheld and realised. It would be consistent with the way forward advocated in chapter 2 section 2.7 of instituting EU wide mandatory human rights due diligence. It implies that, for instance, if a parent company publishes commitments within group policies applying to subsidiaries in areas such as due diligence and sustainability, its behaviour subsequently will be subjected to granular examination by the courts. It should lead companies to design policies for the group that are realisable in reality, as opposed to grand statements it fails to, or indeed has no intention to, align with in practice. Policies could be issued freely prior, in the hope never to be called out on them. With this statement of the UK Supreme Court, that day is hopefully passed. Henceforth, so-called ‘blue-washing’ group policies carry attendant risks that the courts will assign liability to the parent company should it fail to ‘walk its talk’.

5.3.3. Whether it is Reasonable for the Court to Try the Issue

The motivation of claimants taking proceedings against an EU domiciled defendant under Article 4 Brussels I will decide the question of there is an abuse of EU law, notwithstanding whether foreign defendants are ‘the real targets of the claim’.⁹⁰ Unless the sole purpose of proceedings against the anchor defendant is to attract jurisdiction against the foreign defendant, it is unlikely the courts will consider proceedings to be an abuse of EU law.⁹¹ The Supreme Court in *Vedanta* accepted the claimants sought a judgment against Vedanta, and further intended to continue with proceedings against it.⁹² It accepted they were in part

⁸⁹ *Vedanta* (SC) ((n 11) [53].

⁹⁰ *ibid* [23].

⁹¹ *ibid*.

⁹² *ibid* [28].

motivated by doubts about the solvency of the subsidiary KCM. Solvency may reasonably be expected to be a common concern regarding a foreign subsidiary. In principle, the courts will permit proceedings even if a main reason motivating claimants to pursue a parent company in the courts of an EU Member State is to bring proceedings against a foreign defendant.⁹³

5.3.4. Whether the Subsidiary is a ‘Necessary and Proper Party’ to the Claim

On the basis of jurisprudence the courts will approach the question of whether a subsidiary is a necessary and proper party by considering whether, if the foreign defendant were already within the jurisdiction it would be a proper defendant in the proceedings.⁹⁴ In this assessment, the English Courts are influenced by whether the claims against the parent and the subsidiary are based on the same facts, and rely on similar legal principles.⁹⁵

5.3.5. Whether the Forum is the Proper Place to Bring the Claim

In FDL litigation courts are called upon to identify a single jurisdiction in which the claims against all the defendants may most suitably be tried.⁹⁶ As cases typically involve EU domiciled anchor defendants and foreign defendants, they sit at the intersection of EU law and the discretion of domestic courts under national civil procedure rules. The effect of the decision of the European Court of Justice in *Osuwu v Jackson*⁹⁷ is that Article 4 of the Brussels I (recast) Regulation⁹⁸ precludes a court in an EU Member State from declining jurisdiction over an EU domiciled anchor defendant.⁹⁹ Concerning the foreign defendant which is typically not subject to Brussels I, national courts retain discretion to assess whether the court seized is the proper place to bring the claim. In practice, this two-tier

⁹³ *ibid.*

⁹⁴ *Vedanta* (TCC) (n 10) (Coulson J) [141] considering that the prospect of two trials on opposite sides of the world based on precisely the same facts and events as ‘unthinkable’.

⁹⁵ *Vedanta* (CA) (n 10) [99].

⁹⁶ *Vedanta* (SC) ((n 11) [68].

⁹⁷ *Osuwu* (n 58).

⁹⁸ Article 4 (1) of Brussels I (recast) (n 5) provides: ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. (2). Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State’.

⁹⁹ *Vedanta* (CA) (n 10) [34]-[35] citing *UBS AG v HSH Nordbank AG* [2009] 2 Lloyd’s Rep 272 (Lawrence Collins LJ) [103].

regime impacts on the ability of foreign defendants to resist service outside the jurisdiction.¹⁰⁰

The English courts have consistently interpreted the ‘proper place to bring the claim’ under national civil procedure rules (CPR) as the *forum conveniens*.¹⁰¹ The Supreme Court in *Vedanta* reiterated that the approach contained in UK CPR 6.37(3)¹⁰² is a description of the concept summarised by Collins LJ in *Altimo*, that the role of the court is to determine the forum where the case should be tried ‘for the interests of all the parties and for the ends of justice (...)’.¹⁰³ To establish in which single jurisdiction the claims against all the defendants may most suitably be tried, courts will examine the well-established ‘connecting factors’ between the case and each potential jurisdiction.¹⁰⁴ Connecting factors include: accessibility to courts for parties and witnesses; availability of a common language; applicable law; the place where the wrongful act or omission occurred; the place where the harm occurred; and whether a judgment in the alternative jurisdiction would be enforceable against the parent in its home state.¹⁰⁵

Even where the connecting factors point to another jurisdiction a risk of irreconcilable judgments arises, as it did in *Vedanta*, if the court considers that, in any case, the claimant will continue their case against the anchor defendant. This has led to a practice of the English courts agreeing that England is the ‘proper place’.¹⁰⁶ Such a practice was identified as problematic by the Supreme Court. In *Vedanta*, on the basis of connecting factors to Zambia, it was found to be the appropriate jurisdiction to hear the case.¹⁰⁷

¹⁰⁰ *ibid* [113] citing *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell), 12-033. If the English courts are not bound by EU law including Brussels I and *Osuwu*, they are no longer bound to mandatory jurisdiction. It is foreseeable the UK may accede to the Lugano Convention, under which foreign defendants can be joined under Article 6(1) and can be served under local civil procedure rules.

¹⁰¹ *ibid* [37]-[38] citing *Briggs, Civil Jurisdiction and Judgments* (6th edn) 2.304.

¹⁰² ‘The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is *the proper place in which to bring the claim*’ (SC emphasis)

¹⁰³ *Altimo* (n 53) (Collins LJ) [88].

¹⁰⁴ *Vedanta* (SC) ((n 11) (Briggs LJ) [66].

¹⁰⁵ *ibid*. See also *Dicey, Morris and Collins* (n 100) 12-033.

¹⁰⁶ *Vedanta* (SC) (n 11) (Briggs LJ) [70] citing *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Leggatt J) [16]; [8]-[10].

¹⁰⁷ *Vedanta* (SC) (n 11) (Briggs LJ) [85] listed the connecting factors as: ‘i) The allegedly wrongful acts or omissions occurred primarily in Zambia. This is plainly true of the claim against KCM, but since the liability of Vedanta depends mainly upon the extent to which it intervened in the operation of the Mine, it is likely to

In addition, by the time of the hearing the UK domiciled parent company had agreed to submit to the jurisdiction of the Zambian courts. Therefore, the case could be tried in Zambia such that the risk of irreconcilable judgments which the claimants asserted would be prejudicial to them, was effectively alleviated. In such circumstances, Briggs LJ considered the risk of irreconcilable judgments to be the result of the claimants' choice to issue proceedings against a defendant in the English courts notwithstanding they had the option of pursuing both defendants in Zambia. On the facts he concluded 'it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England'.¹⁰⁸

Several conclusions flow from this line of reasoning. Firstly, when the connecting factors point to an alternative forum, the risk of irreconcilable judgements should not result in a practice of accepting jurisdiction over the foreign defendant in the English courts. Although the case against the anchor defendant cannot be stayed in England due to mandatory jurisdiction, the case in the English courts against the foreign defendant may be stayed. Secondly, the risk of irreconcilable judgements can be nullified if the anchor defendant agrees to submit to the alternative jurisdiction.¹⁰⁹ The entire case may then be tried in that

be true of Vedanta as well; ii) The causative link between the allegedly negligent operation of the Mine and the damage which ensued is of course the escape of noxious substances into waterways, which also occurred within Zambia; iii) The Mine was operated (whether by KCM alone, or by KCM and Vedanta together, as the claimants allege) pursuant to a Zambian mining licence and subject to Zambian legislation. In any event, it is common ground that all the applicable law is Zambian, even if that country may prove to follow the common law of England and Wales in material respects; iv) The claimants are all poor persons who would have real difficulty travelling to England to give evidence, for example of their injuries, or of the damage to their land and livelihoods. Although English is an official language in Zambia, many of the claimants only speak a local dialect which would require translation in order to be understood by an English judge or advocate, but not by their Zambian equivalents; v) KCM's witnesses of fact are all based in Zambia. They far outnumber the potential witnesses employed by Vedanta, some (but by no means all) of whom may be supposed to be domiciled in England; vi) Although relevant disclosable documents will be likely to be found in England and in Zambia (in the possession or control of Vedanta and KCM respectively), many of KCM's documents would, like the evidence of their witnesses, require translation for use in an English court, but not in a Zambian court, which has the considerable advantage in this context of being effectively bilingual; vii) All the regulatory and testing records and reports relevant to the alleged emissions from the Mine are likely to be based in Zambia, as is the responsible regulator; viii) Against all those factors it may, as already noted, be the case that significant relevant documents are located in England; and ix) A judgment of the Zambian court would be recognisable and enforceable in England, against Vedanta'.

¹⁰⁸ *ibid* [87].

¹⁰⁹ *ibid* [40].

forum to which the connecting factors point.¹¹⁰ Thus while Article 4 of Brussels I is a relevant factor under the private international law of the EU state assessing an application for service outside the jurisdiction, it is not a ‘trump card’ aimed at avoiding the risk of irreconcilable judgements either inside or outside the EU. After ‘anxious consideration’¹¹¹ the Supreme Court effectively characterised the risk of irreconcilable judgments as the result of the choice of the claimants. As outlined, there are factors attracting proceedings to the state of domicile of the parent, *inter alia*, depth of assets and practical supports. The judgment deals at length with this issue, and it can be considered it will carry weight in subsequent cases. As a practical consequence of it, EU domiciled parent companies may be motivated to submit early to jurisdiction of the foreign courts and avoid proceedings in their state of domicile. It will fall to the claimants to argue that the case should still be heard in the state of domicile of the parent on the basis there is a real risk justice will be unobtainable in the alternative forum.

5.3.5.1. ‘Probability’ Access to Justice Unavailable

Access to justice for claimants in a foreign jurisdiction has been clearly identified as a ‘separate and distinct question’.¹¹² It is to be disconnected from the balancing of connecting factors which lies at the heart of the issue as to the ‘proper place’ to bring proceedings.¹¹³ The Supreme Court in *Vedanta* developed a ‘but for’ test. On the basis of connecting factors to the alternative jurisdiction, England may not be the proper place to bring the claim but for the separate and distinct question of access to justice.¹¹⁴ A high bar had been set for the claimants to establish a ‘real risk’ justice cannot be obtained in the alternative forum.¹¹⁵ In

¹¹⁰ *ibid* [82] reasoning that where another ‘proper, convenient, or natural forum is available for the pursuit of the case against all the defendants’, the claimants are simply exposed to the choice of whether or not to avoid the risk of irreconcilable judgements.

¹¹¹ *ibid* [79].

¹¹² *ibid* [88].

¹¹³ *ibid*.

¹¹⁴ *ibid* summary of analysis by trial judge Coulson J (n 10) [90-97]. The Supreme Court upheld the appellants claim that the proper place for the trial was Zambia, were it not for the issue of a risk substantial justice would not be available in Zambia [102].

¹¹⁵ *Altimo* (n 53) (Collins LJ) [95]. Concerning access to justice, the second test of discretion, in *Vedanta* (TCC) (n 10) [169]-[198] at the trial stage Coulson J concluded that the vast majority of claimants would be unable to afford legal representation. As CFA’s were not available in Zambia to allay costs, there was no prospect of obtaining legal aid in Zambia, local private lawyers with the requisite experience were not available and given the negative result of environmental litigation in Zambia to date.

its assessment, the Supreme Court emphasised pragmatic factors. It correctly focused on issues including lack of funding for medical assessments and lack of appropriate legal resources and expertise, both of which go to the prospects of a large number of claimants to establish causation.¹¹⁶ It is clear that a real risk that justice is not obtainable in an alternative jurisdiction is a ‘hurdle of exceptionality’, as is evident in authorities such as *Connelly*¹¹⁷ and *Lubbe*.¹¹⁸ Neither is it static, taking into account it could also reverse in a jurisdiction where a multinational corporations operates, for example, if conflict break out. As Simon LJ noted in the Court of Appeal in *Vedanta*:

There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally.¹¹⁹

Notwithstanding, on the basis of the zones of weak governance in which the subsidiaries of multinational companies are often located, it will be plausible to plead that claimants will not be able to access justice in the alternative jurisdiction. This is particularly so in FDL cases involving a large number of claimants and factors such as medical reports or environmental assessments requiring funding.¹²⁰ Incomes may be low, with legal aid and local legal expertise to effectively run mass torts claims unavailable. The Supreme Court rejected *Vedanta*’s argument on abuse of EU law, and its assertion that there was no real triable issue against it. The court ultimately rejected that the English courts were not the proper place to bring proceedings due to the failure of the availability of substantial justice for the claimants in Zambia. It clearly stated that but for the issue as to access to substantial justice, it ‘would have been minded to allow the appeal’.¹²¹ The *Vedanta* case has been returned for hearing on the merits.

¹¹⁶ *Vedanta* (TCC) (n 10) (Coulson J) [177]-[198] based this conclusion on two factors. The claimants at the poorer end of the poverty scale who would not be able to fund the case such that even if lawyers prepared to work on the basis of payment from compensation in the case (without a success fee) could be found, he concluded they would lack the necessary expertise to conduct a large complex case of this nature.

¹¹⁷ (n 16).

¹¹⁸ (n 18).

¹¹⁹ *Vedanta* (n 10) (CA) (Simon LJ) [133].

¹²⁰ *Vedanta* (SC) (n 11) [95] citing *Nyasulu v Konkola Copper Mines plc* [2015] ZMCC 33; [100] citing *Shamilimo v Nitrogen Chemicals of Zambia Ltd* (2007/HP/0725).

¹²¹ *Vedanta* (SC) (n 11) [102].

In synthesis relevant to future cases, the Court in *Vedanta* emphasised with some sharpness the need for proportionality, including in jurisdiction disputes.¹²²

5.4. PARENT COMPANY DUTY OF CARE: COMPARATIVE JURISPRUDENCE

The contrast between Canadian and English jurisprudence is pertinent concerning tests of duty of care, policy reasons which negative or otherwise restrict a duty of care, access to justice, and disclosure. As concerns duty of care, the UK Supreme Court in *Vedanta* has advanced principles beyond the Canadian or Dutch courts. However, in aspects of disclosure and access to justice, the Canadian courts have proven more open and facilitating. The rulings of the Canadian courts in *Choc v Hudbay Minerals Inc*¹²³ and *Garcia v Tahoe Resources Inc*.¹²⁴ both weigh in precedential value. Further, the on-going Canadian case of *Araya v Nevsun Resources Ltd.* is relevant concerning violations by a corporation of fundamental human rights enshrined in customary international law, such as the prohibition against slavery, forced labour, and torture.¹²⁵ Judgement is anticipated in the *Hudbay* and *Araya* cases in Canada. The Dutch courts have already indicated their willingness to engage with the principles on parent company duty of care advancing in the English courts. Further developments are anticipated.

5.4.1. Legal Tests Applied in Canada

The *Hudbay* case¹²⁶ concerns alleged human rights abuses in Guatemala during forced removal from an area, which local indigenous populations claim are ancestral homelands,

¹²² *ibid* [10] stating: ‘The extent to which these well-known warnings have been ignored in this litigation can be measured by the following statistics about the materials placed before this court. The parties’ two written cases (ignoring annexes) ran to 294 pages. The electronic bundles included 8,945 pages. No less than 142 authorities were deployed, spread over 13 bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law’.

¹²³ [2013] ONSC 1414.

¹²⁴ (n 45). Discussed in chapter 4 section 4.3.2.

¹²⁵ [2016] BCSC 1856; [2017] BCCA 401 [1] (CA). *Nevsun Resources Ltd v. Araya*, Supreme Court of Canada, 2018 CanLII 53456 (CanLii). Corporate liability under customary international law is also discussed in chapter 2 section 2.4.3. See also Jolene Hansell, ‘Case Note: Case of Araya v. Nevsun Resources Ltd. in the Canadian Courts’ *Justice and the Prevention of Genocide: An International Journal* (2018) 12(3) 177.

¹²⁶ *Choc v Hudbay Minerals Inc.*, (n 123). The claims were joined for the purposes of the defendants’ motions to dismiss. Statements of claim: *Choc v HudBay Minerals* (CV-10-411159) <www.chocversushudbay.com/wp-content/uploads/2010/11/Choc-v-Hudbay-Statement-of-Claim-updated-

to facilitate the development of a mining project. The plaintiffs' primary cause of action in all three related cases is in negligence, based on the direct actions and omissions of the Canadian parent company Hudbay Minerals Inc., related to its wholly owned subsidiaries Hudbay Nickel Inc. (HNI) and Compania Guatemala de Niquel SA (CGN) which owned and operated the Fenix mine in Guatemala.¹²⁷ Similar to the *Vedanta* case, in *Hudbay* the Ontario Superior Court dismissed the defendants motion to strike on the grounds that the actions disclosed no reasonable cause of action in negligence.¹²⁸

The plaintiffs are indigenous Mayan Q'eqchi' from El Estor, Guatemala. The case of *Caal v Hudbay Minerals Inc.* is brought by 11 women against Hudbay Minerals and HNI. The plaintiffs allege that in 2007 they were gang-raped by mining company security personnel, police, and the military during their forced removal from their village by Canadian mining company Skye Resources (subsequently acquired by Hudbay). In *Choc v Hudbay* the action against Hudbay Minerals and its subsidiaries, HMI Nickel and CGN, alleges that Angelica Choc's husband, Adolfo Ich was beaten and shot in the head by CGN's security personnel. In *German Chub v Hudbay* the action against Hudbay Minerals and CGN alleges German Chub was shot in an unprovoked attack by security personnel at the Fenix mining project in September 2009, leaving him paralyzed from the chest down. In 2019, the 11 plaintiffs

[Oct-2013.pdf](#)>; *Chub v HudBay Minerals* (CV-11-435841) <www.chocversushudbay.com/wp-content/uploads/2010/11/Chub-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf> and joint claims of the plaintiffs in *Caal v HudBay Minerals* (CV-11-423077) <<http://www.chocversushudbay.com/wp-content/uploads/2010/11/Amended-Statement-of-Claim-Caal-v.-HudBay-FILED.pdf>> accessed 22 December 2019.

¹²⁷ The defendants sought to have the case struck out on a number of grounds, most relevantly that the plaintiffs had failed to establish the conditions to pierce the corporate veil or the constituent elements for a claim of direct negligence by Hudbay. The court saw no obvious policy considerations to prevent the case from moving to trial.

¹²⁸ *Hudbay* (n 123) [2]-[3].

alleging rape returned to court.¹²⁹ The decision on the merits is awaited, although there has been an interim ruling on disclosure.¹³⁰

5.4.1.1. A Novel Duty of Care

In each *Hudbay* case the defendants argued, *inter alia*, that the claims in direct negligence sought to impose an overarching and ‘novel’ supervisory duty of care on the parent company.¹³¹ As is clear from section 4.3.2.1 above, the UK Supreme Court has since rejected this ‘novel’ duty of care position in *Vedanta*, and grounded its assessment of whether a duty of care can be established by reference to the general principles of tort law. To determine whether a duty of care arose in *Hudbay*, the Ontario Superior Court applied the test laid out in the English case of *Anns v Merton London Borough Council*,¹³² as adopted and affirmed by the Supreme Court of Canada.¹³³ The *Anns* test requires that: ‘the harm complained of is a reasonably foreseeable consequence of the alleged breach; there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and there exist no policy reasons to negative or otherwise restrict that duty’.¹³⁴

The requirement of foreseeability was met on the basis *Hudbay* was aware that violence had previously been used in evictions, and tensions between the mining companies and

¹²⁹ See Gabriel Friedman Business Financial Post (17 September 2019) ‘They burned everything: Guatemalan women press Hudbay in closely watched human rights case’ stating: ‘Several of the plaintiffs (...) in documents filed in the case, describe the trauma — being tied, beaten and gang-raped in front of their children’ <<https://business.financialpost.com/commodities/indigenous-guatemalan-women-travel-to-toronto-to-press-hudbay-on-human-rights-claims>> accessed 22 December 2019. See also <www.business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0> stating ‘the 11 Q’eqchi’ women amended the Statement of Claim to provide further details on the involvement of Skye Resources (now part of Hudbay Minerals) in the violent eviction of their community in January 2007’ accessed 22 December 2019.

¹³⁰ Superior Court of Justice Ontario (June 29 2015) [19] <www.chocversushudbay.com/wp-content/uploads/2010/10/2015-07-03-Judgment-Motion-to-set-Discovery-Plan.pdf> accessed 11 December 2018.

¹³¹ *Hudbay* (n 123) [17]-[13].

¹³² *Anns* (n 26).

¹³³ *Kamloops (City of) v Nielson*, [1984] 2 S.C.R. 2. *Odhavji Estate v Woodhouse* [2003] SCC 69, [2003] 3 S.C.R. 263. By contrast as outlined the English court have moved away from the two tier test in *Anns*. In *Vedanta*, the UK Supreme Court accepted that to the three step test in the latter case of *Caparo* could summarise the ingredients of the tort.

¹³⁴ *Hudbay* (n 123) [57].

local residents were high.¹³⁵ The meaning of proximity is established,¹³⁶ and similar to jurisprudence from the English courts, the Court's analysis relied on public representations by Hudbay/Skye to conclude the relationship between Hudbay and the plaintiffs was sufficiently close, and that it would be just and fair to impose a duty of care on Hudbay to the local community.¹³⁷ Concerning the existence of policy reasons to negative or otherwise restrict the duty of care, the court took a wider view than in English jurisprudence. It recognised that there are competing policy considerations in recognising a duty of care.¹³⁸ It followed *Cooper v Hobart*¹³⁹ in which 'residual policy concerns' in the second part of the *Anns* test involves questions such as whether a remedy is already provided in law, or other broad reasons of policy suggesting a duty of care should not be recognised.¹⁴⁰ If courts in other jurisdictions were to adopt a similar approach and consider whether an alternative remedy is provided in law it could only be favourable to claimants and to advancing accountability on the basis there are, as has been exposed, effectively none.

5.4.1.2. Access to Justice

By comparison to the 'real risk' of denial of justice maintained by the English courts,¹⁴¹ in *Garcia v Tahoe Resources*¹⁴² the Court of Appeal of British Columbia adopted a lower and more balanced standard. It focused on whether there was a 'measurable risk' the claimant would be unable to access a fair trial in Guatemala. The approach of the Canadian court is appropriate and to be welcomed. As discussed in chapter 3 section 3.6.2, the factors which

¹³⁵ *ibid* [63] holding that re *Caal*, Hudbay/Skye (...) knew that violence was frequently used by security personnel during forced evictions; that violence had been used at previous forced evictions; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; there was a risk that violence and rape could occur'. Similarly, at [64] concerning *Choc* and *Chub*.

¹³⁶ *ibid* [66] 'The circumstance of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs'.

¹³⁷ *ibid* [70].

¹³⁸ *ibid* [74].

¹³⁹ [2001] 3 SCR 536. *Choc* [56] stating that in *Coopers* 'the Supreme Court of Canada held that once a duty of care is recognized for a category of cases, it becomes an established duty of care.'

¹⁴⁰ *Hudbay* (n 123) [57]-[58] citing *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 [24]. See also Bryan MacMahon and William Binchy, *The Law of Torts* (4th edn, Bloomsbury Professional 2013), 6.30.

¹⁴¹ *Vedanta* (CA) (n 10) (Simon LJ) [132]-[133].

¹⁴² (n 45) [30], [128]-[129]. The British Columbia Court of Appeal found that Guatemala was not a 'clearly more appropriate' forum to hear the case.

the court considered relevant to its assessment of access to justice in the alternative jurisdiction included stalled criminal proceedings, limited discovery procedures, and the expiration of the limitation period for a civil suit. Subsequent to this ruling, Tahoe issued a formal apology and the case was settled, highlighting as discussed that jurisdiction is a crucial battle. If accorded, the spectre of negative public relations and other potential consequences of an eventual judgment against the parent company in its home state can be expected to motivate it to seek a solution with the claimants.¹⁴³

The approach of the Court of Appeal in *Garcia* is positive in that it recognised, *inter alia*, the host state government's agenda, and the patent inequality of arms between large multinationals corporations backed by governments and affected local communities. Further, the court actively engaged to take a closer look at broader barriers to justice in the host state in practice, including structural problems affecting the judiciary, and the context of the dispute. It is appropriate that when circumstances merit, other courts adopt a similar and wider view of the realities influencing legal accountability in host states.

5.4.1.3. Group Policies: Disclosure

The courts in Canada have exhibited greater willingness to order defendants to disclose internal corporate documentation relating to corporate structures, and the level of control exercised by a parent company. In *Garcia*, the Court of Appeal ruled that procedural factors such as limited discovery proceedings pointed away from Guatemala as an appropriate forum. Such factors are relevant to issues of proximity and establishing a duty of care. The approach of the court should be followed in other jurisdictions.¹⁴⁴

5.4.1.4. Group Policies: Action and Failure to Act

The terms used by the Ontario Superior Court in *Hudbay*, such as 'failure to prevent' and its direct references to the 'acts or omissions' in management by the parent company, support the discussion in chapter 2 advocating liability for failure to prevent human rights violations in criminal law, and themes emerging in comparative jurisprudence explored further in section 4.5.¹⁴⁵ The court stated that direct liability of the parent company Hudbay

¹⁴³ Discussed in chapter 3 section 3.4.7. See further Grahame Russell. 'Is justice possible in Canada or Guatemala for Hudbay Minerals/CGN repression' <<http://upsidedownworld.org/archives/guatemala/justice-possible-canada-guatemala-hudbay-mineralscg-n-mining-repression/>> accessed 11 December 2019.

¹⁴⁴ Discussed in chapter 4 section 4.3.2.

¹⁴⁵ *inter alia* published corporate group policies.

could stem from its failure to prevent harm occurring and the ‘acts or omissions in management functions exercised by Hudbay through its subsidiary CGN’.¹⁴⁶ Moreover, determination of the standard of care required of the defendant in its management of security personnel in Guatemala could plausibly be influenced by comparison to standards of managing such personnel at their Canadian based mining operations.¹⁴⁷ This is notable as the implication is that it is evidently not defensible that as a matter of corporate policy, a standard of protection for Guatemalans is lower than the standard of care of Canadians. It squares with the thinking underpinning of the field of business and human rights. The hearings on the merits in *Hudbay* will reveal whether Canadian higher courts will follow the approach taken by the UK Supreme Court in *Vedanta* regarding control over and enforcement of group policies at the level of subsidiaries.¹⁴⁸ Arguably, and supported by their openness on the above issues, the courts in Canada will take an expansive approach to a parent company’s failure to supervise or control subsidiaries consistent with published group policies, as implied in the English courts.

5.4.1.5. Violations of Customary International Law

The Canadian courts will have the opportunity to consider whether corporations can violate customary international law and open judicial remedies in *Araya v Nevsun Resources Ltd.*¹⁴⁹ The plaintiffs allege that during their national military service they were subjected to torture and forced labour in the Bisha gold mine, owned and operated by a subsidiary of the Canadian corporation Nevsun in Eritrea. Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle allege they were forced to work in unbearably hot temperatures, with inadequate food, housing without beds or electricity, and were tied up and subjected to beatings.¹⁵⁰ At the time of the hearing in the Supreme Court of British Columbia, the plaintiffs were refugees, none were residents of British Columbia or Canada,

¹⁴⁶ (n 130) (Graham M) [19].

¹⁴⁷ Ibid [9], [12] the Court ordered Hudbay to disclose documentation relating to the corporation’s relations with the plaintiffs’ communities in Guatemala. See also <www.breakingthesilenceblog.com/general/press-advisory-ontario-court-orders-hudbay-minerals-to-disclose-internal-corporate-documentation-in-guatemalan-human-rights-lawsuit/> accessed 11 December 2019.

¹⁴⁸ Discussed in section 4.3.1.

¹⁴⁹ (n 125). The position of the ECtHR concerning breaches of *jus cogens* in *Nait-Liman v Switzerland* App no 51357/07 (2018) (Grand Chamber) is discussed in chapter 3 section 3.6.3 and referenced in chapter 2 section 2.3.4.1 <<http://hudoc.echr.coe.int/eng?1=001-181786>> accessed 15 December 2019.

¹⁵⁰ Ibid [44]-[47].

and no legal proceedings had been initiated by the plaintiffs in Eritrea.¹⁵¹ Denying Nevsun's application for a stay on the basis of *forum non conveniens*, Abrioux J concluded Nevsun had failed to establish that 'comparative convenience' favoured Eritrea,¹⁵² and that there was a 'real risk' of an unfair trial occurring there.¹⁵³ The claim raised potential corporate liability for alleged breaches of both private and customary international law, and whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding.¹⁵⁴ In an approach which recalls that of Simon LJ in *Vedanta* regarding developments in the common law of negligence¹⁵⁵ the plaintiffs in *Araya* argued new nominate torts could be created or recognised on the basis of the CIL claims, citing the judgement of the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd.* stating:

‘The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed’.¹⁵⁶

When faced with a 'novel' claim, Abrioux J considered that it was for the court to consider whether there is a reasonable chance the claim will succeed, and in that assessment it should err on the side of permitting the claim to proceed to trial.¹⁵⁷ Notably, the approach of the

¹⁵¹ *ibid* [1]. At [72] Eritrea does not have a constitution as the country's supreme law.

¹⁵² *ibid* [230] citing *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 [110] 'the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties'.

¹⁵³ *ibid* [251] following *Garcia* (n 45)[64]; [295]-[296]. Abrioux J [261] distinguished *Garcia* on the basis that the plaintiffs in that case were not refugees but residents and were also civil claimants in Guatemala in criminal proceedings against the head of the defendant mine's security forces, with *pro bono* legal aid.

¹⁵⁴ *ibid* [2] stating: 'This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims', which were dismissed [330], [422]. *Ibid* [438] noting that 'A *jus cogens* norm enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules, having acquired a status as one of the most fundamental standards of the international community'.

¹⁵⁵ *Vedanta* (CA) (n 10) [88].

¹⁵⁶ [2011] SCC 42 [21].

¹⁵⁷ *Ibid* [431] as a source of international law based on state practice and *opinio juris*, noting that Article 38(1) of the United Nations, Statute of the International Court of Justice, 18 April 1946 enshrines custom as one of the sources of international law; [432] citing *Hunt v. Carey Canada Inc* [1990] 2 S.C.R. 952, 980.

court recognised that new claims may arise ‘as the result of social or technological change posing a novel harm for which there is no existing remedy’.¹⁵⁸ It is to be welcomed as both pragmatic and as reinforcing the dynamic nature of the challenges arising in front of courts globally. The arguments raised by the defendants in *Araya* recall *Kiobel v Royal Dutch Petroleum Co*¹⁵⁹ discussed in chapter 1 section 1.3 that: corporations are creatures of domestic not international law; corporations are not subjects of international law; a norm of customary international law (CIL) requires evidence of state practice and *opinio juris*. In turn the plaintiffs relied on the line of jurisprudence relating to corporate liability in the United States under the ATS to support that corporations are not immune to claims of torture and forced labour,¹⁶⁰ and reflections from the international criminal tribunals to argue that while novel, their claims were not bound to fail.¹⁶¹

On balance, Abrioux J concluded the matter was not settled, and that ‘a real issue exists’ as to whether ‘such claims are permitted based on common law as it currently stands or constitute a “reasonable development” of the common law’. On the basis that the CIL claims raised ‘arguable, difficult and important points of law’ they should proceed to trial.¹⁶² On appeal Newbury J framed the issue for the court within a wider process of adjudication and development:

‘The overarching question in this case is whether Canadian courts, which have thus far not grappled with the development of what is now called ‘transnational law’, might also begin to participate in the change described; or whether we are to remain on the traditional path of judicial abstention from the adjudication of matters touching on the conduct of foreign states in their own territories – even where that conduct consists of violations of peremptory norms of international law, or *jus cogens*.¹⁶³

¹⁵⁸ *Araya* (n 125) [467]. Further at [462] relying on *R.v Hape* [2007] SCC 26 [39] that the courts ‘may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law’; *R. v Appulonappa* [2015] SCC 59 [40].

¹⁵⁹ 621 F.3d 111 (2d Cir. 2010); 133 S. Ct. 1659 (2013) (No. 10-1491).

¹⁶⁰ *Filartiga v. Pena-Irala*, 630 F. 2d. 876 [42]; *Doe v. Nestle* 766 F. 3d 1013, 1022 (9th Cir. 2014).

¹⁶¹ *Araya* (n 125) [468]-[469].

¹⁶² *Ibid* [484]. Further, the plaintiffs application for a representative class action was granted.

¹⁶³ [2017] BCCA 401 [1] (CA) Willcock J and Dickson J concurring. Further at [19] stating the claims raised complex issues of transnational law, certain of which had never directly been addressed by a Canadian court: questions about the operation of *forum conveniens*; the doctrine of act of state and ‘limitations’ or exceptions

The Court of Appeal clarified that the claims related substantially to the secondary liability of Nevsun for complicity in violations of fundamental norms unlawful under international and domestic law, by the Eritrean State or its organs including the Military,¹⁶⁴ and dismissed the Act of State arguments made in the case.¹⁶⁵ The Court upheld the trial court's analysis of *forum non conveniens* citing, *inter alia*, precedent from the English courts including *Connelly*.¹⁶⁶ Notably, in its arguments that corporations are creatures of domestic statute which do not have personality under international law, Nevsun adduced in support that the process for a binding treaty on business and human rights had failed to advance.¹⁶⁷

Considering whether CIL could found a claim in private law in Canada, Newbury J recognised the issues at stake, including international comity and the separation of powers of courts and legislature. However, she also considered that it did not necessarily follow that basing a private law remedy on recognition of a norm of CIL would 'bring the entire system of international law crashing down', and indeed further stated that if 'as the Court suggested, the development of the law in this area should be gradual, it may be that an incremental first step would be appropriate in this instance'.¹⁶⁸ Affirming that the plaintiff's claims were not bound to fail, and Newbury J stated:

We have seen that international law is “in flux” and that transnational law, which regulates “actions or events that transcend national frontiers” is developing, especially in connection with human rights violations that are not effectively addressed by traditional “international mechanisms” (...)¹⁶⁹

It is a penetrating and lucid recognition of both the opportunities and challenges of advancing accountability in the field of business and human rights. In 2020, the Supreme Court of Canada affirmed that rules of customary international law can also bind corporations in *Nevsun Resources Ltd. v Araya*.¹⁷⁰ The majority considered that whether a particular rule of international law is binding on corporations is merely a matter of

thereto; and the applicability of customary international law principles said have been adopted into the common law of Canada.

¹⁶⁴ *ibid* [92].

¹⁶⁵ *ibid* [175].

¹⁶⁶ *ibid* [120], (n 16)(HL) [8].

¹⁶⁷ *ibid* [189].

¹⁶⁸ *ibid* [196].

¹⁶⁹ *ibid* [197].

¹⁷⁰ 2020 SCC 5, [104]-[113]. Discussed in chapter 1 section 1.3.3.

determining whether or not is of a strictly interstate character.¹⁷¹ Opening her majority judgment Abella J stated that international legal norms protecting human rights ‘were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities.’¹⁷² Although the decision is limited on certain aspects, as a decision of a top common law court, it can be expected to carry precedential weight. Notably, concerning routes to remedy and causes of action, Abella J began from the principle that ‘where there is a right, there must be a remedy for its violation.’¹⁷³ Moreover, the majority considered that existing conventional common law torts may be inadequate to redress wrongs so severe that they breach core norms of customary international law.¹⁷⁴ It is potentially possible the courts in Canada could become available to claims from victims of violations of customary international law by corporations.¹⁷⁵ Recalling that this question was addressed in *Jesner v Arab Bank plc* in which the United States Supreme Court found that there is no ‘specific, universal, and obligatory norm of corporate liability’.¹⁷⁶

As argued in this thesis, the cogent dissent of Sotomayor J in *Jesner*, the judgment of Leval J in *Kiobel I*,¹⁷⁷ combined with and amici submissions in *Jesner*, *Kiobel I* and *Kiobel II*¹⁷⁸ provide a contra-current in the discussion of corporate responsibilities. It is bolstered by the

¹⁷¹ *ibid* [105].

¹⁷² *ibid* [1].

¹⁷³ *ibid* [120]-[121].

¹⁷⁴ *ibid* [129].

¹⁷⁵ *Hape* (n 158) Canadian courts use customary international law as an interpretive aid. See also Hansell (n 122) 179 stating: ‘The Court’s decision on this question will either create a new cause of action based in customary international law or risk limiting judicial use of customary international law as an interpretative aid for existing Canadian law.’

¹⁷⁶ *Jesner v Arab Bank PLC*, United States Supreme Court No. 16-499 (April 24, 2018), 17. Discussed in chapter 1 section 1.3.3.

¹⁷⁷ *Kiobel I* (n 159).

¹⁷⁸ *Kiobel II* (n 159) *inter alia* Brief of Amicus Curiae International Human Rights Organisations and International Law Experts in Support of Petitioners No. 10-1491 (December 2011) <www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum> accessed 14 December 2019; Brief of Navi Pillay, UNHCHR in support of Petitioners <www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_navipillay.authcheckdam.pdf> accessed 14 December 2019; Brief of Ambassador David Scheffer, Northwestern University School of Law as Amicus Curiae in Support of the Petitioners <www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_scheffer.pdf> accessed 14 December 2019.

decision of the Canadian Supreme Court in *Araya*, adding to the contribution from *Hudbay* and *Garcia* concerning development of nominate torts under common law and access to justice. Further, the evident crossover of authorities and principles from the English courts in the Court of Appeal in *Araya* supports that there is on-going the cross fertilisation in principles in FDL litigation across jurisdictions.¹⁷⁹ This ought to also reinforce openness in other jurisdictions, including the approach that the Irish courts may adopt.

5.4.2. Legal Tests applied in The Netherlands

Dutch jurisprudence is instructive regarding development of principles concerning tests of duty of care, group policies, and joining of defendants in connected proceedings.

5.4.2.1. Tests of Duty of Care

Although the decision was delivered prior to the UK Supreme Court judgment in *Vedanta*, the approach of the Court of Appeal of the Hague in the five proceedings forming the Dutch Shell Nigeria case displays consistency with the themes emerging in jurisprudence of the English courts.¹⁸⁰ The claimants allege that parent company Royal Dutch Shell plc (RDS) failed to exercise due care in ensuring that the operations of its Nigerian subsidiary Shell Petroleum Development Company (SPDC) did not cause harm to local communities and their environment. The claim against subsidiary SPDC alleges it failed to prevent oil spills occurring, to mitigate the damage, and to restore the contaminated sites.¹⁸¹

¹⁷⁹ (n 163).

¹⁸⁰ Court of Appeal The Hague (17 December 2015) ECLI:NL: GHDHA:2015:3586 (Dooh/Shell); ECLI:NL: GHDHA:2015:3587 (Shell/Akpan); ECLI:NL: GHDHA:2015:3588 (Oguru-Efanga/Shell). There are currently no English translations of the Court of Appeal decisions. See Cees van Dam, 'Preliminary judgments Dutch Court of Appeal in Shell Nigeria case' <www.ceesvandam.info/default.asp?fileid=643> accessed 14 December 2019, 3 stating: 'The court considers that it is undisputed that the court has jurisdiction to hear the case against RDS on the basis of the Brussels I Regulation...Second, the Court of Appeal accepts jurisdiction to hear the cases against SPDC on article 7(1) Dutch Code of Civil Procedure (CPP) regarding plurality of defendants...the claims against the defendants are the same; the factual bases of the claims are the same in that they regard the same spillages...this interpretation of article 7(1) CPP is in line with the case law of the ECJ with respect to the corresponding article 6(1) Brussels I'.

¹⁸¹ See Liesbeth Enneking 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria* Case' (2014) 10(1) Utrecht Law Review 46. The claimants alleged that oil spills were the result of faulty maintenance but were initially denied discovery and disclosure which would substantiate this claim.

In its assessment of duty of care the court applied the same *Caparo*¹⁸² test as the English courts, and its assessment includes extensive citation of English authorities. It specifically referred to the English courts’ ‘cautious but considerable steps to accept a duty of care for parent companies’.¹⁸³ It also referred to *Thompson v Remick Group plc*,¹⁸⁴ in the context of whether the facts of the case would come within the four indicia of *Chandler* at the hearing of the Dutch court on the merits. Further, in applying Nigerian law, the Court was mindful that English case law is an important source of Nigerian common law.

5.4.2.2. Duty of Care and Group Policies

As outlined, it is foreseeable that courts will consider that a duty of care may exist if the parent company has made a focal point of preventing environmental damage by its subsidiaries, and if the parent is to a certain extent actively involved in directing the subsidiary’s operational management in relevant areas. Similar to the UK Supreme Court in *Vedanta*, the Court of Appeal of the Hague suggested that the code of conduct adopted by the company is proof of the standard of overview and monitoring of its subsidiaries that the parent is expected to engage in, and as underpinning its superior knowledge of the risk of environmental damage compared to its subsidiary. The approach to disclosure adopted by the Dutch court is similar to the Canadian Court of the Appeal in *Hudbay*, with the Court of Appeal of the Hague acceding to the plaintiffs’ request to order Shell to disclose documents regarding maintenance of the oil pipelines.¹⁸⁵ While disclosure was initially refused in the District Court, the documents were relevant to establishing whether the subsidiary had failed to act to avoid or mitigate spillages.¹⁸⁶

¹⁸² *Caparo* (n 23) .

¹⁸³ Van Dam (n 180) 5.

¹⁸⁴ (n 38) [37].

¹⁸⁵ (n 180) [7.3].

¹⁸⁶ In 2013 the Hague District Court concluded that the oil spills were the result of sabotage for which SPDC was not liable. As the Dutch court was applying Nigerian law under which there is no general duty of care on parent companies to prevent damage to others from their subsidiaries’ operations, the court rejected the claims against parent company RDS. In one case, the Court SPDC was found liable for having failed to exercise proper care and ordered to pay compensation for the damage suffered *Akpan v Royal Dutch Shell Plc et al* (*Akpan DC*), District Court of the Hague (30 January 2013) C/09/337050/HA ZA 09-1580; ECLI:NL:RBDHA:2013:BY9845 (oil spill near Goi) [4.30]-[4.39]; ECLI:NL:RBDHA:2013:BY9850 (oil spill near Oruma) [4.32]-[4.41]; ECLI:NL:RBDHA:2013:BY9854 (oil spills near Ikot Ada Udo) [4.26]-

5.4.2.3. Connected Proceedings

As in *Vedanta*,¹⁸⁷ in the Dutch Shell Nigeria cases the defendant parent company RDS claimed that the proceedings against it were an ‘illegitimate hook’, designed to bring foreign defendant SPDC within the jurisdiction of the Dutch courts and constituted an abuse of procedural law. Article 7 of the Dutch Civil Code does not require a freestanding ‘good and arguable case’ test for connected proceedings.¹⁸⁸ Notably, the Court of Appeal of the Hague confirmed that once a sufficient connection exists between the claims when initiated, jurisdiction assumed under Article 7 subsists even if the claim against the parent company is dismissed at the merits stage. The judgement is interpreted by Van Dam as a possible prelude to support for a duty of care for parent companies vis-à-vis their subsidiaries or third parties generally, following the jurisprudence of the English courts.¹⁸⁹ The judgement on the merits will be watched with great interest. In particular, it will be instructive to see whether the approach of the English courts concerning the role of group policies in establishing proximity the *Okpabi* and *Vedanta* cases is adopted by the Dutch Court.¹⁹⁰

In 2019 the District Court of the Hague accepted jurisdiction in *Kiobel v Shell*,¹⁹¹ concerning the execution of the ‘Ogoni 9’ in Nigeria in 1995. In this case the claims are based on alleged infringements of fundamental rights,¹⁹² with tort submitted as an

[4.34]. See also *The Guardian* <www.theguardian.com/global-development/2015/dec/18/dutch-appeals-courtshell-oil-spills-nigeria> accessed 14 December 2019.

¹⁸⁷ *Vedanta* (CA) (n 10) [93].

¹⁸⁸ See Burkhard Hess and Miriam Mantovani, ‘Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation’ (January 29, 2019). MPILux Research Paper 2019 (1) <<https://ssrn.com/abstract=3325711>> accessed 15 December 2019.

¹⁸⁹ Van Dam (n 180) 5. Without predetermining the outcome of the hearing on the merits, he perceives the court ‘seems to indicate its willingness not being too reluctant when it comes to such duties, referring to recent English cases’.

¹⁹⁰ See section 5.3.2.3 above.

¹⁹¹ ECLI:NL:RBDHA:2019:4233 (English version) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670>> accessed 15 December 2019.

¹⁹² *ibid* [4.10]-[4.22] based on the African Charter of Human and Peoples Rights (ACHPR) which has been incorporated into domestic law and on provisions of the Nigerian Constitution. Under Nigerian law the provisions of the Constitution have direct horizontal effect and can be invoked against companies, including via *sui generis* proceedings for imminent actual violations of human rights under enforcement procedure rules. Fundamental rights may also be addressed in other legal procedures based in tort or contract.

alternative.¹⁹³ Rome II does not apply *rationae temporis* and the Dutch Court is applying Nigerian law. Notably, the Court considered that the enforcement procedure involving alleged infringement of fundamental rights in Nigeria as an ‘internal jurisdictional distribution rule’, which did not conflict with Dutch international private law, and preclude the Dutch court having jurisdiction over all the defendants ‘taking cognizance of the claims based on a direct invocation of fundamental rights’.¹⁹⁴

The judgement in the Dutch *Kiobel* case centres on evidence and discovery but refers to both *Vedanta*¹⁹⁵ and *Okpabi* in its comparatively brief consideration of jurisdictional issues. The court distinguished the dismissal of jurisdiction in *Okpabi* which it considers the courts decided under English law.¹⁹⁶ While the court’s treatment of jurisdictional issues is succinct, it does track an increasingly familiar path. Consistent with its interpretation of Article 8(1) Brussels I and Article 7(1) Dutch Code of Civil Procedure in the Dutch Shell Nigeria cases, joint handling of the claims¹⁹⁷ is justified on the basis they concern the same facts, circumstances, and legal bases.¹⁹⁸ Notably and also consistent with the Dutch Shell Nigeria cases, the court concluded that it was predictable for all defendants that proceedings would be brought against them in the forum of domicile of a corporate sibling. Its summary judgment was that the allegations of the direct involvement of the anchor defendant in violations of fundamental rights was not ‘bound to fail’ and there was a real issue to be tried.¹⁹⁹ From the foregoing analysis of comparative jurisprudence, and related themes in section 5.5, and synthesis in 5.6, a model for adjudicating FDL cases is presented in Section 5.7.

¹⁹³ *ibid* [4.22] stating ‘A party wishing to put forward an imminent or actual violation of the fundamental rights from the ACPHR and NGW invoked by claimants in legal proceedings in Nigeria has the choice to do so i) either with a claim for redress in a *sui generis* legal action to which the FREP Rules 1979/2009 apply and ii) or on another basis in other proceedings. That other basis would be the private-law concept of tort for a claim instituted by claimants against defendants, who they directly sue extra-contractually for their conduct. But claimants do not base their claims in the first instance on this principle’.

¹⁹⁴ *ibid* [4.29].

¹⁹⁵ *ibid* [4.31] citing *Vedanta* (CA)(n 10) concerning discovery.

¹⁹⁶ *ibid* [4.28].

¹⁹⁷ *ibid* [4.25].

¹⁹⁸ *ibid*. Although the Court [4.24] was clear that the same legal basis is not a requirement.

¹⁹⁹ *ibid* [4.27].

5.5. THEMES IN COMPARATIVE JURISPRUDENCE

FDL litigation involves substantive, procedural or practical obstacles which arise across jurisdictions.²⁰⁰ Flowing from this, threads and wider themes will be synthesised as common across jurisdictions, and which may influence FDL litigation in Ireland.

5.5.1. Shared Authorities and Legal Tests

Common parameters of parent company duty of care and key principles are identifiable across jurisdictions. Shared authorities and the use of markedly similar legal tests indicate cross-fertilisation in developing principles of legal accountability. Tests such as *Anns*²⁰¹ and *Caparo*²⁰² are English authorities which have influenced approaches in Canada and the Netherlands.²⁰³ Moreover, courts in the EU are generally applying the law of the forum where the harm occurred, which in several cases is influenced by English common law.

As FDL cases make their way through trials and appeals in the respective national systems, the timing of decisions and layering of precedent is at issue. For example, in its ruling on jurisdiction the UK Supreme Court in *Vedanta* refuted that parent company liability is a ‘novel’ area guided by a separate set of principles²⁰⁴ prior to pending decisions on the merits in *Hudbay* and the Dutch Shell Nigeria cases. How will these decisions interweave over time? On the basis of extensive cross referencing of jurisprudence, it is foreseeable that FDL cases across jurisdictions will converge towards a common thread on the duty of care of parent companies. It is reasonable to anticipate that the approaches adopted will largely follow the jurisprudence of the English courts, as adapted to the applicable law of the forum of harm. This is all the more so on the basis that the law of the forum of harm in FDL cases has frequently been influenced by English common law.

5.5.2. Duty of Care to Wider Community

It is established that parent company duty of care extends beyond those with whom the parent has a direct (employer / employee) relationship, to the wider community negatively affected by the operations of subsidiaries. The marker here is proximity under general tort

²⁰⁰ See Srinivasan (n 6) 342.

²⁰¹ (n 26).

²⁰² (n 23).

²⁰³ As section 5.4.2 illustrates the Dutch Court of Appeal in The Hague referred to *Caparo*, and also to formulation of the parameters of parent company duty of care in the *Chandler* and *Thompson* cases.

²⁰⁴ See section 5.3.2.1 above.

principles, considered on a case by case basis. Factors influencing the grounding of proximity have been considered in detail by the English courts, *inter alia*, corporate group policies. Using *Vedanta* as an example, an arguable case that a duty is owed is premised on sufficient intervention such that the parent, under applicable law:

(...) incurred itself (rather than by vicarious liability) a common law duty of care to the claimants... the level of intervention requisite to give rise to a duty of care upon Vedanta to persons living, farming and working in the vicinity is a matter of Zambian law.²⁰⁵

Extrapolating from *Vedanta*, if the position under the applicable law is unclear, disputed or has not been considered previously, courts are likely to consider that if an arguable case exists under the law of the forum, an arguable case exists under the applicable law, and particularly so when there is a legacy of English common law. This is reasonably to be expected as the logical and pragmatic response of a court in the normal course of its business reaching decisions with the information available to it.

5.5.3 Corporate Policies

Consistently the weight of commentary has maintained that when a parent company publicises and implements group-wide policies and practices, there is an increased likelihood courts will consider that a parent corporation has assumed a duty of care towards third parties affected by the operation of those policies at subsidiaries.²⁰⁶ This was the position prior to the attention accorded to corporate group policies in *Okpabi* and at each stage of the proceedings through the courts in *Vedanta*. It is now established that courts will

²⁰⁵ *Vedanta* (SC) (n 11) (Briggs LJ) [44].

²⁰⁶ Robert McCorquodale, 'Waving not Drowning: *Kiobel* Outside the United States' (2014) 107 *American journal of international law* 846 at 846; Davitti, Daria, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (2016) 16(1) *Human Rights Law Review*, 74. Davitti signals for a similar argument in relation to the need for corporate groups to treat the risk of human rights impacts as a legal compliance issue. See also Nicola Jägers, 'Will transnational private regulation close the gap?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013), 299. Jägers argues that hard law is gradually encroaching on voluntary CSR policies, as stakeholders are turning to law to enforce voluntary commitments undertaken by corporations though standing of corporate codes of conduct in law remains unclear. For example, in January 2015, a complaint for 'misleading commercial practices' was initiated by Sherpa and its partners against Auchan alleging its claims to abide by the UNGPs were misleading, based on labels used by leading retailers, including the AUCHAN group, found in the debris of the collapsed Rana Plaza complex.

assess whether the facts indicate a threshold of control or intervention by the parent company. Similarly, advice from a parent company to its subsidiary in a relevant area is expected to be interpreted by courts as evidence of control establishing proximity, grounding one element in finding the parent company owed a duty of care.

The statement of Briggs LJ in *Vedanta* to the effect that a parent may be held responsible to third parties negatively impacted ‘if it holds itself out as exercising that degree of control and supervision of its subsidiaries, even if it does not in fact do so’²⁰⁷ is a game-changer. It implies that a disconnect between talk and walk presents legal risk exposure. Multinational corporations were already aware of increasing tension in talk versus walk. Prior to the statement of Briggs LJ, senior in-house legal counsel in multinational companies operating across a range of sectors recognised that failing to respect human rights carries legal, reputational, financial and operational risks which need to be anticipated.²⁰⁸ They identified as vital that in-house counsel are on top of pledges and public statements relating to human rights, and act to address any inconsistencies.²⁰⁹ In the words of Maarten Scholten, GC at Total, as concerns human rights the challenge for lawyers is that ‘once you issue policies you have to make sure the published statements match the on-the-ground reality’.²¹⁰

It is notable that in practice the most likely of all business functions to be assigned responsibility for human rights related issues is not a policy or corporate social responsibility unit within a corporation. It is in fact the legal department, followed by the compliance function.²¹¹ This has primarily been driven by commercial contracts bringing human rights issues to attention.²¹² It is acknowledged that sanctions can be imposed by what are described as ‘new judges’ (any stakeholders) and that legal counsel in corporations need to get ahead and actively manage risks. According to IBA President David Rivkin:

²⁰⁷ *Vedanta* (SC) (n 11) (Briggs LJ) [53].

²⁰⁸ Herbert Smith Freehills and Legal Business. ‘Soft law hard sanctions – human rights laws and the next risk front facing business’ <www.inhouselawyer.co.uk/mag-feature/soft-law-hard-sanctions/> accessed 10 December 2019.

²⁰⁹ *ibid* stating that 60% of legal teams had taken steps to raise awareness of human rights in their organisation

²¹⁰ *ibid*.

²¹¹ *ibid* stating Legal (29%) or compliance (27%) functions are far more likely to be assigned responsibility for human rights than CSR (19%) or social and environmental affairs (12%).

²¹² *ibid* finding that 46% of respondents encountered specific human rights clauses in commercial contracts.

Corporate counsel made it very clear [in 2015] that they regard compliance with human rights standards as of the same importance as compliance with hard law, not least because it is often inextricably linked with complications that may have hard law consequences. Many in-house counsel will tell you that failing to acknowledge human rights can be as harmful, or more harmful, than a violation of hard law in terms of damage to reputation or its direct economic impact.²¹³

In agreement with Rivkin, ‘companies and lawyers need to change their mindsets’.²¹⁴ It is apparent that financial or reputational risks have been forefront in circumstances where there is a dearth of legal accountability. There is evidence that the most effective means to motivate and influence senior management is to talk ‘the language of costs’.²¹⁵ Potentially significant damage to corporate reputation should be highly motivational to effect changes in practice.²¹⁶ Henceforth, as indicated in comparative jurisprudence²¹⁷ analysed in this

²¹³ *ibid.* In 2017, the IBA issued a web-based handbook concerning business and human rights risks and how to address them <www.ibanet.org/Handbook-for-lawyers/Chapter-1.aspx> accessed 10 December 2019.

²¹⁴ *ibid.*

²¹⁵ Rachel Davis and Daniel Franks, ‘Costs of Company-Community Conflict in the Extractive Sector’ (CSR Initiative, Harvard Kennedy School, 2014) <www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/> accessed 16 December 2019 found the ‘language of costs’ was seen as being particularly useful for a company’s community relations/social performance team in reaching two key audiences: senior management and financial colleagues. They found that one company had undertaken a systematic review of the potential costs of nontechnical risks connected to its various projects and identified a significant figure – a value erosion of more than \$6 billion over a two-year period, representing a double-digit percentage of its annual profits – which it used to attract Board-level attention to these issues.

²¹⁶ See Corporate Human Rights Benchmark (2017) Consultations <www.corporatebenchmark.org/>: UNGP Reporting Database <www.ungpreporting.org/reporungdatabase> accessed 1 December 2019. For interpretation of the scope and content of HRDD under the UNGPs, see also Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2(2) Business and Human Rights Journal 223 confirming ‘companies would generally prefer clearer regulation over uncertainty and inconsistency’.

²¹⁷ Norton Rose Fulbright, ‘*Lungowe v Vedanta* appeal highlights important points regarding parent company liability’ (November 2017) stating: ‘This Supreme Court judgment highlights the need for multinational companies to be aware of the possibility that non-UK claimants may be able to bring claims against them in the English courts where they have an English parent company’ <www.nortonrosefulbright.com/knowledge/publications/158040/emlungowe-v-vedantaem-appeal-highlights-important-points-regarding-parent-company-liability> accessed 10 December 2019; Norton Rose Fulbright, ‘UK Supreme Court clarifies issues on parent company liability in *Lungowe v Vedanta*’ (April 2019) <www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-

thesis, management and legal focus upon inconsistencies in group policies, as well as on overpromising and underdelivering is an acute need. It can be expected to require the close interaction of corporate policy makers with in-house legal counsel on an on-going basis. Moreover, aside from FDL litigation, the involvement of corporate groups in human rights violations may lead to claims from shareholders against corporations for avoidable costs,²¹⁸ failure to disclose risks, or misrepresentation concerning its human rights record. In addition, a corporation may also breach the lending criteria or covenants from its financing banks and institutions.

5.5.4. **Hands on / Hands off Approaches**

It remains to be seen whether the themes concerning control emerging in jurisprudence ultimately encourage a more hands-on, or a more hands-off, approach from parent companies vis-à-vis their subsidiaries.²¹⁹ It is established that courts will consider evidence of control as establishing proximity. In this, it is to be hoped that the courts take a wide view, not unduly delimited to ‘active’ control or enforcement as this might lead parent companies

[issues-on-parent-company-liability-in-lungowe-v-vedanta> accessed 1 June 2019>](#) accessed 10 December 2019; Allen Overy, ‘Vedanta: Supreme Court rules that Zambians can seek legal redress in the UK against parent company’ (17 April 2019) <www.allenoverly.com/publications/en-gb/Pages/Vedanta-Supreme-Court-rules-that-Zambians-can-seek-legal-redress-in-the-UK-against-parent-company.aspx> accessed 10 December 2019 stating: ‘This much anticipated decision has important ramifications for British multinationals whose subsidiaries and suppliers operate abroad, particularly in regions where there is a higher risk of adverse environmental and human rights impacts and claimants face practical barriers to accessing effective judicial remedies’; Volterra Fietta, ‘UK Supreme Court allows Zambian villagers to continue UK suit against London-based mining company Vedanta’ (16 May 2019) stating: ‘UK parent companies should proceed with caution and ensure that they have sufficient capacity and competent legal advice to avoid becoming targets of such actions’.

<www.volterrafiatta.com/uk-supreme-court-allows-zambian-villagers-to-continue-uk-suit-against-london-based-mining-company-vedanta/> accessed 1 December 2019.

²¹⁸ Davis and Franks (n 215) explored the most frequent, greatest, and most often overlooked costs of company-community conflict. The most frequent costs were those arising from lost productivity due to temporary shutdowns or delay. For example, it found a major, world-class mining project with capital expenditure of between US\$3-5 billion will suffer costs of roughly US\$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales. Direct costs can accrue even at the exploration stage (for example, from the standing down of drilling programs).

²¹⁹ John Sherman, ‘Should a Parent Company take a hands off approach to the human rights risks of subsidiaries’ (2018) 19(1) Business Law International, 7 arguing that a hands-off approach will dramatically increase both legal and non-legal risks for the entire corporate group, parent as well as subsidiaries.

to consciously opt for a more ‘hands off’ approach to their subsidiaries. Inadvertently stimulating a more hands off approach would be counter-productive. Furthermore, it would go against the thrust of initiatives and trends in this field, *inter alia*, the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) which promote international consensus on ‘a “hands on” approach to corporations’ global human rights impacts’.²²⁰ The risk that multinational corporations may adopt a hands-off approach as an avoidance strategy is neutralised if other courts and jurisdictions respond by endorsing a wide interpretation of the themes in *Vedanta*. An appropriate response from courts is to promote a human rights due diligence approach by parent companies. A supporting and appropriate regulatory response is the introduction of mandatory human rights due diligence.

5.5.5. Dismissal before Disclosure

Litigators and scholars alike criticise the high evidentiary burden placed on claimants at the early stages in the proceedings in the English courts.²²¹ There is a perception that jurisdictional hearings operate as ‘strike-out’ hearings and result in inappropriately high burdens in cost and time upon claimants to appeal such rulings.²²² A significant feature of FDL litigation is the information asymmetry between plaintiffs and defendants, particularly at the time of determining jurisdiction. The recognition by Bingham LJ in *Lubbe* that much of the evidence pertaining to the ingredients of the claim would be contained in documentary material to be found in the office of the parent company was prescient.²²³ In

²²⁰ Amnesty International Rule 15 Submission to Supreme Court of the United Kingdom *Okpabi and others* vs *Royal Dutch Shell plc* UKSC 2018/0068, 4 <www.amnesty.org/download/Documents/AFR4483212018ENGLISH.PDF> accessed 17 December 2019.

²²¹ See also Gabriela Quijano, Legal Adviser, Amnesty International stating: ‘Such a high evidentiary burden on claimants alleging parent company liability at such an early stage in the proceedings is unjust and unrealistic’ <www.business-humanrights.org/en/okpabi-v-royal-dutch-shell-an-opportunity-to-honour-international-standards-or-another-instance-of-corporate-impunity> accessed 20 December 2019.

²²² See Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 378, 393.

²²³ *Lubbe* (n 18) (CA) (Bingham LJ) [1555G]: stating: ‘The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether

effect, courts are making a summary judgement as to whether there is an arguable case at a point when the claimants are likely to be unable to access the documentation necessary to do so.²²⁴

Inability to access data which is uniquely within the remit of the corporation is a recurring theme, as clearly acknowledged by Simon LJ in the Court of Appeal in *Vedanta*, when drawing general principles from English jurisprudence.²²⁵ In this aspect, the position of the English courts in all three cases, *Vedanta*, *Okpabi* and *Unilever*, can be contrasted with orders of disclosure ordered by courts in both the Dutch Shell Nigeria and *Hudbay* cases.²²⁶ Documents which are exclusively within the remit of the corporation will go to, *inter alia*, the crucial element of evidence of control and direction by the parent. More pointed and generous orders on disclosure by the courts is therefore recommended as soon as possible in proceedings.

5.5.6 International Standards

As explored in chapter 2, there is a marked evolution of soft law instruments and transnational private regulation in the field of business and human rights. Alongside relevant national regulation and policy, it has been argued that evidence of emerging norms and standards should be leveraged in considering the law applicable to disputes in EU Member States.²²⁷ Trends in international norms and standards are increasingly difficult to ignore, as evidenced during oral hearings of the UK Supreme Court in *Vedanta*.²²⁸

the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence’.

²²⁴ Personal interview with Richard Meeran of Leigh Day 17 September 2018 offices of Leigh Day, London.

²²⁵ *Vedanta* (CA) (n 10) (Simon LJ) [83].

²²⁶ Discussed in section 5.4. As in *Hudbay* (n 130) in which the court ordered the parent company to produce information to ascertain disparities between its policies at home and in host countries.

²²⁷ Discussed in chapter 4 sections 4.4. concerning Rome II.

²²⁸ During the hearings in the UK Supreme Court in *Vedanta* Wilson LJ pointed out that submissions into the case by CORE and the International Commission of Jurists suggest that there is a trend towards parent company responsibility in international law. International Commission of Jurists and CORE, Statement in Intervention *Vedanta* UK Supreme Court <www.icj.org/wp-content/uploads/2019/01/UK-Intervention-ICJ-CORE-Advocacy-legal-submission-2019-ENG.pdf> accessed 19 December 2019. See also International

It is regrettable that evolving international standards and the voluntary public engagement by corporations with them has not been uniformly referenced in litigation. FDL cases are justifiably seen as key opportunities for ‘giving teeth to the codes of conduct via judicial activism’,²²⁹ and by extension, promotion of a hard law edge to soft law instruments. In comparative jurisprudence, the exception is *Hudbay*, in which the submission of Amnesty International as an amicus curiae is referenced within the judgement.²³⁰ In *Okpabi*, the claimants argued that multinational parent companies conducting themselves consistently with international standards should bear on whether it is fair, just and reasonable to impose a duty of care. The English Court of Appeal did not consider these matters to be persuasive, stating:

The first point may be unobjectionable as an abstract principle but is a doubtful foundation for the imposition of a duty of care.²³¹

The court could have taken a wider view and moved to acknowledge international standards in the field of business and human rights which are widely endorsed by states, business, civil society, and scholars. It was open for the court to consider these standards not as abstract, but as relevant to its reflection as to whether Royal Dutch Shell plc had assumed a responsibility to those affected by the pollution resulting from its extractive activities. Increasingly, overall higher standards and normative expectations concerning the human rights impacts of business should form part of the wider backdrop against which courts assess whether it is just, fair, and reasonable to impose a duty of care. Submissions from the International Commission of Jurists and CORE into the *Okpabi* appeal to the UK Supreme Court²³² stress the international ‘standards expected of a reasonable and prudent enterprise’, referring *inter alia*, to the UNGPs including the concepts of due diligence,

Commission of Jurists and CORE, ‘Multinationals must respect human rights globally’ <www.icj.org/uk-multinationals-must-respect-human-rights-globally-supreme-court-is-told/> accessed 16 December 2019.

²²⁹ Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 - February 2019 ‘Access to legal remedies for victims of corporate human rights abuses in third countries’

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<[www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>

accessed 17 December 2019.

²³⁰ *Hudbay* (n 123) [7].

²³¹ *Okpabi* (CA) (n 8) (Simon LJ) [130]-[131].

²³² *Okpabi* (n 8) UKSC 2018/0068 <<https://www.icj.org/uk-supreme-court-should-recognize-shells-responsibilities-for-devastating-rights-impacts-of-niger-delta-oil-spills-say-ngos/>> accessed 10 July 2020.

OECD Guidelines including OECD Due Diligence Guidance for Responsible Business Conduct²³³ and IFC Standards.²³⁴ The submission also references the UK government publication ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’.²³⁵ They argue that the Court of Appeal erred in finding that international standards are irrelevant, and should, with comparative jurisprudence be considered by a court in determining whether or not the defendant parent company, Royal Dutch Shell arguably owed a duty of care to the Claimants.²³⁶ To illustrate, they reference the amendment of the UK Companies Acts, were amended in the light of the UNGPs.²³⁷

5.5.7. Applicable Law

As discussed, EU Regulation Rome II²³⁸ generally represents a barrier to advancing accountability in FDL litigation. Firstly, applying substantive local law has impacted upon whether a court concludes that it is arguable a parent company owes a duty of care, leading to inconsistent results in comparative jurisprudence. In the Dutch Shell Nigeria cases, it

²³³ Including The OECD has recently published extensive advice on due diligence: OECD Due Diligence Guidance for Responsible Business Conduct(2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

²³⁴ https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h> ICJ / CORE

²³⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf>; May 2020 update on implementation <https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020>> accessed 5 October 2020.

²³⁶ ICJ/CORE (n 232) para 34.

²³⁷ *ibid* ICJ/CORE para 35.1, ref para 2.13 stating that item 15 of ‘Good Business indicates that amendments to the Companies Act 2006 made in 2013 were intended to give domestic effect to principles articulated in the UNGPs’.

²³⁸ (n 5). Until the coming into force of Rome II on 11 January 2009, the issue of applicable law in the UK was governed by the Private International (Miscellaneous Provisions) Act 1995. Under Rome II Article 4(1) the general rule is: ‘Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur’. Although Article 4(3) provides that ‘where it is clear from all of the circumstances of the case that the tort/delict is manifestly more closely associate with a country other than indicated in paragraphs 1 or 2, the law of that country shall apply’.

impacted a finding of no parent company liability. Interpreting Nigerian tort law, the District Court dismissed all the claims against the parent company RDS.²³⁹ Enneking considers that if the court had been able to reach its determination on the basis of a duty to act in civil liability cases pertaining to omissions in Dutch tort law, rather than Nigerian law which is derived from English common law, the court might have reached a different conclusion on the liability of the parent company.²⁴⁰

The same subject matter as the Dutch Shell Nigeria cases was considered by the English High Court in *The Bodo Community v The Shell Petroleum Development Company of Nigeria Limited*.²⁴¹ Again, the applicable law was Nigerian law and the matter concerned issues ‘never previously raised let alone addressed and decided upon in any case in Nigeria’.²⁴² Unlike the District Court of the Hague,²⁴³ Aikenhead J in the English High Court, interpreted the provisions of the Nigerian Oil Pipelines Act to include a ‘general shielding and caring obligation.’ He considered that this could, *inter alia*, entail taking appropriate protective measures to prevent pipelines from leaking, such that SPDC could be held responsible for the oil spills if it did not undertake reasonable measures to protect the pipelines from malfunction or oil theft.²⁴⁴ In that case SPDC agreed to a substantial out of court settlement and pledged to clean up the Bodo Creek.²⁴⁵

²³⁹ (n 186).

²⁴⁰ Enneking ‘The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria Case*’ (n 181) 52.

²⁴¹ (n 35). The Shell Petroleum Development Corporation (SPDC) accepted the jurisdiction of the English High Court in return for which the plaintiffs agreed not to pursue their claims against Royal Dutch Shell, SPDC’s UK-based parent company.

²⁴² *ibid* [21].

²⁴³ (n 186).

²⁴⁴ *ibid* [92 (g)].

²⁴⁵ Leigh Day, ‘Shell agreed £55m compensation deal for Niger Delta community’ (7 January 2015) <www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del> accessed 16 December 2018. In June 2017, Shell tried to strike out the lawsuit alleging that some members of the community obstructed clean up. The Court dismissed the claim. Shell then sought to prevent the community from going back to court by requesting to include a clause in the settlement, according to which any disruptive act by any resident of the Bodo community would lead to termination of the lawsuit. In May 2018, a UK judge ruled that the Bodo community should retain the right to revive the claim for another year with no conditions attached, in the event of the clean-up not be completed to an adequate standard <www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria> accessed 11th September 2018> accessed 16 December 2018.

The matter of duty of care under the applicable law was deftly circumvented by the English Court of Appeal in *Vedanta*. As experts did not agree on whether under the Zambian law of negligence the Zambian courts would follow English law, the court endorsed the trial judge's finding that as the claim is arguable in English law it is also arguable in Zambian law.²⁴⁶ In practice, Rome II limits the scope for domestic courts in EU Member States to develop jurisprudence. Correctly, Van Dam argues that it is inappropriate in a developing area of legal principle as the courts cannot apply the *lex loci delicti* in the same dynamic way that the courts may interpret and apply domestic law. Thus, when a court is called on to apply foreign law 'it seems to be stuck with the monolithic state of the art of that foreign law'.²⁴⁷ The effects of Rome II also contribute to lack of accountability via procedural matters, as evident in *Jabir v KiK*, where hundreds of claimants were time barred under the applicable Pakistani statute of limitations from advancing proceedings in the German courts.²⁴⁸

5.5.8. Procedural and Practical Circumstances of the Forum

Practical considerations have created a flow of FDL cases towards certain jurisdictions. The availability of a specific cause of action, such as in the United States under the Alien Tort Statute (ATS), or an openness to development of principles such as in the English courts, are 'pull' factors for claimants who face a risk of denial of justice in their home courts. As a corollary, there is a concrete risk of push back from a particular forum. As outlined,²⁴⁹ after hundreds of claims were filed under the ATS this trend is evident from *Sosa*²⁵⁰ through to *Daimler*,²⁵¹ and regulating the matter was pushed back to the executive branch of government in *Jesner*.²⁵² FDL cases raise issues of sovereignty, the approach of the home states of domicile, and multinational business such that scholars note that jurisprudence also has regulatory consequences in that the decisions of courts may

²⁴⁶ *Vedanta* (CA) (n 10) [91].

²⁴⁷ Van Dam (n 180) 5.

²⁴⁸ *Jabir v KiK Textilien und Non-Food GmbH* Case No. 7 O 95/15. See also <www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf> accessed 18 October 2019.

²⁴⁹ Chapter 4 section 4.2.1.

²⁵⁰ *Sosa v. Alvarez-Machain Inc* 542 U.S. 692 (2004).

²⁵¹ *Daimler AG v Bauman*, 134 S. Ct. 746 (2014).

²⁵² *Jesner v Arab Bank plc* (n 176).

influence future assessment of risk and reward by multinational corporations.²⁵³ It is possible that anticipation of such effects could result in a similar push back in the English courts as has occurred in the United States. Extending this argument, it could presage cases coming to the natural alternative common law jurisdiction in the EU, Ireland.

Adverse circumstances concerning litigation in a forum relating to costs, collective redress, and access to evidence may result in a denial of access to justice and accountability. In practical terms, it is only even potentially possible to access remedy when the parent company is domiciled within a jurisdiction where the procedural and practical circumstances are propitious or at least sufficient to enable litigation. Procedural and practical circumstances in the EU are not a level playing field. As a result, multinational corporations domiciled in EU jurisdictions with ‘favourable’ procedural and practical circumstances are potential targets, whereas multinational corporations domiciled in other EU jurisdictions which, for example, do not permit collective actions, are practically ‘immune’ from suit.²⁵⁴ As discussed in chapter 3 section 3.8, there are significant challenges to advancing accountability, including in relatively ‘favourable’ jurisdictions such as the UK. While outside the scope of this thesis, Brexit poses a threat and an opportunity to future foreign direct liability litigation in the English courts.²⁵⁵ Extending this argument, again circumstances could presage FDL litigation coming to the alternative common law jurisdiction in the EU, Ireland.

²⁵³ Liesbeth Enneking, ‘Judicial Remedies: applicable law’ in Juan José Álvarez Rubio, Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 44.

²⁵⁴ Philip Wesche and Miriam Saage-Maaß, ‘Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*’ (2016) 16 *Human Rights Law Review* 370, 384 explaining that procedural and practical circumstances for tort based litigation in Germany “implies de facto impunity, which, together with the financial benefits of irresponsible behaviour, may undermine the level playing field for companies investing in responsible business practices.”

²⁵⁵ See further Matheson, ‘Brexit: Cross Border Disputes and Governing Law – a Practical Guide’ (10/03/2019) <www.matheson.com/brexit-forum/news/brexit-cross-border-disputes-and-governing-law-a-practical-guide> accessed 20 December 2019.

5.5.9. A Decision on the Merits?

FDL cases are frequently settled out of court, enabling corporations to avoid any formal admission of liability.²⁵⁶ Moreover, key legal issues may not be conclusively resolved and no workable precedent developed for the future.²⁵⁷ In a study of 35 FDL cases in the EU including civil law jurisdictions, in just three cases the defendant companies were held liable on the merits.²⁵⁸ The ruling of the District Court of the Hague in *Akpan*²⁵⁹ is a rare instance in which a corporate entity within a multinational group has been held liable in an FDL style claim.²⁶⁰ It is salutary that the very existence of a ruling on the merits is heralded by Enneking on the basis there are:

(...) virtually no judgments in which a comprehensively reasoned judicial assessment is made of the legal obligations to exercise due care that may rest upon group entities vis-à-vis people and planet in the host countries in which the group operates.²⁶¹

We sit at a critical juncture of development in direct parent company liability. Multinational corporations, NGOs, policymakers, and home state courts are on notice.²⁶² The approach

²⁵⁶ Anna Grear, and Burns H. Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a post-Kiobel Lawscape' (2015), 15 Human Rights Law Review, 21-44 citing Janet Dine, 'Jurisdictional Arbitrage by Multinational Companies; A National Law Solution?' (2013) 3 Journal of Human Rights and the Environment 44.

²⁵⁷ Liesbeth Enneking, 'Judicial Remedies: Applicable Law' (n 253) 48.

²⁵⁸ Enneking 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria Case*' (n 181) 42. At 41 summarising as often due to failure on jurisdiction or to substantiate claims or settled out of court. Of the 20 civil law claims out of 35, 13 were taken in the English courts.

²⁵⁹ *ibid* 44, 52 noting that: '[...] it does not necessarily set a precedent in a strictly legal sense due to the fact that it has been rendered by a Dutch court on the basis of Nigerian tort law. The first is that the fact that the plaintiffs succeeded in bringing their foreign direct liability claims against RDS and SPDC before a Dutch court, opening the possibility to bring this type of claim in the Netherlands against Netherlands-based corporate entities and their foreign affiliates'.

²⁶⁰ *ibid*. See also Enneking et al 2016 <www.wodc.nl/404.aspx?aspxerrorpath=/onderzoeksdatabase/2531-maatschappelijkverantwoord-ondernemen-in-het-buitenland.aspx> accessed 20 December 2019.

²⁶¹ *ibid* 51.

²⁶² There were extensive demonstrations in front of the UK Supreme Court during the recent *Vedanta* hearings. See <www.foilvedanta.org/uncategorized/supreme-court-hears-landmark-jurisdiction-case-against-vedanta/> accessed 17 December 2019.

that EU courts adopt to the interests of justice and corporate behaviours will be crucial in progressing accountability. Recalling the statement by legal counsel in the *Trafigura* case:

Although the events took place thousands of miles away, it is right that this British company is made to account for its action by the British courts and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way they would act in Abergevenny.²⁶³

It is anticipated that the judgments on the merits in *Hudbay*, *Vedanta* and the Dutch Shell Nigeria cases will cross-fertilise. In an ideal scenario, the position of the UK Supreme Court in *Vedanta* will lead on duty of care, group policies and applicable law. Although the cases are primarily taken under the tort of negligence in common law jurisdictions, the underlying violation is typically of human rights.²⁶⁴ In this context, it would be beneficial that the EU courts have regard to the themes of wider access to justice in *Garcia* and take a justifiably clement approach on jurisdiction. With rulings on the merits awaited in both common law and civil law jurisdictions, there is much to play for.

²⁶³ Leigh Day Press Release, ‘Toxic waste disaster claim in the Hight Court on behalf of victims - Trafigura a company based in the West End of London’ (2006) <www.trafigura.com/media/3931/leigh_day_initial_press_release_09_11_2006.pdf> accessed 20 December 2019.

²⁶⁴ Srinivasan (n 6) 343.

5.6. SYNTHESIS: PRINCIPLES IN COMPARATIVE FDL JURISPRUDENCE

This short summary is intended to present relevant principles synthesised from comparative jurisprudence. It is not intended to be exhaustive, but as foregrounding to the Model in 5.7.

Duty of Care in *Vedanta*

A duty of care may be owed by the parent to those affected by the operations of a subsidiary

The risk of damage to third parties is foreseeable, and not too remote

Parent company duty of care is not 'novel', application of the general principles of assumption of liability

The *Caparo* test is applied in the assessment of extension to *new* categories, and was not directly applied in *Vedanta*

Proximity in *Vedanta*

Key is the intervention of the parent via control, supervision, or advice to the subsidiary
Rejection of limiting parent company duty of care to defined instances per *Okpabi* (CA)
Mandatory group policies do not *per se* give rise to duty of care to third parties,
Abdication by parent of publicly undertaken control or supervision may engage duty of care

Reasonableness

Okpabi - raised spectre of 'floodgates'
Hudbay & Okpabi - reference to evolving international norms and standards
Hudbay - wider view of policy reasons for recognising a duty of care

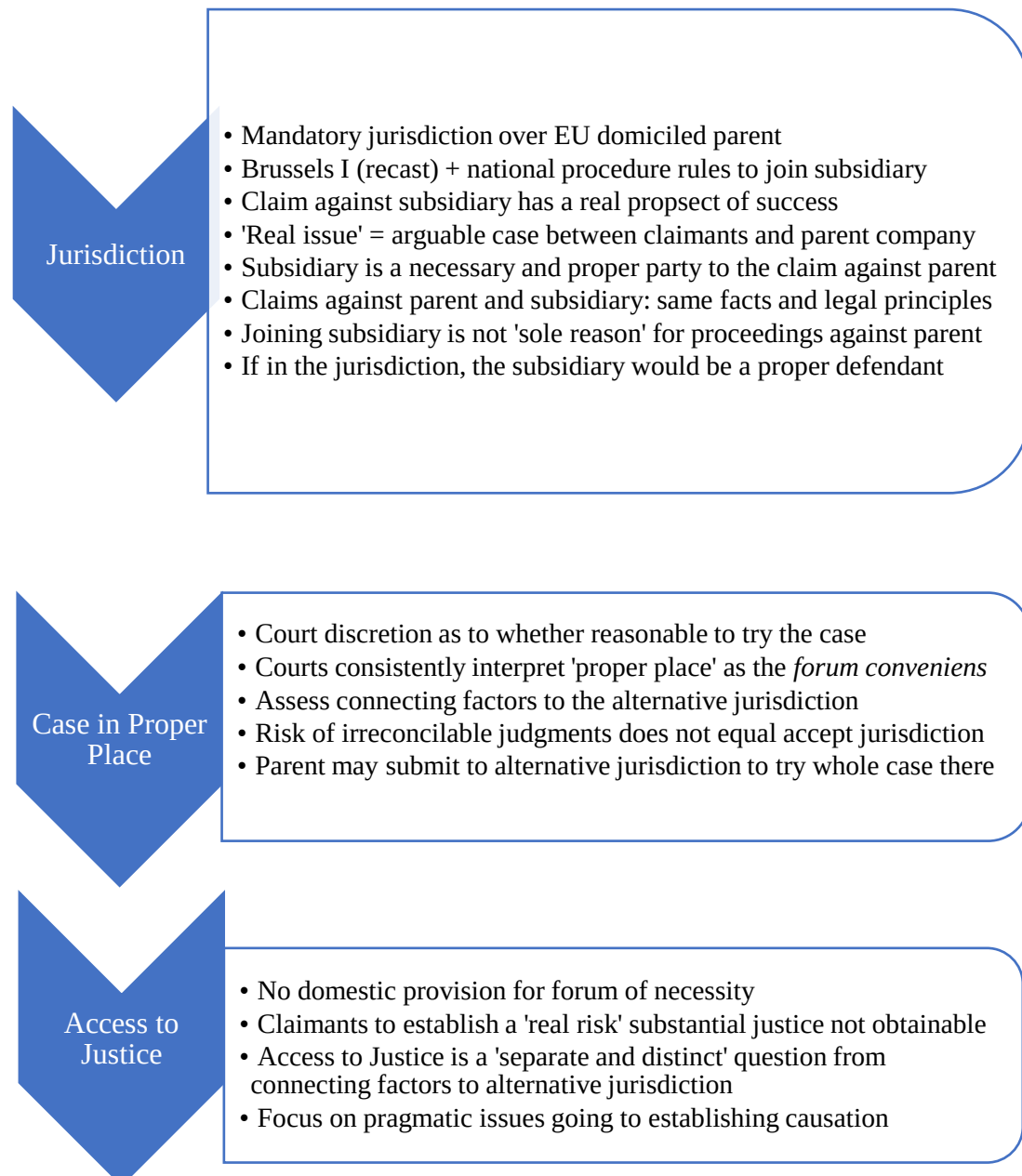
Access to Justice

Vedanta - 'but for' issues of access to justice, the alternative jurisdiction is the 'proper place'
Vedanta - focus on practical issues affecting proof of causation in alternative forum
Garcia - notable appreciation of the wider risks to claimants in alternative forum

5.7. MODEL FOR ADJUDICATING FDL CASES: COMPARATIVE JURISPRUDENCE

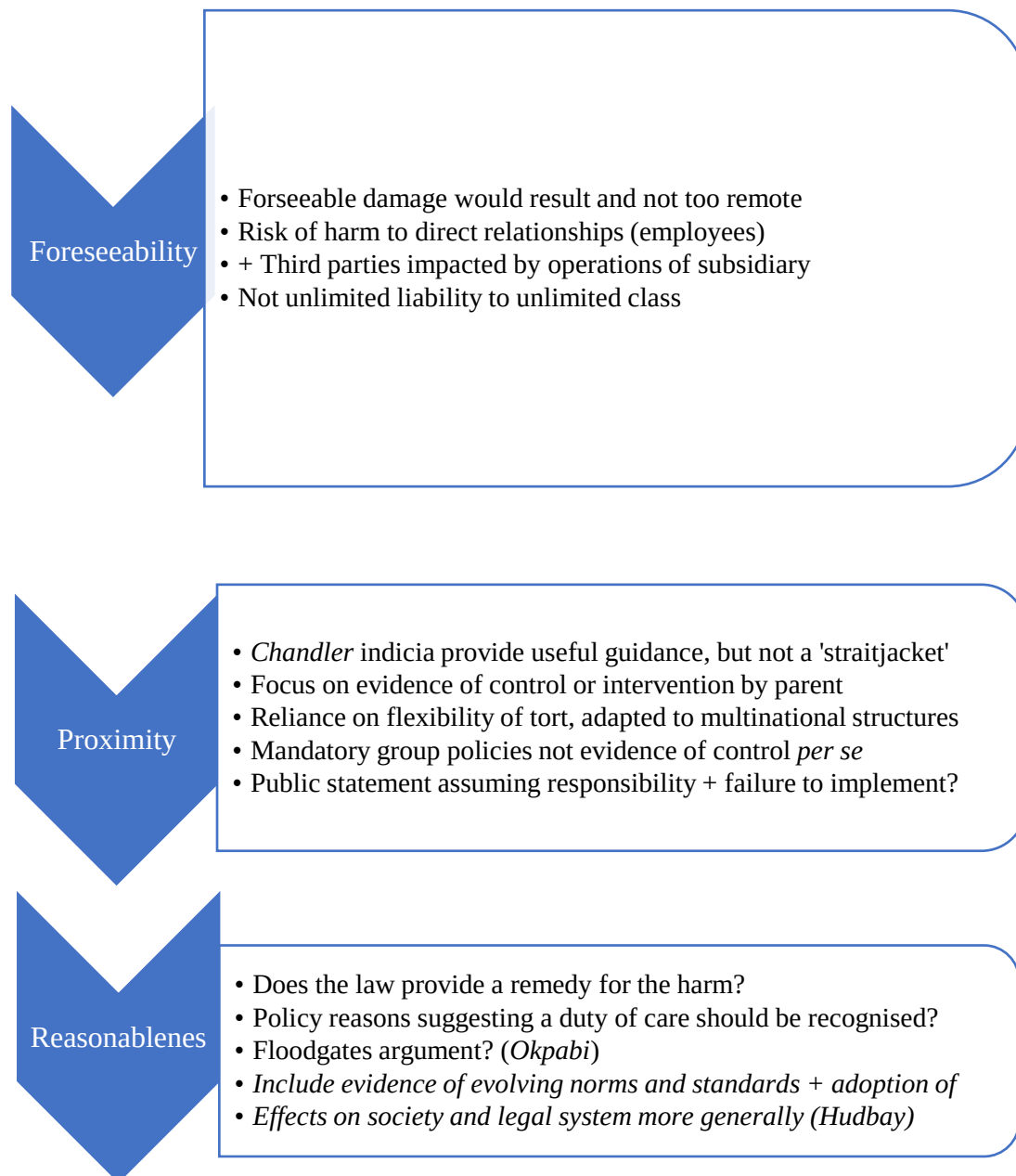
This model will summarise the issues addressed in the process of adjudication of FDL cases in comparative jurisprudence discussed in this chapter, grouped under grounding jurisdiction, establishing an arguable case that a duty of care is owed, and the procedural and practical circumstances of the forum. It is presented to assist understanding the factors influencing litigation, and the positions adopted by the courts. For the reasons outlined, this model favours jurisprudence in the English courts. Advocated leading approaches in other jurisdictions are presented in italics.

5.7.1. Jurisdiction



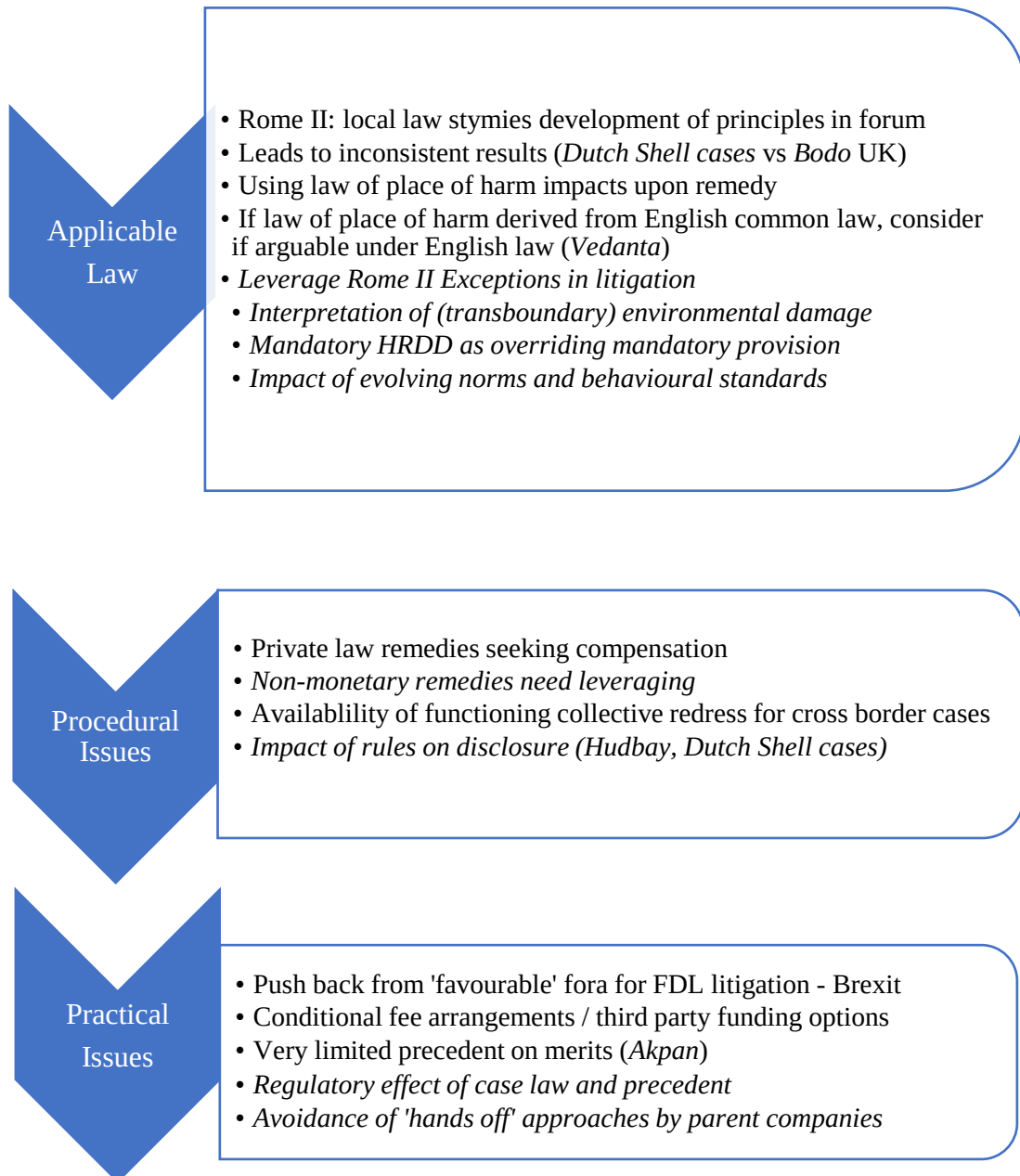
5.7.2. An Arguable Case a Duty of Care is Owed

For the reasons outlined, this model favours jurisprudence in the English courts. Advocated leading approaches in other jurisdictions are presented in italics.



5.7.3. Applicable Law, Procedural and Practical Aspects

For the reasons outlined, this model favours jurisprudence in the English courts. Advocated leading approaches in other jurisdictions are presented in italics.



5.8. CONCLUSION

This synthesis of comparative FDL jurisprudence indicated markedly similar influences, from tests of duty of care to approaches to the *forum conveniens* under domestic civil procedure rules. It illustrated that similarities in approach to the common problem in the research question outweigh divergences. Principles and approaches on parent company duty of care are coalescing into a common thread. A direction of travel has been identified, subject to confirmation on the merits. While led within the EU by the jurisprudence of the English courts, valuable principles were also identified in the Canadian courts' decisions in *Garcia*, *Hudbay* and *Araya*.

The judgement in *Vedanta* can be expected to provide persuasive authority, and to exert a significant and positive influence on the future direction of case law in this field. The seminal markers were highlighted. The clarification by the UK Supreme Court that parent company duty of care is not a 'novel' extension can be expected to render actions based on parent company duty of care more accessible in courts which conceivably may have exhibited reticence to moving beyond established categories in negligence. This chapter concluded that the courts have shown both pragmatism and openness, including in recognising that there are a myriad of models of management in modern multinational corporations which may ground the necessary level of control or intervention by the parent company in the operations of its subsidiaries. It concluded that the approach of the English courts to parent company duty of care is coherent at a doctrinal level and is to be welcomed.

While viewed by the courts as an exception, access to justice will remain relevant in FDL litigation. In addition to the risks to claimants of litigation in host states discussed in chapter 3, comparative jurisprudence recognises the effects of a lack of funding or legal expertise upon claimants' ability to establish causation in the alternative jurisdiction. It is nonetheless foreseeable that the response of multinational corporations to home states accepting jurisdiction may be to submit to the jurisdiction of a foreign court, in order to pre-empt proceedings in those home states and the potential negative publicity involved. Recalling from chapter 3, that although the cause of action in FDL litigation is in the tort of negligence, the underlying violation is of human rights. In this context it is to be hoped that EU courts may have regard to the themes of wider access to justice in *Garcia* and adopt a justifiably clement approach to accepting jurisdiction.

Flowing from the conclusions of this chapter are seminal messages which multinational corporations are advised to attend to. In *Vedanta*, the UK Supreme Court has implied that

a parent company may be held liable if it publicly proclaims a level of supervision or control over its subsidiaries but fails to enact it, with attendant impacts on third parties. It was made clear that a corporation which fails to walk its talk is courting legal risks. Further, it is regrettable that higher international standards in this field are not routinely referenced by the courts. It was argued that widely normative expectations which are widely accepted should form part of the wider backdrop against which courts assess whether it is just, fair, and reasonable to impose a duty of care. To progress accountability, practical and procedural circumstances should be standardised across EU Member States. It was concluded that a harmonised standard is appropriate to avoid targeting of jurisdictions where circumstances are relatively favourable to FDL litigation, while enabling effective immunity from suit for multinational corporations domiciled in other states within the EU which have less favourable procedural and practical circumstances. Following a short summary of relevant principles which were identified in the chapter, a model for adjudicating FDL litigation was presented. It provides an accessible summary of the parameters in this line of jurisprudence which can be readily adjusted as anticipated judgments on the merits feed through.

Chapter 5 concluded that the building blocks of principles of parent company duty of care are in place, yet we remain at a crucial juncture in the development of FDL litigation. Chapter 6 will build forward and will provide an assessment of feasibility of FDL litigation in Ireland from substantive, procedural and practical aspects.

Chapter 6 FOREIGN DIRECT LIABILITY LITIGATION: FEASIBILITY IN IRELAND

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6.1. INTRODUCTION

The aim of this chapter is to build forward and apply the conclusions reached to respond to the central research question: whether actions against a parent company in the tort of negligence for the negative impacts of its foreign subsidiaries are feasible in Ireland.¹ From the preceding chapters, it was concluded that the role of FDL litigation is underpinned by deficiencies within existing routes to accountability. FDL litigation should operate as part of a functioning holistic solution. As it stands, it is the primary route to potentially advancing legal accountability concerning human rights abuses linked to multinational corporations.² Chapter 5 concluded that legal principles on parent company duty of care have moved forward significantly, and are coalescing into a common thread primarily led by the jurisprudence of the English courts. From an analysis of comparative jurisprudence, the model at the end of the chapter synthesised the parameters in the adjudication of such cases. From this state of play, chapter 6 will consider how FDL litigation may develop in Ireland. To do so, it will identify convergences and divergences between the context in Ireland and developments in the English courts, and project scenarios as to how the Irish courts will respond.

The challenges of procedural and practical circumstances pertaining in Ireland will be examined. The impact of the Irish Constitution and its interaction with tort law flows through this chapter. It is set against the background of developments in the wider context of trends towards augmented accountability explored in previous chapters. Chapter 5

¹ To the author's knowledge to date there are no cases in Ireland concerning a duty of care on a parent company of the FDL style, but certain in related areas. Re universal criminal jurisdiction seeking a summons in the District Court requiring the attendance before the court of the Attorney General of Bahrain to answer allegations of torture of Bahraini national Jaafar Alhasabi. The application was refused on the basis of he had not established a 'sufficient nexus' between his torture and the conduct of the Attorney General. GLAN states: 'The decision appears to conflict with Ireland's obligations under the Convention Against Torture which requires that the State either prosecute or extradite individuals who are complicit in torture and who set foot on Irish territory' <www.glanlaw.org/single-post/2016/11/10/Universal-jurisdiction-invoked-before-Dublin-District-Court-in-Bahrain-torture-case accessed 24 September 2019> accessed 10 October 2019. GLAN submitted a formal complaint against San Leon Energy PLC in October 2018 for violating the human rights of the people of Western Sahara. San Leon is headquartered in Dublin. The complaint alleges that the company failed to ensure that it has the consent of the Western Saharan people before drilling for oil on their land. The complaint was filed before Ireland's National Contact Point (NCP) for the Organisation for Economic Cooperation and Development (OECD).

² As discussed in chapter 3 section 3.5.4 jurisprudence has not taken the approach of vicarious liability.

revealed the positive impact of judicial discretion on the development of FDL litigation in the English courts. The leading judgment in this area by the United Kingdom (UK) Supreme Court in *Vedanta Resources Plc v Lungowe* set down key parameters. Notably, it concluded that parent company liability is not a ‘novel’ claim, nor a separate and distinct line of case law in negligence, and affirmed that the general principles of tort apply to parent company duty of care.³

Entities domiciled and incorporated in Ireland, including Irish state-owned entities, are being linked to human rights abuses overseas, underpinning the relevance of this research into FDL litigation for business and policymakers. This chapter will provide a considered analysis of the basis upon which the Irish courts might engage with a case like *Vedanta* from a substantive perspective. It follows from the fact that there are no judgments on the merits in EU common law jurisdictions that projection is required. Where there are gaps or no relevant precedent, hypotheses will be presented concerning which principles and precedent of English jurisprudence Irish courts may consider adopting.

Section 6.2 is a brief introduction to the role and impact of International Human Rights Law (IHRL) in Ireland. Continuing the structure adopted, Section 6.3 will consider how the Irish courts might engage with foreign direct liability (FDL) litigation. It will highlight using examples, the potential relevance of FDL to Irish judicial actors, policymakers, and business operating in or from Ireland. As under national civil procedure rules a claimant must establish a ‘good arguable case’ at the *ex parte* stage, it will consider trends and tests applied in establishing a duty of care is owed. It will consider how Irish courts assess applications to join of a foreign defendant to a case against an Irish based defendant. It will discuss access to justice in the light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and also natural or constitutional justice. Section 6.4 will consider the procedural and practical context for FDL litigation in Ireland. It will examine the evolution of collective redress in the EU, and challenges in Ireland compared to mechanisms enabling claimants to access the English courts. As access to collective redress is meaningless without the means to fund litigation, it will assess the impact of limitations on funding of litigation in Ireland by comparison to the UK.

Parameters, precedent, and principles relating to FDL litigation in Ireland will be synthesised in section 6.5. In section 6.6., the model for adjudicating an FDL case in

³ [2019] UKSC 20 [54].

comparative jurisprudence presented in Chapter 5 is reconfigured for Ireland. In the context of FDL litigation, section 6.7 will consider the interaction of the Irish Constitution with tort law, and possible applications or enhancements. The chapter will conclude with an assessment of the feasibility of FDL litigation in the particular context of Ireland.

6.2. IRELAND AND INTERNATIONAL HUMAN RIGHTS LAW

6.2.1. Architecture

The Irish Constitution is the supreme source of human rights law in Ireland.⁴ Obligations to protect human rights and provide access to remedy have been assumed by the Irish State stemming from ratification, *inter alia*, of the core United Nations human rights treaties,⁵ the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁶ and international instruments relevant to business and human rights including the

⁴ *YY v Minster for Justice Equality and Law Reform* [2017] IESC 61. See also Gerard Hogan, Gerard Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) forward stating: ‘The fact that the Constitution must always remain the fundamental touchstone of fundamental rights protection...signalled by the Supreme Court in *YY* (...)’; Oireachtas Library and Research Service ‘International human Rights Law: Operation and Impact’, 3 <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2016/2016-09-28_spotlight-international-human-rights-law-operation-and-impact_en.pdf> accessed 30 July 2019.

⁵ Including the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entry into force 23 March 1976) ratified by Ireland 1989 except Article 10(2) and 20(1); International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entry into force 3 January 1976), ratified by Ireland in 1989; Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by Ireland 2002; Convention for Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by Ireland 1985; Convention for the Elimination of Racial Discrimination (CERD) ratified 2000; Convention on the Rights of the Child (CRC) ratified by Ireland 1992; Convention on the Rights of Persons with Disabilities ratified by Ireland 2018. Ireland is obliged to report to the six relevant treaty bodies on its obligations in implementing their respective treaties. Ireland has ratified the Optional Protocols to ICCPR (1989), CRC (2014), CEDAW (2000) and CAT (2002) allowing for individual communications but has not yet ratified the Optional Protocol to ICESCR. UN treaties ratified by Ireland do not form part of its domestic law. See further <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=83&Lang=EN> accessed 7 August 2019.

⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) ETS No. 005, 213 UNTS 222.

eight core conventions of the International Labour Organisation.⁷ Ireland is bound by the Charter of Fundamental Rights of the European Union (CFREU).⁸ The obligations assumed by the Irish State under international human rights law (IHRL) are thus relevant to the operations of Irish connected business, both domestically and overseas. Ireland has an active national human rights institution, the Irish Human Rights and Equality Commission (IHREC) established under the Irish Human Rights and Equality Commission Act 2014.⁹ The IHREC is an independent public body which accounts to the Government. Its role is to promote respect and protection of human rights in Ireland through policy and legislative advice, awareness, and education. Ireland has adopted the OECD Guidelines for

⁷ Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) (ILO No. 29) 39 UNTS 55; Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950) (ILO No. 87); Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951) (ILO No. 98) 96 UNTS 257; Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953) (ILO No. 100), 164 U.N.T.S. 303; Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) (ILO No. 105), 320 UNTS 291; Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960) (ILO No. 111), 362 U.N.T.S. 31, ratified 1999; Convention concerning Minimum Age for Admission to Employment adopted 26 June 1973, entered into force 19 June 1976) (ILO No. 138) UNTS 297; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) (ILO No.183), 40 I.L.M. 2, ratified 1999.

⁸ Charter of Fundamental Rights of the European Union (adopted 26 October 2012, entered 1 December 2009) O.J. C 303 (CFREU). The CFREU has become legally binding since the entry into force of Treaty of Lisbon amending the Treaty of the European Union and the Treaty establishing the European Community, 13 December 2007/C 306/01 (Lisbon Treaty) (TEU) art. 6. Human rights are part of the general principles of EU law *Internationale Handelsgesellschaft* [1970] (Case 11-70) ECLI:EU:C:1970:114.

⁹ <www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>. See also <www.ihrec.ie/> accessed 17 October 2020.

Multinational Enterprises,¹⁰ and established a National Contact Point (NCP).¹¹ Under the UN Guiding Principles on Business and Human Rights (UNGPs),¹² Ireland has published a National Action Plan (NAP) 2017-2020 with the mission:

To promote responsible business practices at home and overseas by all Irish business enterprises in line with Ireland's commitment to the promotion and protection of human rights globally and to being one of the best countries in the world in which to do business.¹³

¹⁰ Discussed in chapter 2 section 2.2, the Guidelines were adopted by the OECD on 1976 and revised in 1979, 1982, 1984, 1991, 2000 and 2011 <www.oecd-ilibrary.org/content/publication/mne-2005-en> accessed 17 December 2019. The 2011 revision to the OECD Guidelines for Multinational Enterprises include a dedicated human rights chapter IV <<https://mneguidelines.oecd.org/themes/human-rights.htm>> accessed 30 July 2019. See also <<https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Trade-Policy/OECD-Guidelines-for-Multinational-Enterprises/>> accessed 1 November 2019.

¹¹ The NCP is located in the Department of Business, Enterprise and Innovation which represents Ireland at the OECD on the implementation of the UNGPs. The procedure for complaints is detailed <<https://dbei.gov.ie/en/Publications/Publication-files/Procedures-for-handling-the-OECD-Guidelines-for-Multinational-Enterprises-MNEs-.pdf>> accessed 17 December 2019. See also Ciara Hackett, Ciaran O'Kelly, and Clare Patton, 'The case of the Irish National Contact Point for the OECD Guidelines for Multinational Enterprises: challenges and opportunities for the business and human rights landscape in Ireland' (2019) Irish Jurist 61, 99-121. A number of recommendations are made to increase the impact of the Irish NCP via augmented visibility and accessibility; accountability; transparency and; training.

¹² 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework <www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf> accessed 17 December 2019.

¹³ The National Action Plan 2017-2020 was developed by the Department of Foreign Affairs and launched by the Tánaiste (Deputy Prime Minister) in 2017 following a consultation process with stakeholders including civil society and business, for example <www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Traire.pdf> accessed 17 December 2019. To oversee implementation of the plan, a Business and Human Rights Implementation Group was established in 2018. A 'Baseline Assessment of the Legal and Regulatory Framework' by ReganStein was published in March 2019 <www.dfa.ie/our-role-policies/international-priorities/human-rights/business-and-human-rights/nationalplanonbusinessandhumanrights2017-2020/> accessed 17 December 2019. <www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf> accessed 7 August 2019.

In view of the open and export-led nature of the Irish economy, and foreign direct investment of multinational companies¹⁴ the IHREC, *inter alia*, strongly recommended that the Irish NAP clarify the Government's commitment to ensuring a remedy for victims of human rights abuse linked to the activities of Irish companies operating abroad, and to addressing any barriers that may exist in this regard.¹⁵

The Irish NAP is due for revision, and it is hoped that it will move firmly in the direction of concrete and time defined commitments to advancing human rights protections. Although Ireland did not engage with discussions leading to the publication of the UN sponsored Draft Treaty on Business and Human Rights,¹⁶ Simon Coveney, the Tánaiste and Minister for Foreign Affairs and Trade has stated that, in spite of 'serious concerns'¹⁷ with the manner in which the brief of Intergovernmental Working Group on Business and Human Rights has progressed thus far, 'Ireland will work with EU partners to engage actively and constructively in the negotiation process'.¹⁸ It is hoped that the EU and Irish position will evolve. The level of engagement by Irish corporations with initiatives such as the UNGPs¹⁹ merits further investigation. A lack of engagement is particularly marked in

¹⁴ For information on the importance of foreign direct investment by multinational companies in Ireland see <<https://dbei.gov.ie/en/What-We-Do/Trade-Investment/Foreign-Direct-Investment-FDI/>> accessed 7 October 2020.

¹⁵ <www.ihrec.ie/documents/submission-irelands-national-action-plan-business-human-rights/> accessed 7 August 2019 recommending: 'The Irish Government undertakes a thorough review of existing legislation and the operation of State judicial and non-judicial mechanisms to ensure access to an effective remedy and to identify and address any potential barriers which may exist'.

¹⁶ The Revised Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (July 2019) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 18 October 2019.

¹⁷ The issues of concern mentioned in a written statement (9 October 2018) include the work programme, mandate and chair of the Intergovernmental Working Group on Business and Human Rights, the participation of stakeholders including domestic and international business, the content of the draft and concerns over building on rather than duplicating the implementation of the UNGPs <<https://www.kildarestreet.com/wrans/?id=2018-10-09a.118&s=%22business+and+human+rights%22#g120.r>> accessed 17 December 2019.

¹⁸ See also Dáil Debates 8 May 2019 <www.oireachtas.ie/en/debates/question/2019-05-08/95/> accessed 7 August 2019. See also Shane Darcy, 'Why Ireland is not supporting the business and human rights treaty process' <<https://businesshumanrightsireland.wordpress.com/2018/10/12/why-ireland-isnt-supporting-the-business-and-human-rights-treaty-process/>> accessed 17 December 2019.

¹⁹ (n 12).

relation to embedding respect for human rights due diligence.²⁰ It is necessary that Irish corporations advance and, consistent with the pattern of development elsewhere, show signs of upward progress on awareness and engagement albeit from a low base.²¹

Chapter 1 section 1.4 introduced the Irish context. For Irish policy makers and business, international standards in business and human rights are garnering more and more attentions. The prospect of additional complaints and of FDL litigation are very real. The potential of Irish business abroad and the role of the Irish State in trade and diplomatic supports has also been raised.²² For example in 2014, concerning construction activities related to the Football World Cup in Qatar and forced or slave labour under the ‘kafala’ labour system.²³ That there is evidence of abuses overseas related to corporations domiciled and incorporated in Ireland, including Irish state-owned entities. Such issues are anticipated to feature in related complaints from non-governmental organisations to the Irish National Contact Point.²⁴

²⁰ Centre for Social Innovation, Trinity Business School, ‘Irish Business and Human Rights: Benchmarking Compliance with the UN Guiding Principles’ <www.tcd.ie/business/assets/pdf/CSI-BHR-Report-1.pdf> 32 accessed 18 November 2019. See also Shane Darcy, Irish Business and Human Rights ‘New Report highlights limited to no engagement by Irish companies with business and human rights’ <Business & Human Rights in Ireland <comment-reply@wordpress.com> accessed 18 December 2019. Irish government action on mandatory human rights due diligence was raised in the Dáil by Deputy Maureen O’Sullivan on 12 November 2019 <www.kildarestreet.com/debates/?id=2019-11-12a.401&s=speaker%3A416> accessed 12 December 2019.

²¹ The Corporate Human Rights Benchmark 2019 indicates progress: ‘Average scores for ‘repeat’ companies increased from 18% in 2017 to 31% in 2019; approximately 6% yearly. 75% of companies have improved their scores. Companies are gradually moving out of the lowest scoring bands and, for the first time, 0 - 10 % is not the most populated scoring band’ <www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf> accessed 7 December 2019.

²² In January 2014, the Taoiseach Enda Kenny and Minister Richard Bruton engaged a trade mission to Gulf states that reportedly resulted in contracts valued at €25 million for Irish companies, inter alia, in engineering and construction services in Qatar and Saudi Arabia. <https://www.thejournal.ie/ireland-gulf-states-trade-mission-contracts-1254151-Jan2014/?utm_source=businessetc>. Fine Gael Teachta Dála Pat Breen, chairman of the Oireachtas committee on foreign affairs, made a return visit to Qatar and Bahrain during which he met with the Qatari Prime Minister.

²³ *thejournal.ie*, ‘Concerns raised about some Irish businesses involved with Qatar World Cup’ (3 June 2014) referring to the provisions for prosecutions for forced labour under the Criminal Law (Human Trafficking) Amendment Bill 2013.

<<https://www.thejournal.ie/irish-companies-qatar-world-cup-1437685-Jun2014/>> accessed 10 October 2019.

²⁴ See chapter 1 section 1.4.

6.2.2. International Human Rights Law in the Courts: Overview

IHRL is validly perceived by commentators as a source of normative guidance in domestic legal orders.²⁵ Although Ireland has been characterised as an overall ‘obedient state’ regarding IHRL,²⁶ the impact in the courts is nuanced. Firstly, the position of Constitution as the supreme source of human rights law in Ireland²⁷ has given rise to comments that the ECHR adds ‘limited weaponry’,²⁸ and that ‘the Constitution continues to dominate the space in which legal advocacy and judicial thinking is concerned with human rights’.²⁹ Consistent with this, a study by Kingston and Thornton concludes that ‘the extent of cross-fertilisation of rights standards between the [ECHR] and the Constitution can be hard to decipher’.³⁰ They conclude the approach of Irish courts to relevant treaty provisions in proceedings before them is open to be interpreted as either ‘a carefully calibrated and reflective approach towards the constitutional separation of powers’, or ‘a lost chance for a more rights-orientated approach’.³¹ Section 6.7 will examine whether the response is nuanced but closer to the latter. Secondly, scholars conclude the Government defends dragging its heels on incorporating international human rights treaties into domestic law by emphasising the overlap in the protection of treaty rights by means of the Constitution and/or domestic legislation.³² It is also considered that the Irish courts exhibit a practice of

²⁵ Mark Hirschboeck, ‘Conceptualizing the Relationship between International Human Rights Law and Private International Law’ (2019) 60(1) HILJ 181, 191.

²⁶ Marie Luce Paris, ‘The ECHR: Implementation Mechanisms and Compliance’ in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional 2015) 99.

²⁷ In Ireland, the impact of IHRL is seen as a ‘strong-form’ or direct horizontal effect. See Colm O’Cinnéide, ‘Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?’ in *Human Rights in the Private Sphere: A Comparative Study* (Vol 1) Oliver and Fedtke (eds) (Routledge Cavendish, 2007) 213, 214. As discussed below in section 6.7, the Irish Constitution has been interpreted to confer a right of action.

²⁸ Egan et al (n 26) 2.

²⁹ *ibid* 78.

³⁰ Suzanne Kingston and Liam Thornton, ‘A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review, 52. (2016) <<https://www.lawsociety.ie/globalassets/documents/committees/hr/echrreport30july2015.pdf>> accessed 30 July 2019, 36.

³¹ *ibid* 52. See also Fiona de Londras, ‘Using the ECHR in the Irish Courts: More Whisper than Bang’ PILA Seminar (2011) <www.ucd.ie/t4cms/pilaachrseminar130511fdelondras.pdf> accessed 5 January 2020.

³² See generally Paris (n 26). International treaties and conventions do not have direct effect in Irish domestic law. The combination of Articles 15.2.1 and 29.6 of the Irish Constitution means that in order for the terms of an international treaty to be a source of domestic law, it must have been specifically transformed into

importing authority as required, such as concerning the rights of companies via the ECHR under Irish law in circumstances where is a lack of relevant judicial interpretation of the Constitution.³³

The ECHR was incorporated into Irish domestic law by the European Convention on Human Rights Act 2003. The long title states its purpose is to ‘enable further effect to be given, subject to the Constitution, to certain provisions of the Convention’.³⁴ Under section 2 of the Act courts are obliged to interpret, in so far as is possible, any rule of law, whether it derives from the common law or statute, in a manner consistent with Ireland’s obligations under the ECHR. Further, under section 4 in construing the ECHR Irish courts are to take ‘due account’ of jurisprudence of the European Court of Human Rights (ECtHR).³⁵ Thus, the ECHR does not have direct effect in the Irish courts.³⁶ The approach of the Irish courts is illustrated in *Meadows v Minister for Justice, Equality and Law Reform* concerning whether judicial review of a Government Minister’s decision complied with the requirements of the right to an effective remedy under Article 13 of the ECHR.³⁷ Denham J affirmed that in addition to the European Convention on Human Rights Act 2003 and the rule of law, the reasonableness of a decision should be analysed with regard to fundamental constitutional principles.³⁸

domestic law by legislative enactment or by a constitutional amendment. See also Hogan, Whyte, Kenny and Walsh (n 4) 5.3.136 stating: ‘The European Convention on Human Rights Act 2003 also gives some effect in domestic law to arts 2 to 14 of the Convention and Protocol Nos 1,4,6 and 7 thereto’.

³³ Rossa Fanning SC, Publication Review ‘The Constitutional Rights of Companies’ (2006) Irish Jurist, 1.

³⁴ <www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html> accessed 8 August 2019. See also Hogan, Whyte, Kenny, and Walsh (n 4) 5.3.141.

³⁵ *ibid* Section 4 which is interpreted in *McD v L* [2009] IESC 81 (Murray CJ) [6] stating: ‘(...) recourse may and has been had by our courts to the case-law of the (ECtHR) for comparative law purposes when a court is considering the import of a right under our law which is same or similar to a right under the Convention’.

³⁶ Kingston and Thornton (n 30) 151.

³⁷ [2010] 2 I.R. 701.

³⁸ *ibid* 741. Kingston and Thornton (n 30) 52 interpret *Meadows* to mean that ‘where issues of constitutional or Convention rights arise, first-instance decision-makers should now feel the impact of human rights norms and standards on their substantive decision-making function’. Also, 153 stating: ‘(...) there has been more of a tendency to interpret constitutional rights in light of Ireland’s obligations under the Convention, through the prism of the ECHR Act 2003’.

As emphasised by the ECtHR in *Airey v Ireland*, the rights under the ECHR are to be ‘practical and effective’.³⁹ Research indicates that the ECHR, CFREU and the 2003 Act have been pleaded across a wide variety of legal fields before Irish courts and tribunals,⁴⁰ demonstrating significant engagement.⁴¹ It is noted that the CFREU is increasingly influential.⁴² Unlike the ECHR it is directly effective,⁴³ there is no obligation to exhaust domestic remedies, and has been argued to go further in terms of substantive rights than the ECHR.⁴⁴ Empirical research suggests the CFREU is ‘the main, independent source of EU human rights law for the Court of Justice of the European Union (CJEU) with reliance on ECtHR case law becoming rare’.⁴⁵

6.3. ENGAGING FOREIGN DIRECT LIABILITY LITIGATION

Litigating an FDL case in a European Union (EU) State confronts the law of the forum in two fundamental respects. Firstly, seeking to join a non-EU subsidiary complicates the

³⁹ (1979) 2 EHRR 305 [24]. See also Kingston and Thornton (n 30) 21 stating: ‘The ECtHR has developed a number of core principles that relate to the interpretation of all the rights protected in the Convention including practical and effective rights, the Convention as a living instrument, positive obligations, margin of appreciation and proportionality’.

⁴⁰ Kingston and Thornton (n 30) 53 noting mainly in mental health law, asylum and immigration law; Criminal Law; European Arrest Warrant; Family and Child Law; and Social Rights and Employment Rights. See also de Londras (n 31).

⁴¹ Kingston and Thornton (n 30) 149 stating: ‘Convention/Charter issues have been considered in 581 cases in the Superior Courts during [2004-2014]’.

⁴² Article 51 CFREU (n 8). In domestic terms, the CFREU is addressed to Member States ‘only when they are implementing Union law’.

⁴³ Under Art 6(1) TEU (n 8) the CFREU has binding force with the same status as primary EU law, i.e., on equal footing with the foundational Treaties of the EU, the TEU and the Treaty on the Functioning of the EU (TFEU).

⁴⁴ Kingston and Thornton (n 30) 112.

⁴⁵ *ibid* 109 stating: ‘Between December 2009 and December 2012, the Court of Justice referred to the Charter in 122 cases; of these, only 20 referred to the ECHR; and of these, only 10 referred to ECtHR case law’. These interactions and the approach of the judiciary are further explored in section 5.6.5.

issue of grounding jurisdiction.⁴⁶ In a ‘two-tiered’⁴⁷ approach the Brussels I regime applies to the EU-domiciled or ‘anchor’ defendant, whereas national rules of jurisdiction in each Member State apply for non-EU domiciled defendants.⁴⁸ Secondly, the cause of action is in the tort of negligence involving establishing duty of care, breach and damages under the *lex loci delicti*.⁴⁹ Chapter 5 concluded that, if substantive issues under the applicable law are unclear, disputed or have not been previously considered, courts are likely to assume that if an arguable case exists under the law of the forum, an arguable case exists under the applicable law. This pragmatic solution has been adopted and is appropriate. Recalling that in *Vedanta*, as experts did not agree on whether under the Zambian law of negligence the Zambian courts would follow English law, the English Court of Appeal endorsed the finding of the trial judge that as it is arguable a duty of care is owed in English law, it is also arguable in Zambian law.⁵⁰ By extension, if a claim is arguable in English law, and arguably in Irish law, it is assumed to also be arguable under the law of a hypothetical country of harm which typically has been influenced by principles of English law. This assumption is reasonable also on the basis that FDL litigation is grounded in common law assumption of responsibility and taken primarily in common law jurisdictions.⁵¹

There is the distinct potential for commercial entities domiciled in Ireland to be linked to FDL litigation. While detailed discussion of possible ramifications for an FDL case are

⁴⁶ Discussed in chapter 4 section 4.3.2. Direct methods under Article 4(1) of Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351 (Brussels I (recast)) via contract or property circumvents this issue.

⁴⁷ Philip Wesche and Miriam Saage-Maaß, ‘Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*’ (2016) 16 Human Rights Law Review 375.

⁴⁸ Article 6(1) of Brussels I (recast) (n 46) provides: ‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State’. As noted in Chapter 1, establishing jurisdiction under Article 4(1) over the EU-domiciled defendant under exclusive contracts was not problematic in *Jabir and others v. KiK Textilien und Non-Food GmbH* (Case No. 7 O 95/15) Regional Court (*Landgericht*) of Dortmund Germany or on the basis of property law such as *Lluyia v RWE (RWE)* Case No. 2 O 285/15 Essen Regional Court Germany. In November 2017, the Higher Regional Court of Hamm ruled that it would proceed to hear the *RWE* case and enter into the evidentiary stage. The case is on-going.

⁴⁹ Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199. (Rome II). The effects of Rome II are discussed in chapter 3 section 3.7.

⁵⁰ *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 (*Vedanta CA*) [91].

⁵¹ See chapter 3.

outside the scope of this thesis, potential connections are evident. For example, the Moneypoint power station in Ireland, and its links to the Cerrejón the mine in Colombia. Moneypoint is located in County Clare, Ireland, and the power station is owned by the Electricity Supply Board (ESB). The ESB is 95% Irish state owned. Christian Aid reports that ‘between 2011 and 2016, the ESB purchased the bulk of the coal powering the Moneypoint plant from Colombia, with the majority coming from Cerrejón the mine in Colombia.’⁵² The Cerrejón mine, located in La Guajira, is the largest open-pit coal mine in Latin America. An investigation report by Christian Aid in February 2020 states:

Since the earliest days of its operations, Cerrejón has been accused of wide-ranging human rights abuses and environmental devastation. The original inhabitants of La Guajira have been forced to bear the social, economic, cultural, environmental, and spiritual costs of the mine, while receiving little benefit from the profits generated.⁵³

The mine is a joint venture by BHP Billiton, Anglo American, and Glencore. The same consortium owns the sales arm of the mine, the Coal Marketing Company (CMC), which is domiciled in Ireland. Other connections to Ireland are noted. For example, Anglo American sold its investment in the Lisheen mine in Ireland to Vedanta in 2011, which subsequently concluded operations in 2016.⁵⁴ Glencore maintains an investment in zinc mining activities in Ireland.⁵⁵ In another example, Irish domiciled San Leon Energy PLC is

⁵² Christian Aid investigation of the relationship between the ESB, and the Cerrejón mine (February 2020), 19 <<https://www.christianaid.ie/resources/undermining-human-rights-ireland-esb-and-cerrejon-coal>> accessed 12 October 2020

⁵³ *ibid* Christian Aid 18. See Christian Aid (n 52) 19 stating; ‘Over its 40-year history, the Cerrejón mine has displaced up to 35 indigenous, Afro-Colombian and campesino communities. Of importance here is the principle of free, prior and informed consent, which is at the core of the United Nations Declaration on the Rights of Indigenous Peoples’; Forcible displacement of communities involving violence and injury ‘Several members of the community, including two women and an intellectually impaired youth, were seriously injured when riot police used tear gas and metal projectiles to force the families out’; At 20 ‘In a 2018 submission to the Constitutional Court, Colombia’s Human Rights Ombudsman presented wide-ranging evidence of environmental destruction, and corresponding impacts on human health in the indigenous reserve of Provincial, located close to five Cerrejón mining pits’.

⁵⁴ See <https://southafrica.angloamerican.com/media/press-releases/2011/15-02-11> ; <<https://www.prnewswire.com/news-releases/vedanta-marks-final-shipment-from-lisheen-mine-in-ireland-300208923.html>> accessed 10 October 2020.

⁵⁵ Via an 11.58% stake in Group Eleven Resources, see <<https://www.groupelevenresources.com/resources/presentations/corporate->

linked to resource extraction in Western Sahara, without seeking the consent of the Sahrawi people occupying the land. In 2015, RTE reported ‘Dublin headquartered San Leon Energy is facing a potential legal challenge over its proposed drilling activity in the disputed North African territory, which Morocco describes as its Southern Provinces.’⁵⁶ A complaint to the Irish NCP concerning San Leon was made in 2018.⁵⁷

Formulated in terms of potential FDL litigation and Irish business. As an example, in the overseas activities of Irish business, the possible use of forced labour has been highlighted. The circumstances of the Cerrejón mine raise questions of potential complicity via involvement in the sale by CMC, or use by the ESB, of coal mined in circumstances reportedly involving extensive persistent rights abuses including: failure to seek or obtain free prior and informed consent of indigenous communities; forcible displacement; violence causing serious injury; and wide-ranging evidence of environmental destruction with corresponding impacts on human health. The complaint against Irish based San Leon Energy plc includes failure to seek free prior and informed consent regarding exploitation of natural resources.

In this, and other significant respects, the context in Ireland is similar to the context in which the English courts delivered the seminal rulings in the *Okpabi*⁵⁸ and *Vedanta*⁵⁹ cases. The courts in both jurisdictions are subject to the same EU Regulations concerning

[presentation.pdf](#)>;<<https://www.mining.com/glencore-backs-canadian-junior-zinc-project-in-ireland/>> accessed 10 October 2020. CETIM report to UN HRC, ‘Workers’ Human Rights Violations By Glencore Around The World’ (2018) <<https://www.business-humanrights.org/en/latest-news/ngo-reports-raise-allegations-against-glencore-over-workplace-safety-environmental-damage/>>. See also Glencore, Human Rights Report 2019 <<https://www.glencore.com/dam/jcr:d1c81b2f-32bd-41ba-a3d7-fa10337c657e/2019-Glencore-Human-Rights-Report.pdf>> accessed 17 October 2020.

⁵⁶ RTE ‘NGO Slams Irish Oil Company’s Africa Plans’ <<https://www.rte.ie/news/business/2015/0713/714415-today-in-the-press/>> accessed 10 October 2020.

⁵⁷ Complaint available at <<https://www.glanlaw.org/single-post/2018/10/24/GLAN-files-complaint-against-Irish-oil-companys-dealings-in-annexed-Western-Sahara>> accessed 12 September 2020, stating ‘San Leon has, by its own admission, failed to comply with this basic legal requirement and has publicly referred to the territory as Morocco’s ‘Southern Provinces’ (in line with its definition under Morocco’s domestic law).’

The four complaints which have been made to the Irish NCP are accessible via the OECD <<http://mneguidelines.oecd.org/database/instances/ie0004.htm>> accessed 12 September 2020. See also <<https://www.wsrw.org/a105x4293>> accessed 10 October 2020.

⁵⁸ *Okpabi v Royal Dutch Shell Plc* EWCA Civ 191 (*Okpabi* CA).

⁵⁹ *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (*Vedanta* SC).

jurisdiction and applicable law, and both operate a margin of discretion in the application of residual jurisdiction. Both are common law jurisdictions and share history, development of principles and precedent in tort law, with law in Ireland historically influenced by English common law. From a pragmatic perspective, Ireland is a relatively small jurisdiction in which English precedent is persuasive. The feasibility of FDL cases will be assessed based on five factors:⁶⁰

- i. Whether the home country seized of the matter has jurisdiction to hear the claim;
- ii. Whether parent can be held accountable for foreign subsidiaries actions;
- iii. Conditions for liability relating to the legal basis on which the claim is brought;
- iv. Which national system of tort law the court will apply in determining the validity of the claim and apportioning damages.
- v. To what extent the procedural rules and practical circumstances of the forum are conducive to the pursuit of this type of litigation.

The challenges and barriers to claimants, and their representatives, to bring proceedings are significant. The first legal challenge is to ground jurisdiction of the courts of the home state of the parent company, the anchor defendant. This involves several aspects, including proving there is a ‘good arguable case’ that a duty of care is owed. In this discussion of FDL litigation, insight is to be gained by reference to Lord Denning:

On the one side were those timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow justice if so required⁶¹

⁶⁰ Adapted for present purposes from Liesbeth Enneking, ‘Judicial Remedies: applicable law’ in Juan José Álvarez Rubio, Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 43.

⁶¹ *Candler v Crane Christmas & Co.* [1951] 1 All E.R. 426 at 432 (CA), cited in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd.* [1963] 2 All E.R. 575 (HL). See also Edward M. Hyland ‘International Human Rights Law and the Tort of Torture: What Possibility for Canada’ in *Torture as Tort* 401.

6.3.1. Impact of the Brussels I (recast) Regulation

As outlined, the general rule is that defendants should be sued in the courts of the countries of their domicile.⁶² Jurisdiction over EU domiciled defendants is mandatory in Ireland⁶³ as confirmed in *Abama v Gama Construction Ireland Ltd.*⁶⁴ As in the English cases discussed,⁶⁵ a non-EU foreign subsidiary of an Irish domiciled company would fall outside Brussels I and leave to serve outside the jurisdiction would be determined under domestic civil procedure rules.⁶⁶ Combined with the ruling in *Osuwu v Jackson*,⁶⁷ Hess and Mantovani suggest that Brussels I operates ‘hard and fast logic’ driven by legal certainty and predictability while ‘refusing any flexibility from convenience, fairness and justice’.⁶⁸ However, it is apparent from chapter 4 that the discretion of national courts is a significant factor. For example, the approach to access to justice in an alternative forum as a ‘separate and distinct’ from factors connecting proceedings to it is ascendant,⁶⁹ opening the question of whether the Irish courts may respond in a similarly progressive manner.

⁶² See chapter 4 section 4.2.2.2.

⁶³ Article 4(1) of the Brussels I (recast) (n 46) states: ‘Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the court of that Member State’. Brussels I (recast) was incorporated into domestic law in Ireland via The European Union (Civil and Commercial Judgements) Regulation 2015 SI No. 9, 1-117.

⁶⁴ [2011] IEHC 308 (Dunne J) [32]. The decision was upheld by the Court of Appeal, [2015] IECA 179 (Peart J) [40]. See also Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany, and McGrath on Civil Procedure* (4th edn, Thomson Reuters Ireland 2018), 1-91 and 1-94.

⁶⁵ As discussed in chapter 5 section 5.3, FDL cases in the English courts have relied on the so-called ‘necessary and proper’ gateway of English Civil Procedure Rules.

⁶⁶ Rules of the Superior Courts (RSC) (Jurisdiction, Recognition and Enforcement of Judgments) 2016 SI No. 9 <www.irishstatutebook.ie/eli/2016/si/9/made/en/print> accessed 17 December 2019. See also Delany and McGrath (n 64) 1-136: ‘Under the Jurisdiction of Courts and Enforcement of Judgements (Amendment) Act 2012, the Lugano Convention 2007 has the force of law in Ireland and judicial notice shall be taken of it. Note for non-EU Member States, the Hague Choice of Court Convention has been implemented into Irish law by the Choice of Court (Hague Convention) Act 2015’.

⁶⁷ C-281/02 [2005] ECR I 1383.

⁶⁸ (n 47) I.

⁶⁹ *Vedanta* (SC) (n 59) [88]; see chapter 5 section 5.4.1.2 discussing *Garcia v Tahoe Resources* (2017) BCCA 39 [30], [128]-[129]. In *Garcia* the British Columbia Court of Appeal considered a number of factors affecting the plaintiffs’ ability to bring a case in Guatemala, *inter alia*, stalled criminal proceedings, limited discovery procedures, the expiration of the limitation period for a civil suit and the real risk that the appellants would not obtain justice in the country. The Court of Appeal found that Guatemala was not ‘clearly more appropriate’ to hear the case.

6.3.2. National Rules on Jurisdiction

To connect a foreign defendant to proceedings in Ireland under Article 8 Brussels I⁷⁰ the anchor defendant must be domiciled in Ireland,⁷¹ which under the Rules of the Superior Courts (RSC) Order 11A Rule 10⁷² is to be determined in accordance with the provisions of Articles 62 and 63 of Brussels I or the Lugano Convention.⁷³ As Delany and McGrath highlight the concept of ‘domicile’ under the Regulation is very different to the concept under common law.⁷⁴ For present purposes, Article 63⁷⁵ lays down an ‘autonomous definition’ of domicile of a corporate entity, not contingent on the domestic law of Member States.⁷⁶ Further, the definition of domicile of the company under Brussels I is recognised as yielding broad possibilities to take proceedings before the European courts.⁷⁷ Whether a

⁷⁰ (n 46) Art 8(1) provides: ‘A person domiciled in a Member State may also be sued where he is one of a number of defendants in the courts where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.

⁷¹ Delany and McGrath (n 64) 1-253 citing Case C-645/11 *Réunion Européenne* [1998] ECR I-6511. Further, confirming that as Brussels I (recast) (n 46) art 8(1) is a derogation from the fundamental rule that jurisdiction is based on the domicile of the defendant, jurisprudence indicates that it must be strictly construed citing Case C-616/10 *Solvay SA* EU:C:2012:445 [18]; Case C-145/10 *Painier* [2011] I-12533 [74].

⁷² S.I. No. 9/2016 - Rules of the Superior Courts (Jurisdiction, Recognition and Enforcement of Judgments) 2016 <www.irishstatutebook.ie/eli/2016/si/9/made/en/print> accessed 17 December 2019.

⁷³ *ibid* arts 59 and 60.

⁷⁴ Delany and McGrath (n 64) 1-168.

⁷⁵ Discussed in chapter 4 section 4.2.2.2. Brussels I (recast) (n 46) art 63 provides that for the purposes of the Regulation: ‘a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business’. Under 63(2), for the purposes of Ireland, Cyprus and the United Kingdom, ‘statutory seat’ means ‘the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place’.

⁷⁶ Recitals 14 and 15 Brussels I (recast) (n 46). Under Brussels I (recast) art 63(1)(a) ‘statutory seat’ refers to place of incorporation; ‘central administration’ to the place where the company takes its ‘essential business decisions’ and ‘principal place of business’ involves determining where the major commercial activities occur, and concentration of employees and assets. See Delany and McGrath (n 64) 1-169. See also Lucas Roorda, ‘Foreign Direct Liability and Jurisdiction’ in Angelica Bonifanti (ed) *Business and Human Rights in Europe: International Law Challenges* (Glawcal 2019), 199-200.

⁷⁷ European Commission, ‘Staff Working Document on Implementation of the UN Guiding Principles on Business and Human Rights – State of Play’ (State of Play) SWD(2015) 144 final, 24

court will agree to hear and determine cases together is a matter for national courts,⁷⁸ and in Ireland is based on the concepts of ‘connection, expediency, and the need to avoid irreconcilable judgements’.⁷⁹ The risk of irreconcilable judgments was well aired by in *Vedanta*, in which the UK Supreme Court concluded that the risk was created by the claimants in choosing to take the case in the UK[EU] Member State as opposed to in the foreign jurisdiction.⁸⁰ From this it was concluded in chapter 5 that EU domiciled parent companies of multinational corporations may be motivated to submit to a foreign jurisdiction before, or concurrently with, the *ex parte* determination of jurisdiction, arguably resulting in the EU forum declining jurisdiction all other things being equal, and absent concerns about access to justice in the alternative forum.

In a typical FDL case taken in Ireland, where not all defendants are domiciled in a member state of the EU or a contracting state of the Lugano Convention, the provisions of RSC Order 11 would apply.⁸¹ It is noted that the RSC are to be interpreted in a manner consistent with the provisions of the Irish Constitution. Under Order 11 a court may permit service out of the jurisdiction, *inter alia*, when the action is founded on a tort committed within the jurisdiction, or any person out of the jurisdiction is a necessary or proper party to an action

<https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-implementing-un-guiding-principles-business-and-human_en> accessed 11 December 2019.

. Alternatively, a claim against an EU domiciled company could be brought; in disputes relating to tort or non-contractual obligations, the national courts of a Member State of the place where the harmful event occurred; or in disputes related to contractual obligations, before the courts of the place of performance of the contractual obligation in question.

⁷⁸ See Case C-98/06 *Freeport* [2007] ECR I-08319; *Painier* (n 71); Case C-352/13 *Cartel Damages Claims Hydrogen Peroxide* [2015] EU: C:2015:335. See also Delany and McGrath (n 64) 1-272 to 1-276 stating that: ‘The jurisprudence of the CJEU in this area confirms that it is for national courts to assess whether there is a connection between the different claims brought before it’.

⁷⁹ *Gannon v British & Irish Steampacket Co. Ltd* [1993] 2 IR 359, 376. See also Delany and McGrath (n 64) 1-269.

⁸⁰ *Vedanta* (SC) (n 59) [79].

⁸¹ RSC No. 9 (n 66) Rule 4 provides: ‘(1) Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in: (i) a Member State of the European Union, or (ii) a Contracting State of the Lugano Convention, for the purposes of Regulation No. 1215/2012, the Lugano Convention or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant’.

properly brought against some other person duly served within the jurisdiction.⁸² The High Court interpreted the operation of Order 11 Rule 1 in *Vodafone GmbH -v- IV International Licensing and Intellectual Ventures II LLC (Vodafone)*,⁸³ deriving a set of common principles⁸⁴ from *Grehan v Medical Incorporated (Grehan)*,⁸⁵ *Analog Devices BV v Zurich Insurance Co. (Analog Devices)*,⁸⁶ and *O'Flynn v Carbon Finance Ltd. (O'Flynn)*.⁸⁷

It is settled in jurisprudence that for a case to be appropriate for service out the jurisdiction the applicant must have satisfied the court that it comes within Rule 1.⁸⁸ The applicant must convince the court they have a 'good cause of action', and the court must consider that Ireland is 'a convenient forum to hear and determine the matter'.⁸⁹ Jurisprudence indicates that in its assessment the court assumes a heavy burden to examine the circumstances of

⁸² Order 11 Rule 1 provides: 'Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever — (...) (f) the action is founded on a tort committed within the jurisdiction; or (g) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or (h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (...)' <www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/3f0ac1321ae70bbe80256d2b0046b3cd?OpenDocument> accessed 17 December 2019.

⁸³ [2016] IEHC 321.

⁸⁴ Ibid *Vodafone* [22].

⁸⁵ [1986] IR 528, 541.

⁸⁶ [2002] IR 272, 281.

⁸⁷ [2015] IECA 93.

⁸⁸ Rules of the Superior Courts Order 11 (Service out of the Jurisdiction) (n 88) Rule 5 provides: 'Every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under rule 1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in rule 2 specified; and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order'

⁸⁹ Delany and McGrath (n 64) 1-25.

each case before exercising its discretion,⁹⁰ and should engage with the ‘care and circumspection’ consistent with the international comity of the courts.⁹¹

6.3.2.1. Action Founded on a Tort: Order 11 rule 1 (f)

Under Rule 1 ‘Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever — (...) (f) the action is founded on a tort committed within the jurisdiction’.⁹² The court in *Vodafone* confirmed that the word ‘tort’ in Order 11 bears its customary meaning, ‘a civil wrong for which the usual remedy is an action for unliquidated damages.’⁹³ It is apparent that the Irish courts will adopt a common-sense approach to the issue of service out of the jurisdiction⁹⁴ including considering the potential social and economic effects resulting from choice of law rules.⁹⁵ This approach is a positive indication of potential openness concerning the negative impacts of multinational corporations. Further, jurisprudence indicates a relatively wide interpretation of what elements of a tort must occur within Ireland. As conceived by Walsh J in *Grehan*, where Ireland is the appropriate forum the test is simply whether ‘any significant element’ of the tort has occurred within Ireland. This, Walsh J considered, serves to avoid exposing the plaintiff to a potentially arbitrary outcome in requiring that the ‘the most significant’ element occurred within the jurisdiction.⁹⁶ A similarly open approach applied by the courts is evident in *O’Flynn*,⁹⁷ in which the plaintiffs sought to bring claims in tort. The Court of Appeal held that the plaintiffs’ claims did not come within paragraph

⁹⁰ *Vodafone* (n 83) [25]; *Grehan* (n 85) 532; *Analog Devices* (n 86) 287. See also Delany and McGrath (n 64) 1-14 citing *Yukos Capital S.A.R.L. v Oao Tomsneft* [2014] IHEC 115 (Kelly J) [85]. *Vodafone* (Barrett J) [26] citing *Grehan* 542 stating: ‘It would be as inappropriate (i) to refuse such an order on the application of a technical rule which insists on one element occurring in the jurisdiction as (ii) to grant leave where the case had only a tenuous connection with Ireland on its facts and in terms of the law likely to govern questions of liability and related matters’.

⁹¹ *Vodafone* (n 83) [27] citing *Analog* (n 86) 281.

⁹² (n 82).

⁹³ *Vodafone* (n 83) [20] citing Bryan MacMahon and William Binchy, *The Law of Torts* (4th edn, Bloomsbury Professional 2013), 5.

⁹⁴ *ibid Vodafone* [38] citing *Grehan* (n 85) 541.

⁹⁵ *ibid Vodafone* [37].

⁹⁶ *Grehan* (n 85) (Walsh J) 542 (emphasis in original). Further *Vodafone* (n 83) (Barrett J) [39] confirming that if a significant element in the commission of the tort has occurred within the jurisdiction the plaintiff will have fulfilled the threshold requirements in Order 11 rule 1 (f). See also Delany and McGrath (n 64) 1-54.

⁹⁷ Delany and McGrath (n 64) 106-7.

(f), an action founded in tort. However, it acknowledged there may be other situations where Rule 1 paragraph (h), which permits service against any person deemed a necessary or proper party to an action against another person duly served within the jurisdiction,⁹⁸ ‘could avail a plaintiff or other party seeking to bring in a third party who was residing outside the jurisdiction (other than in an EU member state) on a stand-alone basis.’⁹⁹

6.3.2.2. Necessary or Proper Party: Order 11 rule 1 (h)

As confirmed by the High Court in *Vodafone*¹⁰⁰ the critical test¹⁰¹ of whether a defendant is a ‘necessary or proper party’ is as stated by Barrington J in *Short v Ireland*:

Whether the person outside the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a defendant in the action against the other defendants.¹⁰²

Similar to the English cases discussed in chapter 5, under Order 11 rule 1(h) the burden lies on the claimant¹⁰³ to present evidence on affidavit that the case can reasonably be proven but it is not for the court to rule on questions of fact at this stage.¹⁰⁴ Notably, jurisprudence in Ireland displays an important openness concerning cause of action in applying this test. In *International Commercial Insurance Bank plc v Insurance Corporation of Ireland* Costello J stated that ‘even though the cause of action may have arisen outside the

⁹⁸ (n 82).

⁹⁹ *Vodafone* (n 83) [42] citing *O’Flynn* (n 87) 47. When service is sought on the basis that the action is founded on a tort committed within the jurisdiction, the tort claims must come within Order 11 rule 1 (f), rule 1 (h) is not a free-standing provision.

¹⁰⁰ *Vodafone* (n 83) citing *Analog Devices* (n 86) 283-4

¹⁰¹ *ibid Vodafone* [43] citing *Analog Devices* 285. Relevant factors in this assessment are centralising the hearing of several causes of action and avoiding inconsistent actions.

¹⁰² *Short v Ireland* [1996] 2 IR 188,216. See also Delany and McGrath (n 64) 1-63, 1-64.

¹⁰³ Significantly, the CESCR calls on states to consider this recommendation. It notes in UN CESCR General Comment 24 ‘State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) UN Doc. E/C.12/GC/24, para 13 ‘Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant’.
<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en> accessed 8 August 2019.

¹⁰⁴ *Irish Bank Resolution Corporation v Quinn* [2016] IESC 50 (Clarke J) [6.2]. See also Delany and McGrath (n 64) 1-42.

jurisdiction, once the foreign defendant is considered a proper party to the action against the Irish domiciled defendant the court will assume jurisdiction under Order 11 rule 1(h).¹⁰⁵ In effect, Order 11, rule 1(h) operates as a sweep up provision which enables the court to assume residual jurisdiction concerning a claim which may not be within any of the other subparagraphs of Order 11.¹⁰⁶

Thus, once a ‘proper party’ in Ireland, the cause of action against the Irish domiciliary and the foreign domiciliary need not be the same. In *Vodafone*, Barrett J clarified that, for example, ‘one may be in contract and the other in tort, and... may have little or no connection with this jurisdiction’.¹⁰⁷ This is a wider approach than applied by Simon LJ in the English Court of Appeal in *Vedanta*, where he considered if the foreign defendant were already within the jurisdiction, it would plainly be a proper defendant in the proceedings considering that the claims against the parent and the subsidiary are based on the same facts and rely on similar legal principles.¹⁰⁸

6.3.3. Need for a Good Arguable Case

In an application under Order 11, the issue of jurisdiction cannot be left to trial and must be resolved. Similar to the English cases, the test to be applied in Ireland as to whether the applicant has a ‘good cause of action’¹⁰⁹ is whether there is a ‘good arguable case’¹¹⁰ against the EU domiciled parent and ‘a substantial element in the claims against both parties’.¹¹¹ Thus, the elements required to access jurisdiction in English and Irish jurisprudence are markedly similar.¹¹²

¹⁰⁵ [1991] ILRM 726.

¹⁰⁶ *ibid* 793.

¹⁰⁷ *Vodafone* (n 83) (Barrett J) [45] stating: ‘(...) for example, one may be in contract and the other in tort’.

¹⁰⁸ *Vedanta* (CA) (n 50) (Simon LJ) [99].

¹⁰⁹ Under RSC Order 11 Rule 5 (n 88) an application for service out of the jurisdiction must include an affidavit stating that the plaintiff has a ‘good cause of action’.

¹¹⁰ *Analog Devices* (n 86) (Fennelly J). Delany and McGrath (n 64) 1-40 consider that this test continues to apply based on *O’Flynn* (n 87) [109]-[110].

¹¹¹ *Vodafone* (n 83) [45].

¹¹² As discussed in chapter 5 section 5.3, the criteria set down by the Court of Appeal in *Vedanta* (n 50) [63] include whether there was there is a real issue between the claimants and Vedanta as arising as part of the ‘necessary and proper’ gateway and equated it with ‘a properly arguable case or serious issue to be tried’. At [44], [54] that the claim against the foreign defendant raises ‘a substantial question of fact or law, or both’ and the claim has ‘a real prospect of success’.

Consistent with the jurisprudence of the English courts analysed in Chapter 4,¹¹³ the inclusion of the Irish domiciled anchor defendant ‘must not be a mere device to get a foreign party before the Irish courts’.¹¹⁴ How would the Irish courts approach this issue? The UK Supreme Court in *Vedanta* took a benign view, considering that only if the ‘sole purpose’ of proceedings against the anchor defendant was to attract jurisdiction against the foreign defendant, would it constitute an abuse of EU law.¹¹⁵ In agreement with Hess and Mantovani, the application of this principle is expected to be ‘extremely narrow’ in countering proceedings against an EU-domiciled anchor defendant’.¹¹⁶ Further, they argue that as the principles of parent company duty of care are becoming more established, it is reasonable to assume it will become easier for plaintiffs to argue they have a legal interest in suing the EU-domiciled defendant.¹¹⁷ Flowing from this, it is arguable that the Irish courts would take a pragmatic view in allowing service outside the jurisdiction.¹¹⁸ For example, in *Vodafone*, the court was satisfied a sound basis in law and fact presented and that the proceedings were not ‘some form of contrived device’ to get the foreign defendant IV LLC before the Irish courts.¹¹⁹

¹¹³ *Vedanta* (SC) (n 59) [23].

¹¹⁴ Delany and McGrath (n 64) 1-69 stating this approach was endorsed in *Fairfield Security Ltd. (In Liquidation) v Citco Bank Nederland NV* [2012] IEHC 81, (Unreported, High Court, Finlay Geoghegan J, 28 February 2012) [46].

¹¹⁵ *Vedanta* (SC) (n 59) (Briggs LJ) [23] citing *Réunion Européenne* (n 71) and *Freeport* (n 78). As previously noted in chapter 5, anti-abuse tests were not required in the Dutch Shell Nigeria case as the domestic provision for joining of defendants reflects Article 6(1) of the Brussels I (recast). See also Cees van Dam, ‘Preliminary judgments Dutch Court of Appeal in Shell Nigeria case’ 3 <www.ceesvandam.info/default.asp?fileid=643> accessed 14th January 2016: ‘The court considers that it is undisputed that the court has jurisdiction to hear the case against RDS on the basis of the Brussels I Regulation (...) Second, the Court of Appeal accepts jurisdiction to hear the cases against SPDC on article 7(1) Dutch Code of Civil Procedure (CPP) regarding plurality of defendants...this interpretation of article 7(1) CPP is in line with the case law of the ECJ with respect to the corresponding article 6(1) Brussels I’; Burkhard Hess and Miriam Mantovani, ‘Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation’ (January 29, 2019). MPILux Research Paper 2019 (1) stating: ‘The general principle of prohibition of abuse will have therefore an extremely narrow scope of application, if any, in curtailing the use of the procedural strategy which uses the EU-domiciled parent company as an anchor defendant’ <<https://ssrn.com/abstract=3325711>> accessed 15 December 2019.

¹¹⁶ Hess and Mantovani (n 115) section 2(a).

¹¹⁷ *Ibid.*

¹¹⁸ *Analog Devices* (n 86) (Fennelly J) 286.

¹¹⁹ *Vodafone* (n 83) [68].

Should an FDL case present in Ireland, jurisdiction would fall to be determined by the courts on the basis of the plaintiffs establishing a ‘good arguable case’ concerning parent company duty of care, an application of the tort of negligence not previously considered by national courts. As above, jurisdiction is to be determined as a preliminary matter without disclosure. On balance it is reasonable to assume that the Irish courts would hesitate to preclude further exploration of the issues of law and fact during a hearing on the merits. Similar to the statement of Simon LJ in the Court of Appeal in *Vedanta*, the fact that no duty of care has yet been found to be owed by a parent company to those affected by the operations of its subsidiary does not render the claim unarguable ‘for if it were otherwise, the law would never change’.¹²⁰ Further, as Simon LJ acknowledged, the effect of determining jurisdiction by a preliminary assessment of whether an arguable case a duty of care is owed gives rise to a paradox, rendering it easier to establish jurisdiction when the legal issues are more complex and problematic for a claimant.¹²¹

An argument that the Irish courts may adopt a similarly open approach is supported by a clear line of jurisprudence on service out of the jurisdiction in the Irish courts. Further, the Irish courts would be applying tests which are markedly similar to those applied in FDL jurisprudence which has developed for over three decades in the English courts. Recalling also that the Irish courts would be considering an FDL case within a context of ever increasing awareness of the negative impacts of business on human rights.¹²² The elements required to construct an arguable case that a duty of care is owed are further explored in section 5.3.6.

6.3.4. Is Ireland a Convenient Forum to Hear and Determine the Matter?

The English courts have consistently interpreted the ‘proper place’ to bring the claim under national civil procedure rules as the *forum conveniens*.¹²³ In Ireland, as confirmed by Fennelly J in *Analog Devices*,¹²⁴ the burden lies on the claimant at the *ex parte* stage to satisfy the court that it is the *forum conveniens*.¹²⁵ The term ‘*conveniens*’ in this context is

¹²⁰ *Vedanta* (CA) (n 50) [88].

¹²¹ *ibid* [32].

¹²² See chapter 1 and chapter 2 section 2.2.

¹²³ *Vedanta* (CA) (n 50) [38].

¹²⁴ See *Analog Devices* (n 86) re ‘proper forum’.

¹²⁵ *Doe and another v Armour Pharmaceutical Co. Inc and others* [1994] ILRM 416 concerning the principle of *forum non conveniens*.

the appropriate forum, taking cognisance of whether another jurisdiction is in fact accessible. In *Vodafone* the court confirmed the test is as established by Lord Goff of Chiveley in *Spillada Maritime Corporation v Cansulex Ltd*, and is equated with ‘the forum in which the case can suitably be tried for the interests of all parties and for the ends of justice’.¹²⁶ In his decision in *Analog*, Fennelly J referred to the thorough analysis of English and Irish authorities conducted in *Intermetal Group Ltd v Worslade Trading Ltd*,¹²⁷ in which Murphy J expressly approved the test adopted in *Doe v Armour Pharmaceutical Co. Inc.*¹²⁸ It is established from this line of jurisprudence that the test of whether to grant a stay on proceedings is one based on the ‘broad interests of justice’.

In its determination the courts will consider factors such as: the nature of the dispute; the legal and practical issues involved; local knowledge; availability of witnesses and their evidence;¹²⁹ expense; and the speed with which the proceedings may be determined in each competing jurisdiction.¹³⁰ This constituent elements of the test are again markedly similar to the test applied in the English courts.¹³¹ As the question of whether access to justice is available in the alternative forum has weighed heavily in comparative jurisprudence,¹³² it is to be anticipated that the Irish courts would also be engaged on this issue. A comparative study of residual jurisdiction in civil disputes in the EU by Arthur Cox concluded there are no known cases where the Irish Courts have exercised jurisdiction on the basis that the plaintiff would not get a fair hearing or adequate protection in the courts of non-EU

¹²⁶*Vodafone* (n 83) (Barrett J) [31] citing *Analog Devices* (n 86) 287-288. See also Delany and McGrath (n 64) 1-107. In *Vodafone v Intellectual Ventures* [2017] IEHC 160, the High Court refused to decline jurisdiction but issued a stay in the proceedings pending determination of a parallel case in Germany, following Case No. C-170/13 *Huawei v ZTE* (16 July 2015).

¹²⁷ (n 125).

¹²⁸ [1994] 3 I.R. 78, 107.

¹²⁹ *Vodafone* (n 83) (Barrett J) [33]. See also Delany and McGrath (n 64) 1-27- 1-28. Ireland is not a party to the Hague Convention of taking evidence and relies on local statutory rules to deal with the taking of evidence abroad in matters involving witnesses located outside the EU.

¹³⁰ *Vodafone* (n 83) (Barrett J) [29] citing *O’Flynn*, (n 87) 53. Although Delany and McGrath (n 64) 1-29 referring to Kelly J in *Yukos* (n 90) and McGovern J in *Avobone N.V. v Aurelian Oil and Gas Ltd.* [2016] IEHC 636 [18] state: ‘Irish jurisprudence indicates that the onus is on the applicant to establish that a ‘solid practical benefit’ will be derived from the proposed proceedings in Ireland’. This is not a factor mentioned in *Vodafone*.

¹³¹ *Vedanta* (SC) (n 59) [68].

¹³² Chapter 5 section 5.3.5.1; 5.4.1.2. See also Synthesis 5.6 and Model 5.7.

states.¹³³ It concludes that an Irish court would consider the following practical circumstances as relevant: whether the judiciary is independent; whether a claimant with an arguable claim finds his claim summarily rejected; whether there is an inordinate delay before the action comes to trial (i.e. 10 years); and the imposition of a derisory low limit on damages.¹³⁴

In *Vodafone*, the court approached the question as a matter of weighing the competing interests of the parties, to determine if the interests of the foreign defendant in having the dispute adjudicated in an alternative forum outweighed the interests of the party seeking a determination in Ireland.¹³⁵ In FDL cases, assuming Irish courts will be called upon as English courts have been, the courts might consider three directions in its assessment of access to justice, or indeed a combination thereof: the position of the UK Supreme Court on access to justice in *Vedanta*; the right to access to the court under Article 6 ECHR; and residual jurisdiction based on natural or constitutional justice in Ireland.

6.3.5. Access to Justice: Reflections

It is arguable that the Irish courts would adopt the ‘but for’ approach of the UK Supreme Court.¹³⁶ It concluded in *Vedanta* that on the basis of connecting factors to the alternative jurisdiction England was not the proper place to bring the claim, ‘but for’ the ‘separate and distinct’ question of access to justice.¹³⁷ As Briggs LJ emphasised, the risk substantial justice is not available in an alternative jurisdiction is the exception, and as such a finding may affect international comity it merits attentive scrutiny and requires cogent evidence.¹³⁸ The approach of the UK Supreme Court to the issue of access to justice in the alternative jurisdiction is appropriate and balanced and it is recommended it should be followed in Ireland. Further, on the basis that the subsidiaries of defendant multinational companies are

¹³³ David O’Donohoe and James Murray, Arthur Cox (undated) ‘A Comparative Study of Residual Jurisdiction in Civil and Commercial Disputes in the EU, National Report for Ireland’ 19 stating that it is not clear whether principles concerning declining jurisdiction in favour of an alternative EU forum would apply to a non-EU forum <https://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_ireland_en.pdf> accessed 3 December 2019.

¹³⁴ *ibid.*

¹³⁵ *Vodafone* (n 83) [44] citing *O’Flynn* (n 87) 48-49.

¹³⁶ *Vedanta* (SC) (n 59) [102].

¹³⁷ *ibid* [88].

¹³⁸ *ibid* [11].

often located in zones of weak governance, chapter 5 concluded it is plausible that claimants in FDL cases would succeed in arguing access to justice is not available in the alternative jurisdiction.

6.3.5.1. Forum of Necessity and Article 6 ECHR

If it is considered unlikely that a claimant will be able to access justice in the alternative jurisdiction, and there is a sufficient connection to an EU State forum, would the refusal of courts to exercise jurisdiction constitute a breach of rights of access a court? Firstly, as discussed, universal civil jurisdiction is not accepted in practice.¹³⁹ Secondly, Ireland does not have statutory provision for a forum of necessity.¹⁴⁰ Further, even in EU States which provide for a forum of necessity in domestic law, access under these provisions has been interpreted restrictively.¹⁴¹ The ECtHR considering Article 6(1)¹⁴² has gone as far as to decline to censure such restrictive interpretations by domestic courts even concerning violations of *jus cogens* norms as in *Nait-Liman v Switzerland*.¹⁴³ Thirdly, despite cogent arguments that there is a role for Article 6, to date it has not been sufficiently leveraged or gained due traction in FDL litigation.¹⁴⁴ Combined, it is apparent that access to a forum of necessity based on customary international law and the provisions of IHRL are regrettably muted. As concluded in chapter 4, it is judicial discretion in the interpretation of national civil procedure rules which has proven crucial in similar circumstances in English

¹³⁹ Chapter 2 section 2.3.4.

¹⁴⁰ Arthur Cox (n 133) 16.

¹⁴¹ See chapter 1 section 1.3.

¹⁴² Article 6(1) ECHR (n 6) provides: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

¹⁴³ App no 51357/07 (ECtHR 15 March 2018) concerned the right of a refugee to seize a Swiss court with a civil claim for damages resulting from torture allegedly suffered in Tunisia. The Grand Chamber [188]-[220] concluded that the Swiss courts were not required by Article 6(1) ECHR to examine the applicant’s civil claim for compensation against Tunisia either as a forum of necessity or as a matter of universal civil jurisdiction and considered that the Member States are under no international law obligation to provide universal civil jurisdiction for torture

<[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-181789%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181789%22]})> accessed 17 December 2019.

¹⁴⁴ Chapter 4 section 4.3.2.

jurisprudence. It can hoped to also prove to be the case in Ireland, particularly against the backdrop of the Irish Constitution.¹⁴⁵

6.3.5.2. Residual Jurisdiction based on Natural or Constitutional Justice

As outlined, jurisprudence indicates that the categories under RSC Order 11 rule 1 are exhaustive.¹⁴⁶ However, Delany and McGrath raise some authorities ‘which seem to suggest the courts may enjoy a residual discretion to permit service outside the jurisdiction’ outside the categories of Order 11 rule 1¹⁴⁷ where it is necessary to comply with the requirements of natural or constitutional justice. The authorities cited turn on giving domestic legislation a construction in accordance with the principles of constitutional justice. For present purposes, more promising for FDL cases perhaps is the principle cited by Delany and McGrath:

In ascertaining whether a claim falls within one of these exclusionary rules the courts will look beyond the form of the action or the nature of the complaint and examine the substance of the right sought to be enforced.¹⁴⁸

Extending this, the rights violations which underpin FDL cases merit such judicial discretion in order to comply with the requirements of natural or constitutional justice. As discussed in section 5.6 below, there is a symmetry between rights violations in FDL cases, domestic tort law in its role of vindicating constitutional rights, and the values of natural law and dignity of the human person underpinning the Irish Constitution. This approach is supported by interpretation of the Constitution as responsive to public concern, including concern for the impact of business in the more interconnected world in which we live. In *Merriman v Fingal County Council*¹⁴⁹ Barrett J, made comments in *obiter*, that there may be a ‘right to an environment’ protected under Article 40.3.1° of the Constitution:

A right to an environment that is consistent with the human dignity and wellbeing of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested

¹⁴⁵ All legislation, including statutory instruments, is to be interpreted in a manner consistent with the Irish Constitution.

¹⁴⁶ *Vodafone* (n 83) [34].

¹⁴⁷ Delany and McGrath (n 64) 1-79 citing *Fennell v Frost* [2003] 3 IR 80.

¹⁴⁸ *Duke of Westminster Case* [1936] AC 1, 19. See Delany and McGrath (n 64) 1-07.

¹⁴⁹ [2017] IEHC 695.

personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced¹⁵⁰

As Pernot validly argues, the concerns expressed by Barrett J in arriving at this conclusion support a view of the Irish Constitution as document which encompasses evolution in public concern for protection of human rights and the environment.¹⁵¹ This is potentially significant, and an endorsement of the Irish Constitution as responsive would arguably resonate with the evolution in public concern regarding preventing and remedying violations of human rights by business, *inter alia*, via FDL litigation.¹⁵²

Secondly, the exercise of residual discretion is supported by the effect of the level of interconnectedness of modern society both nationally and globally. In the Irish context this chimes with the contention of MacMahon and Binchy that against the background of the

¹⁵⁰ *ibid* (Barrett J) [264]: ‘A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. ’. At [260] Barrett J criticised the lack of citation of relevant decisions from the ECtHR, stating: ‘Unmentioned in court was, *inter alia*, the decision of the Court of Human Rights in *Taskin v Turkey* (App no 46117/99). In that case the Court of Human Rights recognised a *per se* right to a healthy environment. Indeed, it seems significant that the Court of Human Rights refers in that case to the right to an environment without any qualification (such as ‘emergent’), especially as consideration of supranational law was unnecessary. (Turkey’s Constitution recognises a right to live in a healthy and balanced environment)’.

¹⁵¹ *ibid* [261]. See also Eadbhard Pernot, ‘The Right to an Environment and Its Effects for Climate Change Litigation in Ireland’ (2019) 22 *Trinity College Law Review* 151, 156; Suzanne Kingston, ‘Regulating Ireland’s environment in 2016: hierarchy, networks and values’ (2016) *Irish Jurist*, 7 states: ‘The CSR concept has awakened massive interest in policy-makers at national, EU and international level, who have latched onto it eagerly as fitting perfectly with the goals of sustainable development and environmental integration--once again, as a way of combining growth and enterprise with environmental protection’. Caution is evinced again firstly that ‘voluntary environmental initiatives may be employed tactically’ by certain industries in order to avoid being regulated e.g. car emissions and secondly, human rights based approaches confer standing on environmental protections due to nature of human rights protections in domestic legal orders, however, ‘many argue that human rights approaches to environmental protection are based on an unacceptably reductivist philosophy of environmental law, whereby the environment is valued largely because of its utility to humans’.

¹⁵² Noting that leave to appeal to the Supreme Court was not granted in *Merriman*, and its approval is not assumed.

Irish Constitution is envisaged ‘a network of normative connections between people, excellently captured by the language of proximity of relationship’.¹⁵³

Such heightened connectivity is echoed in the ‘hands-on’ approach to business relationships advocated, *inter alia*, in the UN Guiding Principles of Business and Human Rights (UNGPS) and in the field of corporate social responsibility.¹⁵⁴ A hands-on, eyes open, and connected approach is expected from Irish domiciled companies concerning the operations of their foreign subsidiaries as explored in themes in comparative jurisprudence in chapter 5. Related also is the vulnerability of ‘involuntary creditors’ discussed in chapter 3 section 3.3.2. As discussed in chapter 2, the role of a regime of direct tortious liability as a mechanism to protect those negatively impacted by business is heightened in the face of deficiencies in other mechanisms.¹⁵⁵ Combined, and as supportive of an evolving approach, it is contended that Irish courts may go further than English courts, and in determining jurisdiction in FDL cases may consider the nature of the rights affected and the wider impact of public concern for human rights, as for the environment.

6.3.6. Trends in Duty of Care in Ireland

To access the jurisdiction of the courts in an FDL case requires a ‘good arguable case’ in negligence against the Irish domiciled parent. The elements of negligence are the existence of a duty of care, and breach of that duty causing harm.¹⁵⁶ As has been observed, a person ‘is entitled to be negligent to the whole world if he owes no duty to them’.¹⁵⁷

¹⁵³ MacMahon and Binchy, *The Law of Torts* (n 93) 6.73-6.74.

¹⁵⁴ Chapter 2 section 2.2 and chapter 5 section 5.5.4.

¹⁵⁵ See also Daisuke Ikuta, ‘The legal measures against the abuse of separate corporate personality and limited liability by corporate groups: the scope of *Chandler v Cape Plc* and *Thompson v Renwick Group Plc*’ (2017) UCL Journal of Law and Jurisprudence 6 which examines the effect of the English Court of Appeal judgments in *Chandler* and *Thompson* from a company law perspective.

¹⁵⁶ *Ward v McMaster* [1985] I.R. 29; *Purtill v Athlone UDC* [1968] I.R. 205; *McNamara v ESB* [1975] I.R. 1; *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84; *Fletcher v Commissioners of Public Works* Supreme Court, unreported, 21 February 2003. See also John Tully, *Tort Law in Ireland* (Clarus Press 2014), 10 defines negligence as: ‘The breach of a legal duty of care whereby damage has been caused to the party to whom the duty is owed. It is the doing by the person of some act which a reasonable and prudent man would not do or the omission to do something which a reasonable and prudent man would have done’.

¹⁵⁷ *Le Lievre v Gould* [1893] 1 QB 491 (Esher LJ), 497.

A key issue in this is whether parent company duty of care would be considered as a ‘novel’ extension to the tort of negligence in Ireland. It is pertinent to consider a view that duty of care has perhaps come ‘full circle’ from reliance on incremental development by analogy to established categories of negligence, to expansion, and back to a category based approach.¹⁵⁸ With his two tier test in *Anns v Merton Borough Council (Anns)*¹⁵⁹ Lord Wilberforce moved away from categories and a requirement to bring the facts of the case within circumstances in which a duty of care had already been held to exist. Under the first part of the test a *prima facie* duty of care arises based on damage where the parties are in a relationship of proximity, and a secondary consideration of whether this is limited or negated by policy considerations.¹⁶⁰ By 1990, in *Caparo Industries plc v Dickman*¹⁶¹ the House of Lords signalled a retreat from the formulation in *Anns* and developed a three part test for duty of care: damage to the plaintiff must be reasonably foreseeable; there must be a relationship of proximity between the plaintiff and the defendant; and in addition it must be fair, just and reasonable in the circumstances for a duty of care to be imposed on the defendant. The House of Lords formally overruled *Anns* in *Murphy v Brentwood District Council*.¹⁶²

¹⁵⁸ Michael McGrath SC ‘Duty of Care – The Full Circle?’ Bar Council CPD Tort Law Update Conference, (February 2015) <www.lawlibrary.ie/media/lawlibrary/media/Secure/20150214TortMacGrath.pdf> accessed 8 August 2019.

¹⁵⁹ [1978] AC 728. Lord Wilberforce formulated a two-step test: ‘First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of, the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (...)’

¹⁶⁰ MacMahon and Binchy (n 93) 6.15 suggest that an interpretation is that the formula in *Anns* does not necessarily imply a wider scope of duty of care, they acknowledge the risk of courts ‘an unreflective court to imposing too expansive a range of liability’.

¹⁶¹ [1990] AC 605 (Bridge LJ) stating: ‘What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there exists between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other’.

See Tully (n 156) 22 considering that judicial disapproval with the expansion of the duty of care led to a retreat from *Anns*, bringing the tort of negligence back to a more category-based approach.

¹⁶² [1991] AC 398, 480 (HL).

From the perspective of eventual FDL cases in Ireland, the starting point is relevant. For present purposes, the lens is the scope of duty of care, the role of tort law,¹⁶³ and its interaction with the Constitution in the context of FDL litigation. In agreement with scholars the formulation in *Anns* is worthwhile in:

(...) encouraging courts to raise their eyes beyond immediate pragmatic considerations and develop liability principles which are sensitive to such basic values as the protection of human life, bodily integrity, and economic interests from careless or otherwise unwarranted violations.¹⁶⁴

In outline, for over two decades the application of *Anns* in the Irish courts resulted in expansion of the duty of care in negligence,¹⁶⁵ including continuing beyond the reformulation of the test by the English courts in *Caparo*, and up until *Glencar Exploration Co plc v Mayo County Council*¹⁶⁶ and *Fletcher v Commissioners of Public Works*.¹⁶⁷ The synthesis of O'Donnell J in *Whelan v AIB*,¹⁶⁸ which echoes the House of Lords in *Caparo*,¹⁶⁹ suggests that the two-tier test in *Anns*¹⁷⁰ and in *Ward v McMaster*¹⁷¹ loaded the balance in favour of finding liability. In his analysis, this is as opposed to an approach in which a duty of care is imposed when there is sufficient proximity and in addition 'considerations of policy make it fair just and reasonable that such a duty should exist'.¹⁷² This assemblage and the Irish position is encapsulated by Brennan J in *Sutherland Shire Council v Heyman*, as cited by Keane CJ in *Glencar*.¹⁷³

It is preferable in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by

¹⁶³ Discussed in chapter 3 section 3.2 and 3.5.

¹⁶⁴ MacMahon and Binchy (n 93) 6.05. See also 6.70.

¹⁶⁵ *Purtill v Athlone UDC* (n 93); *McNamara v ESB* (n 156); *Siney v Dublin Corporation* [1980] IR 400; *Ward v McMaster* (n 156).

¹⁶⁶ (n 156).

¹⁶⁷ (n 156). See also William Binchy, 'Meskill, The Constitution and Tort Law' (2011) 18 DULJ 339, 351. Tully (n 156) 24.

¹⁶⁸ [2014] IESC 3.

¹⁶⁹ (n 161).

¹⁷⁰ (n 159).

¹⁷¹ (n 156).

¹⁷² (n 168) (O'Donnell J) [65].

¹⁷³ (n 156) [3] reviewing the authorities on negligence.

a massive extension of a prima facie duty of care restrained only by undefinable considerations which ought to negative, or to reduce or limit the scope of the duty, and the class of person to whom it should be owed¹⁷⁴

The implications are firstly, duty of care in Ireland has come full circle, returning to analogising from established categories.¹⁷⁵ Secondly the test of duty of care applied in the Irish courts realigned with the English courts. While it may appear that these forces would pull against each other in FDL litigation, it is argued that there is a nuanced approach the Irish courts might adopt.

6.3.6.1. Test of Duty of Care

In *Glencar*, Keane CJ took the view that endorsement of the *Anns* test in did not form part of the *ratio* of the decision in *Ward*.¹⁷⁶ Mindful of the risks highlighted by Brennan J in *Sutherland Shire Council*, Keane CJ reformulated the test of duty of care, ushering in a change of direction. It aligns with *Caparo*, but contained four steps:

There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obligated to hold that it does so in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of “proximity” or “neighbourhood” can be said to have

¹⁷⁴ (1865) 60 ALR 1, 4344.

¹⁷⁵ McGrath (n 158). See also MacMahon and Binchy (n 93) 6.01 concerning the shift in momentum away from ‘grand theory and broad principle in favour of the security of analogising from established categories.’

¹⁷⁶ (n 156) [3] stating: ‘While the decision in *Ward .v. McMaster* has been treated by some as an unqualified endorsement by this court of the two stage test adopted by Lord Wilberforce in *Anns*, it is by no means clear that this is so. As already noted, Henchy J. was satisfied that the case could be decided by reference to “well established principles” and made no reference in his judgment to the two stage test in *Anns*. Since Finlay C.J. and Griffin J. expressed their agreement with both the judgments of Henchy J. and McCarthy J., it is not clear that the observations of the latter in relation to the two stage test in *Anns* necessarily formed part of the ratio of the decision. Given the far reaching implications of adopting in this jurisdiction a principle of liability in negligence from which there has been such powerful dissent in other common law jurisdictions, I would not be prepared to hold that further consideration of the underlying principles is foreclosed by the dicta of McCarthy J. in *Ward .v. McMaster*.’ See William Binchy, ‘Tort Law in Ireland: A Half Century Review’ (2016) 56 Irish Jurist 199, 203. See also Tully (n 156) 33 explaining that although McCarthy J’s ‘expressly approved *Anns* in formulating the test for duty of care in *Ward*, in *Glencar* Keane CJ did not consider that McCarthy J’s position on the two step test in *Anns* formed part of the *ratio* of the decision in *Ward* (...) despite the fact that three of McCarthy J’s colleagues on the Supreme Court concurred with his speech’.

been met, unless very powerful public policy considerations dictate otherwise (step three). It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff (...).¹⁷⁷

The *Glencar* approach to duty of care was endorsed by Fennelly J in *Breslin v Corcoran* as ‘the most authoritative statement of the general approach to be adopted by our courts’.¹⁷⁸ Over time the four steps have coalesced into three.¹⁷⁹ As set out by Hogan J in *Ennis v Health Service Executive* the import of *Glencar* and *Whelan* is that in Ireland proximity and foreseeability remain ‘the touchstones’, but are of themselves insufficient to ground a common law duty of care in negligence.¹⁸⁰ It must also be fair and reasonable to impose a duty of care, and this assessment by a court embraces broader policy considerations.

From *Ennis*, implications may be drawn concerning approaches that the Irish courts may adopt in FDL cases. One scenario, following *Hanrahan v. Merck, Sharpe & Dohme Ltd*¹⁸¹ and *Sullivan v. Boylan (No.2)*,¹⁸² is where the law of negligence is adjudged ‘basically ineffective’ to defend and vindicate constitutional rights. This approach is discussed in the context of FDL cases in 6.6 below. A more typical scenario is that of a court presented with gaps in the common law duty of care. As Hogan J noted, Irish courts will fill such gaps ‘only where such developments represent essentially modest incremental changes which can be justified by reasoning by analogy with established case-law’.¹⁸³ While a stepped approach has merits, over time it may also operate to obscure the direction of development

¹⁷⁷ *Glencar* (n 156) 139, emphasis added by MacMahon and Binchy (n 93) 6.49. Similarly, Tully (n 156) 33 considers there are four steps to the test. The Supreme Court, affirming Kelly J, dismissed the claim on the basis that the Council had not owed the plaintiffs a duty of care.

¹⁷⁸ [2003] 2 IR 208.

¹⁷⁹ McGrath (n 158). See also Tully (n 156), 34 stating: ‘In truth, there is some judicial divergence on the application of the test for duty of care in the Irish courts. Some judges treat it as a four-step test...others apply a three-step test as in *Caparo*. Those adopting a three-step approach end to subsume the step dealing with public policy requirements into the requirement for fairness, justice, and reasonableness’.

¹⁸⁰ [2014] IEHC 440 [94].

¹⁸¹ [1988] I.L.R.M. 629, 636 (Henchy J).

¹⁸² [2013] IEHC 104 (Hogan J).

¹⁸³ *ibid.*

or a lack thereof.¹⁸⁴ In circumstances where there is no precedent for parent company duty of care, an approach based on incremental pragmatism could augur a death knell for FDL litigation. An alternative and logical interpretation of ‘incremental pragmatism’ is that Irish courts may be persuaded by recent jurisprudence from other common law jurisdictions, and that the approach of the English courts in FDL litigation would be given due weight. There are reasons supporting why this could be so concerning parent company duty of care.

6.3.6.2. Application in FDL Litigation

Recalling that the application of the *Caparo* test was considered settled law in FDL litigation in the English courts, as illustrated in *Vedanta*¹⁸⁵ and *Okpabi v Royal Dutch Shell Plc*.¹⁸⁶ As discussed, the test of duty of care in Ireland involves essentially the same steps upon which the English courts have assessed the existence of parent duty of care, the three step test in *Caparo*.¹⁸⁷ Thus, when courts are engaged in assessing an extension to a novel category, the principles in the English and Irish courts are arguably markedly similar.

However, at this point it is pertinent to recall the discussion in chapter 5 section 5.3.2.1. The Supreme Court in *Vedanta* clarified that the principles determining whether one party owes a duty of care to another party ‘are not novel at all’. In its view, these principles are identifiable ‘back as far as the decision of the House of Lords in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (...)’.¹⁸⁸ The court rejected the view it necessitated supplemental analysis to extend the existing categories of negligence.¹⁸⁹ As such, the UK Supreme court in *Vedanta* did not directly apply the *Caparo* test, as it was not required

¹⁸⁴ MacMahon and Binchy (n 93) 6.05 stating ‘the courts have eschewed broad principle in favour of incremental pragmatism’. See also Tully (n 156) 30 stating: ‘The “incrementalist” approach means that the courts will develop the law of negligence on a case by case basis, where the facts fit into established categories where a duty of care has been found to exist’.

¹⁸⁵ *Vedanta* (CA) (n 50)

¹⁸⁶ In *Okpabi v Royal Dutch Shell Plc and another* [2017] EWHC 89 (TCC) [107]-[113] Fraser J applied three-part *Caparo* (n 161) test of foreseeability, proximity and whether it is just fair and reasonable to impose a duty of care and analysed the facts by reference to *Chandler v Cape Plc* [2012] EWCA Civ 525 and *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635.

¹⁸⁷ Whether the harm is foreseeable, a relationship of sufficient proximity exists and whether it would be just, fair, and reasonable to impose a duty of care.

¹⁸⁸ *ibid* [54], [56].

¹⁸⁹ *Ibid* [60].

assess a novel category of duty according to these principles.¹⁹⁰ This theme is present in the submissions in the appeal to the UK Supreme Court in *Okpabi*, the International Commission of Jurists and the Corporate Responsibility Coalition (CORE), arguing the proposition that the case falls within the *Dorset Yacht* category:

As the Supreme Court’s judgment in [Vedanta] reiterated, the proper approach – in a case of this kind – is first to consider whether it (at least arguably) comes within one of the well-established categories where a defendant owes the claimant a duty of care in respect of the harmful activities of a third party. The Caparo analysis is only engaged if that question is answered in the negative.¹⁹¹

From there, a parallel can be drawn with Ireland. The assessment of legal issues by Hogan J in *Ennis* commences by referring back to according to the principles in *Dorset Yacht Co. Ltd. v Home Office*.¹⁹² This would support the argument that, consistent with the interpretation of the UK Supreme Court in *Vedanta*,¹⁹³ Irish courts will consider parent company duty of care as coherent with the circumstances in which a third party may be liable for the actions of another in *Dorset*. Thus, it is arguable that on balance the Irish courts would not find it appropriate to engage in the analysis of whether parent company duty of care is an extension, involving assessment according to a *Glencar* test, but would

¹⁹⁰ In *Darnley v Croyden Health Services NHS Trust* [2018] UKSC50 delivered by LORD LLOYD-JONES:(with whom Lady Hale, Lord Reed, Lord Kerr and Lord Hodge agreed [15] states ‘...it is, normally, only in cases where the court is asked to go beyond the established categories of duty of care that it will be necessary to consider whether it would be fair, just and reasonable to impose such a duty’. Previously, the English courts moved away from the test set down by Lord Wilberforce in *Anns* (n 159), which was formally overruled in *Murphy v Brentwood District Council* [1991] AC 398, 480 (HL).

¹⁹¹ *Okpabi v Royal Dutch Shell Plc* (n 186) (*Okpabi* HC); (n 58) (*Okpabi* CA); UKSC 2018/0068 <<https://www.icj.org/uk-supreme-court-should-recognize-shells-responsibilities-for-devastating-rights-impacts-of-niger-delta-oil-spills-say-ngos/>> accessed 10 July 2020. Further, AT 4.4. arguing that ‘If, in the alternative, the Court were to conclude that this case does not (at least arguably) fall within an established category of duty, such that it would be necessary to consider Caparo, the materials drawn together in these submissions would point towards it being “fair, just and reasonable” to recognise the duty contended for. In particular, the duty would:(i) reflect widely-accepted standards, which have been endorsed by RDS itself; (ii) be consistent with the comparative law jurisprudence; and (iii) be consistent with the United Kingdom’s international obligations to provide effective remedies for infringements of human rights and environmental damage.’

¹⁹² (n 188) [64], [85].

¹⁹³ (n 59) (Briggs LJ) [54]. At [60] the court rejected the view it necessitate supplemental analysis to extend the existing categories of negligence. Discussed in chapter 5 section 5.3.2.1.

take that view that parent company comes under the principles flowing from *Dorset*. In effect, the English courts have established the grounding tenets as to how to conceive of parent company duty of care. As outlined, the English courts have also established that direct liability is distinct from veil-piercing,¹⁹⁴ and vicarious liability has not been pleaded in this area in English jurisprudence.¹⁹⁵ It is acknowledged that it remains entirely open for the Irish courts to take a contrary view and, for example, declare that parent company liability is a separate, distinct and ‘novel’ category of negligence. At a practical level, this is unattractive from the perspective of resources, time and the need for proportionality in jurisdictional hearings in FDL cases as emphasised in the English courts.¹⁹⁶ In a parallel with the emergence of climate change litigation in other jurisdictions, scarcity of domestic case law may also encourage the Irish courts to take stock of recent developments in other national courts faced with cases of a similar nature.¹⁹⁷

On this basis, it is logical that under an approach of incremental pragmatism, the Irish courts would closely follow to the jurisprudence of the English courts in assessing the duty of care in eventual FDL cases. On balance, it is reasonable to expect that the Irish courts would follow the precedent of the English courts and consider that the duty of care of parent companies is to be established by reference to the general principles of in tort law.¹⁹⁸ Further, the courts would address whether there is a ‘good arguable case’ according to the

¹⁹⁴ Discussion of *Chandler* (n 186) (Arden LJ) [69] in chapter 5 section 5.2.

¹⁹⁵ Discussed in chapter 3 section 3.5.4.

¹⁹⁶ *Vedanta* (SC) (n 59) (Briggs LJ) [14]..

¹⁹⁷ *Pernot* (n 151) 163.

¹⁹⁸ *Vedanta* (SC) (n 59) (Briggs LJ) [49] agreeing with Sales LJ in *AAA v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 (*Unilever CA*) [36] stating: ‘There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary. Helpful guidance as to relevant considerations was given in *Chandler v Cape plc*; but that case did not lay down a separate test, distinct from general principle, for the imposition of a duty of care in relation to a parent company’.

same essential test and the same process as in FDL litigation in the English courts, as applied to the particular circumstances of the case.

6.3.6.3. Foreseeability of Damage

To ground liability in negligence, the damage must be reasonably foreseeable and not too remote.¹⁹⁹ Foreseeability is regarded to not generally be a contentious issue in litigation.²⁰⁰ As in any assessment of liability in negligence, in FDL litigation the court will weigh up ‘the probability of harm, the gravity of harm, the social utility of the defendant’s conduct and the cost of eliminating the risk’.²⁰¹ For FDL cases, two aspects merit highlighting in this assessment. Firstly, when a court assesses the consequences of the damage, *Caparo* guides that the infliction of physical injury or damage ‘universally requires to be justified’.²⁰²

In assessing whether the harm should have been foreseen, evolving standards in corporate responsibility will increasingly form a compelling backdrop, and can be hoped to be considered in judicial approaches to the assessment of the actions and behaviour of multinational corporations.²⁰³ Support for regard to international standards and relevant state obligations under national provisions is valid, as cogently argued in the submissions of the International Commission of Jurists and Corporate Responsibility (CORE) to the UK Supreme Court in *Okpabi* discussed in chapter 5 section 5.5.6.

6.3.6.4. Proximity of Parties

To ground a duty of care, there must be an adequate relationship between the parties. As such proximity ‘arises by virtue of the circumstances in which the parties find themselves’.²⁰⁴ Irish jurisprudence illustrates instances proximity of relationship in the day-

¹⁹⁹ *Donoghue v Stevenson* [1932] AC 562; *Hedley Byrne v Heller* [1964] AC465; *Ward* (n 156); *Glencar* (n 156); *Breslin* (n 178). *Gaffney v Dundalk County Council* [2006] IEHC 436; *Whelan* (n 168). See also McMahon and Binchy (n 93) 6.62 and 6.67 explaining that foreseeability is linked to remoteness, whereby a defendant may not be liable if the injury to the plaintiff was not foreseeable by the defendant.

²⁰⁰ Tully (n 156), 34. See also McMahon and Binchy (n 93) 6.62.

²⁰¹ McMahon and Binchy (n 93) 5.04.

²⁰² Tully (n 156) 616.

²⁰³ McMahon and Binchy (n 93) 6.03 stating: ‘The court thus fashions the duty of care and specifies its scope with the simple aim of accomplishing social goals’.

²⁰⁴ Tully (n 156) 35. See also McMahon and Binchy (n 93) 6.72 describing that under the *Glencar* formulation proximity is regarded as ‘foreseeability plus something more’.

to-day management of business, the relationship of parent and child,²⁰⁵ and of school and pupil.²⁰⁶ In *Shinkwin v Quin-Con* the Irish Supreme Court focused on the principles of negligence and duty of care, and in particular, the elements of control and involvement necessary to generate proximity.²⁰⁷ *Shinkwin* is termed ‘a classic example’ of how proximity may arise.²⁰⁸ Similarly to the reasoning in *Chandler*,²⁰⁹ the duty of care arose not in the status of the individual defendant as a director *per se*. It was grounded in his personal involvement as a factory manager in the supervision of the plaintiff, an employee.²¹⁰

In the context of eventual FDL cases in an Irish context, general reflections concerning proximity are offered. Firstly, recalling the discussion of the role of tort law in chapter 3, judicial approaches to proximity may be in some measure coloured by empathy for those harmed, however physically distant.²¹¹ While this may not typically be overt, it is arguably an element which can be expected to be present in FDL style cases which have *inter alia* alleged rape, assault, shootings causing grievous bodily harm or death, and significant environmental damage impacting health and livelihoods.²¹² Secondly, given FDL cases typically concern claimants from distant countries, it is notable that proximity does not require closeness in either space or time.²¹³ Thirdly, while scholars consider there is a dearth

²⁰⁵ *McNeilis v Armstrong* [2006] IEHC 269.

²⁰⁶ *Maher v Presentation School Mullingar* [2004] 4 IR 211.

²⁰⁷ [2001] IR 514, 519 (Peart J) considering that proximity goes further than foreseeability.

²⁰⁸ In *Fay v Tegral Pipes Ltd.* [2005] IESC 34 (McCracken) [16] stated: ‘A director or employee of a company will not have a personal liability for wrongful acts of the company merely because he was a director or employee. To incur liability, there must be a duty of care owed by the individual in his own right, and such duty will only arise if, as an individual, he was in a position of proximity or neighbourhood sufficient to give rise to personal liability. The *Shinkwin* case itself is a classic example of how that can arise’.

²⁰⁹ (n 186) (Arden LJ) [69]-[70].

²¹⁰ The second defendant was found to owe a direct duty of care, and personally liable in negligence for injuries sustained by the plaintiff at work.

²¹¹ *McMahon and Binchy* (n 93) 6.42 stating: ‘Liability can attach to conduct which results in damage thousands of miles away or decades later’.

²¹² *Choc v. Hudbay Minerals Inc.*, (2013) ONSC 1414; *Garcia* (n 69); *Esther Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d. 111 (2d Cir. 2010) (CA); *Esther Kiobel v Royal Dutch Petroleum Co.*, 133 S Ct 1659 (2013) (SC).

²¹³ *McMahon and Binchy* (n 93) 6.13.

of structured guidance on proximity in Irish jurisprudence,²¹⁴ it is apparent that evidence of control is a factor.²¹⁵

On this basis, it is reasonable to expect that the Irish courts may explore the jurisprudence of the English courts concerning key conceptions of control in FDL cases in arriving at a position. In *Okpabi*, the English Court of Appeal set a relatively high bar for the plaintiffs at the summary stage, requiring evidence of direct control by the parent of the operations of the subsidiary including responsibility for the practices related to the harm.²¹⁶ Adoption of such a restrictive approach at the summary stage can reasonably be expected to negatively impact access to the courts. It is arguably not an appropriate approach to interpretation of the margin of discretion by national courts on the basis that it restricts ‘to a considerable extent, the plaintiff’s right of access to a court, especially if this is understood as right to a reasoned decision on the merits’.²¹⁷

A more balanced approach for the Irish courts to adopt concerning assessment of control/proximity in FDL cases would be that taken by the UK Supreme Court judgment in *Vedanta*.²¹⁸ Firstly, the court clarified that the relationship of parent subsidiary proves nothing, it merely offers the parent the opportunity to control the operations of the subsidiary but no duty to do so. Secondly, the court focused on supervisory or action-oriented inputs from the parent. As discussed in chapter 5, the appropriate question for the court in assessing control is the extent and the manner in which the parent company intervened in the operations of the subsidiary, as evidenced for example in *Vedanta*, by active intervention, supervision, or advice in an area related to the harm.²¹⁹

²¹⁴ *ibid* 6.72 stating: ‘In the post-*Caparo* era of scepticism about any coherent deep normative basis for determining proximity, regarding it as little more than conclusory rhetorical verbiage, few courts or commentators have ventured to provide any analysis of how proximity should be understood within a coherent framework of social ethics’.

²¹⁵ *Shinkwin* (n 207).

²¹⁶ *Okpabi* (CA) (n 58) [196].

²¹⁷ Hess and Mantovani (n 115) draw a comparison to the restrictive interpretation of obligations of the Swiss state in *Naït-Liman* (n 143) stating: ‘We are back, therefore, to a *Naït-Liman* kind of question, concerned with the margin of discretion enjoyed by national courts in devising interpretive solutions which limit, to a considerable extent, the plaintiff’s right of access to a court, especially if this is understood as right to a reasoned decision on the merits’.

²¹⁸ See chapter 5 section 5.3, synthesis section 5.6 and model section 5.7.

²¹⁹ *Vedanta* (SC) (n 5959) (Briggs LJ) [40]; [59] In support of the existence of a duty of care owed by Vedanta, the claimants relied on factors including; Global sustainability report stressing oversight of all Vedanta’s

Moreover, the UK Supreme Court decision made clear that the circumstances in which a parent company may incur a duty of care to third parties are not closed. It noted these are not limited to where the parent has ‘in substance’ taken over or jointly manages the relevant activity of the subsidiary, or has given relevant advice concerning a relevant risk to the subsidiary.²²⁰ Thirdly, in acknowledging there is that there is ‘no limit to the models of management and control which may be put in place within a multinational group of companies’,²²¹ the *Vedanta* judgment throws a wide net over the multitude of circumstances in which the courts might potentially locate proximity or control. Along this spectrum, for example, could be circumstances in which a parent company with superior knowledge formulates policies which are relied on and followed by the subsidiary, without evidence of intervention or control by the parent, but which involve situations of ‘systemic risk’ in the operations or business model.²²² Similarly, although the business operations of a conglomerate are varied, the courts may find that a holding company exercises the requisite level of control via centralised decision making, or that it directly intervened in the enforcement of relevant group policies at subsidiary level.²²³ Finally, in casting aside use of a defined list of sample or identified categories, or considering them as merely illustrative as in *Chandler*,²²⁴ the UK Supreme Court signals a judicial reliance on the flexibility of tort.²²⁵

Specifically concerning corporate group policies, *Vedanta* forwarded an important principle. It implies that if parent company publishes grand statements of policy, there is a risk it will be held to account for failure to enact which impacts third parties. On this basis, it is in principle open for claimants to plead that a parent company assumed a duty of care, as evidenced in its public statements allied to actions/omissions in a relevant area linked to

subsidiaries ultimately rests with Vedanta board; Management agreement under which Vedanta provides training and other services to KCM, including in relation to environment, health & safety; Public statement by Vedanta about managing environmental risk; Witness statement on degree of oversight and control exercised by Vedanta personnel.

²²⁰ *ibid* [51].

²²¹ *ibid*.

²²² (n 186) (Arden LJ) [74].

²²³ Further, as argued in chapter 2 section 2.3 mandatory human rights due diligence is the direction of travel.

²²⁴ (n 186) [80].

²²⁵ *Vedanta* (SC) (n 59) [54].

the harm.²²⁶ With this statement, it is reasonably foreseeable that corporate policies in areas such as supply chain due diligence and environmental sustainability will be subject to granular examination by the courts. It is hoped that its promise in demanding coherence in the behaviour of multinational companies will be confirmed in the English courts. Moreover, it is hoped that the Irish courts will adopt a similar position in their assessment of proximity and control in FDL litigation.

6.3.6.5. Fair, Just, Reasonable, and Policy Considerations

In practice, policy considerations form part of the assessment of whether it is fair, just, and reasonable to impose a duty of care. This final step in Keane CJ's test in *Glencar* may alter the balance in the weight accorded to policy considerations in restricting the *prima facie* existence of a duty of care. When considering FDL cases it is possible that the Irish courts spike out this fourth step of Keane CJ's test in *Glencar*. Arguably, the courts could leverage public policy considerations in such cases in order to avoid 'floodgates' scenarios.²²⁷ Such an option might have proven tempting for the English courts, had a defined separate 'policy' leg formed part of the test of duty of care.²²⁸

In Ireland, the nature of FDL cases might arguably encourage Irish courts to follow the approach of Geoghegan J in *Fletcher v Commissioner of Public Works*,²²⁹ and consider denying the existence of a duty of care on the grounds of public policy.²³⁰ In *Fletcher*, the

²²⁶ *ibid* (Briggs LJ) [53] stating: 'Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries (...)'

²²⁷ *Fletcher* (n 156); *M v Commissioner of An Garda Síochána* [2011] IEHC 14; *G v Minister for Justice, Equality and Law Reform* [2011] IEHC 65. See also MacMahon and Binchy, (n 93) 6.96 and 6.07 stating '(...) policy considerations can now more easily, and certainly more overtly, trump the putative claim of the duty of care'; Tully (n 156), 36.

²²⁸ As discussed in chapter 5 concerning *Okpabi* (CA) (n 58)..

²²⁹ (n 156).

²³⁰ *ibid* (Geoghegan J) stating: '(...) reasonable foreseeability is not the only determining factor in establishing duty of care. Elements such as proximity (which is given an elastic definition in the decided cases), reasonableness of imposition of a duty of care and public policy may all play a role'. It is noted that also McCarthy J's observation in *Ward v McMaster* (n 156) that the threshold on policy considerations is high, and these would have to be powerful to deprive a plaintiff of damages if foreseeable damage had resulted from the negligent actions of a person in a relationship of proximity to the plaintiff were challenged by Keane

plaintiff, an employee, suffered a psychiatric injury on becoming aware that there was a remote risk of developing mesothelioma due to the potentially lethal effects of exposure to asbestos dust. Although negligence was admitted, the Supreme Court refused to award damages, invoking the more circumspect stance of the courts in cases regarding precise diagnosis, floodgate arguments, and potential strain on the health system. Although FDL cases are not directly comparable in that they do not involve potential strain on a public system, they do have potential implications for companies and multinational corporations of economic value, and may be construed as involving concerns over the international comity of the courts. From a different perspective, Ikuta highlights public policy as supportive of a duty of care in tort cases. In an argument which is relevant to FDL cases, Ikuta advocates that the ‘fairness’ requirement in the *Caparo* test could involve consideration of ‘weak’ justification of limited liability in cases involving a private company or corporate group and an ‘involuntary creditor’,²³¹ justified in part on the basis that limited liability was originally accorded to serve a public purpose, rendering it arguable that judgments should take account of policy considerations.²³²

This perspective bears parallels with the themes explored in chapter 3 including criticism of the role of corporate law as a shield to legal liability of a parent company for human rights violations involving subsidiaries,²³³ and the regulatory role of tort. It was argued *inter alia*, that FDL cases include elements of public interest, of moral censure, and deliver regulatory benefits.²³⁴ On balance, it is considered unlikely that Irish courts would invoke grounds of public policy to restrict a duty of care in FDL litigation. It is to be hoped that they may embrace the opportunity to re-consider the role of tort law within a larger context of normative arguments which support rendering multinational corporations accountable for negative human rights impacts. In addressing duty of care in FDL cases, the Irish courts should consider the statements and principles developed in the English courts. In particular,

CJ in *Glencar*. See also public policy in Donal Nolan, ‘Negligence and Human Rights Law: The Case for Separate Development’ (2013) *Modern Law Review* 286.

²³¹ Ikuta (n 155) 11. See also Muchlinski, ‘Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review’ (2002) *Company Law Review* 168, 174.

²³² Ikuta (n 155) 11.

²³³ Discussion in chapter 3 section 3.3.1

²³⁴ Discussion in chapter 3 section 3.2 and 3.5.

in identifying the circumstances in which a parent company may owe a duty of care to third parties, there is indeed no place for an ‘unnecessary straitjacket’.²³⁵

6.3.7. Damages: Outline

This thesis is concerned with causes of action. As a result an extensive discussion of damages is unwarranted and speculative pending a body of jurisprudence on the merits in FDL litigation.²³⁶ Typically, once a duty of care has been established, the court will assess whether there has been breach of that duty, damage and causation in fact²³⁷ and law.²³⁸ The main remedies are awards of damages and injunctions.²³⁹ The aim of damages is to restore the parties to the position that they would have been in had the breach of duty not occurred. However, as human rights violations are very often by nature irrecoverable, prevention is better than cure. In the context of eventual FDL litigation, it is noted as welcome that that principle of *restitutio in integrum* has been modified ‘by increasing judicial receptivity to other rationales, including the vindication of constitutional rights, rights protected under the ECHR and the principles underlying restitutionary damages’.²⁴⁰

²³⁵ *Vedanta* (SC) (n 59) (Briggs LJ) [56] discussed in section 5.3.

²³⁶ Discussion in chapter 4 section 4.6.

²³⁷ *Tully* (n 156) 119 concerning factual harm stating: ‘(...) the defendant can generally be said to have been a factual cause of the plaintiff’s loss or harm if, “but for” the defendant’s breach of duty, he or she would not have suffered in the way that he or she did’.

²³⁸ *ibid* 139 stating: ‘Even where there is a clear factual link between the defendant’s act and the plaintiff’s loss (causation in fact), the outcome may either be so removed from the original negligence, or of a type which is outside the risk created so that the law would regard it as unjust to make the defendant liable for it’.

²³⁹ Compensatory damages are divided into general damages and special damages. General damages are awarded for non-pecuniary loss such as pain and suffering, loss of amenity and loss of expectation of life. Irish courts will enforce a cap on the amount than can be recovered. Special damages compensate pecuniary loss suffered such as loss of earnings. Both general and special damages are normally subdivided into damages for past loss and future loss. Exemplary damages are awarded to make an example of the defendant related to the nature or manner of the wrong.

²⁴⁰ *MacMahon and Binchy* (n 93) 44.08 fn 14 citing *Grant v Roche Products (Ireland) Limited* [2008] IESC 35.

6.4. PROCEDURAL AND PRACTICAL CONSIDERATIONS

6.4.1. European Union Initiatives on Collective Redress

In 2013 the EU Commission adopted a Recommendation²⁴¹ setting out a series of non-binding principles²⁴² for injunctive and compensatory collective redress mechanisms²⁴³ in the Member States concerning violations of rights granted under [European] Union law. Notably, Union law includes the CFREU.²⁴⁴ The Recommendation sets down that all EU Member States should offer collective redress mechanisms for injunctive and compensatory relief.²⁴⁵ While respecting the different traditions of the Member States, relief should be common across the EU according to the principles outlined in the Recommendation. Such relief is expected to be fair, equitable, timely and not prohibitively expensive. There are eight EU Member States which do not provide ‘any proper compensatory collective redress regime’.²⁴⁶ Ireland is one of these.

For present purposes it is significant that under the Recommendation national rules on admissibility or standing should not preclude participation of foreign groups of claimants

²⁴¹ EU Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>> accessed 10 November 2019.

²⁴² Taking into account the Communication to the European Parliament and Council, ‘Towards a European Horizontal Framework for Collective Redress’ (11 June 2013) COM (2013) 401/2 <<https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=1&year=2013&number=401&version=ALL&language=en>> accessed 6 November 2019.

²⁴³ Collective redress is defined in the Recommendation (n 241) as: ‘(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)’.

²⁴⁴ See section 5.2 concerning direct effect as primary law, the scope of substantive rights under the CFREU and its use by the CJEU.

²⁴⁵ Recommendation (n 241) section I.2.

²⁴⁶ Croatia, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, and Slovakia. See British Institute of International and Comparative Law (BIICL), ‘State of Collective Redress in the EU in the context of the Commission Recommendation’ 9 <www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf> accessed 6 December 2019.

to take an action before national courts.²⁴⁷ Further, collective redress is to be applied across all rights and all policy fields,²⁴⁸ as opposed to one particular area for instance consumer rights.²⁴⁹ It was envisaged in the Recommendation that Member States should take the necessary measures to action the principles therein at the latest by 2015, and report back to the EU Commission on implementation.²⁵⁰ At the point that the EU Commission benchmarked progress on this after five years in 2018 (Commission Report),²⁵¹ it became apparent that adoption of the principles in EU Member States was neither consistent nor uniform.²⁵² Moreover, the conclusion of the Commission Report clearly indicates that the lack of adequate mechanisms of collective redress amounts to denial of justice and accountability in practice:

Without a clear, fair, transparent, and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often prone to potential abuse negatively affecting both parties to the dispute. In many instances affected persons who are unable to join forces in order to seek a redress collectively will abandon their justified claims at all, due to excessive burdens of individual proceedings.²⁵³

Notwithstanding sound justifications to advance coherent provisions for collective redress across the EU, it is apparent that the progress which is achievable via non-binding

²⁴⁷ Commission Recommendation (n 241) paras 17 and 18.

²⁴⁸ *ibid* recital 10. See also ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law’ (2013/396/EU) COM/2018/040 final, 1 (Commission Report) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0040:FIN>> accessed 19 December 2019.

²⁴⁹ Riccardo Savona Siemens, ‘Between Sector-Specific and Horizontal: A New Proposal for Ireland’s Implementation of Collective Litigation Mechanisms’ (2018) 17 *Hibernian Law Journal* 93, 100 argues that: ‘(...) it would have been more advisable to develop an intellectually rigorous and commercially sound sectoral collective litigation mechanism first and expand it then horizontally across other areas of law’.

²⁵⁰ Commission Recommendation (n 241) Recitals 24 and 25.

²⁵¹ Commission Report (n 248) 1.

²⁵² *ibid* 3.

²⁵³ *ibid* 19.

recommendations is questionable.²⁵⁴ For instance, as political agreement could not be found at the time of drafting, the Recommendation did not take a clear position on key issues related to cross border cases such as jurisdiction. As a result, the EU Commission merely advised that the existing rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters contained in the Brussels I Regulation (recast) ‘should be fully exploited’.²⁵⁵ It is regrettable that a more determinative approach was not taken by the EU, including appropriate provision for addressing jurisdiction in cross border cases. While the Recommendation is welcome as a starting point, more robust intervention will ultimately be required in order to reduce disparity and fragmentation in collective redress across EU Member States. Until that occurs, the chilling effects on litigation relating to human rights abuses are evident at Member State level. *Jabir v KIK*, the first tort-based business and human rights lawsuit in Germany,²⁵⁶ brought the effect of national procedural laws into focus regarding the financial feasibility of litigation, lack of pretrial discovery, and class actions. Scholars consider the net effect will be to prevent many potentially legitimate cases from ever reaching the trial stage.²⁵⁷ Similarly to Ireland, German law only provides for a joinder of claims based on the same or an essentially identical factual and legal cause.²⁵⁸

6.4.2. Collective Redress in Ireland

As it has no collective redress mechanisms for private actions, Ireland remains outside the 2013 EU Commission Recommendation.²⁵⁹ While the Rules of the Superior Courts (RSC)

²⁵⁴ See Alexandre Biard, ‘Collective Redress in the EU: A Rainbow Behind the Clouds?’ (2018) 19(2) ERA Forum 189, 191 concerning the ‘predictable failure’ of the Recommendation.

²⁵⁵ EU Communication on Collective Redress (n 241) para 3.7.

²⁵⁶ The *KiK* complaint (n 46) was based on Articles 4(1) and 63(1) of (Brussels I Recast) (n 46). *KiK*’s statutory seat is in West Germany. While German procedural law was applicable, the substantive applicable law of the complaint was Pakistani law.

²⁵⁷ See Wesche and Saage-Maaß (n 47) 384 arguing Germany must remove these barriers in its national action plan to comply with the UNGPs access to remedy.

²⁵⁸ *ibid* 381. See also Joanne Blennerhassett, ‘Mass Harm Litigation in Ireland, Multi-Party Actions and Routes to Collective Redress’ *Contemporary Readings in Law and Social Justice* (2018) 10(1) 35, 47 stating: ‘Ultimately Ireland may have no choice but to be persuaded by these EU developments that may help finally make up its mind on [Multi Party Actions]’.

²⁵⁹ (n 241).

allow for representative actions²⁶⁰ and test cases,²⁶¹ neither mechanism is appropriate. Moreover, there is a bar on representative actions in tort.²⁶² While Siemens considers test cases to be the preferred mechanism for litigation involving mass harm in Ireland,²⁶³ they are validly considered to be used in the absence of a structured tool for multi-party cases, and to present multiple drawbacks.²⁶⁴ The assessment of the British Institute of International and Comparative Law (BIICL) is categoric:

The existing mechanisms do not seem to be a replacement to a structured collective redress mechanism. Although these mechanisms can be used as a means to conduct multi-party litigation, they are nevertheless **far from the type of procedure envisaged by the Commission in the 2013 Recommendation.**²⁶⁵

For present purposes, the existing mechanisms are not fit for purpose and require to be replaced. Accordingly, these mechanisms are not explored as a workable option for eventual FDL cases. In 2005 the Irish Law Reform Commission recommended that Ireland alter the RSC in order to provide for multi-party actions (MPAs), in addition to other routes.²⁶⁶ At the launch of the report Denham J, as she then was, criticised the law as ‘too

²⁶⁰ Representative cases under Order 15 rule 9 of the Rules of Superior Courts provides: ‘Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested’ <www.courts.ie/rules.nsf/0/f10c1841df0af07380256d2b0046b3d4> accessed 8 November 2019.

²⁶¹ Joinder and consolidation of cases are also available.

²⁶² Order 5 rule 10 of the Circuit Court Rules 2001 provides: ‘Save in actions founded on tort, when there are numerous persons having the same interest in one action or matter, one or more of such persons may sue or be sued, or may be authorised by the Judge to defend, in such action or matter, on behalf of or for the benefit of all persons so interested’ <www.irishstatutebook.ie/eli/2001/si/510/made/en/print#l1-8> accessed 8 November 2019.

²⁶³ (n 249) 95.

²⁶⁴ BIICL (n 246) 683-684 concluding that the test case system multiplies costs while the representative case model only provides injunctive and declaratory relief. See also Blennerhassett (n 258) 40 stating: ‘These cases are unduly costly and result in procedural inefficiencies as well as unnecessary duplication’ citing *inter alia* *Cotter and McDermott v Minister for Social Welfare and Attorney General No 2* [1991] 1 ECR 1155 and the Army deafness claims.

²⁶⁵ (BIICL) (n 246) 195 (emphasis in original).

²⁶⁶ The Law Reform Commission, Multi-Party Litigation Report (LRC 76-2005) 2.73 (LRC Multi-Party Litigation) recommended changes by means of changes to the Rules of the Superior Courts, as opposed to via primary legislation. This 2005 report followed the Multi-Party Litigation (Class Actions) Consultation Paper

expensive, too slow and too unequal’.²⁶⁷ She argued that, if implemented, the report would contribute to the development of the legal system in Ireland and enable an Irish judge to say ‘to paraphrase Sir James Matthew, “In Ireland, justice is open to all – a Constitutional service of democratic republic.”’²⁶⁸ Despite this exhortation that justice be accessible to all, no related legislation was introduced by the Oireachtas, and the changes to the RSC recommended by the Law Reform Commission were not made. Flowing from this, continued recourse to the existing ‘improvisations’ is validly argued to have resulted in ‘great injustices and inefficiencies’.²⁶⁹ In enabling this procedural gap on collective redress to persist, it is logical to suspect that the Irish State seeks to avoid the cost of the State itself being a defendant in MPAs.²⁷⁰

In 2017 the Multi-Party Actions Bill, a Private Members Bill, was sponsored by Teachtaí Dála (TDs) Donnchadh Ó Laoghaire and Pearse Doherty.²⁷¹ It included many of the recommendations made by the Law Reform Commission in 2005.²⁷² Throughout the debates on the Multi-Party Actions Bill by the Select Committee on Justice and Equality, there is direct reference to the Irish State’s reluctance to introduce collective redress mechanisms for fear of opening the floodgates on claims against it.²⁷³ In the Second Stage Dáil debates, Pearse Doherty TD argued the Bill would deliver a more democratic system, improving access to justice by reducing costs of representation, litigation and

(LRC CP 25-2003). The schema was based; opt-in; the nominated judge shall consider, in particular, whether in the light of the common or related issues of fact or law arising; (a) there are or are likely to be multiple cases giving rise to Multi-Party Action issues, and (b) a Multi-Party Action offers an appropriate, fair and efficient procedure for the resolution of the Multi-Party Action issues. It included draft amendments to the Rules of the Superior Courts, and a draft amendment bill concerning civil legal aid for those eligible.

²⁶⁷ <www.lawreform.ie/fileupload/Speeches/Denham%20JClassActionsReport.pdf> accessed 8 December 2019.

²⁶⁸ *ibid.*

²⁶⁹ Blennerhassett (n 258) 36.

²⁷⁰ *ibid* 45.

²⁷¹ A Private members Bill <www.oireachtas.ie/en/bills/bill/2017/130/> accessed 20 April 2019.

²⁷² LRC Multi-Party Litigation (n 266). See also Deputies Donnchadh Ó Laoghaire Dáil Debates on the Multi-Party Actions Bill <www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/> accessed 20 April 2019; Blennerhassett (n 252), 36.

²⁷³

Dáil	Deb	21	February	2018

<www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2018-02-21/3/?highlight%5B0%5D=multi&highlight%5B1%5D=party&highlight%5B2%5D=actions> accessed 8 November 2019.

duplication.²⁷⁴ The Government opposed the Multi-Party Actions Bill at its second reading, and referred the question of an MPA procedure in the Irish legal system for consideration by Mr. Justice Peter Kelly as part of the review of civil justice administration which is due for publication in late 2020.²⁷⁵ The Review has been on-going since 2017, and is expected to address issues with mechanisms of collective redress.

As it stands, there is a manifest procedural gap in Ireland due to the limitations within in existing mechanisms for collective redress, *inter alia*, the bar in tort in representative actions, add to high costs associated with test cases and restrictions on legal aid or viable alternative means of funding litigation.²⁷⁶ It is noted that scholars argue that MPAs are a ‘remedy of last resort’, and are not the most efficient route to justice.²⁷⁷ While outside the scope of this thesis, it is agreed that alternative mechanisms of achieving redress, *inter alia*, regulatory redress and consumer Ombudsmen should be examined as part of the development of a suite of mechanisms which respond to, and balance, the need for access to justice, efficiency and deterrence of abusive litigation in Ireland.²⁷⁸ In terms of future development, the risk that regulation on collective redress will address only certain sectors of activity is a concern. In 2018 the EU Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers,²⁷⁹ to repeal the Injunctions Directive²⁸⁰ and replace it. While commentators consider such focus by sector is to be expected in that a horizontal compensatory collective redress mechanism was unrealistic,²⁸¹ it is nonetheless disappointing that the EU might not persist in a

²⁷⁴ Dáil Deb 14 November 2014 <www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/> accessed 8 November 2019.

²⁷⁵ Minister of State at the Department of Health Deputy Catherine Byrne Dáil Deb 14 November 2014 <www.oireachtas.ie/en/debates/debate/dail/2017-11-14/35/> accessed 8 November 2019.

²⁷⁶ See generally Blennerhassett (n 258) 51.

²⁷⁷ *ibid* 50.

²⁷⁸ *ibid* 49.

²⁷⁹ European Parliament Resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC ([COM\(2018\)0184](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0184) – C8-0149/2018 – [2018/0089\(COD\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0184)) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0184>> accessed 8 November 2019.

²⁸⁰ Council Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) Text with EEA relevance [2009] L 110/30.

²⁸¹ Biard (n 254) 189 argues this would be perceived as disproportionate and as going against the legal traditions of Member States. Baird criticises the missed opportunity by the EU to address the application of

horizontal approach to collective redress for violations of all rights under EU law. As it stands, Ireland does not have a fit for purpose structured collective redress mechanism, or a relevant structure for cross border cases.²⁸² On balance the non-binding 2013 EU Recommendation is insufficient to progress mechanisms of collective redress across the Member States. Nonetheless, it does indicate a direction of travel and it can be anticipated that the Oireachtas will come under increasing pressure to act to address this situation, from pressure within Ireland, or further intervention by the EU.²⁸³ As it stands, the words of Walsh J continue to resonate thirty years on:

One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the courts (...)²⁸⁴

It is to be hoped that the Review of the Administration of Civil Justice will decisively address improving access to justice and see fit to recommend robust solutions to collective redress which will be acted upon without delay by the Oireachtas.

6.4.2.1. Comparison with the United Kingdom

The vast majority of FDL claims in the EU have been pursued in the English courts.²⁸⁵ The factors driving litigation towards the UK are identified by Meeran as a favourable position concerning *forum non conveniens* and the progressive attitude of the English courts. The additional contributory ‘pull’ factors are decidedly practical, including financial viability influenced by established procedural mechanisms such as class actions, funding options, relatively liberal rules on disclosure and discovery of evidence,²⁸⁶ and damages levels.²⁸⁷

private international rules to cross border cases of mass harm in the 2013 Recommendation, the 2018 Report and also by the CJEU in Case C-498/16 *Schrems v Facebook Ireland Ltd* EU:C:2018:37. The CJEU dismissed an attempt to bring a class action on behalf of 25,000 consumers before the Austrian courts.

²⁸² BIICL (n 246) 680.

²⁸³ Legislative arm of government <www.oireachtas.ie/en/visit-and-learn/how-parliament-works> accessed 19 December 2019.

²⁸⁴ *Society for the Protection of Unborn Children v Coogan* [1989] IR 734,744. The ‘citizen’ as rights holder is discussed in section 6.6.

²⁸⁵ Enneking, ‘Judicial Remedies: applicable law’ (n 60) 43.

²⁸⁶ The rules for disclosure contained in UK CPR 31 require ‘automatic’ disclosure by list of all relevant documents to the disclosing party’s case.

²⁸⁷ Richard Meeran, ‘Access to Remedy: the United Kingdom experience of MNC tort litigation for human rights violations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge 2013) 378, 380.

Whether the Irish courts will prove as progressive as the English courts regarding the principles developed in FDL litigation remains to be seen. However, the disparity in procedural and practical circumstances for litigants between these two neighbouring systems is manifest.

Collective redress is considered well established in the UK and, unlike in Ireland, the available mechanisms are broadly consistent with the [EU] Recommendation'.²⁸⁸ The UK offers an opt-in collective redress mechanism for victims of mass harm, including non-residents,²⁸⁹ to claim injunctive relief and compensatory damages.²⁹⁰ Group litigation orders (GLOs)²⁹¹ may be made where there are a number of claims 'giving rise to common or related' issues of law and fact.²⁹² Significantly, it is a horizontal regime.²⁹³ With GLOs the starting point is that the loser pays, although the court may make a different order.²⁹⁴ It is acknowledged that GLOs may be considered less than ideal in practice on the basis of mixed success for claimants, costs exceeding awards of damages, and the perceived advantages of alternative routes.²⁹⁵ The advantages of complimentary alternative routes has been noted. Notwithstanding, a study by the British Institute of International and

²⁸⁸ UK Civil Procedure Rules 19.11 Parties and Group Litigation (1) provides: 'The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues. (Practice Direction 19B provides the procedure for applying for a GLO)' <www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.11> accessed 19 December 2019. See also BIICL (n 246) 971.

²⁸⁹ *ibid.* See also BIICL (n 246) 964.

²⁹⁰ *ibid.* BIICL 967-968 stating that an award of exemplary damages is considered 'extremely rare' and have not been awarded in collective redress actions. It is possible for claimants to establish the liability of the defendant under the GLO procedure and to claim additional damages in a separate but related action.

²⁹¹ (n 288). The national GLO list can be accessed at <www.gov.uk/guidance/group-litigation-orders>. Siemens (n 249) 101 considers the GLO not as a class action mechanism as originally intended but rather as essentially procedural, 'a wide-ranging case management instrument conceived to maximise efficiency'.

²⁹² A representative action may be brought under UK CPR 19.6 (n 288). The UK CPR does not make express provisions for bringing a test case on a general basis.

²⁹³ Sector specific regimes are also available in UK Competition and Consumer law.

²⁹⁴ UK CPR 44.2 and 46.6 <www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs> accessed 8 November 2019. Costs are separated into the costs relating to the common issues being tried under the GLO and the individual costs for group members with individual claims. The starting point for a costs order in a GLO where the group loses is that each group member is liable for an equal share of the common costs plus the costs relating to his individual issues. The BIICL Report (n 246), 23 notes that courts have applied cost caps to the recoverable amount of the winning party.

²⁹⁵ Blennerhassett (n 258) 45-46.

Comparative Law (BIICL) clearly points to the weight of cross border claimants in proceedings in the UK. In its survey, 40% of the UK practitioners interviewed stated that over 90% of their cases included a cross border element of some type.²⁹⁶ For present purposes, the crux of the matter is the manifestly positive impact of the availability of a functioning collective redress mechanism on access to justice, and the preponderance of litigation within it which includes a cross border element in practice.

6.4.3. Funding of Litigation in the United Kingdom

Sources of funding for litigation are a *sine qua non* of access to justice. Throughout the cases examined in chapter 4 it is apparent that innovative solutions to funding were leveraged to sustain access to justice. The early cases concerning parent company liability such as *Connelly*²⁹⁷ and *Lubbe*²⁹⁸ were funded by legal aid. Beyond 2000 legal aid was no longer available.²⁹⁹ Under the Access to Justice Act 1999,³⁰⁰ After the Event (ATE) insurance and conditional fee arrangements ('no win, no fee') were introduced in England and Wales, enabling FDL litigation to be funded via cost recovery from the defendant.³⁰¹ Subsequently, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) negatively impacted access to justice, particularly in claims relating to environmental damage.³⁰² This situation is exacerbated by the operation of provisions on damages under EU Regulation No 864/2007 on the law applicable to non-contractual obligations³⁰³ (Rome

²⁹⁶ BIICL (n 246) 267 noting the extra effort and additional costs entailed in identifying class members who may not be resident in the jurisdiction as well as the risk of inconsistent judgments arising out of parallel proceedings.

²⁹⁷ *Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1998] AC 854, [1997] 4 All ER 335, [1997] 3 WLR 373.

²⁹⁸ *Lubbe v Cape Plc* [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL).

²⁹⁹ BIICL (n 246) 363.

³⁰⁰ Part II <www.legislation.gov.uk/ukpga/1999/22/contents> accessed 8 November 2019

³⁰¹ LRC Multi-Party Litigation (n 266) section 3.59. Conditional fee arrangements relate to an uplift in lawyers' fees, and not as in the US to a percentage of the award received by the client or group of clients

³⁰² See *Meeran* (n 287) 381 illustrating that; 'success fees will no longer be recoverable from the losing party and will be deducted from the claimant's recoverable damages; in personal injury cases the lawyers' success fee must not exceed 25 percent of the damages, excluding damages for future care and loss; costs should not generally exceed the amount recovered, and if legal costs do exceed the successful claimant's lawyers will recover only a proportion of their costs; ATE insurance policies taken by the claimant will no longer be recoverable from a losing defendant.'

³⁰³ [2007] OJ L 199.

II).³⁰⁴ However, third party funding is possible as the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty in England and Wales. Without such restrictions on third party funding, litigators can access investors who are willing to fund litigation based on commercial return on investment criteria. Although Rome II continues to impact, this method is still considered viable in large cases.³⁰⁵ The benefits on access to justice are evident. The BIICL Report concluded that respondents rated the availability of such funding as a key factor in the decision to participate in collective proceedings.³⁰⁶ By comparison regarding Ireland, the BIICL report highlights the lack of available funding which, irrespective of the availability of a functioning system of collective redress, impacts victims' power to bring group claims. In a stark verdict, two thirds of survey respondents indicated that 'the current prohibition on third-party funding presents a significant barrier to bringing collective claims in Ireland' and should be revisited.³⁰⁷

Moreover, the BIICL survey also indicated that the general view of the approach to third party funding in the UK was favourable. Although minor concerns were raised regarding regulation and control,³⁰⁸ it is significant that no major practical problems are apparent with the functioning of the system.³⁰⁹ Allied to this, the EU Recommendation is clear that private third-party financing is actively used in several EU Member States. Further, the Report of the EU Commission identifies that such funding has an important cross-border dimension.³¹⁰

6.4.4. Funding of Litigation in Ireland

In practical terms, even if a fit for purpose MPA procedure was available in Ireland, victims of mass harms would remain unable to access justice unless the rules on litigation funding

³⁰⁴ Meeran (n 287) 397. The effects of Rome II are discussed in chapter 3 section 3.7.

³⁰⁵ Interview with Richard Meeran, Leigh Day (London 17 September 2018).

³⁰⁶ BIICL (n 246) 272.

³⁰⁷ *ibid* 195.

³⁰⁸ *ibid* 19.

³⁰⁹ *ibid* 269 indicating that none of the respondents to the survey had any experience of an organisation attempting to fund a claim against a competitor. None of the respondents had had an experience where a funder had overtly attempted to control the litigation although one lawyer described a situation where a funder had withdrawn funding part way through the claim leading to a premature settlement of the case.

³¹⁰ Commission Report (n 248) 10.

are reformed. The BIICL report clearly identifies that the Irish position regarding third party funding directly impedes access to justice:

(...) the Irish system is not very favourable in terms of third-party funding in general.... Because multi-party litigations usually entail a heavy financial burden the lack of possibility to fund it would usually prevent initiation of such proceedings.³¹¹

In Ireland costs generally follow the event, with an unsuccessful party running the risk of the double financial burden.³¹² Further, civil legal aid is specifically excluded for test cases and in representative actions under Section 28(9)(a)(ix) of the Civil Legal Aid Act 1995. The wording of the 1995 Act is also interpreted to prohibit the provision of legal aid in Multi-Party litigation.³¹³ Conditional Fee Arrangements (CFAs) are permitted for the deferral of legal fees, but contingency fees relating to a proportion or percentage of awards are not legal.³¹⁴ ATE insurance appears to be a legitimate means of third-party funding litigation in Ireland, and a search indicates it is commercially available in Ireland.³¹⁵ In *Greenclean Waste Management Ltd v Leahy*, the Court of Appeal overturned a High Court ruling that the insolvent plaintiff's ATE insurance could effectively substitute security for costs.³¹⁶ However, the comments of Hogan J in the High Court in this case are nonetheless pertinent.³¹⁷ In his view, the ATE policy was not champertous. Further, he expressed the view that ATE insurance is a legitimate service, which facilitates 'access to justice for

³¹¹ BIICL (n 246) 685.

³¹² Under the general rules set out in Court Order 99 of the RSC 1986 <www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a55af2a6669ec72180256d2b0046b408> accessed 19 April 2019. See also Blennerhassett (n 258), 43 stating this is not a statutory requirement, leaving discretion to the judge in the case, and that the standard rule of costs follow the event does not apply for certain environmental cases.

³¹³ FLAC 'Submission on the Multi Party Actions Bill to the Select Committee on Justice and Equality, (February 2018 <www.pila.ie/download/pdf/submission_to_joc_mpa_bill_2017.pdf> accessed 20 April 2019. The LRC Multi-Party Litigation (n 266) para. 3.49 recommended that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible group member for his or her proportion of any eventual costs order.

³¹⁴ Blennerhassett (n 258) 43.

³¹⁵ Inter alia <<http://legalprotectiongroup.ie/ate>> accessed 20 April 2019; <<http://claimfinance.ie/ate-insurance/>>; <<https://www.mig.ie/complete-business-legal-protection>> accessed 20 April 2019.

³¹⁶ [2015] IECA 97 (CA).

³¹⁷ *Greenclean Waste Management Limited v Maurice Leahy* (2014) IEHC 31 (HC).

persons and entities who might otherwise be denied this’.³¹⁸ As he emphasised, access to justice is ‘a constitutional fundamental’.³¹⁹ If legal, third party funding from professional investors could be accessed, for example from the Association of Litigation Funders (ALF)³²⁰ including the Harbour Funds (Harbour).³²¹ Harbour was involved as a prospective funder in the first case to come before the Irish Supreme Court concerning the use of a third-party professional funding agreement to support a party in litigation.³²² Harbour agreed, subject to court approval, to fund *Persona* and *Sigma* in High Court. After the High Court dismissed *Persona* and *Sigma*’s motion for approval of this funding,³²³ the Supreme Court granted leave to determine whether third party funding, which is provided during the

³¹⁸ *ibid* [27].

³¹⁹ *ibid* [23]. See also *Society for the Protection of Unborn Children v Coogan* (n 284); *YY -v- Minister for Justice and Equality No.1* (Humphreys J) [64] stating: ‘In the light of such considerations it seems to me that that the right to an effective remedy, involving independent review of a legally cognisable complaint, should be recognised as an unenumerated right under Article 40.3 of the Constitution’.

³²⁰ The Code of Practice of the Association of Litigation Funders <<http://associationoflitigationfunders.com/>> accessed 20 December 2019.

³²¹ Harbour is also active in the UK and was specifically named by Meeran ‘Interview’ (n 305). See Harbour Litigation Funding <www.harbourlitigationfunding.com/> accessed 20 December 2019. The following solutions are offered; Financing, allowing a claimant with insufficient funds to pursue a solid claim via litigation or arbitration; Hedging, claimants who can afford to fund their dispute but want to eliminate the risk, or they want to lay off the costs exposure so they can use their capital elsewhere; ATE insurance: protection from opponent cost awards in the event of an adverse outcome, through bespoke insurance; Security for costs. The website states: ‘If the case is won and monies received, we take our pre-agreed share of the proceeds. If the case is lost, the loss is Harbour’s – not the claimant’s. Harbour does not control the legal team running a claim or discussing settlement. We also offer access to a competitively priced, bespoke ATE insurance facility’.

³²² <www.harbourlitigationfunding.com/supreme-court-decides-tpf-ireland/> accessed 20 December 2019.

³²³ *Persona Digital Telephony Limited Sigma Wireless Networks Limited v The Minister for Public Enterprise Ireland and The Attorney General and Denis O’Brien and Michael Lowry* [2016] IEHC 187 (Donnelly J) [86]-[87] (*Persona* HC) stating: ‘It is important to recall that... the Court has not been asked to examine the constitutionality of the offences and torts of maintenance and champerty and no declaration of unconstitutionality has been sought.... It is the view of this Court that Harbour III L.P., as a professional third-party litigation funder, has no independent interest in this present litigation. Furthermore, it is clear that third party funding arrangements cannot be viewed as being consistent with public policy in this jurisdiction or that modern ideas of propriety in litigation have expanded to such an extent to afford this Court the opportunity to characterise this funding arrangement as acceptable <www.courts.ie/Judgments.nsf/WebJudgmentsByYearAll/30B4F1EEAAF5D9A480258129003925FE?openDocument> accessed 22 July 2019.

course of proceedings rather than when initiated, in order to provide support to a plaintiff who would be otherwise unable to proceed with a case ‘of immense public importance’, is unlawful by reason of the rules on maintenance and champerty.³²⁴ In the course of the pleadings the plaintiffs stressed the high public interest in the proceedings advancing to trial, emphasising that the case would be unable to continue without such funding. Further, that Harbour is a reputable funder which is active in many jurisdictions, and that there was no credible basis to believe that its involvement via funding would undermine the administration of justice. To the contrary, they argued that by permitting the plaintiffs to avail of the funding both access to, and the administration of, justice would be enhanced.³²⁵

The judgments of the Supreme Court in *Persona* are significant in several respects. Firstly, Denham CJ noted that the case was not taken as a constitutional challenge, and expressed the view that the appropriate manner to consider the issues would be for the Law Reform Commission to address it, as a prelude to legislation.³²⁶ Chief Justice Denham acknowledged that Ireland’s position in international trade could well justify reconsideration of the law concerning champerty, but equally that it is a ‘complex multifaceted issue more suited to a full legislative analysis’.³²⁷ She found support³²⁸ in the existing Law Reform Commission recommendation that the fundamental importance of access to justice would merit considering the introduction of legislation in order to enable third party funding of litigation by parties with a legitimate interest in the proceedings.³²⁹

Secondly, addressing the constitutional right to access to the courts, Clarke J considered there was at least an arguable case that ‘the constitutional right of access to the court may include an entitlement that that right be effective, not just as a matter of law and form, but also in practice’. Further, he stated that impediments to the exercise of that right ‘could lead

³²⁴ *Persona Digital Telephony Limited Sigma Wireless Networks Limited v The Minister for Public Enterprise Ireland and The Attorney General and Denis O’Brien and Michael Lowry (Persona SC)* [2017] IESC 27. Denham CJ, McKechnie J (dissenting), Clarke J, MacMenamin J, Dunne J.

³²⁵ *ibid* (Denham CJ) [18].

³²⁶ *ibid* [54 (v)-(vi)]. The State submitted that the funding agreement was void for illegality, and that the plaintiffs were asking the Court to vary the scope of the offences and torts of maintenance and champerty, which was not within the jurisdiction of the Court. Denham CJ, paras 8 and 9.

³²⁷ *ibid*.

³²⁸ *ibid* [52].

³²⁹ Law Reform Commission, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016) para 6.33.

to the Court altering the parameters of the law of champerty.³³⁰ In agreement, McKechnie stated that the right of access to the court must be effective and capable of being exercised.³³¹ It was acknowledged by the Court, notably in the judgment of Clarke J, that there are multiple policy issues involved including limited resources and potential increased cost to the taxpayer. It is also apparent that a constitutional challenge to the right of access to a court may be required in order to progress.³³² A majority of 4-1 of the Supreme Court, McKechnie J dissenting, dismissed the appeal, upholding maintenance and champerty and the strict prohibition on third party litigation funding.³³³ The Court ruled that Harbour had no connection to the plaintiff and no *bona fide* independent interest in the proceedings, *ergo* the funding was unlawful.³³⁴

The constitutional right to access to a court to vindicate a legal right is one of the personal rights under Article 40.3° of the Irish Constitution.³³⁵ Should the Oireachtas persist in failing to vindicating the right to access to the courts in practice, the indications are that the courts may potentially intercede.³³⁶ This possibility was reiterated by Chief Justice Clarke in his judgment for the Supreme Court in *SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, Optimal Investment Services, SA and Banco Santander SA*.³³⁷ Acknowledging the ‘significant and, arguably, increasing problem with access to justice’,³³⁸ he repeated the view he expressed

³³⁰ *Persona* (SC) (n 324) (Clarke J) [2.6], [2.8]-[2.9].

³³¹ *ibid* [36].

³³² *ibid* (Clarke J) [2.8]-[4.4].

³³³ *ibid* Denham CJ defined Maintenance as ‘the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share of the litigation succeeds’.

³³⁴ *ibid* [54 (iii)]. The court distinguished the case from the decision in *Thema International Fund v HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 IR 654, in which the courts considered that a party with a legitimate interest in the litigation, such as a creditor or shareholder, could legitimately fund the litigation.

³³⁵ *Persona* (SC) (n 324) (McKechnie J) [39] citing *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358.

³³⁶ *Persona* (SC) (n 324) (McKechnie J) [48] stating ‘as the ultimate guardians of the Constitution have whatever powers are necessary to uphold and give effect to the personal rights guaranteed thereunder, including, inter alia, the right of access to the courts’.

³³⁷ [2018] IESC 44 with which O’Donnell J., McKechnie J., Dunne J., and Finlay Geoghegan J agreed.

³³⁸ *ibid* [2.1].

in *Persona*, that the courts may have no other option but to intervene ‘if no real effort was being made on the part of the legislature’ to address this issue.³³⁹

At the base of arguments against permitting third party funding are concerns over abuse of process, particularly unless regulated by the legislature.³⁴⁰ Comparative data indicates such concerns are overplayed. As the BIICL concluded, although there is no overarching system of regulation of third-party funding in the UK, there is evidently reason to have confidence in the pragmatism of the courts, and no cause for scaremongering.³⁴¹ Should further comfort be deemed necessary in Ireland, in agreement with Biehler, any concerns could simply be accommodated via court procedures.³⁴² In some instances, the compelling case for access to sources of fund litigation is countered with narratives concerning aggressive law firms. As concerns FDL litigation, it has been illustrated that these cases are complex and costly to litigate, frequently involving tens of thousands of claimants in distant countries, with attendant difficulties of collecting evidence, language barriers and other practical issues.³⁴³ Consequently, even as litigation of this nature becomes more established, costs remain relatively high yet awards of compensation by the courts are hardly existent. Specialist firms operating in this area face the challenges of funding of such cases for years, indeed often decades, within a developing area of law which has led to settlements but not one significant ruling on the merits. In short, significant practical assistance is required to sustain access to justice.

Without effective means of funding litigation, the constitutional right of access to the courts is not ‘effective in practice’.³⁴⁴ In the absence of legal aid, third party funding with appropriate checks and balances is required to enable access to justice. There is a marked disconnect between practical mechanisms supporting access to justice in Ireland, and in its closet common law neighbour the UK. The barrier constituted by practical circumstances in Ireland is stark and unjustifiable, particularly in light of the constitutional right to access

³³⁹ *ibid* [6].

³⁴⁰ Discussed in section 6.4.4.

³⁴¹ BIICL (n 246).

³⁴² Hilary Biehler, ‘Case Comment Maintenance and champerty and access to justice - the saga continues’ (2018) 59 *Irish Jurist* 130, 138.

³⁴³ While disclosure will have a high impact on the success of an action, the practical process of evidence gathering is more difficult and costly, due to language/local dialect, distance, time.

³⁴⁴ *Persona* (SC) (n 324) [2.6].

to the courts. Further, in addition to own Constitution and Article 6 ECHR, reducing barriers to and ensuring effective access to justice for human rights violations by business is advocated: in the UNGPs,³⁴⁵ the EU Fundamental Rights Agency Opinion,³⁴⁶ by the Committee of Ministers of the Council of Europe in its 2016 Recommendation on human rights and business to Member States;³⁴⁷ by the United Nations Office of the High Commissioner for Human Rights in its Accountability and Remedy Project;³⁴⁸ UN CESCR,³⁴⁹ and consistently by the EU Economic and Social Committee.³⁵⁰

To place the need to promote access to justice in context, a 2014 study by IPIS found that over half of the companies listed on the UK FTSE 100, France's CAC 40 and the German DAX 30 have been identified in allegations or concerns regarding adverse human rights impacts.³⁵¹ Using German discount retailer KIK as an example, a fire in a textile factory producing goods for KIK in Pakistan in 2012 resulted in the death of over 260 workers. The building had no fire alarms, no emergency exits, and no fire extinguishers. A case against KIK in Germany alleged it had breached its duty of care to ensure its supplier in

³⁴⁵ UNGPs (n 12).

³⁴⁶ Fundamental Rights Agency Opinion (1/2017), 'Improving access to remedy in the area of business and human rights at the EU level' stating: 'Procedural rules need to allow for collective redress, as well as representative action in business and human rights-related cases' <<http://fra.europa.eu/en/opinion/2017/business-human-rights>>

³⁴⁷ Council of Europe Recommendation CM/Rec(2016)3 <<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>> accessed 8 November 2019.

³⁴⁸ UNOHCHR 'Improving accountability and access to remedy for victims of business-related human rights abuse', 15.3. stating: 'Rules of civil procedure [should] provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses'. <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf> accessed 22 December 2019.

³⁴⁹ (n 103) para 32.

³⁵⁰ European Economic and Social Committee Opinion 2014/C 170/11 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AAOJ.C.2014.170.01.0068.01.ENG>>. See also ECCJ, 'EU Law for Collective Redress: Case for the environment, human rights and fair competition' <http://corporatejustice.org/eccj_eu_law_for_collective_redress_position-paper2017.pdf> accessed 22 December 2019.

³⁵¹ IPIS, 'The Adverse Human Rights Risks and Impacts of European Companies: Getting a glimpse of the picture' <http://corporatejustice.org/documents/ahrri_report_final-2.pdf> accessed 22 December 2019.

Pakistan had adequate fire safety measures in place.³⁵² A small number of claimants were granted legal aid but the remaining 400 survivors and relatives were outside the statute of limitations, and the case was ultimately dismissed.³⁵³

It has been illustrated that the lack of provision for collective actions, and restrictions on sources of funding for litigation place Ireland squarely outside compliance with the EU Commission Recommendation on collective redress, five years after its principles were due to be implemented.³⁵⁴ Solutions to progress this situation have been long advocated by the Irish Law Reform Commission, as well as iterated and reiterated by the Irish Supreme Court. Notwithstanding, the Government declined to support the 2017 Multi-Party Actions Bill. While the Review of Civil Administration is on-going, it may conceivably take years before legislation to allow MPAs and enable funding are introduced, if the matter is left to the executive branch. Alternatively, either solutions will be imposed by the EU, or the Irish judiciary will intervene to vindicate rights to access to justice under the Irish Constitution.

It is recommended that the Oireachtas legislate for collective redress following the model of GLOs in the UK and other mechanisms noted above.³⁵⁵ As part of this, as is the case in the UK, sector specific regimes covering consumer or competition litigation may be adopted to compliment a general regime. It would be regrettable were the Oireachtas to bypass horizontal provisions, and limit development to the sphere of consumer protection. Collective redress must, of necessity, be linked to opening avenues to fund litigation. This should be linked to the repeal of laws in order to permit third-party funding of litigation on a non-recourse investment basis, and designed in accordance with the recommendations of the Law Reform Commission.³⁵⁶

³⁵² Wesche and Saage-Maaß (n 47). Concerning independent contractors, see also Alison Silink and Desmond Ryan, ‘Vicarious Liability for Independent Contractors’ (2018) 77(3) Cambridge Law Journal 458.

³⁵³ Discussed in chapter 5 section 5.5.7. See further Christopher Patx, ‘Consumer is King? Of class actions and who matters in EU law: The European Commission proposes that consumers should be able to take class actions in future, in the wake of the VW Dieselpgate scandal. But it has forgotten other victims of corporate harm’. <www.opendemocracy.net/en/openjustice/consumer-is-king-of-class-actions-and-who-matters-in-eu-law/> accessed 8 November 2019.

³⁵⁴ (n 241).

³⁵⁵ See also Blennerhasset (n 258).

³⁵⁶ (n 266).

6.5. SYNTHESIS: FDL LITIGATION IN IRELAND

In the crucial battle to ground jurisdiction, the elements required under English and Irish national civil procedure rules and related jurisprudence are markedly similar. Concerning applicable law, adopting the approach applied by the UK Supreme Court in *Vedanta*,³⁵⁷ if it is arguable in English law, it can reasonably be expected to be arguable in Irish law.³⁵⁸

The applicant must convince the court they have a ‘good cause of action’, and the court must consider that Ireland is ‘a convenient forum to hear and determine the matter’.³⁵⁹ The legal principles established in *Chandler* represent crucial markers in the process of development of legal principles. These carried through in subsequent cases in the English courts, until the clarifications introduced by the UK Supreme Court in *Vedanta*. As discussed concerning FDL litigation in Ireland, the position the Irish courts may adopt is unknown, and discussion of the *Caparo* test remains potentially relevant. The analysis presented supports that, consistent with the interpretation of the UK Supreme Court in *Vedanta*,³⁶⁰ Irish courts will consider parent company duty of care as coherent with the circumstances in which a third party may be liable for the actions of another in *Dorset*. Thus, it is arguable that on balance the Irish courts would not find it appropriate to engage in the analysis of whether parent company duty of care is an extension, involving assessment according to a *Glencar* test, but would take that view that parent company comes under the principles flowing from *Dorset*. Recalling also that the Irish courts would be considering an FDL case within a context of ever increasing awareness of the negative impacts of business on human rights, norms under international standards, and related obligations of states obligations international human rights treaties.

In its summary assessment of whether an arguable case a duty of care is owed, it is anticipated that the Irish courts will focus on control as relevant to establishing proximity.³⁶¹ As outlined, the claims against the parent and subsidiary need not be the same, once the subsidiary has been properly served as a ‘necessary and proper party’ to

³⁵⁷ *Vedanta* (CA) (n 50) [91].

³⁵⁸ See chapter 5 section 5.5.

³⁵⁹ Delany and McGrath (n 64) 1-25.

³⁶⁰ (n 59) (Briggs LJ) [54]. At [60] the court rejected the view it necessitate supplemental analysis to extend the existing categories of negligence. Discussed in chapter 5 section 5.3.2.1.

³⁶¹ Discussed in section 6.3.6.3.

proceedings.³⁶² It is also apparent from Irish jurisprudence that ‘any significant element [of the tort] within the jurisdiction’ meets the threshold.³⁶³ On balance it is reasonable to assume that the Irish courts would hesitate to preclude further exploration of the issues of law and fact during a hearing on the merits.

It is not expected that the Irish courts would consider the parent-subsidary relationship evidence of control *per se*.³⁶⁴ The Irish courts may, at a minimum follow the *Chandler* indicia,³⁶⁵ or adopt the more progressive stance of the UK Supreme Court in *Vedanta*,³⁶⁶ including assessing evidence of intervention by the parent company with its subsidiary in areas such as training, supervision, and enforcement of corporate group policies in relevant areas. It is advocated that the court consider holding parent companies accountable for public statements regarding supervision or control over its subsidiaries, yet failure to do so impacting third parties.³⁶⁷ On balance, it is considered unlikely that Irish courts would invoke grounds of public policy to restrict a duty of care in FDL litigation.

It will be for the courts to weigh the factors connecting the proceedings with Ireland and with the alternative jurisdiction, and the competing interests of the parties regarding each jurisdiction. As the question of whether access to justice is available in the alternative forum has weighed heavily in comparative jurisprudence, it is to be anticipated that the Irish courts would also be engaged on this issue. It is to be anticipated that the burden would be on the claimants to convince the court that there is a real risk they will not obtain substantial justice the alternative jurisdiction, for example, related to the availability of funding or expertise affecting their ability to establish causation.³⁶⁸ It is arguable that the Irish courts would adopt the ‘but for’ approach of the UK Supreme Court. Combined, and as supportive of an evolving approach, it is contended that Irish courts may go further than English courts, and

³⁶² Discussed in section 6.3.2.2.

³⁶³ Discussed in section 6.3.

³⁶⁴ *Chandler* (n 186) (Arden LJ) [69] discussed in chapter 5 section 5.2.

³⁶⁵ *ibid* [80] stating: ‘The business of the parent and subsidiary are in a relevant respect the same; The parent has, or ought to have, superior knowledge on some relevant aspect of Health & Safety in a particular industry; The subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; The parent knew, or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employees’ protection’.

³⁶⁶ *Vedanta* (SC) (n 59) (Briggs LJ) [56] discussed in chapter 4 section 4.5.3. and section 5.3.6.3.

³⁶⁷ Discussed in section 5.3.2.3.

³⁶⁸ *Vedanta* (SC) (n 59) (Briggs LJ) [56] discussed in section 5.3.5.

in determining jurisdiction in FDL cases may consider the nature of the rights affected and the wider impact of public concern for human rights, as for the environment. It was acknowledged that EU domiciled parent companies of multinational corporations may be motivated to submit to a foreign jurisdiction before, or concurrently with, the *ex parte* determination of jurisdiction, arguably resulting in the EU forum declining jurisdiction all other things being equal, and absent concerns about access to justice in the alternative forum.

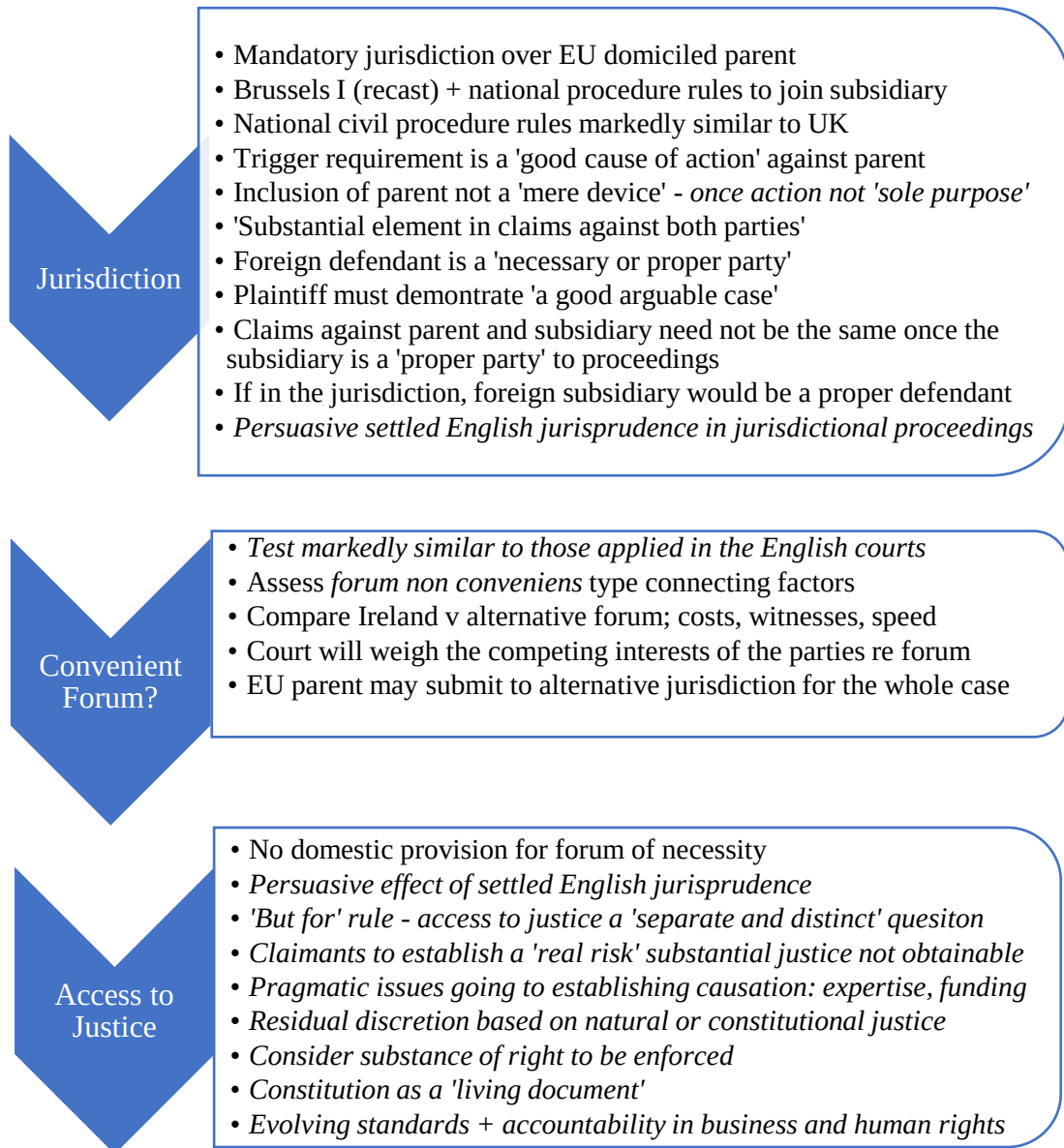
The significant practical barriers to claimants in an FDL case in Ireland were presented. As it stands for FDL litigation, there is no fit for purpose mechanism of collective redress, and no means to fund such cases via civil legal aid or alternative market based means. Unless the forthcoming Review of Civil Administration ushers in fundamental changes, access to justice will remain unobtainable in practice.

A model for adjudication of FDL cases in Ireland is presented. It represents a quick reference synthesis of the parameters impacting the feasibility of such litigation: the interaction of EU provisions with rules of civil procedure concerning the crucial issue of grounding jurisdiction; parent company duty of care under the tort of negligence; applicable law; and the impact of practical circumstances in Ireland. It follows from the fact no FDL case has presented, and that there are no judgments on the merits in EU common law jurisdictions that projection is required. Where gaps present, approaches are proposed based on precedent from comparative jurisprudence, primarily of the English courts, with IHRL providing normative guidance. As explored further in section 6.7, in this context the bright line differentiating factor between the UK and Ireland is the influence of the Irish Constitution.

6.6. MODEL FOR ADJUDICATING FDL CASES: IRELAND

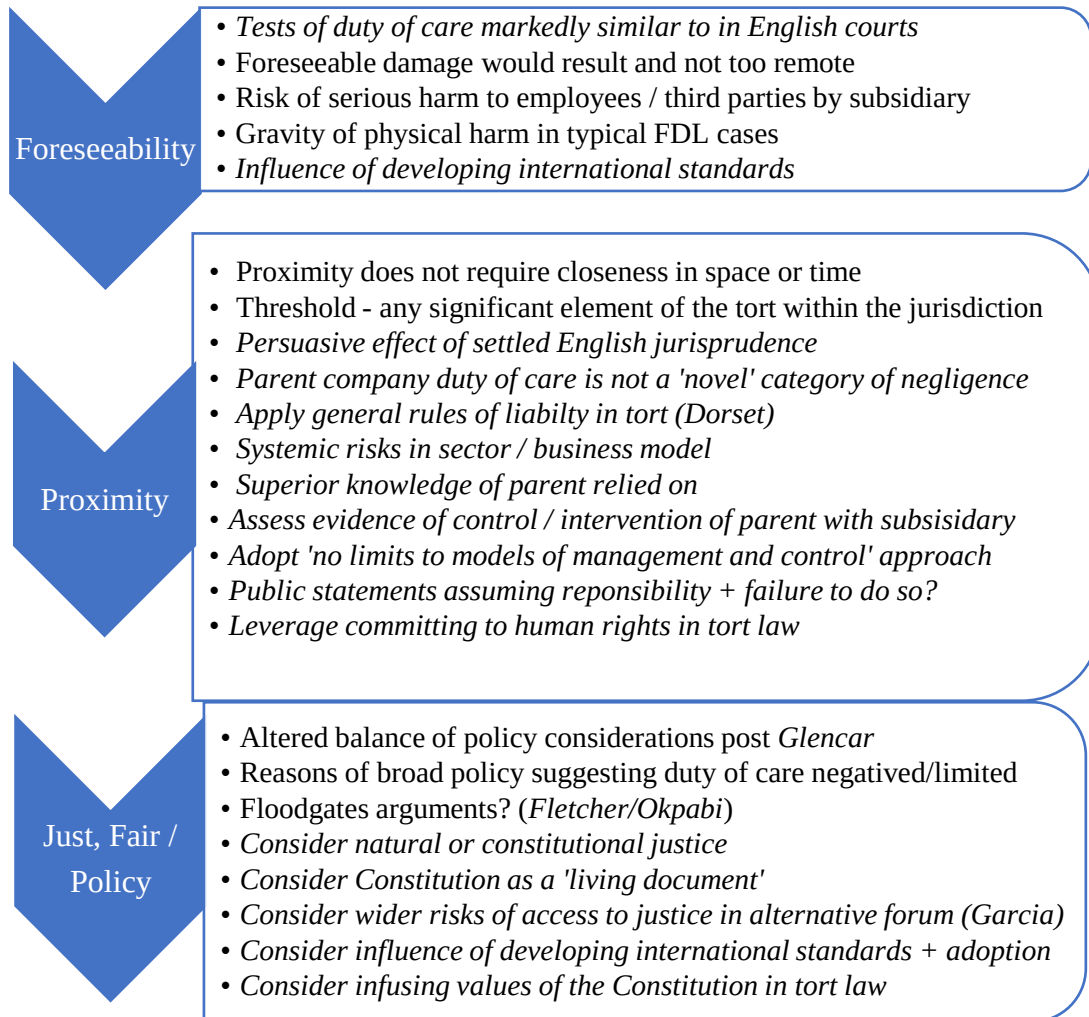
6.6.1. Jurisdiction

Advocated leading approaches are presented in italics.



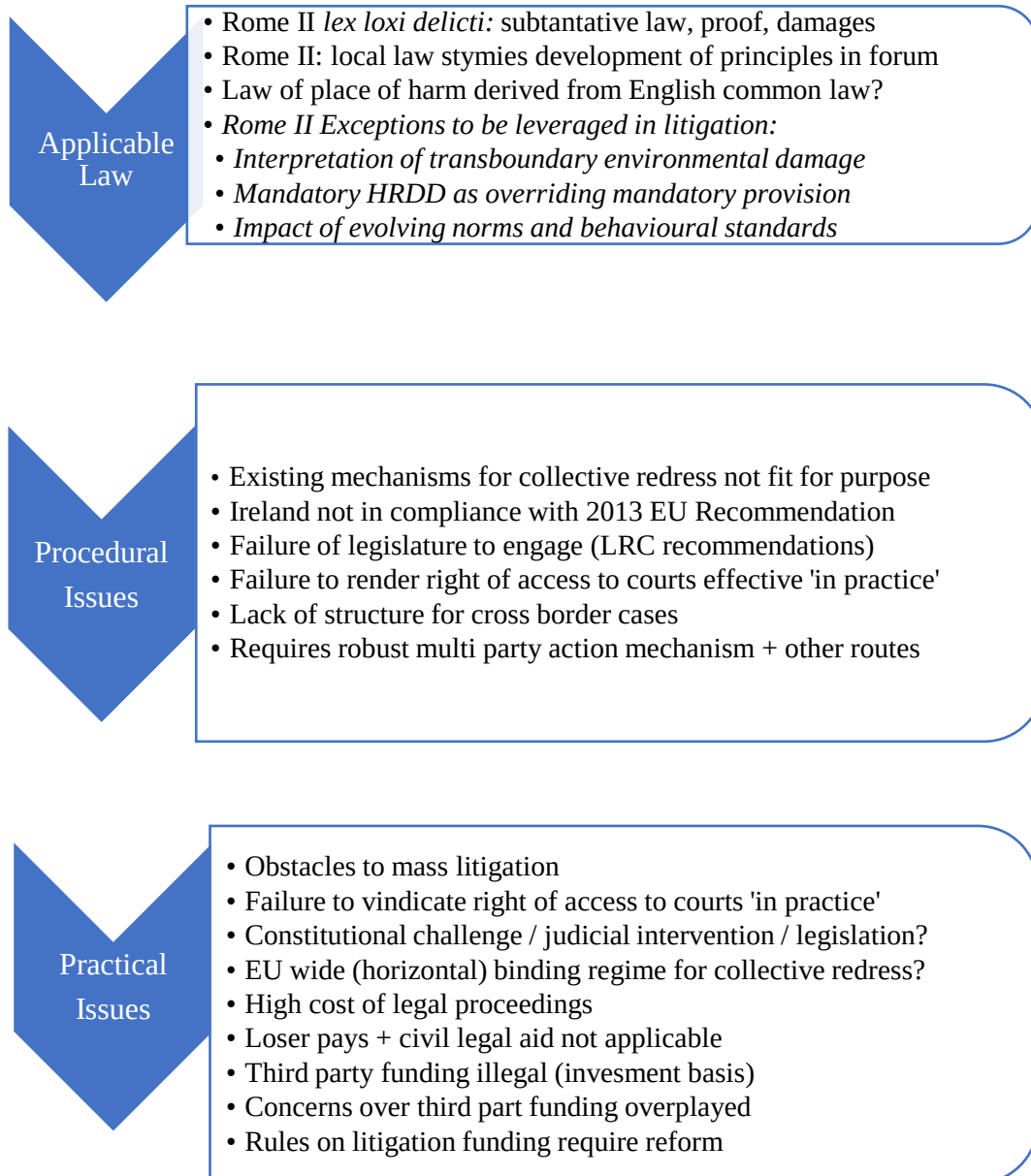
6.6.2. An Arguable Case a Duty of Care is Owed

Advocated leading approaches are presented in italics.



6.6.3. Applicable Law, Procedural and Practical Aspects

Advocated leading approaches are presented in italics.



6.7. INFRINGEMENT OF A CONSTITUTIONAL RIGHT

While tort neither draws directly on nor is framed in language of human rights, tort law is:

(...) a pivotal protector of human rights since time immemorial.... Tort law and human rights law are complimentary. In fact, they are brothers in arms.³⁶⁹

6.7.1. The Irish Constitution, Tort, and Human Rights

Aiming at insights into the interrelationship between the Irish Constitution, tort law and eventual FDL cases, this section focuses on two notable premises raised by Wright.³⁷⁰ The first is that in the absence of a constitutional remedy, it is frequently tort that will provide the best fit in terms of remedy. From this position, in Ireland where a constitutional remedy in principle exists, why would tort be the presumptive vehicle for vindicating constitutional rights and not the other way around?³⁷¹ Incisively, Binchy comments that the Irish courts have ‘struggled with the task of managing the constitutional and traditional tort trains on parallel tracks and overwhelmingly given priority to tort’.³⁷² Indeed, although the Irish courts have not repudiated the principle of a remedy for infringement of a constitutional right developed in *Meskeil v CIE*,³⁷³ the pruning administered in *Hanrahan v Merck Sharp and Dohme*³⁷⁴ and onwards³⁷⁵ begs questions. In particular, why preclude availability to a constitutional remedy to when existing torts prove ineffective, yet not engage to shape a tort system to effectively vindicate constitutional rights?

To coral actions into tort is defensible only if and when tort effectively vindicates constitutional rights. This leads to the second premise raised by Wright, that tort law may be shaped to ensure human rights obligations are accommodated.³⁷⁶ At this juncture it is worth emphasising the interrelationship between human rights, the Constitution, and tort.

³⁶⁹ Cees van Dam, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 JETL 254.

³⁷⁰ Jane Wright, *Tort Law & Human Rights* (Hart Publishing 2017), 17.

³⁷¹ MacMahon and Binchy (n 93) 6.05 citing *Grant v Roche Products* (n 240) (Hardiman J) stating: ‘There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights (...)’

³⁷² Binchy, ‘Tort Law in Ireland: A Half Century Review’ (n 176) 202.

³⁷³ *Meskeil v CIE (Meskeil)* [1993] IR 121.

³⁷⁴ (n 181).

³⁷⁵ *W v Ireland (No 2)* [1997] 2 IR 141 (Costello J) [164] (HC); *McDonnell v Ireland* [1998] 1 IR 134.

³⁷⁶ Wright (n 370) 17.

Scholars consider that the Irish Constitution ‘continues to dominate the space in which legal advocacy and judicial thinking is concerned with human rights’,³⁷⁷ and that ‘central to our understanding of the aims of [Irish] tort law is the Constitution’.³⁷⁸ Thus, the question is primarily how fundamental rights and the values of society as reflected in the Constitution, as opposed to IHRL, permeate into tort law in Ireland. Are Irish courts shaping tort law to accommodate these guarantees and values and if not, why not? In particular when new issues present, such as in FDL litigation, it is desirable that the norms and values in the Irish Constitution should be brought to bear in developing legal principles.

The Irish Constitution is based on natural law philosophy³⁷⁹ whereby, parallel with the normative underpinnings of human rights, rights inhere in people by virtue of their humanity.³⁸⁰ A second thread relies either on ‘the textual protection of the “person” in Article 40.3° or the Preamble’s focus on the “dignity and freedom of the individual” to adopt expansive readings of constitutional rights’. As commentators highlight, ‘only time will tell if these concepts might fill the place of the natural law in a new innovative body of rights jurisprudence’.³⁸¹ Possible implications for FDL cases flowing from this are discussed further below. Of particular interest is Article 40.3.1°³⁸² under which the Irish courts have identified unenumerated (i.e. unwritten) rights including typical ‘human rights’ such as the right to bodily integrity³⁸³ and freedom from torture and inhuman and degrading

³⁷⁷ Egan (n 26) 1.03. Discussed in section 6.2.

³⁷⁸ Binchy ‘Tort Law in Ireland’ (n 176) 2.

³⁷⁹ For example, *McGee v Attorney General* [1974] IR 284 (Walsh J), 310; 317–318; See also Oran Doyle, *Constitutional Law: Text Cases and Materials* (Clarus Press 2008) Chapter 4. II.

³⁸⁰ Hogan, Whyte, Kenny and Walsh (n 4) Chapter 7 for discussion of the sources and interpretations and future directions. For example, 7.1.26 stating: ‘The landmark Abortion Information Bill decision can be seen as a decisive move towards a positivistic understanding of the Irish constitutional order, with significant consequences for the subsequent development of Irish constitutional law’. MacMahon and Binchy, (n 153) 1.114 stating: ‘They are not the gifts of a positive legal system that are conferred from above by the State on its subjects. These rights, on this approach, predated the promulgation of the Constitution, which recognised rather than created them’.

³⁸¹ Hogan, Whyte, Kenny, and Walsh (n 4) 7.126.

³⁸² Article 40.3.1° states: ‘[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen’.

³⁸³ *Ryan v Attorney General (Ryan)* [1965] IR 294.

treatment.³⁸⁴ Notably, these rights are, *inter alia*, rights negatively impacted by business and frequently underlying FDL actions.³⁸⁵ Recognition of implied constitutional rights is both perceived as ‘one of the most significant developments in Irish constitutional jurisprudence’ and acknowledged to have ‘slowed to a trickle’.³⁸⁶ Indeed, constitutional law scholars advocate to reserve ‘Article 40.3.1°’ as a safety-net for sustaining newly-invoked rights which cannot reasonably be otherwise accommodated³⁸⁷ under another article. While it was perceived as unlikely there would be ‘any significant expansion in the canon of implied rights for the foreseeable future’,³⁸⁸ the right to an environment consistent with human dignity and the well-being of the general citizenry was recognised in *Merriman v Fingal County Council*.³⁸⁹ Barrett J recognised the existence of this right that ‘is an essential condition for the fulfilment of all human rights’³⁹⁰ as protected under Art. 40.3.1° of the Constitution.³⁹¹ As Pernot highlights, in his reasoning Barrett J did not rely on the traditional ‘Christian and democratic nature of the State’³⁹² but opened a new narrative relying on objective justifications found in scientific consensus and ‘evidence of the necessity of enshrining environmental protection in the Constitution’.³⁹³ From the foregoing, the parameters are considered in the context of FDL litigation.

6.7.2. Action for Infringement of a Constitutional Right

The Irish courts have regarded the fundamental rights and principles recognised by the Irish Constitution as capable of being applied directly to private individuals,³⁹⁴ and to legal

³⁸⁴ *State (C) v Frawley* [1976] IR 365. Further, Article 40.3.2° provides that the State shall, ‘in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’.

³⁸⁵ For further discussion of the status of the unenumerated rights doctrine, see Oran Doyle (n 379) Chapter 4.II.

³⁸⁶ Hogan, Whyte, Kenny, and Walsh (n 4) 7.3.76.

³⁸⁷ *ibid* 7.3.81.

³⁸⁸ *ibid* 7.3.94.

³⁸⁹ (n 149).

³⁹⁰ *ibid* [21]

³⁹¹ *ibid* [264]

³⁹² *Ryan* (n 383) (Kenny J) 312.

³⁹³ Pernot (n 151) 155, noting that ‘references to both theological and secular philosophy give the right to an environment some added normative credibility’.

³⁹⁴ *Educational Company of Ireland v Fitzpatrick (No.1)* [1961] IR 323; *YY -v- Minister for Justice and Equality No.1* (n 4) (Humphreys J) [64]: ‘In the light of such considerations it seems to me that that the right

entities such as companies.³⁹⁵ However, the Constitution does not specify or prescribe a procedure for remedying their breach.³⁹⁶ A line of case law indicates damages may be awarded for infringement of a constitutional right, by the State or by a private actor³⁹⁷ under normal limitation periods for torts.³⁹⁸ The possibility of bringing an action for infringement of a constitutional right was confirmed by the Supreme Court in a series of decisions in the 1970's,³⁹⁹ notably *Meskeil v CIE*⁴⁰⁰ and *Glover v BLN Ltd.*⁴⁰¹ Subsequently, the following statement of Henchy J in *Hanrahan v Merck Sharp and Dohme*⁴⁰² coloured the issue:

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question...A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v C.I.E.* 1973 IR 121); but when he founds his

to an effective remedy, involving independent review of a legally cognisable complaint, should be recognised as an unenumerated right under Article 40.3 of the Constitution'.

³⁹⁵ While *Meskeil* concerned a semi state body providing public services, in *Glover v BLN Ltd* [1973] IR 388 constitutional rights were applied directly to regulate the internal affairs of a private body. See O'Cinnéide, (n 27) 214.

³⁹⁶ Hogan, Whyte, Kenny, and Walsh (n 4) 7.1.132

³⁹⁷ *Meskeil* (n 373). Hogan, Whyte, Kenny and Walsh (n 4) 7.1.149 interpret that in *Nash v DPP* [2016] IESC 60 the court 'noted also that constitutional damages were of use to vindicate rights that could otherwise not be vindicated'.

³⁹⁸ *McDonnell v Ireland* (n 375), 134; *Blehein v Minister for Health* [2018] IESC 40. See also *C -v- Minister for Social Protection & anor* [2018] IESC 57 concerning damages for constitutional invalidity. The discussion of experts MacMahon and Binchy (n 93) 44-20- 44.76 concerning claims seeking compensation for constitutional rights is noted but is outside the scope of this thesis.

³⁹⁹ *Ibid* O'Cinnéide, (n 395) 219.

⁴⁰⁰ *Meskeil v CIE* (n 373) (Walsh J) stating: 'A right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and...the constitutional right carried within its own right to a remedy or the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right'.

⁴⁰¹ *Glover v BLN Ltd* (n 395).

⁴⁰² *Hanrahan* (n 181).

action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right. But that is not alleged here.⁴⁰³

The statement of Henchy J has been interpreted as meaning that the established array of actions in tort is the presumptive means for vindicating constitutional rights.⁴⁰⁴ The courts may award damages if tort law is ‘basically ineffective’⁴⁰⁵ in protecting a particular constitutional right, or ‘in the absence of a common law or statutory action’.⁴⁰⁶ Unless these circumstances present, the courts should neither modify the parameters of the tort nor provide a supplementary remedy.⁴⁰⁷ Subsequent case law continued to delimit when the courts would be prepared to consider actions for infringements of a constitutionally protected right, noting that constitutional rights should not be regarded as ‘wild cards to be played at any time to defeat the existing rules’.⁴⁰⁸

So why did the Irish courts batten down the hatches and not seek a progressive outcome, to either develop the *Meskeil* doctrine, or promote and develop complementary indirect horizontal approaches⁴⁰⁹ and ensure tort delivers the constitutionally appropriate result? Within the context of constitutional protection of human dignity, Binchy describes the goal of the *Meskeil* principle as ‘giving substance to the constitutional vision of a society that respects human rights’.⁴¹⁰ Similarly, O’Cinnéide questions restraining of the constitutional action, considering it ‘out of step with the general thrust of Irish constitutional law, with its emphasis on the overriding supremacy of constitutional norms and values’.⁴¹¹ Recalling Wright, in the absence of a constitutional remedy, it is tort that will frequently provide the best fit in terms of remedy, and tort law may be shaped to ensure human rights obligations are accommodated. It appears that the Irish courts have inverted the first and failed to

⁴⁰³ *ibid* (Henchy J), 636.

⁴⁰⁴ MacMahon and Binchy (n 93) 6.05.

⁴⁰⁵ *Hanrahan* (n 181) (Henchy J) 636.

⁴⁰⁶ *ibid*.

⁴⁰⁷ MacMahon and Binchy (n 93) 1.54.

⁴⁰⁸ *McDonnell* (n 375) (Barrington J) [148].

⁴⁰⁹ Indirect horizontality occurs when a fundamental constitutional right attaches to a different right or obligation found in the common law. See also Sibo Banda ‘Taking Indirect Horizontality Seriously in Ireland’ (2009) 16 DULJ 263.

⁴¹⁰ Binchy, ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 368.

⁴¹¹ O’Cinnéide (n 27) 221.

engage with the second. Here the focus is on two explanations as to why presented in academic writing. The first revolves essentially around the composition of the Irish Supreme Court at the time of *Meskeil*, the second explores the argument that there has been a fundamental misinterpretation of *Hanrahan* and develops it in the context of FDL litigation. It is considered that the alternative interpretation of the significance of *Hanrahan* is plausible, and proposed that the manner in which the Constitution interacts with private law is relevant to how FDL cases might be approached by the Irish courts.⁴¹²

6.7.2.1. ‘Disarming *Meskeil*’

For present purposes, in agreement with the weight of commentary, decisions such as *Ryan*⁴¹³ and *Meskeil* emerged as a function of the activist approach of the Supreme Court of the time, recognised to be ‘very protective of fundamental rights and the overriding authority of constitutional norms’.⁴¹⁴ *Meskeil* broke new ground, indeed scholars highlight that pre-*Meskeil*, ‘the idea that tort law should be regarded as judicial instrument for the vindication of constitutional rights was one which had simply not occurred to almost any Irish lawyer.’⁴¹⁵ Thus, one explanation is that a judiciary conscious of the potential ramifications of *Meskeil* ‘tamed the beast by shackling it to pre-existing tort law’,⁴¹⁶ as opposed to engaging to re-shape tort law to infuse it with constitutional values.⁴¹⁷ An example of this approach cited is *Sweeney v Duggan*⁴¹⁸ in which the plaintiff claimed failure to safeguard his bodily integrity. Barron J both found that there was nothing in Article 40.3.2° to assist the plaintiff, and moreover did not embrace a possibility to re-configure negligence principles to reflect the framework of rights protection in the Constitution. In this, it is noted that scholars suggest it was open to the Irish courts to take a different road

⁴¹² *ibid* 249 considering that the necessity for the Irish courts to develop this new and preferable approach has not been rendered redundant by s.2 of the ECHR Act 2003 which in S. 1 defines ‘rule of law’ as including common law.

⁴¹³ *Ryan* (n 383383).

⁴¹⁴ O’Cinnéide (n 27) 213-252. See also Hogan, Whyte, Kenny, and Walsh (n 4) 7.3.86.

⁴¹⁵ Binchy, ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 347 noting a prophetic voice in this respect was that of John Temple Lang ‘Private Law Aspects of the Irish Constitution’ (1971) 6 *Ir Jur* (ns) 237, 244-247.

⁴¹⁶ MacMahon and Binchy (n 93) 1.123.

⁴¹⁷ *ibid* 1.124.

⁴¹⁸ [1997] 2 *ILRM* 211, *aff’d*. [1991] 2 *IR* 274.

post *Meskeil* in which nominate torts such as assault and battery, were replaced by an innominate claim for infringement of personal rights under Article 40 of the Constitution.⁴¹⁹

6.7.2.2. Contra-currents Pro *Meskeil*

In contrast, a notable voice making clear statements both in support of actions for infringements of constitutional rights and of re-shaping tort to reflect constitutional values is that of Hogan J.⁴²⁰ Relying on *Meskeil* in *Sullivan v Boylan (No.2)*, he considered there was ‘no doubt’ an action was in principle available for infringement of a constitutional right.⁴²¹ Hogan J awarded compensation to the plaintiff on the basis of violation of a constitutional ‘right to person’ under Article 40.3.2° ‘given the basic ineffectiveness of the common law rules’,⁴²² notwithstanding that commentators agree it would have been open to apply the torts in issue to the facts of the case.⁴²³ Further, whilst acknowledging that the legacy of Walsh J’s judgement in *Meskeil* has not perhaps been fully realised, Hogan J expressed the view that *Meskeil*:

(...) holds out the promise that, over time, an effective remedy will be available to protect aspects of the human dignity (the Preamble to the Constitution) and the person (Article 40.3.2) which, perhaps, have not yet been fully protected by the common law.⁴²⁴

While the *Meskeil* doctrine has undoubtedly languished, commentators suggest that it is not too late to develop *Meskeil* into ‘a mature constitutional medium for vindicating rights’.⁴²⁵ However, a chill has been cast by the decision of the Supreme Court in *Louis Bleheine v The Minister for Health and Children, Ireland and the Attorney General*.⁴²⁶ The plaintiff, having successfully challenged the constitutionality of section 260(1) of the Mental Treatment Act 1945, pursued a damages claim. Dismissing it, the Court considered that the

⁴¹⁹ Binchy ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 340.

⁴²⁰ Former serving Justice of the High Court and Court of Appeal before appointment as Advocate General to the European Court of Justice.

⁴²¹ *Sullivan v Boylan (No 2)* (n 182) (Hogan J) [24].

⁴²² *ibid* [44].

⁴²³ MacMahon and Binchy ((n 93) 1.124.

⁴²⁴ Gerard Hogan ‘Brian Walsh: the legacy of experiment and the triumph of judicial imagination’ (2017) 57 *Irish Jurist* 5.

⁴²⁵ MacMahon and Binchy (n 93) 1.124 citing Hardiman J in *Comcast international holdings v Minister for Public Enterprise* [2012] IESC 50.

⁴²⁶ (n 398) (McKechnie J) [82].

claim for damages for personal injury ‘falls squarely within the existing law of torts’ and is therefore subject to the relevant limitation periods.⁴²⁷ While Charlton J acknowledged that ‘judges are entitled to treat breaches of the Constitution as a tort’ he cautioned,⁴²⁸ stating ‘resort to the Constitution as the wellspring of a new remedy is uncertain, however, [and] requires restraint’.⁴²⁹ Charlton J emphasised that there are not ‘two existing systems’, affirming that reliance is on the law of tort, and resort to the constitutional tort is on the basis of absolute necessity where there is ‘a definite gap’ in remedies. Further:

In that context, judicial restraint requires precise definitions of whatever constitutional tort is invoked. The principle of legal certainty which is the foundation of a system of justice requires this, and that any constitutional tort adheres to precedent and thus to intelligibility.⁴³⁰

It is acknowledged that behind actions for infringements of constitutional rights are multiple questions as yet unresolved, such as, what are the parameters and limitations to the basic ineffectiveness of a tort.⁴³¹ Aside from whether there is judicial appetite to engage further with the principles in *Meskeil*, a lack of precision arguably represents a deterrent to development of the action in practice.⁴³² Yet speculative discussion of the application of the doctrine developed in *Meskeil* continues. On the basis that ‘[T]he purpose of the *Meskeil* ruling is to ensure that no constitutional breach falls through the proverbial cracks in

⁴²⁷ *ibid* stating ‘Any residual claims not involving personal injuries, were adequately remedied by the declaration of invalidity made in respect of section 260(1)’.

⁴²⁸ Concurring with McKechnie J.

⁴²⁹ *ibid* [9] citing *McDonnell* (n 375).

⁴³⁰ (n 398) (Charlton J) [15]. In his dissenting judgment Hogan J [10] considered *Bleheine* to be ‘a ‘pure’ *Meskeil*-style claim in the sense that the claim is one for a pure infringement of constitutional rights, stating ‘even though it does not approximate to an existing claim recognised by the common law of torts. In that respect, therefore, it is slightly different from what might be termed a *Hanrahan*-style claim in the context of the existing law of torts’.

⁴³¹ Binchy, ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 358. See also William Binchy ‘Constitutional Remedies and the Law of Torts’ in James O’Reilly (ed) *Human Rights and Constitutional Law* (Round Hall Press 1992).

⁴³² Binchy ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 355 citing *PH v Murphy & Sons Ltd.* [1987] IR 621; *An Blascaod Mór Teo v Commissioner of Public Works* [2000] 3 IR 565; *Herrity v Associated Newspapers (Ireland) Ltd* [2008] IEHC 249; *Mulligan v Portlaoise Prison* [2010] IEHC 269.

normative tort law’,⁴³³ Kane speculates as to whether *Meskill* could be applied to seek redress in civil law for victims of trafficking in human beings against purchasers.⁴³⁴ Noting that the Irish State could, but has not, regulated civil liability in the case of trafficking victims,⁴³⁵ Kane’s proposition is based on a right to freedom from torture, inhuman or degrading treatment under Article 40.3,⁴³⁶ flowing also from the ‘Christian and democratic nature of the State’,⁴³⁷ which he argues ‘bears an identical nexus’⁴³⁸ to Article 3 of the ECHR.⁴³⁹ It appears plausible that sufficiently severe acts of degradation perpetrated by the purchasers of trafficked victims may amount to a breach of the rights of victims under the Constitution, and offer a remedy of compensation.⁴⁴⁰

Extending the foregoing, FDL cases could offer the occasion to further consider the criteria used by the judiciary to distinguish between infringements of constitutional rights which could be covered by the collective protection offered in torts, and those falling outside. For example, the rights currently coming within FDL actions would frequently be first tier if placed on the schema developed by Costello P in *W v Ireland (No 2)*.⁴⁴¹ Costello P’s differentiation between first tier fundamental rights flowing from man’s rational being and antecedent to positive law, and second tier rights not based on natural law, would be supportive of actions for infringement of constitutional rights in FDL cases. Yet scholars

⁴³³ James Kane, ‘Civil Liability for Exploiting Trafficking Victims? A Speculative Application of *Meskill v CIE*?’ 54 *Irish Jurist* 57, 78.

⁴³⁴ *ibid* 62 noting that a claim under Article 4 of the ECHR which protects against slavery, servitude and forced labour would be against the trafficker as opposed to the purchaser.

⁴³⁵ *ibid* 74. Further at 75-76 distinguishing his proposition from the courts declining to intervene in *O’Reilly v Limerick Corporation* [1989] ILRM 181; *Tuohy v Courtney* [1994] 3 IR 1 and *Fleming v Ireland* [2013] IECS 19 stating: ‘(...) *in the present context*, and where the legislature has *not* regulated a particular area, the *Meskill* ruling is *not* at odds with the *Tuohy* principle’. (italics in original)

⁴³⁶ *Frawley* (n 384).

⁴³⁷ *ibid* (Finlay P) 374.

⁴³⁸ Kane (n 433) 60 arguing that although *Frawley* concerned upholding a right against treatment emanating from the State, the proposition that protecting individuals against degrading treatment at the hands of private persons is sound ‘based on the ‘Christian and democratic nature of the State’, and jurisprudence of the ECtHR supporting that the right in Article 3 ECHR includes private acts citing *HLR v France* (1998) 26 EHRR 29 [40].

⁴³⁹ As discussed in section 6.2, the jurisprudence of the ECtHR (n 6) is accepted as a source of comparative law in interpreting the Irish Constitution.

⁴⁴⁰ Kane (n 433) 78.

⁴⁴¹ (n 375) 164.

highlight that judicial consideration of whether an infringement of a constitutional right comes within or falls outside the existing torts repertoire ‘is a matter of intuition (or oversight) rather than jurisprudential analysis’.⁴⁴² It appears that greater clarity and structured analysis as to the basis upon which such decisions are made would be welcome, particularly as the onus is on claimants to persuade the court that protection in tort is basically ineffective for protection of the constitutional right. FDL cases offer an opportunity to reconsider such issues.

6.7.3. Enhancements for Tort

Taking forward the alternative interpretation of the statement of Henchy J in *Hanrahan*⁴⁴³ as presented by Banda, it is arguable there is a route to infuse the norms and values of the Constitution to modify private law⁴⁴⁴ and to develop new principles in eventual FDL actions. The premise presented by Banda is that important nuance in *Hanrahan*⁴⁴⁵ has been missed, and that there has been a conflation of direct⁴⁴⁶ and indirect horizontality⁴⁴⁷ by both Irish courts and commentators.⁴⁴⁸ He presents the constitutional tort as equivalent to, and incorporating both direct and indirect horizontality, and distinguishes between the two approaches. Firstly, in Henchy J’s statement ‘failure to implement’ grounds justification for intervention through direct horizontality, and for judges ‘to create a new rule, principle

⁴⁴² Binchy, ‘*Meskill*, The Constitution and Tort Law’ (n 167) 353, citing *Shortt v Ireland* [2007] 4 IR 587 stating ‘(...) the Supreme Court made no attempt to investigate whether claims for damages for infringements of constitutional rights should be treated differently from claims for damages for traditional torts in the light of Finlay CJ’s judgment in *Conway v Irish National Teachers Organisation* [1991] 2 IR 305’.

⁴⁴³ (n 181) concerning failure to implement a constitutional guarantee or implementation via tort which is plainly inadequate or basically ineffective.

⁴⁴⁴ Banda (n 409).

⁴⁴⁵ *ibid* 27.

⁴⁴⁶ *ibid* 2 stating: ‘Under direct horizontality an individual is able to plead before the courts that fundamental constitutional rights be applied directly to a private relationship’.

⁴⁴⁷ *Ibid* stating: ‘Indirect horizontality occurs when a fundamental constitutional right attaches to a different right or obligation found in the common law’.

⁴⁴⁸ Banda presents the doctrine of horizontality as the ability of the court to regulate private actions through the direct application of a constitutional right or through the modification of private law. See also Alistair Richardson ‘Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights’ (2018) 21 *Trinity College Law Review* 159, 162 and 159 noting that ‘the primary objection to horizontality is grounded in a concern that the interest of the duty bearer will be unduly burdened by having to honour the constitutional rights of others’, but that in Ireland, ‘little consideration is given as to *why*’ (emphasis in original) constitutional rights can, in principle, have horizontal effect has not been questioned.

or method in order to fill a gap in statutory or common law’.⁴⁴⁹ Secondly, a distinct and separate approach is intervention by the courts on the basis of indirect horizontality in existing private law when the implementation of rights is plainly inadequate. Banda’s alternative interpretation, that ‘failure to implement’ and ‘plainly inadequate’ in Henchy J’s statement represent the distinction between direct and indirect horizontality,⁴⁵⁰ appears plausible. His conclusion is that as a result of missed nuance and conflation, indirect horizontality has failed to feature in the shaping of private common law in Ireland. In effect, there has been a failure to develop principles guiding when indirect horizontality will apply and missed opportunities to do so.

Building this argument forward, FDL cases concern establishing a parent company duty of care owed to the wider community relating to, *inter alia*, underlying rights to be free from inhuman or degrading treatment, to bodily integrity, property, and livelihoods.⁴⁵¹ As outlined, the rights impacted in FDL cases are often the very same rights which the Irish courts have recognised as implied personal rights under Article 40.3.1° of the Constitution.⁴⁵² The implications support infusing tort law with the values underpinning the Constitution,⁴⁵³ and having due regard to the symmetry between the rights impacted in FDL cases and rights guaranteed under the Irish Constitution. In order for such rights to be effectively protected within tort, the Irish courts should have regard to the Irish Constitution in determining the scope of parent duty of care in FDL cases, as discussed further below.

6.7.4. The Constitution, Non-Citizens, and Foreign Direct Liability Litigation

Although FDL cases concern foreign plaintiffs who have suffered harm in a foreign country, it appears arguable claimants in an FDL case could ground an action for infringement of a constitutional right in Ireland. While it is clear that ‘there are no absolute and unqualified fundamental rights’,⁴⁵⁴ *who* may invoke the Constitution is not explicit. It is surprising, as Supreme Court Justice O’Donnell states, that ‘even now, we have no

⁴⁴⁹ Banda (n 409) 22.

⁴⁵⁰ *ibid* 28.

⁴⁵¹ For example, *Vedanta* (SC) (n 59) (CA) (n 50) and *Okpabi* (CA) (n 58).

⁴⁵² For example, *Frawley* (n 384) in which Finlay J accepted that the right to bodily integrity included a right to freedom from torture and inhuman or degrading treatment.

⁴⁵³ Including references relating to human dignity and the common good in the Preamble.

⁴⁵⁴ Hogan, Whyte, Kenny and Walsh (n 4) 7.143 also referring to ‘the two explicit standards of review for rights limitation: the proportionality test and the rationality test’.

coherent theory on who is, in modern terminology, a rights holder under the Irish Constitution'.⁴⁵⁵

In *The State (Nicolaou) v An Bord Uchtála*⁴⁵⁶ Henchy J held that non-citizens could not invoke sections 1 and 3 of Article 40, which are rights stated in terms of the citizen.⁴⁵⁷ However, O'Donnell notes firstly, that the position of Henchy J was not endorsed either in that case or subsequently.⁴⁵⁸ Secondly, he finds support to the contrary in other cases such as *People (DPP) v Shaw*⁴⁵⁹ in which the courts assumed non-citizens can invoke the Constitution, involving the right to liberty held by citizens, as opposed to approaching it on the basis of the right to a fair trial under Article 38, which is not by text limited to citizens.⁴⁶⁰ Constitutional law scholars Hogan, Whyte, Kenny and Walsh cite extensive authorities upholding that various constitutional rights are enjoyed by non-citizens.⁴⁶¹ Notably although in these cases it was not required that the non-citizen establish a period of residence of reasonable duration in the state as a pre-requisite to invoking constitutional protection,⁴⁶² they consider this as implicit.⁴⁶³ Other cases are interpreted as adopting 'an intermediate approach', allowing non-citizens to assert rights under the Constitution in

⁴⁵⁵ Donal O'Donnell, 'International Aspects of the Constitution: Skibbereen Eagle or a shaft of dawn for the despairing wretched everywhere' (2018) 59 Irish Jurist 5 noting that 'the jurisprudence on this issue is remarkably ad hoc and difficult to reconcile.. and there does not seem to be anything by the way of extended academic analysis'.

⁴⁵⁶ *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

⁴⁵⁷ Hogan, Whyte, Kenny, and Walsh (n 4) 7.127. See also MacMahon and Binchy (n 93) 1485-6 concerning general Principles re Non-Citizens stating: 'An alternative basis for inferring that non-citizens enjoy constitutional rights is the view that personal rights of Article 40.3 are "natural" in the sense of inherent in the individual and antecedent to the Constitution. If this is the nature of the personal rights protected by Article 40.3, it is difficult to see how non-citizens can be denied them'.

⁴⁵⁸ O'Donnell (n 455) 5.

⁴⁵⁹ [1982] IR 1. In *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550 in which the applicant non-citizen recently arrived in Ireland succeeded in asserting the right to liberty under Article 40.4.

⁴⁶⁰ O'Donnell (n 455) 5.

⁴⁶¹ Hogan, Whyte, Kenny and Walsh (n 4) 7.129- 7.132, *inter alia*, *Finn v Attorney General* [1983] IR 154, 159 (Barrington J) concerning Articles 40-44; *Northants v ABF* [1982] ILRM 164, 166 (Hamilton J) concerning Article 41; and 'without reliance on the natural law basis of rights' Gannon J in *Rederij Kennemerland BV v Attorney General* [1989] ILRM 821 at 840.

⁴⁶² Hogan, Whyte, Kenny, and Walsh (n 4) 7.131.

⁴⁶³ *ibid*, distinguishing the remarks of Walsh J in *Fajujonu v Minister for Justice* [1990] 2 IR 151, 164 based on connection to the State and endorsed in *Osayande and Lobe v Minister for Justice Equality and Law Reform* [2003] 1 IR 1.

certain but not all cases.⁴⁶⁴ In *Re Article 26 of the Constitution and ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*, the Supreme Court held that non-nationals (illegal immigrants) enjoyed the constitutional right of access to the courts and of fair procedures, albeit possibly subject to conditions or limitations which are not applicable to citizens.⁴⁶⁵ Thus, the broad line of case law is interpreted by scholars as ‘non-citizens possess constitutional rights but they are not co-extensive with those of citizens’.⁴⁶⁶

In FDL cases concerning foreign plaintiffs alleging harm suffered in a foreign country, it appears arguable that claimants could ground an action for infringement of a constitutional right, at least as concerns rights which have a natural law origin.⁴⁶⁷ Applying this in context, the allegations in FDL cases such as *Choc v. Hudbay Minerals Inc.*⁴⁶⁸ include rape, grievous bodily harm and killing. *Garcia v Tahoe Resources Inc*⁴⁶⁹ concerned grievous bodily harm. *Araya v Nevsun Resources Ltd.*⁴⁷⁰ concerns torture and slave labour. *Vedanta and Okpabi* concern harm and loss of income and amenity due to environmental pollution.⁴⁷¹ Further, recalling the circumstances of the Cerrejón mine in Colombia which raises questions of complicity via involvement in the sale⁴⁷² or use⁴⁷³ in Ireland of coal mined in circumstances involving extensive persistent rights abuses including failure to seek or obtain free prior and informed consent of indigenous communities, forcible displacement, violence causing serious injury, and wide-ranging evidence of environmental destruction, and corresponding impacts on human health.⁴⁷⁴ The complaint against Irish based San Leon Energy plc

⁴⁶⁴ O'Donnell (n 455) 6 citing *In Re Article 26 of the Constitution and ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2002] IR 360, 410 (Keane CJ).

⁴⁶⁵ Hogan, Whyte, Kenny, and Walsh (n 4) 7.133 fn 96.

⁴⁶⁶ *ibid.*

⁴⁶⁷ For example, *Frawley* (n 384) in which Finlay J accepted that the right to bodily integrity included a right to freedom from torture and inhuman or degrading treatment.

⁴⁶⁸ (n 212).

⁴⁶⁹ (n 212).

⁴⁷⁰ [2017] BCCA 401

⁴⁷¹ (n 6) (CA).

⁴⁷² See section 6.3 re Coal Marketing Company (CMC), domiciled in Ireland.

⁴⁷³ *ibid.*, use of coal from Cerrejón mine by the ESB in Moneypoint.

⁴⁷⁴ See Christian Aid (n) 19 stating; ‘Over its 40-year history, the Cerrejón mine has displaced up to 35 indigenous, Afro-Colombian and campesino communities.³⁴ Of importance here is the principle of free, prior and informed consent, which is at the core of the United Nations Declaration on the Rights of Indigenous Peoples’; forcible displacement of communities involving violence and injury ‘Several members of the community, including two women and an intellectually impaired youth, were seriously injured when riot

includes failure to seek free prior and informed consent regarding exploitation of natural resources.⁴⁷⁵

Reviewing the influence of natural law theory, the Constitution and citizenship, Hogan et al conclude that rights which ‘explicitly acknowledge a natural law origin should not be differentially applied based on citizenship’.⁴⁷⁶ Similarly, O’Donnell acknowledges there are instances in which citizenship is deliberately distinguished, such as between the rights under Article 40 as held by citizens including rights to equality, liberty, speech, assembly and association, and the rights in Articles 41 to 43 which do not use the term citizen.⁴⁷⁷ The explanation O’Donnell offers, and which appears plausible, is that this may merely reflect the ‘characteristic language of natural law in Arts 41, 42 and 43, and the traditional libertarian language used in Art.40’, rather than necessarily the intention to differentiate between persons who could enforce those rights.⁴⁷⁸ O’Donnell concludes with an avowedly ‘ambitious attempt to provide a coherent theory’ which encompasses the rights worded in terms of citizens:⁴⁷⁹

It is arguable these rights derive not from a man’s citizenship but from his nature as a human being. The State does not create these rights, it recognises them and promised to protect them.⁴⁸⁰

Hogan et al appear to endorse O’Donnell J’s approach, evident also in *NHV v Minister for Justice*.⁴⁸¹ As they validly indicate, this conception which is based on the fundamental nature of rights is a more transparent and arguably more balanced approach. It is

police used tear gas and metal projectiles to force the families out’’; at 20 ‘In a 2018 submission to the Constitutional Court, Colombia’s Human Rights Ombudsman presented wide-ranging evidence of environmental destruction, and corresponding impacts on human health in the indigenous reserve of Provincial, located close to five Cerrejón mining pits’.

⁴⁷⁵ Section 6.3.

⁴⁷⁶ Hogan, Whyte, Kenny, and Walsh (n 4) 7.127.

⁴⁷⁷ O’Donnell (n 455) 4-5.

⁴⁷⁸ *ibid* 5.

⁴⁷⁹ In line with O’Donnell J in *NHV v Minister for Justice* [2017] IESC 35 at [17] in which the court drew on the Preamble to the Constitution at [11].

⁴⁸⁰ O’Donnell (n 455) 9 applies similar logic to the guarantee of equality before the law in Article 40.1 stating: ‘While Article 40.1 guarantees the right of equality to *citizens*, it is expressed in terms that make it clear the right follows from the essential quality of human persons’.

⁴⁸¹ (n 479).

appropriately focused on the fundamental nature of rights inhering in human beings, rather than a studied search for justifications of rights vesting in non-citizens based in the natural law origins of certain provisions the Constitution.⁴⁸² Significantly, support is evident also from the Constitutional Review Group, which recommended that personal rights should be extended to all persons, not just citizens.⁴⁸³ It recommended that the existing qualifying clauses in subsections 1 and 2 of Article 40.3 should be replaced by a general and more comprehensive qualifying clause modelled on Article (10)2 of the ECHR.⁴⁸⁴ In agreement with O'Donnell, rights which derive from status as human persons should enable citizens and non-citizens to be treated the same under our Constitution as concerns justice, fair trial, liberty, free speech assembly, family and property rights.⁴⁸⁵ His conclusion is that there is 'a tacit acceptance that non-citizens were entitled to assert constitutional rights'.⁴⁸⁶ It would be welcome to see this theme, which arguably chimes with the normative underpinning of human rights, developed.

Scholars consider that if the right to bodily integrity is infringed it is in theory open for victims to make claim for infringement of a constitutional right, on the basis that in other contexts such a claim would be possible.⁴⁸⁷ Concerning the nature of third country claimants found in FDL litigation, to qualify for constitutional protection on the basis that a parent company in Ireland had impacted rights to bodily integrity they would normally have to establish actual or likely injury to their own rights or interests. Where unable to do so, it appears the test of standing is genuine *bona fide* concern and interest, related to issues

⁴⁸² Hogan, Whyte, Kenny, and Walsh (n 4) 7.1.36.

⁴⁸³ The Constitutional Review Group 1996 pn 2632 p. 265 <www.constitution.ie/reports/crg.pdf> accessed 8 November 2019.

⁴⁸⁴ *ibid* 271-2. Art (10)2 of the ECHR (n 6) states: 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

⁴⁸⁵ O'Donnell (n 455) 9. While Hogan, Whyte, Kenny and Walsh (n 4) 7.136 consider that O'Donnell's distinction between a right which is social in nature and inherent in citizenship, or 'more basic – going to the essence of human personality' is a useful conceptual framework and note that 'context and the level of generality may chance which of these categories into which a particular right falls'.

⁴⁸⁶ Excluding rights to vote in Presidential elections or referenda.

⁴⁸⁷ MacMahon and Binchy, (n 93) 1.76-1.77. Hogan, Whyte, Kenny and Walsh (n 4), 7.3.1101 affirm 'the right to bodily integrity must be respected not only by the State but also by private individuals'.

such as proximity and the nature of the right in question.⁴⁸⁸ A related question is the scope of application of the Constitution. It appears that once the jurisdiction of the Irish courts is engaged, there is tacit support for the application of the Constitution with full force.⁴⁸⁹ It is noted that O'Donnell does not consider this extends to the universal application of the Irish Constitution in foreign jurisdictions.⁴⁹⁰ From the foregoing, and in the factual context of the rights impacted in FDL cases, it is argued that in principle, Irish courts could engage positively in considering that claimants in FDL style cases may rely on the protection of fundamental rights under the Constitution.

6.7.5. Committing to Human Rights in Tort Law

FDL litigation spans tort and human rights, and at the core of the research question lies mechanisms for the protection of rights in domestic systems. It is contended that FDL cases bring an opportunity to re-visit interactions between tort law, human rights protections, and the Irish Constitution. A core consideration is how attached we are, or should be, to infusing the rights and values within the Constitution across the sphere of tort law, and how this might be realised.⁴⁹¹ As outlined above, this possibility was envisaged but opportunities to ensure tort law is wholly effective for the vindication of constitutional rights have arguably been lost in nuance or (consciously) overlooked. The voice of Hogan J calls for regard to our own Constitution for the protection of human rights, remarking:

⁴⁸⁸ In *Society for the Protection of Unborn Children v Coogan* (n 284) Finlay CJ stated; '[T]he test is that of a *bona fide* concern and interest, interest being used in the sense of proximity and an objective interest. To ascertain whether such *bona fide* concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected'. It is cited by Barrett J in *Merriman* (n 149) [35] stating: 'In the *S.P.U.C.* case, the court allowed for an expansive approach to locus standi where the public interest warrants it'. See also Doyle (n 379) 434.

⁴⁸⁹ O'Donnell (n 455) 9 considers that in *Northampton County Council v ABF* (n 461) the conclusion concerning a breach of family rights 'was underpinned by the argument that Arts 41 and 42 were reflective of principles of universal application which were not created, but merely recognised by the law of Ireland in the Constitution, being rights antecedent and superior to positive law.'

⁴⁹⁰ O'Donnell (n 455) 15 concerning reciprocal nature of international comity and the interaction of Article 1, 5 and 29 and his conclusion that 'Articles 1 and 5..in asserting sovereignty, require respect of the sovereignty of other countries' citing *Balmer v Minister for Justice and Equality* [2016] IESC 25 [37].

⁴⁹¹ This is taken as a separate question to whether judicial activism in this space is acceptable discussion of which is outside the scope of this discussion. For practical purposes, an extensive discussion of values and rights, and values versus rights, under the Constitution is outside the scope.

One might be forgiven for thinking listening to the debate which accompanied the 2003 [ECHR] Act that the past 70 years of domestic constitutional jurisprudence counted for nothing and that the only ‘true’ or ‘authentic’ protection of human rights was via the ECHR.⁴⁹²

In line with this stance, Hogan J regarded the greatest single achievement of Walsh J⁴⁹³ to be that he was ‘to effect an irreversible transformation of judicial attitudes to the entire question of constitutional law and the protection of human rights’.⁴⁹⁴ Notably, he emphasises that one of Walsh J’s most original and striking contributions was his insistence that ‘the scope of private law, and especially the law of torts, might be affected by the Constitution, particularly in the light of the guarantees under Article 40.3.2°’.⁴⁹⁵ Similarly, Richardson argues that the role of constitutional law is to ‘lay down fundamental norms which should permeate the legal system, into all law whether public or private, and which all actors are bound to respect’.⁴⁹⁶ Modern jurisprudence also indicates express support for re-shaping the common law in the light of constitutional values. In *Carr v O’Las* Hogan J stresses potential avenues to do so:

While the common law of torts may be regarded as the primary mechanism whereby the State’s constitutional duty to vindicate the life and person is achieved the common law must, where necessary, be remoulded and re-fashioned in order to reflect and to accommodate itself to these basic constitutional values (...) ⁴⁹⁷

This formulation is energetic, its dynamism is welcome. In principle, it is to be expected that the human rights values, and rights inhering in human persons which are recognised in and underpin our Constitution bear influence on the courts in shaping the contours of private law, including the duty of care in FDL cases. However, in fashioning the scope of duty of care in practice, the value system applied by the courts appears to eschew a ‘nobler

⁴⁹² Gerard Hogan, ‘Ireland - The European Convention of Human Rights Act 2003’ (2005) 12 Eur. Pub. L., 332.

⁴⁹³ Walsh J was not a member of the Supreme Court which decided *Hanrahan* (n 181).

⁴⁹⁴ Hogan (n 492) 334 citing Hogan, ‘The Early Judgments of Mr. Justice Brian Walsh’ (2017) Irish Jurist 1,2.

⁴⁹⁵ Ibid Hogan 4. See also MacMahon and Binchy (n 93) 1.24.

⁴⁹⁶ Richardson (n 448) 162.

⁴⁹⁷ [2012] IEHC 59 [36].

ethical pedigree’ and focus on economic and utilitarian horizons.⁴⁹⁸ As discussed above in *Glencar*⁴⁹⁹ the Irish Supreme Court developed a test for negligence which is interpreted as more pragmatic, but concurrently as moving away from developing principles of liability ‘which are sensitive to basic values’.⁵⁰⁰ Pragmatic it may reasonably be, but viewed from an expanded lens of tort as the presumptive vehicle for vindicating constitutional rights,⁵⁰¹ it is arguably less apt. In developing the principles of duty of care in the English courts, European human rights law is seen to have exerted an important influence on the development of the duty of care.⁵⁰² In parallel, this could be reasonably anticipated in Ireland.⁵⁰³ While it has been argued that the Irish courts should bring the Constitution to bear, it appears that the Irish courts did not actively embrace either approach to shaping and influencing tort law. While it is plausible that a lack of structured engagement and oversight is influenced by the pragmatic realities of pressures rather than design, it remains an opportunity to be mined within tort law, and in particular within FDL cases.

It is recognised that the tort law system in Ireland was not created or developed ‘with constitutional considerations in view’.⁵⁰⁴ Scholars acknowledge that certain torts might require revision were such an examination engaged.⁵⁰⁵ There is scope and reason to engage in this process, on a coherent basis. Reviewing and reshaping the tort law system to ensure it fully and effectively vindicates rights guaranteed under the Irish Constitution is a task the Irish courts could advance, however engagement is considered to have been ‘sporadic’.⁵⁰⁶ In his analysis, Banda did not locate a systematic basis for intervention on the basis that private law was plainly inadequate to protect rights. The result, as commentators validly

⁴⁹⁸ MacMahon and Binchy, (n 93) 6.03.

⁴⁹⁹ *Glencar* (n 156).

⁵⁰⁰ MacMahon and Binchy (n 93) 6.05. See also 6.70.

⁵⁰¹ *Grant v Roche* (n 240) (Hardiman J) [79]. See also Hogan, Whyte, Kenny, and Walsh (n 4) 7.1.125.

⁵⁰² Tully (n 156) 38 noting the jurisprudence concerns mainly public authorities

⁵⁰³ *ibid*, 40 noting ‘in particular given the constitutional dimension in Ireland, it will be interesting to see if the Irish courts in the future will adopt a similar approach’

⁵⁰⁴ MacMahon and Binchy (n 93) 1.122.

⁵⁰⁵ Binchy, ‘*Meskeil*, The Constitution and Tort Law’ (n 167) 367.

⁵⁰⁶ MacMahon and Binchy (n 93) 1.110-1.111 consider *McKinley v Minister for Defence* [1992] 2 IR 33 as a ‘special case’, but that in *Hunter v Duckworth & Co. Ltd.*, O’Caomih J ‘clearly acknowledged the significance of Article 40.3.1 in guiding the interpretation by the court of principles relating to defamation that had been developed at common law’.

argue, is that existing Irish tort law has been ‘set in amber’,⁵⁰⁷ and is out of step with countries such as South Africa where respect for constitutional rights has allowed the courts to reshape common law principles.⁵⁰⁸ It may be of value for the courts in their reflection, as Banda has, to refer to the South African Constitutional Court which has clarified the process of grafting constitutional normative values onto the customary process of incremental development of the common law, including when new development of the common law is at issue.⁵⁰⁹ For example, concerning Canada, Hyland considers that the development of the common law in lights of constitutional values. He raises that to allow for a tort of torture, ‘depends, in part, on the degree to which judges will be moved to develop the common law to ensure that it conforms to the values of the [Canadian] Charter’.⁵¹⁰

From this parallel, when previously unconsidered applications of the tort of negligence such as parent company duty of care in FDL cases arise, the Irish courts might consider the incremental development of legal principles in the light of the Irish Constitution.⁵¹¹ Several threads could enliven this reflection in the future. Firstly, from a perspective flowing from the conception of rights relating to ‘human personality’ discussed above,⁵¹² and by reference to the Preamble of the Constitution, Corbett promotes a deeper rationality of tort which he argues has ‘a moral basis which lies in the promotion of the concept of relational human dignity’.⁵¹³ In his construction, tort is both a rights-based approach and a necessary

⁵⁰⁷ O’Cinnéide (n 27). See also Aoife Nolan ‘Holding non-state actors to account for constitutional economic and social rights violations: experiences and lessons from South Africa and Ireland’ (2014) 12(1) ICON, 74.

⁵⁰⁸ MacMahon and Binchy (n 93) 1.122.

⁵⁰⁹ The Constitution of the Republic of South Africa Act No.108 of 1996 S.39(2) Article 8(2) states: ‘When applying a provision of the Bill of Rights... a court... must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right’.

⁵¹⁰ 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) [17].

⁵¹¹ See Hyland (n 61) 423 discussion of the Canadian Charter and the possibility of a Charter-based cause of action for torture. Hyland identifies that while the Canadian Supreme Court has not recognised that private parties do not owe each other constitutional duties. At 424, he comments that the development of the common law to allow for a tort of torture, ‘depends, in part, on the degree to which judges will be moved to develop the common law to ensure that it conforms to the values of the Charter’. See also 428 on the ‘development of the common law under the influence of Charter values.’

⁵¹² Val Corbett, ‘The promotion of human dignity: a theory of tort law’ (2017) 58 Irish Jurist 121 citing *NVH v Minister for Justice and Equality* (n 479) (O’Donnell J) [17].

⁵¹³ *ibid* 13.

counterbalance to ‘might makes right’ in society.⁵¹⁴ He argues that use of an objective standard of reasonable care indicates that the idea of relational human dignity ‘permeates the standard of care,’⁵¹⁵ and is reflected in the rules of causation in negligence.⁵¹⁶ In agreement, this is another perspective potentially granting judges greater flexibility when interpreting tort rules and formulating new ones,⁵¹⁷ and which is consistent with a perception of tort as having multiple possible purposes.⁵¹⁸ Secondly, tort has proven flexible in adapting to new issues as they present. A hope that tort will be re-shaped to adapt and fully inhabit its regulatory role can be gained from the tenor of Keane J’s observations in *McDonnell v Ireland*:

(...) it may well be said that the English law of tort has, as a matter of history, demonstrated over the centuries a flexibility and a capacity to adapt to changing social conditions, even without legislative assistance, which made it the obvious instrument of the righting of civil wrongs when the Constitution was enacted in 1937.⁵¹⁹

This thread relates to and recalls the dynamic role of the judiciary in developing the law of tort, including in vindicating references to human dignity in the Irish Constitution. Allied is a conception of the Constitution as a living document influenced by public concern as demonstrated in the discussion of *Merriman*.⁵²⁰ It is also consistent with the crucial role of judicial discretion exercised in FDL cases in the English courts as discussed in chapter 5. It is to be hoped these threads, which continue to evolve, might impact upon the manner in which FDL litigation would be approached in Ireland.

It is outside the scope of this thesis to consider in detail the interaction between the Constitution, tort and Rome II.⁵²¹ However, it is noted as an interesting question for future consideration whether provisions of the Irish Constitution, or the applications of rights

⁵¹⁴ *ibid* 6.

⁵¹⁵ *ibid* 7.

⁵¹⁶ *ibid* 8 citing cases which bear relation to FDL style actions, *inter alia*, *McGhee v National Coal Board* [1973] 1 WLR 1 [6] concerning disease contracted by an employee at a brick works as a result of employer’s negligence.

⁵¹⁷ *ibid* 11.

⁵¹⁸ Discussed in chapter 3.

⁵¹⁹ *McDonnell* (n 375) 158.

⁵²⁰ Discussed in section 6.3.

⁵²¹ (n 49).

deriving from it, could be considered an overriding mandatory provision exception under Article 16.⁵²² Further, in time the progress of *Kiobel v Shell* in the Netherlands may be relevant to future consideration of the themes explored in this chapter.⁵²³ In 2019, the District Court of the Hague accepted jurisdiction concerning the execution of the ‘Ogoni 9’ in Nigeria in 1995. The allegations are of infringements of fundamental rights,⁵²⁴ with tort submitted as an alternative.⁵²⁵ Rome II did not apply *rationae temporis* and the Dutch Court is applying Nigerian law. Notably, the Court considered that the enforcement procedure involving alleged infringement of fundamental rights in Nigeria as ‘internal jurisdictional distribution rule’ which did not conflict with Dutch international private-law and preclude the Dutch court having jurisdiction over all the defendants ‘taking cognizance of the claims based on a direct invocation of fundamental rights’.⁵²⁶ Although outside the scope of this thesis, the questions raised also point to themes to be explored.

6.8. CONCLUSION

The potential of businesses domiciled in Ireland and with operations overseas to be linked to abusees is real. In this, the commercial backdrop is no different from circumstances in the UK where the majority of FDL cases have been brought to date.

This Chapter illustrated the significant extent to which the legal context for FDL litigation in Ireland resembles that in the UK. While the possible role of national legislatures in stepping in to clarify parent companies’ responsibilities for human rights abuses, as raised

⁵²² Discussed in chapter 4 section 4.4.

⁵²³ Chapter 5 section 5.4.2.

⁵²⁴ [4.10]-[4.22] detailing that based on the African Charter of Human and Peoples Rights (ACHPR), which has been incorporated into domestic law and on provisions of the Nigerian Constitution. Under Nigerian law the provisions of the Constitution have direct horizontal effect and can be invoked against companies, including via *sui generis* proceedings for imminent or actual violations of human rights under enforcement procedure rules. Fundamental rights may also be addressed in other legal procedures based in tort or contract.

⁵²⁵ [4.22] stating ‘A party wishing to put forward an imminent or actual violation of the fundamental rights from the ACPHR and NGW invoked by claimants in legal proceedings in Nigeria has the choice to do so i) either with a claim for redress in a *sui generis* legal action to which the FREP Rules 1979/2009 apply and ii) or on another basis in other proceedings. That other basis would be the private-law concept of tort for a claim instituted by claimants against defendants, who they directly sue extra-contractually for their conduct. But claimants do not base their claims in the first instance on this principle’.

⁵²⁶ [4.29].

by US Supreme Court decision in *Jesner*,⁵²⁷ and in the UK⁵²⁸ has been noted, on balance it was concluded that advancing legal accountability will continue to fall to the courts. In both jurisdictions the exercise of judicial discretion is a key factor, and it can be expected to influence the development of FDL litigation in Ireland as it has done in the English courts. Navigating the crucial hurdle of establishing jurisdiction and joining foreign co-defendants was shown to be markedly similar in the two jurisdictions.⁵²⁹ The constituent elements of the test of duty of care in Ireland are essentially the same as in the English courts, where there is persuasive precedent on the basis that the application of this test in FDL cases is settled law in the English courts.⁵³⁰ An applicant seeking service out of the jurisdiction in the Irish courts must establish a ‘good arguable case’⁵³¹ against the Irish domiciled parent company⁵³² and ‘a substantial element in the claims against both the parent and the foreign defendant.’⁵³³ It was concluded that evidence of control and intervention by the parent company in the operations of its subsidiary can be expected to influence the approach to establishing proximity. Consistent with the jurisprudence of the English courts, the inclusion of the anchor defendant ‘must not be a mere device’ aimed at anchoring

⁵²⁷ *Jesner v. Arab Bank plc*, No. 16-499, 584 U.S. (2018) (Kennedy J.) [27]-[28].

⁵²⁸ See William Meade, CORE Coalition stating: ‘Recent decisions in the UK on parent company liability cases show the need for law reform’

<<https://corporate-responsibility.org/recent-decisions-uk-parent-company-liability-cases-show-need-law-reform/>> accessed 28 December 2018.

⁵²⁹ As discussed in chapter 5 section 5.3.4, the Court of Appeal in *Vedanta* (CA) (n 50) (Simon LJ) [63] considered the question of whether there was there is a real issue between the claimants and Vedanta as arising as part of the ‘necessary and proper’ gateway and equated it with ‘a properly arguable case or serious issue to be tried’.

⁵³⁰ In the same manner as in *Vedanta*, the trial judge in *Okpabi* (n 186) (Fraser J) [107]-[113] applied three-part *Caparo* (n 160) test of foreseeability, proximity and whether it is just fair and reasonable to impose a duty of care and analysed the facts by reference to the *Chandler* (n 186) and *Thompson* (n 186) cases.

⁵³⁰ In the Court of Appeal in *Okpabi* (n 58) (Vos LJ) [192] stated: ‘It was not in dispute that Fraser J applied the correct test for the existence of a duty of care in this situation, by considering the factors identified in [*Chandler*] and [*Thompson*] in the context of the three-stage test set out in [*Caparo*]. This approach remains correct following this court’s decision in *Vedanta*’.

⁵³¹ *Analog Devices* (n 86) (Fennelly J) 281. Delany and McGrath (n 64) 1-40 consider that this test continues to apply based on *O’Flynn* (n 87) [109-110].

⁵³² Section 6.3.2 this is an autonomous definition under Brussels I art 63.

⁵³³ *Vodafone* (n 83) [45].

proceedings before the Irish courts.⁵³⁴ Policy considerations can be expected to play a role in the Irish courts' assessment of whether it is just, fair and reasonable to impose a duty of care. It was concluded that on balance, policy as influenced, *inter alia*, by higher expected standards from business, may be supportive of recognising parent company duty of care, as opposed to being a negating or limiting vector. After consideration of the alternatives, it was considered logical that under an approach of 'incremental pragmatism', the Irish courts would closely follow to the jurisprudence of the English courts in assessing parent company duty of care in FDL cases.

On the issue of access to justice for claimants in the alternative forum, it was proposed that in FDL cases the assessment of the Irish courts may consider three directions: the position of the UK Supreme Court in *Vedanta*; the right to access to the courts under Article 6 ECHR; and residual jurisdiction in the interests of natural or constitutional justice. It was concluded that the Irish courts should, at a minimum, adopt the reasonable and balanced 'but for' test applied in *Vedanta*. It was proposed that Irish courts may go further than the English courts, by reference to the nature of the rights affected and the Constitution as responsive to public concern for human rights. The synthesis of legal context concluded that on substantive issues, including establishing an arguable case a duty of care is owed to ground jurisdiction, the Irish courts can reasonably be hoped to respond with similar openness as the English courts.

In summary, this indicates a positive conclusion on the feasibility of FDL cases at a substantive level. However, this was then balanced against the challenges at procedural and practical levels in Ireland. The availability of functioning collective redress mechanisms and market based funding options are critical to facilitating access to justice in cross border cases. They are recognised to be significant 'pull' factors to litigating FDL cases in the English courts. Access to mechanisms of collective redress and funding sources for litigation in the two jurisdictions were compared. It was illustrated that there are significant barriers in Ireland which do not exist in its closest common law neighbour, the UK. This chapter concluded these barriers are inappropriate and unjustifiable, and that this situation is all the more stark in view of the constitutional right of access to courts in Ireland. The markedly less favourable practical circumstances regarding litigation in Ireland will depress the feasibility of FDL litigation, in the short term. However, it was argued that initiatives

⁵³⁴ Delany and McGrath (n 64) 1-69 stating this approach was endorsed in *Fairfield* (n 114) (Finlay Geoghegan J) [46].

in play at national and EU level will ultimately influence Ireland to provide routes and means for collective litigation, rendering FDL cases feasible in the short to medium term.

It was strongly recommended that the Oireachtas introduce efficient and appropriate mechanisms enabling access to collective redress. Such mechanisms should view the model of GLOs in the UK as a starting point for reflection, and include the other mechanisms noted above.⁵³⁵ Should the Oireachtas persist in failing to introduce robust and appropriate routes, it is foreseeable that the judiciary may intervene to render the constitutional right of access to courts effective in practice. To advance, functioning horizontal mechanisms for collective redress must be linked to opening avenues to funding which support cases with a public interest element, including FDL cases. While considered unnecessary based on established experience in the UK, third-party funding could be regulated as considered appropriate in order to assuage possible concerns over abusive litigation. It is hoped that the forthcoming Review of Civil Administration will advise fundamental positive change. Thereafter, it may become a question of how long such changes take to be realised and become operational for claimants in FDL litigation.

Although the Irish State has assumed extensive obligations under IHRL, the Constitution remains the over-arching and dominant force influencing thinking and the approach of the courts to human rights protections. Yet, the conclusion is that the Constitution could exert greater positive impact. For FDL cases, it was argued from a number of angles, that the influence of the Irish Constitution would be positive, *inter alia*, concerning access to justice, residual jurisdiction, vindication of rights typically arising in FDL cases and the re-shaping of tort law. All are consistent with the values of the Constitution and its position as a living document which is responsive to emerging concerns including regarding human rights and the environment. As illustrated, vindication of constitutional rights has been re-directed towards the established array of actions in tort, unless there is a clear gap in remedies, or tort is adjudged to be basically ineffective. It was argued that to corral actions into tort is defensible only if and when tort effectively vindicates constitutional rights. Moreover, it was concluded that reconsideration is desirable, particularly when new opportunities present, such as in FDL cases which typically involve underlying violations of fundamental rights.

⁵³⁵ See Blennerhasset (n 258).

The analysis of *O'Donnell J* concerning fundamental rights, including those worded in terms of citizens in the Constitution as flowing from the dignity of the human person, was adopted. This chapter presented an argument that claimants in FDL cases could potentially have standing to take an action for infringement of a constitutional right. A second strand argued in favour of committing to infuse private law with the values underpinning the Constitution. As it stands, systematic examination to ensure tort law effectively and completely vindicates constitutional rights indicates failure to launch. In light of the strong symmetry between the rights underlying FDL actions and the norms and values underpinning the Irish Constitution and the rights guaranteed under it, FDL actions in tort law could support corporate respect for human rights in Ireland.

The synthesis and potential application of legal principles in Ireland was summarised. A model for adjudicating FDL litigation in Ireland was presented, based on the conclusions of the synthesis in chapters 5 and 6. It reflects the conclusion that the Irish courts should follow the grounding tenets established in FDL cases in the English courts, with the main bright line differentiating of the potential influence of the Irish Constitution. It is concluded that from a substantive perspective, FDL cases are feasible in Ireland. Indeed, the Irish Constitution would provide additional support for these cases by comparison to the English courts. From a procedural perspective, FDL cases are not currently supported in Ireland due to lack of appropriate mechanisms of collective redress and access to funding. On balance it is reasonable to expect this will alter in the short to medium term, rendering FDL litigation feasible.

For the Irish courts to accept an FDL case, on the basis of an arguable case of parent company duty of care, on the basis of infringement of fundamental rights, would confirm the Irish legal system is committed to acting consistently with both the values in our Constitution, the obligations of the State under International Human Rights instruments, and recognition of the need to address the negative impacts of business on human rights.

CHAPTER 7 CONCLUSIONS AND RECOMMENDATIONS

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7.1. INTRODUCTION

This chapter brings together the pathways to responding to the central research question with the implications of the major findings of this thesis. It incorporates the original aspect of this piece of research and its contribution to advancing scholarship. Appropriate to the dynamic nature of the field of business and human rights, it looks forward. In conclusion it will draw from the thesis to offer brief comments on future directions at the international and national levels in policy, regulation, and litigation.

7.2. RESEARCH QUESTION

The central research question of this thesis was concerned with investigating whether actions against a parent company in the tort of negligence for the negative impacts of its foreign subsidiaries are feasible in Ireland. The cause of action is based upon the concept of a duty of care owed by a parent company.

7.3. PATH TO CONCLUSIONS

This thesis encompasses research which is in part doctrinal and in part of a comparative nature. A functional method was adopted focusing on solutions to a common problem with conflicting interests, as influenced by forum specific practical and procedural considerations. Appropriate to this area, the themes explored included normative and practical factors influencing advancing accountability. The pathway followed involved:

- i. Outlining the context and drivers of the accountability gap;
- ii. Assessing frameworks and existing mechanisms of accountability including in criminal law;
- iii. Exploring the role of civil remedies in accountability;
- iv. The normative justifications for direct parent company liability;
- v. Factors affecting the feasibility of litigation in the tort of negligence;
- vi. The development of foreign direct liability litigation in comparative jurisprudence;
- vii. Factors affecting the feasibility of foreign direct liability litigation in Ireland;
- viii. Assessing procedural and practical considerations for litigation in Ireland;
- ix. The potential role of the Irish Constitution.

The central research question focuses on a cause of action in the tort of negligence, based on the concept of a duty of care owed by a parent company to third parties negatively impacted by the activity of a subsidiary.¹ The pathway is from context, to accountability gaps, to normative issues and justifications for the cause of action, to the development of principles of parent company duty of care in comparative foreign direct liability jurisprudence, to examination of the application of those principles in the context of Ireland, and conclusions on the feasibility for foreign direct liability litigation in Ireland.

The context is the direct involvement, or more frequently complicity, of multinational corporations in a wide spectrum of human rights violations including, forced land dispossession; rape; extrajudicial killings; forced labour; torture; pollution or environmental destruction which also affects health and livelihoods. By drilling into the existing regulatory system as it confronts the reality of rendering multinational corporations accountable, significant gaps were exposed. A review of relevant themes informed an assessment of the power of potential levers, including international human rights law, international criminal law, and domestic criminal law, to achieve or advance accountability. As it stands, there is no general international regime, and in practice international human rights treaties do not apply to corporations. The contribution of international soft law initiatives, reporting or disclosure style regulation, and issue specific regulation was assessed in terms of implementation and capacity to advance accountability.

It is a perfect storm. There is no forum enabling criminal liability of a corporate entity at the international level. A systemic barrier exists due to the focus on individuals, and exclusion of legal entities, including by the International Criminal Court and ad hoc international tribunals. None were created with jurisdiction over legal persons. However, this is a procedural matter related to the construction of jurisdiction under specific instruments, rather than one of substantive law. Further, universal criminal jurisdiction is rarely employed against legal entities, universal civil jurisdiction for international crimes is considered permissible but is not practiced, and corporate liability has been adjudged as not yet established under customary international law. Welcome advances in corporate criminal liability at national level have failed to deliver enhanced accountability in part due to a lack of resources and enforcement. While the attribution of liability to both the corporate entity and individuals is optimal, within complex multinational organisations the

¹ As all references have been previously cited in the body of the thesis, this chapter does not include footnotes, with the exception of as appropriate in section 7.6.

limitations of the identification method are apparent. The gaps in and deficiencies of existing mechanisms were identified as underpinning the utility of FDL as a cause of action for victims.

Flowing from deficiencies in existing mechanisms, the development of appropriately designed offences to both deter and proactively drive improvements to corporate behaviour was explored, in particular attaching primary liability to a corporate entity for failure to prevent offences in the UK. The introduction of an appropriately designed offence of failure to prevent human rights abuses was recommended to work with and reinforce redress for victims in FDL litigation. The twin doctrines of corporate law are routinely leveraged to structure groups in order to deflect liability from the parent company and to ringfence risk at the level of the subsidiary. Re-balancing the benefits accruing to multinational corporations and rendering the parent company directly accountable to its ‘involuntary creditors’, often communities located in zones of comparatively weak governance, is justifiable and appropriate.

The limitations of tort as a remedy for violations of human rights, and its remit in comparison to public law were appraised. In practice, actions in tort are leveraged as a proxy in circumstances where human rights based causes of action are unavailable, and in conjunction with the non-functioning of, or the deficiencies in, other routes to legal accountability. The risks to claimants of litigation in host states identified support both the need for FDL litigation and the crucial nature of the battle to ground jurisdiction in FDL proceedings. The role of tort as a regulatory tool, and within its wider role of protection of human rights in domestic systems was supported. The thesis advanced to assess the normative justification of direct parent company liability and the contribution of FDL litigation. It was illustrated that FDL litigation offers greater prospects of compensation for victims as multinational corporations may be motivated to avoid reputational damage once jurisdiction is confirmed in its home state.

Responding to the core research question implies the inclusion of comparative research as illustrative of routes to address the common problem. In analysing comparative FDL jurisprudence, a structure for analysis based on five factors was adopted and carried through the thesis:

- i. Whether the home country seized of the matter has jurisdiction to hear the claim;
- ii. Whether the parent company can be held accountable for foreign subsidiaries actions;
- iii. Conditions for liability relating to the legal basis on which the claim is brought;

- iv. Which national system of tort law the court will apply in determining the validity of the claim and apportioning damages;
- v. To what extent the procedural rules and practical circumstances of the forum are conducive to the pursuit of this type of litigation.

Emphasis was placed on case law from the English courts which offers a body of settled jurisprudence and is of greatest instructive value. Conflicts of jurisdiction are a challenge in FDL cases and joining a co-defendant subsidiary to proceedings against the parent company in an EU state is governed by a combination of Brussels I (recast) and national civil procedure rules. The impact the Rome II Regulation, and the potential of exceptions to the application of the *lex loci damni* were evaluated. In considering access to justice, it was noted that although impactful in advancing accountability, a forum of necessity is not provided for by EU law, and falls to the private international law of EU Member States. Jurisprudence shows evidence of restrictive interpretation, and a wide margin of appreciation, concerning the application of such domestic provisions under Article 6 ECHR.

The legal context pertaining to FDL litigation in the English and Irish courts are markedly similar. The conditions to ground jurisdiction include establishing the forum is the proper place to hear the matter, a good arguable case that a duty of care is owed, and that the foreign subsidiary is a necessary and proper party to the proceedings. The authoritative decision of the UK Supreme Court in *Vedanta* settled how the English courts conceptualise parent company duty of care within the tort of negligence. A synthesis of principles and themes in comparative jurisprudence informed the development of a model for adjudicating FDL litigation according to the parameters of jurisdiction; an arguable case a duty of care is owed; applicable law; and procedural and practical aspects of the forum.

Following synthesis of principles in the context of Ireland, the model for adjudicating FDL cases was reconfigured for Ireland based on the substantive, procedural and practical aspects of the forum. In the absence of relevant precedent, hypotheses were presented concerning which principles and precedent of English jurisprudence the Irish courts may find persuasive. Leading approaches from other jurisdictions also feature in relevant aspects. The extended potential of the Irish Constitution to impact upon FDL litigation was explored from various aspects. The barriers which procedural and practical circumstances represent to eventual FDL litigation in Ireland were highlighted, and potential solutions advocated.

At the core of the research question is the interface of human rights and tort in domestic legal systems. The pathway to investigating whether actions against a parent company in the tort of negligence for the negative impacts of its foreign subsidiaries are feasible in Ireland followed the structure laid out in Chapter 1. The synthesis responded to the need to advance legal accountability via a combination of criminal and civil remedies at national level, as a necessary addition to existing initiatives in policy and soft law. It was developed through the body of the thesis and reached conclusions as to the feasibility of FDL litigation in Ireland in Chapter 6.

7.4. CENTRAL FINDINGS AND IMPLICATIONS

Despite the scale and breadth of rights violations identified, the accountability of multinational corporations remains elusive. As it stands, multinational corporations may only be concerned by horizontal accountability, which may issue from financial or reputational damage. Multinational corporations can be considered expert at pricing risk, yet they have not priced in the full extent of the cost of their operations, and the law has not compelled them to do so.

This thesis concludes that there is growing recognition that it is appropriate to inject balance between the benefits accruing to parent companies from foreign subsidiaries and accountability to those negatively affected. It pointed to the challenge of actualisation of accountability. Initiatives have primarily centred on policy and soft law, to the detriment of advancing legal accountability. To move towards a balanced and effective framework it is crucial that increased focus is directed towards achieving legal accountability.

Soft law initiatives have an important contribution to maintain in the on-going process of norm development, and drive towards respect for human rights becoming ingrained within business. From benchmarking it is evident that even large and sophisticated corporations are advancing gradually from a low base. It is hoped that the process of implementation of the UNGPs will accelerate. The downside risk is that implementing the UNGPs is perceived as an end in itself, rather than a marker on the road to progressing accountability. In an unintended effect, the UNGPs have offered a delaying tactic to states and businesses. Best efforts voluntary initiatives are no guarantee of protection of human rights throughout the value chain, nor are they apt to address the issues involved for business. To illustrate, in proceedings against it, German retailer KIK maintained it had a worldwide Supplier Code of Conduct, and independent audit reports on safety at the factory of its supplier in Pakistan

where 260 people perished in a fire. Similarly, disclosure and transparency initiatives are welcome but of themselves are not expected to either prevent violations or to substantially advance accountability. The role of soft law and transparency based initiatives is not discounted or undermined. This thesis recognised the valuable contribution both offer within a holistic solution but argued that it is necessary and timely to concurrently promote pathways to accountability in law.

To progress, instrumental measures are required. As home state regulation with extraterritorial effect, mandatory human rights due diligence is appropriate and proportionate. It was illustrated that support for its introduction has gained significant momentum at national, EU and international levels. While this thesis concluded it is a matter of time, the formulation of human rights due diligence is critical to its potential impact. The model adopted should resemble the French Duty of Vigilance law but with wider application. Statutory human rights due diligence should be linked to civil remedies, and criminal sanctions for failure to prevent abuses. It should include obligations of wide consultation with affected rights holders, as well as mandated disclosure, and free and available access to information. It should be underpinned with public enforcement, and include wide provisions for both those affected and civil society to have standing in proceedings. It should be designed to avoid the risk of cosmetic compliance, and be consistently backed by an engaged regulator. In the interests of both speed and consistency, mandatory human rights due diligence should be instigated at supranational level, such as by the EU. A substantive due diligence model should be fully implemented in EU Member States.

It is evident from the difficulties outlined with, *inter alia*, corporate liability at international and national levels, and challenges of attribution of liability to the corporate entity, that corporations are not sufficiently rendered accountable, including in criminal law. This has been illustrated through the human context of corporate abuses; a legal accountability pathway; the accountability gap; universal criminal jurisdiction; corporate liability under customary international law; and corporate criminal liability under national law. This thesis advocated that appropriate criminal offences should work in tandem with civil causes of action in advancing accountability. It proposed that Ireland should emulate advances in the UK, where well-constructed failure to prevent offences are proving effective. It recommended the introduction of an offence based on primary liability of the corporate entity for failure to prevent human rights abuses. As home state regulation with

extraterritorial effect including an appropriately designed defence of due diligence, it would respond to a number of challenges with existing routes to accountability explored in this thesis. It is intended that its introduction would be allied with statutory human rights due diligence linked to civil remedies.

While the track record of FDL cases proceeding to a judgment on the merits and awards of damages is sparse, this thesis concludes this is indicative of an interim phase. In the EU, decisions are awaited in *Vedanta*, *Okpabi*, and the Dutch Shell Nigeria cases. In Canada *Hudbay* and *Araya* are expected to provide valuable precedent. It is anticipated they will move the pendulum noticeably towards accountability. In addition, FDL litigation offers indirect regulatory and norming effects, including positively influencing the behaviour of both defendants and non-defendants. A newfound interest in publishing human rights policy statements, human rights audits, training for employees, and engagement with NGO's is apparent once proceedings have issued. As illustrated in context, FDL litigation is potentially the sole route to legal accountability. It will both yield more and should not be judged by its litigation function alone but within its wider contribution. This thesis finds that each state can facilitate access to justice via civil procedure and practical supports and this is particularly appropriate in FDL style cases. Judicial discretion has also proven to be influential. Combined with the human context and magnitude of issues in accountability, the implication is there is justification for facilitating FDL litigation in domestic legal systems, for legislative support, and for judiciaries to continue to exercise their discretion.

Refuting that parent company liability is a 'novel' area guided by a separate set of principles in tort is coherent. Moreover, in *Vedanta* the UK Supreme Court correctly focused on what a parent company does with its opportunity of control over its subsidiary. It displayed pragmatism and modern thinking in recognising that there is a wide spectrum of management approaches in complex multinational corporations which may contribute to a finding that a duty of care has been assumed. Expectations have been raised that the content and implementation of published corporate group policies will also be subject to increasing judicial scrutiny in other jurisdictions. Justifiably, the decisions in both *Garcia* and *Vedanta* acknowledge the practical challenges for claimants in establishing causation in the alternative jurisdiction. This thesis finds the approach of the UK Supreme Court to access to justice is appropriate and balanced. Article 6 ECHR has a potentially valuable role in litigation and should be leveraged to a greater extent to support the right to access the courts.

A number of further implications are drawn. Firstly, principles in FDL litigation continue to cross-fertilise across jurisdictions, and it was argued that they will coalesce into a common thread led by the jurisprudence of the English courts. Secondly, settled comparative jurisprudence may be expected to prove persuasive in the Irish courts. Thirdly, it is anticipated this will result in accelerated development once the first FDL case is taken in Ireland. On balance, it is considered unlikely that the Irish courts will commence their assessment of parent company duty of care *de novo*.

In the context of FDL litigation, this thesis finds that the Irish Constitution offers extended possibilities in multiple respects. It advanced an argument based on the symmetry between the rights violations typically underlying FDL cases, tort law in its role of vindicating constitutional rights in Ireland, and the values of natural law and dignity of the human person permeating the Constitution. It advocated that when Irish courts consider FDL litigation, the Constitution may be brought to bear in three aspects; access to justice; actions for infringements of constitutional rights; and the enhancement of Irish tort law. It considered that it is plausible that claimants in an FDL case could ground an action for infringement of a constitutional right in Ireland, at least as concerns infringements of rights which have a natural law origin and which derive from the status as human persons. It is supported by interpretation of the Constitution as a ‘living document’ which is responsive to public concern, including regarding the negative impact of business in the more interconnected world in which we live.

This thesis concludes that from a substantive perspective, FDL litigation is feasible in Ireland. It anticipates that the existing procedural and practical inhibitors to litigation, lack of adequate mechanisms of collective redress and means of funding, will ease in the short to medium term thereby opening possibilities for FDL litigation.

As stated in *Persona* the constitutional right of access to the courts must be effective in practice. Realising this would require introducing a suite of efficient procedural mechanisms for collective redress and removing the bar on third party funding. On the basis of experience in the UK, concerns that unregulated third party funding would lead to abuse of process are considered to be overstated. The model presented projects the response of the Irish courts to adjudicating an FDL case and underpins the pertinence of this research.

The following comparative scorecard is a stark summary, as analysed and exposed within the thesis.

Summary: Comparative Scorecard UK and Ireland

UK

➤ Collective Actions	Yes (GLOs)
➤ Third party funding	Yes (1967)
➤ Modern Slavery	Yes 2015
➤ Failure to Prevent	Yes (2010)
➤ FDL style litigation	Yes (1998)
➤ FDL litigation feasible	Yes
➤ Judicial support	Yes
➤ EU Recommendations	Yes
➤ Constitution	No

Ireland

➤ Collective Actions	No
➤ Third party funding	No
➤ Modern Slavery*	No
➤ Failure to Prevent	Yes (2018)
➤ FDL style litigation	No
➤ FDL litigation feasible**	No
➤ Judicial Support	?
➤ EU Recommendations	No
➤ Constitution	Yes

* As noted, the Modern Slavery Act is not considered apt, and should not be adopted in Ireland.

** substantively yes, in practice significantly inhibited by procedural and practical context

The potential of businesses domiciled in Ireland and with operations overseas to be linked to abusees is real. In this, the commercial backdrop is no different from circumstances in the UK where the majority of FDL cases have been brought to date. For the Irish courts to accept a cause of action on the basis of infringement of fundamental rights, or an arguable case that the parent company of a multinational corporation breached a duty of care, would confirm our legal system is committed to acting consistently with both the values in our Constitution, and the obligations assumed by the State under international human rights instruments. It would signal to multinational corporations operating in Ireland that the Irish judiciary will uphold these standards.

7.5. ORIGINAL CONTRIBUTION

As emphasised within this thesis, commercial law, constitutional law, international public and private law, domestic tort, and criminal law relate to human rights. It is an underexplored interaction, particularly as it pertains to advancing accountability in business and human rights. In the context of FDL litigation, this thesis engaged with the potential of the Irish Constitution, and its relationship to tort law. This thesis is a significant effort to advance such links and interrelationships and may offer opportunities for further research by advocates of respect for human rights by business. The discussions in this thesis drew attention to the advance of legal principles in FDL litigation. In this aspect, FDL cases recall Moran's discussion of cases such as *Filartiga*:

They should rank among the most interesting of all contemporary tort cases, but tort theorists don't write about them...and leading and comprehensive textbooks on the law of torts don't even mention them. But this is only the beginnings of the puzzle.²

Legal remedies in the home states of multinational corporations based on direct liability of the parent company are under development. We await judgments on the merits in EU Member States in landmark cases in the English courts and elsewhere. To the author's knowledge, the feasibility of FDL litigation in Ireland has not been previously considered.

This thesis has illustrated that the commercial backdrop and potential links of commercial entities to abuses in Ireland are no different from in the UK, where the majority of FDL cases have been brought to date. As such, this research is relevant to Irish business, policymakers, tort lawyers, advocates, and those who may be involved in the adjudication of FDL cases in Ireland in the future.

This investigation held challenges, requiring this thesis to span areas of expertise that can be perceived as quite distinct. While this span was demanding, engaging it is valuable. This investigation advances constructing accountability in business and human rights and makes an original contribution to scholarship in an emerging area.

² Mayo Moran, 'An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law' in Craig Scott (ed) *Torture as Tort* (Hart Publishing 2001), 661-662.

7.6. LOOKING TO THE FUTURE

The interaction of business and human rights will demand and will gain increased focus. It will garner the attention of policy makers, institutions, national legislatures, judiciaries and business and financial markets across the globe. Within three to five years, it is anticipated it will be established common parlance and concern. When the law exacts a cost, the fully loaded price of the operations of multinational corporations will become apparent. Once established, it can be anticipated that the markets will respond to risk and cost with a price. The question is how to arrive at that point in the future. Progressing to an effective regulatory system requires responsive regulation. It requires sanctions which encompass legal, administrative, and social means at institutional, national, regional, and international levels. Brief comments are offered on future directions at the international and national levels in policy, regulation, and litigation.

7.6.1. International Treaties

It is expected that all new instruments and treaties should explicitly include corporate liability and require states party to take the necessary measures to ensure that legal persons can be held liable under criminal, civil or administrative law. The content of the Revised Draft Treaty on Business and Human Rights was published in 2019, and negotiations continue. It is questionable whether there is sufficient political will to advance before the medium term. It is hoped and anticipated that a treaty will issue, although a critical mass of signatures and ratifications may be challenging to obtain, particularly from the home states of multinational corporations.

7.6.2. National Systems

Routes to accountability in domestic law should span appropriate offences in criminal law (failure to prevent) and tort law (direct parent liability) and home state regulation of the supply chains of all business with extraterritorial effect. When considering FDL cases, national courts should use the full ambit of their powers to provide remedy, including non-pecuniary elements of compensation such as injunctions, apologies, rehabilitation and *restitutio in integrum* to affected environments.

7.6.3. Ireland

Ireland should play its part in supporting accountability, consistent with the obligations it has assumed. In the body of this thesis, corporate entity primary liability for an offence of failure to prevent human rights abuses is recommended. Consistent with the right to access the courts in the Irish Constitution, recommendations concerning the introduction of a suite of mechanisms for collective redress and the reform of funding of litigation were made. While the implementation of soft law initiatives is outside the scope of this thesis, the level of engagement by Irish corporations with initiatives, such as the UN General Principles on Business and Human Rights, merits further investigation. Civil society and Teachtaí Dála³ continue to press for the Government to engage in discussions on a legally binding treaty. Discussions should include concrete, time-defined undertakings concerning the implementation of the UNGPs via coordination of all appropriate means, including and beyond the National Action Plan. It is hoped that the revision to the Irish National Action Plan will move the dial towards rights and obligations underpinning this field.

As a matter of priority, it is hoped pressure will increase upon the Oireachtas to consider the introduction of mandatory human rights due diligence. The Irish Coalition for Business and Human Rights commissioned the author to prepare a proposal for outline mandatory Human Rights and Environmental Due Diligence legislation, to be launched in 2021. It is to be hoped that the stakeholders will recognise the evolving backdrop and engage.

7.6.4. The Irish Constitution

The extended possibilities offered by the Irish Constitution to influence FDL litigation, and in turn the interaction between the Constitution, FDL litigation and the development of tort law which were explored in this thesis may encourage further discussion. Possible connections between the Constitution, FDL Litigation and Article 16 Rome II was noted as an interesting question for possible consideration. Further, in the context of the discussion of an action for infringement of a constitutional right in this thesis, the progress of *Kiobel v Shell* in the Netherlands may prove of interest. Concerned with allegations of infringements of fundamental rights, with tort submitted as an alternative, as it advances it may point to themes for exploring further in an Irish context.

³ Deputy Fiona O'Loughlin <www.kildarestreet.com/debates/?id=2019-11-12a.401&s=speaker%3A416> accessed 12 November 2019.

7.6.5. Mandatory Human Rights Due Diligence

As home state regulation with extraterritorial effect, mandatory human rights due diligence is appropriate and proportionate. To progress, the movement needs to be from aspiration to actualisation of the substantive elements; assessment, investigation, prevention, and mitigation. Since the French Duty of Vigilance law was introduced a dozen European countries are discussing mandatory legislation. It is plausible that this may commence via state owned or supported organisations and extend into wider regulation of all other business enterprises.

For cause, the model adopted should follow the French Law, but with wider scope of application. The Netherlands progressed from voluntary to instrumental measures on child labour in supply chains in 2019.⁴ The level of reporting and regulatory enforcement of the Dutch Child Due Diligence Law have yet to be specified,⁵ such that it remains to be seen if it will effectively avoid the criticisms levelled at the UK Modern Slavery Act.⁶

Recalling that the EU 2020 study on due diligence through supply chains found that most (business and general) survey respondents supported the introduction of a general due diligence standard at the EU level. However, industry organisation survey respondents, representing a broader range of business were not, overall, in favour of ‘the introduction of new policy changes, including mandatory due diligence.’⁷

As outlined, regulation of HRDD should be gender responsive. In addition to referring to internationally recognised human rights and customary international law, it should refer to additional human rights instruments on the rights of persons belonging to particularly

⁴ <www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet> accessed 2 January 2020. See also Australian Modern Slavery Bill 2018. <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6148> accessed 2 January 2020.

⁵ See MVO Platform ‘Frequently asked questions about the Dutch Child Labour Due Diligence Law’ (3 June 2019) <www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 2 January 2020.

⁶ Discussed in chapter 2 section 2.2.6.

⁷ EU 2020 Study on Due Diligence through Supply Chains 152.

vulnerable groups or communities, such as CEDAW, CRC, CRPD and UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁸

The discussions concerning the EU legislative initiative have commenced. It has been signalled in the Draft Opinion of the Committee on Legal Affairs to the European Parliament report on corporate due diligence and corporate accountability that it will be a Directive. Further, that regulating for related civil remedies may lie outside the capacity of the EU. Indeed, the Committee on Legal Affairs draft includes criminal sanctions only in the case of repeated failure to comply with the obligations.⁹

It is anticipated that a sticking point in HRDD regulation will be whether and to what extent it will apply to small and medium sized enterprises (SMEs).¹⁰ While SMEs may have less capacity than larger companies, they still may risk severe human rights impacts and appropriate measures are expected. Similar conclusions were reported in the EU 2020 study in which survey respondents overall preferred a single standard applying irrespective of size, and while the potential burden for SMEs was noted, other respondents signalled that

⁸ See also Robert McCorquodale and Martijn Scheltema ‘Exploring core elements of an EU Regulation on mandatory human rights and environmental due diligence’ (21 August 2020) available at <<https://www.business-humanrights.org/en/blog/exploring-core-elements-of-an-eu-regulation-on-mandatory-human-rights-and-environmental-due-diligence/>>; Cara-Sophie Scherf, Peter Gailhofer, Nele Kampffmeyer, Tobias Schleicher ‘Responsibility towards society and the environment: businesses and their due diligence obligations Background paper from the research project commissioned by the Federal Environment Agency’ (August 2019) German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety available at: <<https://www.umweltbundesamt.de/publikationen/umweltbezogene-menschenrechtliche>>.

⁹ Draft Opinion of the Committee of Foreign Affairs for the Committee of Legal Affairs to the recommendations to the [EU] Commission on corporate due diligence and corporate accountability (2020/2129(INL)) available at https://www.europarl.europa.eu/doceo/document/AFET-PA-655782_EN.pdf

¹⁰ *ibid* <[EU Study Legislation – Options 1](#)> 9; Committee of International Trade recommendations to the [EU] Commission on corporate due diligence and corporate accountability (2020/2129(INL)) para 6 available at <https://www.europarl.europa.eu/doceo/document/INTA-PA-655776_EN.pdf>; Draft Opinion of the Committee of Foreign Affairs for the Committee of Legal Affairs (n 9) specifically indicates exclusion of micro enterprises and at 7 ‘Considers that small, medium-sized and micro-enterprises may need less extensive and formalised due diligence processes, and that a proportional approach could take into account, amongst other elements, the sector of activity, the size of the undertaking, the context of its operations, its business model, its position in value chains and the nature of its products and services’; See page 12; 16; articles 16 and 17.

often ‘the risks in their supply chain relate to the activities of SMEs.’¹¹ Possible alternatives might be the inclusion of SME in ‘risk sectors’ on entry into force, or to provide that the regulation will apply to all SMEs at a deferred date (e.g. two years) to be specified within HRDD regulation. Regulation should also include non-binding guidance, awareness raising and related funding provisions for SMEs.

Concerning the basis of thresholds which may exempt certain commercial or other organisations, it is not considered appropriate to consider ‘large companies’, based on the sole criterion of employees, as in the French Law. A standard based on ‘2 of 3’ of turnover, balance sheet and employees is advised.¹² For example, in an Irish context, it is advisable to adopt a standard which does not refer only to employees, as many business enterprises in Ireland have significant assets and activity combined with ‘micro’ sized numbers of employees.

As development of regulation advances, the practical challenges of ensuring compliance with HRDD in supply chains is acknowledged.¹³ However, advances in technology employing geo-location technology are anticipated to assist, for example in palm oil, and platforms employing blockchain technology.¹⁴ It has been noted that increasingly, discussions of HRDD across media, civil society at lobbying and at political levels refer to mandatory Human Rights and Environmental Due Diligence (mHR&EDD).¹⁵

¹¹ See also OCED Guidelines examples of how due diligence can be adapted to the resources of SMEs. Committee of Legal Affairs (n 9) 7 ‘Considers that small, medium-sized and micro-enterprises may need less extensive and formalised due diligence processes, and that a proportional approach could take into account, amongst other elements, the sector of activity, the size of the undertaking, the context of its operations, its business model, its position in value chains and the nature of its products and services’; page 12; 16; articles 16 and 17.

¹² See chapter 2 section 2.3. The Swiss RBI is based only upon employees, but at the (standard) lower level of 250. The German proposal is based on 2 of 3 model; turnover; balance sheet; and average number of employees.

¹³ EU Legislation Options 1_10-11; EU 2020 study 214 ff; Sherpa Vigilance Plan Reference Guide (VPRG) 34 <https://www.asso-sherpa.org/vigilance-plans-reference-guidance-legal-analysis-on-the-duty-of-vigilance-pioneering-law> accessed 15 September 2020.

¹⁴ ‘Unilever to use geo-location technology to track palm oil supplies’ (18 August 2020) available at <https://www.irishtimes.com/business/manufacturing/unilever-to-use-geo-location-technology-to-track-palm-oil-supplies-1.4333426>.

¹⁵ Second Revised Draft UN Binding Treaty art. 1.2 ‘Human rights abuse’ is defined as including environmental rights. See also

The German Supply Chain Due Diligence Act is under discussion.¹⁶ In Switzerland, a referendum on the Responsible Business Initiative is tabled for late 2020.¹⁷ In the UK 25 civil society organisations have called for the introduction of mandatory human rights and environmental due diligence.¹⁸ In Ireland the Irish Coalition for Business and Human Rights commissioned the author to prepare a proposal for outline mandatory Human Rights and Environmental Due Diligence legislation, to be launched in 2021.¹⁹

It is evident that there is a groundswell of support for mandatory HRDD.²⁰ At Member State and at EU level, it is the way forward.

7.6.6. European Union Regulation

Policy and regulation in the field of business and human rights will develop further, and it is becoming apparent that EU policy recommendations are reflecting accumulated academic and civil society discourse. It is to be hoped that litigation for business-related human rights abuses will be facilitated in the courts of EU Member States.

It has been argued that in order to facilitate access to justice in the EU, and the right to a fair trial under Article 6 EHCR, procedural and practical circumstances should be aligned.

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 1 September 2020.

¹⁶ See ‘Legislative Proposal: Corporate responsibly and Human Rights: Legal Text and Questions and Answers on the Human Rights Due Diligence Act proposed by German NGOs’ <https://corporatejustice.org/news/mhrdd_lawproposal_and_faq.pdf> accessed 17 August 2020.

¹⁷ Swiss Coalition for Corporate Justice ‘The Initiative Text with Explanations’, available at: <https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf> accessed 17 August 2020.

¹⁸ See Corporate Responsibility (CORE) < <https://corporate-responsibility.org/towards-mandatory-human-rights-due-diligence-uk/>> accessed 22 October 2020.

¹⁹ Irish Coalition for Business and Human Rights members: Trócaire, Trinity Centre for Social Innovation, Trinity Business School, Comhlámh, Front Line Defenders, Fairtrade Ireland, GLAN, Centre for Business and Society (CeBaS) UCD, Oxfam, LASC, Christian Aid, Irish Congress of Trade Unions, Friends of the Earth, NWCI Academics: Rachel Widdis Observers: ESCR-NET, Shift project, Action Aid Ireland, TerraJusta, and Save Our Sperrins <www.icbhr.ie>

²⁰ Juliane Kippenberg, Human Rights Watch <www.hrw.org/news/2019/09/10/chance-curtail-abuse-germanys-supply-chains> accessed 12 December 2019.

Specific regimes in defined areas such as competition or consumer sectors could be introduced, not on their own, but alongside a horizontal regime for collective redress.

Jurisdictional conflicts are a major feature of FDL litigation, and would justify, as scholars suggest, framing a specific set of jurisdictional rules for tort liability claims at the international level.²¹ It has been suggested that the Brussels I Recast Regulation be altered specifically for business-related human rights claims, consistent with the European Parliament 2015 Report on Corporate Liability for Serious Human Rights Abuses in Third Countries which encouraged reconsideration of the jurisdictional rules under Brussels I Regulation where this is a clear link to a Member State via corporate domicile, main or substantive place of business including companies for which the EU is an ‘essential outlet’.²²

Secondly, as originally proposed, and in accordance with Article 6 ECHR, that a *forum necessitatis* would be added to the Brussels I Recast Regulation. It is proposed that this rule would provide a basis for exceptional jurisdiction in the courts of EU Member States in civil claims carrying a risk of denial of justice in a host state and when there is a sufficiently close connection to that state.²³ Similarly, the Committee on Civil Litigation and the Interests of the Public has called for the home states to assert jurisdiction over claims against the overseas subsidiary of multinational corporation on the basis of the *forum necessitatis* doctrine when no other effective forum guaranteeing a fair trial is available.²⁴ Notably, the Draft Opinion of the Legal Affairs Committee to the EU Parliament on regulation of human rights due diligence proposes altering Brussels I specifically for business-related human rights claims. It includes a *forum necessitatis* provision which would provide a basis for exceptional jurisdiction in civil claims risking a denial of justice when there is a sufficiently close connection to the forum. Further, it proposes amendments

²¹ Ekaterina Aristova, ‘Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction’ (2018) 55(2) Utrecht Law Review 6, 21.

²² European Parliament Committee on Foreign Affairs, ‘Report on corporate liability for serious human rights abuses in third countries’ (2015/2315(INI)), 33 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0243+0+DOC+PDF+V0//EN> accessed 11 December 2019.

²³ External Relations Directorate 111.

²⁴ International Civil Litigation for Human Rights Violations’ (2012) 2.3(1) <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1118&StorageFileGuid=59f7e403-7733-4f8c-822d-e58b9be0d02b>> accessed 16 December 2019.

to the Rome II Regulation.²⁵ On the basis of the vulnerability of victims and power imbalances, it has been suggested that a choice of law provision be added specifically for business-related human rights claims. To ensure more effective access to justice and consistent with EU policy for higher human rights standards, it would allow the claimant to choose between the *lex loci damni*, the *lex loci delicti commissi*, and the law of the place where the defendant company is domiciled.²⁶

Of the exceptions to Rome II discussed in this thesis, to the author's knowledge only Article 7 has been successfully raised in litigation.²⁷ It is to be expected that Articles 7, 16 and 17 of Rome II will increasingly feature in litigation. It has been argued that the most promising would be either statutory human rights due diligence as an overriding mandatory provision in domestic systems, or a wide interpretation of transboundary torts under Article 7.

If, for example, the French Duty of Vigilance Law is characterised as an overriding mandatory provision in domestic law, this would enable claimants to choose for the laws of France to be applied to both the substantive and procedural aspects of the case. Extending this argument, EU wide mandatory human rights due diligence would fundamentally alter the complexion of accountability by disassembling the negative effects of Rome II on the applicable law in FDL litigation. Further, from the perspective of EU policy coherence the argument is valid. Interpreting the scope of Article 7 in such a way would underpin, and be consistent with, EU and EU Member States' policies on 'polluter pays', the EU Strategy on Corporate Social Responsibility, and its support for the UNGPs. Scholars identify a further interesting possibility if the Article 7 exception could be applied to circumstances where the corporate defendant in the home country failed to implement, or adhere to, its

²⁵ (n 10).

²⁶ External Relations Directorate, 114.

²⁷ In *Lluyia v RWE* Case No. 2 O 285/15 Essen Regional Court Germany, the claimant successfully argues Article 7 applied. Although the alleged damage, flooding risk, occurred in Peru, the greenhouse gases were emitted in Germany where environmental standards are higher. In November 2017, the Higher Regional Court of Hamm ruled that it would proceed to hear the *RWE* case and enter into the evidentiary stage. The case is on-going. See also Burkhard Hess and Martina Mantovani, 'Current Developments in Forum Access: Comments on Jurisdiction and Forum Non Conveniens – European Perspectives on Human Rights Litigation' (January 29, 2019). MPILux Research Paper 2019 (1) <<https://ssrn.com/abstract=3325711>> accessed 15 December 2019.

own published policies or failed to oversee the activities of subsidiaries in a host country that resulted in the environmental damage.²⁸ This possibility is in the frame post *Vedanta*.

7.6.7. Litigation

It is apparent that litigation focuses on elements of control of the parent over its subsidiaries. Allied to this, Chambers and Vastardis²⁹ propose options where the parent did not necessarily take an active role in the subsidiary's business. The test is one of 'legal control' by virtue of its direct or indirect ownership or ability to appoint management. They propose that the UN Treaty include a model for veil piercing guided by the treaty-based veil-piercing model found in international investment law.³⁰

It is anticipated that the judgments on the merits in *Vedanta*, *Hudbay*, and the Dutch Shell Nigeria cases will show cross-fertilisation. In an ideal scenario, *Vedanta* will lead the development of a line of jurisprudence on the aspects of parent company duty of care falling within general principles of tort, attention to group policies, and applicable law.³¹ It is to be hoped that *Hudbay* will follow the themes of wider access to justice in *Garcia*, and the Dutch Shell Nigeria cases will follow both and deliver a supportive ruling on the merits in a EU civil law jurisdiction. Further, the evident crossover of authorities and principles from the English courts in the Court of Appeal in *Araya* supports that there is on-going the cross fertilisation in principles in FDL litigation across jurisdictions.

²⁸ Enneking 'Judicial Remedies' 53-55 arguing that on the basis of the 'polluter pays' principle for environmental damage, it would be inconsistent to allow the tortfeasor to derive economic benefits of the harmful activity resulting in human rights or health and safety related damage.

²⁹ Rachel Chambers and Anil Yilmaz Vastardis, 'Overcoming the corporate veil challenge: could investment law inspire the proposed business and human rights treaty?' (2018) 67(2) International & Comparative Law Quarterly 389.

³⁰ Ibid 396 lists similarities between international investment law and business and human rights as; positions of vulnerability, both have emphasis on access to remedy; disadvantageous position in relation to multinational corporations (substantively and procedurally); The similarities in the corporate structures and relationships involved in the BHR and IIL claims make the IIL approach to veil piercing a suitable model for BHR claims.

³¹ See also *James Hardie Industries v White* [2018] NZCA 580, concerning parent company duty of care. Decided pre the decision of the UK Supreme Court in *Vedanta*, the New Zealand Court of Appeal upheld the refusal of the judge at first instance to strike out the case, considering that the publicly available material was sufficient to indicate that the parent may have assumed a duty of care, and the case should not be dismissed at an interlocutory stage.

It has been argued that international standards should be considered as a matter of course and accorded weight in FDL litigation. Consideration of increasing normative expectations and international standards in business respect for human rights is an aspect which the judiciary could engage with more proactively, including as concerns the influence of public concern on the scope of policy considerations and whether it is just, fair and reasonable to impose a duty of care. Submissions from the International Commission of Jurists and CORE into the *Okpabi* appeal to the UK Supreme Court³² stress the international ‘standards expected of a reasonable and prudent enterprise’, referring *inter alia*, to the UNGPs including the concepts of due diligence, OECD Guidelines including OECD Due Diligence Guidance for Responsible Business Conduct³³ and IFC Standards.³⁴ The submission also references the UK government publication ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’.³⁵ They argue that the Court of Appeal erred in finding that international standards are irrelevant, and should, with comparative jurisprudence be considered by a court in determining whether or not the defendant parent company, Royal Dutch Shell arguably owed a duty of care to the Claimants.³⁶

Although outside the scope of this thesis *per se*, references are made to the development of public and private litigation concerning climate change. It is anticipated that public concern, costs of remediation and developments in the science of attribution will open the door to significant increases in litigation in this related field.

³² UKSC 2018/0068 <<https://www.icj.org/uk-supreme-court-should-recognize-shells-responsibilities-for-devastating-rights-impacts-of-niger-delta-oil-spills-say-ngos/>> accessed 10 July 2020.

³³ Including The OECD has recently published extensive advice on due diligence: OECD Due Diligence Guidance for Responsible Business Conduct(2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

³⁴ <https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h> ICJ / CORE

³⁵

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf>; May 2020 update on implementation <<https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020>> accessed 5 October 2020.

³⁶ ICJ/CORE (n 32) para 34.

7.7. FINAL COMMENT

There is no silver bullet to advancing the accountability of business for negative human rights impacts. This thesis is not concerned with whether business is overall a positive or negative force. The valid pragmatic concerns for business in advancing respect for human rights throughout its operations are recognised, but outside the scope of this thesis to address. The future of protection and accountability necessitates moving along a pathway which includes policy and soft law initiatives but redresses the balance to greater focus on hard law consequences. Strands of vertical and horizontal accountability must combine and form a holistic advance.

At an everyday level, there is awareness of corporate social responsibility, but hard law accountability is not on the radar, at least not sufficiently. Multinational corporations in Ireland are arguably more aware than lawyers or the general public. It is predicted that within five years, the effect of business on human rights will be part of the lexicon of policy advisors, lawyers, businesspeople, and the general public. A binding treaty on business and human rights will make a major contribution to advancing accountability at multiple levels, at the point when the political will to implement is followed by sufficient weight of ratifications by states and acceptance by business.

Education will yield a new generation of lawyers and business leaders for whom protection of human rights within business is ingrained. Leadership is required from within corporations to operationalise protection of human rights. Corporate policies must be soundly based in protection and prevention of harm and move from aspiration to actualisation. Advocates should engage with comparative jurisprudence and give weight to international initiatives in their assessment of the duty of care owed by companies to third parties. It is hoped that the Irish judiciary will adopt an open approach to FDL litigation, recognising the human context of negative impacts to which these proceedings relate, and where appropriate, exact a cost.

Optimism is a strategy for making a better future. Because unless you believe that the future can be better, it's unlikely you will step up and take responsibility for making it so. If you assume that there's no hope, you guarantee that there will be no hope. If you assume that there is an instinct for freedom, there are opportunities to change things, there's a chance you may contribute to making a better world. The choice is yours.

Noam Chomsky

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