Tort Law and Human Rights

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Abstract The article explores the relationship between tort law and human rights. It explains the potential inherent in holding corporations liable in tort for human rights violations along the supply chain, such as the 2013 Rana Plaza collapse in Bangladesh. On a theoretical level, it devises a legal framework of tort liability that is optimal from the standpoint of social welfare. Such an optimal liability system would make manufacturers internalise the full cost of production, including harm caused to workers, third parties and the environment. In contrast, the present global liability situation is characterised by legal fragmentation and enforcement deficits. These factors provide the explanation for the large-scale externalisation of production risks we witness today, leading to an inflated global demand. In principle, tort law is well suited to offer a remedy, as the interests protected by human rights and national tort law broadly overlap. Furthermore, the duty of care which is the core requirement for shifting losses to others via tort law is a flexible concept that may even be stretched to accommodate cross-border human rights policies. The new French “*devoir de vigilance*,” or human rights due diligence, as well as the UK Supreme Court’s recent jurisprudence, aim to tap this potential. On the other hand, the article raises doubt in relation to the adverse economic incentives and market shifts if such duties are imposed selectively, i.e. only in some jurisdictions, but not in others. After all, private international law often stands in the way of a global application of national tort law. Finally, alternative mechanisms of enforcement are assessed and examined with a view to their comparative effectiveness. This analysis casts doubt on the usefulness of tort law as a means to further the human rights cause.

Keywords Torts · Delict · Entity principle · Duty of care · Human rights due diligence · Strategic litigation · Choice of law · Level playing field · Supply chain liability · Externalities · Cost internalization · Devoir de vigilance

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1 Introduction

In spite of the developments of Europeanisation and globalisation, tort law is essentially a domestic affair. Most practical cases involve accidents that are connected to only one legal regime, namely the one in force at the place of injury. Traffic accidents, which account for the bulk of tort cases in courts, are a pertinent example. In recent decades, however, the number of cases that include a foreign element, in the sense that more than one jurisdiction is involved, have grown in number. Even many traffic accidents now involve a party from outside the jurisdiction where the accident occurred. Many products that cause harm in one jurisdiction were produced in other jurisdictions, and so on.

The legal rules for dealing with cases involving a “conflict of laws,” where it is not unequivocally clear whether one legal system or another controls, are designed to provide a “level playing field.”¹ These rules seek to ensure that the persons who choose to act in a particular jurisdiction play by the same rules. The idea behind ensuring a level playing field is that the safety standards and rules for proper behaviour must be coordinated in order to provide the benefit aimed for, namely reduced accident costs. For example, if a tourist from England decides to drive his car through France while observing the rules of the road of his home jurisdiction, such as driving on the left-hand side of the road, disaster is nearly certain. The conflict-of-law rules providing that the tort law of France applies, and that in any event the safety standards at the place of injury control, ensure that English tourists and French motorists coordinate their behaviour in the interest of safety.² Where everybody drives on the same side of the road, the number of accidents is minimised, at least in comparison to any other system of assigning lanes to drivers.

2 Imagine: A Global Legal System

2.1 *Legal Unity, Economic Diversity*

Imagine that all the jurisdictions in the world operated according to the same system of tort law or, alternatively, that the whole world was one single jurisdiction. In this scenario, the courts in Pakistan and Bangladesh would apply the same legal rules and safety standards as the courts in the United Kingdom, France, Germany, or Canada. While the prospect that all countries on the planet merge into one, or that they at least apply identical liability rules, is extravagant already, now stretch your imagination even further to include the enforcement stage. Let us assume not only that the rules

¹Magnus (2019), para 2; Wagner (2008), pp. 1ff.

²Cf. Article 4(1), 17 Regulation (EC) 864/2007 on the law applicable to non-contractual obligations, OJ 2007 L 199/40.

are identical across the globe, but also the frequency of suit, the adequacy of the procedural framework, and the quality of the judicial system.

In such a uniform world, the specific problem addressed by human rights litigation through tort law would not and could not occur. If the systems of tort law, or non-contractual liability more broadly, were identical everywhere and enforcement equally effective, then there would be no disparity between jurisdictions. The “law on the books” and the “law in action” would be the same, regardless of location. In terms of safety levels and, correspondingly, exposure to liability, it would make no difference whether someone acted in Paris, Berlin, Toronto, Karachi or Dhaka. The expected costs of liability would be the same in each of these places.

How would firms that sell goods to consumers behave in such a uniform world? One might expect that firms would always produce “at home” in such a world, in close proximity to their customers. In this scenario, economies would likely resemble those of the mercantilist age, when every nation operated its own closed-shop economy. But this would be a mistake. While expected liability costs are certainly a factor in commercial enterprises’ balance sheets, they are not the only factor, let alone the most relevant. Other major factors include raw material costs, which may differ depending on location, and labour costs, which may also vary across jurisdictions, reflecting local differences in supply and demand.

Attempting to eliminate these differences in production factor costs, together with any differences in tort law regimes and their enforcement, would be wrong and wasteful. Economic globalisation has generated huge benefits to the world population in the form of more and better goods and services available at lower prices, largely by expanding the benefits derived from the division of labour to another level. If people in Bangladesh are, on average, more skilled in assembling electronic appliances than people in Germany, then the people in both jurisdictions benefit from an economic system that lets the Bangladeshis run the electronics business, while the Germans focus on other activities in which they enjoy a comparative advantage. In a similar vein, people living in the desert areas of the Middle East and North Africa might enjoy a comparative advantage in the renewable energy sector, simply because there is so much solar power available for collection and transformation into electricity. In short, division of labour is a good thing and would continue to flourish even if human rights standards and their enforcement were identical across the globe.

This thought experiment of a global tort law regime provides a useful backdrop for thinking about the problem of human rights violations. If there were a uniform tort law, applicable and binding around the globe, the scope of liability would be identical across regions and nations. However, diversity and division of labour would persist, as there would still be regional differences in the availability and cost of natural resources as well as talented and skilled labour. Unlike today’s reality, tort law would simply be taken out of the equation that defines global competition and economic development.

2.2 *The Tort Law Problems of Human Rights Violations*

Imagining a world with a uniform tort law raises the question as to the normative underpinnings and principles of such a global regime. More specifically, what uniform rules would govern the human rights violations currently discussed in the present world of legal fragmentation? For this purpose, it is not necessary to develop a rich and nuanced regime of non-contractual liability for any kind of claim and fact pattern. Rather, the thought experiment shall focus on two paradigmatic scenarios for the current discussion on tort law and human rights, both built on widely publicised incidents. One involves the 2013 collapse of a garment factory called Rana Plaza in Dhaka, Bangladesh, which killed 1134 and injured around 2500 of the factory's mostly female workers.³ As it turned out, the garment factory's owner ignored cracks that had appeared throughout the building and ordered the workers back in before the building collapsed. This case represents a paradigmatic fact pattern characterised by the following features: (1) the victims of the incident are employees who suffered death or personal injuries; (2) the victims' direct employer is a supplier operating in a jurisdiction with poor standards of occupational safety and/or with poor enforcement of these standards; (3) the ultimate buyer of the goods manufactured by the direct employer is a business that sells clothes or other consumer goods under a well-known Western brand; (4) the ultimate buyer is domiciled and sells the goods in a jurisdiction with comparatively high occupational safety standards and with reasonable enforcement of these standards.

The second representative scenario involves injury not to workers, but to third parties, where harm is caused through contamination or deprivation of natural resources. A prominent example of this scenario is the oil contamination of the Niger Delta region in southern Nigeria, involving the Dutch/UK company Royal Dutch Shell and a local subsidiary thereof.⁴ From a legal perspective, the crucial elements are: (1) the victims are located in a jurisdiction with poor environmental standards, little or no enforcement of the existing standards, and a weak and/or corrupt government; (2) there is no pre-injury relationship of a contractual or quasi-contractual nature between the victims and the party that allegedly bears responsibility for the harm; (3) part of the harm is caused to private interests, such as health and property, but a major fraction of the harm is caused to public resources, such as soil, water, and the environment at large; (4) the party that, at least initially, bears responsibility for the damage is a local subsidiary of a multinational group of companies; (5) the head of the corporate group is domiciled in a Western jurisdiction

³ILO, The Rana Plaza incident and its aftermath, www.ilo.org/global/topics/geip/WCMS_614394/lang%2D%2Den/index.htm (last accessed 11 June 2020), see also www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html (last accessed 11 June 2020), www.bbc.com/news/world-asia-22476774 (last accessed 11 June 2020).

⁴Cf. Amnesty International (2017), www.amnesty.at/media/2086/a-criminal-enterprise.pdf (last accessed 11 June 2020).

with a comparatively well-functioning government, comparatively high standards of environmental protection, and reasonable enforcement.

A common feature of both these scenarios is the difference in standards between two jurisdictions. The jurisdiction where the damage occurs is characterised by modest or outrightly insufficient safety standards and enforcement, while another jurisdiction implicated in the incident scores high on these same counts. In both cases, the jurisdictions with the higher standards are similarly situated in countries that import goods from the jurisdictions with the lower standards. A second common feature is the existence of a local entity, usually a corporation, that is domiciled in the low-standard country and which seems to be responsible for the damage as the direct, immediate tortfeasor. In the Bangladesh case, this is the owner and operator of the Rana Plaza garment factory, while in the Nigeria case, it is the Shell Petroleum Development Company of Nigeria Ltd. Both cases involve another party domiciled in a Western country, that is only indirectly connected to the incident, namely major clothing brands like Benetton, Prada, Gucci, Versace, Primark and Walmart in the Rana Plaza case, and Royal Dutch Shell PLC in the Niger Delta case.

2.3 *The Optimal Legal Solution*

If the world was one jurisdiction, what would be the optimal solution to each of the aforementioned cases? This question cannot be answered descriptively, as the law of non-contractual liability differs from country to country. Even comparative legal scholarship cannot provide the answer, as it lacks a normative yardstick to allow the characterisation of one legal system as superior to another.⁵ A normative theory is needed to identify the legal system, or rather, the solution, that works best. One such normative theory is the economic approach to law, which aims to maximise society's welfare through an optimal allocation of resources.⁶ Applied to the law of non-contractual liability, economic analysis focuses on the incentives of the various actors, namely potential injurers and victims. The goal is to maximise the net surplus from any given activity, meaning that the gains accruing to the potential injurer must outweigh the costs of the respective activity. The costs of any given activity, of course, include the costs of harm caused to third parties. Other than the activity's direct cost, harm to third parties does not figure into the calculus of potential tortfeasors.

Tort law is an instrument to "internalise" costs of an activity that otherwise would be left externalised. The purpose of cost internalisation is not to sanction the activity in question in the sense of punishing the wrongdoer or to suppress the harmful activity altogether, but rather to incentivise potential injurers to balance the costs of precautions against the costs of harm, and against the benefits that the respective

⁵For a comparison of national tort law systems cf. van Dam (2013); Wagner (2019), pp. 994ff.

⁶Shavell (2004), pp. 177ff.

activity generates. From an economic point of view, injurers should take precautions and increase the costs of care until they equal the marginal benefit in terms of an associated decrease in the costs of accidents. If optimal care is ensured, the potential injurer should balance the respective activity's total costs, meaning its direct costs, the costs of care, and the costs of the residual harm, i.e. harm that is caused even if optimal care is taken, against the benefits generated by the activity in question. The potential injurer should engage only in activities to the degree where the benefits are at least equal to total costs, including the costs of harm.

These principles apply with particular force to the production and distribution of goods and services.⁷ Where product markets are an issue, demand and supply depend on price. The lower the price of a given product, the higher the demand, and the more of the respective good is supplied, that is, manufactured and distributed. The mechanism of supply and demand with price as the crucial variable determining the scale of production works optimally only if the price is set correctly. The price of a product or service must reflect the total costs of production. If some cost items are left out of the equation, the price set for a particular product will be "too low," and consequently, demand will be "too high." The result is that "too much" of the good is produced.

The costs imposed on others in the course of production face a particular risk of being left off manufacturers' balance sheets. The reason for this is simple: Typically, market forces significantly influence how much a manufacturer pays for raw materials and other inputs. No such market forces are at work when it comes to avoiding external harm. When a person other than the manufacturer sustains damage, this loss rests with the victim. The potential victims who stand to suffer from the manufacturing process may be divided into the manufacturer's employees, on the one hand, and external third parties, on the other. Harm to both groups of victims must enter the manufacturer's balance sheet to make him or her face the full social costs of production. Thus, the maxim propagated by an eminent observer of US tort law with a view to workplace injuries makes good sense: "the cost of the production should bear the blood of the workman."⁸ The cost of production should also bear the blood of other victims who are not employed by the manufacturer, but external to the manufacturing process and business. Even harm to environmental resources that cannot be captured under the rubric of private property or other private interests should be considered and monetised to avoid their inefficient overuse.

In theory, tort law provides a mechanism to reallocate these costs to the manufacturer, but in reality, this depends on the shape and contents of the applicable tort law rules. More importantly, it also depends on a functioning system of law enforcement, i.e. courts that aim to faithfully apply the law and that are easily accessible to claimants, including potential victims. Finally, where the tortfeasor is unwilling to pay up voluntarily, the victims must be able to credibly threaten the enforcement of a judgment in their favour. This simple and rudimentary sketch of the

⁷Shavell (2004), pp. 207ff.

⁸Keeton et al. (1984), p. 573; cf. Wagner (2012), p. 15.

prerequisites necessary for tort law's proper operation provides an idea of the many pitfalls and intricacies of tort law in practice. Even in well-functioning societies, potential tortfeasors have reasons to discount the costs of harm inflicted on third parties, which, in turn, weakens their incentives to invest in safety measures in order to avoid such harm from occurring.⁹ Both effects undermine the functioning of tort law as a means of cost internalisation and depress prices beyond efficient levels. The higher the degree of judicial and other governmental institutions' malfunctioning in a particular jurisdiction, the more serious these consequences will be.

Ignoring the costs of harm caused to third parties is always bad, as the potential injurer has no reason to take precautions against such harm, even if their costs are lower than the damage they would help to avoid. With a view to harm caused in the course of producing goods and services, the additional problem of excessive activity levels is of particular importance. The nexus between the costs of production, demand, and the volume of supply, mediated through the price mechanism, is the reason why the manufacturer's failure to consider all cost items when setting the price for their products results in excessive levels of production and, therefore, excessive levels of harm. If some fraction of the "real" costs of production are ignored, the adverse effects just described ensue, namely, the levels of production and consumption are too high.

3 The Real World: Fragmentation of Legal Systems, Divergent Standards

3.1 Legal Fragmentation

In reality, the world is not a single jurisdiction, but a patchwork of many jurisdictions. The United Nations has close to 200 members, and some member states run federal systems with different tort law regimes. Thus, the number of distinct systems of tort law exceeds 200. Tort law's fragmentation means that a person or legal entity may be liable to redress a particular harm under the tort law rules of one jurisdiction, but not under the rules of another. In reality, such diversity on legal grounds may be rare, as the various tort law systems tend to converge, at least when it comes to the protection of life, bodily integrity, health, and personal property. However, enforcement systems, meaning the quality and accessibility of civil justice systems, vary greatly across jurisdictions. This explains why courts located in well-functioning and comparatively rich countries attract human rights cases that, at least arguably, originate in jurisdictions which are poor and unable to offer high-quality enforcement of legal entitlements.

When a court is confronted with a claim based on a human rights violation that occurred elsewhere, the first step is to identify the applicable law. In doing so, the

⁹Polinsky and Shavell (1998), pp. 887ff.

court must consult the private international law of its jurisdiction. International law, in general, is based on the principle of non-interference, meaning that one sovereign must not interfere in the internal affairs of another.¹⁰ In private international law, this principle generates the assumption of equality of legal systems. Private international law does not choose between legal systems based on their inherent merit or functionality. Rather, it assumes that one legal system is as good as another. As a consequence, private international law does not aim to identify the “better law,” but rather to identify the “spatially best solution” by choosing the law that is most closely connected to the facts of the case.¹¹ Whether the legal system that actually has the geographically closest connection to the case provides a solution that is particularly good or bad is irrelevant.¹²

Under this theory of spatial connectedness, it is rather obvious that the legal system of the jurisdiction that imports products manufactured in far-away jurisdictions is not the one that should govern cases involving human rights violations committed in the latter jurisdictions, even if the latter jurisdictions have lower standards and less or no law enforcement. If a garment factory in Bangladesh collapses, or burns down, all the elements of the tort are located in Bangladesh. The harm was sustained there and the behaviour that caused the harm occurred there. In the Rana Plaza case, the workers were ordered back into the building even after cracks in the building’s structure had become visible. The incriminating order was issued and received in Bangladesh, the building was located there, and the injuries to life, health, bodily integrity, and private property were sustained within Bangladesh’s jurisdiction.

In Europe, the view that the law of the country of production should govern personal injuries and damage to property caused in the course of production is confirmed by Regulation (EC) No. 865/2007 on the law applicable to non-contractual obligations, the so-called Rome II Regulation. The general rule for the choice of law set out in Article 4(1) of the Rome II Regulation provides that “the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs . . . irrespective of the country or countries in which the indirect consequences of that event occur.” Thus, damage claims for personal injuries are governed by the law in force in the jurisdiction where the injury was sustained. In the cases of interest here, this means that the law of the country of production, where the human rights violation occurred, controls. The law of the country to which the goods were ultimately shipped is irrelevant. Even more remote from the choice-of-law analysis is the jurisdiction where the “lead firm” of the supply chain has its headquarters. Thus, if Versace SpA, with its headquarters in Milan, Italy, procures clothes that are produced in a garment factory in Dhaka, Bangladesh, and an accident occurs in this garment factory, then Italian law has nothing to say in this matter. The same is true of French law, assuming it was the

¹⁰Shaw (2014), p. 832; Shearer (1994), pp. 90ff.

¹¹Cf. Hay (2018), pp. 48ff.

¹²Kegel (1964), pp. 184f.

country of destination to which the clothes were shipped. The law that is geographically closest to the accident is the law of Bangladesh.

3.2 *Broad Externalisation*

The fragmentation of the rules on extra-contractual liability, together with the differences in enforcement, provide the explanation for the problem that human rights litigation was designed to address. The existing differences between jurisdictions allow the costs of human rights violations to be externalised, thus generating the adverse effects described above.¹³ In short, manufacturers operating in the countries of production omit the costs of harm sustained by employees and third parties in the countries of production in their overall corporate calculus, diminishing incentives to guard against harm. As a consequence, the costs of production in their calculus are “too low” in the sense that they do not reflect the true cost to society for manufacturing the item in question. Hence, the prices quoted for the product in question are also “too low” and, in turn, demand for such products is “too high.”

The textile market is an example in point, if one assumes that the incident at Rana Plaza is representative of the current set-up of the garment industry. Publicly available information suggests that the building did not comply with basic safety standards and that the owners of the garment factories operating inside the building ignored their workers’ welfare. As no safety measures were taken, the costs associated with such measures did not impact the price of the clothes manufactured at the site. The same is true for the cost of harm incurred by the victims, but only if one assumes that Bangladesh does not offer an effective enforcement mechanism. From this anecdotal evidence, one may conclude that the price of textiles sold in Western markets is not only low, but too low. The normative yardstick against which to measure reality is the hypothetical world in which the price of a fashion item includes the full cost of production, including the costs imposed on workers, third parties, and the environment.

When clothes like t-shirts cost less than 10 dollars or euros, demand often skyrockets in rich countries, where average teenagers with no income can buy large amounts of clothing from the allowance they receive from their parents. Popular brands offering cheap clothes, such as Primark and H&M, put out several product lines per season and dozens of product lines per year. Even without further econometric study, it seems safe to assume that textile prices are artificially low. Demonstrating this, between 1982 and 2020, the US Consumer Price Index (CPI)

¹³Supra, II. 3.

increased by 158.82%,¹⁴ while households' real disposable income rose by 294%.¹⁵ For apparel minus footwear, the CPI rose by a meagre 15.88% during the same period,¹⁶ lagging dramatically behind both rising incomes and the pricing of other consumer goods. This data shows that, with the migration of the garment industry to Asia, relative prices for clothes have drastically decreased.

4 An Easy Fix? Global Application of National Tort Law

4.1 *Globalising National Law*

An easy fix to the problem of externalisation just described would be the global application of national tort law, together with making the courts in the jurisdictions with well-functioning civil justice systems available to claimants from elsewhere. Both measures would ensure the internalisation of external costs and thus create incentives to take care, compensate victims, and lead to realistic pricing of goods and services. To the extent that a given national tort law system meets these goals, why not opt for its extraterritorial application? Given that tort law pursues the goal of cost internalisation, and further assuming that the legal systems in the countries of production fail to get the job done, it seems to follow easily that the legal and judicial systems of another jurisdiction should pick up the slack and provide the enforcement mechanism lacking abroad.

4.2 *The Overlap Between Tort Law and Human Rights*

Tort law seems well-equipped to meet this challenge. After all, the interests protected by modern systems of tort law are the same interests protected by human rights.¹⁷ The reason for this broad overlap is not that the private law of torts copied the protected interests from human rights law, but rather the other way around. Historically, the private law of torts offered individuals protection for their basic interests in relation to life, health, bodily integrity, freedom of movement, property, etc., long before human rights law came along and “discovered” these same basic interests for constitutional and international law. While it is true that some forms of

¹⁴Federal Reserve Bank of St. Louis, Economic Research, www.fred.stlouisfed.org/series/CPIAUCSL#0 (last accessed 2 March 2020).

¹⁵Federal Reserve Bank of St. Louis, Economic Research, www.fred.stlouisfed.org/series/DSPIC96 (last accessed 2 March 2020).

¹⁶Federal Reserve Bank of St. Louis, Economic Research, www.fred.stlouisfed.org/series/CPIAUCSL#0 (last accessed 2 March 2020).

¹⁷Van Dam (2011), p. 243; Wagner (2016), pp. 752ff.

human rights violations, such as torture and slavery, constitute exceptionally reprehensible forms of personal injury, they nonetheless fall within the protective parameters of traditional torts.¹⁸ The basic innovation ushered in by human rights law does not lie in expanding the list of protected interests, but in redirecting the protective force of these interests against the sovereign, i.e. the state. It is not without irony that the rhetoric of “tort law and human rights” implies that human rights are new to liability systems.

Another feature of modern tort law amenable to human rights causes is its flexibility. In a long historic development from ancient Roman law to the theoretical cathedrals of natural law and enlightenment, all the way to the challenges of industrialisation, modern liability systems have come to accept a “general clause” of fault-based liability that does not require intentional wrongdoing, but settles with negligence.¹⁹ While aspects of negligence liability are heavily contested between European legal systems and others around the world, particularly with a view to pure financial interests, its core is well established and undisputed. The subjective rights to life, health, bodily integrity, and personal property listed above, which are also the concern of human rights law, are protected against negligent infringements across all legal jurisdictions.²⁰ The core of a negligence analysis is the violation of a duty of care. The tortfeasor is liable if he or she did not take the safety measures required in the specific situation *ex ante*, at the stage when the decision to take one particular course of action over another was made.

Most tort cases that occupy the dockets of courts around the world centre on the duty of care issue, which can be split up into several sub-issues. A threshold requirement is that the defendant was subject to a duty of care at all, i.e. that the law expected the defendant to avert harm to the plaintiff’s interests. The second sub-issue concerns the contents of the duty of care, asking what the defendant should have done or not done in order to comply with the duty of care. Finally, it must be established that the defendant actually breached the duty of care by failing to live up to required safety standards. Hence, the concept of duty of care is potentially broad and flexible enough to ensure adequate protection of human rights.²¹ In the context of globalised business practices, a duty of care could be imposed on domestic business enterprises with a view to production abroad, with clearly defined safety measures to be taken in order to comply with such a duty. In this sense, the concept of the duty of care seems to offer a readily available key for developing tort law into an effective tool of human rights policy in the international arena.

¹⁸Cf. the dissent in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, www.canlii.ca/tj5k5j (last accessed 11 June 2020), para. 216: “The point is this: Since all torture is battery (or intentional infliction of emotional distress), albeit a particularly severe form thereof, it does not need to be recognized as a new tort. Our law, as is, furnishes an appropriate cause of action.”

¹⁹Zimmermann (1990), pp. 1031ff; Jansen (2003), pp. 271ff; Wagner (2003), pp. 213ff.

²⁰Wagner (2019), pp. 1004ff; Van Dam (2013), pp. 167ff.

²¹Van Dam (2011), pp. 244ff.

Matters are not so easy, however. As will be seen, the large overlap between tort law and human rights carries advantages, but also disadvantages. In essence, tort law's traditional focus on protecting the same interests that are now relabelled as human rights makes it more rather than less difficult to devise tailor-made solutions for the paradigmatic scenarios described above with regards to accountability of subsidiaries or suppliers in far-away jurisdictions for human rights violations. While the duty of care concept is certainly flexible, it has limitations that are not so easy to overcome with a view to these specific cases. The real challenge for tort law with respect to human rights violations caused by third parties in distant jurisdictions is not the protection of basic human interests, but the stretching of duties and liabilities across the borders separating different corporate entities.

4.3 *Pathways Towards Global Application*

Most systems for dealing with conflict of laws do include pathways towards subjecting domestic firms to domestic liability rules, even with a view to their offshore activities. Take the EU's Rome II Regulation on the application of mandatory provisions of forum law as an example. Article 4(3) of the Rome II Regulation allows the court to avoid the law of the place of injury and to apply the law of another jurisdiction that is manifestly more closely connected with the tort or delict that is the subject matter of the complaint. Hence, one can argue that the law of the jurisdiction where the lead firm of the supply chain has its seat is more closely connected. Another way to evade the application of the *lex loci damni* principle is Article 16 of the Rome II Regulation, which authorises the court to override the law designated by Article 4 of the Rome II Regulation by applying mandatory provisions of *lex fori*. For Article 16 of the Rome II Regulation to apply, one must argue that the tort law at the domicile of the supply chain leader is mandatory in nature, and that the policy decision behind it is strong enough to warrant international application. This is similar to the approach taken by the majority of the Canadian Supreme Court in the *Nevsun v. Araya* case, which classified human rights as "peremptory norms," taking priority over the national law otherwise applicable to the case at hand.²²

4.4 *Discriminatory Liability and the Virtues of Restraint*

Whether the pathways outlined above are feasible or not remains a matter for discussion in legal circles and will ultimately be decided by the courts, in the European theatre by the European Court of Justice. However, regardless of this

²²*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, www.canlii.ca/t/j5k5j (last accessed 11 June 2020), para. 83ff.

discussion's outcome, the principle of *lex loci damni*, enshrined in Article 4(1) of the Rome II Regulation, will continue to carry weight. From the perspective of international law, it safeguards the sovereignty of the states in which production occurs. From a traditional international law viewpoint, based on the principle of equality of nations, Bangladesh and other countries that manufacture large amounts of consumer goods for markets in the Northern Hemisphere have the right to decide for themselves whether and how to accept and enforce standards of, for example, workplace safety and environmental protection. Other states lack the authority and the legitimacy to impose their standards upon activities that take place in the territory of their peers.

Another concern that points in the same direction of restraint in applying domestic legal standards to activities carried out in other jurisdictions is the fairness of competition, or in other words, the idea of a level playing field for market participants in the economy of the supply chain leader, i.e. in the country that imports the goods or is host to the parent corporation of a multinational group with a subsidiary in the country of production. If only certain jurisdictions recognise and enforce the extraterritorial application of tort law, then corporations domiciled within these jurisdictions that export its tort law face a competitive disadvantage compared to those domiciled elsewhere. In France, for example, lawmakers have imposed a special duty of care on French firms, i.e. on large corporations whose seat is located in France, in the name of protecting human rights.²³ Corporations domiciled in France are now subject to a duty to ensure that human rights are respected elsewhere, i.e. in the countries where their subsidiaries and trading partners operate. Other firms headquartered outside of France are not subject to the same duties. However, the French market remains open to goods and services offered by foreign firms. As a consequence, some participants in the French market are subject to the new corporate "*devoir de vigilance*," while others are not. Assuming, as one must, that raising standards in the countries of origin with a view to workplace safety, environmental, and other concerns is not costless, French firms are burdened with additional costs, while their competitors are free to save these costs, thus distorting competition between them. If a French firm is equally as efficient as a Chinese competitor, for example, the imposition of liability only on the French firm will increase the prices it must charge for its products, thus shifting demand away from the French firm and into the arms of its Chinese competitor. Assuming that the Chinese corporation has access to the French products' markets, its sales will increase, and the revenue of the French firm will decrease. The decline of firms subject to human rights due diligence will not be offset by any benefit in terms of deterrence of violations, and will neither improve production nor compensation of victims.²⁴ Rather, this will only cause a

²³Article L 225-102-4 (1) Code de commerce; cf. Cossart et al. (2017), p. 317; Brabant and Savourey (2017), p. 90; Nasse (2019), pp. 789f. More precisely, the law applies to corporations that have been incorporated or registered in France for at least two consecutive fiscal years and employ 5000 persons in France, or 10,000 people worldwide, respectively.

²⁴Sykes (2012), pp. 2194f.

shift of demand to the detriment of firms that are domiciled in the jurisdiction imposing strict standards of human rights diligence and serve as chain leaders.

A third problem caused by the unilateral imposition of a duty of care is based on the functions of tort law. In international scholarship, there is broad consensus that tort law not only aims to compensate for damage already incurred, but also aims to avoid harm in the future.²⁵ In other words, tort law aims to deter wrongful behaviour for the sake of protecting legal entitlements, of course including human rights. The deterrence function of the law requires looking not only at the party that may cause the harm, but also at the victim who stands to suffer. In a causal sense, harmful events are attributable to both parties, not only the injurer: without a victim, there can be no harm. Looking beyond causation, most accidents are bilateral in nature in the sense that both the injurer and the victim were in a position to do something to prevent the harm from occurring. In such bilateral cases, tort law must regulate the behaviour of, or rather address the incentives faced by, both parties. More precisely, tort law must coordinate the behaviour of potential injurers and victims in the interest of safety.

Obviously, the coordination of both parties' behaviour is accomplished if all the actors operating in a certain spatial area are subject to the same standards of behaviour. This is exactly what Article 4(1) of the Rome II Regulation aims for in embracing the principle of *lex loci damni*. Consequently, the deterrence function of tort law suffers if the persons that interact in a given spatial area are not subject to the same standards, as is the case in most jurisdictions where production takes place and from which goods are exported to other countries. If some destination jurisdictions impose tort-based duties of care on firms domiciled there, while others do not, firms and workers in the countries of origin are exposed to divergent legal standards. While this concern is very strong in theory, it may not weigh heavily in the present context, as human rights law seems to aim for minimum protection, a standard that can and should be met anywhere. Matters may look differently when labour law or environmental protection standards enter the picture.

The problems described above counsel against the global application of national tort law, and also against subjecting firms at the top of global supply chains to duties of care and associated liabilities in their domestic jurisdictions, while sparing other firms domiciled elsewhere. In essence, this approach distorts competition in national product markets by only burdening domestic firms with the additional costs of taking care. One remedy against this distortion is to eschew imposing duties of care on domestic enterprises that would require the protection of human rights abroad. Unfortunately, this solution would make it impossible to advance human rights with the help of national tort law.

²⁵ As to European liability systems: Koziol (2015), pp. 24ff, 115ff, 186ff, 277ff and 379ff; as to US law: Dobbs et al. (2016), pp. 15ff; Geistfeld (2012), p. 383; Geistfeld (2003), pp. 585ff; Goldberg (2003), pp. 513ff. Cf. also Abraham (2017), pp. 16ff.

5 Production Liability as an Alternative Regime of Choice of Law

An alternative to the application of Article 16 of the Rome II Regulation or the peremptory-norms approach of the Canadian Supreme Court turns to product liability for inspiration. This approach marries the goal of improving human rights protection in countries of production and along supply chains to the principles of equal treatment and fair competition. The liability regime for products developed after the Second World War attributes responsibility for the output of the production process, including all inputs procured from other manufacturers along multiple supply chains, to the “ultimate” manufacturer, i.e. the one who markets the product to consumers or other businesses. The ultimate manufacturer thus plays a pivotal role in product liability, bearing full responsibility not only for their own inputs and design choices, but for the product as a whole. This principle, firmly rooted in the liability regime for products, focussing on the *outputs* of the production process, could be transferred, or rather expanded, to apply to the production process itself. The ultimate manufacturer at the top of a supply chain, the “chain leader,” would then bear responsibility not only for the processes they organise and control, but for the production process as a whole, including component parts and other inputs procured from third-party suppliers.

Admittedly, the assimilation of human rights liability into product liability does not cure the distortion of the competitive process described above. However, it does provide a clue to a remedy by unlocking the conflict of laws regime for human rights liability. While the rules for conflict of laws in product liability claims differ from jurisdiction to jurisdiction, they have one feature in common: The law applicable to product liability claims is never restricted to products manufactured by firms that are domiciled in the particular jurisdiction, but rather applies to all products sold in a particular market. Take the EU’s Rome II Regulation as an example. The relevant provision is Article 5, which supplies an elaborate list of connecting factors that are structured like a “ladder,” in that the designation of a legal system by a prong at the top of the hierarchy forecloses steps further down in order to rely on the connecting factors defined on lower prongs. Looking through the complicated array of connecting factors reveals, however, that the general principle behind Article 5 of the Rome II Regulation is simple: All products sold in the market of a particular jurisdiction shall be subject to the law of that jurisdiction.²⁶

The product liability version of the equal treatment principle is enshrined in the provision, included in all three variants of Article 5(1) of the Rome II Regulation, that the product must have been marketed within the jurisdiction in question. Only in the rarest of cases, in which the manufacturer did not market the product in any of the jurisdictions listed in Article 5(1) (a)–(c) of the Rome II Regulation, does the law of

²⁶Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 40, Recital 20; Wagner (2008), pp. 6f; Schmid and Pinkel (2015), para. 28; Machnikowski (2019), para. 4.

the habitual residence of the manufacturer apply. The current proposals for human rights liability along supply chains follow the opposite principle of holding manufacturers liable depending upon their seat in one jurisdiction or another. Turning this approach around would lead to a conflict-of-laws rule that imposes liability for human rights violations along the supply chain on any manufacturer who puts a product into circulation within a particular market jurisdiction. In essence, liability for harm caused in the course of production (“production liability”) would follow the same principle as liability for harm caused by the outcome of the production process (“product liability”).²⁷

6 Duties of Care Across the Supply Chain

6.1 *The Entity Limitation*

A second major roadblock for a vigorous extraterritorial application of tort law in the name of protecting human rights is almost invisible from the black letter law. Even if it is rarely said explicitly, the duties of care imposed by tort law remain confined to the person or entity concerned and do not extend to the behaviour of other persons or entities. This is the tort law version of the so-called “entity principle” in corporate law.²⁸ Corporate law allows companies to limit liability for contractual obligations, but also for tort-based debts, to the corporate fund. This protects shareholders and managers who are not personally liable for harm caused by the respective corporation. Even before this concept of limited liability developed in corporate law, however, the law of torts limited the liability of actors to their own assets and restricted each actor’s duty of care to their own sphere. In general, every person is responsible for their own actions and the things that they control. Rules on vicarious liability, which attribute the wrongful behaviour of employees (traditionally servants) to their employers (traditionally their masters), are the exception to the rule. Vicarious liability means not only that an employer is liable for the torts of their employee, but also that no one bears liability for the torts of someone else who is not their employee.

The high degree of overlap between the scope of protection accorded by tort law and human rights stands in the way of a sweeping solution like attributing wrongs committed by entities within the supply chain to the chain leader. If the owner of a premium clothing brand were liable for harm caused by a supplier in Bangladesh who operates a garment factory there, the same would apply to a supermarket operator and their domestic suppliers of foodstuffs. In effect, everybody could be liable for the harm caused by others with whom they interacted. This outcome is

²⁷As to this terminology cf. Bagchi (2019), p. 2501.

²⁸Easterbrook and Fischel (1991), pp. 41ff; cf. also Hansmann and Squire (2018), pp. 251ff.

simply untenable as it would destroy the boundaries between different persons and legal entities, which are crucial for an efficient allocation of responsibilities.²⁹

Human rights advocates have pointed out that the rules on vicarious liability are not cast in stone, suggesting that it is conceivable to classify a business enterprise incorporated in one jurisdiction as the servant of another corporation with a seat elsewhere. Unfortunately, such a reinterpretation of the traditional rules on vicarious liability could not be confined to human rights violations but would affect tort law as a whole. Moreover, it is doubtful whether it makes sense to classify corporations as servants of another corporation for purposes of holding the latter liable for wrongful behaviour committed by the former. Such a move could easily develop into a general liability of parent companies for torts committed by their subsidiaries. In other words, it threatens to introduce a group-wide liability of parent companies as heads of corporate groups. Traditional doctrines of company law that allow for a piercing of the corporate veil under certain narrowly defined conditions would be pushed aside and rendered meaningless, at least for claims based on tort. However, large segments of the legal system, such as contract law, insolvency law and tax law, as well as the financing of corporations through debt, secured or unsecured, and equity, are built on the entity principle, i.e. on the proposition that different corporations form different legal entities, with each discrete entity being responsible for its own actions and omissions, assets and liabilities. Tort law respects and affirms this structure by addressing duties of care to discrete legal entities, instead of applying them wholesale to corporate groups. This structure cannot be pushed aside for the sole purpose of creating a cause of action for offshore human rights violations.

6.2 *Human Rights Due Diligence as an Intermediate Solution*

The framers of the UN Guiding Principles on Business and Human Rights acknowledged these difficulties, at least implicitly, by promulgating a duty of care—labelled human rights due diligence—of the firm serving as chain leader regarding the behaviour of every link in the supply chain.³⁰ This duty is not limited to relationships between parent companies and subsidiaries, but also extends to stand-alone suppliers. While the imposition of a duty of care creates a serious risk of liability for the parent company or chain leader, respectively, it stops short of attributing the actions and omissions of subsidiaries to the parent company. France has adopted the approach of the UN Guiding Principles and translated the duty to take care against human rights violations into a *devoir de vigilance* imposed on large business corporations, provided that their seat is in France.³¹

²⁹Wagner (2016), pp. 757ff.

³⁰UN, Guiding Principles on Business and Human Rights, 2011, Article 15 (b), Article 17.

³¹Article L 225-102-4 (1) Code de commerce, cf. Cossart et al. (2017), p. 317; Brabant and Savourey (2017), p. 90; Nasse (2019), p. 789f.

In the same vein, the UK Supreme Court, in its preliminary judgment in the *Vedanta v. Lungowe* case, clearly distinguished between vicarious liability of parent companies for the torts of their subsidiaries, and liability of a parent company for its own negligence.³² Liability in negligence requires the breach of the duty of care. The crucial question thus becomes whether the parent company has a duty to prevent careless behaviour on the part of its subsidiary. The general duty of care, designed to protect others from harm to the extent that this is feasible with the help of efficient safety measures, is flexible enough to answer this question in the affirmative. The UK Supreme Court even refused to acknowledge the significance of stretching the duty of care across corporate boundaries. In the eyes of the judges, the tort of negligence was broad enough to allow for the development of a new niche, namely the responsibility of parent companies for the harmful behaviour of their subsidiaries, provided that the parent breached a duty of human rights due diligence incumbent on himself.³³ In doing so, the court placed parent liability for subsidiaries on the same plane as the liability of public authorities for the acts of human agents, as developed in the case of *Dorset Yacht v. Home Office*.³⁴

The UK Supreme Court thus downplayed the innovative force of tort-based duties of companies at the top of corporate groups to control their subsidiaries' behaviour. While the conceptual argument that the duty of care is broad and flexible enough to accommodate such an extension is well taken, there is no point in denying the normative weight of such a move. The imposition of a duty of care that cuts across corporate boundaries and reaches businesses that are incorporated as separate legal entities eats away at the entity principle that is not only the basis of corporate law, but also of the law of torts. While the group-wide duty of care still honours the separateness of corporate entities, it creates potential liability of one corporate entity for the acts and omissions of another one. This innovation should not be belittled. The departure from the entity principle of corporate law as well as tort law is particularly striking if the duty of care is triggered by and attached to activities of the parent company or its agents. Notably, in its *Vedanta* decision, the UK Supreme Court went down this route and based the duty of care on a "sufficient level of intervention" of the parent company into the conduct of the subsidiary, together with "published materials" of the parent company in which it assumed responsibility for diligent behaviour of its subsidiaries.³⁵

This interpretation of human rights due diligence seems to create highly undesirable incentives. If a parent company's responsibility for harm caused by a subsidiary is contingent on the parent issuing guidelines for diligent behaviour and taking measures to ensure compliance on the part of the subsidiary, then a parent company's efforts to ensure a group-wide policy of human rights protection will be sanctioned,

³²*Vedanta Resources PLC v. Lungowe*, 2019 UKSC 20 para. 44 (per Lord Briggs).

³³*Vedanta Resources PLC v. Lungowe*, 2019 UKSC 20 para. 54 (per Lord Briggs).

³⁴*Dorset Yacht Co Ltd v. Home Office*, 1970 AC 1004.

³⁵*Vedanta Resources PLC v. Lungowe*, 2019 UKSC 20 para. 61 (per Lord Briggs); as to the nature of the published materials cf. *ibid.*, para. 58.

rather than rewarded. The parent company that shows indifference vis-à-vis its subsidiaries' behaviour in terms of respect for human rights is more, rather than less, negligent than the one showing a "sufficient level of intervention." However, if the judgment in the *Vedanta* case is taken seriously, the UK Supreme Court attaches liability to the parent's intervention, even though non-intervention would clearly have been worse. The perverse effect of attaching liability to intervention, and not to passivity, will be even more visible in cases involving global supply chains, i.e. where the entity committing the violation is not a subsidiary of the chain leader, but an independent supplier. The passive attitude of firms at the top of the supply chain towards the poor standards of human rights protection prevailing in most countries of production is precisely the problem, and hence, not the cure. This is the behaviour that tort law's duty of care should be designed to discourage. If, however, the duty of care and potential liability hinges on the chain leader taking active measures to control risk, then tort law creates a clear incentive not to do such things, i.e. not to engage in risk management along the supply chain.

The upshot of the preceding analysis is that human rights due diligence cannot settle with sanctioning active measures to control risk. It must also impose affirmative duties to protect human rights on a group-wide scale and across the supply chain. If this is accepted, the problems associated with the rollback of the entity limitation, as explored above, must be confronted in their most poignant form. It is difficult to see how firms at the top of global supply chains could be expected to micro-manage the behaviour of their suppliers located in far-away jurisdictions, while these same firms are not liable for overseeing and controlling their domestic suppliers' behaviour. Tort law simply is not flexible enough to provide nuanced solutions.

7 Enforcement: Public or Private?

As pointed out already, the problems associated with the current fragmentation of liability systems across the globe are not caused by differences of "law on the books," but rather by differences of "law in action." Enforcement is the real problem, not liability rules and legal doctrine. The remedy often employed to compensate for deficient enforcement in various countries of production is the expansion of domestic tort law's territorial reach to cover human rights violations committed in other jurisdictions. As discussed in the previous sections, this approach raises serious concerns. In this section, however, these concerns shall be pushed aside. It will be assumed that the application of domestic liability rules to extraterritorial wrongdoing does not distort competition because it applies equally to all firms selling goods or services in a given market. It will also be assumed that human rights violations committed abroad are not attributable to the firm that serves as the supply chain leader, but that the liability of domestic firms is moderated by the requirement of a breach of a duty of care. With these safeguards in place, the responsibility of firms at

the top of the chain of production for human rights violations committed further down the chain may be worth considering.

Under these assumptions, one crucial question remains, namely the one of enforcement within the jurisdiction of the supply chain leader, which is typically an industrialised country that imports goods manufactured in low-cost jurisdictions. While enforcement must be assured within the jurisdiction of the chain leader, it is by no means clear what the preferred means of enforcement should be. As the dissent in the Canadian *Nevsun* case correctly pointed out, the proposition that domestic firms are accountable for human rights violations committed by their subsidiaries as well as independent firms along the supply chain does not, in and of itself, create a private cause of action in damages.³⁶ Liability in tort certainly counts among the possible remedies for violations of a supply chain leader's human-rights-related duty of care, but it is by no means the only conceivable remedy. The usual alternatives to the liability system, namely criminal law and administrative law, are also options in this context. Typically, criminal and administrative wrongs are prosecuted not by private individuals but by public agencies. Leaving the differences between criminal and administrative sanctions aside for purposes of the present inquiry, the choice is thus between public enforcement and private enforcement.

Disregarding doctrinal and constitutional intricacies, the choice between public and private enforcement is one of policy. Deciding between the two mechanisms requires balancing costs and benefits. Upon first blush, private enforcement of the duty to respect human rights looks attractive. After all, the victims of such violations have a strong incentive to prosecute valid claims, and they typically possess the relevant information needed to assess both liability (fault) and quantum (amount of damages). In contrast, public authorities must expend resources, i.e. taxpayer money, to gather information about human rights violations, including the nature and circumstances of the defendant's wrongdoing and the scope and amount of harm sustained by the victims. Even where the public authority is in command of the relevant information, civil servants may lack the resolve and the financial resources to vigorously prosecute claims against powerful corporations.

Upon second blush, however, private enforcement of human rights, meaning the prosecution of valid claims for redress in response to human rights infringements, is not an easy undertaking. Assuming that the substantive law of torts is up to the task, much depends on the procedural framework for litigating damage claims. A whole array of topics opens up here, such as the availability of funding and the allocation of the costs of litigation; available options to aggregate claims and to litigate collectively; access to information and evidence that is within the possession of the other side, i.e. the potential wrongdoer; and the ways and means to enforce a judgment in favour of the potential claimants. Not all of these issues can be adequately resolved in European jurisdictions where potential claims against corporations at the top of supply chains can be brought. But even assuming that this were the case—that the

³⁶*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, www.canlii.ca/tj5k5j (last accessed 11 June 2020) para. 217ff.

procedural framework provided easy access to justice and ensured a high quality of judicial decisions, based on the true facts of the case—private enforcement would still not be an easy option.

While legal rules and resources may facilitate the enforcement of valid claims, they cannot change the physical and geographical obstacles that often stand in the way of effective cross-border prosecution. Enforcing claims in far-away jurisdictions is never easy, not even for large enterprises experienced in the enforcement market that know how to secure the advice of sophisticated counsel. Empirical studies have confirmed the existence of a “home-town bias” in the enforcement of claims.³⁷ This bias rests on the realisation that legal proceedings are much easier to initiate and litigation is much more effective and successful within the jurisdiction of one’s domicile or seat, where language is no barrier, where representation by one’s counsel of choice is possible, and where the substantive and procedural law as well as the members of the judiciary are easily accessible and well-known.

The practical hurdles standing in the way of the effective enforcement of damage claims based on human rights violations that occurred in far-away jurisdictions of the Global South are thus considerable. The typical victim of a human rights violation is in the opposite position of a large corporation. Usually, the potential claimants in human rights cases are poor and without access to the financial resources it takes to successfully launch and prosecute a claim in a court located thousands of kilometres away. In addition, these claimants often lack any legal knowledge and are generally inexperienced in techniques of dispute resolution and, particularly, the art of litigation. The typical respondent in a human rights case is situated at the other end of the spectrum. Corporations that may be the subject of damage claims in their capacity as heads of supply chains are often experienced and sophisticated litigants. They are usually cash-rich or at least enjoy easy access to financial resources. On top of these advantages, corporations are typically sued in their home-country, i.e. in the jurisdiction of their seat, simply because the courts there promise to be friendlier to the victims’ cause than the ones in the victims’ respective home-country. In light of all these factors, it seems unrealistic to expect that victims located in countries of production in the Global South, such as Pakistan, Bangladesh, Vietnam or Malaysia, will make it into the courtrooms of France, Germany, Switzerland, the UK, or Canada.

Though improbable, human rights litigation does indeed occur in Western courts. However, these cases tend to confirm that the enforcement of claims by the victims is unrealistic. Cases to date have been brought in the name and on behalf of victims, but the victims were usually not the true initiators of the claims. Typically, a human rights organisation or other non-governmental organisation is the real litigant, having recruited the victims, investigated the facts, collected the evidence, explored the applicable substantive law, appointed counsel, and funded the litigation. In essence, the victims only gain access to the courts of the supply chain leader’s jurisdiction with the help of an NGO located in the same or a neighbouring

³⁷Wagner (2014), pp. 1108ff.

jurisdiction. The enforcement activities taking place in European jurisdictions and elsewhere must therefore be categorised as strategic litigation.³⁸ Strategic litigation looks far beyond the individual case and its resolution, and instead aims for judicial investigation of the true causes behind accidents and crimes committed in other jurisdictions. It also seeks to raise public awareness of human rights issues.

The fact that NGOs serve as the real litigants in cases involving human rights violations in distant countries of production is nothing to complain about. Civil litigation was not designed to facilitate strategic litigation, but there is nothing illegitimate about using it for this purpose. In the special case of human rights litigation, public interest organisations are needed in order to level the procedural playing field and to provide funding for the claims to proceed. However, the central role played by NGOs raises the question as to whether private enforcement is the optimal remedy. Given that the victims themselves do not have a realistic chance to initiate suits, the enforcement of damage claims relies on public interest organisations operating in the same jurisdiction as the business that stands to be sued. These organisations' activities are not limited to civil litigation, as they can also initiate or participate in criminal or administrative proceedings. If the work is done by an NGO rather than the victims anyway, private litigation loses some of its appeal. It does not lose all of it, however, as damage suits remain an effective and unrivalled tool for achieving deterrence and compensation, at least in comparison to criminal and administrative sanctions.

In relation to litigation's deterrence function, much can be said in favour of criminal and administrative law.³⁹ To begin with, the question of funding legal proceedings goes away, as criminal and administrative trials are initiated by public authorities, funded by the public purse. Prosecutors and other public authorities command sweeping powers to investigate the facts of an incident and to identify the individuals who bear responsibility. The problem of aggregating claims of several victims into one proceeding does not arise, as criminal and administrative investigations and trials are incident-based, i.e. they relate to a particular accident or crime, and are not tied to individual damage claims growing out of such incidents. Finally, the sanctions meted out by the criminal justice system or administrative law are not tied to the amount of harm sustained by any victim or group of victims. Rather, the overall harm caused by the behaviour in question can be considered, as well as the degree of fault, i.e. whether the harm was caused recklessly, intentionally, or through mere negligence.

Tellingly, French lawmakers, in drafting the law introducing the human-rights-focused *devoir de vigilance*, did not settle for liability in delict as a response to corporations' wrongful behaviour, but also relied upon civil fines as sanctions for wrongful behaviour. The constitutional counsel intervened and held that the

³⁸As for the US, see Cummings (2012); for Japan, see Hatano (2019); for Germany and Europe cf. Graser and Helmrich (2019); as for strategic litigation used by businesses, see Nanopoulos and Yotova (2016).

³⁹Bagchi (2019), pp. 2535ff.

sanctioning of corporations with the help of civil fines was unconstitutional in the circumstances, as the description of the wrong remained vague und unpredictable.⁴⁰ Assuming that these defects can be cured through adequate wording, fines and other criminal sanctions may be a more effective means of deterring domestic corporations' wrongful behaviour than civil liability that is contingent on the enforcement of private damage claims by victims who find themselves at a serious disadvantage vis-à-vis defendant corporations.

8 Conclusions

Tort law is designed to protect the same human interests that also lie at the core of human rights law. However, the globalisation of human rights protection through national tort law creates serious tensions with established legal principles. Legal duties and corresponding liabilities are focussed on particular legal entities and do not cut across such entities. Thus, in principle, parent companies are not responsible for the acts and omissions of their offshore subsidiaries, and firms leading global supply chains are not liable for risks created by direct and indirect suppliers abroad. The entity principle is fundamental to the legal system, relevant not only to the law of torts, but also central to company law, insolvency law, and tax law, to name only a few. Thus, the development of duties of care imposed that cut across legal entities could not be limited to tort law, and would, much rather, affect these fields of law as well.

Further, duties of care designed to protect human rights also cut across national borders and reach subsidiaries and suppliers domiciled in other jurisdictions. Such cross-border duties create problems for private international law as well. The choice of law rules governing non-contractual liability aim to provide a level playing field for people and firms interacting within one particular jurisdiction. If only those firms that are domiciled within the jurisdiction are subjected to human rights due diligence, this will disadvantage them in competition with other firms domiciled outside of this jurisdiction—with the ensuing market shift in favour of the latter hampering the human rights cause. Human-rights-based duties of care thus require a supplement: a choice of law rule that connects them with the products offered in a particular market, regardless of the manufacturer's seat.

Even if these substantive and international law concerns were addressed properly, the fact remains that tort law does not offer an adequate enforcement mechanism for human rights. While the number of claims brought on behalf of offshore claimants in Western jurisdictions is increasing, litigation mostly remains symbolic. The purpose of these claims is not primarily to collect substantial damages on behalf of the victims but to alert the public in the countries where the courts sit to human rights violations. Raising awareness of economic and social problems in other countries is

⁴⁰Conseil constitutionnel, 23 March 2017, Décision n° 2017-750 DC, Rn. 5-14; Mathieu (2017).

certainly a legitimate goal, but not the one tort law was designed to serve. There may be other enforcement mechanisms that are better suited, and that impose lesser costs on firms and society.

References

- Abraham KS (2017) The forms and functions of tort law. Foundation Press, St. Paul
- Bagchi A (2019) Product liability. *Fordham Law Rev* 87(6):2501–2538
- Brabant S, Savourey E (2017) French law in the corporate duty of vigilance – a practical and multidimensional perspective. *Revue Internationale de la Compliance et de l'Étique des Affaires* 50:90–95
- Cossart S, Chaplier J, Beau de Lemeinie T (2017) The French law on duty of care: a historic step towards making globalization work for all. *Bus Hum Rights J* 2(2):317–323
- Cummings SL (2012) The pursuit of legal rights – and beyond. *U.C.L.A. Law Rev* 59:506–549
- Dobbs DB, Hayden PT, Bublick EM (2016) *Hornbook on torts*. West Academic Publishing, St. Paul
- Easterbrook FH, Fischel DR (1991) *The economic structure of corporate law*. Harvard University Press, Cambridge
- Geistfeld M (2003) Negligence, compensation, and the coherence of tort law. *Georgetown Law J* 91(3):585–632
- Geistfeld M (2012) The coherence of compensation-deterrence theory in tort law. *DePaul Law Rev* 61(2):383–418
- Goldberg J (2003) Twentieth-century tort theory. *Georgetown Law J* 91(3):513–584
- Graser A, Helmrich C (2019) *Strategic Litigation: Begriff und Praxis*. Nomos, Baden-Baden
- Hansmann H, Squire R (2018) External and internal asset partitioning: corporations and their subsidiaries. In: Gordon JN, Ringe WG (eds) *The Oxford handbook of corporate law and governance*. Oxford University Press, Oxford, pp 251ff
- Hatano A (2019) Can strategic human rights litigation complement social movements? A case study of the movement against racism and hate speech in Japan. *Univ Pa Asian Law Rev* 14(2):228–274
- Hay P et al (2018) *Conflict of laws*. West Academic Publishing, St. Paul
- Jansen N (2003) *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz*. Mohr Siebeck, Tübingen
- Keeton WP et al (1984) *Prosser and Keeton on torts*. West Publishing Company, St. Paul
- Kegel G (1964) The crisis of conflict of laws. *Recueil des Cours* 112:91–268
- Koziol H (2015) Basic questions of tort law from a comparative perspective. Jan Sramek, Wien
- Machnikowski P (2019) Article 5 Rome II Regulation. In: Magnus U, Mankowski P (eds) *European commentaries on private international law*. Dr. Otto Schmidt, Cologne
- Magnus U (2019) Article 4 Rome II Regulation. In: Magnus U, Mankowski P (eds) *European commentaries on private international law*. Dr. Otto Schmidt, Cologne
- Mathieu B (2017) Jusque'ou peut-on faire porter sur les entreprises un devoir de vigilance en matière de protection des droits de l'homme et de l'environnement? *Constitutions* 2017:291–295
- Nanopoulos E, Yotova R (2016) "Repackaging" plain packaging in Europe: strategic litigation and public interest considerations. *J Int Econ Law* 19(1):175–210
- Nasse L (2019) *Devoir de vigilance – Die neue Sorgfaltpflicht zur Menschenrechtsverantwortung für Großunternehmen in Frankreich*. *Zeitschrift für Europäisches Privatrecht* 2019(4):774–802
- Polinsky AM, Shavell S (1998) Punitive damages: an economic analysis. *Harv Law Rev* 111(4):869–962
- Schmid C, Pinkel T (2015) Article 5 Rome II Regulation. In: Callies GP (ed) *Rome Regulations*. Wolters Kluwer, Hürth, pp 127ff

- Shavell S (2004) Foundations of economic analysis of law. Harvard University Press, Cambridge
- Shaw MN (2014) International law. Cambridge University Press, Cambridge
- Shearer IA (1994) Starke's international law. Butterworths, London
- Sykes AO (2012) Corporate liability for extraterritorial torts under the alien tort statute and beyond: an economic analysis. *Georgetown Law J* 100(6):2151–2210
- Van Dam C (2011) Tort law and human rights: brothers in arms – on the role of tort law in the area of business and human rights. *J Eur Tort Law* 2(3):221–254
- Van Dam C (2013) European tort law. Oxford University Press, Oxford
- Wagner G (2003) Grundstrukturen des Europäischen Deliktsrechts. In: Zimmermann R (ed) *Grundstrukturen des Europäischen Deliktsrechts*, Nomos, Baden-Baden, pp 189ff
- Wagner G (2008) Die neue Rom-II-Verordnung. *Praxis des Internationalen Privat- und Verfahrensrechts* 2008(1):1–16
- Wagner G (2012) Tort, social security, and no-fault schemes: lessons from real-world experiments. *Duke J Comp Int Law* 23(1):1–61
- Wagner G (2014) The dispute resolution market. *Buffalo Law Rev* 62(5):1085–1158
- Wagner G (2016) Haftung für Menschenrechtsverletzungen. *Rabels Zeitschrift* 80(4):717–782
- Wagner G (2019) Comparative tort law. In: Reimann M, Zimmermann R (eds) *Oxford handbook of comparative law*. Oxford University Press, Oxford, pp 994ff
- Zimmermann R (1990) The law of obligations: Roman foundations of the civilian tradition. Juta & Co., Cape Town

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