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Current developments in forum access:
Comments on jurisdiction and
forum non conveniens

European Perspectives
on Human Rights Litigation

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CURRENT DEVELOPMENTS IN FORUM ACCESS: COMMENTS ON JURISDICTION AND *FORUM NON CONVENIENS*.

EUROPEAN PERSPECTIVES ON HUMAN RIGHTS LITIGATION

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Abstract:

This article explores the approach recently adopted by supranational and national courts in Europe *vis-à-vis* the assessment of jurisdiction in human rights and public interest litigation.

In its first part, the article analyses whether, and to extent, the private international law doctrine of forum of necessity could, in the current state of the law, help guaranteeing the effectiveness of the “right to a court” vested by article 6 E.C.H.R. Reference will be made to the interpretations of this head of jurisdiction recently submitted by the highest civil courts of France and Switzerland, as well as by the European Court of Human Right in the seminal *Nait-Liman* case.

Remarking the fairly narrow understanding of said doctrine arisen in recent case-law, this article, in its second part, looks into alternative procedural strategies that plaintiffs in foreign-cubed cases may adopt in order to ground jurisdiction in Europe. The paper contends, in particular, that there are multiple ways in which these plaintiffs could profit from the hard-and-fast logic underlying the jurisdictional regime set in place by the Brussels I^{bis} Regulation. Nevertheless, while establishing jurisdiction might no longer be a big impediment, several other issues of procedural and substantive law might still derail a judgment on the merits.

Keywords:

Forum of necessity; forum non conveniens; human rights litigation; public interest litigation; Brussels I^{bis} Regulation.

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I. Introduction: Perspectives from the European Union

In the aftermath of the landmark *Filártiga*¹ and *Marcos*² cases, the Alien Tort Statute garnered worldwide attention for its potential of becoming “the main engine for transnational human rights litigation in the United States”³ and a model of “universal civil jurisdiction” that should have inspired other States to move in a similar direction. Since then, however, things have changed considerably on the other side of the Atlantic: the US Supreme Court has more recently adopted a restrictive attitude to the extraterritorial application of US regulatory laws which forestalled, in practice, ATS litigation before American courts while reducing in parallel specific and general jurisdiction over foreign-cubed⁴ cases and foreign-cubed class actions⁵.

In Europe, conversely, the legal framework for the exercise of jurisdiction and its potential limitations by judicial discretion has not changed much in recent times.

Admittedly, the first impression may be one of sheer immobility. Firstly, following the 2012 Recast of the Brussels I Regulation,⁶ all discussion about the establishment of a European *universal* jurisdictional framework has stalled. As a result, the EU still adopts a two-tiered approach to jurisdiction in civil and commercial matters, with the uniform jurisdictional regime of the Brussels I^{bis} Regulation applying to cases involving EU-domiciled defendants and the national jurisdictional rules of each Member State applying to cases involving non-EU domiciled defendants.⁷

Secondly, the seminal authority of *Owusu*⁸ has not been overruled.⁹ Consequently, when the uniform European rules are applicable, no discretion exists and they must be accepted. In fact, these rules of jurisdiction hold to a hard-and-fast logic based on the principles of legal certainty and predictability, refusing any flexibility from considerations of convenience, fairness and justice.

In spite of this apparently unvarying picture, some interesting developments have occurred in the practice of domestic courts, mainly influenced by human rights law. Human rights and public interest

¹ *Filártiga v Peña-Irala*, 630 F.2d 876, (2d Cir. 1980) (opening the first wave of modern human-rights litigation under the Alien Tort Statute); see BURKHARD HESS, THE PRIVATE-PUBLIC DIVIDE IN INTERNATIONAL DISPUTE RESOLUTION 49 (RdC 388 2018), para. 69.

² *In re Estate of Marcos Human Rights Litigation*, DC no. MDL 840, Order Granting Class Certification (D. Haw. 8 April 1991) (the first ATS class-action to be tried on the merits, where for the first time a former head of state was held liable under the ATS) see Natalie R. Davidson, *Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in Filártiga and Marcos*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 147 (2017).

³ Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013).

⁴ Cases where a foreign plaintiff sues a foreign defendant for acts committed outside the territory of the forum State.

⁵ With a series of subsequent judgments: *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) on the one hand, and *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), *Daimler AG v Bauman*, 134 S.Ct 746 (2014) and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. ___ (2017) on the other hand: see HESS, THE PRIVATE-PUBLIC DIVIDE, *supra* note 1, para 194.

⁶ Regulation (EU) No 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351)1.

⁷ Only a limited number of the heads of jurisdiction set out by the Brussels I^{bis} Regulation also apply vis-à-vis third country defendants (namely Arts. 18 (1), 21 (2), 24 and 25). On the other hand, according to Art. 6 (1), jurisdiction vis-à-vis third country defendants is regulated, *by that same instrument*, through a referral to the domestic rules of private international law of the 28 Member States: Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, EU:C:2006:81, para. 148.

⁸ Case C-281/02, *Owusu v. Jackson*, EU:C:2005:120, BURKHARD HESS, EUROPÄISCHES ZIVILPROZESSRECHT, § 5 para 7, (2nd ed., to be published in 2019).

⁹ Even if plaintiffs from common law jurisdictions persist in soliciting new referrals to the European Court of Justice: see: lastly, *Lungowe v. Vedanta Resources* [2016] EWHC (TCC) 975, para. 51 [hereinafter *Vedanta*].

cases have been relatively numerous in the last few years and present some distinctive features which are of indubitable interest for the jurisdictional test.

In the first place, the uniform rules set out by the Brussels regime and their hard-and-fast logic may be *entirely* bypassed in cases involving exclusively defendants domiciled outside the EU, as usually happens in the so-called foreign-cubed cases. In these instances, domestic flexible approaches based on judicial discretion may return via the backdoor of Art. 6 of the Brussels I^{bis} Regulation.¹⁰ Among these inherently discretionary grounds, a special place should be reserved for the fora of necessity which function similarly to the common law doctrine of forum non conveniens. **Part II** will analyse the recent practice of European courts with regard to the forum of necessity in the light of the recent Grand Chamber judgment of the European Court of Human Rights in the case *Nait-Liman*.¹¹

In the second place, cases involving human rights infringements which have occurred outside the jurisdiction may entail difficult problems with identifying the “proper” defendant(s). Issues of this kind have emerged, in particular, within the framework of the recent litigation when seeking to establish some sort of corporate social responsibility of a domestic company complicit in infringements committed in third-countries. **Part III** will describe three different procedural strategies devised by plaintiffs. These are all centred on the idea of suing an EU-domiciled defendant – alone or in conjunction with other co-defendants – with a view to capitalizing on, to the extent possible,¹² the hard-and-fast logic which underlies Art. 4 of the Brussels I^{bis} Regulation.

II. The Margin of Judicial Discretion in the Exercise of Jurisdiction of Necessity. The Impact of the “Right of Access to a Court” in Civil Proceedings under Art. 6 E.C.H.R.

The private international law doctrine of the forum of necessity, known to several European States,¹³ aims at averting a denial of justice by allowing the domestic courts of a bystander State to exceptionally hear a claim over which they would not normally have jurisdiction.

Heads of jurisdiction based on necessity and the common law forum non conveniens have an underlying similarity.¹⁴ A forum of necessity equally requires, in fact, the rules of jurisdiction to be to a certain extent *flexible and open-ended*. From a comparative perspective,¹⁵ this kind of jurisdiction is triggered by two cumulative conditions, usually broadly expressed, which allow States wide discretion in their application. On the one hand, there is a general “impossibility”, or objective difficulty,¹⁶ for the plaintiff to bring his case before a foreign forum. On the other hand, there is the existence of “some

¹⁰ See *supra* n 7.

¹¹ *Nait-Liman v. Switzerland* (GC), <http://hudoc.echr.coe.int/eng?i=001-181786>.

¹² In cases involving multiple defendants, domiciled both within and outside the EU, the court will necessarily have to proceed to a distributive application of European uniform rules of jurisdiction and of domestic jurisdictional rules.

¹³ Arnaud Nuyts, Study on Residual Jurisdiction. Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, 3 September 2007, para. 83, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (providing a comparative overview).

¹⁴ Even though the distinction between the two doctrines remains clear-cut on paper: the doctrine of the forum non conveniens operates within the framework of the solution of a *positive* conflict of jurisdictions, presupposing that the jurisdiction of the English courts has previously been established in accordance with one of the ordinary jurisdictional gateways: *Four Seasons v. Brownlie* [2017] UKSC 80, para. 31. Conversely, a forum of necessity is generally a remedy to a *negative* conflict of jurisdictions, allowing a court to exceptionally assume a jurisdiction which would not exist under ordinary rules. For the existence of a certain functional proximity between the two doctrines, see *infra* note 143.

¹⁵ Valentin Rétornaz & Bart Volders, *Le For de Nécessité: Tableau Comparatif et Evolutif*, 2 RCDIP 225, (2008).

¹⁶ *Id.*; Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction*, 4 RABELS ZEITSCHRIFT 783, 810 (2016) (both offering a comparative overview of the requirements of impossibility and unreasonableness).

sort of connection”, generally characterised as merely “sufficient”, between the claim and the forum State.¹⁷

Moreover, the case-by-case application of a provision with a forum of necessity postulates a delicate balancing of the interests of plaintiffs, defendants and States which echoes the second stage of the test required under the forum non conveniens doctrine.¹⁸ In fact, *assuming jurisdiction* in circumstances where there is an insufficient connection with the dispute could breach the defendants’ rights of fair procedure,¹⁹ and run counter the principles of procedural economy and good administration of justice which shall govern the judicial activity of States. Nonetheless, *the refusal to exercise jurisdiction* could equally breach the plaintiff’s right of access to a court which, since the seminal *Golder* judgment²⁰ of the European Court of Human Rights, forms an integral part of the right to a fair trial guaranteed by Art. 6 (1) European Convention of Human Rights (E.C.H.R.).

While several European States provide, at the domestic level, for a forum of necessity, deeming that this kind of jurisdiction is authorized, or even imposed, by Art. 6 (1) E.C.H.R.,²¹ this doctrine did not find its way into the Recast Brussels I Regulation.²² In civil and commercial matters,²³ the availability of a forum of necessity therefore exclusively depends on the domestic systems of private international law of the Member States. As such, these heads of jurisdiction will be naturally given fuller expression in relationships with third-countries.²⁴

By its very nature, a forum of necessity may represent, at the same time, a source of hurdles and hope for victims of human rights abuses committed by local actors outside the jurisdiction of European States. On the one hand, it enables this class of plaintiffs to sue a non-EU domiciled defendant before

¹⁷ Pursuant to the ILA Resolution on International Civil Litigation and the Interest of the Public (Sophia, 2012), the sheer “presence of the claimant” or “some activity of the defendant” may constitute a sufficient connection: Guideline n 2.3(3).

¹⁸ *Spiliada Maritime Corp v. Cansulex* [1986] UKHL 10, para. 6, (in ascertaining whether a particular forum is a forum conveniens, i.e. a clearly or distinctly the more appropriate forum, the court, will have to determine whether or not a case may be tried more suitably in the other forum “in the interests of all the parties and the ends of justice”).

¹⁹ ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW, JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 272 (Cambridge University Press 2009).

²⁰ *Golder v. United Kingdom*, <http://hudoc.echr.coe.int/eng/?i=001-57496>, para.36 (defining the right of access to a court as the right to “institute legal proceedings before courts in civil matters”)

²¹ Nuyts, Study on Residual Jurisdiction, *supra* note 13, para. 83.

²² The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, included a proper “forum of necessity” under its Art. 26. This provision allowed a European court to assume jurisdiction over disputes which had a sufficient connection to the forum, with a view to ensuring compliance with the right to a fair trial or the right to access to justice. The introduction of such a forum was the consequence of the proposed extension of the personal scope of application of the uniform rules set forth by the Brussels regime to non-EU domiciled defendants, and of the consequent suppression of domestic rules of jurisdiction of the Member States. Meant simply as a remedy to potential negative conflicts of jurisdictions which could have arisen therefrom, this forum of necessity lost its *raison d’être* once this project was abandoned in the final version of the Recast, and Art. 26 was deleted.

²³ However, a forum of necessity is set out in other instruments of EU civil procedure, notably Regulation (EC) No 4/2009 of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in 2009 O.J. (L 7) 1 (Art. 7 and Recital 16) and Regulation (EU) No 650/2012 of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in 2012 O.J. (L 201) 107 (Art. 11 and Recital 31).

²⁴ Lacking, until now, any clarifications coming from the European Court of Justice, it remains doubtful whether a forum of necessity-logic could operate in situations directly regulated by the Brussels system. Cautiously in favor, see Marta Requejo Isidro, *Business and Human Rights Abuses: Claiming Compensation under the Brussels I Recast*, 1 HUM. RTS. & INT’L LEGAL DISCOURSE 74 (2016).

a “sufficiently connected” European court, thus overcoming the recurrent problems relating to the ineffectiveness of local remedies in the country where these infringements occur. On the hand however, triggering the conditions of a forum of necessity, and particularly of the required “sufficient connection”, may be particularly challenging in a foreign-cubed case.

This section will take stock of the current practices of European courts with regard to the interpretation and application of a forum of necessity in human rights and public interest litigation. Particular reference will be made to two relatively recent judgements, delivered by the highest state courts of France and Switzerland, which are prime examples of judicial discretion exercised towards restrictive and formalistic interpretations of the triggering conditions of a forum of necessity (1). This preliminary analysis will pave the way for an assessment of European Court of Human Rights’ Grand Chamber judgment in *Nait-Liman*, dealing with the role – if any – that Art. 6 (1) E.C.H.R. may play in limiting the margin of discretion of domestic courts in the interpretation of domestic grounds of jurisdiction based on necessity (2).

1. The Forum of Necessity in the Case Law of Domestic Courts. Lessons from France and Switzerland

The cases *Comilog* and *Nait-Liman*, decided respectively by the French Court of Cassation and by the Swiss Federal Court, have little factual background in common, the former being a public interest case concerning mass redundancies and workers’ rights, the latter a civil claim relating to State-supported individual acts of torture.

What they do share is the manner in which these courts exercised their judicial discretion in interpreting the triggering conditions of the forum of necessity, i.e. the “impossibility of bringing proceedings abroad” (*Comilog*) and the “sufficient connection to the forum” (*Nait-Liman*). In both cases, these courts supported an extremely narrow understanding thereof based on a formalistic legal interpretation.

In legal reasoning, formalism is the application of an existing rule of law *by its terms* to a set of facts. It favours textual forms of analysis, and relies particularly upon the “plain meaning” of the words of the legal text, intertextual arguments and canons of construction²⁵. Formalism is generally contrasted with “realist” or “functional” approaches which seek to “fulfil the values that the law is intended to serve”.²⁶ In legal cases concerning a novel situation, or where the values of society are in flux, courts usually employ a combination of different methods of legal reasoning: first, the courts attempt to apply a deductive, formalistic approach to clarify the possible ambiguities in an existing rule. Then, as a second step, they usually resort to an inductive, realist approach, seeking to balance the relevant values and interests in line with the objectives pursued by the relevant provision.²⁷

In the cases under study, however, both courts seem to stop at the first stage of the legal reasoning and adopt an interpretation of the forum of necessity which, albeit respectful of the letter of the law, is liable in practice to hinder achieving the aim of those provisions, i.e. averting a denial of justice.

a) *The Comilog Judgment of the French Court of Cassation:*²⁸ *on the required “impossibility” of bringing proceedings abroad*

²⁵ Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy and Realism*, 48 VILL. L. REV. 305, 309 (2003).

²⁶ *Id.*, 316.

²⁷ *Id.*, 341.

²⁸ Cour de cassation [Cass.] [Supreme court for judicial matters] soc., 14 September, 2017, Rev. sociétés 2018, 467.

French procedural law does not have any statutory provision on the forum of necessity²⁹. The possibility of opening a forum in France with the aim of averting a denial of justice has been nonetheless acknowledged by continuous case law dating back to the 1950s³⁰. Such an exceptional gateway is available when it is impossible (either factually or legally)³¹ to bring proceedings before a foreign forum provided that the claim presents some sort of connection with France.³²

The application of this jurisprudential rule to a foreign-cubed public interest case has come under the scrutiny of the Court of Cassation within the framework of the *Comilog* litigation.³³ In 1991, the Gabonese mining company *Compagnie Minière de l'Ogooué-Comilog*, operating between Congo and Gabon, dismissed almost 900 Congolese workers without due notice or any compensation. By 1992, most of these workers had already brought proceedings against their former employer before the Congolese courts. However, these have yet to address the merits of the claim: their jurisdiction having been challenged by the defendant at all levels of court hierarchy, the case is currently pending before the Supreme Court of Congo. Seized in 1994 with a request for preliminary ruling on jurisdiction, this court has not, to date, ruled on the issue.

This manifestly unreasonable delay in the Congolese proceedings prompted the French Court of Appeal³⁴ in 2015 to resort to the aforementioned jurisprudential rule allowing for the exercise of jurisdiction for reasons of international public policy and to avoid a denial of justice. In its view, the mere fact of having to endure 25-year long proceedings without even having any concrete prospects of a ruling of the merits in the foreseeable future amounted to an objective denial of justice. As for the “sufficient connection with France”, the fact that the Gabonese employer was a subsidiary of a French company was deemed sufficient.

In a judgment delivered on 14 September 2017,³⁵ however, the Court of Cassation rejected this interpretation in full. In the view of that Court, the sheer fact that applicants were not in practice prevented from initiating their complaints before the Congolese courts proves that there was not an objective “impossibility” barring access to a foreign court of law.

Indisputably formalistic, this interpretation relies on the literal meaning of both “impossibility” as the state of being “unable to occur, exist, or be done”,³⁶ and “access” understood as “physical access”. In

²⁹ Nuyts, Study on Residual Jurisdiction, *supra* note 13, paras 83-6.

³⁰ LYCETTE CORBION, LE DENI DE JUSTICE EN DROIT INTERNATIONAL PRIVE § 216 (PU Aix-Marseille 2004) (providing an overview of the relevant case law).

³¹ Olivera Boskovic, *Déni de justice et compétence internationale du juge français*, in REV. SOCIÉTÉS 2018, 467.

³² *Id.* (the underlying idea being that the competence of French courts does not extend to the sanctioning of denials of justice committed worldwide).

³³ It is worth stressing that the jurisdiction of the French courts was initially grounded on Art. 2 (1) of the Brussels I Regulation, as interpreted by Cour de cassation [Cass.] [supreme court for judicial matters] soc., 28 January, 2015, Recueil Dalloz 2015, 328 (interpreting that provision as encompassing the case of an EU-domiciled defendant who allegedly has the status of co-employer).

³⁴ Overall, the *Comilog* litigation in France gave rise to two judgments of the Court of Cassation (Cour de cassation [Cass.] [supreme court for judicial matters] soc., 28 January, 2015, Recueil Dalloz 2015, 328 and soc., 14 September, 2017, Rev. sociétés 2018, 467) and to six judgments of the Court of Appeal: Cour d'Appel [CA] [regional court of appeal] Paris, Sept. 10, 2015, cases n. 11/05953, 11/05955, 11/05956, 11/05957, 11/05959 (all dismissing, as to the merits, the claim against the French companies, having found that their quality of “co-employers” as alleged by the plaintiffs was missing. Two of them accept, however, jurisdiction of necessity with respect to the claims brought by the claimants who could prove their former participation in the Congolese proceedings).

³⁵ Cour de cassation [Cass.] [supreme court for judicial matters] soc., 14 September, 2017, Rev. sociétés 2018, 467.

³⁶ Oxford Dictionary of English, “Impossible”.

this sense, “access” to Congolese courts had been granted since the moment proceedings in that forum came into existence. A mere delay in sentencing on the merits, even if manifestly unreasonable, is not sufficient to substantiate an “impossibility” under French private international law.

Harshly criticized in domestic academic debate, this interpretive solution seems at odds with earlier approaches to interpreting this requirement, keen to show a certain degree of flexibility in the understanding of the notion of impossibility.³⁷ To say that the simple fact of submitting a claim with a foreign judge precludes a potential denial of justice irrespective of the time required to process the application is, in the words of the first commentators, “utterly artificial and highly regrettable”,³⁸ insofar as the objective and rationale of a forum of necessity are entirely disregarded.³⁹

b) *The Nait-Liman Judgment of the Swiss Federal Court:*⁴⁰ on the required “sufficient connection” between the claim and the forum state

For the American audience, the facts of *Nait-Liman* may ring a bell given the striking similarities with those of the case *Filártiga*.⁴¹

In 1992, Mr Nait-Liman – a Tunisian national living at the time in Italy – was arrested by the Italian police and subsequently surrendered to the Tunisian authorities. He was taken back to Tunis where he was allegedly subjected to severe acts of torture by the Minister of the Interior. The applicant survived and fled to Switzerland where he was granted political asylum. Years later, having learned that his torturer was hospitalized on Swiss territory, Mr Nait-Liman solicited the intervention of the public prosecutor but criminal proceedings were discontinued because the defendant had fled from the country. The applicant then introduced a civil action for damages against the Minister and Tunisia, grounding the civil jurisdiction of Swiss courts on Section 3 of the Swiss Law on Private International Law (LDIP).⁴²

Under this provision, entitled “forum of necessity”, Swiss courts “must assume jurisdiction”⁴³ if (a) proceedings abroad prove *impossible or cannot reasonably be required* to be brought and (b) the “case” (in French, “*la cause*”) presents a sufficient connection with Switzerland. The Swiss Federal Court

³⁷ Boskovic, *supra* note 31.

³⁸ *Id.*, (proposing that the distinction between reasonable and unreasonable delays borrows from case law of the Eur.Ct.H.R on the “reasonable delay” under Art. 6 (1) E.C.H.R.).

³⁹ It seems worth mentioning that, according to that same judgment, only participation by a French company in the capital of the Gabonese subsidiary (amounting to 63,71%) was not a sufficient connection justifying the exercise of jurisdiction of necessity. Given the brevity with which the Court of Cassation addresses the issue, omitting any further explanation as to the temporal dimension of that requirement, this part of the judgment does not seem to allow for any definite conclusions to be drawn. In particular, the Court of Cassation does not explain whether the fact that the participation of the French companies in the Gabonese subsidiary was acquired a considerable period after the disputed event has impacted on its interpretation of the requirement of the “sufficient connection”.

⁴⁰ Tribunal federal [TF] [Federal Supreme Court] May 22, 2007, 4C_379/2006.

⁴¹ *Filártiga v Peña-Irala*, see *supra* note 1 (opening the first wave of modern human-rights litigation under the Alien Tort Statute).

⁴² BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG], LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP], LEGGE FEDERALE SUL DIRITTO INTERNAZIONALE PRIVATO [LDIP] [LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, RS 291, art. 3 (Switz.). This provision reads as follows: “When this Law does not provide for jurisdiction in Switzerland and proceedings in a foreign country are impossible or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction.”

⁴³ Tribunal federal [TF] [Federal Supreme Court] May 22, 2007, 4C_379/2006, para. 3:4.

deemed that the case could be decided on the basis of the latter requirement alone,⁴⁴ and devised a solution centred on the literal and intertextual interpretation of the word “case”.

While stating that “in itself, the meaning of the [French] term ‘*cause*’ is uncertain”, a cross-reference to the Italian (*fattispecie*) and German (*Sachverhalt*) versions of the LDIP, equally authentic, allowed the submission that said term should be assigned the restricted meaning of “set of facts”. Against this backdrop, a “sufficient connection” under Section 3 LDIP is deemed to exist only where “*the set of facts and the legal argumentation, rather than the person of the applicant*” present a sufficient link to that country. All personal connections with Switzerland developed by Mr *Nait-Liman* after the disputed events – the acquisition of refugee status, a 14 year-long domicile in that country, and the acquisition of Swiss nationality – could therefore have no bearing on the interpretation of Section 3 LDIP “short of disregarding *the clear text* of [that provision]”.⁴⁵

In terms of formalism, this judgment follows the footsteps of *Comilog*. No attempt is made to corroborate the interpretive result reached in applying the literal and inter-textual methods by taking into account the objective pursued by that provision, i.e. “to prevent a formal denial of justice⁴⁶”. This was, in essence, the main criticism levelled against that decision in the domestic academic debate. An interpretation which limits the relevant connection to the “set of facts” underlying the case rather than extending it to the procedure as a whole “empties Section 3 LDIP of its very substance⁴⁷”. In fact, in cases where such sufficient connection between *the facts* of the case and Switzerland exists, the LDIP will already likely provide for one or even several ordinary grounds of jurisdiction vesting Swiss courts with the power/obligation to hear the case without need to appeal to a forum of necessity.⁴⁸

Account should also be taken of the particular status of the applicant. A refugee is, by definition⁴⁹, a person who has severed all connections with their country of nationality due to the “set of facts” which occurred or was likely to occur there, i.e. persecution or a well-founded fear of being persecuted. He is consequently “*unwilling to avail himself of the protection of th[at] country*” including the legal protection provided by its courts. An interpretation which disregards all subsequent personal connections developed by such a subject with the country of refuge lays itself open to the risk of creating, to the benefit of the alleged perpetrators of persecution, a sort of jurisdictional ‘safe haven’ in the State of origin where the persecution took place. This approach might come very close to “taking away jurisdiction to determine certain classes of civil actions” – which is precisely what the right of access to a court under Art. 6 (1) E.C.H.R. aims to prevent.⁵⁰

⁴⁴ Even though some uncertainty equally persisted also as regards the requirement of “impossibility to bring proceedings” (para 3.3 of the judgment). The possibility of bringing proceedings in Italy was summarily discussed before the Grand Chamber of the Eur.Ct.H.R but no definite information was garnered on that account. As it is, Italian courts would have indisputably had jurisdiction over an action, brought against the Italian authorities, relating to the violation of the prohibition of *refoulement*. More unclear is the issue as to whether they would have also accepted to hear a claim against Tunisia, relating to the torture sustained in Tunis. In fact, Italy does not have any statutory provision nor case law recognizing either a universal jurisdiction (but see *Nait-Liman* (GC) para. 71) or a forum of necessity: see also Nuyts, Study on Residual Jurisdiction, *supra* note 13, para. 86.

⁴⁵ Tribunal federal [TF] [Federal Supreme Court] May 22, 2007, 4C_379/2006, para. 3:5.

⁴⁶ *Id.* para. 3:4.

⁴⁷ BERNARD DUTOIT, DROIT INTERNATIONAL PRIVE EN SUISSE. COMMENTAIRE DE LA LOI FEDERALE DU 18 DECEMBRE 1987 15, 18 (Helbing Lichtenhahn eds., 5th ed. 2016),.

⁴⁸ *Id.* The same view is defended by Judge Serghides in his dissenting Opinion annexed to the Grand Chamber judgment *supra* note 11 (esp. paras 57 *et seq.*).

⁴⁹ Art. 1 (A)(2) of the Geneva Convention relating to the status of refugees, July 28, 1951, 189 U.N.T.S. 150.

⁵⁰ Golder, *supra* note 20, para. 35.

It is therefore not surprising that the *Nait-Liman* case was then brought before the Strasbourg Court where the applicant sought to determine whether, and to what extent, an excess of formalism in the interpretation of a domestic ground of jurisdiction in the judgment of the Swiss Federal Court was reviewable under Art. 6 E.C.H.R.

2. Reviewing Domestic Interpretations of Fora of Necessity under Art. 6 (1) E.C.H.R.

While only the case *Nait Liman*, and not *Comilog*, made its way up to the Eur.Ct.H.R (a), the Grand Chamber⁵¹ judgment provides important overarching clarifications on the scope of the discretion legitimately retained by States under Art. 6 (1) E.C.H.R. in interpreting the conditions of application of a forum of necessity and in applying that provision on a case-by-case basis (b).

a) *The Case Nait-Liman before the Grand Chamber of the Eur.Ct.H.R.*

The *Nait-Liman* saga before the Strasbourg Court began in 2007. It gave rise to a Chamber judgment⁵² – establishing by four votes to three that there had been no violation of Art. 6 (1) – and to the recent Grand Chamber judgment of March 2018.⁵³

With respect to the latter, it should be noted that there seems to be a certain disagreement between the Grand Chamber and the applicant about the scope of the question referred. According to the applicant, his case did not necessarily require the Court to rule on the refusal or the acceptance on the basis of Art. 6 E.C.H.R. of a *universal civil jurisdiction* over acts of torture. Instead, it concerned the more limited question as to whether that provision prevented a State Party which had legislated for a right of access to its courts by introducing a forum of necessity in its domestic law from interpreting that forum “in a manner which disregarded the ties that one of the parties to the dispute had with that State”.⁵⁴ From this perspective, this case is all about the legitimate boundaries of judicial discretion. According to the Grand Chamber, however, the applicant pleadings came very close to the acceptance of a universal civil jurisdiction over acts of torture.⁵⁵

The view expressed by the applicant seems more in line with the traditional distinction between universal civil jurisdiction and jurisdiction of necessity. While the former can be established without any nexus between the dispute and the forum, the latter requires conversely some sort of connection, albeit a tenuous one, with the forum state. In *Nait-Liman*, a certain connection with Switzerland indisputably exists, even though this is deemed insufficient by the Swiss Federal Court. This case seems therefore more closely related with jurisdiction of necessity than with universal civil jurisdiction.⁵⁶

In any event, the Grand Chamber readily acknowledged that the interpretation of Section 3 LDIP upheld by the Swiss Federal Court amounted to a restriction of the applicant’s right of access to a

⁵¹ *Nait-Liman* (GC), *supra* note 11; HESS, *THE PRIVATE-PUBLIC DIVIDE*, *supra* note 41, para. 223.

⁵² *Nait-Liman v. Switzerland* (Second Section), <http://hudoc.echr.coe.int/eng?i=001-164470>.

⁵³ Unsatisfied with the Chamber’s finding that the decision of the Swiss courts to decline jurisdiction to hear his civil action had not violated his right of access to a court, insofar as it pursued legitimate aims and had been proportionate to those aims, the applicant requested a referral to the Grand Chamber, which was accepted in November 2016. In that forum, the Redress Trust jointly with the World Organisation against Torture (OMCT), Amnesty International jointly with the International Commission of Jurists, and Citizens’ Watch were granted leave to intervene as third parties.

⁵⁴ *Nait-Liman* (GC), *supra* note 11, para. 134.

⁵⁵ *Id.*, para. 176.

⁵⁶ Accord. Cedric Ryngaert, *From Universal Civil Jurisdiction to Forum of Necessity: Reflections on the Judgment of the European Court of Human Rights in Nait-Liman*, 3 *RIV. DIR. INTERNAZ.* 804 (2017) (referring to the conceptualization of the forum of necessity adopted by the ILA Guidelines on Best Practices for International Civil Litigation for Human Rights Violations, *supra* note 17).

court guaranteed under Art. 6 E.C.H.R. As per a long-standing case law of the Strasbourg court, however, that right is not absolute in nature, there being “room for limitations permitted by implication”.⁵⁷ The Grand Chamber resorted therefore to its former case law determining the conditions under which States can legitimately limit the right granted under that provision.

A limitation shall, at the outset, pursue “a “legitimate aim”. From this standpoint, the restrictive interpretation by the Swiss Federal Tribunal is deemed justified by the traditional principles of the proper administration of justice⁵⁸, the effectiveness of domestic judicial decisions⁵⁹, and the avoidance of potential diplomatic difficulties among States. Secondly, said limitation must be proportional to the objective sought to be achieved. In this respect, *the scope* of the margin of appreciation effectively enjoyed by domestic authorities in interpreting domestic heads of jurisdiction depends, in the view of the Court, on the preliminary question as to whether an obligation to open a forum for certain class of claims is imposed upon states by *public international law*.

In the light of the substantive violation alleged in *Nait-Liman*, the focus was on claims relating to acts of torture. The relevance of the treaty law provisions relied upon by the applicant was easily dismissed.⁶⁰ In the light of the aforementioned disagreement regarding the scope of the question submitted to its review, the Grand Chamber reviewed the practice of States⁶¹ regarding *both* universal jurisdiction *and* jurisdiction of necessity in order to assess whether a customary obligation to open a forum for actions relating to acts of torture existed. On the basis of this assessment, it finally concluded that public international law does not impose, in its current state of development, any such obligation on the basis of either universal civil jurisdiction in respect of acts of torture or forum of necessity. This leaves States with an almost unlimited margin of appreciation in deciding both *if* they should provide for a forum of necessity and *how* they should make it available on a case-by-case basis.

Moreover, since the interpretation of domestic law lies solely with the domestic authorities, this margin of appreciation is reviewed by the Eur.Ct.H.R only within the strict limits of arbitrariness and manifest unreasonableness.⁶² Taking distance from the opinions raised within the Swiss academia,⁶³ the Grand Chamber deemed that the domestic case law on Section 3 LDIP was too limited and diverse to enable any decisive conclusion to be drawn, and that no arbitrary or manifestly unreasonable elements could consequently be detected in the Swiss Federal Court’s reasoning. It finally concluded that the refusal, by the Swiss authorities, to open a forum under Section 3 LDIP did not amount to a violation of Art. 6 (1). *As for now*, Switzerland is beyond reproach: by simply providing for a forum of necessity, it already does more than that incumbent upon States by public international law.

⁵⁷ *Golder*, *supra* note 20, para. 38.

⁵⁸ Specific reference was made to the need of averting potential difficulties in “gathering and assessing evidence” and of preserving the effectiveness of case management with the justice system. These objectives could have been jeopardised by broad interpretations of Section 3 LDIP, opening up to the submission of similar complaints by “other victims in the same situation with regard to Switzerland”.

⁵⁹ A specific emphasis was put, especially at the hearing before the Grand Chamber, on the potential difficulties that the plaintiff would have encountered in enforcing the resulting Swiss judgment in Tunisia.

⁶⁰ Namely, Art. 14 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S., 85 and Art. 16 of the 1951 U.N. Refugee Convention.

⁶¹ The existence of an international custom was assessed on the basis of a comprehensive comparative study, commissioned by the Eur.Ct.H.R., which covered 40 jurisdictions of both European and non-European States. This study looked into the existence of relevant practice with respect to both universal jurisdiction and forum of necessity.

⁶² *Anheuser-Busch. v. Portugal* (GC), <http://hudoc.echr.coe.int/eng?i=001-78981paras.85-86>.

⁶³ See *supra* note 47.

b) *Beyond Nait-Liman: prospective impact on future litigation*

The Grand Chamber's judgment in *Nait-Liman* has an important temporal dimension as clearly emerges from its last paragraphs⁶⁴. In fact, by recognizing the "dynamic nature of this area", the Eur.Ct.H.R. endeavours to stress that the interpretive solution it devised is only valid in the *status quo* and that it "does not rule out the possibility of developments in the future". Were more States to adopt, a national level, a consistent practice in recognizing a forum of necessity over human rights infringements, public international law would possibly see the emergence of an international custom bound to reduce the discretion granted to domestic authorities in interpreting their domestic provisions. In an *obiter*, the Court takes it upon itself to encourage the development of such a practice, inviting State Parties "to give effect to th[e victim's] right [to obtain effective redress] by endowing their courts with jurisdiction to examine such claims for compensation, including where they are based on facts which occurred outside their geographical frontiers". The Grand Chamber moreover "invite[d] the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation" and to assess "carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it".⁶⁵

However, for the plaintiff in *Nait-Liman*, these "prospective considerations" were not helpful at all.

The concerns expressed by the Strasbourg Court about potential difficulties in the future enforcement of the prospective judgment and potential deterioration of diplomatic intergovernmental relations may hold very little importance for victims of severe human rights violations. These are mainly concerned with the "cathartic" symbolic effect of adjudication. In cases involving infringements so severe as to be shocking to the collective conscience of society, a trial's – even a civil trial's – potential for catharsis is immense, acting as a sort of purgative ritual bridging the gaps and restoring social peace.⁶⁶ Even more than civil compensation, the victims may be seeking the clear establishment of responsibilities for the atrocities they suffered and a clear judgment as to the unacceptability of the perpetrators' behaviour under the nation's norms and fundamental cultural values⁶⁷.

When assessed against this backdrop, the self-restraint exercised by the Grand Chamber of the Strasbourg Court in maintaining a conservative interpretation of Art. 6 (1) E.C.H.R. closely resembles the approach adopted by the International Court of Justice in *Germany v Italy*⁶⁸. Therein, the I.C.J. examined Italy's argument that Italian courts were justified in denying Germany immunity as all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings

⁶⁴ *Nait-Liman* (GC), *supra* note 11, paras 218–220.

⁶⁵ Obviously, the Grand Chamber felt embarrassed by the adverse effects its judgment might entail for the protection of human rights.

⁶⁶ Simon Chesterman, *Never Again...and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 229 (1997).

⁶⁷ A positive recognition of the importance of this function of adjudication seems to underlie the 2014 judgment of the Italian Constitutional Court (Corte Cost. 22 Ottobre 2014, 238/2014, HESS, THE PRIVATE-PUBLIC DIVIDE, *supra* note 1 para 36) (invalidating two laws which denied to the victims of Nazi atrocities the right to bring a civil lawsuit, before Italian courts, against the Federal Republic of Germany. "In an institutional context characterized by the centrality of human rights", the objective of avoiding potential diplomatic difficulties among States could not justify the "completely disproportionate sacrifice of two supreme principles of the Constitution", namely the protection of human rights and human dignity under Art. 2 of the Constitution, and the right of access to justice for individuals in order to invoke their inviolable rights under Art. 24. One substantive, the other procedural, these rights are strictly intertwined in the view of the Constitutional Court, since "it would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection").

⁶⁸ *Germany v. Italy: Greece intervening*, Judgment, 3 February 2012.

had failed. In doing so, the I.C.J. reviewed the relevant domestic or international practice, concluding that, as it stands, the entitlement of a State to immunity is not dependent upon the existence of effective alternative means of securing redress. This parallel in the approach followed by two major international courts confirms that they are for now very careful to avoid engaging in any kind of law-making through innovative interpretations which would be at odds with their judicial, rather than political, role.

The combined analysis of the two approaches additionally confirms that in current international law the *jus cogens* nature of the alleged violation does not automatically override or expand the scope of procedural rules such as rules on jurisdiction.⁶⁹ Although the practice of international courts and tribunals shows that rules of *jus cogens* are usually taken into account when procedural rules allow for some discretion,⁷⁰ this deference does not emerge as a mandatory requirement for national courts. In *Nait-Liman*, the Swiss Federal Court attached no weight at all to the substantive nature of the alleged violation in interpreting the domestic forum of necessity – a typical discretionary ground of jurisdiction – and this approach was not censored by the Eur.Ct.H.R..

It seems therefore, that, in current law, the *jus cogens* nature of a substantive right can only indirectly affect the exercise of jurisdiction of necessity over civil law claims alleging its violation, and its reviewability under Art. 6 E.C.H.R. Realistically, a coherent and pan-European, if not global, state practice of assuming jurisdiction on the basis of necessity is more likely to emerge with the intention of vindicating the most severe violations of fundamental human rights. The emergence of said practice would give the Eur.Ct.H.R. more leeway to review the proportionality of a limitation of the scope of application of a domestic forum of necessity deriving from narrow and formalistic interpretations.

III. Grounding the jurisdiction of EU-based Courts: New Procedural Strategies

The cases described above show that, at present, victims of human rights violations occurring outside of Europe may find it extremely difficult to bring their case before a court located in Europe on the basis of sheer “necessity”. To increase their chances of success, these plaintiffs may resort to alternative strategies, relying on the application of ordinary grounds of jurisdiction of the Brussels Regulation (Arts. 4, 62 and 63). Being “mandatory”,⁷¹ these rules, if properly triggered, would oblige the seized court to assume jurisdiction over the case.

1. Identifying the Defendant: Three Constellations of Human Rights Litigation.

The identification of the defendant acquires particular importance under the Brussels I^{bis} Regulation,⁷² insofar as the determination of the applicable jurisdictional regime will depend on whether or not the defendant is domiciled within or outside the territory of the EU. In particular, once an EU-defendant is identified, grounding jurisdiction in the EU is relatively easy: the case is brought under the scope of the uniform regime and in particular Art. 4 (1) which compels the courts of the Member State where

⁶⁹ Stefan A. G. Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*, 4 BONN RES. PAPERS ON PUB. INT'L L. 1, 20 (2012) (commenting on the distinction between substantive law and procedure in the I.C.J.'s judgment); Burkhard Hess, *Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf*, IPRAX 201 (2012).

⁷⁰ Talmon, *id.*, 20.

⁷¹ Case C-281/02, *Owusu v. Jackson*, EU:C:2005:120, para. 37.

⁷² Human rights violation and public interest cases fall, more often than not, within the notion of “civil and commercial matters”, even though they might frequently require addressing the question of the possible involvement of the exercise of State authority (*acta iure imperii*). This would exclude the application of the Brussels I^{bis} Regulation: HESS, *THE PRIVATE-PUBLIC DIVIDE*, *supra* note 1, 49, paras. 54 *et seq.*

the defendant is domiciled to assume jurisdiction over the claim without any additional proof being required from the plaintiff.⁷³

This may explain why, in recent human rights and public interest litigation, plaintiffs in foreign-cubed cases seem willing to go the proverbial extra mile to identify an EU-domiciled defendant against whom to bring their suit. This may require looking at the “harmful event” through a new prism. It means going beyond the analysis of the legal relationship existing between the victims and the direct perpetrator of the abuse – both likely domiciled in an unappealing jurisdiction – in order to take account of the whole chain of causation. The final goal consists in identifying a substantial causal contribution of a subject domiciled within the EU,⁷⁴ against whom the applicable substantive law may provide a cause of action.

In this respect, the concept of corporate social responsibility plays a pivotal role. Internal rules of multinational companies on compliance with human rights’ standards are now sometimes framed in a way which allows accountability or even a direct liability to third parties to be established.⁷⁵

The recent case law of European courts demonstrates that victims of human rights violations have relied on Art. 4 (1) of the Brussels I^{bis} Regulation to bring their claims against three different categories of EU-domiciled defendants, *i.e.* (i) a parent company exercising some degree of control over the activities of a foreign subsidiary which is, allegedly, the direct perpetrator of the abuse; (ii) a contractual party – usually under an exclusivity agreement– of the alleged direct perpetrator of the abuse and finally (iii) a major international economic player chosen for its dominant position in a given market.

These situations give rise to considerably different challenges. The cases involving claims brought against the EU-domiciled parent company bring into view the sometimes-problematic coexistence between the hard-and-fast logic imposed under the Brussels regime and the more articulate (and possibly discretionary) jurisdictional tests set out under domestic rules of jurisdiction (below, 2). Conversely, the claims brought against the second and third categories of defendants identified above confirm that establishing jurisdiction is uncomplicated when the case falls entirely under the scope of art. 4 (1) of the Brussels I^{bis} Regulation. Plaintiffs may nonetheless encounter other hurdles before having their claim assessed as to the merits (below, 3).

2. Claims Brought Against the EU-domiciled Parent Company

Hardly a “new” procedural strategy in the strict sense, the approach of suing a domiciled parent company in a European forum relies on the idea that an “effective remedy”⁷⁶ should entail, in principle, access to effective domestic judicial mechanisms for victims of business-related human rights abuses in both home and host countries of multinational corporations.

This kind of litigation has recently been quite prolific in European courts. Following the popular *Milieudefensie* judgment delivered in late 2015 by the Court of Appeal of The Hague,⁷⁷ three new cases

⁷³ As opposed to other jurisdictional grounds set out by that instrument, e.g. Art. 7, whose triggering requires, in addition to proof of domicile of the defendant within the EU, the allegation of the existence of a “contract”, of a “tort” etc.

⁷⁴ And sufficiently deep-pocketed to face claims which may amount to several millions of euros.

⁷⁵ Gerhard Wagner, *Haftung für Menschenrechtsverletzungen*, 80 RabelZ 717 (2016); Marc-Philippe Weller, *Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland*, ARCHIV CIVILISTISCHE PRAXIS 387 (2016).

⁷⁶ “Access to remedy” constitutes the third pillar of the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council on 16 June 2011. See Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/128/88/PDF/G0912888.pdf?OpenElement>.

⁷⁷ Hof Den Haag 18 December 2015, NL:GHDHA:2015:3586 [hereinafter *Milieudefensie*]. .

were decided by the English Court of Appeal between the end of 2017 and 2018,⁷⁸ and a new case was brought before the Italian courts in 2017.⁷⁹

Like *Milieudefensie*, the cases *Vedanta*, *Okpabi*, and *Ikebiri* concern environmental damage in African countries affecting the life, health and economic subsistence of local communities. The damage originated, in all instances, from alleged negligent behaviour of a delocalized subsidiary controlled by an EU-based multinational corporation. *Unilver* concerns, instead, ethnic violence that occurred in a Kenyan plantation following the 2007 election. It was alleged that the violence was highly predictable and that the local subsidiary failed to take adequate measures to protect its workers from the risk.

All these cases try to engage a freestanding liability in tort of the EU-domiciled parent company on the basis of an alleged duty of care and supervision that the company should hold vis-à-vis the activities of its delocalised subsidiaries. Moreover, in all of them, the EU-domiciled parent company is used as an “anchor defendant” in order to bring the case in its entirety – i.e. including the claim against the foreign subsidiary – before the EU-based court. The reasons brought to justify the preference for the European forum, albeit being rather diverse⁸⁰ can be summarized in the existence of a comparative disadvantage that would affect the plaintiffs’ chances of success in a non-European forum. Nonetheless, the joining of the claims against both defendants may considerably complicate the jurisdictional test.⁸¹ It determines, in particular, the distributive application of different jurisdictional regimes, insofar as only jurisdiction against the parent company will be assumed, in a rather straightforward way, according to Art. 4 (1) of the Brussels I^{bis} Regulation. By contrast, the existence of jurisdiction over the non-EU domiciled subsidiary will need to be established by the application of the domestic heads of jurisdiction of the forum.

The relative abundance of cases coming from different jurisdictions is an opportunity to compare the approaches adopted by different Member States to assuming jurisdiction under the combined effect of these regimes. Common to most of these cases is the defendants’ allegation that the plaintiffs’ strategy of relying on the automatic logic underlying Art. 4 (1) constitutes an abuse of EU law, an argument which was met nonetheless with little success in both common and civil law courts **(a)**. As concerns the jurisdictional test set out under domestic private international law rules, this comparative overview will evidence that, in this specific kind of litigation, it is the “good and arguable case” prong of the test **(b)**, rather than limitations by judicial discretion **(c)** which presently constitutes the main obstacle to grounding jurisdiction in Europe.

a) *Mandatory Nature of Art. 4 (1) and Abuses of EU Procedural Law.*

The objection whereby the plaintiffs’ reliance on the hard-and-fast logic of Art. 4 (1) may have amounted to an “abuse of EU law” was raised before both the English and the Dutch courts in identical

⁷⁸ *Lungowe v Vedanta Resources* [2017] ECWA Civ 1528 (cert. granted on 23 March 2018) [hereinafter *Vedanta*]; *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191 [hereinafter *Okpabi*]; *AAA v Unilever Plc* [2018] EWCA Civ 1532 [hereinafter *Unilever*].

⁷⁹ *Comunità Ikebiri v. Eni S.p.A* (Trib. Milano filed May 2017) (the first case of this kind brought in the Italian jurisdiction).

⁸⁰ Limiting the overview to the most recent cases mentioned above, concerns were expressed with regard to: the independence of the local judiciary (*Ikebiri/Eni* case, see Associazione A Sud e CDCA (ed), *La Comunità Nigeriana e il Processo in Italia Contro ENI*, <http://asud.net/wp-content/uploads/2018/04/IKEBIRI-SPECIALE.pdf>); the inefficiency and state of corruption of the local judiciary, together with an alleged risk of being exposed to violence and other forms of retaliation in case of local lawsuit (*Unilever*, [2017] EWHC (QB) 371, para. 122); the concrete ability of the local system of legal aid to finance a mass litigation involving more than a thousand plaintiffs (*Vedanta*, [2016] EWHC (TCC) 975 para. 181. accord. *Unilever, supra*); the approach adopted by local courts in similar cases, evidencing that the claim would have had much better chances to progress in England than in Nigeria (*Okpabi*, [2017] EWHC (TCC) 89 para. 16).

⁸¹ Joining the claims against both nonetheless has other procedural advantages, insofar as it may prove particularly useful to establish a shared liability and to ensure a proper assessment to the evidence gathered.

terms. In the defendants' view, the claim against the parent company was but a device⁸² designed to ensure that all the claims were brought in Europe. Said otherwise, the plaintiffs were allegedly taking undue advantage of the mandatory nature of that provision, interpreted in *Owusu* as obliging the court of the defendant's domicile to assume jurisdiction irrespective of any consideration of "convenience".

The principle of abuse of EU law has been quite popular among European private international law scholars,⁸³ who see in it a potential remedy to the *de facto* unavailability of effective tools for limiting forum shopping within the European Judicial Area.⁸⁴ As it is, the claimant's "subjective right"⁸⁵ to sue an EU-domiciled defendant in one of the fora opened under the Brussels I^{bis} Regulation cannot be effectively curtailed by any of the traditional common law tools for governing the exercise of jurisdiction – namely forum non conveniens and anti-suit injunctions⁸⁶.

These circumstances compel, in the view of some,⁸⁷ a civil law surrogate of the forum non conveniens doctrine to be created and used to counter forum shopping *malus*. Against this backdrop, in academic literature, an "abuse of procedure" has been discerned not only when the plaintiff seizes a specific forum for the sole purpose of harming the defendant, but also when such a choice would cause such a serious damage to the legitimate interest of the defendant that it appears manifestly disproportionate, even where said choice is not devoid of all interest for the plaintiff. Detecting an "abuse of procedure" would therefore entail the balancing of the disadvantage suffered by the defendant against the benefit potentially enjoyed by the plaintiff,⁸⁸ with a view to assessing whether the disadvantage is disproportionate to the benefit.

However, such a balancing exercise – which echoes, in a way, the two-phase test required under the doctrine of the forum non conveniens – does not seem to find a place within the case law of the European Court of Justice concerning EU instruments of civil procedure. The general principle of prohibition of abuse of rights has frequently been invoked in relation to the rule on connected claims in Art. 6 (1) of the 1968 Brussels Convention, a provision which may in principle deprive a (EU-domiciled⁸⁹) co-defendant of his natural forum. In its interpretation, however, the ECJ favoured giving full expression to the principle of legal certainty and to the logic of automaticity underlying the Convention, ruling that the risk of abuse cannot give rise to any separate argument once the statutory requirement laid down by that provision – i.e. the existence of the required connection between the claims – has been met.⁹⁰

⁸² The claim against the parent company was labelled as "fake" in *Milieudefensie, supra* note 77, para. 3:7, and as "not viable" and bound to "never realistically come to trial" in *Vedanta*, EWHC (TCC) 975, para. 59.

⁸³ RALUCA N. IONESCU, L'ABUS DE DROIT EN DROIT DE L'UNION EUROPEENNE (Bruylant 2012); Arnaud Nuyts, *Forum Shopping et Abus de Forum Shopping dans l'Espace Judiciaire Européen*, in MELANGES JOHN KIRKPATRICK 745 (Bruylant 2004); Laurence Usunier, *Le règlement Bruxelles I bis et la théorie de l'abus de droit*, in LE NOUVEAU REGLEMENT BRUXELLES I BIS 449 (Emmanuel Guinchard ed., 2014).

⁸⁴ Usunier, *id.*, 452.

⁸⁵ *Id.*, 464.

⁸⁶ See Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflicts of Laws*, 54 I.C.L.Q 813 (2005).

⁸⁷ Usunier, *supra* note 83, 460.

⁸⁸ *Id.* 474.

⁸⁹ Case C-51/97, *Réunion européenne v. Spliethoff's Bevrachtungskantoor*, EU:C:1998:509; case C-645/11, *Land Berlin v. Sapir* EU:C:2013:228. (stating that this provision can be invoked vis-à-vis non-EU domiciled defendants).

⁹⁰ Case C-98/06, *Freeport v. Arnoldsson*, EU:C:2007:595.

The principle of prohibition of abuse of rights has been recently invoked also with respect to a choice of law made under the Rome I Regulation,⁹¹ in a case where such choice was detrimental to the interests of creditors in foreseeable insolvency proceedings.⁹² Therein, the Court recalled that the mere fact of exercising an option to choose conferred under a European instrument of civil procedure does not create, as such, any presumption of abuse or fraud. To the contrary, to invoke an abuse, it must be proven that the “*primary aim*” of the party effecting the choice was fraudulent in nature, aiming to alter the scope of a provision EU law or to compromise the objectives pursued by it.⁹³

It is reasonable to assume that a similar test – impervious to all balancing of competing interests and centred instead upon the scheme and objectives of the relevant provision of EU law – should apply also in assessing the risk of abuse in cases where Art. 4 (1) of the Brussels I^{bis} Regulation, in conjunction with domestic rules of jurisdiction, results in depriving a non-EU domiciled defendant of his natural forum. This was, in any event, the view expressed by the English High Court in assessing the allegation of abuse advanced by the defendants in *Vedanta*.

In identifying the statutory objective underlying Art. 4 (1) of the Brussels I^{bis} Regulation, the English High Court criticized the European Court Justice for its “suspect” reasoning in *Owusu* for unjustifiably ignoring that, in cases brought against the parent company, “it is the defendant himself who would prefer *not* to be sued in the courts of its domicile”. By doing so, *Owusu* is liable to transmute a rule *in principle* justified by the need of ensuring certainty for a defendant in a rule providing instead certainty for a claimant.⁹⁴ In spite of this alleged fallacy, the High Court recognised that *Owusu* could be set aside on the basis of an abuse of EU law only if there was proof that the proceedings against the parent company had the *sole objective* of ousting the jurisdiction of another court, or alternatively that the basis of the joinder was fraudulent.⁹⁵

While the plaintiffs were surely very aware of the potentially beneficial spin-off arising from bringing proceedings in England, the wider picture suggested that the claim against the parent company was authentic and not merely a hook for the claim against the subsidiary. Firstly, the plaintiffs were “quite entitled to try and bring themselves within the class of freestanding liability in tort of the parent company recognized by *Caparo* and *Chandler*”.⁹⁶ Secondly, the precarious financial position of the subsidiary justified on practical grounds the plaintiffs’ decision to also bring a claim against the much wealthier parent company.

The test adopted by the Dutch court to decide on this same issue seems even lighter. It remarked, in fact, that the parent company is indisputably “domiciled” in the Netherlands according to Art. 60 of the Brussels I Regulation,⁹⁷ which brought it under the scope of Art. 4 (1). Moreover, because the domestic rule on connected claims was modelled upon Art. 6 (1) of the Brussels Convention, it required no

⁹¹ Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), in 2008 O.J. (L 177) 6.

⁹² Case C-54/16, *Vinyls Italia v. Mediterranea di Navigazione*, EU:C:2017:433, paras. 52 et seq.

⁹³ *Id.*, para. 55 (“It should be recalled, as the Commission submitted, that the mere fact that the parties exercised the option to choose...a law of a Member State other than the Member State in which they are established does not create any presumption regarding an intention to circumvent the rules on insolvency for abusive or fraudulent ends”).

⁹⁴ *Vedanta*, [2016] EWHC (TCC) 975, para. 70.

⁹⁵ *Id.*, para. 74.

⁹⁶ *Id.*, para. 47 (*Caparo Industries v. Dickman* [1990] UKHL 2 and *Chandler v. Cape*, [2012] EWCA Civ 525, being the authorities which first recognized the possibility of a freestanding liability in tort of the parent company in cases where the damage arose out of the operations of the subsidiary).

⁹⁷ Current Art. 63 of the Brussels I^{bis} Regulation.

“extra anti-abuse test”, according to the interpretation devised by the European Court of Justice case law.⁹⁸

The general principle of prohibition of abuse of rights will have therefore an extremely narrow scope of application, if any, in curtailing the use of the procedural strategy which uses the EU-domiciled parent company as an anchor defendant. On the one hand, its *mise en œuvre* does not even come close to the balancing of the parties’ conveniences underlying the forum non conveniens doctrine. On the other hand, the more established the existence of a freestanding duty of care of parent companies becomes, the narrower the scope of the prohibition of abuse of rights will get, as it would be much easier for the plaintiffs to substantiate the existence of a genuine legal interest in suing the EU-domiciled defendant.

b) *Substantive Law within the (Domestic) Jurisdictional Test: “Mini-trials” on the Merits v. Prima Facie Assessments*

This is not the place to map the great variety of legal arguments tendered, more or less successfully, to establish the responsibility of parent companies for harm caused by subsidiaries.⁹⁹ Suffice it to say that the existence of “duty of care” of the parent company has been established in some European countries,¹⁰⁰ while remaining a highly debated issue in others.¹⁰¹

This underlying uncertainty as to the existence and extent of a duty of care in substantive law has very little bearing on the issue of jurisdiction vis-à-vis the EU-domiciled parent company. The E.C.J. advocates in fact for a pragmatic approach to the interpretation of the specific heads of jurisdiction set out by the Brussels regime, imposed by its “the purposes and spirit”, whereby the investigation required for the purpose of establishing jurisdiction should not go as deep as to consider issues relating the existence and nature of the prejudice alleged by the claimant¹⁰². A *prima facie* assessment

⁹⁸ *Milieudefensie, supra* note 77, para 3H7. Accord. more recently, Ktr Rotterdam 19 septemeber 2018, (Stitching Petrobras Compensation Foundation/Petroléo Brasileiro S.A Petrobras and others) NL:RBROT:2018:7852, para. 5.15. [hereinafter *Petrobras*] (maintaining an identical approach to the identification of an abuse).

⁹⁹ See Report of the Special Representative of the Secretary-General, *supra* note 76, para. 106 (providing an overview of said arguments).

¹⁰⁰ The French legislator has recently enacted a due diligence statutory law (Loi2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of 27 March 2017 on the duty of care of parent companies and outsourcing companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France] Mar. 28, 2017, p. 1) (requiring French holding companies to monitor the activities of their subsidiaries throughout their supply chains, so as to prevent human rights and environmental abuses). In England, a substantial jurisprudence exists addressing, more or less directly, the liability of parent companies for human rights abuses (such as *Chandler v. Cape*, [2012] EWCA Civ 525, and *Thompson v. Renwick Group* [2014] EWCA Civ 635).

¹⁰¹ The Swiss Parliament is currently considering a proposal for a due diligence statutory law: Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt': Indirekter Gegenentwurf, <https://www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf>. In the Netherlands, a law introducing a duty of care to prevent child labor is currently under discussion: <https://www.business-humanrights.org/en/dutch-companies-issue-open-letter-in-support-of-child-labour-regulation>. In Italy, the National Plan on Business and Human Rights has commissioned an evaluation study of the legislation on duty of care, as well as to the analysis of the obstacles on access to reparation: https://cidu.esteri.it/resource/2016/12/49118_f_PANBHRITAFINALE15122016.pdf. In Spain, a similar plan was adopted by the Council of Ministries in July 2017: <http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/DerechosHumanos/Documents/170714%20PAN%20Empresas%20y%20Derechos%20Humanos.pdf> (see, in particular, Guiding Principles No. 25 and 26).

¹⁰² Case 34/82 Martin Peters Bauunternehmung v. Zuid Nederlandse Aannemers, para. 17 (concerning the investigation required for the purposes of a characterization under Art. 5(1) of the Brussels Convention of 27 September 1968. This approach is valid, *a fortiori*, also under the general rule of jurisdiction based on the defendant’s domicile, where no such characterization is required).

that the statutory conditions set out by each head of jurisdiction are satisfied is considered sufficient for that purpose.

The situation is considerably different as far as the national jurisdictional tests are concerned. A major partition can be drawn. On the one side there are the domestic systems which have been explicitly modelled upon the Brussels Convention and its logic, where jurisdiction is seen as a procedural question impervious to consideration of substantive law **(i)**. On the other side, there are the countries, typically belonging to the common law tradition, that retain a more original and autochthonous approach to the jurisdictional test. Here, the most recent trend seems to be in favour of undertaking veritable “mini-trials” on the merits already at the interlocutory stage of jurisdiction¹⁰³ **(ii)**. The comparative assessment between the civil and the common law approach is helped by two cases with the same factual background. The case *Milieudefensie*, decided by the Dutch courts, and the case *Okpabi*, decided in England, involve different plaintiffs but aim at engaging the responsibility of the same defendants – the parent company Royal Dutch Shell¹⁰⁴ and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) – in relation to a widespread oil spillage affecting the Ogoniland region, allegedly caused by wrongful acts and negligence of the local subsidiary.

i. “Jurisdiction first” Approaches in Civil Law Countries

Before the Dutch courts, the existence of jurisdiction over proceedings brought jointly against a domiciled parent company and a non-EU domiciled subsidiary is assessed using the combined application of Art. 4 (1) of the Brussels I^{bis} Regulation and Art. 7 of the Dutch Code of Civil Procedure (hereinafter Rv.). The latter provision is a perfect example of a ground of jurisdiction modelled upon the logic and spirit of the Brussels I^{bis} Regulation. In drafting this rule, which governs the assumption of jurisdiction over connected claims, the Dutch legislator in fact made the conscious choice to incorporate the E.C.J. case law on Art. 6 (1) of the Brussels Convention, so that there would be no deviation between the two regimes.¹⁰⁵

Art. 6 (1) the Brussels Convention,¹⁰⁶ which governs jurisdiction over connected claims brought against EU-domiciled defendants¹⁰⁷, is exclusively grounded in considerations of procedural expediency and international harmony. This provision establishes jurisdiction over a claim brought against a co-defendant if the claims “are so closely connected that is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. Its application does not presuppose, conversely, any preliminary evaluation of the likelihood of success of the action brought against the anchor defendant and/or against the non-domiciled parties.¹⁰⁸ In the

¹⁰³ The expression was used by Justice Coulson in *Vedanta*, [2016] EWHC (TCC) 975 para. 118.

¹⁰⁴ The parent company Royal Dutch Shell having a registered office in the United Kingdom and headquarters in the Netherlands. Both count as “domicile” of a legal person under Art. 63 of the Brussels I^{bis} Regulation. Hence the existence of a claim under Art. 4 (1) both in the Netherlands and in England.

¹⁰⁵ *Milieudefensie*, *supra* note 77, para. 3:7.

¹⁰⁶ This head of jurisdiction is now found in Art. 8 (1) of the Brussels I^{bis} Regulation. The structure of the norm has remained unchanged.

¹⁰⁷ This provision does not apply to defendants domiciled in third states: see case C-51/97, *Réunion européenne v. Spliethoff's Bevrachtungskantoor*, EU:C:1998:509; case C-645/11, *Land Berlin v Sapir*, EU:C:2013:228.

¹⁰⁸ The question as to whether the likelihood of success of the action against a co-defendant non domiciled in the forum was relevant in the interpretation of that provision was raised in case C-98/06, *Freeport v. Arnoldsson*, EU:C:2007:595, but the Court decided not to address the issue. However, academic literature considers that national procedural laws may set out specific additional requirements, such as the existence of a real issue to be tried, provided that these do not deprive Art. 8 para(1) of its effectiveness: Horatia Muir Watt, *Article 8, in BRUSSELS IBIS REGULATION* 369, 379 (Magnus & Mankowski eds. 2015). At present, it is certain that jurisdiction over a connected claim still exists when the initial claim against the anchor defendant is procedurally

same vein, Art. 7 of the Dutch Rv. sets out a very liberal rule on connected claims establishing that “in the event that the Dutch court has jurisdiction over one of the defendants [...] the Dutch court also has jurisdiction over other defendants involved in the same proceedings, *provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing*”.

The liberal interpretation of this provision propounded by the Dutch courts was pivotal to the plaintiffs’ success in grounding jurisdiction in *Milieudefensie*.¹⁰⁹ According to the Dutch Court of Appeal, Art. 7 Rv. requires no freestanding “good and arguable case” test. Rather, this is sort of “implicit in the requirement of the connection as provided in Art. 7”. In fact, in its view, in cases where it is clear from the very beginning that a claim is bound to fail on the merits, the “reasons of efficiency” justifying a joint hearing would not, by definition, exist.

Against this backdrop, that court proceeded to a very rough and *prima facie* assessment of the applicable substantive law, notably *Chandler* and *Caparo*. On this basis, it could conclude that it could not have been excluded *beforehand* – i.e. at the preliminary stage of the assessment of jurisdiction – that in that case a “duty of care” of the parent company existed. It also repeatedly stressed that this question remained distinct from that of jurisdiction and would be more comprehensively addressed in a subsequent phase of the proceedings¹¹⁰.

As to “the reasons of efficiency” justifying the joint hearing of the claims, these are the same which would have led to characterizing the subsidiary as a “co-defendant”, had Art. 6 of the Brussels Convention been applicable. This provision requires that the claims originate from “a single situation of fact and law”, even if they may have different legal grounds and being subject to different governing laws.¹¹¹

The Dutch Court of Appeal additionally confirmed that jurisdiction over the subsidiary assumed under Art. 7 Rv. continues to exist even after the claim against the parent company – the anchor defendant – is dismissed as unfounded on the merits. Once jurisdiction has been properly established, by assessing the required connection between the claims as existing when proceedings are initiated, it cannot change during the course of the proceedings. Again, there is in this interpretation an echo of the Brussels Convention’s logic. Therein, the goal of ensuring legal certainty for both the claimant and the defendant has led the E.C.J. to establish that the jurisdiction conferred under the uniform heads

inadmissible from the very time it is brought: case C-103/05, *Reisch Montage v. Kiesel Baumaschinen Handels*, EU:C:2006:471, para. 27.

¹⁰⁹ *Milieudefensie*, *supra* note 77, para 3:2.

¹¹⁰ Dutch Courts have recently adopted the same approach in a claim jointly brought by investors against the oil company Petrobras, incorporated in Brazil, and several other legal entities, part of the Petrobras group, established in the Netherlands: *Petrobras*, para.5.5 *supra* note 98 (“the district court does not have to accept proof or instruct a party to furnish proof in relation to the disputed facts which are relevant to both the issue of jurisdiction and to the existence of the right of action...[T]he court regards it as consistent with the aforementioned assessment framework to take into account...that which appears *prima facie* plausible on the basis of all the information, including the information provided by the defendant that did appear”).

¹¹¹ Case C-645/11, *Land Berlin v. Sapir* EU:C:2013:228; Case C-98/06, *Freeport v. Arnoldsson*, EU:C:2007:595. More specifically, the Court of Appeal found that the co-defendants were essentially facing “the same claims” in accordance with said case law. Moreover, as the factual basis underlying the claims was the same, regarding the same oil spills, the evidentiary part of the proceedings would have focused on the same issues. Its concentration in joint proceedings would therefore comply with the principle of procedural economy and prevent diverging conclusions as concerns the assessment of that evidence. Dutch Courts recently confirmed their willingness to establish jurisdiction under Art. 7 Rv. in cases that have a somewhat tenuous link with the Netherlands: see *Petrobras*, *supra* note 98 (“the condition that it had to be foreseeable for the defendants that they might be sued in the Netherlands has been met. Since the claims concern the same situation of fact and law, [the foreign-domiciled defendants] could have reasonably foreseen that they might be sued in the courts of the country where [the anchor defendant] is domiciled).

set out by that instrument persists irrespective of the changes in the facts which had initially justified its exercise.¹¹²

The question as to whether the Dutch approach to the assessment of jurisdiction is really representative of an overarching “civil law approach” is nevertheless open to debate. Generalizing a rule based on the approach adopted in one single case may seem quite far-fetched. Pertinent supporting case law might come, in the future, from Italian courts currently deciding the *Eni-Ikebiri* case.¹¹³ As jurisdiction of the Italian courts has been promptly challenged by the defendants, the question as to the approach to be adopted is looming ahead for the Italian judges. The court will prospectively have to apply Art. 3 of the Italian Law on Private International Law¹¹⁴. This provision only indirectly governs the issue of jurisdiction on connected claims, insofar as it merely contains a *renvoi* to the 1968 Brussels Convention. The practice on Art. 6 (1) of that instrument¹¹⁵, as interpreted by the E.C.J. case law, will therefore provide for the relevant starting point for that Court’s reasoning¹¹⁶.

ii. Summary Review on the Merits in Common Law Countries

The approach adopted by the English courts in *Okpabi* to assess their jurisdiction is considerably different. While these courts have by now accepted *Owusu* as a binding authority for establishing jurisdiction over the domiciled parent-company under Art. 4 (1) of the Brussels I^{bis} Regulation, they maintain a traditional common law approach in deciding whether the service outside the jurisdiction should be allowed vis-à-vis the non-EU domiciled subsidiary.

An authorization to serve a claim on a co-defendant domiciled outside the jurisdiction under paragraph 3.1 of Practice Direction 6B will be granted solely if the claimant can establish that (1) the claim falls within one of the jurisdictional gateways set out in that provision (2) that the claim has a reasonable prospect of success and, lastly, (3) that England and Wales is the proper place in which to bring the claim.

In cases aiming at attracting a non-domiciled subsidiary before the forum of the domiciled parent company, the relevant jurisdictional gateway is the so-called “necessary or proper party” gateway¹¹⁷, which additionally requires proof that (4) there is, between the claimant and the anchor defendant, “a real issue which it is reasonable for the court to try” and that (5) the non-domiciled defendant is a necessary or proper party to that claim”.

As a result, the victims of human rights violations will have to prove, inter alia, that on the basis of the applicable substantive law they have a “good arguable case” both against the non-EU domiciled subsidiary (under point 2) and against the domiciled parent company (under point 5).¹¹⁸

¹¹² Case C-18/02, Danmarks Rederiforening, *ex rel.* DFDS Torline v. LO Landsorganisationen i Sverige EU:C:2004:74, paras. 36–7; Case C-352/13, Cartel Damage Claims (CDC) Hydrogen Peroxide v. Evonik Degussa, EU:C:2015:335.

¹¹³ *Comunità Ikebiri v. Eni* supra note 79.

¹¹⁴ Legge 31 maggio 1995, n. 218, G.U. *June 03, 1995* n.128.

¹¹⁵ According to the Italian Court of Cassation, the *renvoi* is to be understood as being limited to the 1968 Brussels Convention and not as encompassing the subsequent Brussels I and I^{bis} Regulations: Cass. Civ., 21 October 2009, n. 22239.

¹¹⁶ Antonietta Di Blase, *Art. 3, II, in* LEGGE 31 MAGGIO 1995, N. 218, RIFORMA DEL SISTEMA ITALIANO DI DIRITTO INTERNAZIONALE PRIVATO (Stefania Bariatti eds., 5 Le Nuove Leggi Civili Commentate 879, 910 (1996).

¹¹⁷ Paragraph 3.1(3) of Practice Direction 6B.

¹¹⁸ The court must be additionally satisfied that it is reasonable to try the issue between the claimant and the anchor defendant. According to *Erste Group Bank v. JSC 'VMZ Red October'* [2015] EWCA Civ 379, the court must examine the nature of the claim against the anchor defendant on the assumption that there would be no additional joinder of the foreign defendant.

Against this backdrop, the ease with which victims of human rights violations will succeed in grounding the jurisdiction of English courts over the joined claims will largely depend on the evidential standard required for establishing the existence of the “good and arguable”. In defining such a standard, account shall be taken of two different potential constraints for plaintiffs. Firstly, in defining what is required from these plaintiffs in terms of proof, due regard should be had to the objective limitations of access to evidence, insofar as the jurisdictional test is to be applied at a preliminary stage of the proceedings where disclosure is not available. Secondly, the difficulties in proving the existence of a good and arguable case may be greater in claims concerning a developing area of law. This is why, as Lord Collins put it, “it is not normally appropriate in a summary procedure...to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts”.¹¹⁹

The relevant starting point in defining the evidential standard for establishing jurisdiction is provided by the well-established case according to which this shall be neither the civil burden of proof, insofar as this would amount to “a trial of the action or a premature expression of an opinion on its merits”, nor a prima facie assessment based on the sole evidence adduced by the claimant.¹²⁰ Rather, it should be something in between, corresponding to the test for resisting an application for summary judgment. In practice, the seized court must be “as satisfied as it could be, *having regard to the limitations which an interlocutory process imposes*, that factors exist which allows the court to take jurisdiction.”¹²¹

In cases trying to engage the responsibility of a parent company, the existence of said factors shall be assessed on the basis of the authorities in *Chandler* and *Caparo*.¹²² While the former identifies the four factors which may indicate that a duty of care of the parent company exists,¹²³ the latter lays down, more fundamentally, the three-step test necessary when considering whether a duty of care exists or should be imposed. Firstly, the harm caused by the negligent actions must be reasonably foreseeable; secondly, the relationship between the parties to the dispute must be one of reasonable proximity and finally, it must be fair, reasonable, and just to impose liability.

In *Vedanta*, both the High Court and the Court of Appeal adopted a cautious approach geared towards the goal of avoiding a “mini-trial” on the merits at this interlocutory stage. The former assessed the available evidence in the light of *Caparo* and *Chandler*, concluding that there was “at least some support for the claim in the material” provided by the plaintiff. In spite of the defendant’s solicitations of a declaration that the case was “very weak in English law”, that court declared itself “unenthusiastic to express any further view on the merit”.¹²⁴ The Court of Appeal further added that the sheer fact that there had allegedly been no reported case in which a parent company had been held to owe a duty of care to a person affected by the operation of a subsidiary “does not render such a claim

¹¹⁹ *Altimo Holdings v. Kirgыз Mobil Tel* [2011] UKPC 7, para. 84.

¹²⁰ See *Four Seasons v. Brownlie* [2017] UKSC 80, para. 5 (summarising previous authorities).

¹²¹ *Id.*, para. 7.

¹²² See *supra* note 96.

¹²³ Namely the fact that: the companies were operating the same businesses; the parent had superior or specialist knowledge compared to the subsidiary; the parent had knowledge as to the subsidiary’s systems of work; and the parent company knew that the subsidiary was relying on it to protect the claimants.

¹²⁴ *Vedanta*, [2016] EWHC (TCC) 975, para. 121.

unarguable”, because, “if it were otherwise, the law would never change”.¹²⁵ On the basis of these considerations, the courts held that there was a serious issue to be tried, in England, both against the parent company and the subsidiary. Having ascertained that all the other conditions required under the relevant jurisdictional gateway were satisfied, and that England was the appropriate forum for the dispute,¹²⁶ both Courts permitted service outside the jurisdiction.

In *Okpabi*, the stance taken was considerably less plaintiff-friendly. Concerns about avoiding a mini-trial of the merits were in principle shared by the Courts. These, however, critically noted that adopting a too-lenient approach to the “good arguable case” test would result in the paradox whereby “the more difficult the legal issue, and therefore the more problematic the issue may ultimately prove to be for a claimant, the easier it may be to establish jurisdiction”.¹²⁷ The correct approach therefore consisted in *not* slavishly following *Vedanta*, in spite of the factual similarity between the two applications, and to arrive, instead, at an autonomous conclusion on the basis of the application of the principles set out by *Chandler and Caparo* to the facts of *Okpabi*.¹²⁸

Against this background, the Court of Appeal goes out of its way to distinguish the facts of *Okpabi* from *Vedanta* and the kind of evidence produced therein¹²⁹. On this basis, it held that the plaintiffs failed to demonstrate a good and arguable case against the parent company, lacking an adequate proof of the requisite proximity under the *Caparo* test. In the view of that Court, the “corporate structure itself tends to militate against the requisite proximity”¹³⁰, and the proof needed to rebut this presumption shall be particularly strong. Those plaintiffs should have proven, in particular, that the parent company *controlled the operations* of the subsidiary, or that it had *direct responsibility for practices or failures* which are the subject of the claim.¹³¹

As pointed out by the first commentators,¹³² by adopting such a high evidential standard, the Court requires a “winnable” rather than a merely “arguable” case under the applicable substantive law. This approach may hinder victims from accessing a remedy in that jurisdiction having regard to the limitations of access to evidence they face at this stage. As noted by Lord Justice Sales in his dissenting opinion, the plaintiffs effectively proved that their case was not “wholly speculative”¹³³ by producing some internal documents – the Shell Control Framework and the HSSE & SP Control Framework¹³⁴ –

¹²⁵ *Vedanta*, [2017] ECWA Civ 1528, para. 88.

¹²⁶ See *infra*, section c.

¹²⁷ *Okpabi*, [2018] EWCA Civ 191, paras. 31–2.

¹²⁸ *Okpabi*, [2017] EWHC (TCC) 89, para. 48.

¹²⁹ *Okpabi*, [2018] EWCA Civ 191, para. 197.

¹³⁰ *Id.*, para. 196. (“it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries”).

¹³¹ *Id.*, para. 127 (“There were reputational concerns (in part in relation to personnel), there was concern about losses of oil and environmental damage, *there was a desire to ensure that proper systems were put in place to reduce such losses and environmental damage; and there was the establishment of an overall system which was there to ensure best uniform practices*. However, the claimants have not demonstrated an arguable case that RDS controlled SPDC’s operations, or that it had direct responsibility for practices or failures which are the subject of the claim.” *Emphasis added*).

¹³² Lucas Roorda, *Okpabi v Shell on Appeal: Foreign Direct Liability in Troubled Waters*, <http://rightsasusual.com/?p=1194>.

¹³³ *Okpabi*, [2018] EWCA Civ 191, para. 179.

¹³⁴ *Id.*, para. 41 *et seq.* These documents set out mandatory requirements for all Shell Group companies, defined standards and established processes and procedures. These apply to all Shell companies in which the parent company RDS has a direct or indirect controlling interest (i.e. including the Nigerian subsidiary SPDC, co-defendant in the *Okpabi* case).

evidencing the existence of a system of distribution of expertise and control between the members of the Shell corporate group which could have been relevant under *Chandler v Cape plc*¹³⁵. It is worth noting that these documents were discovered and produced solely during the appellate proceedings, thus suggesting that there could have been some potential for new factual findings were a proper disclosure undertaken. In the majority view, however, the fact that the parent company may design and implement policies or corporate programs is not enough to impose a duty of care upon the parent company. For this to arise, the parent company shall “actively enforce” such programs or set out mandatory instructions to its subsidiaries¹³⁶.

It is worth noting that this restrictive interpretation might be submitted to the review of the UK Supreme Court.¹³⁷ Nonetheless, in the recent judgment *Four Seasons v. Brownlie*,¹³⁸ the Supreme Court evidenced a similar *favor* towards restrictive interpretations of the jurisdictional gateways set out under domestic common law. This approach has been justified, *inter alia*, by the policy consideration of avoiding conferring upon the English courts “what amounts to a universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world”.¹³⁹ In light of the restrictive interpretation of the required “Caparo proximity” submitted in *Okpabi*, this reasoning might be extended to claims brought against English residents for harm committed outside the jurisdiction. In fact, according to that judgment, *all the jurisdictional gateways in the Practice Direction* – including, therefore, the necessary and proper party gateway – “are concerned to identify some substantial and not merely casual or adventitious link between the cause of action and England”.¹⁴⁰ We are back, therefore, to a *Nait-Liman*-kind of question, concerned with the margin of discretion enjoyed by national courts in devising interpretive solutions which limit, to a considerable extent, the plaintiffs’ right of access to a court, especially if this is understood as right to a reasoned decision on the merits.¹⁴¹

c) *Forum Non Conveniens*.

In *Four Seasons v. Brownlie*, the Supreme Court also clarified the relation existing between the jurisdictional gateways and judicial discretion under the doctrine of forum non conveniens.¹⁴² It confirmed that the two serve “completely different purposes”, the interpretation of the gateways being a question of law concerning the connection between the cause of action and England, whereas forum

¹³⁵ *Id.*, paras. 158, 165 and 168. (submitting that the parent company was arguably conscious of having, in principle, the practical means of asserting executive power from the centre of the group to control at least some aspects of management of operating companies and that it had “the will and intention to do so”).

¹³⁶ *Id.*, para. 198. (remarking that a duty of care may arise “where a parent required its subsidiaries or franchisees to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful to health. One might suggest a food product that injured many, but was created according to a prescriptive recipe provided by the parent” Emphasis added).

¹³⁷ The plaintiffs manifested the intention of seeking a leave to appeal: <https://www.leighday.co.uk/News/News-2018/February-2018/Nigerian-villagers-vow-to-take-fight-over-Shell-oil>

¹³⁸ *Four Seasons v. Brownlie* [2017] UKSC 80 (concerning, however the interpretation of jurisdictional gateways other than the “necessary or proper party” gateways).

¹³⁹ *Id.*, para. 28.

¹⁴⁰ *Id.*, para. 28.

¹⁴¹ See Eur.Ct H.R., *Markovic v. Italy*, <http://hudoc.echr.coe.int/eng?i=001-78623>, concurring opinion of Judge Costa, para. 12. (“Can the right of access to a court be theoretical and illusory (in this instance amounting to mere “physical” access), or must it be practical and effective In the instant case, this would have meant enabling the relevant court to deliver a reasoned decision (even one dismissing the claim) on the merits of the dispute, without a *judex ex machina* saying that it was precluded from deciding anything at all”).

¹⁴² *Four Seasons v Brownlie* [2017] UKSC 80, para. 31.

non conveniens concerns “the practicalities of litigation”. In particular, the doctrine of forum non conveniens aims at limiting the exercise of jurisdiction, “not to enlarg[ing] it and certainly not to displac[ing] the criteria in the gateways”.

Although the assessment as to whether English courts were the appropriate forum for the dispute has sometimes taken into account typical forum of necessity considerations,¹⁴³ the doctrine of forum non conveniens can never, as such, open an exceptional jurisdiction which would not exist under the ordinary gateways. This explains why, in *Unilever*, the English courts declined jurisdiction even if it was ascertained that there was cogent evidence of a real risk that the plaintiffs would not be able to obtain substantial justice in the foreign forum.¹⁴⁴ This was due to rather compelling reasons: first, there was the real risk that, unless anonymity orders were made, the plaintiffs would be exposed to further physical violence by the rival ethnic group. Moreover, even if such orders were made, the fact remained that there is no provision, and no precedent for, a confidentiality club in Kenya. Second, there was evidence of a continuing problem with judicial corruption and inefficiency in that legal system which might affect the conduct of the case. Finally, there was a problem with funding litigation which might effectively discourage the plaintiff to bring the much more complex case against the parent company.

All these circumstances cannot, nevertheless, make up for the lack of a “good and arguable case” against the parent company under *Caparo* and *Chandler*, and the consequent impossibility of triggering the jurisdictional gateway under Paragraph 3.1(3) of Practice Direction 6B. Again, the previous authority in *Vedanta* remains the example of a more liberal approach to social corporate responsibility. Therein, similar concerns¹⁴⁵ led the court to characterize the English forum as the appropriate seat for the dispute, but this was only *after* the adoption of a much lighter evidential standard had vouched for the existence of the “good and arguable case” required under the jurisdictional gateway.

3. Alternative Procedural Strategies Based on the Application of Art. 4 (1) of the Brussels Ibis Regulation.

The brief overview of the litigation directed against parent companies and their subsidiaries shows that, in the large majority of cases, this is a road paved with difficulties and procedural hurdles. In particular, the distributive application of the Brussels regime and of domestic rules of jurisdiction prevents the claimants from fully benefiting from the *prima facie*, hard-and-fast logic of Art. 4 (1). Even if *Owusu* obliged the English courts to assume jurisdiction over the claim directed against the domiciled parent company, the impact of the domestic jurisdictional test deployed against the non-domiciled subsidiary was of such a magnitude that it allowed these courts to dismiss the case *in its entirety* on

¹⁴³ In *Connelly v. RTZ Corporation Plc and Others* [1997] UKHL 30, and *Lubbe v. Cape* [2000] UKHL 41, the House of Lords held that a stay on the basis of forum non conveniens would not be compatible with Art. 6 E.C.H.R. if the outcome is that the claimant will not be able, for economic or other reasons amounting to a denial of justice, to proceed in the alternative forum. A similar reasoning was advanced by the Court of Appeal in *Mark v. Mark* [2004] EWCA Civ 168 in a scenario which came very close to a negative conflict of jurisdictions – the traditional domain of a *forum necessitatis*: see *supra* note 14 – given that the plaintiff, an overstayer illegally present on English territory, could not have engaged the ordinary jurisdiction of English courts on the basis of domicile or habitual residence.

¹⁴⁴ *Unilever*, [2017] EWHC (QB) 371, para. 154 *et seq.*

¹⁴⁵ *Vedanta*, [2016] EWHC (TCC) 975 paras. 175 *et seq.* (Identifying the relevant factors in: the lack of a workable local system of legal aid, permitting an appropriate funding of such a complex litigation; the unavailability of law firms having the relevant experience and who were willing and able to take on the claimants' claims in Zambia; the track record in Zambia of litigation of the same kind, showing not only the likelihood of delays and denials of justice, but also that the defendants had been shielded, in the past, by political connections and by their financial influence in that Country).

the basis of the domestic rules of procedure.¹⁴⁶ From the perspective of European procedural law, this result is doubtful: jurisdiction against the parent company was clearly established under Art. 4 (1) of the Brussels Regulation. Therefore, the case had to go to the merits.

To fully profit from the hard-and-fast logic of the Brussels regime, the plaintiff must find a way to ensure that it finds exclusive application. This means, in practice, directing a claim exclusively against a EU-domiciled defendant. The fundamental strategic decision consists therefore in the choice of the person to be sued.

This could be, for example, the EU-domiciled contractual party of the main (alleged) perpetrator of the human right abuses, who might be found in breach of the so-called “supply chain due diligence”.¹⁴⁷ In the case *Kik*, pending before the *Landgericht* of Dortmund, in Germany, the survivors of a fire sparked in a Pakistani textile supplying factory are suing the Germany-based company KIK as the “main retailer” of the merchandise produced in the Pakistani premises. The claimants are attempting to have KIK held liable for not having promoted and undertaken, *in practice*, the implementation of “adequate safety measures” in the Pakistani factory (producing clothes), thus breaching an engagement they undertook in a Code of Conduct applicable to its relationship with its contractual counterpart. In 2016, the judges accepted jurisdiction under Art. 4 (1) of the Brussels I^{bis} Regulation and granted legal aid to the Pakistani claimants.¹⁴⁸ Under German law, a positive decision of granting legal aid implies that the Court deemed the case *prima facie* founded¹⁴⁹ as to the merits, cf. sec. 114 ZPO.

Property law may also provide for a viable cause of action. The case *Song Mao*,¹⁵⁰ currently pending before the English High Court, involves 200 Cambodian farmers who were allegedly unlawfully evicted by force from their land in order to allow for the construction of a sugar plantation operated by the Thai company KSL. The land clearances were accompanied by multiple episodes of violence against the local population, committed by the police on behalf of the Cambodian Government and/or KSL. As a result, the farmers were finally forced to abandon their farms. Their claim is not, however, directed against the Thai company which operates the plantation.¹⁵¹ Again, the choice fell upon a contractual party of the alleged perpetrator of the abuse. In order to bring the case in England, the plaintiffs relied on the existence of a contract between KSL and the UK-incorporated Tate & Lyle Sugars, according to which the latter will be the exclusive purchaser of the raw sugar produced by former. The claim is based on Cambodian property law, pursuant to which as the farmers allegedly remained the legal owners of the land used to produce the sugar, they should therefore be entitled to enjoy all fruits of

¹⁴⁶ The High Court seems uncertain as to the proper way to dispose, procedurally, of the claim against the mother company: see *Okpabi*, [2017] EWHC (TCC) 89, para. 118 (envisaging two different routes, leading however to the same substantive outcome, *i.e.* the dismissal of the case. In particular, that Court could either “uphold RDS’s jurisdictional challenges” or “declare that it had jurisdiction” over that claim, which would be nonetheless subsequently struck out under CPR Parts 3.3 and 3.4 (2) (a)).

¹⁴⁷ Holger Fleischer & Jakob Hahn, *Berichtspflichten über menschenrechtliche Standards in der Lieferkette*, 64 RECHT DER INTERNATIONALEN WIRTSCHAFT 397 (2018).

¹⁴⁸ LG Dortmund (regional court), 2016 BeckRS, 125771. LG Dortmund (regional court), 2016 BeckRS, 125771. In January 2019, the the Dortmund regional court finally dismissed the complaint, finding that the statute of limitations, as determined under the applicable Pakistani law, had expired: see <https://www.business-humanrights.org/en/german-court-dismisses-lawsuit-against-kik-over-liability-for-fire-at-factory-in-pakistan-in-2012>.

¹⁴⁹ PETER L. MURRAY & ROLF H. STÜRNER, *GERMAN CIVIL JUSTICE* 123 (Carolina Academic Press 2004).

¹⁵⁰ The Pls. [] Appl. is available at: <https://www.business-humanrights.org/sites/default/files/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf>.

¹⁵¹ Local proceedings against the Thai company and local authorities were initiated and pursued, but remained completely ineffective: see Mahdev Mohan, *The Road to Song Mao: Transnational Litigation From Southeast Asia to the United Kingdom*, in 107 *AJIL UNBOUND* 30 (2013).

this property. When accepting the delivery of the first shipments of raw sugar, Tate knew, according to the plaintiffs, or at least ought to have known, that the villagers were the owners and legally entitled to possession of those goods.

Property law is also providing a viable cause of action in the case *Sàul v RWE*,¹⁵² pending before German courts.¹⁵³ This case is, without any doubts, a prime example of a “long shot” in public interest litigation. A Peruvian farmer is claiming that his property – located in Peru – is “acutely endangered” by the potential collapse of two glaciers into the nearby Palcacocha Lake. Lacking the adoption of appropriate preventive measures, the prospective – and only potential – collapse of these glaciers into the lake, allegedly due to global warming, could cause flooding of the area with consequent damage to the defendant’s property. The claim is being brought against a German electric utilities company, RWE, which carries out no direct activities in the Palcacocha Lake area. This particular defendant was selected solely on the basis of the declarations made on its corporate website.¹⁵⁴ Therein, the company acknowledged that its level of CO₂ emissions during electricity generation is high, and in any case “above average compared to [its] competitors”. It additionally qualified itself as “Europe’s largest single emitter of CO₂”. On this basis, the plaintiff is contending that RWE should be obliged to cover, on a pro-rata basis¹⁵⁵, the costs that he may have to incur, in the future, for removing the interference with his property caused by the defendant’s activity. The right to the removal of this interference follows from § 1004 BGB, which, in the plaintiff’s view, protects even property located on foreign territory.

In both *Kik*¹⁵⁶ and *RWE*,¹⁵⁷ establishing the jurisdiction of the German court was a rather straightforward task. With these companies – the only defendants – having their domicile in Germany under Art. 63 of the Brussels I^{bis} Regulation, the seised courts could assume jurisdiction under Art. 4 (1) of that instrument. Jurisdiction was never disputed in the proceedings. As for the *Song Mao* case, no court documents are publicly available at present. It can only be assumed that, both defendants being UK-incorporated companies, Art. 4 (1) of the Brussel I^{bis} Regulation played an important role in establishing the jurisdiction of the High Court.¹⁵⁸

Resorting to this procedural strategy to bring a claim before European courts remains however, fraught with difficulties for these plaintiffs. On the one hand, there are additional procedural hurdles which may derail a decision on the merits **(a)**, and, on the other hand, these plaintiffs will be faced with the often unsatisfying state of development of the applicable substantive law **(b)**.

a) *Procedural Hurdles*

¹⁵² OLG Hamm (higher regional court) Zeitschrift für Umweltrecht 2018, 118.

¹⁵³ To be more precise, the lawsuit is brought under Section 823 of the German Civil Code, asserting a violation of the property rights of the claimant by the defendant.

¹⁵⁴ Pl. [s] Appl., Section A, § 8.1. All court documents are available, in English, at <https://germanwatch.org/en/14841>.

¹⁵⁵ The plaintiff recognizes that RWE is merely co-responsible for his impairment. The claim referring only to the determination of this specific respondent’s liability, the compensation has been quantified at 17 000 euros, on the basis of RWE quantifiable contribution to greenhouse gas emissions at the global level (0.47 % of total emissions).

¹⁵⁶ Marc-Philippe Weller, *supra* note75, 387 (“International procedural law is usually not a major “hurdle” in human rights claims directed against domestic companies”).

¹⁵⁷ Pl. [s] Appl., Section B I §1.

¹⁵⁸ There was no need to serve the claims on any defendant domiciled outside the jurisdiction, so that domestic jurisdictional gateways were completely ousted. Equally symptomatic is the fact the Defs. [] defence and countercl. (available at <https://www.business-humanrights.org/sites/default/files/media/documents/tate-lyle-defence-counterclaim-2-may-2013.pdf>) place exclusive focus on points of fact and law, with no specific contestation of the jurisdiction of the English courts.

A Court may still have to address many procedural objections *after* having established its jurisdiction but *before* moving to the assessment of the merits of the case. In the cases described above, most of the defendants' objections focused on the *admissibility* of the claim under domestic procedural rules.

Rules of civil procedure are designed not only to ensure the expeditious and efficient conduct of the proceedings, but also to protect defendants against the burdens and costs of unwarranted procedures initiated in relation to unfounded claims.¹⁵⁹ A good example of a procedural rule aiming at achieving this double objective is Section 253 paragraph 2 no. 2 of the German ZPO. This provision sets out minimum mandatory requirements for the statement of claim, aiming at ensuring that this is sufficiently specific in the interest of both the proper administration of justice and the defendant.

This provision was at issue in the case *RWE*, where the defendant alleged that the claimant's request did not meet the requisite specificity under domestic procedural law.¹⁶⁰ In particular, the claimant allegedly failed to delineate with sufficient precision the scope of the protection sought and the impairment to be removed or to be averted. In the claim at hand, however, this lack of precision was a direct consequence of the specific kind of infringement alleged by the claimant. The Peruvian farmer is in fact seeking a judgment, imposing upon the defendant the obligation to cover costs which currently remain purely hypothetical, the collapse of the glaciers into the lake having yet to occur. Moreover, central to that his request to the court was the determination of the defendant's causal contribution to the creation of the alleged risk. All these factors remained therefore necessarily vague in the plaintiff's statement of claims. On this basis, at the first instance, the court found the threshold required under Section 253 (2) no. 2 ZPO was not met.¹⁶¹ The Court of Appeal, however, reversed this decision, deeming that the claim was not too imprecise "in the light of the facts of the matter and the status of the dispute to date"¹⁶². By doing so, it set a different balance between the parties' interests which took into account the specific characteristics of the litigation at stake.

An additional issue in the case *RWE* was whether the plaintiff lacked substantive legal standing to bring proceedings.¹⁶³ In that court's view, however, the claimant clearly had an interest in obtaining a declaratory judgment that the defendant will eventually have to cover the costs he may have to sustain, in the future, to eliminate the disturbance to his property created by the defendant's activity. This interest would subsist "even if, in the end, that plaintiff would be able to demand only 0,33 € from the defendant".¹⁶⁴

It is worth noting that the more removed a defendant is from the set of facts which gave rise to the alleged harm, the less evident the admissibility of the claim and the issue of substantive legitimation may be. In some cases, the effective possibilities for the claim to progress on to the merits may depend

¹⁵⁹ Matthias E. Storme, *Harmonisation of civil procedure and its interaction with substantive private law*, in CIVIL LITIGATION IN A GLOBALIZING WORLD 141 (Kramer & van Rhee eds. 2012 Springer).

¹⁶⁰ It must be noted that this argument was raised in the context of an application for legal aid. Here, the defendant may object that the lawsuit does not meet the requirements set out by Section 118 ZPO. In ordinary proceedings, a not sufficiently substantiated lawsuit is dismissed on the merits.

¹⁶¹ LG Essen, *Zeitschrift für Umweltrecht* 2017, 370.

¹⁶² OLG Hamm *supra* note 152.

¹⁶³ This requirement only applies to declaratory actions, cf. Section 256 (2) ZPO.

¹⁶⁴ OLG Hamm, *supra* note 152 (taking up an old (academic) discussion whether claims for very small sums of money are admissible in German courts or constitute rather an abuse of procedure. The majority of doctrine considers these claims as permissible. The case at hand demonstrates the political dimension of the lawsuit).

on the availability of quasi-discovery like procedures, aiming at clarifying whether the defendant is liable to suit by the claimant.¹⁶⁵

Another procedural hurdle that these plaintiffs may encounter relates to the existence of *locus standing*. This issue is exemplified by the Italian *Eni-Ikebiri* case,¹⁶⁶ where the Nigerian plaintiffs are being represented by their King. While, under Nigerian law, the king of the Tribe has *locus standing* to introduce legal actions in the public interest, Italian procedural law does not include local communities nor their Kings among the subjects entitled to bring representative actions. In these instances, however, legal standing (including the capacity to be a party) should be recognized under international human rights' standards.¹⁶⁷

b) *The Pivotal Role of the Applicable Substantive Law.*

A strategy which starts from the damage occurred in a foreign and remote jurisdiction – Pakistan, Cambodia and Peru – and works back up the chain of causation until a viable, European-domiciled defendant can be found may greatly simplify the question of jurisdiction.¹⁶⁸ The fact remains, however, that litigating a case of this kind requires conspicuous efforts in relation to the applicable substantive law.

The state of corporate social responsibility and of chain supply liability is an ongoing and vigorously discussed topic, its scope being far from uniform across the European States.¹⁶⁹ The cases explained here may therefore elicit important issues of private international law which may be pivotal to the plaintiffs' effective chances of success on the merits. Having successfully brought a case before a European court, (alleged) victims of human rights violations will be able to rely on the prospective application of the Rome Regulations, particularly of the Rome II Regulation.¹⁷⁰

In fact, even in cases where the action is brought against the contractual party of the alleged perpetrators, victims of human rights violations will likely be able to exclusively invoke some kind of

¹⁶⁵ Illustrative, in this sense, is the Véolia-Alstom litigation before the French Courts. The case concerned a contract for the construction of a tramline in East Jerusalem, officially signed only between the Israeli Government and the Israeli company City Pass. Alleging that this contract violated the 1949 Geneva Convention, insofar as it fostered the unlawful colonization by Israel of the Palestinian territory, the NGO "Association France Palestine Solidarité" brought the case before the Tribunal de Grand Instance of Nanterre. This result could be achieved by suing the French based companies Véolia and Alstom which, albeit not being formal parties to the disputed contract, were nonetheless allegedly substantially involved in its execution. To confirm that the action was admissible under Art. 32 of the French Code of Civil Procedure, the French had to order the disclosure of the Concession agreements and of their annexes, in sworn translation (see the account of the first-instance proceedings made by Monique Chemillier-Gendreau, Synthèse relative au déroulement des faits et de la procédure dans l'affaire du tramway de Jérusalem, 29 May 2013, available at <http://www.forpalestinianrights.org/tramway.pdf>). On this basis, the court was able to establish that Véolia and Alstom were proper "defendants" even though they were not formal parties to the disputed contract. The case was finally dismissed, as to the merits, by both the court of first instance and the Court of Appeal of Versailles, due to the fact that the provisions of public international law relied upon by the plaintiffs had no horizontal effect, and could not therefore apply to a relationship between private parties: see Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, R.G. N° 11/05331.

¹⁶⁶ *Comunità Ikebiri v. Eni*, *supra* note 79.

¹⁶⁷ Burkhard Hess, *Grundfragen und Entwicklungen der Parteifähigkeit*, 117 ZJP 267, 286 (2004).

¹⁶⁸ There is, moreover, a potentially beneficial spin-off that arises from the grounding of jurisdiction in Europe, such as the possibility of accessing the systems of Legal Aid of European States, likely to provide for much better funding conditions than those – if any – available before the courts of the State in which the direct perpetrator of the abuse is domiciled.

¹⁶⁹ Marc-Philippe Weller, *supra* note 75 (emphasising the difficulties which may arise in identifying and proving a viable kind of responsibility under the applicable substantive law).

¹⁷⁰ Regulation (EC) of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), in [2007] O.J. (L 199) 40.

non-contractual liability vis-à-vis these defendants, the availability of a cause of action grounded in contract law being difficult to envision in the current state of the law.¹⁷¹

The cornerstone of the Rome II Regulation is the rule under Article 4 (1), pursuant to which the law applicable to the breach of a non-contractual obligation shall be, in principle, the law of the State where the (direct) damage occurs, “irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur”. As a consequence, this law will be, in the vast majority of cases, the law of a non-European state.

The plaintiff may anyway have a particular interest in the application of the law of the European forum, potentially more receptive to the recognition of some sort of social corporate responsibility or of a supply chain due diligence¹⁷². He or she may therefore be prompted to use to his best advantage all the correctives to the general rule under Article 4 (1) contemplated by that Regulation. Victims may try, in particular, to adduce evidence in support of the triggering of the escape clause under Article 4 (3).¹⁷³ They may otherwise allege that the more protective standard of human rights protection endorsed by the forum forms part of its *ordre public* or identify a set of advantageous overriding mandatory provisions which shall apply irrespective of the law applicable to the case¹⁷⁴. Finally, potential plaintiffs may invoke one of the special rules of the Rome II Regulation setting out a partially derogatory regime with respect to specific kinds of infringements.

In this respect, the victims of environmental damage may benefit from a comparative advantage thanks to the option opened under Article 7 of the Rome II Regulation. This provision allows the victims of an environmental damage, sustained by either persons or property, to choose between the law of the country where the damage occurred and the law of the country in which the event giving rise to the damage occurred, in cases where these places differ. Again, the exercise of this option might bring into view additional important issues of private international law, such as the identification of *Distanzdelikt*, the geographical localization of kinds of damage which are, by their very nature, diffuse if not inherently global in reach, and the distinction between the relevant “direct damage” from its irrelevant “indirect consequences”.

This option to choose the applicable law under Article 7 of the Rome II Regulation was effectively exercised by the plaintiff in the *RWE* litigation. The choice was made in favour of German law as the law of the State in which the event giving rise to the damage occurred.¹⁷⁵ In the view of the plaintiff, the emissions attributable to the respondent, determining an increase in greenhouse gas

¹⁷¹ A form of contractual liability may be conceivable only vis-à-vis the end-users, ie the direct customers of the European-based retailer, which could in principle direct an action against the retailer under paras 437 BGB if it has advertised, in public statements (for example, in the sales prospectus) that its goods were produced in compliance with fundamental human rights or a certain environmental standards which were not effectively met in practice: see Marc-Philippe Weller *supra* note75.

¹⁷² Some European instruments already impose specific forms of supply chain responsibility, such as, *inter alia*, Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, in [2014] O.J. (L 330) 1; Regulation (EU) 2017/821 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, in [2017] O.J. (L 130) 1; Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), in [2006] O.J. (L 369) 1.

¹⁷³ This provision operates as a corrective to the localization of the case effected under para. 1, providing for the application of the law of the State with which, in the light of “all the circumstances of the case” that the tort/delict is manifestly more closely connected.

¹⁷⁴ Arts.16 and 26 of the Rome II Regulation.

¹⁷⁵ Pl. [s] Appl., Section B, para. 3.

concentrations in the atmosphere, gives rise to “a typical *Distanzdelikt*”. In fact, the place of the event (Germany, where most of the factories releasing the damaging emissions are located) and the place of the damage (Peru, in that case) are located in different jurisdictions.¹⁷⁶

However, the *RWE* litigation is hardly illustrative of the hurdles which plaintiffs may currently encounter in soliciting the application of a more favourable substantive law. As it is, until now, all the different Courts have adjudicated, more or less extensively, on issues relating to the merits of the case, without nevertheless sparing a single thought for issues of applicable law. The Court of first instance found the claim unfounded as to the substance in application of German law.¹⁷⁷ Overturning that decision, the Court of Appeal established the existence of *prima facie* legal causality between the harm alleged by the claimant and the activities of the defendants, requesting however expert opinions regarding factual allegations of the plaintiff with respect to the (direct) contribution of the defendant to global warming¹⁷⁸. It additionally ordered the plaintiff to advance the €20 000 cost of this expert opinion. Again, it simply based its decision on German law, without specifying on which basis it deemed it applicable to the case. As recognised by the plaintiff himself, in cases of that kind “there is no singular event giving rise to damages, but rather a chain of damaging events”. This prompts some important questions of private international law: what is, in particular, the event giving rise to the (future) damage¹⁷⁹ to property alleged by the claimant? Is it the discharge of CO₂ emissions in the atmosphere and the resulting global warming or rather the potential collapse of the glacier in the lake? In the first case, why should this event be located only in Germany when *RWE* has facilities in different States?¹⁸⁰ In the second case, would the alleged tort really be a *Distanzdelikt*, opening up the choice granted by Article 7? Is the damage to the Peruvian property a direct consequence of global warming, or merely an indirect financial consequence of a direct damage occurred elsewhere, irrelevant under that regime? How can we date global warming as an “event giving rise to damage”, considering that it began well before 11.01.2009 – the relevant point in time for the application of the Rome II Regulation¹⁸¹ – but has continued and will continue beyond that point? Some of these questions are easier to answer than others but they would all have deserved to be addressed or at least clarified by the Court in such a complex scenario. However, it must be stressed that the courts only decided on legal aid – not on the substance of the case.

IV. Conclusion. Future Outlooks on Forum Access in Europe

The overview conducted here shows that among European States there is a growing sensitivity to the hurdles that victims of human rights violations may encounter in finding a viable forum for their claims. With a few notable exceptions¹⁸², the current trend seems set towards restrictive interpretations aiming at averting drifts towards the much-feared universal civil jurisdiction. The courts’ major concerns, in this respect, seem related to the risks that an exercise of judicial discretion tending

¹⁷⁶ It remains to be seen whether the courts will take up this rather bold statement.

¹⁷⁷ LG Essen, *supra* note 161 (additionally deeming the case unfounded as to the substance, the defendant not being “a disturber” according to the BGB and due to an insufficient proof of legal causality).

¹⁷⁸ OLG Hamm, *supra* note 152.

¹⁷⁹ The fact that the claimant is acting to prevent a damage that have not yet occurred is not a problem under the Rome II Regulation, which expressly applies also to “non-contractual obligations that are likely to arise” (Art. 2 (2)).

¹⁸⁰ This brings into view a potential problem of distributive application, to the plaintiffs claim, of the laws of different States.

¹⁸¹ Arts. 31 and 32 of the Rome II Regulation.

¹⁸² Essentially limited to the Dutch experience.

towards more flexible and plaintiff-friendly approaches would attract an unmanageable flood of litigation, putting domestic civil justice systems under severe strain.

Recent litigation shows however, that a risk of overflow is more prominent in those countries which have the most appealing system for management of collective claims and funding of litigation. In *Okpabi*,¹⁸³ in particular, an overarching concern was expressed – quite conveniently, one may say, by the defendants – as to the risk of “cynical” and predatory behaviours of law firms that allegedly seek to bring before the English courts claims that would otherwise have no connection whatsoever with that jurisdiction, with the intent only of profiting from Conditional Fee Agreements.¹⁸⁴

These consist in arrangements entered into by claimants and their lawyers pursuant to which the latter agree to provide their legal services on a no-win, no-fee basis but are entitled to charge an “uplift” to their usual rates in the event of success¹⁸⁵. Conversely, provision for payment of a successful defendant's costs, in case a claimant were to lose, is made by what is called After-The-Event (or “ATE”) insurance¹⁸⁶. The availability of arrangements of this kind therefore holds the greatest appeal for claimants with deserving cases but who have no financial means, who are thus empowered to bring proceedings against a defendant without having to fund the litigation costs during the action. At the same time, however, they may foster abusive behaviours by profit-seeking law firms.

It is worth noting that concerns of this kind are shared by the European legislator and will prospectively mould to a considerable extent the physiognomy of the pan-European system of collective redress which is currently under debate.¹⁸⁷ This proposal, whose scope is currently limited to consumer protection, aims at harmonizing an area of procedural law that remains for now highly heterogeneous. At present, the availability of collective procedure remains regulated by the procedural laws of the 28 EU Member States.¹⁸⁸

The proposal endorses a “European model” of class action, “distinctively different from US-style class actions”¹⁸⁹ in that they will not be open to law firms but only to non-profit organizations acting in the general interests. In the Commission’s view, this should avoid the risk of abusive or unmerited litigation. Yet, it is totally unclear which criteria apply to the qualification process of those entities. Lacking European uniformity, it remains to be seen whether this ambitious approach will be successful in its practical application.

A first and, for now, isolated implementation of this European model of representative action can be found in the new General Data Protection Regulation¹⁹⁰ (GDPR), available in relation to infringements¹⁹¹ of the rights conferred by that instrument. As a result, a workable framework for

¹⁸³ *Okpabi v. Royal Dutch Shell* [2017] EWHC (TCC) 89.

¹⁸⁴ *Id.*, paras. 16 and 33.

¹⁸⁵ The uplift is not currently permitted to be in excess of 100%.

¹⁸⁶ These premiums are usually payable by the unsuccessful defendant as part of the costs of the action.

¹⁸⁷ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018)184 final.

¹⁸⁸ CHRISTOPHER HODGES & STEPHAAN VOET, *DELIVERING COLLECTIVE REDRESS* (Hart 2018).

¹⁸⁹ Communication of the Commission on the New Deal for Consumers, COM (2018) 183 final, para. 3:1.

¹⁹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. 2016 (L 119) 1, Art. 80.

¹⁹¹ Within this legal framework, even a bare procedural violation of a statute gives standing to seek a judicial remedy. This is another fundamental difference from the US class action, where, following the Supreme Court ruling in *Spokeo v. Robins* 136

collective redress – including specific rules of jurisdiction which will potentially overcome the inadequacies of the Brussels regime brought to light by the *Schrems II* case¹⁹² – covers *de lege lata* only an extremely limited area of public interest litigation. The prospective extension of this European representative action beyond the field of data protection is indisputably the most anticipated future development of European civil procedure. It remains to be seen whether the EU will effectively bring the envisaged reform beyond the stage of a mere proposal.

578 U. S. ___ (2016), the existence of Article III standing is dependent on the proof of “an injury-in-fact”, *i.e.* an actual or imminent harm which is “sufficiently concrete and particularized”.

¹⁹² Case C-498/16, *Schrems v. Facebook Ireland*, EU:C:2018:37. In this case, brought before the entry into force of the GDPR, the plaintiff – a data protection activist – was arguing *de lege ferenda* in favour of an interpretation of the protective head of jurisdiction for consumer contracts (Arts. 15 and 16 of the Brussels I Regulation, now Arts. 17 and 18 of the Brussels I^{bis} Regulation) which would have fostered, within the existing jurisdictional framework, collective redress for consumers, effective judicial protection for small-value data privacy claims and procedural economy. The claimant was also representing⁶ additional plaintiffs – all allegedly consumers – domiciled in Austria, Germany and India and for whom he claimed a (symbolic) compensation of € 500. He advocated for his right, under Art. 16 of the Brussels I Regulation, to bring the claim in its entirety before the Austrian courts, the place of his domicile. The European Court of Justice ruled, however, that said *forum actoris* is solely available to economically weaker and unsophisticated litigants, who act personally as plaintiffs or defendants, and not for claims which had been assigned to the plaintiff: HESS, THE PRIVATE-PUBLIC DIVIDE, *supra* note 1, para. 64. The new GDPR introduced a head of jurisdiction (Art. 79) tailored upon “data subjects” as a self-standing class of vulnerable plaintiffs, who are now entitled to bring proceedings either in the Member State where the controller or processor has “an establishment” or, alternatively, in the Member State where the data subject has his or her habitual residence. It is nonetheless unclear whether the representative action introduced under Art. 80 of that instrument could be brought in the place of habitual residence (of whom?), or whether the same logic endorsed by *Schrems II* shall apply: see Marta Requejo Isidro, *Max Schrems against Facebook*, 4 MPILUX RES. PAPER SERIES (2018).



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