Chapter 6
National Civil Liability and Transboundary Environmental Damage

Peter Gailhofer

Contents

The author would like to thank the participants of the online workshop "National tort/delict law as a horizontal instrument to strengthen environmental rights and duties" on 23 April 2021: Carola Glinski (University of Copenhagen), Tilmann Altwicker (University of Zurich), Moritz Renner (University of Mannheim) and Leonhard Hübner (Heidelberg University/Osnabrück University) for their valuable contributions

P. Gailhofer (✉)
Öko-Institut e.V., Berlin, Germany
e-mail: p.gailhofer@oeko.de

P. Gailhofer et al. (eds.), *Corporate Liability for Transboundary Environmental Harm*, https://doi.org/10.1007/978-3-031-13264-3_6

6.1 Introductory Remark

1 Having discussed the regulatory objectives and functions of international environmental liability (Chap. 2) and the international obligations of private and public actors alike to prevent and redress environmental harm (Chaps. 3 and 4), this and the next chapter's point of departure is the complementary perspective of domestic law and international law on corporations' civil liability for transnational environmental damage.

2 Some domestic legal systems provide for environmental corporate liability through special liability rules that go beyond existing tort law. However, in the absence of such special liability laws, or in cases of their inapplicability, claimants have to pursue their actions for damages based on general tort law. This chapter primarily focuses on the conditions under general domestic tort law to establish the liability of companies for transboundary environmental damage. It asks whether and to what extent civil litigation before national courts can be used to vindicate environmental rights, values and interests and, thus, scrutinises whether or not tort law can fulfil the legal functions and objectives outlined in Chap. 2. The answers to these questions are decisive for the broader policy goals related to environmental liability, namely, to enable transnational civil litigation to help provide further impetus for the development of global norms regarding environmental damage.[1]

3 Any attempt to determine the suitability of domestic tort law for claims in respect of transboundary environmental damage can only highlight key issues. The reasons for this are numerous, not the least of which is the fact that national laws of tort and delict diverge in many and, at times, even in fundamental respects. A comprehensive analysis of the conditions for transnational environmental liability *de lege lata* would have to take account of this variation between national laws by looking at the relevant substance of different legal systems.[2] This is even more the case where the goal of such an analysis is to delineate the potential of environmental liability in a legal system *de lege ferenda*: a comparative account can then examine whether certain foreign legal concepts would, in principle, be applicable in the legal system at hand. Going further, *a ius commune* approach could try to elucidate common ground

[1] Percival (2010), p. 39. A decisive question from the perspective of national civil law is, accordingly, if and to what extent national courts can refer to such global norms to resolve a given dispute and, in doing so, take part in their concretization and by that, function as a 'hinge' between national and international law, cf. Ammann (2019).

[2] For a comparative approach cf. Seibt (1994).

among the legal systems to discuss their potential for further harmonisation. At least in the European context, the search for such overarching principles of tort law has been going on for several years.[3]

Even if only the material preconditions for transnational environmental liability in just one national legal system are comprehensively explored, the analysis would have to cover an inordinately wide range of different legal issues. These issues would relate to diverse causes of action and their maybe unclear or complicated relationships.[4] It is beyond the scope of any single volume, let alone a single chapter, to do justice to this level of complexity. The present chapter will focus on issues of particular prominence in the context of environmental tort law from a rather general perspective. Although this general perspective provides insight into concepts and issues which will be relevant for many legal systems, the chapter refers to German and European law if more specific doctrinal questions need to be clarified. **4**

6.2 Two Types of Transboundary Environmental Damage

Cases of transboundary environmental damage can differ in many respects, e.g. regarding the type of wrongdoing forming the basis of the civil claims, the legal goals of the claimant or the defendant's corporate structure. Despite such differences, many liability cases have a range of common denominators and many of the broader legal issues raised by them are quite similar. Given such general parallels, two broad types of cases have been differentiated for this chapter which, as will be further explicated below, can have different implications with respect to the legal preconditions for liability cases. **5**

In type-one cases, the transboundary implications of the case are rather unambiguous: an activity or facility in one State directly causes environmental damage in another State. The damage is clearly delocalised[5] as it occurs in territory beyond the borders of the State where the source of the damage is located. Typically, there are no intermediate causal factors that may lead to the assumption that another person located, for example, in the State where the damage occurred, could be responsible for the damage. Such cases frequently refer to the flow of pollution (through watercourses, oceans, or the air and atmosphere) from a source State to an affected State.[6] Prominent examples of this kind of transboundary causation of damage are dealt with in current climate change litigation.[7] **6**

[3] For all see van Dam (2014), p. 126.

[4] For example, environmental liability claims in common law systems can be based on doctrines such as private or public nuisance, trespass, strict liability or negligence, all of which are independent of each other and whose relationship to each other has not been systematically and coherently clarified, cf. Pöttker (2014); Shapo (1997), p. 532.

[5] Grušić (2016), pp. 23 et seq.

[6] Sachs (2008).

[7] Cf. Chap. 8.

7 **Type-One Cases: Direct Transboundary Causation of Environmental Damage**

In *Bier*, a Dutch horticulturalist (as well as the Rheinwater Foundation, a non-governmental environmental organisation that aims to improve the quality of the water in the Rhine basin), brought an action against the French mining company Mines de Potasse d'Alsace. The defendant had polluted the waters of the Rhine by releasing saline residue from its operations into it and the horticultural company, which used the river water for irrigation, was forced to install a water purification system. The causal event was located in France while the harm became manifest in the Netherlands. The Dutch claimants brought a claim for damages against the French company before the Dutch courts.[8] The Court held, that the claimant could sue the defendant in France as well as in the Netherlands.

8 Type-two cases differ from type-one cases in one important aspect: While the environmental damage and its direct cause are localised, i.e. confined to one State,[9] the transboundary dimension of the cases results from indirect causes originating in another State. These types of cases are often seen where claims target multinational corporations' parent companies that are only indirectly involved in the alleged violations of rights and interests.[10] Type-two cases may, as a result, involve cases where victims use European national courts to sue a European-based multinational corporation with an overseas subsidiary, typically operating in a developing State (the host State), that has caused environmental damage in that host State. The parent company's decisions in its home State, which started the chain of events that ultimately resulted in environmental damage, can be regarded as an indirect cause in the sense that it precedes the subsidiary's tortious act that directly caused the damage.[11] In addition to such cases of liability within corporate groups, scholars increasingly discuss the liability of enterprises for infringements of rights and interests in their global value chains, which have been directly caused by a third entity beyond the corporation. In these cases, again, the harm is only indirectly attributed to the defendant's actions or omissions, typically related to management decisions made in the home State. The defendant's conduct (or omission) is regarded as the source of the damage because of the existence of a factual or legal relationship to the direct polluter, typically a supplier.

[8] *Bier v Mines de Potasse d'Alsace* [1976] ECLI:EU:C:1976:166; Grušić (2016), p. 20; Ahern and Binchy (2009), p. 116.

[9] Grušić (2016), p. 23.

[10] Enneking (2012), p. 107.

[11] Grušić (2016), p. 61.

Type-Two Cases: *Okpabi v Shell* **9**

The recent decision of the UK Supreme Court in the *Okpabi and others v Shell* case is considered to represent an important development in the treatment of type-two cases under common law.

In 2015, the Nigerian communities of Ogale and Bille each filed a lawsuit in the UK High Court against the British-based company Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company (SPDC). Both suits were filed on behalf of some 42,500 residents and citizens of Nigeria who sought redress for serious oil pollution that had and still did significantly affect their livelihoods and the environment. The claimants held both RDS and its Nigerian subsidiary SPDC liable for environmental damage caused by oil spills from pipelines and infrastructure operated by SPDC which, they argued, are the result of negligent pipeline maintenance and oil spill responses by the operating company. They further argued that RDS owed them a duty of care under common law as it consistently exercised significant control and direction over its subsidiary by, amongst other things, promulgating, monitoring and enforcing group-wide health, safety and environmental policies and standards.[12] In 2017, the High Court ruled that the local authorities cannot seek redress against Shell in the English courts. It concluded that there was insufficient evidence that Shell exercised a high degree of supervision, control or direction over SPDC, and that the parent company therefore did not bear legal responsibility for the pollution caused by its Nigerian subsidiary. In 2018, the Court of Appeal upheld the High Court's decision, with the majority of judges ruling that the parent company had no duty of care to the affected communities.[13]

In 2020, the claimants appealed to the UK Supreme Court, arguing that RDS owed them a duty of care in relation to the extensive environmental damage caused by its operations in Nigeria. On 12 February 2021, the Supreme Court heard the appeal and ruled that the case against RDS and its Nigerian subsidiary could proceed in the UK courts, stating that there is a strong case that Shell is legally responsible for the systemic pollution affecting the communities of Ogale and Bille.[14]

In July 2021, it was announced that Shell had not contested the jurisdiction of the English courts and that its Nigerian subsidiary SPDC would join the actions.[15]

[12] Roorda and Leader (2021).

[13] Court of Appeal 14.2.2018, [2018] EWCA Civ 191, https://media.business-humanrights.org/media/documents/files/documents/Shell_Approved_Judgment.pdf. Accessed 13 Apr 2022.

[14] UK Supreme Court *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3, https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf. Accessed 13 Apr 2022.

[15] UK Court of Appeal *Okpabi and others v Royal Dutch Shell* [2018] EWCA Civ 191; UK Supreme Court *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3; For all see https://www.

6.3 Procedural Issues I: Jurisdiction

10 A major procedural precondition for cases concerning transboundary environmental damage before national courts is the question of the jurisdiction of the State in which the legal action is brought.

11 Depending on the particular jurisdictional regime that is applicable in the home State where a case is brought, the question of jurisdiction can be a crucial matter, especially for a type-two case involving transboundary tort-based litigation. Although domestic rules and legal cultures diverge, it can be said, in general terms, that the key factor which determines the jurisdiction of a national court is whether there exists a sufficiently close nexus between the facts of the case and the forum State (i.e. the State of the court to which the claim is applied).[16] Given the strong connection to the host State that these claims typically have, as that is usually the location where at least part of the harmful behaviour has taken place, where individual rights or environmental interests have been affected, where the damage has arisen and where the plaintiffs, as well as some of the defendants, are located, where local subsidiaries, business partners or sub-contractors may be sued as co-defendants, the exercise of jurisdiction in these cases by home State fora is not assured.[17]

12 The jurisdiction of national courts in the EU, when considered in isolation, is less problematic. As will be further explained below,[18] national courts in the EU generally have jurisdiction over (parent) companies domiciled in the EU. Obstacles for transnational torts-based civil litigation tend to arise only as a consequence of a combination of deficits in substantive law and problems of access to justice in the host State: On the one hand, it can be difficult to substantiate claims against a European company for damage directly caused by one of its subsidiaries or suppliers in its European home State. On the other hand, while non-EU victims often encounter difficulties in obtaining effective redress in their countries, EU Member States' courts will, as a general rule, decline jurisdiction in cases directly brought against foreign subsidiaries and contractors.[19]

13 Proposals to resolve such problems sometimes point to the possibility to create new international judicial institutions and, thus, to an approach that imposes direct environmental obligations and oversight by new international institutions on corporate actors under international law.[20] This chapter, however, first focuses on the challenges facing extraterritorial liability cases created by existing relevant domestic rules on jurisdiction before considering some of the options and challenges in

---

business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell/. Accessed 13 Apr 2022.

[16] Augenstein and Jägers (2017), p. 11.

[17] Enneking (2012), p. 134.

[18] ¶ 33.

[19] Augenstein and Jägers (2017), p. 7.

[20] See Chap. 4, ¶ 40 et *seq*. (Sect. 4.2.3). Cf. Steinitz (2019).

substantive tort law connected to establishing the liability of (parent) companies domiciled in the EU for environmental damage that occurs abroad.

14 The jurisdictional rules in national and supranational law need to be considered separately from the concept of jurisdiction in public international law. The former determine the competence of State courts to hear private disputes involving a foreign element and are a part of the forum State's national law. They may emanate from, or be supplemented by, non-domestic sources of law, as is the case in EU Member States where the regime of the Brussels Ia Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies.[21]

15 Relevant norms and developments in public international law regarding the issue of jurisdiction are examined in more detail in Chap. 7.[22] At this point, it suffices to point out the relevance of international norms for the question of jurisdiction: First of all, courts have to take into account international norms when they interpret the domestic rules regarding extraterritorial jurisdiction. Developments in international law regarding jurisdictional rights and obligations are, as a result, relevant for the understanding of and can induce change in domestic jurisdictional doctrines. They may include the adjudicative obligations of a State to provide access to justice for rights violations, e.g. through the recognition of special grounds of jurisdiction in the State's private international law. As an example, there are cases in which French and Spanish courts have recognised *forum necessitatis* jurisdiction in the light of Article 6 ECHR and the prohibition of a denial of justice.[23]

16 It should also be noted that interaction between national and international law also takes place in a complementary manner: national rules and practices regarding extraterritorial jurisdiction may provide, as instances of constant practice and legal conviction, arguments for or against a certain interpretation of international law.[24]

6.3.1 The Potential Scope of Extraterritorial Tort Law: The US Alien Tort Statute

17 The US Alien Torts Statute (ATS) is the most prominent example for the potential scope of jurisdictional competences of national courts and extraterritorial torts and can be considered as a form of universal civil jurisdiction. It is also exemplary for its integration of international rights and standards into national tort law. Before turning to relevant norms in European and German law, it makes sense to examine the concept and evolution of the ATS as well as some other relevant jurisdictional doctrines in US law.

[21] Enneking (2012), p. 133.

[22] Section 7.7.3.

[23] Augenstein and Jägers (2017), p. 30.

[24] See for example Wuerth (2013).

18 The provision, which was enacted in 1789, provides US district (federal) courts with "original jurisdiction" of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US.[25] For 200 years the ATS was understood as simply establishing the jurisdiction of US federal courts for actions brought by foreigners based on torts. However, following the first extraterritorial human rights lawsuits in the 1980s, US courts began to reinterpret the provision to entitle the courts to formulate a "cause of action for [a] modest number of international law violations thought to carry liability".[26] Eventually, the courts began to understand this substantial norm as forming the foundation of liability not only of public actors but also of private individuals and companies.[27] As a consequence, the ATS has been the legal basis for a high number of transnational human rights civil suits before US courts brought by non-US citizens seeking monetary compensation for human rights violations committed by private actors.[28]

19 The uniqueness of the ATS stems from the fact that it made possible so-called 'foreign-cubed liability cases', which involve foreign plaintiffs, foreign defendants and involving conduct that occurred outside the US, which means that such cases have few connecting factors with the US legal order.[29] Given the growing relevance of environmental dimensions of human rights, the ATS' approach has the potential to ensure greater corporate responsibility in a global environmental context. However, from an environmental perspective, it has been pointed out that the ATS is "a flawed mechanism in its current state" for substantial reasons. Under the first prong of the ATS, plaintiffs can bring suit for torts that violate the "law of nations," i.e. customary international law, which is given if "there has been a violation by one or more individuals of those standards, rules, or customs that govern the relationships between states or between individuals and foreign states".[30] So far, however, the US courts predominantly do not consider environmental norms in customary international law as universally accepted while also viewing them as inadequately specific to establish the basis of an international cause of action. Human rights to life, health and the environment arising in the context of environmental harm have been seen to be too vague to provide feasible avenues for recovery under the ATS.[31] Under the second prong of the ATS, plaintiffs can sue for torts

[25] 28 U.S.C. Section 1350 Alien's action for tort.

[26] US Supreme Court *Sosa v Alvarez-Machain* (2004) 542 U.S. 692, pp. 17–30.

[27] For this development of the jurisprudence regarding substance and scope of the Alien Tort Statute see Wagner (2016), pp. 728–732; Enneking (2012), pp. 77–87.

[28] Augenstein and Jägers (2017), p. 28.

[29] Enneking (2014), p. 44.

[30] See US District Court for the Eastern District of Pennsylvania *Lopes v Reederei Richard Schroder* (1963) 225 F. Supp. 292. According to the 'Sosa-Test', courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the eighteenth-century paradigms, US Supreme Court *Sosa v Alvarez-Machain* (2004) 542 U.S. 692, 725. Cf. Kupersmith (2013), pp. 890–892.

[31] Kupersmith (2013), pp. 906–911.

violating a treaty ratified by the United States, which must be either self-executing or implemented through an Act of Congress. Scholars assume that there are too few or too narrowly defined international treaties for this approach to be effective.[32] It is important to note, however, that the legal mechanism of the ATS to integrate norms of public international law as potential causes of action into national torts, could become relevant if treaty law further evolves.

Alexis Holyweek Sarei et al. v Rio Tinto PLC and Rio Tinto Limited **20**

In 2006, the plaintiffs, who were all current or former residents of the island of Bougainville in Papua New Guinea sued the mining company Rio Tinto. The plaintiffs claimed, amongst other things, that Rio Tinto's mining activities had harmed their health and the environment. They relied on the ATS. The Court of Appeals confirmed the District Court's reasoning that the majority of the claims (those regarding war crimes, crimes against humanity, racial discrimination and, notably, violations of the UN Convention on the Law of the Sea) fall within the scope of the ATS, and that the Court had jurisdiction to hear these claims and that the plaintiffs had sufficiently alleged Rio Tinto's liability. Eventually, in 2013, the Appeals Court ruled that the case should be dismissed, citing the recent Supreme Court ruling in the *Kiobel v Shell* case.[33]

In its landmark *Kiobel* decision in 2013, the US Supreme Court massively restricted the reach of the Alien Torts Statute. In what came as a surprise to many,[34] the Court based this restriction on the doctrinal presumption against extraterritoriality and limitations of personal jurisdiction.[35] The presumption against extraterritoriality is a canon of statutory construction pursuant to which Congress normally intends to regulate domestically[36] and has been applied by the Supreme Court since the nineteenth century in different forms to determine the geographic scope of a statute.[37] It is supposed "to protect against unintended clashes between **21**

[32] See Kupersmith (2013), pp. 922–923. According to Kupersmith, Congress should resolve this shortcoming by amending the ATS to provide a remedy for corporate-induced environmental harm in U.S. courts.

[33] For a summary of the case US Court of Appeals for the 9th Circuit *Alexis Holyweek Sarei et al v Rio Tinto PLC* and *Rio Tinto Limited (2006)* cf. http://www.internationalcrimesdatabase.org/Case/1135/Sarei-v-Rio-Tinto/, accessed 13 Apr 2022.

[34] The previous ruling of the Court of Appeals had dismissed the claim on the grounds that the Alien Tort Statute, if correctly interpreted, does not give rise to any liability of private undertakings for human rights violations by their employees. Cf. Grušić (2016), p. 3.

[35] Personal jurisdiction refers to the power that a court has to make a decision regarding the party being sued in a case. Before a court can exercise power over a party, the U.S. Constitution requires that the party has a certain minimum contacts with the forum in which the court sits, see https://www.law.cornell.edu/wex/personal_jurisdiction, accessed 13 Apr 2022.

[36] Ryngaert (2015a), p. 60.

[37] In the terms of international public law, the presumption thus concerns the question of prescriptive extraterritorial jurisdiction.

[US] laws and those of other nations which could result in international discord" and "to ensure that the judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches".[38] According to recent decisions to rebut this presumption, it has to be shown that the relevant rule shows "some clear indication" that it shall be applied abroad and that its substantial "focus" implicates its application to the extraterritorial case in question.[39] In *Kiobel*, the court dismissed the case arguing that, since those drafting the ATS in 1789 did not provide that its reach should extend beyond US territory, it should be assumed that the statute only applies to norm violations perpetrated within the US or on the high seas.[40] According to the US Supreme Court, jurisdiction now is only given if the claim "touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption against extraterritorial application." It thereby clarified that it will no longer be possible to bring 'foreign-cubed cases' before US federal courts.[41] In its 2021 decision on *Nestle v doe*, the Supreme Court made highly relevant specifications regarding the implications of the presumption against extraterritoriality: It decided that allegations of general corporate activity in the US, such as decision making, cannot by themselves establish a domestic application of the ATS. "Because making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action [...] and domestic conduct."[42]

22 The ATS does not convey to US courts either international jurisdiction or personal jurisdiction for lawsuits against companies and individuals domiciled abroad. Therefore, in addition to the hurdle of the presumption against extraterritoriality, jurisdiction has to be substantiated on a case-by-case basis in accordance with the general principles of personal jurisdiction.[43] To ascertain personal jurisdiction, US courts will consider whether the defendants' contacts with the forum are sufficiently "continuous and systematic" to render it subject to the forum's jurisdiction.[44] While the US rules regarding personal jurisdiction were originally fairly

[38] US Supreme Court *Kiobel v Royal Dutch Petroleum Co*. (2013) 589 U.S. 2013, at 1664.

[39] In US Supreme Court *Morrison v National Australia Bank Ltd.* (2010) 561 U.S. 247, the Supreme Court developed a transactional test for applying US rules extraterritorially which shall determine if the respective provision focuses on the place of conduct or on another connecting factor (e.g. the place of a transaction). If whatever is the focus of the provision occurs in the United States, then applying the provision is considered domestic and is permitted, even if the conduct occurs abroad, see Dodge (2018).

[40] Enneking (2014), p. 44.

[41] Ryngaert (2015b), p. 139. According to Young, however, the "broader view of ATS litigation" taken by four of the justices deciding on the case suggests that the "universal jurisdiction vision of the ATS is hardly dead" and that the scope for human rights litigation, amongst other things, remains subject to debate, see Young (2015), p. 1065.

[42] Cf. US Supreme Court *NESTLE USA, INC. v DOE ET AL* (2021) 593 U. S. Syllabus, p. 5.

[43] Wagner (2016), p. 730.

[44] Augenstein and Jägers (2017), p. 36.

liberal with respect to extraterritorial constellations,[45] the US Supreme Court asserted a stricter general jurisdiction requirement in the *Daimler AG v Bauman* case in 2014. It decided that a defendant is subject to "general jurisdiction" only if its extensive contacts with the forum render it "at home" there. To satisfy this requirement, US courts will consider the places where a company is incorporated and where it maintains its principal place of business.[46] In decisions post-*Kiobel*, lower US courts have generally followed the idea that cases against foreign companies for conduct abroad should be dismissed.[47] Where extraterritorial jurisdiction was affirmed, the connecting factor was determined on a case-by-case basis, e.g. in cases of US-based decision-making by executives of the company.[48] The Supreme Court has, according to many observers, basically limited the jurisdiction of US Courts to claims against companies domiciled in the US. Furthermore, claims for damages can only be brought for human rights violations that have a connection to the territory of the US.[49]

6.3.2 Discretionary Common Law Doctrines Concerning Jurisprudence

The jurisdiction in the United States and other common law jurisdictions is restricted by broad discretionary powers of courts to abstain (upon motion by the defendants) from exercising jurisdiction in cases involving foreign defendants, even if the tortious behaviour in question and/or its harmful effects occurred within the US.[50] The *forum non conveniens* doctrine, as applied by the United States and other jurisdictions,[51] provides that a court may decline jurisdiction for the benefit of a court in another State considered to be more appropriate as a forum for the case at hand. In their *forum non conveniens* analysis, courts are guided by private interests

23

[45] With respect to corporate defendants, the simple fact that a corporation is "doing business" within the forum, meaning that it has substantial ongoing business relations there, may provide US courts with personal jurisdiction over it, cf. Enneking (2012), p. 141.

[46] Augenstein and Jägers (2017), pp. 36–37.

[47] According to Marullo and Zamora Cabot (2016), p. 22, in most of the cases where the defendant is a US corporation, lower courts are applying the same standard established in US Supreme Court *Kiobel v Royal Dutch Petroleum Co*. (2013) 589 U.S. 2013 and, therefore, they are dismissing all cases where the conduct is verified abroad.

[48] Augenstein and Jägers (2017), p. 36.

[49] The court explicitly justified its restraint by referring to the complementary jurisdiction of European courts for companies domiciled in the EU on the basis of the Brussels Ia regulation, Wagner (2016), p. 731.

[50] Enneking (2012), p. 14.

[51] Cf. De Schutter (2006), p. 49.

such as the burden placed on a defendant in bringing the case and by matters of public interests, especially the use of judicial resources.[52]

24 ***Forum non conveniens* and the Bhopal Gas Leakage Disaster**
A joint case regarding claims seeking to hold the US parent company liable for the harm suffered by the victims of the Bhopal gas leakage disaster, described above (Chap. 2 ¶ 8), was dismissed by a US court on the grounds of *forum non conveniens*. The court considered that the case should be tried in the Indian legal system rather than in the US, explaining that "[t]he administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case. The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation".[53]

25 A court's discretionary power in this regard can, of course, lead to negative consequences for claimants who try to obtain a remedy for extraterritorial damage and, more generally, may entail substantial limitations to the feasibility of extraterritorial lawsuits. According to *Augenstein and Jäger,* it has been noted that US courts have increasingly been granting *forum non conveniens* motions in cases involving foreign plaintiffs.[54] The doctrine, however, is not considered to simply be a constraining factor for extraterritorial jurisdiction, on the contrary, many scholars argue that the flexibility of the *forum non conveniens* doctrine is also a strength as it "allows to escape the dilemma between not taking into account the interests of the other States in exercising extraterritorial jurisdiction, on the one hand, and leaving certain violations unpunished or certain victims without remedies, on the other hand, since the exercise of extraterritorial jurisdiction will be considered justified to the extent that the balancing of interests clearly weighs in favor of such exercise, rather than in favor of deferring to the choices of the territorial State in the

[52] Augenstein and Jägers (2017), p. 26.

[53] In US District Court for the Southern District of New York *In re Union Carbide gas plant disaster at Bhopal, India in December 1984* (1986) 634 F.Supp. 842 (S.D.N.Y. 1986), p. 867; Enneking (2012), p. 94.

[54] Augenstein and Jägers (2017), p. 26.

face of human rights violations committed by transnational corporations or in which such corporations are complicit".[55] If courts decline jurisdiction based on *forum non conveniens*, they accordingly have to take into consideration, at least in principle, the need to ensure that another forum is available in which the plaintiff may obtain an adequate remedy.[56] Under the regime of the Brussels Ia Regulation, however, courts cannot rely on the *forum conveniens* doctrine to decline jurisdiction.[57] In its ruling in *Vedanta v Lungowe*, the UK Supreme Court clarified that this also applies in cases in which the immediate cause of the damage in question arose from the operations of one of the defendant corporate group's overseas subsidiaries.[58]

The principle of comity also can play an important role in transnational cases before US courts. This principle, according to the US Supreme Court, concerns "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[59] Comity considerations may prompt a court not to adjudicate a case that has been, is or will be heard in a foreign court out of deference to the sovereignty of the other State.[60] **26**

[55] De Schutter (2006), p. 49.

[56] Mills (2014), p. 227. In the UK context, van Calster (2016), p. 177 points out, that a court which decides to decline jurisdiction under the doctrine of *forum non conveniens* stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum. As Aristova (2019) summarises, the Supreme Court in UK Supreme Court *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* Judgement of 10 April 2019, UKSC 20, acknowledged that there is a real risk that substantial justice will be unobtainable in Zambia based on two principal grounds. First, securing funding to pursue the proceedings in Zambia was a serious problem for the rural villagers. Second, the "unavoidable" complexity of the case means that it would be litigated in Zambia on a simpler and more economical scale than in Britain. Holly (2019) observes that the discussion of substantial justice, in substance and effect if not in name, is not radically dissimilar to the doctrine of *forum necessitatis*, a doctrine which has never been expressly endorsed by English courts, but which plays a significant role in other European legal systems, see below ¶ 37 *et seq*. According to Holly (2019), the increasing number of States where the *forum necessitatis* is available with varying degrees of qualification shows that the sense of such an approach may yet find favour. See also summary in ECtHR *Naït-Liman v Switzerland* App No 51357/07 (2018) at 84, available online https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181789%22]}, accessed 13 Apr 2022.

[57] ECJ *Andrew Owusu v N. B. Jackson* [2005] ECLI:EU:C:2005:120.

[58] UK Supreme Court *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* Judgement of 10 April 2019, UKSC 20, at 88, 94–95.

[59] US Supreme Court *Hilton v Guyot* (1985) 159 U.S., at 164.

[60] Augenstein and Jägers (2017), p. 26.

6.3.3 Jurisdiction According to European Union Law

27 In the Member States of the EU, rules on jurisdiction in civil cases have been partially harmonised through Regulation (EU) No. 1215/2012 of the European Parliament and of the Council 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereafter: Brussels Ia Regulation). This Regulation is directly applicable in EU Member States and contains some of the most important rules for establishing adjudicative and enforcement jurisdiction in tort cases for corporate human rights abuses and liability for environmental damage.[61] However, Article 71 of the Brussels Ia Regulation also makes clear that it shall not affect any conventions governing jurisdiction or the recognition or enforcement of judgments in relation to specific matters to which the Member States are parties.[62]

28 According to the general rule presented in Article 4(1), the Regulation states that persons are, in principle, to be sued where they have their domicile. The place where a company can be sued is determined by the seat of the registered office of the company, the place of its head office or its principal place of business, according to Article 63(1) Brussels Ia Regulation. If one of these places is located in a Member State, a company that may be legally responsible for a violation of rights can, in principle, be brought before the courts of this State.

29 A claim arising out of a tort or delict against a person domiciled in a Member State may be brought before the courts for the place where the harmful event occurred if that place is located in an EU Member State (Article 7(2) Brussels Ia Regulation). This covers both the place where the damage occurred and the place where the natural or legal person causing the damage acted. If courts in different States have international jurisdiction, the injured party has the right to choose where to bring action.[63] This rule could serve to establish jurisdiction in type-two cases, e.g. if the place where the organs of the parent company operate is located in an EU Member State while the parent company itself is domiciled in another Member State. However, according to Wagner, courts may not consider every causal contribution to the delict as the place of causal action in the terms of Article 7(2) Brussels Ia. Rather,

[61] With respect to Switzerland, Norway and Iceland the Lugano Convention regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It contains essentially the same rules as the Brussels Ia Regulation. Although the Brussels Ia Regulation does not apply to Denmark, Denmark has declared on the basis of an agreement concluded between the European Community and Denmark that the Regulation applies to the relations between the EU and Denmark, cf. BMJV (2019).

[62] A number of international environmental treaties include jurisdictional rules that, therefore, will apply when the incident/harm takes place in the territory of a state that is party to such a treaty, cf. Chap. 5, Chap. 15 ¶ 26. As Garcia-Castrillón notes, these particular jurisdictional rules often coincide with one of the fora offered by the Regulation, cf. Otero Garcia-Castrillón (2011), p. 559.

[63] A problem arises if there is no physical harm but only financial loss or some other kind of non-physical harm, as it is not always clear in such cases where the damage occurs; cf. Hartley (2018). This problem however cannot be treated here in detail.

for the sake of legal certainty and to ensure a forum close to the facts and evidence, the action which has the closest connection to the infringement of legal rights and where the dispute can best be settled should be considered relevant to establishing jurisdiction.[64]

30 For type-two cases of transnational environmental damage (damage directly caused by subsidiaries or business partners of domestic corporations), at least two more relevant provisions of the Brussels Ia Regulation should be mentioned: Article 7(3) provides for concurrent jurisdiction of the courts of the Member State for a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, if that court has jurisdiction under national law to entertain civil proceedings. According to Article 8 of the regulation, action can be brought against EU-based business partners or subsidiaries of companies with headquarters abroad as co-defendants before the place of jurisdiction of the purchasing company or the parent company. This is possible if an independent claim against the purchasing company or the parent company does not appear to be evidently unfounded at the time the action is brought. Article 8 gives claimants in intra-EU disputes the choice to consolidate proceedings in order to avoid the risk of irreconcilable judgments.[65] The jurisdiction regarding the claim against the subsidiary or supplier continues to exist even if the action against the parent-company defendant is terminated or dismissed.

31 The Brussel Ia Regulation also contains a number of rules concerning the enforcement of decisions of national courts. In general, these rules are based on the principle that judgments given in a Member State should be treated as if they had been given in the Member State addressed and thus be recognised in all Member States without the need for any special subsequent procedure. If a judgment contains a measure or order which is unknown in the law of the Member State addressed, the responsible authorities in that Member State shall adapt that measure or order, including any right indicated therein, as far as possible to an equivalent measure under the law of that Member State. The Regulation also exhaustively sets the rules, whereby recognition of a judgment can be refused. The rules of recognition and enforcement of the Regulation also apply if a judgement is given against a person not domiciled in a Member State. It should be kept in mind, however, that these rules

[64] Wagner (2016), p. 735.

[65] Cf. UK Supreme Court *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* Judgement of 10 April 2019, UKSC 20. Under Article 8 No. 1 of the Brussels I Regulation, a foreign subsidiary, as well as suppliers and other business partners domiciled abroad, may in principle be sued as co-defendants before the general place of jurisdiction of the parent company or the customer in Germany, if an independent claim against the (parent) company is not obviously unfounded at the time the action is brought. However, at least according to the wording of the Regulation, this possibility only applies to co-defendant companies with their registered office in a Member State of the EU. In order to avoid discrimination against European companies and to include typical human rights violations by suppliers or subsidiaries, a different interpretation is conceivable but questionable according to Wagner, see Wagner (2016), p. 737.

only apply to EU Member States, if either the deciding court or the enforcing institutions fall outside of the scope of the Regulation, national rules apply.

32 Courts with international jurisdiction under the Brussels Ia Regulation may not deny their jurisdiction on discretionary grounds based on *forum non-conveniens* considerations. However, the Regulation contains rules which follow a comparable rationale: *Forum non conveniens*, according to *van Calster*, has cautiously been introduced into Article 33 and Article 34. Article 33 (*lis alibi pendens*) permits a court to stay the proceedings under certain conditions, when the case is pending before a court of a third State. Article 34 confers the same right on a court in cases related to the action in a court of a third State. These rules impose a more restricted and firmly defined room for manoeuvre for courts in the EU than would be the case in a *forum non conveniens* scenario.[66]

33 To summarise the above, the Brussel Ia Regulation permits suing European corporations and other business enterprises for rights violations suffered abroad before the courts of the States where they are incorporated. Independent actions against non-EU-nationals (including subsidiaries of EU corporations) do not fall within the scope of application of the Regulation. Accordingly, jurisdiction for actions against subsidiaries and suppliers incorporated in a third State is typically not given and depends on the divergent procedural laws of the respective forum State.

34 In the course of the recasting process, several changes were discussed with respect to the scope of the Regulation. The Commission initially suggested extending its rules to non-EU defendants, fully harmonising Member States' rules on jurisdiction in civil and commercial disputes.[67] Proposals to integrate jurisdictional rules to include a *forum necessitatis* provision, which would have provided for jurisdiction where it is impossible or unreasonable for a claimant to bring a case in another State,[68] were also not adopted in the final version of the Regulation. However, as Mills specifies, this was not the case because the idea was specifically rejected, but because the general idea of enlarging the scope of the Regulation to cover non-EU domiciled defendants was deferred. A forum of necessity rule is not considered to be required for defendants domiciled within the European Union because at least one Member State court will always have jurisdiction under the Regulation, and that court will be presumed to be capable of delivering justice because its procedures must comply with the European Convention on Human Rights. *Mills*, therefore, predicts that a forum of necessity rule would form a part of any future proposals on these questions within the European Union.[69]

---

[66] van Calster (2016), p. 181. However, as Grušić (2016), p. 39 points out, Articles 33 and 34 could lead to a "race to the court", with the European-based parent company and its overseas subsidiary commencing preventive proceedings in the (developing) country where the harmful event occurred.

[67] Augenstein and Jägers (2017), p. 20.

[68] The original proposal also included a rule on asset-based jurisdiction, which concerns jurisdiction in cases where the defendant owns property in the forum State, provided the value of that property is not disproportionate to the claim, Augenstein and Jägers (2017), p. 20.

[69] Mills (2014), p. 222.

6.3.4 Residual National Jurisdiction

In cases in which the defendant is not domiciled in a Member State, the Brussels Ia Regulation delegates the issue of forum to the rules of jurisdiction applicable in the territory of the Member State of the court seized, recital (14) Brussels Ia Regulation. If the company to be sued is not domiciled in a Member State of the EU, Switzerland, Norway or Iceland and no specific jurisdictional rules apply, national procedural laws must be used to answer the question of whether national courts have international jurisdiction. Those rules of course, may diverge from State to State in several ways. This chapter, however, limits itself to a rather brief and general outline of the dimensions of national norms which are relevant as they may facilitate tort litigations in cases involving transboundary environmental damage. Where legal norms are cited, it refers to the German Code of Civil Procedure (ZPO). **35**

Section 32 ZPO, which establishes the local jurisdiction for intra-German torts as well as the international jurisdiction of German courts ("principle of the double function of the jurisdictional rules"), follows a similar rationale to Article 7(2) of the Brussels Ia Regulation. Claims based on a tortious act committed abroad by a company that has its registered office outside one of the Member States of the EU (or Switzerland, Norway, Iceland) can be brought before German civil courts if the tortious act was also committed in Germany. An act is deemed to have been committed both at the place where the person causing the damage acted and at the place where the protected legal interests of the injured person were infringed. To establish jurisdiction, it is sufficient that one (of several) causal action was committed in Germany, although a mere preparatory action is not sufficient to invoke jurisdiction. In the case of omissions, the place where the action was required according to the relevant legal duty, is regarded as the relevant place of causal action.[70] It is irrelevant whether the action is directed against the sole perpetrator of a delict or an accomplice. The provision also applies to defendants who are liable for the actions of others and, in the case of actions against more than one co-defender, the tort must be demonstrated conclusively for each of them.[71] **36**

German civil procedural law generally recognises jurisdiction based on *forum necessitatis* considerations for cases in which the plaintiff cannot, for legal or factual reasons, pursue his or her right before a competent foreign court. This is derived from the guarantee of access to justice and the corresponding prohibition of denial of justice in constitutional and customary international law.[72] Similar *forum necessitatis* rules, based either on statute or developed through case law, form part of the law of at least ten European States, including France, Austria, Belgium, the Netherlands and Switzerland.[73] **37**

[70] Musielak and Voit (2020), Section 32, para. 23; Patzina (2016), Section 32 at 20.

[71] Cf. Saenger (2019), Section 32, para. 12.

[72] Patzina (2016), Section 12, para. 100.

[73] Mills (2014), p. 222.

38 In German law, another rule can serve to establish the jurisdiction of domestic courts. Section 23 ZPO states that if a claim under property law is to be brought against a person who does not have a residence in Germany, a German court may have jurisdiction if sufficiently valuable assets of this person or company are located in Germany.[74] However, the legal dispute must still have a sufficient nexus to Germany.[75] Notwithstanding this limitation, the rule of 23 ZPO is considered to be able to fulfil the function of *forum necessitatis*.[76]

6.4 Procedural Issues II: Standing

39 In addition to the question of the competent national court, plaintiffs seeking to press a tort claim have to overcome more procedural hurdles. One such major requirement a party must satisfy stems from the principle of *locus standi*. Standing qualifications reserve the right to sue to persons who are actually legally aggrieved or have a specific legal interest in a matter. They are, in short, intended to prevent persons from arbitrarily pursuing the legal interests of others or the general public and, thereby, deter so-called 'popular actions' (*actio popularis*). As such, a claimant has to establish that he or she is the right party to bring the case at hand, i.e. that he or she is entitled to assert the claim.[77] Depending on the legal culture and adjudicative setting, standing can be restricted to those directly affected by a defendant's action, to States or certain kinds of non-governmental organisations.[78]

40 With respect to environmental liability, standing will usually not be of concern in cases when a person is specifically and uniquely harmed by, for example, someone cutting down their trees or dumping waste on their land.[79] It can be particularly problematic for public interest litigants and victims in cases concerning environmental problems which give rise to different kinds of harm that may have not yet materialised or may be difficult to trace to a particular action.[80] When environmental harm is inflicted upon many people, for example, an entire region is harmed by

[74] If a claim is lodged seeking a pecuniary benefit, it is always a pecuniary claim, even if it is derived from a non-pecuniary legal relationship. It thus is sufficient if the claim seeks monetary compensation; cf. Toussaint (2020), Section 23 at 4; Saenger (2019), Section 23 at 2.

[75] A sufficient domestic nexus is given, for example, if a defendant, in addition to having assets in Germany, also actively participates in business life. In such cases, the domestic connection is deemed as sufficient even if the plaintiff does not have a residence in Germany, cf. Patzina (2016), Section 23 at 15.

[76] Cf. Bertele (1998), p. 228. Given this function, the possibility to establish jurisdiction based on the statutory rule of Section 23 ZPO results in the diminished practical relevance of the judiciary rule of *forum necessitatis*, cf. Patzina (2016), Section 12 at 101.

[77] Musielak and Voit (2020), Section 51 at 18.

[78] Hadjiyianni et al. (2015).

[79] UN Environment (2019), p. 192.

[80] Hadjiyianni et al. (2015).

negligent air pollution, many courts have interpreted statutes to mean that it was the government's political prerogative to find a general solution for the issue.[81] When applied to environmental matters, standing rules can prohibit an individual from suing to protect a natural resource upon which he or she relies, even when the government fails to act, which then effectively precludes access to justice.[82]

Complementary to this restrictive role, however, standing rules can also reflect a legal system's openness to public interest claims by private individuals or non-governmental organisations. For example, the landmark *Urgenda* case,[83] in which the Dutch State was obliged to take stricter climate protection measures, could be taken to a civil court because of particularly liberal practice regarding standing in the Netherlands: Article 3:205a of the Dutch Civil Code stipulates that "a foundation or association with full legal capacity that, according to its articles of association, has the objective to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons".[84] Reforms of national laws regarding the *locus standi* can, of course, serve to improve the openness in this sense of civil law systems to public interest litigation: As an instance of growing recognition, in a more general sense, of procedural and substantial rights related to the environment, UN Environment (2019) has highlighted many countries that have enacted broad or universal approaches to standing for those appealing to courts to remedy environmental harm. Such reforms may, for example, introduce so-called citizen suits primarily designed to enforce adherence to the law. Such provisions are supposed to supplement government enforcement, sometimes requiring the citizen to give notice to the government and the accused party of an intent to sue prior to bringing suit so that the government has a chance to act. For instance, Australia allows individuals and organisations to bring civil suits and civil enforcement actions if they have been involved in environmental matters for the previous 2 years. In a more general sense, States may broaden statutory standing for persons acting in their own interest, on behalf of others who cannot act in their own name, in the interest of a group or class, in the public interest or as an association acting in the

41

[81] Cf. UN Environment (2019), p. 192. In the case of *Lliuya v RWE* (Regional Court of Essen 2 O 285/15 (2016)), the defendants followed this line of argument, submitting that the claim was both inadmissible due to the lack of a legitimate interest on the part of the claimant and the lack of specificity of the claim, and unfounded as "climate change cannot be addressed through individual civil liability" but must be tackled through national and inter-governmental measures, cf. https://germanwatch.org/sites/germanwatch.org/files/announcement/21252.pdf, at 8 (Accessed 14 Apr 2022).

[82] UN Environment (2019), p. 192. In common law systems doctrines regarding the justiciability of a claim fulfill a comparable function. Prominently, the political question doctrine allows US federal courts to refrain from exercising jurisdiction over cases raising issues that are simply too political to be decided by a court of law, as to do so might force it to venture too far into the realm of the legislative and/or executive branches of government and as such be contrary to separation of powers principles, Enneking (2012), p. 144.

[83] See Chap. 4, ¶ 68 (Sect. 4.3.2).

[84] Cf. Saurer and Purnhagen (2016), p. 17.

interest of its members.[85] Section 606 of the German Code of Civil Procedure, which was introduced in 2018, establishes the right of certain associations to take legal action against enterprises to protect the legal interests of consumers affected by mass damage. The association then acts in its own name but on behalf of a collective interest.[86] Although it is not yet clear whether the new norm will have major consequences (specifically concerning environmental issues), the reform proves that even in legal systems such as the German one, which is rather stringently tailored to the two-party process, collective interests can be integrated into *locus standi* regulations.

6.5 Applicable Law

42 Another critical legal issue in liability cases concerning two or more States in one way or the other, the competent court has to decide which State's law it should apply. Even if a European court accepts jurisdiction it is, as *Enneking* explains, not at all a given that the court will be able to adjudicate on a foreign liability claim based on the forum State's substantive norms on tort law. In fact, in many cases, the forum court involved will have to formulate its judgment with respect to the alleged wrongfulness of the corporate conduct and its legal consequences based on foreign rules of tort law.[87] This application of foreign tort law can have far-reaching consequences, especially when the damage was suffered in a developing State where local law may contain relatively lax environmental and compensation standards in comparison with that operating in EU Member States. Consequently, even though the victims of environmental damage can find German or other European courts willing to accept jurisdiction over corporations domiciled in their State, victims will find it more difficult to prevail in their claim and may even struggle to find lawyers willing to take on their case.[88]

43 The issue of the applicable law must, again, be examined on the ground of private international law which is, in principle, part of the law of the forum State. Courts will, accordingly, apply the rules of private international law of their respective countries. Within the EU, except for Denmark, private international law is largely unified and for claims in tort, the applicable law is defined by the Rome II Regulation of the EU. Contrary to the Brussels Ia Regulation, which is concerned only with torts connected to the EU, Rome II applies universally, i.e. to all transboundary torts regardless of the place where the environmental damage or the defendant's actions took place.

[85] UN Environment (2019), p. 193.

[86] Musielak and Voit (2020), Section 606 at 4.

[87] Enneking (2017), p. 49.

[88] Grušić (2016), p. 65.

6.5.1 *General Rule of* lex loci damni *and a Special Rule for Environmental Damage*

As a general rule, the law applicable to an obligation arising out of a tort shall be the law of the State in which the damage occurred. This applies regardless of the country in which the event giving rise to the damage occurred and irrespective of the country or the countries in which the indirect consequences of that event occur (Article 4 (1) Rome II Regulation). According to this rule (*lex loci damni*), it is the tort law of the host country that will, in principle, be applicable in type-two cases concerning damage directly caused by suppliers or subsidiaries abroad but which are brought before EU Member State courts. The same rule in principle also applies if the tort in question is a type-one case,[89] that is when the act (or omission) giving rise to the damage is located in one country whereas the harm resulting from that act (or omission) has arisen in another country.[90] **44**

For environmental damage, there is an exception to this principle: Article 7 Rome II gives the claimant a choice between the law of the State where the environmental damage occurs and the law of the State where the event giving rise to the damage occurred. According to recital 24 of the Regulation, 'Environmental damage' is understood as meaning an adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms. However, the material scope of Article 7 Rome II not only encompasses environmental damage in a strict sense but also damage sustained by persons or property as a result of such damage. **45**

The event giving rise to the damage is commonly understood as the conduct that has given rise to the damage. In cases of environmental damage, the claimant thus has a right to choose between the law of the place where the damage is sustained and the law of the State where the actions occurred that gave rise to the damage. The Regulation's choice-of-law rule for environmental damage is based on the principle of ubiquity.[91] The claimant's right to choose the applicable law is supposed to "discriminate in favour of the person sustaining the damage", cf. recital 24 Rome II. Article 7 Rome II implies an important facilitation as the claimant is, in principle, free to choose the law which involves more relevant precedents, higher regulatory **46**

[89] See above, ¶ 6 *et seq*.

[90] Cf. Enneking (2017), p. 50. Article 4 contains two general exceptions to this rule for cases: According to Article 4(2), in cases where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply; according to Article 4(3) in situations where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. These exceptions, however, are unlikely to gain much relevance in cases concerning extraterritorial environmental liability.

[91] Before the harmonisation of European private international law this used to be the general rule in German Law for delicts, cf. Junker (2018), Article 7 Rom II-VO at 1.

standards, stricter liabilities, more liberal rules on presumptions of law or on shifting the burden of proof, higher damages awards and so forth.[92] In many cases, especially those involving incidents in the Global South, this will be the law of the corporate defendant's home State.

47 Article 7 Rome II, in accordance with *Enneking*'s qualification, can be of significance at least for those liability cases that involve environmental damage as specified in the Regulation, provided they can be construed as transboundary tort claims in which the event giving rise to the damage in the host country has taken place in the home country.[93] This seems to be obvious for type-one cases where the detrimental effects of an action or omission in one country transcend this countries borders and directly cause environmental damage in another country.

48 Regarding type-two cases, however, it is controversial whether Article 7 Rome II makes it possible that a decision taken at a corporation's European headquarters will be understood as the event giving rise to the damage.[94] This could be the case when the demands or policies related to a corporation's supply-chain, or the lack of supervision regarding a parent company's subsidiaries[95] that initiate the chain of events, which results in environmental damage are to be considered the legally relevant action for the purposes of Article 7 Rome II.[96] In such cases, the corporation's behaviour may be regarded as an 'indirect event' in the sense that it precedes the subsidiary's or tortious action causing the damage directly.[97] Many scholars argue, however, that Article 7 has to be interpreted in such a way that, in order to be linked to the place of action, only the action or omission that directly caused the violation of rights is the decisive factor. Causal contributions on a preliminary stage thus would not be relevant.[98] When the legally relevant contribution is an omission, i.e. if the parent company is blamed for not taking the required action to prevent damage directly caused by a supplier or a local subsidiary, the place where the act (omission) giving rise to the damage occurred (*lex loci delicti commissi*) then shall be the place where action should have been taken in accordance with the law applicable at the location of the legal interest to be protected. This place, in principle, will be the place where the legal interest was infringed.[99] In cases of strict liability,

[92] Enneking (2017), p. 54.

[93] Enneking (2017), p. 54.

[94] Cf. van Calster (2016), p. 265.

[95] Enneking (2012), pp. 212–218.

[96] Grušić (2016), p. 60.

[97] Grušić (2016), p. 61.

[98] Wagner (2016), p. 743.

[99] Junker (2018), Article 7 Rom II-VO at 22; Späth and Werner (2021). Grušić, however, points to a perspective which differentiates according to the substance of the relevant duty: "If the duty is one of exercising supervision over a subsidiary to prevent it from, inter alia, causing environmental harm it can be said that that duty must be exercised in the boardroom of the parent. If, on the other hand, it is framed as a duty to warn, then that duty is breached at the last place where that warning could have been given, usually the place where the harm occurs", Grušić (2016), in footnote 201 citing International Law Association, 'Transnational Enforcement of Environmental Law'

the place to be considered as the *lex loci delicti commissi* is the place where the event causing the damage occurred, understood as the place where the polluter acted dangerously or the place where the damage-causing facility operated.[100]

To support this interpretation, scholars point to common principles of autonomous international tort law[101] and—given that there are no decisions of the European Court of Justice involving Article 7 Rome II—on the case law on Article 7 (2) of the Brussels Ia Regulation.[102] CJEU cases dealing with the jurisdictional treatment of indirect damage accordingly demonstrate that only the place where the direct victim suffers direct damage is of jurisdictional relevance.[103] Applying this distinction to the question of the nature of the event giving rise to the damage for the purposes of Article 7 of Rome II would imply, as *Grušić* explains, that both the 'indirect event' (i.e. the parent company's or purchasing company's decisions that started the chain of events resulting in environmental damage) and the actions of the 'indirect tortfeasor' (i.e. the company whose decisions concerning the operations of the subsidiary or supplier) would be disregarded for choice-of-law purposes.[104] **49**

Although many seem to support this restriction of the ubiquity principle of Article 7 to the type-one kind of direct transboundary damage,[105] a number of arguments can be made in favour of applying Article 7 to type-two cases and, thus, open the door to consider the decisions and actions of the parent company or purchasing company as the causal event relevant for choice-of-law. Most importantly it should be noted, with *Enneking*, that such a narrow interpretation neither seems "to be in line with the Rome II Regulation's universal application, nor with the environmental damage rule's main aim, which is to raise the overall level of environmental protection and of making the polluter pay".[106] As the Commission made clear in the explanatory memorandum to the proposal of the regulation, Article 7 shall, as a reflection of the European Union's more general objectives of environmental policy, "not only [. . .] respect the victim's legitimate interests but also [. . .] establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity".[107] The major rationale of the rule, besides having the goal to adequately **50**

(Conference Report Berlin 2004), available at https://www.ila-hq.org/index.php/committees, last accessed 14 Apr 2022.

[100] Cf. Junker (2018), Article 7 Rom II-VO at 22.

[101] Wagner (2016), p. 743.

[102] See, ¶ 29 *et seq*.

[103] CJEU, Dumez France SA and Tracoba SARL v Hessische Landesbank and others: ECJ 11 Jan 1990 ECLI:EU:C:1990:8; Marinari v Lloyd's Bank: ECJ 19 Sep 1995 ECLI:EU:C:1995:289. Cf. Grušić (2016), p. 61.

[104] Grušić (2016), p. 62.

[105] See Wagner (2016), pp. 743–744; Grušić (2016), with further references at footnote 202.

[106] Enneking (2017), p. 54.

[107] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual regulations (Rome II), EU Doc COM (2003) 427 final 19–20.

take into account the right of injured persons to effective redress, is to guarantee an environmental rule of law despite the existence of an uneven regulatory playing field:[108] it was implemented to make sure that private international law does not give economic actors problematic incentives by exclusively applying the law of the place where damage is sustained. Elsewise, benefit-maximising actors could exploit the lower environmental standards in other States by establishing risky facilities at locations well-suited for the purpose, such as border regions, and thereby avoid the costs of effectively mitigating their risk of liability.[109]

51 The Commission thus explicitly acknowledges the significance of environmental liability for environmental policies. It highlights the importance of applying an adequate standard of care to transboundary environmental damage to prevent "pollution havens".[110] While the Commission only expressly refers to externalities caused in "neighbouring countries", the regulatory ratio or "underlying philosophy"[111] regarding environmental liability as a functional precautionary mechanism[112] would not allow the restriction of this rule to only certain situations, such as when local conduct results in transboundary environmental damage which manifests in a neighbouring (EU) country.[113] The assumption that there will be problematic effects from leaving corporate leeway to take advantage of "pollution havens" is also plausible in constellations where liability risks can be shifted to far away developing countries, just as it is in constellations where damage would manifest in a neighbouring (EU) country. To restrict the *lex loci delicti commissi*-rule of Article 7 Rome II to type-one cases would entail that non-EU environmental interests do not fall within the scope of Rome II's environmental policies.[114] This would, given the global relevance of most environmental problems, not only contradict the 'enlightened self-interest' of the EU but would also collide with the 'cosmopolitan objective' that the Regulation presumably pursues, namely, raising the general level of environmental protection based on the universally accepted principles of environmental law.[115]

---

[108] See above, Chap. 2, ¶ 12 *et seq.* (Sect. 2.2.1).

[109] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual regulations (Rome II), EU Doc COM (2003) 427 final 19–20.

[110] See above, Chap. 2, ¶ 14 (Sect. 2.2.1) and van Calster (2016), p. 264.

[111] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual regulations (Rome II), EU Doc COM (2003) 427 final 19–20.

[112] Cf. van Calster (2016), p. 264.

[113] Cf. Enneking (2017), p. 54. As Grušić points out, it is unlikely that Member States' courts will be seised with a claim concerning a type I case of transboundary torts where both elements of the tort occur entirely outside the EU; the effect of Article 7 in this type of case is to raise the level of environmental protection within the EU and at its borders, cs. Grušić (2016), p. 50.

[114] Enneking (2017), p. 54.

[115] Grušić (2016), p. 50. The facilitations for victims of environmental damage, according to recital 25 of the regulation, are "fully justified" given the environmental principles of the Union, such as the precautionary principle, the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays.

52 It has been proposed that a more 'cosmopolitan understanding' of Article 7 Rome II in this sense may be more viable for another reason: This follows, as *van Calster* explains, from the close link between Rome II and the European Environmental Liability Directive (ELD). On the one hand, again according to *van Calster*, the Commission's reference to the Rome II Regulation in its proposal regarding recent developments, which recognise environmental damage as being included (without specifically mentioning it), undoubtedly relates to the concepts of the ELD. The ELD, on the other hand, specifically mentions in Article 3(2) that it shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of the Directive and without prejudice to community legislation containing rules on conflicts of jurisdiction. Article 6 and 8 of the Directive establish liability of the 'operator', as defined in Article 2(6): "'operator' means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity."[116] With regard to the prevention and remedying of environmental damages, precisely this broad definition of 'operator' in the ELD and the ELD's link to the Rome II Regulation are considered to open up an option to accept the characterisation of corporate-headquarter decisions as "an event giving rise to damage" in terms of Article 7 Rome II.[117] Concerning the relevant content of Article 7 and its practical implications for extraterritorial liability cases, however, there remains a need for further clarification.

6.5.2 Exceptions According to Rome II

53 In addition to the special rules for environmental damage in Article 7, Rome II contains several relevant exceptions that may allow for the application of the law of the (European) forum, even though the *lex loci damni* rule of Article 4 would stipulate the application of foreign law. The first exception concerns overriding mandatory provisions of the forum which, according to Article 16, should be applicable irrespective of the law otherwise applicable to the non-contractual obligation. The ECJ has defined overriding mandatory provisions as national law with which compliance "has been deemed to be so crucial for the protection of the political, social or economic order in the EU Member States concerned as to require compliance therewith by all persons present on the national territory of that EU Member States and all legal relationships within that State".[118] Overriding

[116] van Calster (2016), pp. 263, 265.

[117] Otero Garcia-Castrillón (2011), p. 571.

[118] ECJ *Arblade* C-369/96 and C-376/96 [1999] ECLI:EU:C:1999:575ECJ. Cf. Marx et al. (2019), p. 35.

mandatory provisions, in *Enneking*'s words, "include domestic regulations of a (semi-) public law nature that intervene in private legal relationships in order to protect the public interest".[119] Such "regulatory private law"[120] could be seen in "statutory duties for locally based internationally operating business enterprises with respect to the people and planet related impacts of their activities in host countries, [which] could be considered to be overriding mandatory provisions that should find application in foreign direct liability cases brought before the courts in those EU Member States."[121] As has been observed recently, legislative provisions on mandatory due diligence, such as the French Law on the Duty of Vigilance, could form the basis for overriding mandatory rules to ensure their applicability in civil liability cases relating to corporate human rights abuses or environmental damage in third countries.[122] Such national due diligence regulations aimed at creating extraterritorial effects, which will be discussed in detail in Chap. 7, may also expressly stipulate that their provisions should be considered as overriding mandatory provisions, and as such, applied regardless of the otherwise applicable law. Drafts for such laws, such as the unsuccessful Swiss Responsible Business Initiative and the regulatory debate that preceded the German Supply Chain Due Diligence Act ("Lieferkettensorgfaltspflichtengesetz", LkSG), discussed a provision to ensure the applicability of due diligence obligations of companies in civil liability claims irrespective of the foreign applicable law.[123]

54 The second relevant exception in Rome II is found in Article 26 and provides that the forum can preclude the application of a foreign law that would be manifestly inconsistent with its public policy (*ordre public*).[124] This exception, according to *Marx et. al*. could provide a minimum guarantee in transnational liability cases that are brought before EU Member State courts but governed by host country law. *Marx et al.* refer to transnational liability cases arising from human rights violations, as those, whether ensuing from international or domestic law, are considered a part of the public policy of the forum. The same can be true for environmental liability cases, which involve infringements of fundamental human rights. Just as the mandatory-provisions exception, Article 26 may, at least in theory, open the possibility for a forum State to apply its own law when the law of the host State does not offer sufficient protection for the victims, or when damages in a host country is too low to deter businesses from further abuse.[125]

[119] Enneking (2017), p. 55.

[120] Cf. Hellgardt (2016).

[121] Enneking (2017), p. 56. Cf. Otero Garcia-Castrillón (2011), p. 576.

[122] Marx et al. (2019), p. 113.

[123] Smit et al. (2020), p. 280.

[124] Cf. recital (32) Rome II Regulation.

[125] Marx et al. (2019), p. 113.

These interpretations of Articles 16 and 26 Rome II, however, are not undisputed.[126] In addition, the exceptions to the general rules of the Rome II Regulation are subject to certain restrictions.[127] Their practical relevance for environmental liability cases therefore remains to be seen. A statutory reform could resolve this uncertainty. In this regard, the recent report of the JURI committee proposed to include a new Article 6(a) into the Rome II Regulation that provides a specific choice of law provision for civil claims relating to alleged business-related human rights abuses committed by EU companies in third countries. Victims of business-related human rights violations would, accordingly, be able to choose between the law of the country in which the damage occurred (*lex loci damni*), the law of the country in which the event giving rise to the damage occurred (*lex loci* **55**

[126] For example, according to Wagner, Article 26 does not create the possibility to apply forum law. This follows from the distinction between a positive and negative function of the *ordre public* principle. The positive function of the reservation in favour of fundamental interests of public policy allows the application of domestic legal norms on situations which are, *per se,* governed by foreign law. The negative function consists of avoiding intolerable results that would arise from the application of foreign law. Article 26 accordingly concerns only the negative function. Article 16 Rome II, on the other hand, shall only apply when the mandatory provisions in national law exclusively concern legal interests and legal relationships within the territory of the forum State. It could be ruled out that the regulation of legal relationships of entities situated in other States would be required for the preservation of the political, social or economic order of the concerned Member State. A legitimate interest of one State to regulate situations on the territory of another State should not be recognized, see Wagner (2016), pp. 744–749. Particularly with respect to Article 16 Rome II, Wagner thus bases his view on fundamental considerations regarding legitimate prescriptive jurisdiction which can, however, be readily disputed. The German Supreme Court, the highest national civil court, also has taken the view that it would run contrary to principles of international law if the application of foreign legal norms would *a priori* depend on their compatibility with constitutional or human rights law, see Federal Court of Justice IV ZR 93/63 (1964), 12 ff. The German constitutional court however has rejected this view. Accordingly, the *ordre public* clause should be understood as a 'gateway' or 'entry-point' for fundamental rights into private international law, see Federal Constitutional Court 1 BvR 636/1968 (1971). Results that run contrary to the constitution, as Colombi Ciacchi concludes, thus can be avoided either (indirectly) by using the public policy exception or (directly) by seeing in the fundamental rights a barrier that limits the application of the law designated by a conflict-of-law rule. According to Colombi Ciacchi, the progressive intrusion of fundamental rights into private international law is proving to be a renaissance of the *ordre public*. Its relevance and scope of application are growing as more and more areas of law are being attributed constitutional and human rights dimensions, cf. Colombi Ciacchi (2008), pp. 24, 37. In the context of transnational environmental liability, one may add that the growing recognition of the environmental dimensions of human rights as well as possible developments regarding direct human rights obligations of transnational corporations, which may become relevant for national torts, could further increase the relevance of *ordre public* exceptions in the context of the Rome II Regulation. As *Enneking* concludes, "in the particular context of foreign direct liability cases, where application of host country law may lead to fundamentally different outcomes with respect to standards of care in relation to the protection of human and environmental interests, including fundamental human rights standards, the public policy exception may well prove instrumental", Enneking (2017), p. 65.

[127] For example, in accordance with recital 32 Rome II Regulation, courts of the Member States shall apply Article 26 only "in exceptional circumstances". This suggests that the reservation should be limited to a narrow range of exceptional cases, cf. Colombi Ciacchi (2008), p. 11.

delicti commissi) and the law of the place where the defendant undertaking is domiciled or, lacking a domicile in the Member State, where it operates.[128] Such a proposition, as *Marx et. al.* explain, "would take into consideration the specific nature of the business-related human rights claims and redress the power imbalance between the parties, the victims usually being in a situation of particular vulnerability in relation to the multinational companies. It would also promote the interests of the respective countries and of the EU as a whole in upholding higher human rights standards [. . .] At the same time, it also determines the possibilities for host country-based individuals and communities who have suffered harm as a result of the activities of EU-based businesses with international operations to ensure, through this type of litigation, that the level or protection of their environmental and human rights interests is adequate and not fundamentally different from that afforded to those living in the EU home countries of the business enterprises involved."[129]

56 Article 17 of the Rome II Regulation provides that "in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability". Conduct and safety rules may bear specific relevance in the context of environmental damage.[130] According to the Commission's Explanatory Memorandum to the Regulation, Article 17 shall be of help with respect to "one of the most frequently asked questions [concerning] the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 17, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business."[131] Whereas the Commission's explication indicates that rules of safety and conduct at the place of the event giving rise to the liability may exonerate the perpetrator, this does not necessarily mean that those rules could not also lead to a stricter or extended liability.[132] However, the Commission chose a more neutral wording that also seems to allow for an interpretation in the latter direction by saying that rules of conduct should be taken into account by the court "as a point of fact and insofar as is appropriate, for example when assessing the seriousness of the fault or

[128] JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[129] Marx et al. (2019), p. 114.

[130] van Calster (2016), p. 264.

[131] EU Com, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), 20. Available online at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF.

[132] Wagner, however, interprets the rule in a way that Article 17 Rome II-VO allows for an exoneration of the perpetrator regarding the safety and security regulations applicable at the *lex loci delicti*. The application of stricter domestic standards at the expense of the injuring party, in contrast, would undermine the purpose of the Rome II Regulation, which has abandoned the ubiquity principle, cf. Wagner (2016), pp. 741–742.

the author's good or bad faith for the purposes of the measure of damages".[133] Therefore, it seems not out of the question to assume that provisions on rules of safety and conduct may also play a role with respect to type-two cases. Before EU Member State courts dealing with the liability of EU-based parent companies for harm caused to human rights and environmental interests in non-EU host countries, it could allow the court to take into account home country behavioural standards that can be stricter than those in the host country, even when the law of the host country is applicable to the case.[134] There seems to be a wide consensus, however, that Article 17 should, on the one hand, not be understood in such a way as to provide for an application of the rules of safety and conduct, but does only allow the court to take them into account as a matter of fact in assessing the conduct of the tortfeasor and, on the other hand, it is intended as a tool for helping the tortfeasor, but not necessarily the victim.[135]

However, Article 17 may help to resolve the complex issue of how to best deal **57**
with public permits or licences for potentially harmful conduct in cases of transboundary environmental damage. As will be further discussed below,[136] permits might limit a perpetrator's liability. If the environmental damage was caused by an emission or event expressly authorised by and fully in accordance with the conditions of an administrative authorisation conferred by or given under applicable national laws, cf. Article 8(4)(a) Environmental Liability Directive, the question arises whether this authorisation affects the juridical assessment of the environmental damage. The aim of an authorisation can be to provide legal certainty about the permissibility and legality of an emitting installation not only for the neighbourhood and the public but also for the owner of the emitting installation. Depending on the concrete legislation, it is conceivable that the authorisation would legalise environmental damage to a certain level or that the authorisation limits the possibility of third parties to claim remediation or compensation.[137]

[133] EU Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), 25. Available online at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF. Accessed 14 Apr 2022.

[134] Enneking (2017), p. 58.

[135] Symeonides (2008), pp. 40-41; cf., van Hoek (2006), p. 166; Wagner (2016), pp. 741–742. Also see EU Com, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), 25. Available online at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF. Accessed 14 Apr 2022.

[136] ¶ 99 *et seq*.

[137] van Calster (2016), pp. 264–265.

6.6 Selected Material Problems I: Environmental Damage—Anthropocentrism and Normative Individualism of Tort Law

6.6.1 Protected Rights and Interests: Does Tort Law Protect Environmental Rights?

58 Scholars differentiate between two different concepts of environmental damage in relation to the protective scope of tort law and do so in a way that mirrors the distinction between a narrow, anthropocentric and a wider, 'eco-centric' concept of environmental human rights, as described in Chap. 4 of this study.[138] The 'rather complex' notion of environmental damage is, as a result, equally often understood in a binary manner:[139] Firstly, it refers to damage to a private interest, such as personal integrity or property, which is caused by pollution. Here, the natural elements are merely a transmitter of harmful emissions or other detrimental impacts. The second, fundamentally different category,[140] is seen in cases where the harm is not to a private interest but to the environment per se.[141] The latter form of damage, referred to hereafter as 'pure environmental damage', covers damage to environmental goods, namely air, water, soil, flora and fauna and interactions between these factors.[142] Traditional tort law only covers most of the first, environment-related harms to private interests.

59 In German law, Section 823 para. 1 BGB protects a number of rights, such as the right to life, physical integrity, health, personal liberty and property as potential starting point for tort claims.[143] If a person loses her life as a consequence of environmental impacts, that victim's relatives may be entitled to damages; physical injuries or harm to health can occur, for example, in the form of sleep disorders due to noise or as allergic reactions to pollutants released. Tort law also protects against restrictions on the freedom of physical movement. Prominently, environment-related damage may concern the destruction of or damage to property, the withdrawal of property or the reduction of the use-value of property.[144] Property in land or in inland waters, but also in beaches and the seabed is protected as is, under certain circumstances, property in animals.[145] Notably, publicly-owned property can be a

[138] Chapter 4, ¶ 77 *et seq*. (Sects. 4.3.3 and 4.4).

[139] Hinteregger (2019), p. 1038.

[140] Brans (2001), p. 13.

[141] Wagner (2012).

[142] Hinteregger (2019), p. 1038.

[143] Cf. van Dam (2011), p. 243.

[144] Cf. Schimikowski (2002), p. 34.

[145] Wagner (2017), para. 217. However, wild animals are only exceptionally subject to civil law ownership and these animals are usually not part of the natural diversity. Indirect protection of the property of wildlife may only be provided in exceptional cases, e.g. as damage to micro-organisms

protected right under German tort law.[146] Finally, in addition to damage to proprietary rights, certain kinds of environmental damage can be covered by German liability law if they exhibit a relevant similarity to property rights: For example, the appropriation right of a landowner to hunt, i.e. to take possession of the prey and to tend the prey is protected. Comparably, fishing rights within inland waters, as well as certain water-sharing rights are protected.[147]

The focus of (German) tort law on individual rights and the fact that it covers only specific impacts of environmental damage have been thoroughly analysed and controversially debated, especially during the 1990s and early 2000s, and still may be seen as a major limitation of civil environmental liability. It has to be kept in mind, however, that particularly the horizontal protection of individual rights,[148] as *van Dam* has comprehensively described, reflects much of the instrumental potential of torts from a rights-based perspective: "While it is questionable whether corporations have obligations on the basis of international human rights law [. . .], it is beyond doubt that in tort law they are obliged not to infringe (rather, to respect) the citizen's rights to life, physical integrity, health, property and freedom and other rights. In this respect, human rights and tort law are brothers in arms."[149] In many **60**

on a certain territory will frequently be associated with damage to a plot of land; cf. Meyer-Abich (2001), pp. 127–139.

[146] With respect to German law, this is the case if the relevant property can be considered as ownership in the sense of civil law as opposed to public property, which is not subject to civil law, cf. Meyer-Abich (2001), p. 140. The seashore down to the low tide mark and the public rivers are, however, according to the jurisdiction of the federal court of justice, owned by the State and are not subject to the protection of property under civil law, Wagner (2017), Section 823, p. 218.

[147] Meyer-Abich (2001), pp. 142–146. Seibt (1994), pp. 28–31.

[148] Chapter 2, ¶ 68 (Sect. 2.4.3).

[149] van Dam (2011), p. 243. Van Dam has also analysed in detail the extent to which tort law systems are designed to protect rights and interests varies between different legal cultures. In German doctrine, a prominent element of the endeavour to establish the required unlawfulness of a perpetrator's act consists in proving that one of the rights according to Section 823 para. 1 BGB has been infringed. The question of when and whether the infringement of the protected right/interest is sufficient to establish the unlawfulness of the conduct in question is, however, the subject of perennial debate in German doctrine, cf. Wagner (2017), Section 823, para. 5. This somehow contrasts with common law tort law, particularly the tort of negligence, where the emphasis is not on the claimant's rights but the defendant's duty of care, and the principle of the freedom of action is a strong driving force. French tort law, with its emphasis on strict liability rules that apply to cases of death and personal injury, is not explicitly rights-based but it is implicitly so, and *de facto* perhaps even more so than German tort law; van Dam (2011), pp. 243–244; van Dam (2014), pp. 168–169. The differences, however, may not be as striking as they first appear: If the injury is brought about by an act which only indirectly causes the damage or by an omission, the prominent focus of German doctrine on protected rights and interests is less definite as the primary focus shifts to substantiating the duty of care, i.e. the duty to prevent the violation of a protected interest; this also holds true for a right to injunctive relief; cf. Wilhelmi (2009), pp. 132–133. Notwithstanding the emphasis of common law on a tortfeasor's obligations, it is, as Latham et al. (2011), pp. 764–765 point out, a fundamental principle of tort law that there must be an actual physical injury to person or property, or at least actual serious emotional harm for a cause of action to exist in common law. In the context of an environmental tort action, there must likewise be an actual injury to a person or

cases, environmental harm will concern individual human interests. The fact that the impairment of soil and water, as well as fishable and huntable animals, are included in the scope of protection under tort law means that many environmental harms can already be taken into account under liability law. Tort litigation regarding environment-related damage can thus be, in principle, quite relevant concerning the regulatory functions and objectives of environmental liability. From a policy perspective, effective access to justice and consequential compensation in such cases may have significant impacts.

61 It is clear, however, that 'pure' environmental damage does not readily fit into the categories of traditional tort law. The traditional rules primarily concern the protection of private and individual interests and, in cases of pure environmental damage, these interests are only indirectly affected if at all.[150] Pure environmental damage to natural resources which were not held as private property, such as non-huntable animals, natural habitats and the climate, remains outside tort law's traditional scope of protection.[151] As pure environmental damage affects common instead of private interests, the respective gaps in traditional liability law can also be seen as a 'collective action problem':[152] Incidents that affect collective interests do not, generally speaking, give rise to legal rights.[153]

62 **The European Administrative Liability Regime for Environmental Damages**

A rather evident approach to fill tort-law's gaps regarding public and collective goods relies on the traditional division of labour between public and private law. Most importantly, an 'administrative' liability regime, as mentioned above,[154] gives national authorities the competence to directly address polluters responsible for activities that pose a threat to the environment.[155] In cases involving pure environmental damage, it is then up to the relevant public authorities to seek injunctive relief or clean up the pollution and seek recovery of the clean-up costs from the person responsible for the damage.[156]

(continued)

group of persons or to property. The differences between the legal cultures in this respect are also likely to appear less significant when one takes into account that the duty of care, as the principal point of reference of common law, is, in analytical terms, necessarily related to a right or interest to be taken into account by the liable person. For an analytical account on the complex correlation between rights and duties in private law, cf. Cane (2012).

[150] Brans (2001), p. 13.

[151] Wagner (2012).

[152] Casado Pérez and Gómez Ligüerre (2019), p. 24.

[153] Brans (2001), p. 13.

[154] Chapter 2, ¶ 40 (Sect. 2.3.2), Chapter 3, ¶ 40 (Sect. 3.3.3), see also Chapter 14, ¶ 4 et seq. (Sect. 14.2.1 and 14.2.2).

[155] IICA (2007), pp. 9–10.

[156] Grušić (2016), p. 28.

The German Umweltschadensgesetz (USchadG), which implements the European Environmental Liability Directive,[157] takes such an administrative approach to tackle pure environmental damage.[158] The law covers damage to land, damage that significantly affects the environmental (ecological, chemical or quantitative) status of water resources and damage to protected species and natural habitats. Damage is defined as an identifiable adverse change to a natural resource (species and natural habitats, water and soil) or impairment of the function of a natural resource that occurs directly or indirectly.

In accordance with the polluter-pays principle, the polluter shall primarily be responsible for preventing and remedying environmental damage. If the polluter cannot be held liable, the authority itself shall take the necessary measures. An operator who carries out specific hazardous professional activities, or is responsible for them, shall accordingly take preventative measures or, if harm has already occurred, prevent further harm and take all necessary remedial actions. The operator shall also be required to bear the costs of remedying the environmental damage caused.

The rules explicitly do not apply to individual claims for personal injury or damage to property based on tort law. Only the competent government authorities may take action against the polluter and, indeed, private organisations and individuals have no right of action. However, non-governmental organisations promoting environmental protection are entitled to approach the competent authority and request that actions be taken against the polluter.[159]

The USchadG is thus supposed to have a complementary relationship to environmental liability under tort law: While the latter undisputedly covers the violation of private legal goods and interests 'via the environmental path', i.e. by means of contamination of environmental media, the USchadG focuses

(continued)

[157] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

[158] Notably, the Commission at first proposed a comprehensive liability regime applicable to damage to common goods as well as to damage to individual property. Given, that "there are limits to the availability of public resources for this, and there is a growing acknowledgement that the public at large should feel responsible for the environment and should, under certain circumstances, be able to act on its behalf", it took a "two tier approach": Member States should be under a duty to ensure the restoration of biodiversity damage and decontamination in the first place (first tier) by using the compensation or damages paid by the polluter. Public interest groups should get the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly (second tier). This approach should apply to administrative and judicial reviews and to claims against the polluter. Cf. EU Commission, White Paper on Environmental Liability, Doc. COM (2000) 66 final, 22–23. Only later did the Commission draw a clear distinction between civil liability and an administrative liability for preventive or remedial actions, cf. Hellberg et al. (2008), p. 30.

[159] Wagner (2012).

on the damage to nature itself. Tort law has a decidedly anthropocentric approach, whereas the USchadG follows an ecocentric approach.[160]

This approach, provided that the competent authorities ensure its effective implementation, may, in principle,[161] be well-suited to provide for the prevention or restitution of pure environmental damage in national constellations. It has to be kept in mind, however, that it has its limits in transboundary constellations. For jurisdictional reasons, the competent authority can only ensure compliance on its own national territory. If environmental damage in another country originates on its own territory, the authority cannot guarantee restoration at the place of damage. If environmental damage caused in another State occurs or is likely to occur on its own territory, a competent authority cannot hold residents of third countries accountable to ensure prevention or restitution. The enforcement of costs incurred by the competent authority for preventative or remedial actions against injuring parties abroad is also unlikely to be successful.[162] The solution to such issues in transboundary cases regarding pure environmental damage thus has to take place in a rather cumbersome manner under traditional rules of jurisdiction, recognition and enforcement of foreign judgments and, if present, international environmental treaties.[163] The prospect of transnational environmental litigation by public authorities to alleviate such difficulties, as *Grušić* concludes, is poor even within the European Union, given that the Member States' traditional laws also contain public law exceptions and the dearth of civil liability environmental treaties.[164]

Scholars have therefore proposed a 'green' interpretation of the Environmental Liability Directive and particularly the Rome II Regulation to enable public authorities to use tort law remedies to address environmental damage. Such an approach would, accordingly, be best suited to accommodate the EU environmental principles as regulated in EU law as interpreted by the EU Court of Justice. The majority of scholars, however, seem to disagree with this interpretation and the proposal does not seem to be reflected in relevant decisions of the ECJ.[165]

[160] Wagner (2017), Section 823, para. 885.

[161] Contrary to this theoretical potential, scholars have highlighted the weak and limited practical implementation of the Environmental Liability Directive, cf. Pouikli (2018), p. 204.

[162] Cf. Beckmann and Wittmann (2012), Section 12, para. 3. Hellberg et al. (2008), p. 98.

[163] Cf. Sec. 12 UmwSchG.

[164] Grušić (2016), p. 30. Given these shortcomings, proposals to improve the directive include the adoption of an international convention on the issue of transboundary pollution or the designation of a special authority on the European level, which will supervise and coordinate the national competent authorities, cf. Pouikli (2018), p. 204.

[165] Cf. Kunda (2012), p. 512. Grušić (2016), pp. 31–36.

63 In addition to environment-related damage and pure environmental damage, environmental harm can cause so-called pure economic losses; for example, when a hotel or other beach facility operators lose profits due to an oil spill, even though none of their property has been damaged.[166] The possibility to recover such pure economic losses can vary as there are significant differences between different legal systems when addressing this issue.[167] As *Bergkamp* observes, courts have, in principle, been reluctant to award compensation for pure economic loss. Accordingly, denying recovery could be justified because, *inter alia*, the concept of pure economic loss does not provide for the clear and reasonable limits required by the deterrence and insurance rationale of liability law.[168] However, although deterrence efficiency may not require compensation, it is argued that corrective or distributive justice requires that tortfeasors repair the private consequences of their negligence. In addition, the most plausible candidate for a moral- or economically-based exception to a principle denying recovery of pure economic loss would be damage to public resources, for example, when an oil spill kills fish, fishermen who see their income drop should be entitled to compensation.[169]

64 The argument regarding demarcation problems of the concept of pure economic loss as a right may be less convincing if clear and reasonable limits of liability can be provided for by means of defining a correlative duty or a prohibition. In German tort law, pure economic loss as a consequence of environmental damage can be compensable in specific cases. On the one hand, according to German case law, pure economic losses can be compensable if there is an immediate interference targeting a business itself ('unmittelbar betriebsbezogener Eingriff').[170] On the other hand, this kind of loss can also be covered by Section 823 para. 2 BGB if a statutory obligation has been infringed and when the respective statute can be qualified as a 'protective law' ('Schutzgesetz'). This is the case where the purpose of the provision is to protect the legal interests of a person. If a provision is designed to protect an object, the person to whom this object is legally attributed is included in the protective scope. According to Section 823 para. 2 BGB, violations of environmental standards in public law which, for example, create certain obligations for operators of hazardous facilities, can also give rise to liability, especially if the infringement of the respective rule leads to financial losses.[171]

[166] Bergkamp (2001), p. 348.

[167] Cf. Bussani et al. (2003).

[168] In addition, the case against recovery of pure economic loss may be compelling regarding the economic functionality of liability, because private economic losses caused by a tortious act often are not a cost to society—imposing liability in such cases thus would not be economically efficient, Bergkamp (2001), p. 346.

[169] Bergkamp (2001), pp. 346, 348.

[170] German Federal Court of Justice VI ZR 199/57 (1958); also see below, Chapter 8.

[171] Cf. Meyer-Abich (2001), pp. 146–147.

6.6.2 *Problems Regarding the Compensation and Restitution of Ecological Damage*

65 An equally complex issue closely linked to the question of the protected legal interest concerns the possibilities of compensation for ecological damage. When an environment-related right or interest protected by tort law has been infringed, it has to be clarified if and how, *de facto* and *de jure*, compensation for damage is possible.[172] With regard to the compensable damage, claims for the restoration of the original state prior to the damage have to be discerned from claims for (monetary) compensation.

66 The German law on damages is founded on the principle of restitution in kind: A person who is liable for damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred, (Section 249 para. 1 BGB). Where damages are payable for injury to a person or damage to a thing (Section 249 para. 2 BGB), or if the injuring party does not remedy the damage within a certain period of time (Section 250 BGB), the obligee may demand the required monetary amount in lieu of restoration. Only if the remedy is not possible or not sufficient to compensate the injured party, or if restoration is only possible by incurring disproportionate expenses, the person liable in damages may, in principle,[173] financially compensate the obligee (Section 251 BGB). Tort law thus primarily entitles the owner of the damaged good or property to claim the costs incurred for its restoration. Only if restoration is not possible or unreasonably difficult to procure, monetary compensation for the reduction of the market value may be requested. The latter may comprise the costs for compensatory restoration.[174]

67 The primacy of restitution in kind is an expression of the principles of compensation and prevention and the weight of the "interest of integrity" of the injured party.[175] From an environmental point of view, restitution in kind can be advantageous when compared to a rule which requires financial loss, as it also provides compensation when the damage cannot be quantified in monetary terms. A legal rule providing restoration in kind can be particularly valuable in environmental liability cases as environmental goods often do not have a market value.[176]

68 Notwithstanding this general advantage, the rules on restitution in kind can also be problematic. First of all, these rules may not always guarantee that the impaired good is restored to, or close to its pre-damage condition. In principle, it is up to the claimant to decide whether he or she wants restoration of the impaired good or

[172] Cf. Meyer-Abich (2001), p. 161.

[173] In particular, if the environment is damaged or animals are injured, the threshold of proportionality cannot be regarded as equivalent to the economic value of the damaged natural property. Depending on the importance of the natural property for nature conservation, judges may consider a differentiated level of proportionality, Oetker (2019), Section 251 BGB, para. 57.

[174] Hinteregger (2019), p. 1038.

[175] Cf. Meyer-Abich (2001), p. 161.

[176] Cf. Herbst (1996), p. 68.

monetary compensation, which does not have to be spent on restoration efforts. In specific cases, however, this freedom of the claimant to decide how to use the compensation has been restricted. 'Fictitious' restoration costs, for example, are not recoverable in the event of pure environmental damage.[177] Second, it may be questionable if compensatory restitution is possible: According to the German Federal Court of Justice, restitution in kind requires the state of the environment prior to the damaging event to be restored "by an identical and equivalent thing".[178] Frequently, restitution of the previous conditions of the ecological system which has been damaged may be difficult to obtain, e.g. when organisms that are necessary for the system to function have been destroyed or when the damage was caused by non-degradable substances.[179] Given the complexity and dynamic development of biological systems, it can be very hard to determine how and what actually constitutes restoration of the original condition. This can be problematic from a legal point of view because to undertake restitution in kind, in accordance with Section 249 BGB, it is necessary to bring about a situation that comes as close as possible to the state of being damage-free.[180]

69 This relatively narrow understanding has led to the situation that restitution in kind plays a secondary role. In practice, the rule and the exception laid down in Section 249 have been reversed. In most cases, the damage thus is compensated by monetary means.[181] Whereas there are, in principle, no particularities to be considered in the case of environment-related types of damage (e.g. when an individual's property is damaged as a consequence of environmental harm), the matter of monetary compensation for pure environmental damage concerns complex and much-debated issues. With respect to monetary compensation, several aspects which are problematic from an environmental perspective have been noted: As a consequence of the difficulty to evaluate pure environmental damage in economic terms, this kind of damage is frequently considered as 'immaterial damage',[182] which implies specific problems concerning questions regarding damages for pain and suffering (compensation of 'immaterial damage', cf. Section 253 BGB). For example, in cases related to air pollutants, cases of minor and temporary damage may occur on a large scale and some have argued that such minor 'immaterial' damage should not be taken into account. German courts, in contrast, do consider compensation for minor damage to do justice to the compensatory function of damages for pain and suffering.[183]

[177] Oetker (2019), Section 249, para. 382. According to many scholars, this follows from the qualification of pure environmental damage as 'immaterial' damage;

[178] German Federal Court of Justice VI ZR 262/82 (1984).

[179] Cf. Seibt (1994), pp. 187–188.

[180] Oetker (2019), Section 249 BGB, para. 325.

[181] Oetker (2019), Section 249 BGB, para. 320.

[182] The question of if and when pure environmental damage should be considered as 'immaterial' damage, however, has been the subject of debate, cf. Ladeur (1987).

[183] Cf. Schimikowski (2002), p. 60.

70 Prominently in cases of pure environmental damage, compensation may be difficult to measure. Particularly if an environmental good has no market value, tort law can encounter serious difficulties regarding the evaluation and quantification of the harm.[184] The question of which methods or models to use to evaluate pure environmental damage can lead to viable solutions that may differ from case to case.[185] These complex issues, however, cannot be treated in depth here. Specific aspects of this problem will be looked at in the following chapters.[186]

71 The notion of monetary compensation for pure environmental damage may also meet even more fundamental, ethical objections: For example, it may seem problematic to try to capture the intrinsic value of natural goods by means of an economic valuation. It is noteworthy, however, that the discussion of such difficult questions in liability cases, might also fulfil a legally productive political function:[187] As *Meyer-Abich* concludes, deliberations about how to evaluate the value of natural goods may, in the end, still contribute to raising awareness of such ecological issues.[188]

6.6.3 Extending the Scope of Environmental Torts?

72 Several solutions have been discussed to fill the gaps regarding addressing environmental damage. In terms of tort law's scope of protected rights and interests, first of all, a protected right to a healthy environment could be defined as the right of the public to have a healthy, secure, quiet, comfortable and aesthetically pleasing environment. Infringement of rights to such an environment means interference with the public's enjoyment of that environment.[189] Understood in this sense, the public would have a collective right to common goods under civil law. The protected interests would be the natural environment and natural goods not related to individual rights.[190]

73 As a second approach, it has been suggested that environmental goods, such as clean air, clean water and unpolluted soil, should be directly recognised as an individual right protected by tort law.[191] The protected right should be attributed to where the damage has occurred. Thereby only environmental harm which has caused damage (including 'immaterial' damage) to a specific individual would be

[184] Hinteregger (2019), p. 1038.

[185] For a comprehensive comparative analysis cf. Kokott et al. (2003). For specific methods to quantify environmental damage cf. Cohen et al. (2006); Mortazavi et al. (2019). For an overview see Guijarro and Tsinaslanidis (2020); Wu and Wang (2018); Kappert (2006), pp. 23–33.

[186] For damage related to climate change cf. Chap. 8.

[187] Cf. Chap. 2, ¶ 72 (Sect. 2.4.3).

[188] Meyer-Abich (2001), pp. 184–186.

[189] Cf. Areal Ludeña and Fierro Abella (2010), p. 67.

[190] Seibt (1994), p. 162.

[191] Köndgen (1983), p. 348.

sanctioned.[192] The proposed right would establish a legal entitlement for individuals concerning collective goods.[193]

Finally, a third approach that has been proposed is that pure environmental damage which is irrelevant in terms of property rights etc. could be prevented, restituted or compensated by invoking the affected persons' general personality right.[194] Such an approach would thus neither integrate collective goods, as opposed to individual rights, into the protective scope of tort law nor establish protection against individual (financial or 'immaterial') loss as a consequence of damage to public environmental goods. It would rather entail an extension of the concept of the individual interests covered by tort law. Such a individual right to a healthy environment would protect people against the negative effects on their well-being, which do not have the intensity of an adverse health effect or do not cause damage to property.[195] **74**

The *Kunitachi* Case **75**

The Japanese Supreme Court has developed criteria for the violation of a legally protected individual interest in 'valuable' urban landscape. In 2006, the Court had to decide on a building complex in the Kunitachi district of Tokyo. The building complex had been constructed in accordance with the applicable planning law, however, residents, current and former members of a neighbouring school and interested third parties claimed that the complex violated their interest in preserving the valuable, homogeneous urban character of the Kunitachi district. The Supreme Court ruled that people who live near an objectively valuable urban landscape and enjoy the benefits of the landscape on a daily basis have an interest protected by tort law in preserving such "good" landscapes. In support of its judgement, the Court referred to provisions that protect such valuable landscapes to preserve the enjoyment of these landscapes as a common good for the present and future population. Whoever lives in the vicinity of such a good landscape and enjoys it on a daily basis may not have a individual right but does have an interest protected by civil law in the preservation of this landscape.[196]

In German legal doctrine, such approaches have, however, been predominantly criticised. Particularly with respect to the idea of extending the scope of the **76**

[192] Seibt (1994), p. 50.

[193] According to Köndgen (1983), the claimant should not be entitled to injunctive relief, a lawsuit would rather presuppose financial damage; also cf. Meyer-Abich (2001), pp. 117–118.

[194] Forkel (1968). The general personality right was created by the German Federal Court of Justice (BGH) in 1954 to provide for better protection for human dignity and the right of free development of one's personality, cf. van Dam (2014), p. 89.

[195] Meyer-Abich (2001), pp. 116–117.

[196] Peukert (2014), p. 55.

individual rights covered by tort law, critics fear that it would necessarily lead to a vague concept of the respective right or interest which would ultimately lead to a situation where any disturbance would give rise to the possibility of legal action.[197] More specifically, it is held that integrating a individual right to a healthy environment into the protective scope of the general personality right would fundamentally contradict the legal nature of the latter. According to *Baston-Vogt*, this right is a individual right that gives the individual the power to assert his or her interests independently and under his or her own responsibility. In this sphere, his or her will has priority over that of his or her fellow citizens. The individual can determine whether, when and for what purpose to assert this right and against which impairments he or she defends herself. It follows from the nature of this right that, although it is well suited to protecting highly personal individual interests, it is unsuitable for protecting public goods such as the environment. Individuals must not be granted exclusive private rights over public environmental goods.[198]

77 Although this critique points to crucial problems of a 'horizontal' right to a healthy environment, which cannot be addressed in much detail here, it does not seem to be entirely convincing for two reasons. First of all, the rights protected by tort, and very prominently many of the legal positions subsumed under the general personality right, do not in any way give the right holder an unlimited right to dispose of the protected interest. Rather, courts weigh public and individual interests against each other in each case. Only if the individual interest, for example, the protection of privacy, outweighs colliding public or private interests—e.g. in transparency of a person's economic activity—is a violation of the law assumed. Tort law is, therefore, in principle well suited to deal with the possible conflicts that arise between private and public rights and interests. Secondly, the question of which individual interests carry sufficient weight to be asserted against other private rights or the interests of the public is in constant development. Civil courts have repeatedly developed new rights or expanded the scope of existing rights to be covered by tort law as reactions to new and evolving modern-day threats or existing threats that manifest themselves with new intensity. This constant redefinition of the limits of subjective autonomy vis-à-vis public and State interests equals corresponding dynamics at the level of fundamental and human rights. As we have seen, a individual right to a healthy environment has long been the subject of debate and

[197] Cf. Wagner (2017), Section 823 at 309, who believes that a generous recognition of human well-being as a protected right under Section 823 I BGB would come close to an *actio popularis.* Also cf. German Federal Administrative Court, Decision VII B 84.74 (1975); Baston-Vogt (1997), p. 472. According to some critics, the legitimate interests of economic actors, e.g. of those operating facilities, would then be neglected. However, as Baston-Vogt rightly objects, such interests would be taken into account in the balancing of the merits and interests by courts in each individual case. According to the dogmatics of the German civil courts, the general right of personality is a 'framework law' ("Rahmenrecht") in which, in contrast to the other rights pursuant to Section 823 I BGB, the unlawfulness of the conduct of the person causing damage must be positively established.

[198] Baston-Vogt (1997), p. 472.

is increasingly recognised in connection with constitutional and human rights.[199] There is no convincing reason why such a right would be, in principle, impossible in tort law, which protects the realisation of fundamental rights in 'horizontal' legal relationships.[200] Decisions and developments which reflect and reshape the relationship between constitutional and human rights and the environment, most prominently in the field of climate-change litigation,[201] may also trigger new discussions about the protective scope of environmental civil liability.

Notwithstanding such theoretical considerations, however, it is not discernible that such a new right or interest is being seriously considered by German civil courts. In addition, as *Meyer-Abich* rightly qualifies, even an approach that extends the concept of individual environmental rights would still exclude much important environmental damage. Such a right still puts people at its centre, whereas environmental damage is often centred on common goods, which sometimes may have no tangible link to individual or collective human interests or well-being. For example, forest damage does not necessarily impair the recovery function of forests for humans.[202] **78**

6.7 Selected Material Problems II: Liability for Acts of Others or a Corporation's Own Duty of Care?

As a practically pivotal precondition for liability, an act capable of giving rise to liability has to be identified, i.e. a tortious action, which may consist of either an act or an omission. In certain constellations, such as in type-one cases detailed above, in which the effects of an act or omission in the defendant's State of operation directly cause the infringement of rights or interests in another State, this does not pose any specific problems beyond those common to purely domestic situations.[203] **79**

In type-two cases, however, the chain of attribution may be interrupted because there is no direct link between the domestic company's actions and the foreign environmental damage. The question then arises of whether the liability of a **80**

[199] As has been explicated above, constitutional and human rights increasingly are considered to capture rights and interests, which differ from the traditional scope of traditional human rights law and a 'narrow' understanding of the link between human rights and the environment. As we have seen in Chap. 2 of this study, many international or foreign judges and institutions recognize a individual right to a healthy environment in the face of new risks, and even try to reconstruct a concept of environmental rights, which goes beyond an anthropocentric account. It is conceivable that more and more national constitutional courts will follow this path. Such a development could have considerable relevance for tort law.

[200] Cf. Peukert (2014), p. 56.

[201] See Chap. 8.

[202] Meyer-Abich (2001), p. 120.

[203] The question of if a causal link between this behaviour and the harm/damage can established can, of course, be a major problem.

company can be established if the respective environmental damage was directly caused by the action of a subsidiary or a supplier. *De lege lata,* however, establishing liability for third party conduct is difficult to tackle. The basic rule is that each person is responsible for his or her own conduct and property.[204] Beyond this sphere, the scope of a person's legal responsibility for other persons is rather narrowly defined: In Germany, the BGB does not contain any specific rules on the liability of companies but focuses on the liability of the individual. The individual can be liable as a principal according to Section 831 for torts of his vicarious agents, i.e. persons who are bound to the instructions of the company.[205] In practice, it will only rarely be the case that a foreign supplier or a subsidiary can be considered a vicarious agent in this sense. Even if the supplier/subsidiary is subject to the company's instructions, this may be difficult to prove; in addition, a company can exonerate itself from liability in a relatively simple way, namely by demonstrating that the vicarious agent was carefully selected and monitored. Any extension of liability for third parties beyond this principle is met with reservations and, indeed, doing otherwise would result in a disruption of the existing doctrinal system.

81 The problem of attribution is of specific relevance in cases in which environmental damage abroad is directly caused by a foreign subsidiary of a German parent company or a corporate group. One of the major obstacles for horizontal extraterritorial liability, which also holds true, by and large, for other legal systems,[206] lies in the corporate-law principle of the separation of corporate identity. This principle stipulates that as a shareholder, a parent company is not liable for the conduct of the subsidiaries in which it invests.[207] German law hardly provides any opportunities for the creditors of a dependent company to take direct legal action against the group's parent company.[208] In the case of corporate groups, the conduct of an independent legal entity within the group cannot be attributed to the other elements of the corporate group; there can be neither an attribution between the company and its shareholders nor, in particular, between several companies which are integrated into a corporate group.[209] The corporate law doctrine of separate legal personality is thus considered to create a presumption of the (non-)liability of the constituent parts of a corporation operating in different territories for wrongful acts by other members of the same corporate group.[210]

[204] Wagner (2016), p. 758.

[205] Wagner (2017), sec. 823, para. 95. In addition, the rule of section 31 BGB applies to corporations, according to which the association has to pay for damage caused by one of its constitutional representatives to a third party.

[206] Although common law, e.g. US case law, may provide more flexible means than German law to pierce the corporate veil under specific conditions, cf. Renner and Kunz (2018), p. 60.

[207] van Dam (2011), pp. 247 ff.

[208] Renner and Kunz (2018), p. 60.

[209] Wagner (2016), p. 760.

[210] Augenstein et al. (2010), p. 13.

82 The difficulties of attribution do not seem to be alleviated by strict liability regimes. The liable party under the German Environmental Liability Act ('Umwelthaftungsgesetz' hereinafter UmwHG) is the operator of a facility, which has been enumerated in Annex 1 to the Act.[211] The operator is the person who permanently uses the hazardous facility for his own purposes, i.e. operates it on his own account and pays for its maintenance, and who has effective control over its use.[212] It is possible that a parent company can be held liable either as an operator in this sense of the dependent company's facility or by means of piercing the corporate veil ('Haftungsdurchgriff'), but only in exceptional cases. It is precisely the effective and direct control of the company that is decisive: Such control may be given when the facility of the subsidiary company is leased or transferred to the parent company or if the operational technical operation of the facility is also under the direct management of members of the controlling company.[213] This reflects the basic idea of strict liability, namely the conjunction of effective control of risk and liability.[214]

83 Pathways to pierce the corporate veil in cases involving tortious liabilities of a subsidiary have been widely discussed[215] in recent years, for example, with respect to CSR obligations. A general piercing of the corporate veil in this sense would, however, require legislative intervention or a fundamental change of jurisdiction.[216] To date, imposing liability on a parent company for environmental damage caused by its subsidiaries under German corporate law is only possible in exceptional circumstances.

84 Given these difficulties, the main basis for claims against corporations in practice does not consist in piercing the corporate veil but in substantiating an independent duty of care of domestic companies. The allegation here is that the parent company or purchasing company has breached a duty of care that it owed to individuals affected by its overseas operations, be that workers employed by subsidiaries, contractors or local communities, and that this breach resulted in harm.[217]

---

[211] Cf. Wetterstein (2002), p. 267.

[212] German Federal Court of Justice III ZR 157/79 (1981); Rehbinder (2019), sec. 1, para. 49.

[213] Rehbinder (2019), sec. 1, para. 49.

[214] Glinski (2004), p. 29. The administrative liability regime of the Environmental Damage Act (USchadG), on the other hand, defines a wider circle of addressees. Accordingly, the party responsible for the obligations under the Act is defined, *inter alia*, as a person who carries out or determines a professional activity. A professional activity is any activity carried out within the context of an economic activity, a business activity or an enterprise, regardless of whether it is carried out privately or publicly and with or without commercial character. As Glinski observes with respect to the European Environmental Liability Directive, which the Environmental Damage Act implements, this definition is understood in such a way that parent companies can also be considered as responsible entities and, thus, subjects of liability. As has been explicated above, the administrative regime of the UmwSchG is, however, of secondary relevance with respect to the transboundary types of cases on which we focus in this chapter.

[215] Cf. for example Teubner (1991). Also cf. Glinski (2004), p. 29.

[216] Kessedjian and Cantú Rivera (2020), p. 409.

[217] van Dam (2011), pp. 247 ff.

Even if this argumentation is in some tension with the principle of corporate separation, the latter does not exclude such a solution under general liability law: This is because liability is no longer based on the attribution of the subsidiary's conduct to the parent company and thus does not require any piercing of the corporate veil. Instead, it has to be determined whether the parent company has breached its own duty of care.

85 This line of reasoning was, for example, adopted by the British Supreme Court in the recent *Vedanta* case where the Court stated that:

> [a] parent company will [. . .] be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case.[218]

86 According to this approach, the legal reconstruction of the transboundary dynamics of type-two cases no longer differs fundamentally from type-one cases. This is because the decisive factor is whether the company against which a claim is made can itself be accused of breaching its own duty of care, which raises the question of the content and scope of the duty of care.

6.8 Selected Material Problems III: Breach of Obligation—Features of a Transnational Standard of Care

87 Liability frequently depends on the court being able to establish that the defendant has acted in violation of his obligations. These legal obligations against which the conduct of the liable party is measured are the defendant's duties of care.[219] Duties of care are of prominent importance in the tort of negligence and liability cases, where harm to protected rights and interests has been caused by an omission or an indirect action.[220]

---

[218] Cf. UK Supreme Court *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* Judgement of 10 April 2019, UKSC 20 on appeal from: UK Court of Appeal *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2017] EWCA Civ 1528, para. 54, confirming the decisions of England and Wales Court of Appeal *Chandler v Cape* [2012] EWCA Civ 525 (see http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html, last accessed 24 Apr 2022) and the decision of Sales LJ in the Court of Appeal decision in England and Wales Court of Appeal *AAA v Unilever* [2018] EWCA Civ 1532, para. 36 (see http://www.bailii.org/ew/cases/EWCA/Civ/2018/1532.html, last accessed 24 Apr 2022).

[219] In the German doctrine on the tort of negligence the relevant duties traditionally are called "Verkehrspflichten", which may be seen, however, as just another term for tortious duties of care ("deliktische Sorgfaltspflichten"), see Wagner (2017), sec. 823, para. 66, p. 11.

[220] Wagner argues that intentional tort and negligence should be constructed uniformly in civil law, i.e. to consider the breach of duty in the sense of a breach of the duty of care (negligence) or a deliberate breach of the permitted risk (intent) as a wrongful act.

National Strict Liability Regimes **88**

It can be problematic, in cases of environmental harm, to establish the defendant's fault, as damage can occur during normal business operations without any fault occurring or there being an infringement of standards. The awareness that compensation and prevention of environmental damage are critical also in such cases, has led to the introduction of strict environmental liability regimes. Strict liability means that the person who creates a source of elevated risk is liable, even if acting without fault if the risk of damage becomes actual damage.[221] Strict liability is supposed to make it easier for an injured party to pursue claims and has, as a liability standard, traditionally been considered to constitute the legal equivalent to permitted risks.[222] In German Environmental Law, *inter alia,*[223] the Environmental Liability Act (Umwelthaftungsgesetz) establishes a strict liability standard. Accordingly, the operator of a facility that has been enumerated in Annex 1 to the Act is obliged to pay compensation for damage caused by somebody being killed, or injured in his/her health or if his or her property is damaged as a result of the environmental impact. The Act also contains differentiated provisions regarding the burden of proof (Section 6 UmweltHG) and the compensation of damage (Section 16 UmweltHG). Only a *force majeure* (e.g. an act of war, natural disaster etc.) excuses liability.[224]

As it "guarantees that the cost of damage caused by economic activities are born by the operator", strict liability is considered to be the optimal liability standard to implement the polluter pays principle.[225] It has to be kept in mind, however, that strict liability for environmental damage, typically and certainly in the case of the German UmweltHG,[226] is limited and covers damage caused by specific, very hazardous activities. Other than fault-based liability, a strict

(continued)

[221] Cf. Chap. 2, ¶ 38 *et seq*. (Sect. 2.3.1).

[222] Cf. Deutscher Bundestag, Gesetzesbegründung der Bundesregierung, Entwurf eines Umwelthaftungsgesetzes, 10.5.90, Drucksache 11/7104, 15.

[223] Claims based, for example, on Sect. 22 WHG, Sect. 32 GenTG and Sect. 906 para. BGB equally do not need to establish fault.

[224] Cf. Wetterstein (2002), p. 226.

[225] EU Commission, Green Paper on Remedying Environmental Damage, COM(93) 47 final, 1993, section 4.1.2. Bergkamp, in contrast, considers strict liability as "unnecessary, inefficient, and rather pointless". "Liability beyond fault—by definition" accordingly "constitutes no more than an inefficient insurance program." Fault-based liability regimes, in contrast, are "at least as capable of dealing with complex situations involving multicausal damages, and long-tail, diffuse, creeping and indivisible damages." Given its adaptability and openness, fault-based liability continues to evolve and is able to accommodate new technologies and "developments in the health and safety and environmental area", cf. Bergkamp (2001), pp. 260, 264, 553.

[226] There also exist implementations of strict liability, such as liability under the Wasserhaushaltsgesetz, which are unlimited.

regime also does not contribute to the implementation of primary norms of conduct—and therefore cannot be considered as an enforcement or implementation mechanism.[227] As specific strict liability regimes and their implications are discussed in the previous and the following chapters, this chapter, therefore, concentrates on the general fault-based tort law.

89 The relevant properties of duties of care for transnational tort law and extraterritorial litigation have been broadly examined in legal doctrine in the last few years, specifically in the context of human rights due diligence obligations of transnational corporations and other business enterprises. Given the overlaps between environmental and individual interests protected by tort as well as human rights law, these discussions are very much relevant for the issues discussed this book. Equally, the relevant substance and functionality of the doctrine on duties of care regarding environmental liability have been debated quite extensively, albeit predominantly in the geographical context of national tort law. More recently, these different dimensions of duties of care have been put into one perspective: Lawyers then focus on synergies and correlations between duties of care regarding human rights and obligations to prevent environmental harm, often in the context of new legislation on human rights and environmental due diligence.[228] An in-depth analysis of the implications of these debates and developments for environmental liability cannot, however, be carried out here, as necessity requires only briefly highlighting specific features of an environmental standard of care in tort law. This standard is, firstly, open towards norms of different origins (Sect. 6.8.1), it contains, secondly, relevant specifications regarding the relationship between public and private responsibility (Sect. 6.8.2) and thirdly, it can entail obligations to prevent risks caused by others (Sect. 6.8.3). Several more specific issues surrounding such a standard of care will be reflected in the following chapters.

6.8.1 Transnational Focus of an Environmental Standard of Care

90 Fault-based liability requires a breach of a duty of care, which means that the defendant did not take the measures required in the specific situation *ex ante* that is, at the stage when the decision to take one particular course of action over another was made.[229] The question of which preventive measures are necessary, refers to an

[227] Cf. Chap. 2, ¶ 38 *et seq*. (Sect. 2.3.1).

[228] See Chap. 7.

[229] Wagner (2021), p. 219. These basic features are, notwithstanding many differences and conceptual disputes within and between legal systems, well established. For comparative analysis see van Dam (2014); Brüggemeier (2020); Stoyanova (2019).

objective standard which determines what is to be expected from a reasonable and prudent person in the concrete situation. Comparable concepts exist in many legal systems. In US tort law, a duty of care is commonly defined as a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others. English courts similarly refer to 'the reasonable man' and French courts to the *bon père de famille* to establish this standard. The same objective standard is reflected as an element of the German concept of duties of care ("Verkehrspflichten", "Organisationspflichten"), which focus on reference groups or the relevant public spheres ("Verkehrskreise") to justify concrete obligations.[230] Even though the conceptual distinction between a duty of care and a standard of care is not as prominent in German doctrine as it is in the US, the former also refers to an objective standard ("Sorgfaltsmaßstab").[231] In view of these similarities between legal cultures, the standard of care in tort law has been adequately described as a universal rule that applies between people, businesses and public institutions.[232]

Some general properties of this 'universal rule' illustrate its relevance for the purpose of this project. First of all the duty of care aims at the protection of a right or interest.[233] Its suitability for the concretisation of standards of transnational corporate human rights responsibility has, despite various objections, been emphasised repeatedly in recent years.[234] Second, the standard of care functions as a mechanism of risk deterrence more or less in the same way as the principles of risk assessment in public environmental law:[235] The standard of care to be observed to prevent the violation of such an interest depends on the magnitude of the damage and the degree of probability of its occurrence. Precautionary measures are, therefore, "the more reasonable, the greater the danger and the probability of its realisation".[236] The risk of serious damage justifies a greater effort to avoid the damage, even if its realisation is not very likely.[237] The significance of private interests in the preservation of an endangered good or interest require a higher standard of care and, as a result, more ambitious precautionary measures. Notably, public or common interests also determine which preventive measures are appropriate vis a vis the respective risks, which means that common interests, and particularly interests in environmental protection, must also be taken into account. If, as *Wilhelmi* explains, in addition to individual

91

[230] Glinski (2018), p. 76.

[231] This reference to an objective standard to justify the illegality is indisputably required where infringements have been committed indirectly or by omission. The question of whether and under which circumstances the violation of a behavioural standard is necessary to establish the unlawfulness of the conduct in question has been the subject of perennial debate in German doctrine, cf. Wilhelmi (2009), pp. 104–132.

[232] van Dam (2011), p. 237.

[233] Wilhelmi (2009), p. 132.

[234] Peters et al. (2020); Wagner (2021), p. 219; Weller and Thomale (2017); van Dam (2011).

[235] Cf. Frank (2019), pp. 518–522.

[236] Federal Court of Justice VI ZR 223/05 (2006), in BGH VersR 2007, 72 para. 11.

[237] Wagner (2017), sec. 823, para. 424.

rights or interests environmental goods are concerned, the common interest in environmental protection can further amplify the interest in more stringent precautionary measures. The legal reconstruction of a standard of care accordingly may support environmental protection by establishing stringent environmental obligations.[238]

92 Third, as has been outlined above, the reconstruction of the standard of care by courts in liability cases is a gateway to take into account specific and dispersed information about norms and standards which, from the standpoint of a rational and prudent person, should be applied to prevent environmental damage in a particular situation. The differentiated case law, or 'reference cases', as a result of the concretisation of duties and standards of care by courts can also provide orientation about precautionary measures necessary to avoid liability. *Hylton* describes the advantages of this decentralised approach to norm-generation in environmental tort law as follows: "The plaintiff knows more about his injury than any other party. The defendant knows more about his burden of precaution than anyone else. The negligence system gives both parties an incentive to persuade the court that their version of the relevant regulatory rule is appropriate. Courts use their common knowledge, as well as information provided by the parties, to decide which parties' version is more persuasive, and to determine general conduct norms that will apply in future cases [. . .] What emerges from negligence litigation is a set of conduct norms that are shaped by the private information of parties. Although courts decide only the individual cases in front of them, the decisions create precedents that shape specific conduct norms that apply to future cases. A decision that a firm, or a professional, is not negligent in conforming to industry custom is both a regulatory rule and a judgment based on an assessment of private information in one case."[239]

93 **Conceptual Clarification: Duty of Care, Standard of Care, Due Diligence**

In this study, as elsewhere, different concepts are used when talking about corporate obligations to prevent violation of rights and interests. Specifically, lawyers often refer to due diligence obligations, duties of care and standards of care. In the present context, we use these terms in the following sense:

The issue to be examined under the concept of duty of care is whether a duty exists: is there a duty whose breach is claimed by the injured party? Is the defendant obligated under this rule? It has to be determined, in other words, if 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.[240] A breach of a duty of

(continued)

[238] Wilhelmi (2009), pp. 282, 285.

[239] Hylton (2002), p. 525.

[240] Wagner (2021), p. 219.

care is a prerequisite for fault-based liability due to negligent causation of rights violations/damage to protected interests.

The standard of care specifies the content and scope of the relevant duty of care, i.e. the degree of care expected from the duty bearer in a specific case. Establishing this standard requires examining what the defendant should have done or not done to comply with the duty of care.[241] Environmental standards of different origins can be understood as elements of an environmental standard of care in terms of liability law. The standard of care is thus determined by reference to different primary norms,[242] duties of result as well as duties of conduct; in addition to substantive duties, the standard of care can also refer to procedural duties.

Due diligence requirements can be understood to form a specific standard of care under liability law. They thus define the content and extent of the required care if a particular duty of care exists. Due diligence is a duty of conduct that relates to the protection of specific legal interests. Contents of a due diligence provision, for example risk-adapted obligations to monitor and control suppliers, audit obligations, the establishment of complaint mechanisms and so forth, substantiate standards, the infringement of which can lead to liability if harm to a protected interest is caused. In the context of approaches for supply chain regulation, environmental and human rights due diligence is understood in a broader sense that goes beyond an understanding as a standard of care. This understanding of due diligence is examined in detail in Chap. 7.

Notably, the term is understood in a very similar way, as a standard, in public international law. The ILA Study Group on due diligence in international law stated: "At its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, of reasonable care, that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by the State or international organisation that either commissioned the relevant act or which omitted to prevent its occurrence. The resort to due diligence as a standard of conduct should be seen against the backdrop of general approaches to accountability in international law".[243]

94 It is assumed that States and private parties may have comparable due diligence obligations with regard to the conduct of third parties.[244] This leads to the question

[241] Wagner (2021), p. 219.

[242] Also see above, Chap. 2, ¶ 38 *et seq*. (Sect. 2.3.1), ¶ 66 (Sect. 2.4.2).

[243] ILA Study Group on Due Diligance in International Law (2016), p. 2.

[244] The ILA Study Group on Due Diligence in International Law (2016), pp. 32, 47 has found due diligence to be an expansive, sector-specific and yet overarching concept of increasing relevance in international law.

of the extent to which certain environmental standards in international law can determine the standard of care of both States and private parties. This question is examined in Chap. 8 with a view to climate protection-related obligations.[245] The case-by-case reconstruction of the standard of care may be of particular use in transboundary cases where the parties can have better information about the factual[246] and normative circumstances relevant for determining risks and adequate precautionary measures.

95 As *Glinski* has repeatedly and comprehensively described, the openness and flexibility of the standard of care in tort law have specific potential with respect to transnational norms and standards: On the one hand, companies can be held liable for the violation of their own (internal) technical standards or any deviations from their own tried and tested practices. The law can therefore rely on private rules and knowledge to establish, if necessary, an individual standard of care, especially if special knowledge or capabilities are available.[247] On the other hand, corporate and industry-wide self-regulation reflects a standard of what is considered necessary and feasible to prevent damage. Accordingly, not only public law and institutionalised private standards such as ISO, CEN/CENELEC and DIN may provide a framework for constructing an objective standard of care but also the safeguards and rules that the industries or sectors themselves have developed. Prominently, the UN Guiding Principles are considered to reflect societal norms and expectations with respect to corporate responsibility regardless of whether they are based on international soft law or broad acceptance by the main stakeholders.[248]

96 **A Transnational Standard of Care Determines Corporate Obligations to Reduce CO_2 Emissions: *Milieudefensie v Royal Dutch Shell***

On 5 April 2019, the environmental group Milieudefensie/Friends of the Earth Netherlands and co-plaintiffs served Royal Dutch Shell (RDS), which is domiciled in The Hague, a court summons alleging Shell's contributions to climate change violate its duty of care under Dutch law and human rights obligations. The case was filed in the Hague District Court.[249]

The court decided that RDS is obliged to reduce the Shell group's CO_2 emissions by 45% (net) of their 2019 levels by the end of 2030 as per the group's corporate policy. This reduction obligation is an obligation of result for the Shell group, meaning RDS is expected to ensure that the CO_2 emissions

(continued)

[245] Cf. Sect. 8.2.

[246] For example, regarding the local context, financial, technical and organisational resources.

[247] Glinski (2018), pp. 75–91.

[248] Glinski (2018), pp. 75–91.

[249] For more information on the case cf. District Court of The Hague *Milieudefensie v Shell* (2021) C/09/571932/HA ZA 19-379, available at http://climatecasechart.com/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/, accessed 24 Apr 2022.

of the Shell group are reduced to this level. It is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by the business relations.

To assess whether or not RDS has the alleged legal obligation and to decide on the claims, the court interpreted "the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code based on the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights."

In its interpretation of the standard of care, the court included: "(1.) the policy-setting position of RDS in the Shell group, (2.) the Shell group's CO_2 emissions, (3.) the consequences of the CO_2 emissions for the Netherlands and the Wadden region, (4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region, (5.) the UN Guiding Principles, (6.) RDS' check and influence of the CO_2 emissions of the Shell group and its business relations, (7.) what is needed to prevent dangerous climate change, (8.) possible reduction pathways, (9.) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand, (10.) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group, (11.) the effectiveness of the reduction obligation, (12.) the responsibility of states and society, (13.) the onerousness for RDS and the Shell group to meet the reduction obligation, and (14.) the proportionality of RDS' reduction obligation."

97 While self-regulation provides orientation for the courts, the relevant private standards do not necessarily delimit a standard of care. Compliance with the relevant standards may be insufficient if these standards are outdated, if they do not address the relevant problem or if the circumstances of the specifics of a given case require a stricter standard of care. Duties of care which refer to widely-accepted standards can also be binding for companies that do not explicitly comply with these standards.

98 A transnational standard of care finally may evolve dynamically: In principle, compliance with the requirements at the time of the damage is relevant. Changes and new developments in state-of-the-art technology to mitigate risks and detrimental effects have to be taken into account, especially if the risks at hand are high.[250]

[250] Förster (2020), para. 347.

6.8.2 *Public vs. Private Responsibility: Constraints in Public Law for a Transnational Standard of Care?*

99 The hazardous activities and facilities which can trigger the evolution of a duty of care and, in case of damage, lead to civil liability, will frequently be regulated by public environmental law. The operation of polluting facilities and other environmentally hazardous conduct is highly regulated and public bodies issue permits for specific activities and facilities. As has been previously indicated, relevant norms of public law may help to concretise a standard of care. For example, the public law provisions of sections 4–6 of the German Environmental Damage Act (USchadG), which stipulate obligations regarding information, prevention and remediation in cases of (imminent) environmental damage, can 'preform' an environmental standard of care.[251]

100 Given this relevance of public law for the standard of care, the question may arise as to whether an injuring party, when it complies with the relevant standards of under public environmental law, also necessarily acts in accordance with its duty of care, and thus lawful. It can be argued, however, that the openness and flexibility of the standard of care also hold concerning public law. Legal scholars as well as, for example, the German Supreme Court, have frequently emphasised the autonomy of tortious duties of care from public law.[252] This reflects the traditional idea of tort law as a decentralised mechanism of regulation:[253] According to *Wagner*, tort law is not only intended not to compensate for damage but above all serves to regulate hazardous behaviour in concrete individual cases in a way that goes far beyond public law. Public law, on the other hand, must employ a relatively high degree of generalisation when establishing 'command and control' standards because any attempt to regulate private conduct in a comprehensive and detailed manner would either suppress an inordinate number of social activities or inevitably lag behind economic, technological[254] and, given the dynamic development of sector-specific primary norms on many regulatory levels, normative development. Private liability law can also take into account infringements of interests that could have been expected from the perspective of the injuring party but which the legislator did not foresee *a priori*. Public law can only take into account typical situations and is the result of political compromise, whereas civil law provides standards for balancing interests in concrete individual cases.[255] Public law thus needs to be supplemented by private law which, because of its nature and focus, adequately performs the task of controlling behaviour in individual cases in detail.[256] The same principles apply

[251] Wagner (2017), sec. 823, para. 887.

[252] Wilhelmi (2009), p. 272.

[253] See above, Chap. 2, ¶ 47 *et seq*. (Sect. 2.4.1).

[254] Wagner (2017), sec. 823, para. 445.

[255] Pöttker (2014), pp. 118–120.

[256] Wagner (2017), sec. 823, para. 445.

with respect to public permits and licences: An obliged party must, on its own responsibility, determine the relevant risks and take the safety measures required. It cannot rely on the permit for a facility or certain activities as a green light to proceed without due caution.[257] Permits are only recognised as a justification for violations of legal interests in exceptional cases, namely if the relevant public law provides the official permit with an exclusionary effect vis-à-vis the private rights of third parties. Beyond that, the standards of conduct contained in a permit do not conclusively determine the standard of care of the addressee.[258]

101 According to these principles, German public law and respective permits may provide important information, but do not definitely determine the limits of a standard of care.[259] This can be relevant in type-one cases: Given that German law is applied in such a case, a German company thus might be liable for a damage that has been directly caused by a facility or an activity on German territory even though this conduct was authorised by means of an administrative permit and the facility/activity complies with local statutory thresholds and other stipulations of the permit.[260]

102 **Differentiated Effects of Administrative Permits in Strict Environmental Liability Regimes**

The German Environmental Liability Act (Umwelthaftungsgesetz—UmwHG) does not fully exonerate the operator of a hazardous installation if its conduct was within the limits set by a permit. The claim under the strict liability regime of the UmwHG can, however, be modified if a permit is given. In principle, Section 6(1) of the Environmental Liability Act contains a substantial facilitation of the general burden of proof for victims of environmental damage by establishing a presumption of causality: If, according to the circumstances of the individual case, an installation is considered capable of causing the damage, it is assumed that the damage was actually caused by this installation. According to Article 6(2) of the Environmental Protection Act, this presumption does not apply if the installation was operated in accordance with the normal operational requirements permitted by the authorities. Section 6(4)(1) of the Environmental Liability Act makes it easier for a plant operator to prove that the plant in question is operating in accordance with this normal operation: the presumption of causation is removed if specific duties of care (Schutzpflichten) are complied with by proving compliance with the relevant monitoring provisions, if inspections are prescribed to monitor the operational

(continued)

[257] German Federal Court of Justice VI ZR 65/86 (1986); German Federal Court of Justice VI ZR 270/95 (1996). Wagner (2017), sec. 823, para. 450.

[258] Wagner 2017, sec. 823, paras. 450, 451.

[259] This principle does not always apply, when a claimant seeks injunction, cf. sect. 14 BImSchG.

[260] Cf. Rüppell (2012), p. 103.

obligations and the inspections have revealed no evidence of a breach of an operational obligation or if there is a period of more than 10 years between the environmental impact in question and the claim for damages.

103 In type-two cases, the situation is more complicated. In those cases—again, given, that German tort law is applied—it also has to be asked, for example, whether and under which conditions a foreign administrative decision can bind a German court at all.[261] This question may arise before a German court when environmental harm caused by a facility abroad for which a local permit has been issued and which complies with local statutory thresholds and other stipulations of the permit violates protected interests located in the issuing country. According to Article 7 Rome II, nevertheless German tort law might be applicable, for example, if the German headquarter of a corporation is considered to be the place of action.[262]

104 Although this approach is certainly controversial,[263] Article 17 Rome II may provide a viable solution to this problem: Accordingly, a court, in assessing the conduct of the person claimed to be liable, should take into account, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. Permits shall be taken into account as a form of local data, i.e. as foreign local norms, which might shape a legal dispute, be applied irrespective of the applicable law and concretise the relevant national law[264] Even if direct application of Article 17 may not be feasible,[265] it may be adequate to apply it by analogy: the fundamental rationale of the

[261] This the case, when the foreign permit is 'functionally equivalent' to a German permit, cf. Krzymuski (2011), p. 59.

[262] See above, ¶ 48.

[263] According to van Calster (2016), p. 265, an environmental permit, as a much more extensive instrument than merely containing 'rules of safety and conduct', is not captured by Article 17. The European Commission however assumed that the rule would apply to permits, cf. KOM (2003) 427 final 2003/0168 (COD), 22.

[264] Krzymuski (2011), p. 59; Leible and Lehmann (2007), p. 725.

[265] Article 17 directly addresses the constellation, where permits of the *lex loci delicti commissi* are given, but the applicable law is the *lex loci damni*; it would directly be applicable in type-one cases in which the law of the country in which the damage occurred is applied. According to the Commission, Article 17 addresses the question of the consequences of an activity authorised in State A and that complies with its legislation (e.g. permitting a certain pollutant emission) but causes damage in State B, having not been authorised there (exceeding the limits applicable in this State), cf. KOM(2003) 427 final 2003/0168 (COD), 22. A type-two case would, as a result of Article 7 Rome II and its potential application, possibly lead to a different situation: The applicable law is then still the *lex loci delicti commissi* (e.g. the law of the home State of a potentially liable corporation, where the latter has taken decisions to be understood as the event giving rise to the damage, see above ¶ 48), whereas relevant permits were granted by the State where the damage occurred (e.g. where the damaging facility is located). According to Article 17 Rome II the court could then consider that only permits issued in the home state can be taken into account to determine the relevant standard of care and potentially limit liability, cf. Weller and Tran (2022), p.10.

norm is to ensure that the relevant public law standards of safety and conduct are predictable for the injuring party. The allegedly liable party's standard of care should not be determined based on rules of which it has no knowledge.[266] The norm could take the permit into account as a matter of fact. To consider a permit as a datum means that it is taken into account and without it, the facts of the case would be incomplete.[267]

105 According to such proposals, courts might have further leeway in determining the standard of care by reference to those norms and standards that perceptibly delineate the conduct required by the tortfeasor in order to avoid harm in other countries. Notwithstanding such ideas, a clarification of the question on which substantive standards a duty of care directed at the prevention of environmental damage has to deal with a number of difficult legal issues, not confined to only private international law but also, for example, in international law and international economic law. In this regard, Chap. 7 discusses ways to address such challenges in supply chain legislation.

6.8.3 Duties Regarding Risks Caused by Others Abroad

106 A transnational standard of care may, in certain cases, also entail liability for damage directly caused by third parties. This follows from the general definition of a duty of care, which emerges under two general conditions: An indispensable prerequisite in this respect is the actual and legal possibility of controlling the risk in the specific individual case. In addition, a normative responsibility for the source of the hazard or the interest to be protected is to be established.[268]

107 Such a responsibility can be established, if a behaviour of the defendant has actively contributed to the damage or if a facility the defendant directly controls causes the damage. Everyone has to act in such a way and keep his/her property and assets in such a condition that no injuries to third parties occur which could have been avoided with reasonable effort.[269] Active behaviour or direct control can be, as

---

Symeonides (2008) emphasises that, if it were to be avoided that the polluter seeks refuge in States with lower standards, an even broader application to transboundary constellations would be required, in which the law of the place of damage is applied, but the safety standards (and, if applicable, corresponding permits) at the place of the event giving rise to the damage are stricter than those at the place of damage. The application of the law of the state of conduct would recognise that state' s right to regulate conduct on its territory, even if the consequences of that conduct materialised abroad in the specific case. He sees no legitimate expectation on the part of the tortfeasor not to be subjected to the rules at his place of action because the consequences of this conduct manifest themselves abroad. The key question in such cases should be whether, under these facts, a reasonable person should have foreseen that his conduct in the one state would produce injury in the other state, see Symeonides (2008), pp. 41–42.

[266] Leible and Lehmann (2007), p. 725.

[267] Krzymuski (2011), p. 59.

[268] Wagner (2017), sec. 823, para. 400.

[269] Wagner (2017), sec. 823, para. 400.

Glinski has analysed, relevant in extraterritorial liability cases. If, for example, a company exercises influence on production in a developing country by issuing instructions regarding individual activities, but also by providing general instructions in guidelines or manuals, liability may be assumed if these instructions do not meet the necessary standards and lead to damage. In such cases, there exists a connection between an act of the parent company and damage in the developing country which is relevant under tort law. Likewise, if a parent company assumes responsibility for certain tasks within a group of companies, such as the maintenance of systems, it is also responsible under Section 823 of the German Civil Code for carrying out these tasks properly. If the actions of a parent company, or a purchaser and a foreign company jointly cause damage, this leads to joint and several liability.[270]

108 However, in the framework of claims against corporations or other business enterprises for their involvement in extraterritorial violations of tortious rights or interests, the main issue is liability for omissions, that is, whether a corporation has a duty to prevent a third party, such as a subsidiary or business partner, from causing harm.[271] Under English tort law, as we have seen, a duty of care has been confirmed if a company exercised a sufficiently high level of supervision and control of the activities of the third person, with sufficient knowledge of the propensity of those activities to cause harm or if, in its published materials, it presents itself as exercising that degree of supervision and control of its subsidiaries, even if it does not factually do so.[272]

109 ***Chandler v Cape***

In the case of *Chandler v Cape*, the UK Court of Appeal held that Cape plc. was liable for the harm Mr. Chandler, an employee of Cape's subsidiary in the UK, had suffered due to exposure to asbestos while working for Cape's subsidiary. According to the Court of Appeal, a duty of care owed by the parent company vis -à-vis its subsidiary's employees exists under four conditions: (1) the two companies' businesses are similar in a relevant respect; (2) the parent company has, or ought to have, superior knowledge on relevant aspects of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe and the parent company knew or ought to have known this; and, (4) the parent company knew, or ought to have foreseen, that the subsidiary would rely on its superior knowledge.[273]

[270] Glinski (2004), pp. 32–33.

[271] van Dam (2014), p. 230.

[272] UK Supreme Court *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* Judgement of 10 April 2019, UKSC 20 on appeal from UK Court of Appeal *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2017] EWCA Civ 1528, para. 53, 55.

[273] Cf. Bergkamp (2018), p. 221.

In German law, the doctrine of organisational duties of care could be used to develop group-wide obligations. Relevant case law can be found in particular in the jurisdiction on product liability. It is recognised that the manufacturer must organise his production in such a way that no defective products enter the market. In addition, he is required to verify the condition and possible defects of his products by means of state-of-the-art monitoring equipment.[274] Organisational obligations arise according to criteria similar to those in British law by means of creating and maintaining a source of danger or by controlling it. According to this doctrine, the managers of companies are obliged to structure, organise and monitor their internal processes in such a way that infringements of legal interests are avoided as far as possible and reasonable.[275] The courts have developed the general requirement to organise internal company processes in such a way that damage to third parties is avoided to an appropriate extent. To this end, not only must employees be carefully selected, but they also have to be instructed to an appropriate extent and the careful implementation of the assigned activities must be monitored. These organisational duties are proportionally more demanding the greater the risks, the control of which is left to the other person.[276] **110**

Many German scholars, however, have to date been reluctant to accept such organisational duties with respect to suppliers and subsidiaries. Accordingly, a principle of legitimate expectations ('Vertrauensgrundsatz') is supposed to preclude liability. Consequently, each person may assume, when choosing his or her own level of care, that all other involved persons will behave with due care. Domestic companies would, therefore, not be obliged under tort law to control or manage the conduct of their foreign subsidiaries and business partners.[277] In addition, sceptical lawyers warn that linking liability to violations of duties of care in the exercise of effective control over subsidiaries or suppliers would create a counterproductive incentive for the management of parent companies to remain ignorant of the affairs of their subsidiaries or suppliers.[278] **111**

However, it is doubtful that the principle of legitimate expectations would categorically prevent the incurrence of liability as it does not apply in cases where information and possibilities of steering and control are asymmetrically distributed between different parties. In hierarchical relationships, organisational duties of care remain a task for the executive level. But also with respect to horizontal relationships, case law concerning the allocation of duties of care in complex and differentiated organisational structures indicates that the "principle of legitimate expectations" is not well-suited as a general argument against liability in transnational corporations and value chains: For example, in medical malpractice cases, courts have emphasised that the principle of legitimate expectations does not apply if **112**

[274] Cf. Renner (2019), p. 115.

[275] Wagner (2016), p. 767.

[276] Wagner (2017), sec. 823, para. 100. Glinski (2004), pp. 32–33.

[277] Wagner (2016), p. 758.

[278] Wagner (2017), sec. 823, para. 100.

there are clear indications to doubt that the qualification or the concrete behaviour of another person does not meet an appropriate standard of care. When working together, physicians have a duty to critically observe their peers, this is particularly the case when legal rights or interests of great value are at stake.[279]

113 This indicates that the principle of legitimate expectations would be irrelevant in cases such as *Vedanta* where superior information and control rests with the parent company. In addition, it may be evident in many cases, such as when certain resources are imported from specific areas prone to risk, that there is at least reason to doubt that suppliers or subsidiaries meet a standard of care. Particularly, when the normative openness of the tortious standard of care is taken into account, it seems rather questionable that a principle of legitimate expectations is tenable. The legitimacy of these expectations, i.e. the question of whether the expectation of a diligent affiliate or supplier is justified, concerns normative issues and cannot be determined without looking at transnational norms and evolving societal expectations. Developments on many levels in this context suggest that the weight and value of the rights and interests which may be at risk due to global economic activities trigger a duty to critically observe business partners and subsidiaries. Normative expectations in politics and society thus undoubtedly induce a shift towards greater responsibility for corporate actors concerning their value chains. The pro-active measures required by the UN Guiding principles, particularly regarding the need for risk analyses along the entire value chain and corresponding self-regulatory prevention and mitigation measures, are increasingly considered to be relevant for a tortious standard of care. If such measures are taken, they form the basis for the development of experiences and commercial expectations about managing risks and means of harm prevention. The knowledge on the part of companies about what risks are impending and how they can be avoided may also be considered as a driver to raise what is considered the appropriate standard of care.[280]

114 The objection that an organisational duty of care, which is primarily based on factual supervision or control, may lead to problematic incentives, however, is based on reasonable concerns. If one of the key elements of proving a duty of care is a high level of parental involvement, it is far from unthinkable that parent companies could then avoid closely supervising their subsidiaries.[281] Such an incentive may factually undermine voluntary initiatives and soft-law standards, such as the UN Guiding Principles. Furthermore, and independent of this problematic incentive, *Grušić* highlights that a liability standard based on a model of a "closely controlled, managerially centralized multinational enterprise" would leave many constellations of extraterritorial damage outside of the scope of protection: "Modern forms of corporate organization [. . .] involve subsidiaries or affiliates with substantially more autonomy. The bonds of ownership are often replaced by purely contractual relations

[279] Cf. Matusche-Beckmann (2001), p. 177, 241. Ballhausen (2013), p. 241. Higher Regional Court of Cologne I-5 U 81/10 (2011), in OLG Köln, VersR 2011, 81 (81 f.).

[280] For all, see Glinski (2018), pp. 75–91.

[281] Cf. Davies (2019).

or even informal alliances."[282] This is all the more the case in complex value chains. Modern due diligence legislation, therefore, combines a liability norm with statutory obligations regarding risk analysis and prevention to trigger and define a standard of care.[283]

6.9 Selected Material Problems IV: Epistemic Complexity and Torts—Causation

Causation is another 'cardinal problem' for environmental liability, irrespective of whether strict liability or fault-based liability is concerned.[284] This is a consequence of the complex and uncertain nature of the dynamics which lead to environmental damage and the infringement of protected rights and interests. Environmental damage may evolve as the effects of the cumulative actions of many potential polluters or as a consequence of a complicated interplay of natural events potentially triggered by certain activities.[285] Even if detrimental effects of a certain behaviour are evident, it can be hard to determine that these effects caused the plaintiffs' particular damage. In many cases, it is not discernible which of several alternative causes has generated the damage. Long time lags between human action and environmental damage also aggravate efforts to prove causation.[286] **115**

Given these problems, the actual Achilles' heel of environmental liability from the point of view of the injured party is not the precondition of the breach of duty, but the burden of proof regarding the causal connection between the emitting conduct and the infringement of legal rights suffered.[287] According to general principles, the claimant will have to prove, that the conduct or the omission of the defendant has caused the respective damage. Lability statutes as well as case law contain differentiated rules regarding the allocation of the burden of proof.[288] The question of causation however concerns a wide range of complex problems.[289] These issues **116**

[282] Grušić (2016), p. 27.

[283] See Chap. 7, ¶ 228 (Sect. 7.8).

[284] Cf. Brüggemeier (1989), pp. 217–218.

[285] Frank and Meyerholt (2010), p. 117; cf. Chaps. 6 and 7.

[286] Cf. Underdal (2010).

[287] Wagner (2017), sec. 823, para. 891.

[288] Prominently, for example, causality of the breach of a duty of care for the damage that has occurred can, under certain circumstances, be proven by *prima facie* evidence if the consequences of the breach of duty appear to be typical in the light of the laws of nature and general experience. This also applies if it can be determined that technical standards, such as DIN or ISO norms, have been infringed or if emission limits have been exceeded, cf. Wagner (2017), sec. 823, para. 87–89.

[289] Although the issue whether and to what extent causation refers to simply normative questions or necessarily involves a 'pre-juridical', scientific or epistemological concept, is the subject of debate, cf. Pöttker (2014), p. 37.

however cannot be treated in detail in this chapter. Chapters 8 and 9 will examine such problems with respect to specific contexts of environmental damage.

6.10 Conclusions

117 This chapter has described the preconditions for establishing the liability of companies for transboundary environmental damage under national civil law. In this context, a focus on the provisions of specific national law was unavoidable, particularly substantive legal issues were, therefore, dealt with regard to German law. Furthermore, the chapter focused mainly on fault-based liability and general tort law. More in-depth considerations of the transboundary implications of environmental strict liability regimes remain reserved for future examination.

118 From this vantage point, the analysis allows for a mixed but cautiously optimistic assessment of the potential of tort law to deal with cross-border liability issues. Most importantly, the standard of care applied in cases of fault-based liability to substantiate a defendants' breach of duty displays some characteristics that make it appear particularly well suited for legally processing transboundary environmental damage. In fact, in view of these characteristics established in more recent legal discourse and relevant court rulings, it indeed seems reasonable to consider civil liability as a potential catalyst for an emerging transnational environmental standard of care.

119 Importantly and first of all, it has to be noted that tort law can not only address such constellations of transboundary environmental damage where harm arises abroad directly as a result of the transboundary effects of a tortfeasor's conduct or facility. It also provides legal solutions for cases in which a defendant's domestic actions only indirectly contribute to damage abroad: According to a still controversial, but increasingly accepted view, tortious duties of care of domestic companies can apply to risks that are directly caused by suppliers or subsidiaries in the company's value chain. Such duties of care have always been intended to specify a standard of care for such cases in which the infringement of a right is not entirely within the direct control of the alleged wrongdoer. Its very purpose is then the attribution and demarcation of complementary responsibilities of various actors who operate together in a division of labour.[290] There is no convincing legal reason to assume that this would not apply to transnational divisions of labour. Importantly, the legal recognition of such duties of care implies specific and independent duties of the buyer or the parent company and does not suggest an attribution of breaches of duty of the supplier or subsidiary and thus does not require a piercing of the corporate veil.

120 Secondly, the civil law concretisation of duties of care in liability cases is well suited to reconstruct a transnational normative standard that, on the one hand, reflects the regional and sectoral specificities of transboundary environmental

[290] Wagner (2017), sec. 823, para. 455 ff.

damage, and on the other hand, meets the characteristics of globalised value chains. Duties of care require actors who create or control risks to take measures deemed objectively reasonable to avoid harm. This also means that the information that is or should be available to these actors about sector-specific, technical, regional or scientific standards needs to be used to avoid risks. A relevant standard of care can thus integrate public law rules and principles of different origins, as well as recognise private technical standards and soft law which are applied in practice and considered appropriate.

121 An effective liability norm can, in principle, create an incentive for companies to align their prevention and remediation measures with the standards of care recognised in the relevant context. However, a number of obstacles still stand in the way of realising this theoretical potential: First and foremost, the anthropocentric focus of liability law excludes environmental damage that does not also clearly affect defined human interests, such as property, health, life and so forth. Scholarly debates on how the multiple overlaps and interactions between environmental damage and rights protected in tort could be better addressed have not been meaningfully pursued since the early 2000s. As such, it remains to be seen whether the intense current dynamic regarding the recognition of a human right to a healthy environment will have an impact on tort law.

122 Despite this limitation, there is, in principle, considerable potential for transnational environmental claims against companies in many cases where serious environmental damage affect fundamental human rights and interests. In these cases, victims may refer to violations of environmental duties of care to substantiate their claims. However, even this potential is somewhat limited by disadvantageous, or at least unclear, rules in private international law. Specifically, in cases of liability for environmental damage in value chains, courts will often apply foreign tort law, which can be sub-optimal from the perspective of the injured party. Many lawyers also believe that domestic regulations and standards should only be relevant to the liability of European companies if they exonerate them. These views are at odds with the possibilities and goals of effective transboundary environmental liability, which is supposed to prevent companies from strategically exploiting 'pollution havens' abroad.[291] They contradict fundamental principles of the EU's approach to the conflict of laws, which is intended to raise the overall level of environmental protection by enabling the victims of environmental damage to choose the applicable law and thereby opt for the more ambitious standard of care. Given the global implications of environmental damage caused in transnational value chains, such obstacles to effective transboundary environmental liability should be removed.

[291] Cf. Levinson and Taylor (2014).

References

Ahern J, Binchy W (2009) The Rome II Regulation and the law applicable to non-contractual obligations: a new internatiol litigation regime. Martinus Nijhoff, Leiden

Ammann O (2019) How do and should domestic courts interpret international law? Insights from the jurisprudence of HLA Hart and Duncan Kennedy. Transnatl Leg Theory 10(3-4):385–420

Areal Ludeña S, Fierro Abella JA (2010) Environmental civil liability under comparison: some notes in soft law. Revista Jurídica Piélagus 9:59–100

Aristova E (2019) UK Supreme Court decision in Vedanta: finding a proper balance between Brussels I and the English common law rules of jurisdiction. http://conflictoflaws.net/2019/uk-supreme-court-decision-in-vedanta-finding-a-proper-balance-between-brussels-i-and-the-english-common-law-rules-of-jurisdiction/. Accessed 13 Apr 2022

Augenstein DH, Jägers N (2017) Judicial remedies: the issue of jurisdiction. In: Álvarez Rubio JJ, Yiannibas K (eds) Human rights in business: removal of barriers to access to justice in the European Union. Routledge, Oxon, pp 7–37

Augenstein DH, Boyle A, Singh Galeigh N (2010) Study on the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union. European Commission, Brussels

Ballhausen B (2013) Das arztrechtliche System als Grenze der arbeitsteiligen Medizin. Universitätsverlag Göttingen, Göttingen

Baston-Vogt M (1997) Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts. Mohr Siebeck, Tübingen

Beckmann M, Wittmann A (2012) USchadG. In: Beckmann M, Durner W, Mann T, Röckingshausen M (eds) Landmann/Rohmer: Umweltrecht: Kommentar. Beck, Munich

Bergkamp L (2001) Liability and environment: private and public law aspects of civil liability for environmental harm in an international context. Martinus Nijhoff, Leiden

Bergkamp PA (2018) Models of corporate supply chain liability. Jura Falconis 55(2):161–227

Bertele J (1998) Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht. Mohr Siebeck, Tübingen

BMJV (2019) Menschenrechtsverletzungen im Verantwortungsbereich von Wirtschaftsunternehmen: Zugang zu Recht und Gerichten. Bundesministerium der Justiz und für Verbraucherschutz, Berlin. https://www.bmj.de/SharedDocs/Publikationen/DE/Menschenrechtsverletzungen_Wirtschaftsunternehmen.html. Accessed 13 Apr 2022

Brans EHP (2001) Liability for damage to public natural resources: standing, damage and damage assessment. Kluwer International, The Hague

Brüggemeier G (1989) Umwelthaftungsrecht – Ein Beitrag zum Recht der "Risikogesellschaft"? Kritische Justiz 22(2):209–230

Brüggemeier G (2020) The civilian law of delict: a comparative and historical analysis. Eur J Comp Law Gov 7(4):339–383

Bussani M, Palmer VV, Parisi F (2003) Liability for pure financial loss in Europe: an economic restatement. Am J Comp Law 51(1):113–162

Cane P (2012) Rights in private law. In: Nolan D, Robertson A (eds) Rights and private law. Hart, Portland, pp 35–62

Casado Pérez V, Gómez Ligüerre C (2019) From nuisance to environmental protection in continental Europe. Texas A&M University of Law, Legal Studies Research Paper Series, Research Paper No. 19-01

Cohen MJ, Brown MT, Shepherd KD (2006) Estimating the environmental costs of soil erosion at multiple scales in Kenya using emergy synthesis. Agric Ecosyst Environ 114:249–269

Colombi Ciacchi A (2008) Internationales Privatrecht, ordre public européen und Europäische Grundrechte. ZERP-Diskussionspapier, Zentrum für Europäische Rechtspolitik, Bremen, 1/2008. https://www.ssoar.info/ssoar/handle/document/62589. Accessed 14 Apr 2022

Davies E (2019) Parents beware: lessons from Vedanta v Lungowe. Baker & Partners Briefings.. https://www.bakerandpartners.com/briefings-articles/parents-beware-lessons-from-vedanta-v-lungowe/. Accessed 24 Apr 2022

De Schutter O (2006) Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations. https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf. Accessed 13 Apr 2022

Dodge WS (2018) The presumption against extraterritoriality in the U.S. Supreme Court today. In: Bonomi A, Nadakavukaren Schefer K (eds) US Litigation Today: still a threat for European business or just a paper tiger? Conference proceedings from the 29th Journée de droit international privé of 23 June 2017. Schulthess Éditions Romandes, Geneva, pp 187–196

Enneking LFH (2012) Foreign direct liability and beyond. Eleven International Publishing, den Haag

Enneking LFH (2014) The future of foreign direct liability? Exploring the international relevance of the Dutch Shell Nigeria Case. Utrecht Law Rev 10(1):44–54

Enneking LFH (2017) Judicial remedies: the issue of applicable law. In: Álvarez Rubio JJ, Yiannibas K (eds) Human rights in business: removal of barriers to access to justice in the European Union. Routledge, Oxon, pp 38–77

Forkel H (1968) Immissionsschutz und Persönlichkeitsrecht: Eine privatrchtliche Untersuchung. Carl Heymanns Verlag, Cologne

Förster C (2020) § 823. In: Bamberger HG, Roth H (eds) Beck'scher Online Kommentar BGB, 53rd edn. C.H. Beck, Munich

Frank W (2019) Aspekte zur Risikobewertung beim Eigentumsschutz gemäß § 1004 BGB am Beispiel der Klimaklage eines peruanischen Bauern gegen RWE. Zeitschrift für Umweltrecht 10:518–552

Frank G, Meyerholt U (2010) Umweltrecht, 3rd edn. BIS Verlag, Oldenburg

Glinski C (2004) Haftung multinationaler Unternehmen beim Transfer von Produktionsrisiken in Entwicklungsländer. TranState Working Papers No. 4, Universität Bremen

Glinski C (2018) UN-Leitprinzipien, Selbstregulierung der Wirtschaft und Deliktsrecht: Alternativen zu verpflichtenden Völkerrechtsnormen für Unternehmen? In: Krajewski M (ed) Staatliche Schutzpflichten und unternehmerische Verantwortung für Menschenrechte in globalen Lieferketten. FAU University Press, Erlangen, pp 43–96

Grušić U (2016) International environmental litigation in EU courts: a regulatory perspective. Yearbook of European Law 35(1): 180-228. Page numbers refer to https://discovery.ucl.ac.uk/id/eprint/1515842/1/Grusic_,%20International%20Environmental%20Litigation%20in%20the%20EU%20Courts%20-%20A%20Regulatory%20Perspective%20(UCL).pdf. Accessed 20 Apr 2022

Guijarro F, Tsinaslanidis P (2020) Analysis of academic literature on environmental valuation. Int J Environ Res Public Health 17(7):2386

Hadjiyianni I, Minas S, Scotford E (2015) Climate change in the courts: challenges and future directions. OUPblog, 30 November 2015. https://blog.oup.com/2015/11/climate-change-in-courts/. Accessed 14 Apr 2022

Hartley T (2018) Jurisdiction in tort claims for non-physical harm under Brussels 2012, Article 7(2). Int Comp Law Q 67(4):987–1003

Hellberg N, Orth M, Sons J, Winter D (2008) Umweltschadensgesetz und Umweltschadensversicherung: Ein Handbuch für die Praxis. Verlag Verischerungswirtschaft, Karlsruhe

Hellgardt A (2016) Regulierung und Privatrecht. Mohr Siebeck, Tübingen

Herbst C (1996) Risikoregulierung durch Umwelthaftung und Versicherung. Duncker und Humblodt, Berlin

Hinteregger M (2019) Environmental liability. In: Viñuales JE, Lees E (eds) Oxford handbook of comparative environmental law. Oxford University Press, Oxford, pp 1025–1043

Holly G (2019) Vedanta v Lungowe Symposium: a non conveniens revival – The Supreme Court's Approach to Jurisdiction in Vedanta. https://opiniojuris.org/2019/04/24/vedanta-v-lungowe-

symposium-a-non-conveniens-revival-the-supreme-courts-approach-to-jurisdiction-in-vedanta%EF%BB%BF/. Accessed 13 Apr 2022
Hylton KN (2002) When should we prefer tort law to environmental regulation. Washburn Law J 41(3):515–534
IICA (Inter-American Institute for Cooperation on Agriculture) (2007) Liability and redress within the context of the biodiversity convention and the biosafety protocol. http://repiica.iica.int/docs/B0480i/B080i.pdf. Accessed 21 Mar 2022
ILA Study Group on Due Diligence in International Law (2016) Second report. https://docplayer.net/34722822-Ila-study-group-on-due-diligence-in-international-law-second-report-july-tim-stephens-rapporteur-and-duncan-french-chair.html. Accessed 4 Apr 2022
Junker A (2018) Art. 38-42, 46a EGBGB (Außervertragliche Schuldverhältnisse). In: Säcker FJ, Rixecker R, Oetker H, Limperg B (eds) Münchener Kommentar zum Bürgerlichen Gesetzbuch (MüKoBGB), 7th edn. C.H. Beck, Munich
Kappert LC (2006) Tankerunfälle und der Ersatz ökologischer Schäden. Schriften zum Seehandelsrecht Bd. 18. LIT Verlag, Münster
Kessedjian C, Cantú Rivera H (eds) (2020) Private international law aspects of corporate social responsibility. Springer, Cham
Kokott J, Klaphake A, Marr S et al (2003) Ökologische Schäden und ihre Bewertung in internationalen, europäischen und nationalen Haftungssystemen – eine juristische und ökonomiesche Analyse. UBA Berichte 3/03. Erich Schmidt Verlag, Berlin
Köndgen J (1983) Überlegungen zur Fortbildung des Umwelthaftpflichtrechts. Umwelt- und Planungsrecht (UPR): 345
Krzymuski M (2011) Umweltprivatrecht in Deutschland und Polen unter europarechtlichem Einfluss. Mohr Siebeck, Tübingen
Kunda I (2012) Policies underlying conflict of law choices in environmental law. In: Sancin V (ed) International environmental law: contemporary concerns and challenges. GV Založba, Ljubljana, pp 507–528
Kupersmith T (2013) Cutting to the chase: corporate liability for the environmental harm under the Alien Tort Statute, Kiobel, and Congress. William Mary Environ Law Policy Rev 37(3): 885–923
Ladeur KH (1987) Schadensersatzansprüche des Bundes für die durch den Sandoz-Unfall entstandenen "ökologischen Schäden"? Neue Juristiche Wochenschrift 1987(21):1236–1241
Latham M, Schwartz VE, Appel CE (2011) The intersection of tort and environmental law: where the Twains should meet and depart. Fordham Law Rev 80(2):737–773
Leible S, Lehmann M (2007) Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II"). Recht der Internationalen Wirtschaft 53(10):721–735
Levinson A, Taylor MS (2014) Unmasking the pollution haven effect. Nber Working Paper 10629. 981. http://www.nber.org/papers/w10629. Accessed 17 Mar 2022
Marullo MC, Zamora Cabot FJ (2016) Transnational human rights litigations: Kiobel's touch and concern: a test under construction. HURI-AGE 1. https://ssrn.com/abstract=2765068. Accessed 13 Apr 2022
Marx A, Bright C, Wouters J, Pineau N, Lein B, Schiebe T, Wagner J, Wauters E (2019) Access to legal remedies for victims of corporate human rights abuses in third countries. Study for the European Parliament, Directorate General for External Policies of the Union, PE 603.475. https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2019)603475. Accessed 14 Apr 2022
Matusche-Beckmann A (2001) Das Organisationsverschulden. Mohr Siebeck, Tübingen
Meyer-Abich M (2001) Haftungsrechtliche Erfassung ökologischer Schäden. Nomos, Baden-Baden
Mills A (2014) Rethinking jurisdiction. Br Yearb Int Law 84(1):187–239

Mortazavi SA, Najafi Alamdarlo H, Zaghi Bjarbas M (2019) Estimating the eco-environmental value of damages caused by groundwater over drafting. Int J Environ Sci Technol 16(7): 3861–3868

Musielak JH, Voit W (2020) ZPO: Zivilprozessordnung: Kommentar, 17th edn. Verlag Franz Vahlen, München

Oetker H (2019) Section 251. In: Säcker FJ, Rixecker R, Oetker H, Limperg B (eds) Münchener Kommentar zum Bürgerlichen Gesetzbuch (MüKoBGB), 8th edn. C.H. Beck, Munich

Otero Garcia-Castrillón C (2011) International litigation trends in environmental liability: a European Union – United States comparative perspective. J Priv Int Law 7(3):551–581

Patzina R (2016) §§ 12-40. In: Krüger W, Rauscher T (eds) Münchener Kommetnar zur ZPO, 5th edn. C.H. Beck, Munich

Percival RV (2010) Liability for environmental harm and emerging global environmental law. Maryland J Int Law 25:37–63

Peters A, Gless S, Thomale C, Weller MP (2020) Business and human rights: making the legally binding instrument work in public, private an criminal law. Max Planck Institute for Comparative Public Law and International Law (MPIL), Research Paper No. 2020-06

Peukert A (2014) Schutz wertvoller Stadtlandschaften durch das Zivilrecht? Bemerkungen zum Schutz individueller und kollektiver Rechtsgüter. Kobe Univ Law Rev 48:45–70

Pöttker E (2014) Klimahaftungsrecht: Die Haftung für die Emission von Treibhausgasen in Deutschland und in den Vereinigten Staaten von Amerika. Mohr Siebeck, Tübingen

Pouikli K (2018) Propositions towards a potential revision of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (ELD). In: Lorenzmeier S, Miler D (eds) The new law: suggestions for reforms and improvements of existing legal norms and principles. Nomos, Baden-Baden, pp 199–208

Rehbinder E (2019) UmweltHG. In: Beckmann M, Durner W, Mann T, Röckingshausen M (eds) Landmann/Rohmer: Umweltrecht: Kommentar. Beck, Munich

Renner M (2019) Bankkonzernrecht. Mohr Siebeck, Tübingen

Renner M, Kunz M (2018) Konzernhaftung und deliktische Durchgriffshaftung. In: Krajewsky M, Oehm F, Saage-Maaß M (eds) Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen. Springer, Berlin, pp 51–71

Roorda L, Leader D (2021) Okpabi v Shell and Four Nigerian Farmers v Shell: parent company liability back in court. Bus Hum Rights J 6(2):368–376

Rüppell P (2012) Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen. Mohr Siebeck, Tübingen

Ryngaert C (2015a) The concept of jurisdiction in international law. In: Orakhelashvili A (ed) Research handbook on jurisdiction and immunities in international law. Edward Elgar, Cheltenham, pp 50–75

Ryngaert C (2015b) Jurisdiction in international law, 2nd edn. Oxford University Press, Oxford

Sachs NM (2008) Beyond the liability wall: strengthening tort remedies in international environmental law. UCLA Law Rev 55:837–904

Saenger I (2019) Zivilprozessordnung, 8th edn. Nomos, Baden-Baden

Saurer J, Purnhagen K (2016) Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation "Urgenda" gegen die Niederlande und seine Bedeutung für Deutschland. Zeitschrift für Umweltrecht 27(1):16–23

Schimikowski P (2002) Umwelthaftungsrecht und Umwelthaftpflichtversicherung, 6th edn. Verlag Versicherungswirtschaft, Karlsruhe

Seibt CH (1994) Zivilrechtlicher Ausgleich ökologischer Schäden. Mohr Siebeck, Tübingen

Shapo MS (1997) Tort law and environmental risk. Pace Environ Law Rev 14(2):531–544

Smit L, Bright C, McCorquodale R, Bauer M, Deringer H et al. (2020) Study on due diligence requirements through the supply chain: Final Report. European Commission, Directorate-General for Justice and Consumers, Brussels

Späth P, Werner FR (2021) Die Opkabi-Entscheidung des Supreme Court of the United Kingdom zur Internationalen Konzernhaftung aus rechtsvergleichender Sicht. Corporate Compliance Zeitschrift 5(2021):241–251
Steinitz M (2019) The case for an International Court of Civil Justice. Cambridge University Press, Cambridge
Stoyanova V (2019) Common law tort of negligence as a tool for deconstructing positive obligations under the European convention on human rights. Int J Hum Rights 24(5):632–655
Symeonides S (2008) Rome II and tort conflicts: a missed opportunity. Am J Comp Law 56(2008)
Teubner G (1991) Unitas Multiplex: Das Konzernrecht in der neuen Dezentralität der Unternehmensgruppen. Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 20(2): 189–217
Toussaint G (2020) §§ 12 – 40, 330 – 347, 495 – 510b. In: Vorwerk V, Wolf C (eds) Beck'scher Online-Kommentar ZPO (BeckOK ZPO), 36th edn. C. H. Beck, Munich
UN Environment (2019) Environmental rule of law: first global report. United Nations Environment Programme, Nairobi. https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report. Accessed 14 Apr 2022
Underdal A (2010) Complexity and challenges of long-term environmental governance. Glob Environ Change 20(3):386–393
van Calster G (2016) European private international law, 2nd edn. Hart, Oxford
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 3(2011):221–254
van Dam C (2014) European tort law. Oxford University Presse, Oxford
van Hoek AAH (2006) Transnational corporate social responsibility: some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers. In: Pennings F, Konijn Y, Veldman A (eds) Social responsibility in labour relations: European and comparative perspectives. Kluwer Law International, Alphen aan den Rijn, pp 147–170
Wagner G (2012) Environmental liability. In: Basedow J, Hopt KJ, Zimmermann R (eds) Max Planck encyclopedia of European private law. Oxford University Press, Oxford
Wagner G (2016) Haftung für Menschenrechtsverletzungen. Rabels Zeitschrift für ausländisches und internationales Privatrecht 80(4):717–782
Wagner G (2017) Section 823. In: Säcker FJ, Rixecker R, Oetker H, Limperg B (eds) Münchener Kommentar zum Bürgerlichen Gesetzbuch (MüKoBGB), 7th edn. C.H. Beck, Munich
Wagner G (2021) Tort law and human rights. In: Saage-Maaß M, Zumbansen P, Bader M, Shahab P (eds) Transnational legal activism in global value chains: the Ali Enterprises factory fire and the struggle for justice. Springer, Cham, pp 209–236
Weller MP, Thomale C (2017) Menschenrechtsklagen gegen deutsche Unternehmen. Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 46(4):509–526
Weller MP, Tran M-L (2022) Climate litigation against companies, vol 1. Springer Nature, p 14. https://doi.org/10.1007/s44168-022-00013-6
Wetterstein P (2002) Environmental damage in the legal systems of the Nordic countries and Germany. In: Bowman M, Boyle A (eds) Environmental damage in international and comparative law: problems of definition and valuation. Oxford University Press, Oxford, pp 223–242
Wilhelmi R (2009) Risikoschutz durch Privatrecht. Mohr Siebeck, Tübingen
Wu D, Wang S (2018) Environment damage assessment: a literature review using social network analysis. Hum Environ Risk Assess Int J 24(4):904–924
Wuerth I (2013) National Court Decisions and Opinio Juris. Conference Paper Prepared for The Role of Opinio Juris in Customary International Law, Duke – Geneva Institute in Transnational Law, University of Geneva, 12–13 July 2013
Young EA (2015) Universal jurisdiction, the Alien Torts Statute, and transnational public-law litigation after Kiobel. Duke Law J 64:1023–1127