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**THE APPLICABLE LAW TO BUSINESS-RELATED  
HUMAN RIGHTS TORTS UNDER THE ROME II  
REGULATION**

Dissertation to obtain a Master's  
Degree in Law, in the specialty of  
International and European Law.

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Benedita Sequeira

*Benedita Sequeira*

*Para a avó São e o avô Zé*

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## **Quoting**

This dissertation follows the quoting provisions of Portuguese Norms 405-1 and 405-4 of the Portuguese Quality Institute. Throughout this work all relevant references are identified in the footnotes, in full when referenced for the first time and in abbreviated form after that, in the following format: AUTHOR, Abbreviated title..., page. All references are listed in full in the bibliography.

## **Abbreviations**

Art. - Article

BHR – Business and Human Rights

BHRE – Business, Human Rights and the Environment

CESCR - Committee on Economic, Social and Cultural Rights

CJEU – Court of Justice of the European Union

CSR – Corporate Social Responsibility

ECHR – European Convention on Human Rights

GVC – Global Value Chain

HRDD – Human Rights Due Diligence

mHRDD – mandatory Human Rights Due Diligence

MNC – Multinational Corporation

MS – Member-State

NGO – Non-governmental organization

PIL – Private International Law

RRII – Rome II Regulation

TNC – Transnational Corporation

TFEU – Treaty of Functioning of the European Union

UN – United Nations

UDHR – Universal Declaration of Human Rights

UNGPs – UN Guiding Principles on Business and Human Rights

UN HRC – UN Human Rights Council

OEIWG – Open-Ended Intergovernmental Working Group

The body of the dissertation, including spaces and notes, occupies a total of 143.763 characters.

## **Abstract**

As the momentum for corporate liability for human rights abuses grows, and as corporations are being increasingly brought to justice for human rights harms they caused or contributed to in their global value chains, through civil legal action based on the law of torts, access to remedy remains challenging. Indeed, accountability and proper redress rarely occur, namely due to hurdles such as establishing the applicable law to the proceedings. This dissertation aims to analyse the conflict-of-laws rules provided for under the Rome II Regulation, which determines the applicable law to business and human rights tort actions brought before EU Courts against European parent or lead corporations. Particularly, we will focus on their solutions and impact on access to remedy for victims of corporate human rights abuse, reflecting on the need to adapt these conflict rules or come up with new solutions to ensure that European corporations are held liable for human rights harms taking place in their value chains in a third country territory. Our analysis takes into account the relevant case-law from European Courts on the topic, as well as the proposed EU Directive on Corporate Sustainability Due Diligence, the Draft Legally Binding Instrument on Business and Human Rights, and relevant national and international standards and regulation on business and human rights.

## **Resumo**

*Com a crescente tomada de consciência acerca da responsabilidade das empresas por violações dos direitos humanos, estas começam, cada vez mais, a ser trazidas à justiça para responder pelos danos causados ou para os quais contribuíram nas suas cadeias de valor globais, através de ações judiciais civis baseadas no direito da responsabilidade civil extracontratual. Não obstante, o acesso à reparação continua a ser um desafio, já que, de facto, a responsabilização e a compensação adequadas raramente ocorrem, nomeadamente devido a obstáculos como a determinação da lei aplicável à matéria da causa. Esta dissertação propõe-se a analisar as normas de conflitos previstas no Regulamento Roma II, que determina a lei aplicável às ações de responsabilidade civil extracontratual, intentadas perante os tribunais da UE, e movidas contra empresas mãe ou empresas líderes europeias pela violação de direitos humanos. Em particular, centrar-nos-emos nas suas soluções e no impacto destas no acesso à*

*justiça para as vítimas de violação de direitos humanos por parte de empresas, refletindo sobre a necessidade de adaptar estas regras de conflitos ou de encontrar novas soluções para assegurar que as empresas europeias sejam responsabilizadas pelos danos que ocorram nas suas cadeias de valor no território de um país terceiro. A nossa análise tem em conta a jurisprudência relevante dos tribunais europeus sobre o tema, bem como a proposta de Diretiva da UE sobre Deveres de Diligência Devida em Sustentabilidade Corporativa, o Projecto de Instrumento Legalmente Vinculativo sobre Empresas e Direitos Humanos, e as normas e regulamentos nacionais e internacionais relevantes sobre empresas e direitos humanos.*



## I. Introduction

The economic and commercial globalization witnessed in the last decades brought with it a shift in market and corporate structures, leading corporations to adopt external expansion techniques, such as forming corporate groups<sup>1</sup> or fragmenting their production through GVCs.

MNCs soon became very “powerful economic actors”<sup>2</sup>, operating in multiple countries through a complex web of entities and business relationships, and taking advantage of the best conditions for production by establishing their production sites in States “with less stringent regulatory frameworks in relation to human rights.”<sup>3</sup> This “short-termism approach”<sup>4</sup> led corporations to source from States which are highly dependent on foreign investment and, therefore, less willing and less capable of regulating corporate activity in their territory.

The fact remains that, while companies can create jobs, channel foreign investment and generate revenue, and thus bring positive change into a region or country, many negative impacts may materialize through conducting business operations in GVCs, namely, on the human rights of workers and surrounding communities.<sup>5</sup> We can point out several examples, such as the collapsing of the Rana Plaza building in Bangladesh, in 2013, where over 1.100 workers died, and the collapse of the Brumadinho tailings dam in Brazil, in 2019, killing at least 250 people, mostly

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<sup>1</sup> ENGRÁCIA ANTUNES, JOSÉ, *Os Grupos de Sociedades: estrutura e organização jurídica da empresa plurissocietária*, 2.<sup>a</sup> ed., Coimbra, Almedina, 2002, p. 38 ss.

The corporate group aggregates different commercial partnerships that, while maintaining their separate legal personality, are subordinate to a unitary and common direction. The corporate group stands at a crossroads between diversity, as it incorporates different and autonomous legal entities, and unity, as the economic activity is united. See: ENGRÁCIA ANTUNES, JOSÉ, “Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law, an International and Comparative Perspective”, in *Studies in Transnational Economic Law*, vol. 10, Boston, Kluwer Law and Taxation Publishers, 1994, p. 497-542, p. 158.

<sup>2</sup> AMNESTY INTERNATIONAL, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, London, Amnesty International, 2014, p. 11.

<sup>3</sup> BRIGHT, CLAIRE [et. al], “Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?”, in *Business and Politics*, vol. 22, special issue 4, 2020, p. 667-697, p. 668.

<sup>4</sup> RUGGIE, JOHN / REES, CAROLINE / DAVIS, RACHEL, “Ten Years after: from UN Guiding Principles to Multi-Fiduciary obligations”, in *Business & Human Rights Journal*, forthcoming, 2021, p. 10.

<sup>5</sup> ECCHR, *Making Corporations Respond to the Damage They Cause: Strategic approaches to compensation and corporate accountability*, Berlin, Brot für die Welt, 2012, p. 4.

workers.<sup>6</sup> These disasters are attributed to the dangerous working conditions in the sites and factories, hosting manufacturers supplying international brands.

This global production phenomenon, which has contributed to an increase in inequalities between the global north, where the head corporation is generally domiciled, and which is usually referred to as the home State, and the global south, where subsidiaries and suppliers usually operate<sup>7</sup>, which can be called the host State, is fuelled by a *governance gap*, creating “a permissive environment for wrongful acts [to be carried out] by companies”<sup>8</sup> and impairing the right to access remedy for victims of corporate human rights abuse.

This gap, when aligned with the traditional corporate law concepts of separate legal personality and limited liability of corporations<sup>9</sup>, shields parent and lead companies from liability<sup>10</sup> for harms inflicted upon the human rights of others by their overseas subsidiaries or suppliers. With the acquisition of legal personality corporations become separate legal persons, with their own rights and obligations, and their own patrimonial sphere.<sup>11</sup> In the case of limited liability corporations, this separation goes further, entailing that only the corporation can be held responsible for its acts, shielding shareholders from any responsibility in relation to third parties.<sup>12</sup> For *polycorporate* groups or MNCs this means that the parent or lead company is not responsible for the wrongful conduct of another corporation that integrates the group, thus creating a “tension between diversity (multiplicity of legal entities) and unity of economic activity.”<sup>13</sup> A perfect illustration of this reality is provided by the *Nike* case, where, after reports emerged exposing the poor working conditions and

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<sup>6</sup> HUMAN RIGHTS WATCH, “Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties”, in *Human Rights Watch World Report*, 2020, available at: <https://www.hrw.org/world-report/2020/country-chapters/global-2#> (08.06.2022).

<sup>7</sup> See: PARANCE, BÉATRICE / GROULX, ELISE / CHATELIN, VICTOIRE, “Regards croisés sur le devoir de vigilance et le “duty of care””, in *Journal du Droit International*, n. ° 1, 2018, p. 21-52, p. 23.

<sup>8</sup> AMNESTY INTERNATIONAL, *Injustice Incorporated...*, p. 196.

<sup>9</sup> ENGRÁCIA ANTUNES, JOSÉ, “The Liability of Polycorporate Enterprises”, in *Connecticut Journal of International Law*, vol. 13, n.º 2, 1999, p. 197-231, p. 214.

<sup>10</sup> CHAMBERS, RACHEL, “Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court”, in *University of Pennsylvania Journal of International Law*, forthcoming, 2020, p. 6.

<sup>11</sup> COUTINHO DE ABREU, JORGE MANUEL, *Curso de Direito Comercial*, vol. II, 7ª ed., Coimbra, Almedina, 2021, p. 168.

<sup>12</sup> CARVALHO, ORLANDO, *Direito das Empresas*, Coimbra, Coimbra Editora, 2012, p. 211.

<sup>13</sup> ENGRÁCIA ANTUNES, J., *Liability of Corporate Groups...*, p. 38.

child labour issues at *Nike's* overseas supplier factories in Asia, the company started being targeted by numerous protests and boycotts, nonetheless, it quickly exempted itself from any legal responsibility because it did not own the said factories.<sup>14</sup>

The widespread awareness of the impact of transnational corporate activity on human rights soon gave rise to the BHR movement, growing out of “a quest for corporate accountability to mitigate or prevent the adverse impacts of business activity on individuals and communities.”<sup>15</sup> In this context, a series of soft law instruments, i.e., non-binding in terms of international law, but which are “intended to create pressure and to influence the conduct of States” and corporations<sup>16</sup>, have been adopted, alongside self-regulatory corporate initiatives.<sup>17</sup>

Within this framework, Professor JOHN RUGGIE developed the “Protect, Respect and Remedy framework”, later materialized into the UNGPs<sup>18</sup>, which were unanimously endorsed by the UN Human Rights Council in 2011. They form a “global standard of practise that is now expected of all States and businesses with regard to BHR”<sup>19</sup>, and are based on three pillars: (i) the State duty to protect, (ii) the corporate responsibility to respect human rights and (iii) access to appropriate and effective remedies. They rest on “differentiated but complementary responsibilities with regard to human rights impacts”<sup>20</sup>, establishing under pillar II that business enterprises should respect all internationally recognized human rights, and implement a HRDD process “in order to identify, prevent, mitigate and account for their actual

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<sup>14</sup> See: TEATHER, DAVID, “Nike lists abuses at Asian factories”, in *The Guardian*, 2005, available at: <https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money> (17.06.2022).

<sup>15</sup> RAMASASTRY, ANITA, “Corporate Social Responsibility versus Business and Human Rights: bridging the gap between responsibility and accountability”, in *Journal of Human Rights*, n. ° 14, 2015, p. 237-259, p. 237.

<sup>16</sup> OLIVIER, MICHÈLE, “The relevance of “soft law” as a source of international human rights”, in *The Comparative and International Law Journal of Southern Africa*, vol. 3, n.° 35, 2002, p. 289-307, p. 295.

<sup>17</sup> See, for instance: UN, *Global Compact*, 2006, available at: <https://www.unglobalcompact.org/> (17.06.2022); and BUSINESS ROUNDTABLE, *Business Roundtable Statement on the Purpose of a Corporation*, 2019, available at: <https://www.businessroundtable.org/> (17.06.2022).

<sup>18</sup> UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, available at: <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr-en.pdf> (15.06.2022).

<sup>19</sup> UN OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Corporate Responsibility to Respect Human Rights: an Interpretative Guide*, New York/Geneva, United Nations, 2012, p. 1.

<sup>20</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 684.

and potential human rights impacts.”<sup>21</sup> This process, which should be ongoing and proportionate to the company’s size, structure and activity, is important to address the ways in which a corporation may be involved with human rights impacts, namely by causing, contributing to or being directly linked to it through its activities or business relationships.<sup>22</sup> This is an *independent responsibility*<sup>23</sup>, that is, not dependent on the State’s capacity or willingness to fulfil its own obligations with regard to human rights.<sup>24</sup>

Beyond the Human Rights Council, the establishment of HRDD obligations has been endorsed by several other actors, such as international organizations, governments, NGOs.<sup>25</sup> The concept was introduced in the OECD in the Guidelines for Multinational Enterprises<sup>26</sup>, in the course of the 2011 revision, and in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, revised in 2017<sup>27</sup>, illustrating the “dynamic dimension” and importance of the UNGPs.<sup>28</sup>

All these instruments rely, however, on “voluntary undertakings on the part of companies”, meaning, they do not set legally binding obligations and, therefore, no legal consequence can derive from non-compliance.<sup>29</sup> The corporate responsibility to

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<sup>21</sup> Guiding Principle 17, UNGPs.

<sup>22</sup> UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights* (A/HRC/32/19), 2016, available at: <https://digitallibrary.un.org/record/841635> (30.05.2022), p. 3.

<sup>23</sup> UN GENERAL ASSEMBLY, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, General Assembly seventy-third session, 2018, available at: <https://undocs.org/pdf?symbol=en/A/73/163> (04.04.2022), p. 3.

<sup>24</sup> ESSEX BUSINESS AND HUMAN RIGHTS PROJECT, *Investor Obligations in Occupied Territories: A Report on the Norwegian Government Pension Fund – Global*, University of Essex, 2019, available at: <https://www.npaid.org/publications/investor-obligations-in-occupied-territories> (04.04.2022), p. 8.

<sup>25</sup> UN HUMAN RIGHTS COUNCIL, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council Seventeenth session, 2011, available at: [https://www.ohchr.org/documents/issues/business/a-hrc-17-31\\_aev.pdf](https://www.ohchr.org/documents/issues/business/a-hrc-17-31_aev.pdf) (05.09.2021), p. 4.

<sup>26</sup> OECD, *Guidelines for Multinational Enterprises*, OECD, 2011, available at: <http://mneguidelines.oecd.org/guidelines/> (08.06.2022).

<sup>27</sup> ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 2017, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) (08.06.2022).

<sup>28</sup> RUGGIE, J. / REES, C. / DAVIS, R., *Ten Years after...*, p. 3.

<sup>29</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 669.

respect human rights is grounded in “social expectations”<sup>30</sup>, which have “intrinsic persuasive power”<sup>31</sup>, and, according to the most recent studies, namely the Corporate Human Rights Benchmark of 2020, “only a minority of companies demonstrate the willingness and commitment to take human rights seriously.”<sup>32</sup> The relevance of soft law approaches is, thus, very limited, remaining at the “companies’ discretion.”<sup>33</sup>

Even though there are currently no binding instruments “to specifically regulate companies with regards to human rights violations that occur in their GVCs”<sup>34</sup> at the international level, domestic and regional legislations seeking to implement BHR standards have started to emerge. In particular, reporting legislations, requiring companies to “disclose information regarding their human rights impacts”<sup>35</sup>, have been adopted in the UK (UK Modern Slavery Act<sup>36</sup>) and in the EU (EU Non-Financial Reporting Directive<sup>37</sup>), and mHRDD legislations have been adopted either for a particular sector or issue, as in the Netherlands (Dutch Child Labour Due Diligence Act<sup>38</sup>) and in the EU (EU Timber Regulation<sup>39</sup> and EU

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<sup>30</sup> MACCHI, CHIARA / BRIGHT, CLAIRE, “Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation”, in *Forthcoming in M. Buscemi, N. Lazzerini and L. Magi (eds), Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, 2020, p. 2.

<sup>31</sup> RUGGIE, J. / REES, C. / DAVIS, R., *Ten Years after...*, p. 2.

<sup>32</sup> WORLD BENCHMARKING ALLIANCE, “Corporate Human Rights Benchmark 2020”, in *World Benchmarking Alliance*, 2020, available at: <https://www.worldbenchmarkingalliance.org/publication/chr/b/> (11.06.2022).

<sup>33</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 685.

<sup>34</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 684.

<sup>35</sup> BUENO, NICOLAS / BRIGHT, CLAIRE, “Implementing Human Rights Due Diligence through Corporate Civil Liability”, in *International and Comparative Law Quarterly*, Vol. 69, issue 4, 2020, p. 789-818, p. 800.

<sup>36</sup> United Kingdom, *Modern Slavery Act*, 2015, available at: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (14.03.2022).

<sup>37</sup> EU, *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, 2014, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> (14.03.2022).

<sup>38</sup> Netherlands, *Child Labour Due Diligence Act*, 2017, available at: <https://zoek.officielebekendmakingen.nl/stb-2019-401.pdf> (14.03.2022).

<sup>39</sup> EU, *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*, 2010, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995> (14.03.2022).

Conflict Minerals Regulation<sup>40</sup>), or imposing a general duty to conduct mandatory HRDD, as in France (French Duty of Vigilance Law<sup>41</sup>).

Moreover, civil and criminal legal action started being brought against corporations for human rights harms they caused, contributed to, or that are directly linked to their operations or business relationships.

In particular, an increasing number of transnational civil liability cases started being brought in home States against “Western society based parent companies”<sup>42</sup> of MNCs, often together with the subsidiary responsible for carrying out the harm in the host State, or against lead companies in relation to harms caused by their suppliers.<sup>43</sup> These transnational claims try to circumvent the difficulties in accessing justice in the host state, where the harm occurred and where there is frequently “a lack of political willingness to ensure remedy.”<sup>44</sup> This is the type of litigation we will focus on throughout this dissertation, that is, the private law tort claims brought before home State courts and which are increasingly being used as a means for ensuring “extraterritorial human rights protection.”<sup>45</sup>

However, accessing justice in the State where the MNC is headquartered<sup>46</sup>, is not without its challenges and there are various recurrent obstacles to reparation, namely: difficulties in seeking legal representation, in establishing direct liability for the parent or lead company, difficulties relating to the “complexity of corporate structures” and access to adequate information, and difficulties grounded on the

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<sup>40</sup> EU, *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*, 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821> (14.03.2022).

<sup>41</sup> France, *French Duty of Vigilance Law*, 2017, available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> (14.03.2022).

<sup>42</sup> ÁLVAREZ RUBIO, JUAN JOSÉ / YIANNIBAS, KATERINA, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, New York, Routledge, 2017, p. 39.

<sup>43</sup> *Ibid*, p. 39.

<sup>44</sup> AMNESTY INTERNATIONAL, *Injustice Incorporated...*, p. 11.

<sup>45</sup> AUGENSTEIN, DANIEL, “Torture as tort? Transnational tort litigation for corporate-related human rights violations and the human right to remedy”, in *Human Rights Law Review*, vol. 18, n. ° 3, 2018, p. 593-612, p. 610.

<sup>46</sup> AMNESTY INTERNATIONAL / BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, London, Amnesty International, 2017, p. 3.

“power of influence of TNCs.”<sup>47</sup> When we are dealing with transnational cases, the TNC “presents a unique challenge”, as it is “a *forum shopper* per excellence, capable of choosing the most favourable legal regime for it at any given time, and even negotiating with States to opt-out of supposedly mandatory regimes of regulation.”<sup>48</sup>

Adding to this, private international law hurdles, such as establishing jurisdiction and determining the applicable law can pose significant challenges. Indeed, PIL rules may play a role in perpetuating the impunity of MNCs for harms inflicted upon human rights and the environment<sup>49</sup>, impacting the victims’ access to remedy negatively.

We will focus on the impact of choice of law rules – which determine the applicable law to a transnational dispute – on the access to effective remedy for victims of corporate human rights abuse in the context of transnational torts. The main research question to be analysed throughout this dissertation is the following: “Is there the need to adopt special rules to determine the applicable law to business-related human rights torts, under the Rome II Regulation, in order to ensure access to remedy?”

Our aim is to study the conflict-of-laws rules applicable to BHR torts under the RRII, on the law applicable to non-contractual obligations, and reflect on the necessity to adapt them or come up with new solutions to ensure access to remedy for victims of human rights abuse, looking, in particular, at the PIL solutions proposed by the EU upcoming Directive on mHRDD and the Draft Binding BHR Treaty.

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<sup>47</sup> MARX, AXEL [et. al], *STUDY: Access to legal remedies for victims of corporate human rights abuses in third countries*, European Union (EP/EXPO/B/DROI/FWC/2013-08/LOT4/07), 2019, p. 14.

<sup>48</sup> BRIGHT, CLAIRE / WRAY, BENEDICT, “Corporations and Social Environmental Justice: the Role of Private International Law”, in *Towards Social Environmental Justice? (EUI Working Paper)* 2012, p. 75-94, p. 76.

<sup>49</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice and Effective Remedies*, Report of the European Law Institute, Vienna: European Law Institute, 2022. p. 44

## II. Access to remedy for business-related human rights torts: the applicable law issue

The corporate responsibility to respect human rights is, as we have seen, grounded on social expectations, and provided for in soft law instruments, such as the UNGPs. Indeed, International Human Rights law imposes duties on States, and, according to the classic Public International Law doctrine, “corporations are not subject to binding human rights obligations contained in international treaties.”<sup>50</sup>

Notwithstanding, a significant part of the doctrine disagrees with this traditional view, and, with the adoption of mHRDD frameworks, human rights obligations are increasingly being considered proper legal obligations, with many scholars already recognizing that businesses are bound by its standards and are under the obligation to guarantee them.<sup>51</sup>

Overlooking this ongoing debate, it is consensual that States must effectively implement human rights standards, in accordance with their international obligations, namely by ensuring that non-State actors comply with them. This is in line with the increasingly acknowledged horizontal effect (or “privatization”) of human rights<sup>52</sup>, stemming from a process of continuous expansion of their realm of influence.<sup>53</sup> Therefore, access to remedy should be available for all those harmed in their human rights by corporate actors.<sup>54</sup>

Access to effective remedy is set forth under pillar III of the UNGPs, in accordance with the principle of international human rights law that “all victims of human rights abuse have a right to an effective remedy”<sup>55</sup> and that the perpetrator

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<sup>50</sup> OXFORD PRO BONO PUBLICO, “Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: Comparative submission prepared for John Ruggie”, in *Oxford Pro Bono Publico*, 2008, available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf> (16.04.2022), p. 2.

<sup>51</sup> IZQUIERDO-SANS, CRISTINA/ MARTÍNEZ-CAPDEVILA, CARMEN/ NOGUEIRA-GUSTAVINO, MAGDALENA, *Fundamental Rights Challenges*, Cham, Springer, 2021, p. 7.

<sup>52</sup> GOMES CANOTILHO, JOSÉ, *Estudos Sobre Direitos Fundamentais*, 2.<sup>a</sup> ed., Coimbra, Coimbra Editora, 2008, p. 192.

<sup>53</sup> MAC CRORIE, BENEDITA, *A Vinculação dos Particulares aos Direitos Fundamentais*, Coimbra, Almedina, 2005, p. 5.

<sup>54</sup> OXFORD PRO BONO PUBLICO, *Obstacles to Justice and Redress...*, p. 2.

<sup>55</sup> AMNESTY INTERNATIONAL, *Injustice Incorporated...*, p. 15.

The applicable law to business related human rights torts under the Rome II Regulation

should be held accountable for the harm caused. The Guiding Principles prescribe the implementation of judicial, administrative, legislative or other remedial schemes<sup>56</sup>, in order to have corporations respond for the harm they caused or contributed to.<sup>57</sup> Effective remedy should be accessible, affordable, timely and adequate.<sup>58</sup> Moreover, this general guarantee, that an effective remedy should be provided to anyone who had their human rights allegedly violated, is stated in Art. 13 of the ECHR<sup>59</sup> and Art. 10 UDHR, as an “essential, if not imperative, part of any legal system purporting to be based on the rule of law.”<sup>60</sup>

Nonetheless, when business enterprises are responsible for human rights abuses, “adequate accountability and redress rarely occur”<sup>61</sup>, and difficulties in accessing remedy are exacerbated in cross-border cases, as, in fact, “State borders have not kept pace with the global nature of corporate operations”<sup>62</sup>, even though the extension of the State’s obligation to control extraterritorial business conduct where it might lead to human rights harms has been confirmed by the CESCR.<sup>63</sup> Indeed, according to the Study for the European Parliament on Access to legal remedies for victims of corporate human rights abuses in third countries (2019)<sup>64</sup>, amongst the 35 cases under analysis, civil and criminal, concerning allegations of human rights abuses

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<sup>56</sup> SKINNER, GWYNNE / MCCORQUODALE, ROBERT / DE SCHUTTER, OLIVIER, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, ICAR, CORE, ECCJ, 2013, p. 29.

<sup>57</sup> In case businesses are directly linked to a human rights abuse through their products or services, they are not required to provide remediation themselves, although they may have to take a role in such remediation, namely by exercising leverage. See: Guiding Principle 22, commentary, UNGPs.

<sup>58</sup> BSR, “Access to Remedy Report”, in BSR, 2021, available at: <https://www.bsr.org/en/our-insights/report-view/access-to-remedy> (03.05.2022).

<sup>59</sup> VAN DIJK, PIETER/ VAN HOOF, FRIED/ VAN RIJN, ARJEN/ ZWAAK, LEO, *Theory and Practise of the European Convention on Human Rights*, Oxford, Intersentia, 2006, p. 998.

<sup>60</sup> ALFREDSSON, GUDMUNDUR/ EIDE, ASBJORN, *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Kluwer Law International, 1999, p. 223.

<sup>61</sup> AMNESTY INTERNATIONAL / BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Creating a paradigm shift...*, p. 3.

<sup>62</sup> *Ibid*, p. 3.

<sup>63</sup> SKINNER, G. / MCCORQUODALE, R. / DE SCHUTTER, O., *The Third Pillar...*, p. 29. See also: UN ECONOMIC AND SOCIAL COUNCIL, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 2017, available at:

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsjZZVQcIMOUuG4TpS9jwIhCjCjXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawQrJx3hlK8Odk6DUwG3Y> (30.10.2021).

<sup>64</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*

in third countries by EU-based companies, only 2 had a successful outcome for the claimants.<sup>65</sup>

Despite the difficulties posed, tort law may constitute an effective mechanism for seeking justice and compensation.<sup>66</sup> Indeed, transnational civil liability claims are increasingly being brought against internationally operating business enterprises for human rights harms they caused, contributed to, or that are directly linked to their operations or business relationships.<sup>67</sup> The law of torts and civil liability is usually the means used to address human rights harms arising from corporate activity, as, even when dealing with transnational hurdles, the lower thresholds for establishing liability and the easier engagement through the mechanisms of PIL render it more enticing than criminal law in this context.<sup>68</sup>

The first civil liability cases against corporations were based on the Alien Tort Statute<sup>69</sup> and brought before US federal courts for “alleged involvement in human rights violations perpetrated in host countries.”<sup>70</sup> Following this trend, civil tort and delicts claims started being brought before European courts for alleged corporate-related human rights abuses, seeking compensation from corporations. Most often, redress is sought through civil action in the home State<sup>71</sup>, enabling victims to seek remedies from the head of the corporate group<sup>72</sup>, although often the foreign subsidiary is also joined in the proceedings.

In the EU, there is no specific regime under which victims can sue corporations through a BHR civil claims. Nonetheless, harms inflicted upon human

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<sup>65</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 19.

<sup>66</sup> Actually, “tort law can thus play the role of a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society.” See: *Ibid*, p. 76.

<sup>67</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 39.

<sup>68</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 75.

<sup>69</sup> US, Alien Tort Statute, in *Alien Tort Claims Act (‘ATCA’)*, 1948, available at: <https://www.law.cornell.edu/uscode/text/28/1350> (08.11.2021).

<sup>70</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 40.

<sup>71</sup> QUIJANO, GABRIELA, “Justice for Corporate Atrocities”, in *Harvard International Law Journal*, vol. 57, 2016, p. 30-34, p. 32.

<sup>72</sup> CHAMBERS, RACHEL, “Corporate Law as a Barrier to Human Rights Claims and the Promise of MHRDD Laws”, in *Nova Center on Business and Human Rights blog*, 2021, available at: <https://novabhre.novalaw.unl.pt/corporate-law-human-rights-claims-mhredd/> (15.11.2021).

rights give rise to causes of action in most States under tort law, as the “company’s neglect towards exercising HRDD can be the cause of action in a tort of negligence.”<sup>73</sup> In general, civil law systems require the plaintiff to prove that the tortfeasor’s unlawful actions were voluntary, that a harm was suffered and that there is a causal link between the harm and the tortfeasor’s conduct.<sup>74</sup> This meaning that, in order to hold the parent or lead company accountable, its actions must have had a direct impact on the materialization of the harm caused by the subsidiary or supplier, overseas.<sup>75</sup> Common law systems, on the other hand, usually require the plaintiff to prove that a concrete harm was suffered and caused by a concrete conduct of the defendant, that this conduct breached a duty of care owed to the plaintiff and that the defendant could have foreseen and prevented the harm.<sup>76</sup>

The separate legal personality doctrine creates difficulties for holding the EU-based head corporation responsible for human rights harms inflicted by its subsidiaries or suppliers, “despite the fact that the former may have owned, controlled, directed or managed the latter.”<sup>77</sup> However, the case-law on corporate responsibility to respect human rights “increasingly acknowledges the existence of a duty of care in relation to the harms arising out of the activities of subsidiaries [or

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<sup>73</sup> CASSEL, DOUGLAS, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence”, in *Business and Human Rights Journal*, vol. 12, 2016, p. 179-202, p. 188.

<sup>74</sup> This is the case in Portugal. See: ANTUNES VARELA, JOÃO, *Das Obrigações em Geral*, vol. I, 10<sup>a</sup> ed., Coimbra, Almedina, 2000, p. 525 ss.

<sup>75</sup> ZERK, JENNIFER, "Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights", in *OHCHR*, 2014, available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (17.04.2022), p. 65.

In fact, limited liability is a fundamental concept of corporate law, “yet, liability has never been absolutely limited”, as we can see from the situations of vicarious liability or where piercing the corporate veil is possible. See: ROMANO, ROBERTA, *Foundations of Corporate Law*, New York, Foundation Press, 1993, p. 62.

<sup>76</sup> ECCHR, *Making Corporations Respond ...*, p. 26.

<sup>77</sup> AUGENSTEIN, DANIEL, *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union*, Study for the European Commission ENTR/09/045, 2010, available at: [https://www.academia.edu/1366068/Study\\_of\\_the\\_Legal\\_Framework\\_on\\_Human\\_Rights\\_and\\_the\\_Environment\\_applicable\\_to\\_European\\_Enterprises\\_operating\\_outside\\_the\\_European\\_Union\\_Study\\_for\\_the\\_European\\_Commission\\_ENTR\\_09\\_045\\_2010](https://www.academia.edu/1366068/Study_of_the_Legal_Framework_on_Human_Rights_and_the_Environment_applicable_to_European_Enterprises_operating_outside_the_European_Union_Study_for_the_European_Commission_ENTR_09_045_2010) (10.05.2022), p. 61.

suppliers].”<sup>78</sup> For instance, in the case *Lungowe v. Vedanta Resources plc*<sup>79</sup>, brought before the UK Supreme Court by several Zambian nationals against both the parent company Vedanta and its Zambian subsidiary KCM, “on the basis of alleged personal injury, damage to property and loss of income, amenity and enjoyment of land arising out of discharges from the Nchanga copper mine”<sup>80</sup>, the Court clarified the various ways in which a parent company may incur in a duty of care (“direct liability for negligent supervision of the subsidiary”<sup>81</sup>). Namely, “if, as part of groupwide policies, it exercised a certain degree of supervision and control over the activities of its subsidiary or if it held itself out to exercise it in published materials, even if it did not actually do this in practise.”<sup>82</sup> The Court held that Vedanta was involved in KCM’s management<sup>83</sup> and, therefore, could owe to the victims of the damages caused by the subsidiary a duty of care.<sup>84</sup>

Over and above, cross-border tort cases pose particular challenges that can influence the outcome of access to remedy for victims. These include, aside from the difficulties in establishing parent or lead company liability, the fragmented nature or underdevelopment of legal regimes on BHR, structural complexities within business enterprises, difficulties in securing legal representation and access to relevant information, difficulties in accessing funding for private law claims and lack of enforcement. All these problems have contributed to “a system of domestic law remedies that is patchy, unpredictable, often ineffective and fragile”.<sup>85</sup>

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<sup>78</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 673.

<sup>79</sup> UK Supreme Court, *Lungowe v. Vedanta Resources plc*, 2019, available at: <https://www.supremecourt.uk/cases/uksc-2017-0185.html> (15.05.2022).

<sup>80</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 92.

<sup>81</sup> CASSEL, DOUG, “Vedanta v. Lungowe Symposium: Beyond Vedanta—Reconciling Tort Law with International Human Rights Norms”, in *Opinio Juris*, 2019, available at: <http://opiniojuris.org/2019/04/19/vedanta-v-lungowe-symposium-beyond-vedanta-reconciling-tort-law-with-international-human-rights-norms%E2%80%9F/> (15.05.2022).

<sup>82</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 10.

<sup>83</sup> HORNE, LOIS / ROBERTS, LAUREN, “Vedanta v Lungowe & Others: liability of a UK parent company”, in *MacFarlanes*, 2019, available at: <https://www.macfarlanes.com/what-we-think/in-depth/2019/vedanta-v-lungowe-others-liability-of-a-uk-parent-company/> (15.05.2022).

<sup>84</sup> PALOMBO, DALIA, “Okpabi v Shell and Lungowe v Vedanta Dispel Three Myths”, in *Business and Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/latest-news/okpabi-v-shell-and-lungowe-v-vedanta-dispel-three-myths/> (15.05.2022).

<sup>85</sup> UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *Improving accountability...*, p. 3.

Also, since we are dealing with PIL situations, where there is a relationship between private parties and/or the State, acting outside the scope of its *ius imperii*, which is in contact with more than one legal order, the need to determine the competent court and which law in contact with the transnational situation will be applicable surges.<sup>86</sup>

In particular, the issue of determining the applicable law, i.e., the legal norms on which the plaintiffs can base their claims<sup>87</sup>, has a substantial impact on the claimants' potential success, as it is according to this law that we can determine substantive rights and responsibilities<sup>88</sup>, namely: the basis and extent of the company's responsibility, the grounds for exemption from and division of liability, the existence and nature of the damage, as well as its assessment, the redress claimed, which persons are entitled to remedy, etc.<sup>89</sup>

When determining the applicable law to cross-border torts, one must have in mind the conflict-of-laws rules of the forum<sup>90</sup>, and these differ from country to country and can constitute an obstacle to remedy if they point towards the application of a law which could bar the claim or is insufficiently protective of the victim's human rights, contributing to the impunity of TNCs, "a profound and pervasive injustice in the globalized world."<sup>91</sup>

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<sup>86</sup> BRITO, MARIA HELENA, *Direito do Comércio Internacional*, Coimbra, Almedina, 2004, p. 65.

<sup>87</sup> VAN DEN EECKHOUT, VEERLE, "Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?", in SSRN, 2011, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1895690](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895690) (10.05.2022), p. 1.

<sup>88</sup> ZERK, J., *Corporate liability for gross human rights abuses...*, p. 74.

<sup>89</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 86.

<sup>90</sup> BRITO, MARIA HELENA, *Direito do Comércio Internacional: Relatório sobre o programa, os conteúdos e os métodos de ensino da disciplina*, Lisboa, FDUNL, 2003, p. 163.

<sup>91</sup> CHAMBERS, R., *Parent Company Direct Liability...*, p. 1.

### III: The applicable law to cross-border torts under the Rome II Regulation

In the EU, PIL rules have been harmonized, under Art. 81 of the TFEU. Therefore, when bringing a transboundary civil BHR claim before a MS court, jurisdiction and applicable law are determined in accordance with European PIL Regulations, provided that their scope of application is met. Jurisdiction from EU Courts is determined in accordance with the Brussels I Recast Regulation<sup>92</sup>, whereas the applicable law is set according to the Rome II Regulation's<sup>93</sup> conflict-of-laws rules.

Unlike criminal claims, where the law of the forum is always applicable<sup>94</sup>, when dealing with a PIL cross-border situation, one must determine, based on conflict-of-laws rules, which one of the laws connected to the cross-border situation is applicable.<sup>95</sup>

#### 1. The Rome II Regulation

In the context of an increasing globalization of markets, Rome II, adopted in 2007, serves the purpose of developing the European judicial space<sup>96</sup>, setting uniform rules on the applicable law to non-contractual obligations, and thus extending the harmonization of PIL, already advanced in the Brussels I Regulation and the Rome Convention of 1980.<sup>97</sup>

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<sup>92</sup> EU, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> (02.05.2022).

<sup>93</sup> EU, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864> (02.05.2022).

<sup>94</sup> AUGENSTEIN, D., *Study of the Legal Framework on Human Rights...*, p. 68.

<sup>95</sup> BERNARD, AUDIT, *Droit International Privé*, 4<sup>ème</sup> ed., Paris, Economica, 2006, p. 56.

<sup>96</sup> SOUSA GONÇALVES, ANABELA, *Da Responsabilidade Extracontratual em Direito Internacional Privado: a mudança de paradigma*, Coimbra, Almedina, 2013, p. 228. See also: MOURA RAMOS, RUI, "Le droit international privé communautaire des obligations extracontractuelles", in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional II*, Coimbra, Coimbra Editora, 2007, p. 79-98, p. 92.

<sup>97</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")*, Brussels, European Commission, 2003, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52003PC0427> (12.06.2022).

The uniformization of conflict-of-law rules on non-contractual obligations is of paramount importance for the EU internal market, allowing operators to know, *ex ante*, and with certainty, what the applicable law is, regardless of the jurisdiction, and preventing the *forum shopping* phenomenon.<sup>98</sup>

The Regulation issues a series of uniform “black-letter rules”<sup>99</sup>, with narrow exceptions, mostly focused on conflicts justice, rather than on material justice.<sup>100</sup> Under Art. 1(1), it applies in situations involving a conflict of laws, i.e., connected to various legal systems<sup>101</sup>, and which involve “non-contractual obligations in civil and commercial matters.”<sup>102</sup> This should be understood as an autonomous concept of EU Law, “covering all actions which seek to establish the liability of a defendant and which are not related to a contract”, as interpreted by the CJEU in *Athanasios Kalfelis*.<sup>103</sup> Art. 2 RRII precises the material scope of the Regulation, covering “any consequence arising out of tort/delict”<sup>104</sup>, that is not excluded under Art. 1(2).<sup>105</sup> Therefore, it is applicable to actions brought against corporations and seeking compensation for human rights harms arising from or linked to their activities or business relationships.

This instrument has universal application, meaning that it applies if the dispute is tried in an EU MS<sup>106</sup>, regardless of whether the applicable law is that of a third

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<sup>98</sup> CALVO CARAVACA, ALFONSO-LUIS/ CARRASCOSA GONZÁLEZ, JAVIER, *Las obligaciones extracontractuales en Derecho internacional privado: El Reglamento “Roma II”*, Granada, Editorial Comares, 2008, p. 64.

<sup>99</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 50.

<sup>100</sup> *Ibid*, p. 50.

<sup>101</sup> DICKINSON, ANDREW, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, Oxford University Press, 2008, p. 156.

<sup>102</sup> Art. 1(1), Rome II Regulation.

<sup>103</sup> CJEU, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, 1988, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0189> (15.05.2022).

<sup>104</sup> Art. 2, Rome II Regulation.

<sup>105</sup> LIMA PINHEIRO, LUÍS, *Direito Internacional Privado*, vol. II: Direito de Conflitos – Parte Especial, 4.<sup>a</sup> ed., Coimbra, Almedina, 2015, p. 473.

<sup>106</sup> FAWCETT, JAMES / CARRUTHERS, JANEEN, *Private International Law*, 14<sup>th</sup> ed., Oxford, Oxford University Press, 2008, p. 787.

country.<sup>107</sup> This entails that it “covers damages that took place outside the EU borders.”<sup>108</sup>

It is important to note that the applicable law, in accordance with the rules prescribed by the Regulation, applies to all the matters set out in Art. 15, as the RRII does not allow for *dépeçage*.

## 2. The *lex loci damni* general rule

Under RRII’s Art. 4(1), the applicable law to torts is the *lex loci damni*, which, according to the “last event theory”, is law of the place in which the damage or harm was suffered, the place of direct injury.<sup>109</sup> The place of the indirect damage, if any was endured, and the place in which the event giving rise to the damage occurred shall not be considered.<sup>110</sup> In the event that the damage materialises in more than one State, Art. 4(1) requires that the law of each of those States is “applied on a distributive basis (*Mosaikbetrachtung*).”<sup>111</sup>

The preference, set in the RRII, for the *lex loci damni* (*Erfolgsort*) connecting factor, as opposed to the *lex loci delicti commissi* (*Handlungsort*), which is applicable in most EU MS – pointing towards the place where the event giving rise to the damage occurred, i.e., where the tortfeasor acted causing the damage or should have acted in order to avoid it - , is based on its adequateness to coordinate the different interests at stake. RRII’s general rule is based on a “modern approach to civil liability”<sup>112</sup>, focusing on the damage as the point of departure of the intervention of tort law and favouring the reparatory function of *ex delicto* liability over its sanctioning function.<sup>113</sup> Damage constitutes a *conditio sine qua non* for the responsibility<sup>114</sup>, which can be based either on

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<sup>107</sup> VAN CALSTER, GEERT, *European Private International Law*, 2<sup>nd</sup> ed., Oxford, Hart Publishing, 2016, p. 240.

<sup>108</sup> OXFORD PRO BONO PUBLICO, *Obstacles to Justice and Redress...*, p. 119.

<sup>109</sup> BAPTISTA MACHADO, JOÃO, *Lições de Direito Internacional Privado*, 3<sup>a</sup> ed., Coimbra, Almedina, 2011, p. 368.

<sup>110</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations...*

<sup>111</sup> DICKINSON, A., *The Rome II Regulation...*, p. 330.

<sup>112</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 12.

<sup>113</sup> BALLARINO, TITO, *Diritto Internazionale Privato*, 3<sup>a</sup> ed., Padova, Cedam, 1999, p. 720.

<sup>114</sup> BERNARD, A., *Droit International Privé...*, p. 641.

fault or on a strict liability scheme.<sup>115</sup> Furthermore, this system fosters legal certainty, as the localization of the damage is relatively easy to identify<sup>116</sup>, whilst considering material values, such as favouring the victim.<sup>117</sup> The Brussels I Recast Regulation, under Art. 7(2) also opts for the *lex loci damni* criterion when determining jurisdiction over transnational torts.

On the other hand, difficulties in applying this formula have come to light when the damage occurs in a different place than the event giving rise to the damage, as can be seen in the *Mines de Potasse*<sup>118</sup> case. In these situations, the application of the *lex loci damni* can be seen as “excessively detrimental to the tortfeasor.”<sup>119</sup> Furthermore, this rule does not produce satisfactory results in those situations where “the state of conduct prescribes higher standards of conduct for the tortfeasor than the state of injury.”<sup>120</sup>

When dealing with BHR torts, the *Erfolgsort* criterion most often leads to the application of the host state law, since the injury usually materializes in the State where the subsidiary is located. These are typically States “with weak regulatory standards, poor rule of law or governance structures”<sup>121</sup>, perpetuated by a prevalent socioeconomic underdevelopment, an imbalance in bargaining power and “interjurisdictional competition”, encouraged by TNC mobility.<sup>122</sup> Moreover, for these torts there is not, usually, a *lex loci damni* and *lex loci delicti commissi* coincidence, since the event giving rise to the damage usually takes place in the home State, prescribing higher human rights standards of conduct.

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<sup>115</sup> BRIGHT, C./ WRAY, B., Corporations and Social Environmental Justice..., p. 12.

<sup>116</sup> VAN CALSTER, G., *European Private International Law...*, p. 252.

<sup>117</sup> FALLON, MARK / KINSCH, PATRICK / KOHLER, CHRISTIAN, *Le Droit International Privé Européen en Construction*, Antwerp, Intersentia, 2011, p. 204.

<sup>118</sup> CJEU, *Handelskvekerij G. J. Bier BV v Mines de potasse d'Alsace S.A.*, 1976, available at: <https://curia.europa.eu/juris/liste.jsf?&num=21/76> (15.05.2022).

<sup>119</sup> BRIGHT, C./ WRAY, B., Corporations and Social Environmental Justice..., p. 12.

<sup>120</sup> SYMEONIDES, SYMEON, “Rome II and Tort Conflicts: A Missed Opportunity”, in *American Journal of Comparative Law*, vol. 56, 2008, p. 19.

<sup>121</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, European Union, 2021, available at: <https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1> (15.05.2022), p. 89.

<sup>122</sup> BRIGHT, C./ WRAY, B., Corporations and Social Environmental Justice..., p. 16 ss.

Indeed, in foreign direct liability cases tried in Europe against a EU head office alone or together with an overseas subsidiary or supplier, the application of the host State law, as opposed to the home State law, of an EU legal system, has been “considered unfair to non-European victims”<sup>123</sup>, fostering the imbalance between the parties.

Let us have a look at some case-law examples:

The *Kik*<sup>124</sup> case was filed before the German *Landgericht Dortmund* in 2015, following the fire that took place in the Pakistani factory of Ali Enterprises. The tort of negligence was brought against Kik, the lead company, for “catering to the low-price market” and “not ensuring adequate fire safety precautions at the factory.”<sup>125</sup>

The German court applied the Pakistani law to the substance of the case, in accordance with Art. 4(1) RRII, which created “major hurdles for the claimants because of the lower health, safety and labour standards, weaker governance structure and enforcement mechanisms, and shorter statutes of limitation provided.”<sup>126</sup> In the face of this lawsuit, lawyers and activists were aware of the “limits of law and litigation”<sup>127</sup>, and even though this case was ultimately unsuccessful in establishing a “precedent on liability for human rights violations upstream the supply chain”, it did inspire the German law-maker’s proposal of mHRDD legislation.<sup>128</sup>

In the case *A.F. Akpan v. Royal Dutch Shell, plc*<sup>129</sup>, civil proceedings were brought before the Dutch courts by four Nigerian farmers and a Dutch NGO against parent

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<sup>123</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 12.

<sup>124</sup> Landgericht, Dortmund, *Jabir and others v. KiK Textilien und Non-Food GmbH*, 2019, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=LG%20Dortmund&Datum=10.01.2019&Aktenzeichen=7%20O%2095/15> (15.05.2022).

<sup>125</sup> WESCHE, PHILIPP/ SAAGE-MAAB, MIRIAM, “Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v Kik*”, in *Human Rights Law Review*, n.º 16, 2016, p. 370-85, p. 372.

<sup>126</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 89.

<sup>127</sup> AZEEM, MUHAMMAD, “The KiK Case: A Critical Perspective from the South”, in *Transnational Legal Activism in Global Value Chains*, Cham, Springer, 2021 p. 279-298, p. 291.

<sup>128</sup> BURCK, KRISTOFFER, “The German KIK Case: from failed case towards national supply chain legislation”, in *PILPG*, 2020, available at: <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/12/7/the-german-kik-case-from-failed-case-towards-national-supply-chain-legislation> (15.05.2022).

<sup>129</sup> Hague Court of Appeals, *A.F. Akpan v. Royal Dutch Shell, plc*, 2015, available at: <https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf> (15.05.2022).

company Shell and its Nigerian subsidiary with regard to the oil leaks from the pipelines ran by Shell, and which allegedly resulted in harms to the “health and livelihood of various local communities in the Niger Delta.”<sup>130</sup>

The claims were originally dismissed by the District Court of the Hague, in 2013, since the oil spills were considered to be acts of sabotage by third parties.<sup>131</sup> This decision was, nonetheless, appealed to the Court of Appeals of the Hague, who issued, in 2015, some relevant statements on the applicable law issue. Both parties agreed on the application of the Nigerian Law, however, since we are dealing with a common law system, English law remained relevant<sup>132</sup>, allowing the Court to apply the case-law of *Chandler v. Cape*<sup>133</sup>, and sustain that “parent companies may, under certain circumstances, owe a duty of care to the workers of their subsidiaries and the local communities directly affected by their operations.”<sup>134</sup> The Court asserted that it could not be excluded that the “parent company may be expected to take an interest in preventing the spills” and implied that “group wide policies adopted by the parent company were a key element in establishing the degree of control and supervision that should have been exercised by the parent company over the activities of its subsidiary.”<sup>135</sup>

In *Lungowe v. Vedanta Resources plc*, which was settled before the Court could decide on the merits of the case, the applicable law to the dispute would be the Zambian law, according to RRII’s general rule. Being this a common law system, the claim could be based on English case-law, which recognizes that parent companies are, to some extent, responsible for the human rights harms endured by the workers and communities affected by the operations of their subsidiaries.

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<sup>130</sup> BRIGHT CLAIRE, “The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands”, in *Business and Human Rights in Europe: International Law Challenges*, 2018, p. 212-222, p. 212.

<sup>131</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 76.

<sup>132</sup> MEERAN, RICHARD, “Multinational Human Rights Litigation in the UK: A Retrospective”, in *Business and Human Rights Journal*, vol. 6, n.º 2, 2021, p. 255-269, p. 263.

<sup>133</sup> England and Wales Court of Appeal, *Chandler v Cape plc*, 2011, available at: <https://vlex.co.uk/vid/chandler-v-cape-plc-793931665> (15.05.2022).

<sup>134</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 78.

<sup>135</sup> BRIGHT, C. [et. al], *Toward a Corporate Duty...*, p. 679.

As we can see, RRII's general rule may be unsuitable when dealing with BHR cases, rendering the application of the law of a European legal system unlikely, which is considered detrimental for the victims' right to access remedy, increasing the parties' inequalities even further and perpetuating the accountability gap for TNCs operating in host countries with disregard for human rights standards.<sup>136</sup>

Indeed, in the two cases above, the applicable law under Art. 4 did not directly bar access to remedy for the claimants<sup>137</sup>, but only due to the fact that we are dealing with English-based legal systems, which accept that a duty of care may be owed by the head company to the claimants in case a human rights harm materializes. This did not happen in the *Kik* case, where the applicable law dictated the claim's failure.

The application of this general rule could, moreover, be inappropriate in situations with "only a tenuous connection with the country where the damage occurs."<sup>138</sup> Therefore, two special rules are introduced in the article's following paragraphs.

On the one hand, Art. 4(2) states that if the tortfeasor and the person who allegedly sustained the damage "are habitually resident in the same country, the law of that country is applicable."<sup>139</sup> As to what concerns BHR torts, it is unlikely for this exception to be relevant, as usually victims reside in the State of injury.<sup>140</sup> One could argue that the victims reside in the same country as the tortfeasor, if we consider that the tortfeasor in the claim is the subsidiary or supplier company. Nonetheless, with both parties residing outside the EU, most likely in the host state, the practical importance of this exception remains limited.

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<sup>136</sup> VAN DEN EECKHOUT, V., *Corporate Human Rights Violations and Private International Law...*, p. 12.

<sup>137</sup> OKOLI, CHUKWUMA, "Corporate Due Diligence and Private International Law: A Note on the Hague Court of Appeal's decision in *Shell*", *Nova Centre on Business, Human Rights and the Environment Blog*, 2021, available at: <https://novabhre.novalaw.unl.pt/corporate-due-diligence-private-international-law-note-hague-court-decision-shell/> (15.05.2022).

<sup>138</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations...*

<sup>139</sup> *Ibid.*

<sup>140</sup> VAN CALSTER, G., *European Private International Law...*, p. 369.

Art. 4(3), on the other hand, institutes a *clause d'exception*, which, based on the *most significant relationship*, functions as a general exceptional clause.<sup>141</sup> This flexible conflict-of-laws rule enables the court to apply the “law that reflects the centre of gravity of the situation.”<sup>142</sup> It is very unclear how far this exception can be put to use where there is not a pre-existing relationship between the parties, and no guidelines are provided to the interpreter.<sup>143</sup> Nonetheless, its application should remain exceptional, striking “the proper equilibrium between the two perpetually competing goals of certainty and flexibility.”<sup>144</sup> In the BHR context, the application of Art. 4(3) is problematic given that the direct injury usually occurs in the host State, where the subsidiary or business partner is operating. There is, thus, no “manifestly closer connection” to the law of another State.<sup>145</sup> For example, when deciding on the *Kik* case, the application of German law in accordance with RRII’s escape clause was rejected, due to the fact that “both the place of the tort and the claimants’ habitual residence were in Pakistan.”<sup>146</sup>

### 3. The choice of law clause

Under Art. 14 of the RRII, parties are allowed to choose the applicable law to the dispute. This possibility is grounded on the *principle of party autonomy*<sup>147</sup> and on the enhancement of legal certainty, as stated in Recital 31.<sup>148</sup>

The application of this law, justified by the voluntary submission of the parties to it<sup>149</sup>, is restricted by the application, under Art. 14(2) and (3), of the provisions of national or EU law that cannot be derogated from by agreement, when dealing with

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<sup>141</sup> MARQUES DOS SANTOS, ANTÓNIO, *As Normas de Aplicação Imediata no Direito Internacional Privado: Esboço de uma Teoria Geral*, vol. I, Coimbra, Almedina, 1991, p. 402.

<sup>142</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations...*

<sup>143</sup> STONE, PETER, *EU Private International Law*, Cheltenham, Elgar European Law, 2006, p. 354.

<sup>144</sup> SYMEONIDES, S., *Rome II and Tort Conflicts...*, p. 30.

<sup>145</sup> Art. 4(3), Rome II Regulation.

<sup>146</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 89.

<sup>147</sup> GRAY, JACQUELINE, *Party Autonomy in EU Private International Law: Choice of Court and Choice of Law in Family Matters and Succession*, Brussels, Intersentia, 2021, p. 4.

<sup>148</sup> FAWCETT, J. / CARRUTHERS, J., *Private International Law...*, p. 837.

<sup>149</sup> BATIFFOL, HENRI, *Aspets philosophiques du droit international privé*, Paris, Éditions Dalloz, 2002, p. 65.

*fictional internationalization* or *extra-comunitarization*. This is normally not the case for BHR torts, by nature transnational and extra-European.

Additionally, given the particular vulnerability of the weaker party, the Regulation imposes that this choice of law takes place “after the event giving rise to the damage occurred”, when both parties do not pursue commercial activities.<sup>150</sup> This provision, thus, allows for parties of a BHR tort to agree upon the law applicable to the dispute. Nonetheless, “the chances that parties to a foreign direct liability case will agree on the law that is to be applied to the case seem slim”, especially since the corporate actors benefit from the application of the *lex loci damni*.<sup>151</sup>

It is important to note, also, that for the *electio iuris* to be attended, the agreement must be either “express or inferable with reasonable certainty from the circumstances of the case”, which means that there needs to be a tacit and not merely hypothetical choice of law.<sup>152</sup> A number of factors may justify that the parties engaged in a real, yet tacit, choice of law, such as the existence of a previous contract between them governed by a particular legal system, a previous course of dealing between them containing an express choice of law, etc.<sup>153</sup> The problem that stands is that an implied choice of law may be difficult to prove in the context of BHR cases, in which both parties are not pursuing a commercial activity, and where these negotiations need to take place after the event giving rise to the damage occurred. Indeed, there will often not be a strong case for inferring that the parties intended that the tort should be governed by a certain law. In fact, in *Kiké*, off-court negotiations between the parties pointing towards the application of German law, after the damage occurred, were rejected as a valid tacit *professio iuris*, based on the fact that the parties were not “aware

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<sup>150</sup> FAWCETT, J. / CARRUTHERS, J., *Private International Law...*, p. 838.

<sup>151</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 52.

<sup>152</sup> BRITO, MARIA HELENA, “Breves notas sobre o Regulamento relativo à lei aplicável às obrigações contratuais (“Roma I)””, in *E-learning CEJ*, Texto correspondente à comunicação apresentada no Colóquio dedicado ao tema “Direito europeu: Análise dos regulamentos europeus relativos a competência internacional, responsabilidade contratual e extracontratual e direito sucessório”, organizado pelo Centro de Estudos Judiciários, que decorreu em Lisboa, em 12 de Dezembro de 2014, 2014, disponível em: [https://elearning.cej.mj.pt/file.php/214/Documentacao\\_apoio\\_MHB/texto\\_comunicacao/texto\\_Maria\\_Helena\\_Brito.pdf](https://elearning.cej.mj.pt/file.php/214/Documentacao_apoio_MHB/texto_comunicacao/texto_Maria_Helena_Brito.pdf), p. 6.

<sup>153</sup> DICKINSON, A., *The Rome II Regulation...*, p. 553.

of all the implications of their choice.”<sup>154</sup> This restrictive approach to the wording of Art. 14 barred the application of German law, *in casu*.

Moreover, this choice can not impinge upon the rights of third parties<sup>155</sup>, i.e., persons who are not parties to the agreement, but who are succeeding to their rights and obligations with respect to the non-contractual obligation in question.<sup>156</sup> Concerning BHR torts, it remains unclear if head corporations are third parties in relation to their subsidiaries or suppliers, and vice versa. If each entity that integrates the corporate group is regarded as a separate legal entity for the purposes of this norm, then only an agreement entered into by the subsidiary or supplier, the parent or lead company and the claimants could be relevant, whereas an express or tacit agreement between the subsidiary or supplier and the claimants would be ignored in determining the law applicable to the tort for the purposes of a direct action against the parent or lead company. The same issue would arise in case the head corporation entered into an agreement with the claimants, but which excluded the subsidiary or supplier.

#### 4. Overriding mandatory provisions

Art. 16 of the RRII allows for the Courts of the MS, in exceptional circumstances, and on a case-to-case basis, to apply overriding mandatory rules (*lois de police*), “irrespective of the law otherwise applicable to the tort.”<sup>157</sup>

Overriding mandatory provisions were first defined by FRANCESCAKIS as norms that are applicable in a certain space, regardless of the established conflict-of-laws system.<sup>158</sup> This particular category of material norms from the *lex fori*, whose application is immediate and necessary<sup>159</sup>, protect certain political, social, and

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<sup>154</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 91.

<sup>155</sup> OXFORD PRO BONO PUBLICO, *Obstacles to Justice and Redress...*, p. 121.

<sup>156</sup> DICKINSON, A., *The Rome II Regulation...*, p. 556.

<sup>157</sup> STONE, P., *EU Private International Law...*, p. 359.

<sup>158</sup> MARQUES DOS SANTOS, A., *As Normas de Aplicação Imediata...*, p. 7.

<sup>159</sup> BRITO, MARIA HELENA, *A Representação nos Contratos Internacionais: um contributo para o estudo do princípio da coerência do direito internacional privado*, Coimbra, Almedina, 1999, p. 719.

economic interests (*publica utilitas*)<sup>160</sup>, imposing their application *a priori*, regardless of the application of the *lex causae*.<sup>161</sup>

These rules have played an important role in the CJEU cases *Arblade*<sup>162</sup> and *Ingmar*<sup>163</sup> and some consider them to be promising when dealing with BHR litigation, although their exact potential in this regard is yet to be seen.<sup>164</sup>

If each MS's norms on human rights protection could generally be considered overriding mandatory provisions of the forum, then they would have to be applied in lieu of the otherwise applicable host country law<sup>165</sup>, provided that there is “a connecting factor between the claimant and the State exercising jurisdiction.”<sup>166</sup> In this sense, emerging domestic mHRDD legislative initiatives, imposing a duty of care on companies, could be considered mandatory rules, “that should find application in foreign direct liability cases”<sup>167</sup>, regardless of the applicability of host State law.

For instance, and as will be further developed in the following chapter, Art. 22 of the Proposed EU Directive on Corporate Sustainability Due Diligence<sup>168</sup> instates that due diligence obligations imposed on companies are to be considered *lois de police*, thus demanding their application irrespective of the otherwise applicable law and ensuring that corporations are held responsible for their actions even in case EU law is not applicable to the tort.

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<sup>160</sup> FOYER, JACQUES, “Lois de police et principe de souveraineté”, in *Mélanges en l'honneur du Professeur Bernard Audit*, Issy-les-Moulineaux, LGDJ, 2014, p. 339-358, p. 342.

<sup>161</sup> MOURA RAMOS, RUI MANUEL, “L'ordre Public International en Droit Portugais”, in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra, Coimbra Editora, 2002, p. 245-262, p. 250.

<sup>162</sup> CJEU, *Criminal Proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*, 1999, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-369/96&language=en> (15.05.2022).

<sup>163</sup> CJEU, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 2000, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0381> (15.05.2022).

<sup>164</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 94.

<sup>165</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice...*, p. 51.

<sup>166</sup> AUGENSTEIN, D., *Study of the Legal Framework on Human Rights...*, p. 72.

<sup>167</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 56.

<sup>168</sup> EUROPEAN COMMISSION, *Sustainable Corporate Governance*, European Commission, 2020, available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en) (13.06.2022).

## 5. Rules of safety and conduct

Art. 17 of the RRII requires the court to consider the rules of safety and conduct of the *lex loci delicti commissi*<sup>169</sup>, in force at the place and time of the relevant event, given that the agent should respect them, regardless of the applicable law to the civil consequences of his/her actions.<sup>170</sup> This rule is based on the corresponding norms of the Hague Conventions on traffic accidents and product liability.<sup>171</sup>

The court of the forum is required to take into account the safety and conduct rules, which “does not mean that those rules must be applied to determine questions of civil liability.”<sup>172</sup> These operate from a factual point of view and can influence the concretization of relevant elements of the application of the *lex causae*, namely, the tortfeasor’s fault.<sup>173</sup> The rule is grounded on the “presumption of equivalent safeguard and on the principle that the local law is better placed to set the standard of protection required locally.”<sup>174</sup>

For BHR torts, considering the rules of safety and conduct of the home state is a possibility worth looking into, as “the perpetrator must abide by the rules in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action.”<sup>175</sup> This would mean that home State law should be taken into account when determining liability and compensation. In the case of the Rana Plaza Building collapse, for example, the application of Art. 17 RRII would mean that the lead companies operating in Bangladesh through suppliers had to abide by the rules of safety and conduct of the home state, and these rules could be relevant to determine their fault after the incident.

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<sup>169</sup> On the issue of rules of safety and conduct, see: MAGALHÃES COLAÇO, ISABEL, *Direito Internacional Privado: Sistema de Conflitos Português (Obrigações não voluntárias)*, Lisboa, AAFDL, 1971, p. 22.

<sup>170</sup> LIMA PINHEIRO, L., *Direito Internacional Privado...*, p. 483.

<sup>171</sup> See: HCCH, *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, 1971, available at: <https://assets.hcch.net/docs/abcf969d-bac2-4ad5-bf52-f1aabc0939ad.pdf> (11.08.2022), Art. 7. See also: HCCH, *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, 1973, available at: <https://assets.hcch.net/docs/e102a194-59b8-4d75-9c6f-d2bbfb81e4ff.pdf> (11.08.2022), Art. 9.

<sup>172</sup> DICKINSON, A., *The Rome II Regulation...*, p. 442.

<sup>173</sup> DIAS OLIVEIRA, ELSA, *Da Responsabilidade Civil Extracontratual por Violação de Direitos de Personalidade em Direito Internacional Privado*, Coimbra, Almedina, 2011, p. 378.

<sup>174</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice...*, p. 52.

<sup>175</sup> *Ibid*, p. 52.

Howbeit, this norm does not “establish an alternative connection” to the *lex loci damni* rule<sup>176</sup> and, regrettably, “this minimalist conception prevents Art. 17 from becoming the useful corrective tool that Rome II sorely needs.”<sup>177</sup> Indeed, its relevance, in terms of determining the tortfeasor’s fault, is dependent on the applicable law establishing liability and holding the tortfeasor accountable, which is not always the case in foreign direct liability litigation, especially when the general rule points towards the law of the host state.

## 6. Public policy exception

According to Art. 26 RRII, Courts are able to examine the applicable law to determine whether it is “manifestly incompatible with essential social or juridical values of the forum”<sup>178</sup>, and, in such cases, refrain from applying it.

The *ordre public* (*Vorbehaltsklausel*) operates *a posteriori*<sup>179</sup>, standing as an inviolable stronghold of the forum’s legal system.<sup>180</sup> In order for it to intervene, it is not sufficient that the solutions differ, the application of the foreign law “must depart so radically from the forum’s concepts of fundamental justice that it would be intolerable to the forum’s legal conscience.”<sup>181</sup> Furthermore, there needs to be an expressive connection to the forum, making it imperious and urgent to expurgate the *polluting body*<sup>182</sup>, and this evaluation should be made *in concreto*.<sup>183</sup>

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<sup>176</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 95.

<sup>177</sup> SYMEONIDES, S., *Rome II and Tort Conflicts...*, p. 41.

<sup>178</sup> BATIFFOL, HENRI/ LAGARDE, PAUL, *Traité de Droit International Privé*, Tome I, Paris, Librairie Générale de Droit et de Jurisprudence, 1993, p. 567.

<sup>179</sup> MARQUES DOS SANTOS, A., *As Normas de Aplicação Imediata...*, p. 171.

<sup>180</sup> FERRER CORREIA, ANTÓNIO, *Lições de Direito Internacional Privado*, Coimbra, Almedina 2000, p. 405.

<sup>181</sup> MOURA RAMOS, RUI, “Public Policy in the Framework of the Brussels Convention: Remarks on Two Recent Decisions by the European Court of Justice”, in, *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra, Coimbra Editora, 2002, p. 283-300, p. 290.

<sup>182</sup> MOTA, HELENA, “A ordem pública internacional e as (novas) relações familiares internacionais. Análise do Despacho n.º 87/2010, de 19 de Julho, do Presidente do Instituto dos Registos e do Notariado”, in *Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster*, Coimbra, Almedina, 2012, p. 261-284, p. 265.

<sup>183</sup> VAREILLES-SOMMIÈRES, PASCAL, “Taux d’intérêts et controle concret de l’ordre public international”, in *Revue Critique de Droit International Privé*, n.º 4, Paris, Editions Dalloz, 2019, p. 12

This clause should be put into practise only in exceptional circumstances, as stated under Recital 32, and it refers to the national public order, as “in principle, States are free to determine the requirements of public policy”, according to their own core values.<sup>184</sup> It guarantees that “certain minimum standards of morality and social conduct can operate negatively to secure domestic law against the implications of applicable foreign law that are incompatible to such standards.”<sup>185</sup>

In each EU MS, the public policy exception protects internationally recognized human rights<sup>186</sup>, even in extraterritorial cases, as confirmed by the ECJ in the case *Renault v. Maxicar (2000)*.<sup>187</sup> Thus, regarding BHR cases where the law of the host state is applicable, the *ordre public* should “work as a minimum guarantee of protection as human rights principles”<sup>188</sup>, making it possible for Courts to refuse to apply foreign law “that would amount to serious violations of international human rights law”<sup>189</sup>, in exceptional cases.

A prominent example is the civil case *Hamad Begum v. Maran*<sup>190</sup>, brought forth in 2020, against the UK-based company Maran by the widow of a Bangladeshi worker, who died in the course of the dismantling operations of a large tanker in 2018.<sup>191</sup> The claimant argued that the defendant is “both factually and legally responsible for the vessel ending up in Bangladesh where working conditions are known to be highly

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<sup>184</sup> MOURA RAMOS, R., *Public Policy in the Framework of the Brussels Convention...*, p. 286.

<sup>185</sup> JOHN, THOMAS/ DELAHAYE, LUKAS, “The use of Private International Law escape devices to manage the mediate application of (foreign) human rights in civil and commercial disputes in Australia”, in *A Commitment to Private International Law – Essays in honour of Hans van Loon*, Cambridge, Intersentia, 2013, p. 235-252, p. 249.

<sup>186</sup> PERRONE-MOISÉS, CLÁUDIA, “A ordem pública no mundo globalizado: Direito Internacional Privado e Direitos Humanos”, in *Direito Internacional e Comparado: Trajetória e Perspetivas – Homenagem aos 70 anos do Professor Catedrático Rui Manuel Moura Ramos*, vol. I, São Paulo, Quartier Latin, 2021, p. 157-167, p. 158.

<sup>187</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 61.

<sup>188</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 95.

<sup>189</sup> ÁLVAREZ RUBIO, J. J. / YIANNIBAS, K., *Human Rights in Business...*, p. 60.

<sup>190</sup> England and Wales Court of Appeal, *Hamad Begum v. Maran*, 2021, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html> (15.05.2022).

<sup>191</sup> HOLLAND, OLIVIER / BONNER, RACHEL, “Recent UK Court of Appeal judgment may lead to greater accountability of companies hiding behind complex supply chains”, in *Business & Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/blog/recent-uk-court-of-appeal-judgment-may-lead-to-greater-accountability-of-companies-hiding-behind-complex-supply-chains/> (15.05.2022).

dangerous.”<sup>192</sup> The Court recognized that a duty of care “required the defendant to take all reasonable steps to ensure that its negotiated and agreed end of life sale and the consequent disposal of the Vessel for demolition would not and did not endanger human health, the environment or breach international regulations.”<sup>193</sup>

The applicable law to the dispute was the Bangladeshi law, according to Art. 4(1) RRII, therefore, the one-year limitation period established under it was applicable, barring the claim. The claimant tried to circumvent this hurdle by invoking the applicability of Art. 26 RRII, “which would have permitted the foreign limitation period to be disapplied on the basis that it was manifestly incompatible with English public policy.”<sup>194</sup> On this issue, the Court held that “it was at least arguable the one-year limitation period under Bangladeshi law caused “undue hardship”, making it incompatible with public policy.”<sup>195</sup> The case has been appealed and a final decision is yet to be made.

On the other hand, in *Kik*, the claimants argued that limitation-period Pakistani rules were contrary to the German and EU *ordre public*, and a violation of their fundamental rights to a fair trial and access to remedy.<sup>196</sup> The Court, however, did not withhold the possibility of applying the public policy exception, stating that similar limitation periods are provided for in the German and other EU legal systems.

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<sup>192</sup> VAN CALSTER, GEERT, “Applicable law and statutes of limitation in CSR /business and human rights cases. The High Court, at least prima facie, on shipbreaking in Bangladesh in *Begum v Maran*”, in *GAVC Law*, 2020, available at: <https://gavclaw.com/2020/07/13/applicable-law-and-statutes-of-limitation-in-csr-business-and-human-rights-cases-the-high-court-at-least-prima-facie-on-shipbreaking-in-bangladesh-in-begum-v-maran/> (15.05.2022).

<sup>193</sup> *Ibid.*

<sup>194</sup> HARDWICKE-HUNTER, Madison, “*Begum v Maran (UK) Ltd* [2021] EWCA Civ 326: UK: Court of Appeal shipbreaking decision highlights potential liability risks arising from involvement with third parties’ harmful practices”, in *Linklaters*, 2021, available at: [https://www.linklaters.com/knowledge/-/media/digital-marketing-image-library/files/06\\_ckp/2021/june/gc22869\\_begum\\_v\\_maran\\_ewca\\_client\\_alert\\_2pp\\_fs-final\\_screen.ashx?rev=ce2d418a-fa8e-440e-becd-06df774233f6&extension=pdf&hash=40454A4D64699A730538A22A50711AEE](https://www.linklaters.com/knowledge/-/media/digital-marketing-image-library/files/06_ckp/2021/june/gc22869_begum_v_maran_ewca_client_alert_2pp_fs-final_screen.ashx?rev=ce2d418a-fa8e-440e-becd-06df774233f6&extension=pdf&hash=40454A4D64699A730538A22A50711AEE) (15.05.2022).

<sup>195</sup> NORTON ROSE FULBRIGHT, “Court of Appeal considers “unusual extension” to duty of care principles”, in *Norton Rose Fulbright*, 2021, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/f248bef3/court-of-appeal-considers-unusual-extension-to-duty-of-care-principles> (15.05.2022).

<sup>196</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 96.

The application of the public policy exception clause in cross-border civil liability BHR cases remains uncertain, as, “even though differences exist between legal systems as to statutes of limitations or level of damages, these differences do not justify the automatic intervention of public policy”<sup>197</sup>, and given that its actioning is left at the Court’s discretion.

## 7. The applicable law to environmental damages

A special rule regarding non-contractual obligations arising out of environmental damage, as defined under Recital 24, is provided by Art. 7 RRII.<sup>198</sup>

When dealing with an environmental tort, the claim can either be based on the *lex loci delicti commissi* – the law of the place where the event giving rise to the damage occurred, i.e., “the event for which the defendant is alleged to be responsible”<sup>199</sup> -, or on the *lex loci damni* general rule.<sup>200</sup>

The *lex loci delicti commissi* is the prevailing rule for civil law systems, nonetheless, it is progressively being abandoned “in favour of a more flexible but more amorphous rule.”<sup>201</sup> The applicable law is determined in accordance with the fact that originates the non-contractual responsibility<sup>202</sup>, as this criterion points towards the State in whose territory the tort was committed, i.e., where the tortfeasor acted, causing the harm, or should have acted, in order to prevent it.<sup>203</sup>

Under the principle of *favor laesi*<sup>204</sup>, this rule allows the claimants to choose the applicable law from these two alternatives, and victims can enjoy the stronger protection thresholds of the country in which the event giving rise to the damage

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<sup>197</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation...*, p. 96.

<sup>198</sup> MOURA RAMOS, RUI, *Estudos de Direito Internacional Privado da União Europeia*, Coimbra, Imprensa da Universidade de Coimbra, 2017, p. 124.

<sup>199</sup> DICKINSON, A., *The Rome II Regulation...*, p. 439.

<sup>200</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 13.

<sup>201</sup> COLLIER, JOHN G., *Conflict of Laws*, 3rd ed., Cambridge, Cambridge University Press, 2001, p. 220.

<sup>202</sup> BAPTISTA MACHADO, J., *Lições de Direito Internacional Privado...*, p. 367.

<sup>203</sup> NORTH, PETER / FAWCETT, JAMES, *Cheshire and North's Private International Law*, 13<sup>th</sup> ed., London, Butterworths, 1999, p. 608.

<sup>204</sup> FERNÁNDEZ ROZAS, JOSÉ CARLOS / SÁNCHEZ LORENZO, SIXTO, *Derecho Internacional Privado*, 9<sup>a</sup> ed., Navarra, Thomson Reuters, 2016, p. 653.

occurs. Additionally, businesses are discouraged to “establish their facilities on the border of low-protection countries.”<sup>205</sup> Account was taken of the “more general objectives in environmental matters”<sup>206</sup>, requiring a special protection for environmental torts, especially since the tortfeasor usually benefits economically from his damaging activities.

The principle of ubiquity<sup>207</sup>, inspired by environmental protection purposes, is very important in terms of access to remedy, allowing the victims to choose to base their claim on the law of the home State, and simultaneously preventing the establishment of subsidiaries and suppliers in host countries with lesser environmental protection.<sup>208</sup> This approach also favours party autonomy and is justified by the differences in the evolution of different legal systems, guaranteeing the application, in transnational situations, of the law which reaches the material result intended by the European legislator.<sup>209</sup>

For instance, the case *Milieudefensie et al v Royal Dutch Shell*<sup>210</sup> was brought by *Milieudefensie* and six other NGOs, as well as over 17.000 Dutch citizens, against Royal Dutch Shell on the grounds of an “unwritten standard of care to contribute to the prevention of dangerous climate change.”<sup>211</sup>

Since we are dealing with an environmental tort, the applicable law was determined on the grounds of Art. 7 of the RRII, having claimants the right to choose between the applicability of the *lex loci damni* and the *lex loci delicti commissi*. The claimants chose to base their claim on Dutch law and the interpretation of the event giving rise to the damage was one of the main points of contestation in this case. The Court ultimately found that Shell’s “corporate policy adopted in the Netherlands

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<sup>205</sup> FAWCETT, J. / CARRUTHERS, J., *Private International Law*..., p. 814.

<sup>206</sup> VAN CALSTER, G., *European Private International Law*..., p. 264.

<sup>207</sup> BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation*..., p. 90.

<sup>208</sup> *Ibid*, p. 90.

<sup>209</sup> SOUSA GONÇALVES, A., *Da Responsabilidade Extracontratual em Direito Internacional Privado*..., p. 471.

<sup>210</sup> Hague District Court, *Milieudefensie et al v Royal Dutch Shell*, 2021, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> (15.05.2022).

<sup>211</sup> MACCHI, CHIARA / VAN ZEBEN, JOSEPHINE, “Business and human rights implications of climate change litigation: *Milieudefensie et al. v Royal Dutch Shell*”, in *Review of European, Comparative & International Environmental Law*, vol. 30, n.º 3, 2021, p. 409-415, p. 410.

constitutes the event giving rise to harm”, leading to the application of Dutch tort law to this case<sup>212</sup>, as the *lex loci delicti commissi*.

This case is pioneer in holding a parent company accountable “under a duty of care with regard to foreign claimants”<sup>213</sup>, and its success is mainly due to the fact that the Dutch standard of care was applicable.<sup>214</sup> It casts light on the success of the ubiquity approach in relation to torts where there is an imbalance of powers between the parties and where the application of home State law is fundamental for guaranteeing access to remedy.

A problem which may be raised, when dealing with Art. 7 RRII, is the characterization of environmental torts. This rule is applicable to “environmental damage or damage sustained by persons or property as a result of such damage”<sup>215</sup>, thus including any “adverse change in a natural resource, 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”<sup>216</sup> as well as “claims for personal injury and property damage resulting from environmental damage.”<sup>217</sup>

Within this framework, and since environmental damages usually have an impact (even if only indirect) on human rights, it is not always clear whether we are before an environmental or a human rights claim. The distinction between a typical environmental tort case, such as *Mines de Potasse*, and a case which deals with climate change, but which fits the BHR realm, such as *Miliendefensie v. Shell*, is not always plain. Therefore, in the absence of case law further developing on this qualification problem,

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<sup>212</sup> MACCHI, C. / VAN ZEBEN, J., Business and human rights implications of climate change litigation..., p. 411.

<sup>213</sup> ROORDA, LUCAS, “Commentary: The Hague Court of Appeals rules on Shell in Nigeria”, in *Business and Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/latest-news/commentary-the-hague-court-of-appeals-rules-on-shell-in-nigeria/> (15.05.2022).

<sup>214</sup> The Court explained that, under this norm, any conduct which is contrary to an unwritten standard of care, is contrary to the law. Hence, when the corporate group defines its corporate policy, RDS should observe the duty of care owed to the environment and human rights, as it is generally understood by society. See: SERRA, CATARINA, “Empresas e Human Rights Due Diligence – Algumas observações a propósito de desenvolvimentos recentes”, in *Direito das Sociedades em Revista*, n.º 27, 2022, p. 25-45, p. 28.

<sup>215</sup> Art. 7, Rome II Regulation.

<sup>216</sup> Recital 24, Rome II Regulation.

<sup>217</sup> DICKINSON, A., *The Rome II Regulation...*, p. 436.

we believe that Art. 7 RR II, so long as its scope of application is met, may be used as the basis for a claim where there are interconnected human rights and environmental harms, allowing the claimants to opt between the *Erfolgsort* and the *Handlungsort*.

Besides, Art. 7 RR II may constitute a point of departure for the debate on the potential amendment of the Regulation in relation to BHR torts. This is an area where there are prominent policy objectives related to the extraterritorial protection of human rights and where the tortfeasor generally extracts profit from its harmful conduct. Furthermore, a *favor laesi* approach to this type of litigation could have a great impact in terms of access to remedy. Indeed, a conflict of laws rule for BHR torts, based on the ubiquity principle, was under consideration by the European Parliament in the first Draft Report on corporate due diligence and corporate accountability, with recommendations to the European Commission.<sup>218</sup> This norm, which will be analysed in the following chapter, was not adopted in the end.

#### **IV. The Upcoming EU Directive on Corporate Sustainability Due Diligence**

In April 2020, Commissioner for Justice Didier Reynders announced that a legislative initiative on mHRDD would be introduced at the EU level in 2021, “to ensure human rights and environmental standards are complied with for all products sold on the EU market.”<sup>219</sup> This will mandate MS to impose due diligence obligations on companies<sup>220</sup>, ensuring a “faster adoption, greater harmonization and a better

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<sup>218</sup> EUROPEAN PARLIAMENT, COMMITTEE ON LEGAL AFFAIRS, *Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)), EU, 2020, available at: [https://www.europarl.europa.eu/doceo/document/A-9-2021-0018\\_EN.html#title2](https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html#title2) (28.05.2022).

<sup>219</sup> DE SCHUTTER, OLIVIER, “Mandatory Human Rights Due Diligence in the EU: The Promise and the Risk”, in *Business & Human Rights Resource Centre Blog*, 2020, available at: <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-eu-the-promise-and-the-risk/> (28.05.2022).

<sup>220</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Business and Human Rights – Access to Remedy*, Luxembourg: European Union Agency for Fundamental Rights, 2020, p. 82.

comparison” of mHRDD measures<sup>221</sup> and facilitating access to remedy for victims of corporate human rights abuse.

This initiative does not emerge in a legal vacuum, as, at the EU level, mHRDD frameworks have already been adopted in relation to specific sectors of commodities. For instance, the EU Timber Regulation<sup>222</sup> requires EU traders who place timber products on the EU market for the first time to exercise due diligence. Also, the EU Conflict Minerals Regulation<sup>223</sup> requires EU importers of certain minerals from conflict-affected areas to exercise due diligence to ensure that they have not been produced in a way that funds conflict or other related illegal practices. These apply, however, only to “a very specific sector of international supply chains.”<sup>224</sup> Moreover, the EU Non-Financial Reporting Directive, “imposes on some large undertakings the obligation to report on the policies they pursue in relation to respect for human rights”, as well as other topics<sup>225</sup>, and in 2019, the European Commission issued a series of non-binding guidelines to help companies disclose social information, given that “sufficient, reliable and comparable sustainability-related information is critical to effectively identify and manage risks.”<sup>226</sup>

However, the limited scope of these due diligence obligations, only covering certain specific sectors or only imposing a communication obligation, showcases the

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<sup>221</sup> AUGENSTEIN, DANIEL. “Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union”, in *Global Policy*, vol. 9, n.º 2, 2018, p. 254-263, p. 261.

<sup>222</sup> EU, 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, 2010, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995> (14.03.2022).

<sup>223</sup> EU, 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, 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821> (14.03.2022).

<sup>224</sup> JEDRZEJOWSKA-SCHIFFAUER, ISABELA, “Business Responsibility for Human Rights Impact under the UN Guiding Principles: at Odds with European Union Law?”, in *European Law Review*, vol. 46, n.º 4, 2021, p. 481-505, p. 485.

<sup>225</sup> EUROPEAN PARLIAMENT, COMMITTEE ON LEGAL AFFAIRS, *Report with recommendations to the Commission on corporate due diligence and corporate accountability...*

<sup>226</sup> BRIGHT, CLAIRE / SEQUEIRA, BENEDITA, “Mandatory Human Rights Due Diligence: An Overview of the Legislative Developments at the European Level (Practical Brief)”, in *Nova Center for Business, Human Rights and the Environment*, 2021, available at: <https://novabhre.novalaw.unl.pt/wp-content/uploads/2022/05/Practical-Brief-on-Mandatory-Human-Rights-Due-Diligence.pdf> (28.05.2022), p. 3.

“significant regulatory gaps” remaining and the limitations as to what concerns responsible social practises of EU-based companies in global value chains.<sup>227</sup>

In this context, and having in mind that “EU companies operate in complex surroundings and rely on global value chains”<sup>228</sup>, a Union-wide general legislation is regarded as essential, especially considering that MS legislation alone in this transboundary area is unlikely to be sufficient and efficient to level the playing field for companies in terms of respect for human rights and the environment. In addition, several studies, such as the Study for the European Commission on Due Diligence Requirements through the Supply Chains (2020)<sup>229</sup> and the Study for the European Parliament on Access to legal remedies for victims of corporate human rights abuses in third countries (2019) highlighted the limitations of corporate practices in Europe in relation to HRDD, “part of a wider issue which is linked to the non-binding character of current international instruments.”<sup>230</sup> Both studies found that businesses foresee benefits from a potential cross-sectoral regulation in this area<sup>231</sup>, which would provide greater harmonization and legal certainty, and increase the leverage in the business relationships established throughout the value chain.<sup>232</sup>

Hereinafter, on the basis of the studies’ findings, a Draft Report on corporate due diligence and corporate accountability with recommendations to the Commission, containing a proposal for a Directive and Amendments to the Brussels I Recast Regulation and RRII, was made public by the European Parliament. The proposed Directive, “aimed at ensuring that undertakings operating the internal market fulfil their duty to respect human rights, the environment and good

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<sup>227</sup> JEDRZEJOWSKA-SCHIFFAUER, I., *Business Responsibility for Human Rights Impact...*, p. 499.

<sup>228</sup> EU, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (28.05.2022), Explanatory Memorandum, p. 1.

<sup>229</sup> SMITH, LISE [et. al], *Study on due diligence requirements through the supply chain : final report*, Luxembourg, European Union, 2020, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (14.06.2022).

<sup>230</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 107.

<sup>231</sup> SMITH, LISE [et.al], “Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies”, in *Business and Human Rights Journal*, vol. 5, n.º 2, 2020, p. 261-269, p. 265.

<sup>232</sup> JEDRZEJOWSKA-SCHIFFAUER, I., *Business Responsibility for Human Rights Impact...*, p. 501.

governance”<sup>233</sup>, would impose due diligence obligations on certain large European and non-European companies carrying out operations in the internal market, and would provide for administrative oversight of public bodies, as well a civil liability remedy for victims. The proposed alterations to the Brussels I *bis* Regulation sought to both expand the jurisdictional basis of Art. 8 and introduce a *forum necessitatis* clause, whereas the amendments to RRII included the insertion special choice of law provision for BHR torts under the new Art. 6(a).

In March 2021, a revised version of the Draft Report, which did not include the PIL alterations, was adopted by a large majority of the European Parliament.<sup>234</sup>

The Draft framework on Corporate Sustainability Due Diligence was finally made public by the European Commission, who has legislative initiative, in February 2022. The proposal is based on Arts. 50 and 114 of the TFEU, and the Draft instrument is a Directive. This meaning it is “binding with regard to the result to be achieved”<sup>235</sup>, requiring each MS to incorporate it in order for it to be given effect in the national legal system.<sup>236</sup>

The EU has gradually incorporated human rights concerns into many of its policies<sup>237</sup>, and this instrument aims to protect human rights and human dignity by imposing standards on responsible business conduct. It uses the UNGPs, as well as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles as a point of departure.<sup>238</sup>

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<sup>233</sup> EUROPEAN PARLIAMENT, COMMITTEE ON LEGAL AFFAIRS, *Report with recommendations to the Commission on corporate due diligence and corporate accountability...*, Art. 1.

<sup>234</sup> NOVA BHRE, *Human Rights and Environmental Due Diligence Legal Brief*, IMVF: Our Food. Our Future Project, 2021, available at: <https://www.imvf.org/wp-content/uploads/2021/06/legal-brief-human-rights-and-environmental-due-diligence-ofof.pdf> (04.04.2022), p. 11.

<sup>235</sup> DINAN, DESMOND, *Encyclopedia of the European Union*, Hampshire: Macmillan, 1998, p. 140.

<sup>236</sup> FAIRHURST, JOHN, *Law of the European Union*, 5<sup>th</sup> ed., Essex: Pearson Education Limited, 2006, p. 58.

<sup>237</sup> CRAIG, PAUL / BÚRCA, GRÁINNE, *EU Law: Text, Cases and Materials*, 6<sup>th</sup> ed., Oxford: Oxford University Press, 2015, p. 381.

<sup>238</sup> “The EU frequently uses international human rights instruments as a point of reference and source of inspiration.” See: ROSAS, ALLAN, “The European union and International Human Rights Instruments”, in *The European Union and the International Legal Order*, Hague: TMC Asser Press, 2001, p. 53.

Under Art. 2, the Directive's scope covers both European and non-European companies above a certain threshold. In particular, it covers "companies which are formed in accordance with the legislation of a MS" and which "had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year" or "which had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year", if they operate in increased-risk sectors, such as manufacture of textiles, agriculture, forestry or extraction of mineral resources.<sup>239</sup> As to what concerns third-country companies, the Directive will be applicable to those with "significant operations in the EU"<sup>240</sup>, i.e., which have a net turnover of at least EUR 150 million in the EU in the last financial year. After two years, the threshold for both European and non-European business enterprises shall be lowered. It will include mid-cap European companies that have more than 250 employees on average and a net turnover of over EUR 40 million, provided that at least 50% of this turnover was generated in one or more of three high impact sectors. For non-European companies the threshold will be lowered to a turnover of more than EUR 40 million, or at least 50% of the company's net worldwide turnover being generated in one or more of the high-impact sectors.

The Draft Directive obliges MS to impose due diligence obligations on companies, who "should take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, their subsidiaries, as well as their established direct and indirect business relationships throughout the value chain"<sup>241</sup>, in accordance with Arts. 5 to 11.

To abide by their due diligence obligations, businesses should: (i) integrate due diligence into corporate policies; (ii) identify actual and potential adverse impacts; (iii) prevent and mitigate adverse impacts; (iv) implement a complaints procedure; (v) monitor the effectiveness of the due diligence policy and measures; and (vi) publicly

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<sup>239</sup> Art. 2 of the Draft Directive on Corporate Sustainability Due Diligence.

<sup>240</sup> *Ibid.*

<sup>241</sup> Recital 14 of the Draft Directive...

communicate on the steps taken.<sup>242</sup> Businesses should also implement a complaints procedure, as provided for in Art. 9, and, under Art. 10 “carry out periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the value chains of the company, those of their established business relationships, to monitor the effectiveness of their identification, prevention, mitigation, bringing to an end and minimization of the extent of human rights adverse impacts.”<sup>243</sup>

The Proposed Directive instates both public and private enforcement mechanisms. First of all, MS should establish a national supervisory authority, with the power to apply sanctions which are “effective, proportionate and dissuasive.”<sup>244</sup> Secondly, as stated in Recital 61, in order to ensure access to effective remedy for victims, companies should be liable for damages arising out of their failure to comply with due diligence obligations stemming from the Directive, if as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimized through the appropriate measures occurred and led to damage<sup>245</sup>, in accordance with Art. 22 of the Draft Directive. MS are, thus, required to ensure that companies are subject to civil liability for damages in case they failed to comply with their due diligence obligations.

The proposed alterations to the RRII, initially advanced by the EP were not included in the Commission’s Directive proposal. They encompassed the introduction of Art. 6(a), which would allow victims of business-related human rights abuses to “choose the applicable law *ex post*.”<sup>246</sup>

This norm would allow the victims to choose the applicable law with the highest human rights standards between four different options: (i) the law of the place

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<sup>242</sup> BRIGHT, CLAIRE / SMITH, LISE, “The new European Directive on Corporate Sustainability Due Diligence”, in *Nova Center on Business, Human Rights and the Environment blog*, 2022, available at: <https://novabhre.novalaw.unl.pt/new-european-directive-corporate-sustainability-due-diligence/> (14.06.2022).

<sup>243</sup> Art. 10 of the Draft Directive...

<sup>244</sup> Art. 20 of the Draft Directive...

<sup>245</sup> Art. 22 of the Draft Directive...

<sup>246</sup> RUEHL, GISELA, “Human rights in global supply chains: Do we need to amend the Rome II-Regulation?”, in *Conflict of Laws.net*, 2020, available at: <https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/> (14.06.2022).

where the damage occurred, i.e., the general rule under Art. 4(1); (ii) the law of the country in which the event giving rise to the damage occurred; (iii) the law of the country in which the parent company has its domicile; (iv) or, where it does not have a domicile in a MS, the law of the country where it operates.<sup>247</sup> It sought to improve the level of human rights protection, by means of having businesses adjust to the most severe law out of the four options.

The *lex loci delicti commissi* corresponds to the law of the place where the harmful conduct was carried out by the tortfeasor.<sup>248</sup> This meaning that victims of corporate human rights abuse can choose to base their claim on the law of the State where the company acted causing the harm, or should have acted in order to prevent it or mitigate it, thus referring to “the place where the proper diligence ought to have taken place.”<sup>249</sup> This criterion usually points towards home State law, more precisely, to the law of the place from where the corporation's shareholders direct, control, and coordinate the corporation's activities, and from where the head corporation manages and oversees subsidiary and supplier companies.

Favouring the application of this criterion is the argument on territorial sovereignty, reasoning that “the law of the place where events occur is the only law which can attribute legal consequences to them”<sup>250</sup>, and the argument that the application of the *lex loci delicti commissi* accords with the legitimate expectations of the parties, which “should be able to calculate the risks they are incurring” in relation to the law of the State in which they carry out their activities.<sup>251</sup>

On the other hand, in relation to BHR torts this might not be the most suitable criterion, as, in an initial stage of the process, access to relevant corporate information might be challenging, and thus the place where the company acted or should have

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<sup>247</sup> EUROPEAN PARLIAMENT, COMMITTEE ON LEGAL AFFAIRS, *Report with recommendations to the Commission on corporate due diligence and corporate accountability...*, Art. 6(a) RRII Proposal.

<sup>248</sup> BAPTISTA MACHADO, J., *Lições de Direito Internacional Privado...*, p. 368.

<sup>249</sup> VAN CALSTER, GEERT, “First analysis of the European Parliament’s draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence”, in *GAVC Law*, 2020, available at: <https://gavclaw.com/2020/10/02/first-analysis-of-the-european-parliaments-draft-proposal-to-amend-brussels-ia-and-rome-ii-with-a-view-to-corporate-human-rights-due-diligence/> (14.06.2022).

<sup>250</sup> MCCLEAN, DAVID / MORRIS, J.H.C, *The Conflict of Laws*, 4<sup>th</sup> ed., London, Sweet & Maxwell Ltd, 1993, p. 278.

<sup>251</sup> *Ibid*, p. 278.

acted might be difficult to establish. Additionally, “the event giving rise to the damage may not always be clearly identifiable, and there will be often a series of actions, inactions or decisions which, together, give rise to the damage.”<sup>252</sup>

The *lex domicili* refers to the law of the company’s domicile. This can either be the law of the incorporation, the law of the central administration or the law of the place of operation, depending on the legal system we are dealing with. Determining the corporation’s domicile is not without its challenges, especially when dealing with corporate groups<sup>253</sup>, and there are great disparities between legal systems in this regard, which is why the Regulation defines the domicile of the company as the place of central administration, under Art. 23.

The place of central administration corresponds to the place where the head office is located and acts, pointing towards the *centre of gravity* or higher decision-making centre of the legal person.<sup>254</sup> This criterion instates a strong and stable connection to the home State<sup>255</sup>, where the *nerve centre* of the company, i.e., its centre of direction, control, and coordination, is located.<sup>256</sup> This means that if the claim is brought against the parent or lead company, this criterion “is likely to be conducive to effective access to substantive justice and remedy and redress the imbalance of powers between the parties to civil claims for BHR torts”<sup>257</sup>, as head corporations tend to be located in economically developed States, with more stringent rules in relation to human rights protection and compensation.<sup>258</sup>

The law of the place of operation, which can be applicable in case the company is not based in an EU MS, corresponds to the law of the place where the business

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<sup>252</sup> BRIGHT, CLAIRE / MARULLO, MARIA CHIARA / ZAMORA CABOT, FRANCISCO, “Private international law aspects of the Second Revised Draft on the legally binding instrument on business and human rights”, in *Nederlands Internationaal Privaatrecht*, vol. 39, n.º 1, 2021, p. 35-52, p. 50.

<sup>253</sup> ENGRÁCIA ANTUNES, J., *Os Grupos de Sociedades...*, p. 245.

<sup>254</sup> BRITO, MARIA HELENA, Comentário ao Artigo 33.º, in *Código Civil Anotado*, coord. Ana Prata, Vol. I., Coimbra, Almedina, 2017, p. 60.

<sup>255</sup> BAPTISTA MACHADO, J., *Lições de Direito Internacional Privado...*, p. 344.

<sup>256</sup> LIMA PINHEIRO, L., *Direito Internacional Privado...*, p. 173.

<sup>257</sup> BRIGHT, C. / MARULLO, M. C. / ZAMORA CABOT, F., Private international law aspects of the Second Revised Draft..., p. 50.

<sup>258</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 113.

operations and activities are carried out by the company.<sup>259</sup> This criterion is, nonetheless, volatile, and can create a *mobile conflict*<sup>260</sup>, delaying and complexifying proceedings even more, as the place of operations is in constant mutation and very difficult to determine in a context of globalized markets, and may very easily be changed by the corporation.

Advocates for the introduction of a special conflict-of-laws rule concerning BHR torts believe that, having in mind the distinct nature of these proceedings, a series of special connecting factors, favouring access to remedy and corporate liability for human rights harms, are needed in order to ensure that MS refrain from applying a law which is incompatible with their human rights obligations.<sup>261</sup> It is also noteworthy that “PIL rules may serve political policy objectives”, such as ensuring access to remedy for victims of business-related human rights harms and/or regulating the conduct of MNCs in the international arena.<sup>262</sup> One should also bear in mind that the forthcoming European mHRDD framework only sets “minimum requirements” and “does not contain an independent set of rules on civil liability triggered by a violation of its standards.”<sup>263</sup> Therefore, the applicable law will, almost exclusively, determine the plaintiffs’ success in the proceedings.

This ubiquity approach has, nonetheless, been condemned for “leading to an impairment of foreseeability”<sup>264</sup> and for increasing the compliance costs for businesses, who would need to “adjust their behaviour to four potentially different laws to avoid liability.”<sup>265</sup> Moreover, special PIL rules such as the public policy

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<sup>259</sup> MOTA, HELENA, “A lei pessoal das sociedades comerciais na jurisprudência da União Europeia”, in *A Transferência da Sede Societária no Espaço da União Europeia*, Coimbra, Almedina, 2016, p. 76-92, p. 79.

<sup>260</sup> FERRER CORREIA, ANTÓNIO, *Temas de Direito Comercial e Direito Internacional Privado*, Coimbra, Almedina, 1989, p. 314.

<sup>261</sup> COUNCIL OF EUROPE, *Human Rights and Business: Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states*, Strasbourg: Council of Europe, 2016, p. 40.

<sup>262</sup> VAN DEN EECKHOUT, V., *Corporate Human Rights Violations and Private International Law...*, p. 16.

<sup>263</sup> VON HEIN, JAN, “Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims”, in *Conflict of Laws.net*, 2020, available at: <https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/> (14.06.2022).

<sup>264</sup> *Ibid.*

<sup>265</sup> RUEHL, G., *Human rights in global supply chains: Do we need to amend the Rome II-Regulation...*

exception, overriding mandatory provisions and rules of safety and conduct, already provided for under the RRII, could be considered sufficiently protective of the victims' right to access justice, hence, there would be no need for a special conflict-of-laws rule to be adopted.

Even though Art. 6(a) failed to be adopted, the upcoming EU Directive on BHR could be of paramount importance in terms of access to remedy for victims, as the provisions it contains, in particular in terms of due diligence and civil liability, could acquire the status of overriding mandatory provisions, or serve as grounds for the application of the public policy exception, or for the factual consideration of the rules of safety and conduct.<sup>266</sup> Thus, the human rights obligations imposed by the Directive may be “applicable indirectly through PIL rules.”<sup>267</sup>

The public policy exception is based on an adjustment which is necessary in case the court seized in the dispute can not admit the application of the law designated by the conflict-of-laws rule, as it “would offend against certain notions of its own law which are regarded as essential or contrary to its own public policy.”<sup>268</sup> Having in mind the Proposed Directive and the human rights protection obligations of means it imposes on companies, one could argue that applying a law which shields businesses from any liability when they caused, contributed to or are directly linked to a human rights harm is against the forum's *ordre public*. The functioning of this clause is, however, dependent on a case-by-case analysis.

As to what concerns the overriding mandatory nature of the Draft Directive's rules, Art. 22(5) states that the rules on civil liability, to be transposed by the MS, are to be considered *lois de police*, having “overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a MS.”<sup>269</sup> These mandatory

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<sup>266</sup> OXFORD PRO BONO PUBLICO, *Obstacles to Justice and Redress...*, p. 124.

<sup>267</sup> VAN DEN EECKHOUT, V., *Corporate Human Rights Violations and Private International Law...*, p. 15.

<sup>268</sup> LAGARDE, PAUL, “Public Policy”, in *International Encyclopaedia of Comparative Law*, vol. III(1), Chapter II-2, Tübingen, Mohr Siebeck, 1986, p. 3.

<sup>269</sup> Recital 61 of the Draft Directive...

provisions will, therefore, override the normal rules resulting from the application of the otherwise competent law<sup>270</sup> in accordance with the RRII.

Finally, the standards imposed by the Draft Directive, following their transposition into MS national legislation, are to be taken into account as rules of safety and conduct, even where the non-contractual obligation is governed by the law of another country. This means that the rules imposing HRDD obligations on companies can be used as an “evidentiary tool, providing standards according to which the conduct of the tortfeasor should be appraised.”<sup>271</sup>

## V. The Draft BHR Treaty

Another noteworthy legislative initiative for the purposes of this work is the Legally Binding Instrument on BHR, emerging together with the momentum for mHRDD growing and gaining widespread support from stakeholders, who started viewing the translation of the UNGPs into hard law as essential to “close legal protection gaps at the global level.”<sup>272</sup>

Despite the fact that there are several domestic and regional legislations implementing mHRDD frameworks or disclosure obligations, the fragmentation of these initiatives gives rise to legal uncertainty, subjecting businesses to multiple and/or different standards. Having this in mind, the mHRDD international initiative is aimed at closing the regulatory gap at the international level and level the playing field, imposing on companies the duty to prevent, mitigate and remedy actual and potential human rights impacts they have caused, contributed to or that are directly linked to their operations.

The process towards the adoption of a BHR international framework began in 2013, when Ecuador, supported by over 80 countries, “urged the UN Human

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<sup>270</sup> COLLINS, LAWRENCE, *The Conflict of Laws*, 14th ed., vol. II, London, Sweet & Maxwell, 2006, p. 1955.

<sup>271</sup> BRIGHT, C./ WRAY, B., *Corporations and Social Environmental Justice...*, p. 14.

<sup>272</sup> AUGENSTEIN, D., *Negotiating the Hard/Soft Law Divide in Business and Human Rights...*, p. 254.

Rights Council to take up the issue of a Legally Binding Treaty on BHR.”<sup>273</sup> In 2014, the UN Human Rights Council established the OEIWG, in charge of elaborating a Draft instrument to “regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>274</sup> Since then, three versions of a Draft Legally Binding Instruments were made public, the most recent one – Third Revised Draft<sup>275</sup> – being published in August 2021, after the 6th session of the IGWG, which was held from 26 to 30 October 2020.

This instrument shall take the form of a Treaty, i.e., a “written agreement whereby the States participating bind themselves legally to act in a particular way.”<sup>276</sup> Treaties are binding towards signatory subjects of international law, acting in that quality<sup>277</sup>, thus, they are binding on contracting States, the fundamental or primary subjects of the international community<sup>278</sup>, and not on companies.

Although the proposed instrument would only create obligations for States, these should “take legislative and other measures to make businesses legally accountable.”<sup>279</sup> Indeed, the State duty to protect human rights by ensuring that private actors comply with human rights obligations “is for the most part well understood, and it now belongs to the *acquis* of international human rights law”<sup>280</sup>, having States the primary responsibility to prevent and address corporate-related human rights abuses.<sup>281</sup> And, actually, home States are increasingly expected to “adopt

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<sup>273</sup> RAMASASTRY, A., *Corporate Social Responsibility versus Business and Human Rights...*, p. 248.

<sup>274</sup> BUENO, N. / BRIGHT, C., *Implementing Human Rights Due Diligence through Corporate Civil Liability...*, p. 8.

<sup>275</sup> OEIWG CHAIRMANSHIP, *Third Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of Transnational Corporations and other Business Enterprises*, 2021, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (14.06.2022).

<sup>276</sup> SHAW, MALCOM N., *International Law*, Cambridge: Cambridge University Press, 2017, p. 69.

<sup>277</sup> GONÇALVES PEREIRA, ANDRÉ / QUADROS, FAUSTO, *Manual de Direito Internacional Público*, 3.<sup>a</sup> ed., Coimbra: Almedina, 1997, p. 174.

<sup>278</sup> CASSESE, ANTONIO, *International Law*, 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005, p. 71.

<sup>279</sup> LOPEZ, CARLOS, “Towards an International Convention on Business and Human Rights” (Part I), in *Opinio Juris Blog*, 2018, available at: <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/> (14.06.2022).

<sup>280</sup> DE SCHUTTER, OLIVIER, “Towards a New Treaty on Business and Human Rights”, in *Business and Human Rights Journal*, vol. I, n.º 1, 2016, p. 41-67, p. 44.

<sup>281</sup> BERNARD, VINCENT, “Editorial: Globalisation will only mean progress if it is responsible”. *International Review of the Red Cross*, Vol. 94 n.º 887, 2012, p. 881-890, p. 881.

domestic legislation mandating companies in their territory or under their jurisdiction to exercise HRDD wherever they operate”<sup>282</sup>, as TNCs are often more powerful than the host States in which they carry out their operations conducive to human rights harms.<sup>283</sup>

On this account, the Proposed Treaty imposes on contracting States the obligation to protect human rights by regulating the activities of corporations over which they exercise influence, by any means compatible with international law.<sup>284</sup> Art. 6 requires States to “mandate companies to exercise HRDD proportionate to their size, risk of severe human rights impacts and the nature and context of their business activities and relationships.”<sup>285</sup> This obligation includes the following steps: (i) identifying and assessing actual and potential human rights impacts throughout the value chain; (ii) taking the appropriate measures to avoid, prevent or mitigate effectively the actual or potential human rights abuses; (iii) monitoring the effectiveness of their measures to prevent and mitigate human rights abuses; and (iv) communicating regularly on the steps taken.<sup>286</sup> Under Art. 3, this instrument shall be applicable to “all business activities, including business activities of a transnational character.”<sup>287</sup>

Furthermore, Art. 7, declares that “States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with the (Legally Binding Instrument) to enable victims’ access to adequate, timely and effective remedy and access to justice.”<sup>288</sup>

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<sup>282</sup> DELAUTRE, GUILLAUME / MANRIQUE, ECHEVERRIA / FENWICK, COLIN, *Decent work in a globalized economy: Lessons from public and private initiatives*, Geneva: International Labour Organization, 2021, p. 97.

<sup>283</sup> JOSEPH, SARAH, “An Overview of the Human Rights Accountability of Multinational Enterprises”, in *Liability of Multinational Corporations under International Law*, The Hague: Kluwer International, 2000, p. 75-95, p. 78.

<sup>284</sup> DE SCHUTTER, O., *Towards a New Treaty on Business and Human Rights...*, p. 46.

<sup>285</sup> BRIGHT, C. / MARULLO, M. C. / ZAMORA CABOT, F., *Private international law aspects of the Second Revised Draft...*, p. 49.

<sup>286</sup> Art. 6 of the Third Revised Draft: Legally Binding Instrument...

<sup>287</sup> Art. 3 of the Third Revised Draft: Legally Binding Instrument...

<sup>288</sup> Art. 7 of the Third Revised Draft: Legally Binding Instrument...

The provisions on access to remedy for victims and legal liability of TNCs are key on this Draft Treaty<sup>289</sup>, making it of the uppermost importance to improve accountability and redress for business-related human rights harms.<sup>290</sup>

The Draft Treaty also provides several solutions as to what concerns the applicable law issue, under Art. 11.

In accordance with Art. 11(1), “all matters of procedure regarding claims before the competent court which are not specifically regulated in the Legally Binding Instrument shall be governed by the law of the court seized.”<sup>291</sup> This meaning that the *lex fori* will be applicable to all procedure matters which are not regulated in the Treaty.

Regarding the substance, Art. 11(2) provides that all matters which are not specifically regulated in the Legally Binding Instrument “may, upon the request of the victim, be governed by the law of another State where: the acts or omissions have occurred or produced effects; or the natural or legal person alleged to have committed the acts or omissions is domiciled.”<sup>292</sup>

Once again, victims of corporate human rights abuse are given the opportunity to request for a different law to be applicable, allowing “the dispute to be governed by higher standards.”<sup>293</sup> The victims can choose to have the *lex loci delicti commissi*, that is, the law of the State where the acts or omissions of the company, that later materialize in human rights harms, apply. This will normally be the law of the State where the parent or lead company acted or should have acted in exercise of its due diligence obligations, under Art. 6. Following Art. 11(2), claimants can, alternatively, choose to have the *lex domicili* of the company, i.e., the law of the home state, apply.

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<sup>289</sup> LOPEZ, C., Towards an International Convention on Business and Human Rights...

<sup>290</sup> DE SCHUTTER, O., Towards a New Treaty on Business and Human Rights..., p. 59.

<sup>291</sup> Art. 11(1) Third Revised Draft: Legally Binding Instrument...

<sup>292</sup> Art. 11(2) Third Revised Draft: Legally Binding Instrument...

<sup>293</sup> BRIGHT, C. / MARULLO, M. C. / ZAMORA CABOT, F., Private international law aspects of the Second Revised Draft..., p. 46.

This choice between the application of the *lex loci delicti commissi* and the *lex domicilii* is, *mutatis mutandis*, similar to that established in proposed Art. 6(a) RRII. We, thus, report back to our previous analysis of these connecting factors.

## VI. Conclusion

The legal and policy framework for corporate accountability, as we have seen, remains “both incoherent and fraught with contradiction.”<sup>294</sup> If, on the one hand, the business responsibility to respect human rights is increasingly accepted amongst stakeholders, on the other hand, this reality is not yet being translated into actual legal accountability, as corporations are rarely held liable for human rights harms arising out of their activities or established business relationships.

The endorsement of the UNGPs, in 2011, “was a powerful stimulus for the global multi-stakeholder dialogue on BHR”<sup>295</sup>, expressly addressing the independent responsibility of corporations to respect human rights and paving the way for a new wave of international, national and regional HRDD regulation, placing the business community’s relationship with human rights under the spotlight<sup>296</sup> and leading to a progressive “hardening” of the initially established soft law in this field.

Existing domestic regulations on the activities of MNCs throughout the value chain, as well as the proposed EU Directive and the Draft BHR Treaty, oblige in-scope corporations to conduct HRDD on their value chains, and hold them accountable for failing to do so. But even the most well-drafted regime “can not ensure that companies carry out this obligation in ways that lead to measurable and lasting improvements in the wellbeing of stakeholders along their supply chain”<sup>297</sup> or that victims of abuse will be able to obtain compensation or hold the corporation liable for a failure to act in accordance with its due diligence obligations.

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<sup>294</sup> AMNESTY INTERNATIONAL, *Injustice Incorporated...*, p. 67.

<sup>295</sup> JEDRZEJOWSKA-SCHIFFAUER, I., *Business Responsibility for Human Rights Impact...*, p. 481.

<sup>296</sup> AVERY, CHRIS, “Business and Human Rights in a Time of Change”, in *Liability of Multinational Corporations under International Law*, The Hague: Kluwer International, 2000, p. 17-73, p. 17.

<sup>297</sup> EUROPEAN COMMISSION, *Making Mandatory Human Rights and Environmental Due Diligence Work for All: Guidance on designing effective and inclusive accompanying support to due diligence legislation*, European Union, 2022, available at: [https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all\\_en](https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all_en) (16.07.2022), p. 25.

As to what concerns legal action against TNCs, the fact remains that “human rights litigation is complex, costly and uncertain”<sup>298</sup>, and emblematic cases, as we have seen, testify to the seriousness of this issue.<sup>299</sup>

Even though corporate groups are increasingly exposed to legal prosecution for human rights harms they caused, contributed to, or are directly linked to, access to remedy continues to be beyond the reach of most victims. For one, cross-border litigation is costly, legal expertise is scarce, corporate structures are complex and accountability gaps in place shield parent and lead companies from liability for harms taking place in their GVCs, and to which they are “considered to be giving their consent, implied through benefits obtained or risks created by the corporation.”<sup>300</sup>

Moreover, concerning transnational legal action based on the law of torts and civil liability, PIL rules, and, in particular, choice-of-law rules, constitute a potential challenge for victims of corporate human rights abuse, who want to bring forward a civil lawsuit.<sup>301</sup> Indeed, RRII’s rules on the applicable law to non-contractual obligations, setting a harmonized regime for EU MS, seem to be impairing the right to access remedy. Art. 4(1) RRII, pointing towards the application of the *lex loci damni*, which, for BHR civil claims, as was determined, is the law of the State where the human rights harm was suffered, “fails to perform any corrective or distributive function traditionally attributed to tort law.”<sup>302</sup>

The law of the place of injury, which will determine liability, time limitations, immunity and remedy, works in disfavour of the claimants, barring access to remedy, particularly when “the law of the host State either does not recognize or limits vicarious and/or secondary liability, provides for a higher burden of proof to establish a claim in tort or provides stricter immunities than does the forum’s state law.”<sup>303</sup> The

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<sup>298</sup> ZERK, J., Corporate liability for gross human rights abuses..., p. 79.

<sup>299</sup> BOUCOBZA, XAVIER / SERINET, YVES-MARIE, “La régulation des groupes internationaux de sociétés : universalité de la compliance versus contrôles nationaux”, in *Journal du Droit International*, n.° 1, 2019, p. 3-26, p. 3.

<sup>300</sup> PEREIRA DIAS, RUI, “Suing Corporations in a Global World”, in *Yearbook of Private International Law*, Vol. XIV (2012/2013), 2013, p. 493-517, p. 512.

<sup>301</sup> VAN DEN EECKHOUT, V., Corporate Human Rights Violations and Private International Law..., p. 16.

<sup>302</sup> BRIGHT, C./ WRAY, B., Corporations and Social Environmental Justice..., p. 15.

<sup>303</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice...*, p. 55.

case *Kik*, brought forward before German Courts clearly demonstrates how the application of RRII's general rule to claims of this particular nature stands in the way of access to justice and compensation for victims of human rights abuse.

Furthermore, the exceptions set under Art. 4(2) and Art. 4(3) are, as identified, inappropriate for these types of torts, where usually the tortfeasor and the plaintiff do not have the same habitual residence, nor is there a State whose connection to the tort is manifestly closer, as the host State, where the harm was endured, usually coincides with the habitual residence of the victims and the domicile of the subsidiary or supplier company.

Also, post-tort agreements on the applicable law, under Art. 14, may be reached by the parties to a business-related human rights civil claim. Withal, the usage of party autonomy as a device in cross-border BHR torts is challenging. Firstly, reaching an agreement on the applicable law is difficult, since, under the current *status quo* businesses derive advantages from the application of RRII's general rule. In addition, proof of a real choice of law, when this choice is not expressed, may be intricate, as we can see in *Kik* and it may be ineffective in case it is detrimental for third parties.

Within this framework, in order to obtain compensation for the harms suffered, non-European victims have to rely on exceptions and/or a flexible interpretation of RRII's rules, as, even within the context of this harmonized regime, there will be grey areas, allowing for the displacement of the otherwise applicable law.

The application of the public policy exception is dependent upon the applicable law being manifestly incompatible with the *ordre public* of the forum. To ensure the international cooperation of States, these have to "respect each other's (legal) views"<sup>304</sup>, and that means that the public policy exception should only be actioned in extraordinary circumstances. Securing human rights horizontal protection seems to fit the scope of application for this PIL mechanism, and, indeed, the European Parliament listed several examples of circumstances that would justify

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<sup>304</sup> VLAS, PAUL, "Public Policy in Private International Law and its Continuing Importance", in *A Commitment to Private International Law: Essays in honour of Hans van Loon*, Cambridge, Intersentia, 2013, p. 621-631, p. 629.

invoking this exception, namely “a breach of fundamental rights and freedoms as enshrined in the ECHR, national constitutional provisions or international humanitarian law.”<sup>305</sup> Nonetheless, its employment in practise, in the context of BHR torts, is yet to be confirmed. This is mainly due to the fact that the law applicable to the tort is not usually directly offending the victims’ human rights. Normally, it is rules on time limitations, burden of proof, immunities and corporate liability that constitute an obstacle to the claim’s success. For example, in *Kik*, the German Court held that rules on limitations periods could hardly be characterized as offending the public policy of the forum<sup>306</sup>, even though the statute of limitations provided for in the Pakistani legal system was extremely short, barring access to remedy. Despite the fact that limitation periods, as such, do not seem to interfere with the forum’s most important and unsurpassable values, their application could, in practise, be leading to results which are incompatible with the *ordre public*, namely if they impede access to justice and compensation.

A decision on the application of the public policy exception to a BHR claim is pending before the UK Courts, in the *Maran* case. If the decision is favourable for the defendants, considering that limitation periods from the Bangladeshi legal system hurt the forum’s most essential legal values, in the sense that they cause undue hardship for accessing remedy, an important precedent could be set.

Rules of safety and conduct of the law of the country in which the event giving rise to the damage occurred, under Art. 17, should be taken into account from a factual point of view, and may influence the outcome of a case, insofar as they support the concretization of relevant elements, and, particularly, the tortfeasor’s fault and good or bad faith. Taking account of these rules does not, however, mean applying them: “the court will apply only the law that is applicable under the conflicts rule, but it must take account of another law as a point of fact.”<sup>307</sup> Hence, in case the *lex causae*, under Art. 4(1) does not hold the corporate actor liable for the harms it caused,

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<sup>305</sup> DICKINSON, A., *The Rome II Regulation...*, p. 627.

<sup>306</sup> VON HEIN, J., *Back to the Future – (Re-)Introducing the Principle of Ubiquity...*

<sup>307</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations...*

contributed to, or is directly linked to, these rules will not be taken into consideration and serve as a standard to measure damages and compensation.

Finally, the Regulation does not “restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation”<sup>308</sup>, as stated under Art. 16. Although the actual impact of this rule on access to remedy remains unseen in practise, the adoption of a uniform EU mHRDD framework, whose norms on civil liability are to be considered overriding mandatory provisions, is promising, ensuring that businesses are held responsible for human rights atrocities they took a part in.

These interfering rules, which introduce some adaptability in RRII’s rigid and uniform regime, “will frequently not sufficiently cover the risks inherent in cross-border litigation.”<sup>309</sup> This is why supporters of the ubiquity approach advocate for the introduction of a special conflict-of-laws rule for BHR torts in the RRII, allowing claimants to choose, between different connecting factors, the one that points towards the law with the highest human rights standards.

For instance, in accordance with the EP’s first Report with recommendations to the Commission on corporate due diligence and corporate accountability, a new Art. 6(a) would be introduced in the RRII, covering business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a MS of the Union or operating in the Union who is subject to the HRDD obligations to be set in the upcoming EU Directive on Corporate Sustainability Due Diligence. This norm would allow claimants to base their claim, as explored above, on the *lex loci damni*, the *lex loci delicti commissi*, the *lex domicili* of the corporation or the law of the country where it operates, when it does not have its domicile in a MS. The norm was not, however, adopted by the European Commission in the latest version of the Draft Directive on Corporate Sustainability Due Diligence. Another ubiquity approach to BHR tort litigation is presented in Art. 11 of the Draft BHR Treaty, allowing the

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<sup>308</sup> Art. 16, Rome II Regulation.

<sup>309</sup> VON HEIN, J., Back to the Future – (Re-)Introducing the Principle of Ubiquity...

The applicable law to business related human rights torts under the Rome II Regulation

claimants to choose between the application of the *lex loci damni* and the *lex loci delicti commissi*.

A special conflicts rule, to be introduced in the RRII, such as those proposed by the EP or the OEIWG, would not only respect the victims' right to justice and remedy, but also establish a legislative policy that contributes to raising the general level of human rights protection, especially since the tortfeasor, "unlike other torts or delicts, generally derives an economic benefit from his harmful activity."<sup>310</sup>

This rule would respect party autonomy, and, by redressing the imbalance of powers between the parties to the tort claim, facilitate settlements and a choice of law, under Art. 14 RRII. Indeed, if the corporation can not rely on the application of the host State law, it will be more prone to try to reach a compromise solution and come to an agreement with the claimants on the applicable law to the dispute.

The adoption of a ubiquity approach would be "conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection"<sup>311</sup> in other countries, thus removing the incentive for the establishment in low-protection States.

Besides, the amendment of RRII in this sense would be in line with the Community's well established objectives in terms of corporate responsibility to respect human rights, set under the upcoming Directive on Corporate Sustainability Due Diligence. Over and above, the revision of the RRII in order to include "a choice of law provision specific to business-related human rights claims against EU companies that would allow the claimant a choice between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled, as the applicable law"<sup>312</sup> is recommended in the Study for the European Parliament on Access to Remedy for Victims of Corporate Human Rights Abuses, from 2019, for the above-stated reasons.

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<sup>310</sup> VAN CALSTER, G., *European Private International Law...*, p. 264.

<sup>311</sup> DICKINSON, A., *The Rome II Regulation...*, p. 438.

<sup>312</sup> MARX, A. [et. al], *STUDY: Access to legal remedies ...*, p. 114.

Establishing a special conflict-of-laws rule for this particular category of torts “has the precise aim of granting human rights protection to victims of multinational businesses who would otherwise be left uncompensated.”<sup>313</sup> In this sense, PIL rules would “act as a conductor of human rights or as a tool for enhancing human rights”<sup>314</sup>, and would not stand as a legal obstacle for victims.

By contrast, the ubiquity approach has been criticized for leading to an impairment of foreseeability and legal certainty, as the “question of the applicable law remains unanswered until the plaintiffs have made their choice.”<sup>315</sup> This is particularly problematic in a field such as this, where there is a great disparity between legal systems, and, therefore, the introduction of this provision could result in an increase of compliance costs for businesses, “because they would have to adjust their behaviour to four (potentially) different laws to avoid liability.”<sup>316</sup> In contraposition, we can argue that, even in case a ubiquity approach is not adopted, foreseeability of the applicable law is not necessarily guaranteed, as the Court still has to carefully consider the application of *lois de police*, rules of safety and conduct and of the public policy exception. Therefore, corporations can not expect to be automatically exempt from any liability for human rights harms taking place in their GVCs, solely because the applicable law is that of the host State.

Practical problems may also be posed regarding legal representation, in case claimants are able to choose between different laws under which to bring their claim, as an expertise which covers the familiarity with various legal systems is required. Aside from the difficulties in finding a lawyer or a team of lawyers with such expertise, which we acknowledge, we should also bear in mind there is a great financial risk for representing victims in such “complex, hard fought and protracted MNC litigation”<sup>317</sup> and legal aid is not always available, especially when we are not dealing with very high value and high-profile cases. This is, however, the case even without a special

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<sup>313</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice...*, p. 55.

<sup>314</sup> VAN DEN EECKHOUT, V., *Corporate Human Rights Violations and Private International Law...*, p. 19.

<sup>315</sup> VON HEIN, J., *Back to the Future – (Re-)Introducing the Principle of Ubiquity...*

<sup>316</sup> RUEHL, G., *Human rights in global supply chains: Do we need to amend the Rome II-Regulation...*

<sup>317</sup> MEERAN, R., *Multinational Human Rights Litigation in the UK...*, p. 2.

conflicts-rule for BHR torts, as lawyers will have to build their case around exceptions such as public policy and overriding mandatory provisions, demanding an analysis of the legal framework of different States.

Many scholars also argue that access to remedy objectives can be achieved without amending existing EU legislation of PIL, by means of having its interfering provisions act with the objective of deterring businesses from acting in breach of their HRDD obligations. Nonetheless, the reliance on these flexibility clauses is frail, as their appreciation, *in casu*, is left at the Court's discretion, and there is no case law from EU Courts on these issues, according to which claimants can set their expectations.

Another problem which is pointed out by critics of the ubiquity approach is the difficult delineation between human rights violations and environmental damages.<sup>318</sup> Indeed, in case a special conflict-of-laws rule was to be adopted for BHR torts, introducing new connecting factors, the need would surge for more developed criteria to draw the line between these different types of legal action. This qualification problem could further delay proceedings and complexify them. A solution which may be considered is having human rights violations understood expansively, and adjustments could be made to Art. 7, in order for it to comprise both non-environmentally related human-rights torts and, comprehensively, all environmental torts. This would avoid, at the outset, intricate qualification challenges.

All in all, we believe that regulatory reform, which “recognizes the inherent value of the principle of *favor laesi* in the pursuit of justice”<sup>319</sup>, is needed in order to shorten and simplify proceedings and ensure effective access to remedy and substantive justice.

If a special conflicts rule for business-related human rights torts was to be adopted, in an amendment to the RRII, we consider that a ubiquity approach would be the best suited for this sort of litigation. In particular, claimants should be provided with the choice between having the host State law and the home State law apply to

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<sup>318</sup> VON HEIN, J., Back to the Future – (Re-)Introducing the Principle of Ubiquity...

<sup>319</sup> EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice...*, p. 56.

the tort. Account should also be taken of the specific connecting factors proposed, as an alternative to the *lex loci damni*, in the EP Report and in the Draft BHR Treaty for a conflicts rule covering business-related human rights torts, which are: the *lex loci delicti commissi*, the *lex domicili* and the law of the place of operation.

As analysed beforehand, the *lex loci delicti commissi* connecting factor points towards the law of the place where the harmful conduct or omission of the tortfeasor took place. For BHR torts this will generally be the law of the place where the corporation acted or should have acted in exercise of its due diligence obligations. It generally coincides with the company's place of central administration, where the ultimate and most relevant decisions are taken by the shareholders, and from where the head corporation controls and manages the activities, projects and strategies of its subsidiaries and suppliers. Whilst generally pointing towards the law of the home State, this connecting factor might be challenging to precise, especially considering that corporate information, which allows for the establishment of this connection, is difficult for victims to access, and since the event giving rise to the damage will not always be distinct from other events which contributed towards its concretization.

The law of the company's domicile, on the other hand, which, under RRII, corresponds to its place of central administration, is usually easier to prove, pointing, indisputably, towards the law of the home State, in case the claim is brought against the parent or lead company.

Finally, the law of the place of operations, pointing towards the State where business operations are pursued by the company also generally alludes to the home State law or the law of another developed State, where human rights protection against corporate atrocities is ensured. This might, however, be difficult to establish in practise, as we are dealing with a highly mobile connecting factor, which may be changed very rapidly in the face of legal prosecution.

Having this in mind, a choice between the *lex loci damni*, and either the *lex loci delicti commissi* or the *lex domicili*, although preferably the latter, would be adequate to ensure access to remedy. This ubiquity approach would ensure that victims are able to choose the law of the home State, where the TNC is domiciled or controls the

operations of its subsidiaries or suppliers, and which usually has higher levels of established human rights protection and greater enforcement mechanisms, as the applicable law to the tort. In line with the Regulation's regime, we believe that *dépeçage* should not be possible in this stance, as the choice of the claimants displaces the law otherwise applicable to the tort in accordance with RRII's general rule. Furthermore, analogously to the regime established in Recital 25, the moment where this choice should take place and its form shall be regulated by the law of the MS in which the court is seized, that is, the *lex fori*.

The option conferred to the victims under these terms would contribute to raising the general level of human rights protection, by having MNCs adjust their behaviour throughout the value chain to the law with the higher human rights standards. It would also ensure that accountability for harms inflicted upon the human rights of subsidiary or supplier workers or surrounding communities occurs, putting an end to the ubiquitous injustice that is the lack of legal consequence for corporate activity that disrespects human rights and the environment. The possibility conferred to claimants to choose the applicable law to the dispute would shorten and simplify legal proceedings, as well as foster legal certainty, by avoiding the need to recur to exceptions such as public policy and overriding mandatory provisions, which are dependent upon a case-by-case analysis to be carried out by the competent court, and which hampers and delays proceedings.

We conclude that amendments to the RRII are in need, in order to ensure access to remedy for victims of corporate-related human rights abuses taking place overseas, when bringing a claim against an EU-based parent or lead company.

Reaffirming all which was above stated, the current regime is insufficiently protective of the victims' right to access remedy, in the sense that it points towards the application of host State law, where the damage occurred, and where the legal framework is generally less solid and stern as to what concerns human rights protection against corporate abuses. As ascertained beforehand, host States are usually highly dependant upon foreign MNC investment, they are less economically developed and their legal foundations are less solid, which hinders access to remedy for victims. These are States more prone to problems such as corruption, dangerous

liaisons, and reaching and enforcing a decision which is favourable for the victims is also more difficult. Therefore, whilst, for the larger part of non-contractual obligations, the *lex loci damni* connecting factor is relatively easy to determinate and does not pose substantial problems, serving the purposes of preciseness, facility and certainty, for BHR torts it is ultimately unjust, perpetuating the already existing imbalance of powers between the parties to the tort and impunity for business-related human rights violations.

On the grounds that a choice of law is, for the reasons explored, difficult to reach between the parties to this specific type of tort, and that the interfering provisions, such as public policy exception, overriding mandatory provisions and rules of safety and conduct are unreliable, in the sense that case-law has consistently denied their application in practise, access to remedy can not be ensured for victims of corporate abuse under the RRII.

For that reason, we see the introduction of a special conflict-of-laws rule for BHR torts, such as that established for environmental damages under Art. 7 of the Regulation, as a positive step towards ensuring accountability and redress for corporate human rights abuse. This alteration would be in line with the EU's wider objectives in terms of corporate sustainability due diligence, contributing towards the "increase in corporate accountability for adverse impacts" and improving "access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour."<sup>320</sup>

Although Proposed Art. 6(a), which would alter the RRII, was withdrawn from the negotiations in the context of the upcoming Corporate Sustainability Due Diligence Directive, we hope that this issue can be revisited by the European legislator in the near future. Indeed, imposing mHRDD obligations on corporate actors and holding them liable for human rights harms taking place in their value chains is of the uppermost importance, and the regime to be set under the upcoming Directive is ground-breaking. Nonetheless, it may not have the practical impact we hope for, especially in the civil liability field, if it is not accompanied by alterations in the PIL

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<sup>320</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations...*

The applicable law to business related human rights torts under the Rome II Regulation

regime, which guarantee that the law of an EU MS can be applicable to the transnational tort, in order to ensure liability and remedy.



## Bibliography:

ALFREDSSON, GUDMUNDUR/ EIDE, ASBJORN, *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Kluwer Law International, 1999.

ÁLVAREZ RUBIO, JUAN JOSÉ / YIANNIBAS, KATERINA, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, New York, Routledge, 2017.

AMNESTY INTERNATIONAL / BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, London, Amnesty International, 2017.

AMNESTY INTERNATIONAL, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, London, Amnesty International, 2014.

ANTUNES VARELA, JOÃO, *Das Obrigações em Geral*, vol. I, 10ª ed., Coimbra, Almedina, 2000.

AUGENSTEIN, DANIEL, “Torture as tort? Transnational tort litigation for corporate-related human rights violations and the human right to remedy”, in *Human Rights Law Review*, vol. 18, n. ° 3, 2018, p. 593-612.

AUGENSTEIN, DANIEL, *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union*, Study for the European Commission ENTR/09/045, 2010, available at: [https://www.academia.edu/1366068/Study\\_of\\_the\\_Legal\\_Framework\\_on\\_Human\\_Rights\\_and\\_the\\_Environment\\_applicable\\_to\\_European\\_Enterprises\\_operating\\_o\\_outside\\_the\\_European\\_Union\\_Study\\_for\\_the\\_European\\_Commission\\_ENTR\\_09\\_045\\_2010](https://www.academia.edu/1366068/Study_of_the_Legal_Framework_on_Human_Rights_and_the_Environment_applicable_to_European_Enterprises_operating_o_outside_the_European_Union_Study_for_the_European_Commission_ENTR_09_045_2010) (10.05.2022).

AUGENSTEIN, DANIEL. “Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union”, in *Global Policy*, vol. 9, n.º 2, 2018, p. 254-263.

AVERY, CHRIS, “Business and Human Rights in a Time of Change”, in *Liability of Multinational Corporations under International Law*, The Hague: Kluwer International, 2000, p. 17-73.

AZEEM, MUHAMMAD, “The KiK Case: A Critical Perspective from the South”, in *Transnational Legal Activism in Global Value Chains*, Cham, Springer, 2021, p. 279-298.

BALLARINO, TITO, *Diritto Internazionale Privato*, 3<sup>a</sup> ed., Padova, Cedam, 1999.

BAPTISTA MACHADO, JOÃO, *Lições de Direito Internacional Privado*, 3<sup>a</sup> ed., Coimbra, Almedina, 2011.

BATIFFOL, HENRI, *Aspets philosophiques du droit international privé*, Paris, Éditions Dalloz, 2002.

BATIFFOL, HENRI/ LAGARDE, PAUL, *Traité de Droit International Privé*, Tome I, Paris, Librairie Générale de Droit et de Jurisprudence, 1993.

BERNARD, AUDIT, *Droit International Privé*, 4<sup>ème</sup> ed., Paris, Economica, 2006.

BERNARD, VINCENT, “Editorial: Globalisation will only mean progress if it is responsible”. *International Review of the Red Cross*, Vol. 94 n.º 887, 2012, p. 881-890.

BOUCOBZA, XAVIER / SERINET, YVES-MARIE, “La régulation des groupes internationaux de sociétés : universalité de la compliance versus contrôles nationaux”, in *Journal du Droit International*, n.º 1, 2019, p. 3-26.

BRIGHT CLAIRE, “The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands”, in *Business and Human Rights in Europe: International Law Challenges*, 2018, p. 212-222.

BRIGHT, CLAIRE / MARULLO, MARIA CHIARA / ZAMORA CABOT, FRANCISCO, “Private international law aspects of the Second Revised Draft on the legally binding instrument on business and human rights”, in *Nederlands Internationaal Privaatrecht*, vol. 39, n.º 1, 2021, p. 35-52.

BRIGHT, CLAIRE / SEQUEIRA, BENEDITA, “Mandatory Human Rights Due Diligence: An Overview of the Legislative Developments at the European Level (Practical Brief)”, in *Nova Center for Business, Human Rights and the Environment*, 2021, available at: <https://novabhre.novalaw.unl.pt/wp-content/uploads/2022/05/Practical-Brief-on-Mandatory-Human-Rights-Due-Diligence.pdf> (28.05.2022).

BRIGHT, CLAIRE / SMITH, LISE, “The new European Directive on Corporate Sustainability Due Diligence”, in *Nova Center on Business, Human Rights and the*

*Environment blog*, 2022, available at: <https://novabhre.novalaw.unl.pt/new-european-directive-corporate-sustainability-due-diligence/> (14.06.2022).

BRIGHT, CLAIRE / WRAY, BENEDICT, “Corporations and Social Environmental Justice: the Role of Private International Law”, in *Towards Social Environmental Justice? (EUI Working Paper)* 2012, p. 75-94.

BRIGHT, CLAIRE [et. al], “Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?”, in *Business and Politics*, vol. 22, special issue 4, 2020, p. 667-697.

BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW / CIVIC CONSULTING, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, European Union, 2021, available at: <https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1> (15.05.2022).

BRITO, MARIA HELENA, “Breves notas sobre o Regulamento relativo à lei aplicável às obrigações contratuais (“Roma I”)”, in *E-learning CEJ*, Texto correspondente à comunicação apresentada no Colóquio dedicado ao tema “Direito europeu: Análise dos regulamentos europeus relativos a competência internacional, responsabilidade contratual e extracontratual e direito sucessório”, organizado pelo Centro de Estudos Judiciários, que decorreu em Lisboa, em 12 de Dezembro de 2014, 2014, disponível em: [https://elearning.cej.mj.pt/file.php/214/Documentacao\\_apoio\\_MHB/texto\\_comunicacao/texto\\_Maria\\_Helena\\_Brito.pdf](https://elearning.cej.mj.pt/file.php/214/Documentacao_apoio_MHB/texto_comunicacao/texto_Maria_Helena_Brito.pdf).

BRITO, MARIA HELENA, *A Representação nos Contratos Internacionais: um contributo para o estudo do princípio da coerência do direito internacional privado*, Coimbra, Almedina, 1999.

BRITO, MARIA HELENA, Comentário ao Artigo 33.º, in *Código Civil Anotado*, coord. Ana Prata, Vol. I., Coimbra, Almedina, 2017.

BRITO, MARIA HELENA, *Direito do Comércio Internacional*, Coimbra, Almedina, 2004.

BRITO, MARIA HELENA, *Direito do Comércio Internacional: Relatório sobre o programa, os conteúdos e os métodos de ensino da disciplina*, Lisboa, FDUNL, 2003.

BSR, “Access to Remedy Report”, in *BSR*, 2021, available at: <https://www.bsr.org/en/our-insights/report-view/access-to-remedy> (03.05.2022).

BUENO, NICOLAS / BRIGHT, CLAIRE, “Implementing Human Rights Due Diligence through Corporate Civil Liability”, in *International and Comparative Law Quarterly*, Vol. 69, issue 4, 2020, p. 789-818.

BURCK, KRISTOFFER, “The German KIK Case: from failed case towards national supply chain legislation”, in *PILPG*, 2020, available at: <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/12/7/the-german-kik-case-from-failed-case-towards-national-supply-chain-legislation> (15.05.2022).

BUSINESS ROUNDTABLE, *Business Roundtable Statement on the Purpose of a Corporation*, 2019, available at: <https://www.businessroundtable.org/> (17.06.2022).

CALVO CARAVACA, ALFONSO-LUIS/ CARRASCOSA GONZÁLEZ, JAVIER, *Las obligaciones extracontractuales en Derecho internacional privado: El Reglamento “Roma II”*, Granada, Editorial Comares, 2008.

CARVALHO, ORLANDO, *Direito das Empresas*, Coimbra, Coimbra Editora, 2012.

CASSEL, DOUG, “Vedanta v. Lungowe Symposium: Beyond Vedanta—Reconciling Tort Law with International Human Rights Norms”, in *Opinio Juris*, 2019, available at: <http://opiniojuris.org/2019/04/19/vedanta-v-lungowe-symposium-beyond-vedanta-reconciling-tort-law-with-international-human-rights-norms%E2%BB%BF/> (15.05.2022).

CASSEL, DOUGLAS, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence”, in *Business and Human Rights Journal*, vol. 12, 2016, p. 179-202.

CASSESE, ANTONIO, *International Law*, 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005.

CHAMBERS, RACHEL, “Corporate Law as a Barrier to Human Rights Claims and the Promise of MHRDD Laws”, in *Nova Center on Business and Human Rights blog*, 2021, available at: <https://novabhre.novalaw.unl.pt/corporate-law-human-rights-claims-mhredd/> (15.11.2021).

CHAMBERS, RACHEL, “Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court”, in *University of Pennsylvania Journal of International Law*, forthcoming, 2020.

COLLIER, JOHN G., *Conflict of Laws*, 3rd ed., Cambridge, Cambridge University Press, 2001.

COLLINS, LAWRENCE, *The Conflict of Laws*, 14th ed., vol. II, London, Sweet & Maxwell, 2006.

COUNCIL OF EUROPE, *Human Rights and Business: Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states*, Strasbourg: Council of Europe, 2016.

COUTINHO DE ABREU, JORGE MANUEL, *Curso de Direito Comercial*, vol. II, 7<sup>a</sup> ed., Coimbra, Almedina, 2021.

CRAIG, PAUL / BÚRCA, GRÁINNE, *EU Law: Text, Cases and Materials*, 6<sup>th</sup> ed., Oxford: Oxford University Press, 2015.

DE SCHUTTER, OLIVIER, “Mandatory Human Rights Due Diligence in the EU: The Promise and the Risk”, in *Business & Human Rights Resource Centre Blog*, 2020, available at: <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-eu-the-promise-and-the-risk/> (28.05.2022).

DE SCHUTTER, OLIVIER, “Towards a New Treaty on Business and Human Rights”, in *Business and Human Rights Journal*, vol. I, n.º 1, 2016, p. 41-67.

DELAUTRE, GUILLAUME / MANRIQUE, ECHEVERRIA / FENWICK, COLIN, *Decent work in a globalized economy: Lessons from public and private initiatives*, Geneva: International Labour Organization, 2021.

DIAS OLIVEIRA, ELSA, *Da Responsabilidade Civil Extracontratual por Violação de Direitos de Personalidade em Direito Internacional Privado*, Coimbra, Almedina, 2011.

DICKINSON, ANDREW, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, Oxford University Press, 2008.

DINAN, DESMOND, *Encyclopedia of the European Union*, Hampshire: Macmillan, 1998.

ECCHR, *Making Corporations Respond to the Damage They Cause: Strategic approaches to compensation and corporate accountability*, Berlin, Brot für die Welt, 2012.

ENGRÁCIA ANTUNES, JOSÉ, “Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law, an International and Comparative Perspective”, in *Studies in Transnational Economic Law*, vol. 10, Boston, Kluwer Law and Taxation Publishers, 1994, p. 497-542.

ENGRÁCIA ANTUNES, JOSÉ, “The Liability of Polycorporate Enterprises”, in *Conneticut Journal of International Law*, vol. 13, n.º 2, 1999, p. 197-231.

ENGRÁCIA ANTUNES, JOSÉ, *Os Grupos de Sociedades: estrutura e organização jurídica da empresa plurissocietária*, 2.ª ed., Coimbra, Almedina, 2002.

ESSEX BUSINESS AND HUMAN RIGHTS PROJECT, *Investor Obligations in Occupied Territories: A Report on the Norwegian Government Pension Fund – Global*, University of Essex, 2019, available at: <https://www.npaid.org/publications/investor-obligations-in-occupied-territories> (04.04.2022).

EUROPEAN COMMISSION, *Making Mandatory Human Rights and Environmental Due Diligence Work for All: Guidance on designing effective and inclusive accompanying support to due diligence legislation*, European Union, 2022, available at: [https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all\\_en](https://international-partnerships.ec.europa.eu/publications/making-mandatory-human-rights-and-environmental-due-diligence-work-all_en) (16.07.2022).

EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")*, Brussels, European Commission, 2003, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52003PC0427> (12.06.2022).

EUROPEAN COMMISSION, *Sustainable Corporate Governance*, European Commission, 2020, available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en) (13.06.2022).

EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice and Effective Remedies*, Report of the European Law Institute, Vienna: European Law Institute, 2022.

EUROPEAN PARLIAMENT, COMMITTEE ON LEGAL AFFAIRS, *Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)), EU, 2020, available at:

[https://www.europarl.europa.eu/doceo/document/A-9-2021-0018\\_EN.html#title2](https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html#title2) (28.05.2022).

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Business and Human Rights – Access to Remedy*, Luxembourg: European Union Agency for Fundamental Rights, 2020.

FAIRHURST, JOHN, *Law of the European Union*, 5<sup>th</sup> ed., Essex: Pearson Education Limited, 2006.

FALLON, MARK / KINSCH, PATRICK / KOHLER, CHRISTIAN, *Le Droit International Privé Européen en Construction*, Antwerp, Intersentia, 2011.

FAWCETT, JAMES / CARRUTHERS, JANEEN, *Private International Law*, 14<sup>th</sup> ed., Oxford, Oxford University Press, 2008.

FERNÁNDEZ ROZAS, JOSÉ CARLOS / SÁNCHEZ LORENZO, SIXTO, *Derecho Internacional Privado*, 9<sup>a</sup> ed., Navarra, Thomson Reuters, 2016.

FERRER CORREIA, ANTÓNIO, *Lições de Direito Internacional Privado*, Coimbra, Almedina 2000.

FERRER CORREIA, ANTÓNIO, *Temas de Direito Comercial e Direito Internacional Privado*, Coimbra, Almedina, 1989.

FOYER, JACQUES, “Lois de police et principe de souveraineté”, in *Mélanges en l'honneur du Professeur Bernard Audit*, Issy-les-Moulineaux, LGDJ, 2014, p. 339-358.

GOMES CANOTILHO, JOSÉ, *Estudos Sobre Direitos Fundamentais*, 2.<sup>a</sup> ed., Coimbra, Coimbra Editora, 2008.

GONÇALVES PEREIRA, ANDRÉ / QUADROS, FAUSTO, *Manual de Direito Internacional Público*, 3.<sup>a</sup> ed., Coimbra: Almedina, 1997.

GRAY, JACQUELINE, *Party Autonomy in EU Private International Law: Choice of Court and Choice of Law in Family Matters and Succession*, Brussels, Intersentia, 2021.

HARDWICKE-HUNTER, Madison, “Begum v Maran (UK) Ltd [2021] EWCA Civ 326: UK: Court of Appeal shipbreaking decision highlights potential liability risks arising from involvement with third parties’ harmful practices”, in *Linklaters*, 2021, available at: [https://www.linklaters.com/knowledge/-/media/digital-marketing-image-library/files/06\\_ckp/2021/june/gc22869\\_begum\\_v\\_maran\\_ewca\\_client\\_alert\\_2pp\\_fs-final\\_screen.ashx?rev=ce2d418a-fa8e-440e-becd-](https://www.linklaters.com/knowledge/-/media/digital-marketing-image-library/files/06_ckp/2021/june/gc22869_begum_v_maran_ewca_client_alert_2pp_fs-final_screen.ashx?rev=ce2d418a-fa8e-440e-becd-)

[06df774233f6&extension=pdf&hash=40454A4D64699A730538A22A50711AEE](https://www.business-humanrights.org/en/blog/recent-uk-court-of-appeal-judgment-may-lead-to-greater-accountability-of-companies-hiding-behind-complex-supply-chains/)

(15.05.2022).

HOLLAND, OLIVIER / BONNER, RACHEL, “Recent UK Court of Appeal judgment may lead to greater accountability of companies hiding behind complex supply chains”, in *Business & Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/blog/recent-uk-court-of-appeal-judgment-may-lead-to-greater-accountability-of-companies-hiding-behind-complex-supply-chains/> (15.05.2022).

HORNE, LOIS / ROBERTS, LAUREN, “Vedanta v Lungowe & Others: liability of a UK parent company”, in *MacFarlanes*, 2019, available at: <https://www.macfarlanes.com/what-we-think/in-depth/2019/vedanta-v-lungowe-others-liability-of-a-uk-parent-company/> (15.05.2022).

HUMAN RIGHTS WATCH, “Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties”, in *Human Rights Watch World Report*, 2020, available at: <https://www.hrw.org/world-report/2020/country-chapters/global-2#> (08.06.2022).

IZQUIERDO-SANS, CRISTINA/ MARTÍNEZ-CAPDEVILA, CARMEN/ NOGUEIRA-GUSTAVINO, MAGDALENA, *Fundamental Rights Challenges*, Cham, Springer, 2021.

JEDRZEJOWSKA-SCHIFFAUER, ISABELA, “Business Responsibility for Human Rights Impact under the UN Guiding Principles: at Odds with European Union Law?”, in *European Law Review*, vol. 46, n.º 4, 2021, p. 481-505.

JOHN, THOMAS/ DELAHAYE, LUKAS, “The use of Private International Law escape devices to manage the mediate application of (foreign) human rights in civil and commercial disputes in Australia”, in *A Commitment to Private International Law – Essays in honour of Hans van Loon*, Cambridge, Intersentia, 2013, p. 235-252.

JOSEPH, SARAH, “An Overview of the Human Rights Accountability of Multinational Enterprises”, in *Liability of Multinational Corporations under International Law*, The Hague: Kluwer International, 2000, p. 75-95.

LAGARDE, PAUL, “Public Policy”, in *International Encyclopaedia of Comparative Law*, vol. III(1), Chapter II-2, Tübingen, Mohr Siebeck, 1986.

LIMA PINHEIRO, LUÍS, *Direito Internacional Privado*, vol. II: Direito de Conflitos – Parte Especial, 4.<sup>a</sup> ed., Coimbra, Almedina, 2015.

LOPEZ, CARLOS, “Towards an International Convention on Business and Human Rights” (Part I), in *Opinio Juris Blog*, 2018, available at: <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/> (14.06.2022).

MAC CRORIE, BENEDITA, *A Vinculação dos Particulares aos Direitos Fundamentais*, Coimbra, Almedina, 2005.

MACCHI, CHIARA / BRIGHT, CLAIRE, “Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation”, in *Forthcoming in M. Buscemi, N. Lazzerini and L. Magi (eds), Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, 2020.

MACCHI, CHIARA / VAN ZEBEN, JOSEPHINE, “Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell”, in *Review of European, Comparative & International Environmental Law*, vol. 30, n.º 3, 2021, p. 409-415.

MAGALHÃES COLAÇO, ISABEL, *Direito Internacional Privado: Sistema de Conflitos Português (Obrigações não voluntárias)*, Lisboa, AAFDL, 1971.

MARQUES DOS SANTOS, ANTÓNIO, *As Normas de Aplicação Imediata no Direito Internacional Privado: Esboço de uma Teoria Geral*, vol. I, Coimbra, Almedina, 1991.

MARX, AXEL [et. al], *STUDY: Access to legal remedies for victims of corporate human rights abuses in third countries*, European Union (EP/EXPO/B/DROI/FWC/2013-08/LOT4/07), 2019.

MCCLEAN, DAVID / MORRIS, J.H.C, *The Conflict of Laws*, 4<sup>th</sup> ed., London, Sweet & Maxwell Ltd, 1993.

MEERAN, RICHARD, “Multinational Human Rights Litigation in the UK: A Retrospective”, in *Business and Human Rights Journal*, vol. 6, n.º 2, 2021, p. 255-269.

MOTA, HELENA, “A lei pessoal das sociedades comerciais na jurisprudência da União Europeia”, in *A Transferência da Sede Societária no Espaço da União Europeia*, Coimbra, Almedina, 2016, p. 76-92.

MOTA, HELENA, “A ordem pública internacional e as (novas) relações familiares internacionais. Análise do Despacho n.º 87/2010, de 19 de Julho, do

Presidente do Instituto dos Registos e do Notariado”, in *Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster*, Coimbra, Almedina, 2012, p. 261-284.

MOURA RAMOS, RUI MANUEL, “L’ordre Public International en Droit Portugais”, in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra, Coimbra Editora, 2002, p. 245-262.

MOURA RAMOS, RUI, “Le droit international privé communautaire des obligations extracontractuelles”, in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional II*, Coimbra, Coimbra Editora, 2007, p. 79-98.

MOURA RAMOS, RUI, “Public Policy in the Framework of the Brussels Convention: Remarks on Two Recent Decisions by the European Court of Justice”, in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra, Coimbra Editora, 2002, p. 283-300.

MOURA RAMOS, RUI, *Estudos de Direito Internacional Privado da União Europeia*, Coimbra, Imprensa da Universidade de Coimbra, 2017.

NORTH, PETER / FAWCETT, JAMES, *Cheshire and North’s Private International Law*, 13<sup>th</sup> ed., London, Butterworths, 1999.

NORTON ROSE FULBRIGHT, “Court of Appeal considers “unusual extension” to duty of care principles”, in *Norton Rose Fulbright*, 2021, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/f248bef3/court-of-appeal-considers-unusual-extension-to-duty-of-care-principles> (15.05.2022).

NOVA BHRE, *Human Rights and Environmental Due Diligence Legal Brief*, IMVF: Our Food. Our Future Project, 2021, available at: <https://www.imvf.org/wp-content/uploads/2021/06/legal-brief-human-rights-and-environmental-due-diligence-ofof.pdf> (04.04.2022).

OKOLI, CHUKWUMA, “Corporate Due Diligence and Private International Law: A Note on the Hague Court of Appeal’s decision in *Shell*”, *Nova Centre on Business, Human Rights and the Environment Blog*, 2021, available at: <https://novabhre.novalaw.unl.pt/corporate-due-diligence-private-international-law-note-hague-court-decision-shell/> (15.05.2022).

OLIVIER, MICHÈLE, “*The relevance of “soft law” as a source of international human rights*”, in *The Comparative and International Law Journal of Southern Africa*, vol. 3, n.º 35, 2002, p. 289-307.

OXFORD PRO BONO PUBLICO, “Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: Comparative submission prepared for John Ruggie”, in *Oxford Pro Bono Publico*, 2008, available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf> (16.04.2022).

PALOMBO, DALIA, “Okpabi v Shell and Lungowe v Vedanta Dispel Three Myths”, in *Business and Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/latest-news/okpabi-v-shell-and-lungowe-v-vedanta-dispel-three-myths/> (15.05.2022).

PARANCE, BÉATRICE / GROULX, ELISE / CHATELIN, VICTOIRE, “Regards croisés sur le devoir de vigilance et le "duty of care"”, in *Journal du Droit International*, n. ° 1, 2018, p. 21-52.

PEREIRA DIAS, RUI, “Suing Corporations in a Global World”, in *Yearbook of Private International Law*, Vol. XIV (2012/2013), 2013, p. 493-517.

PERRONE-MOISÉS, CLÁUDIA, “A ordem pública no mundo globalizado: Direito Internacional Privado e Direitos Humanos”, in *Direito Internacional e Comparado: Trajetória e Perspetivas – Homenagem aos 70 anos do Professor Catedrático Rui Manuel Moura Ramos*, vol. I, São Paulo, Quartier Latin, 2021, p. 157-167.

QUIJANO, GABRIELA, “Justice for Corporate Atrocities”, in *Harvard International Law Journal*, vol. 57, 2016, p. 30-34.

RAMASASTRY, ANITA, “Corporate Social Responsibility versus Business and Human Rights: bridging the gap between responsibility and accountability”, in *Journal of Human Rights*, n. ° 14, 2015, p. 237-259.

ROMANO, ROBERTA, *Foundations of Corporate Law*, New York, Foundation Press, 1993.

ROORDA, LUCAS, “Commentary: The Hague Court of Appeals rules on Shell in Nigeria”, in *Business and Human Rights Resource Centre*, 2021, available at: <https://www.business-humanrights.org/en/latest-news/commentary-the-hague-court-of-appeals-rules-on-shell-in-nigeria/> (15.05.2022).

ROSAS, ALLAN, “The European union and International Human Rights Instruments”, in *The European Union and the International Legal Order*, Hague: TMC Asser Press, 2001.

RUEHL, GISELA, “Human rights in global supply chains: Do we need to amend the Rome II-Regulation?”, in *Conflict of Laws.net*, 2020, available at: <https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/> (14.06.2022).

RUGGIE, JOHN / REES, CAROLINE / DAVIS, RACHEL, “Ten Years after: from UN Guiding Principles to Multi-Fiduciary obligations”, in *Business & Human Rights Journal*, forthcoming, 2021.

SERRA, CATARINA, “Empresas e Human Rights Due Diligence – Algumas observações a propósito de desenvolvimentos recentes”, in *Direito das Sociedades em Revista*, n.º 27, 2022, p. 25-45.

SHAW, MALCOM N., *International Law*, Cambridge: Cambridge University Press, 2017.

SKINNER, GWYNNE / MCCORQUODALE, ROBERT / DE SCHUTTER, OLIVIER, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, ICAR, CORE, ECCJ, 2013.

SMITH, LISE [et. al], *Study on due diligence requirements through the supply chain : final report*, Luxemburg, European Union, 2020, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (14.06.2022).

SMITH, LISE [et.al], “Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies”, in *Business and Human Rights Journal*, vol. 5, n.º 2, 2020, p. 261-269.

SOUSA GONÇALVES, ANABELA, *Da Responsabilidade Extracontratual em Direito Internacional Privado: a mudança de paradigma*, Coimbra, Almedina, 2013.

STONE, PETER, *EU Private International Law*, Cheltenham, Elgar European Law, 2006.

SYMEONIDES, SYMEON, “Rome II and Tort Conflicts: A Missed Opportunity”, in *American Journal of Comparative Law*, vol. 56, 2008.

TEATHER, DAVID, “Nike lists abuses at Asian factories”, in *The Guardian*, 2005, available at: <https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money> (17.06.2022).

UN ECONOMIC AND SOCIAL COUNCIL, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 2017, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawQrJx3hlK8Odk6DUwG3Y> (30.10.2021).

UN GENERAL ASSEMBLY, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, General Assembly seventy-third session, 2018, available at: <https://undocs.org/pdf?symbol=en/A/73/163> (04.04.2022).

UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights (A/HRC/32/19)*, 2016, available at: <https://digitallibrary.un.org/record/841635> (30.05.2022).

UN HUMAN RIGHTS COUNCIL, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council Seventeenth session, 2011, available at: [https://www.ohchr.org/documents/issues/business/a-hrc-17-31\\_aev.pdf](https://www.ohchr.org/documents/issues/business/a-hrc-17-31_aev.pdf) (05.09.2021).

UN OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Corporate Responsibility to Respect Human Rights: an Interpretative Guide*, New York/Geneva, United Nations, 2012.

UN, *Global Compact*, 2006, available at: <https://www.unglobalcompact.org/> (17.06.2022).

VAN CALSTER, GEERT, “Applicable law and statutes of limitation in CSR /business and human rights cases. The High Court, at least prima facie, on shipbreaking in Bangladesh in Begum v Maran”, in *GAVC Law*, 2020, available at: <https://gavclaw.com/2020/07/13/applicable-law-and-statutes-of-limitation-in-csr-business-and-human-rights-cases-the-high-court-at-least-prima-facie-on-shipbreaking-in-bangladesh-in-begum-v-maran/> (15.05.2022).

VAN CALSTER, GEERT, “First analysis of the European Parliament’s draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence”, in *GAVC Law*, 2020, available at: <https://gavclaw.com/2020/10/02/first-analysis-of-the-european-parliaments-draft-proposal-to-amend-brussels-ia-and-rome-ii-with-a-view-to-corporate-human-rights-due-diligence/> (14.06.2022).

VAN CALSTER, GEERT, *European Private International Law*, 2<sup>nd</sup> ed., Oxford, Hart Publishing, 2016.

VAN DEN EECKHOUT, VEERLE, “Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?”, in *SSRN*, 2011, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1895690](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895690) (10.05.2022).

VAN DIJK, PIETER/ VAN HOOFF, FRIED/ VAN RIJN, ARJEN/ ZWAAK, LEO, *Theory and Practise of the European Convention on Human Rights*, Oxford, Intersentia, 2006.

VAREILLES-SOMMIÈRES, PASCAL, “Taux d’intérêts et controle concret de l’ordre public international”, in *Revue Critique de Droit International Privé*, n.° 4, Paris, Editions Dalloz, 2019.

VLAS, PAUL, “Public Policy in Private International Law and its Continuing Importance”, in *A Commitment to Private International Law: Essays in honour of Hans van Loon*, Cambridge, Intersentia, 2013, p. 621-631.

VON HEIN, JAN, “Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims”, in *Conflict of Laws.net*, 2020, available at: <https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/> (14.06.2022).

WESCHE, PHILIPP/ SAAGE-MAAB, MIRIAM, “Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK”, in *Human Rights Law Review*, n.° 16, 2016, p. 370-85.

WORLD BENCHMARKING ALLIANCE, “Corporate Human Rights Benchmark 2020”, in *World Benchmarking Alliance*, 2020, available at: <https://www.worldbenchmarkingalliance.org/publication/chrb/> (11.06.2022).

ZERK, JENNIFER, "Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights", in *OHCHR*, 2014, available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (17.04.2022).

### **Jurisprudence:**

CJEU, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, 1988, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0189> (15.05.2022).

CJEU, *Criminal Proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*, 1999, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-369/96&language=en> (15.05.2022).

CJEU, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA.*, 1976, available at: <https://curia.europa.eu/juris/liste.jsf?num=21/76> (15.05.2022).

CJEU, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 2000, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0381> (15.05.2022).

England and Wales Court of Appeal, *Chandler v Cape plc*, 2011, available at: <https://vlex.co.uk/vid/chandler-v-cape-plc-793931665> (15.05.2022).

England and Wales Court of Appeal, *Hamad Begum v. Maran*, 2021, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html> (15.05.2022).

Hague Court of Appeals, *A.F. Akpan v. Royal Dutch Shell, plc*, 2015, available at: <https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf> (15.05.2022).

Hague District Court, *Miliendefensie et al v Royal Dutch Shell*, 2021, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5332> (15.05.2022).

Landgericht, Dortmund, *Jabir and others v. KiK Textilien und Non-Food GmbH*, 2019, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=LG%20Dortmund&Datum=10.01.2019&Aktenzeichen=7%20O%2095/15> (15.05.2022).

UK Supreme Court, *Lungowe v. Vedanta Resources plc*, 2019, available at: <https://www.supremecourt.uk/cases/uksc-2017-0185.html> (15.05.2022).

## **Legislation:**

EU, *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, 2014, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> (14.03.2022).

EU, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (28.05.2022)

EU, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, 2007, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864> (02.05.2022).

EU, *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*, 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821> (14.03.2022).

EU, *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2012, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> (02.05.2022).

EU, *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*, 2010, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995> (14.03.2022).

France, *French Duty of Vigilance Law*, 2017, available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> (14.03.2022).

ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 2017, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/--emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/--emp_ent/---multi/documents/publication/wcms_094386.pdf) (08.06.2022).

Netherlands, *Child Labour Due Diligence Act*, 2017, available at: <https://zoek.officielebekendmakingen.nl/stb-2019-401.pdf> (14.03.2022).

OECD, *Guidelines for Multinational Enterprises*, OECD, 2011, available at: <http://mneguidelines.oecd.org/guidelines/> (08.06.2022).

OEIGWG CHAIRMANSHIP, *Third Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of Transnational Corporations and other Business Enterprises*, 2021, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (14.06.2022).

UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, available at: [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (15.06.2022).

United Kingdom, *Modern Slavery Act*, 2015, available at: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (14.03.2022).

HCCH, *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, 1971, available at: <https://assets.hcch.net/docs/abcf969d-bac2-4ad5-bf52-f1aabc0939ad.pdf> (11.08.2022).

HCCH, *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, 1973, available at: <https://assets.hcch.net/docs/e102a194-59b8-4d75-9c6f-d2bbfb81e4ff.pdf> (11.08.2022).

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