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# Rome II Regulation and Liability of Multinationals for Human Rights Violations in Third Countries: Irreconcilable Differences?

*The Public policy exception to the application of the "host countries" legislation under Rome II Regulation*

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*Abstract*

The past 20 years have seen an increase in the number of legal cases brought against corporations in their home countries for the harm caused by human rights violations in host countries. Lawyers apply different areas of law, such as civil law, criminal law or consumer protection law, to try to hold corporations legally responsible in their home countries for human rights abuses committed abroad. From these, tort law is one of the few available ways for victims to bring direct claims against corporations. The applicable law in this type of situation is of paramount importance. It is especially relevant when the standards between the developing host countries and the developed home countries are different. The applicable law will define the standard, the duty of care, as well as determine the amount of the damages. This thesis explores the effect of the European Union's conflict-of-laws rules on these types of claims. It focuses on Rome II Regulation, specifically on the general rule set out in article 4 whereby the applicable law shall be the one of the country in which the damage occurs. The analysis is centered on the effect the rule has on such claims and the viability of overcoming it using the public order exception under article 26. By examining the legislative history of Rome II Regulation, legal academic articles and opinions of legal experts, statutory law of EU Member States, domestic case-law and case-law of the European Court of Justice, this thesis argues that the public order clause is an exceptional argument. It has been rarely used in the area of non-contractual obligations and it presents different weaknesses. It proposes further research on the topic as well as an amendment of Rome II Regulation to include a specific choice-of law rule for business related human rights claims against EU companies.

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*List of Abbreviations*

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| ECCHR | European Center for Constitutional and Human Rights |
| ECJ | European Union Court of Justice. |
| EGBGB | Introductory Act to the German Civil Code |
| EU | European Union |
| GEIP | Groupe européen de droit international privé |
| IAC | Iraqi Airways Co |
| KAC | Kuwait Airways Corporation |
| NGO | Non-governmental Organization |
| PIL | Private International Law |
| UK | United Kingdom |
| US | United States of America |

## 1. Introduction

In the summer of 2006,[1] the cargo ship Probo Koala, loaded with 580 tons of petrochemical waste, attempted to discharge it at the port of Amsterdam, Netherlands. The ship was chartered by the English office of Trafigura, a Dutch international commodity-trading company. The Amsterdam port authorities asked for an additional handling fee due to the waste's high toxicity. However Probo Koala left the port of Amsterdam in search for another port to discharge its waste. Several other ports in other countries also denied its request. Finally, the Probo Koala discharged the waste in Abidjan,Côte d'Ivoire, in open air sites. The consequences for the people living in the area near the discharge were devastating. Among other things, they "began to suffer from a range of ailments and illnesses (nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs). Sixteen people died, allegedly from exposure to this waste, and more than 100,000 have sought medical attention."[2]

Three executives of Trafigura were arrested in Abidjan and sent to prison where they awaited trial. They were released after an out-of-court settlement between the company and the Government of Côte d'Ivoire.[3] At the same time, 30,000 victims of the disaster brought a class action suit against the Dutch parent company in the High Court of Justice in London. The court agreed to hear the suit in November 2006. Trafigura denied that the waste was hazardous. It also argued that the responsibility relied on Tommy, the Ivorian company that was entrusted with the waste disposal.[4] During the proceedings, evidence showed that the Dutch company had approached the claimants to urge them to change their testimonies.

The Trafigura tort claim is not an isolated event. Over the last 20 years there has been an increase[5] in the number of legal cases brought against corporations in their home countries[6] for the harm caused by

[1] Business & Human Rights Resource Centre, "Trafigura Lawsuits (Re Côte d'Ivoire)," Business & Human Rights Resource Centre,
[2] Business & Human Rights Resource Centre.
[3] Business & Human Rights Resource Centre.
[4] Business & Human Rights Resource Centre.
[5] Enneking, L. in Juan José Alvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2017), 39. She uses the data of a 2015 comparative study commissioned by the Dutch Ministries of Security & Justice and Foreign Affairs where she participated, under the title Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen. An Executive summary in English is available at https://www.wodc.nl/binaries/2531-summary_tcm28-124392.pdf

human rights violations[7] in host countries.[8] Lawyers apply different areas of law, such as civil law, criminal law or consumer protection law, to try to hold corporations legally responsible in their home countries for human rights abuses committed abroad. From these, tort law is one of the few available ways for victims to bring direct claims against corporations.[9] The structure of tort cases is usually the same and it mirrors the Trafigura claim. Victims in host countries, typically assisted by NGOs, file a civil suit in the home country's courts seeking damages.[10] Researchers have demonstrated a number of procedural and substantive legal barriers for victims when seeking damages in home countries: attribution of legal responsibility to parent companies by piercing the corporate veil, difficulty of proving causality, jurisdiction constraints, the applicable law, access to evidence, costs of bringing claims, safety of witnesses, time barriers and culture and/or language barriers.[11]

The Trafigura tort suit has been analyzed by Enneking, Endowed Professor on the Legal Aspects of International Corporate Social Responsibility at Erasmus School of Law,[12] in a paper discussing the common characteristics of the Trafigura case, foreign direct liability cases[13] and the Rome II Regulation. The author argues that the applicable law in this type of situation is of paramount importance. It is especially relevant when the standards between the host and home countries are different: "different law systems in different countries can result in widely differing levels of legal protection for the (potential)

[6] Home country is the country where the company has its headquarters. From a legal perspective, home country is the country of incorporation. The country where the headquarters are located and the country of incorporation could be different, in which case both can be considered home country.
[7] Technically, under International Law, only States can "violate" human rights, when they fail in their obligations to ensure that human rights are effectively enjoyed without discrimination or in their obligation to respect, protect and fulfil them. An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), as well as the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. There are also other international human rights standards that apply to specific groups or populations. United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Companies can be legally responsible for human rights violations under national or regional regulations. However, companies have a soft-law international responsibility to respect human rights, regulated in the UN Guiding Principles of Business and Human Rights. These principles are not hard law and therefore,not mandatory.
[8] Host country is the country where the company is operating in respect of a particular investment or operation.
[9] Criminal liability for corporations is not recognized in every jurisdiction. Therefore, criminal complaints against corporations can only be brought in those countries where criminal law recognises criminal liability of corporations. In those countries, the viability of the criminal complaint depends on the home country's public prosecution, who decides whether the criminal claim should be brought or not. These limitations make tort law a very appealing avenue for victims of human rights violations.
[10] Wex Legal Dictionary, "Tort," Wex legal dictionary, accessed April 29, 2019, https://www.law.cornell.edu/wex/tort: The primary aim of tort law is to provide relief to injured parties for harms caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts.
[11] Axel Marx, Jan Wouters, and Claire Bright, "Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (European Parliament, 2019), https://lirias.kuleuven.be/retrieve/534258.
[12] Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation," *European Review of Private Law* 16, no. 2 (2008): 284.
[13] Tort claims based on damages that occurred due to multinationals violations of human rights in third countries.

victim."[14] These differences are even more pronounced among legal systems of developed and developing countries. The latter are still in the process of creating their legal system and therefore, are not as well established. Law regimes in home countries often have "higher standards of care, regulatory standards, and damages awards"[15] than legal regimes in host countries. In the Trafigura case, there are two possible applicable laws, English tort law, the home country law, or the laws of the Ivory Coast, the host country law. The applicable law will define the standard, the duty of care, as well as determine the amount of the damages.

This example represents the dilemmas that foreign direct liability cases present. Even if the High Court of Justice in London accepts jurisdiction over the Trafiigura claim, this does not mean that the applicable law would be the English Law. The applicable law to a dispute can be a decisive factor for claimants seeking more protective standards of care. The applicable law is determined by the rules on conflict-of-laws governed by private international law (PIL). Thus, PIL can play a key role in the protection of victims of human rights abuses committed by corporations. Researchers and advocacy groups have analyzed how the European Union's private international law regime, particularly the conflict of laws regime, may not be suited for foreign direct liability cases in the area of business and human rights.[16] In the case of transnational tort liability cases, the applicable regime conflict-of-law regime is Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (also known as Rome II Regulation).

Rome II Regulation establishes that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs (*lex loci damni)*, irrespective of the country in which the event giving rise to the damage occurred (*Lex loci delicti*) and irrespective of the

[14] Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation," 292.
[15] Enneking, L.F.H., 292.
[16] When the defendant is domiciled in one state of the European Union, the EU existing jurisdiction regime is, overall, advantageous. Article 4(1) of the 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 states that: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". Therefore, if the company is domiciled in a member state, in general, defendants will not have jurisdictional impediments to bring the claim against the court of that state.

country or countries in which the indirect consequences of that event occur.[17] In the Trafigura case, the lawyer that represented the victims stated: 'Although the events took place thousands of miles away, it is right that this British company is made to account for its actions by the British courts, and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way as they would act in Abergavenny.'[18] The case was settled before trial in September 2009 so the matter of the applicable law was never discussed and therefore not decided.[19]

Researchers, advocates and lawyers are looking at Rome II Regulation to argue the applicability of the home country law. They have examined different legal exceptions contained in Rome II Regulation to avoid using the general rule of *lex loci damni*. One of these exceptions is the public policy clause in article 26 of the Rome II Regulation. This clause has captured the attention of scholars[20] and advocacy groups.[21] The European Union's Agency of Fundamental Rights issued an Opinion where it established that "The EU should provide guidance on when and how to make full use of the flexibility available under the ordre public clause of the Rome regime, in particular in extraterritorial settings. This should be done to ensure that, when damage levels in 'host' countries are too low, an EU-wide level of damage, high enough to deter business from further abuse, could be applied."[22]

Foreign direct liability cases are constrained by the rules of private international law. These rules determine the applicable law to the cases which defines the standard, the duty of care, as well as determine the amount of the damages. This thesis will explore the effect of the European Union's conflict-

[17] Andrew Dickinson, *The Rome II Regulation : The Law Applicable to Non-Contractual Obligations* (New York: Oxford University Press, 2008), 298.
[18] Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation," 285., citing Leigh Day & Co, "Press Release: Toxic Waste Disaster Claim in the Hight Court on Behalf of Victims - Trafigura a Company Based in the West End of London," November 9, 2006, https://www.trafigura.com/media/3931/leigh_day_initial_press_release_09_11_2006.pdf.
[19] Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation."
[20] Veerle Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law," *Contemporary Readings in Law & Social Justice* 4, no. 2 (September 2012): 178–207; Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation"; Angelica Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente : Profili Di Diritto Internazionale Pubblico e Privato* (Multinational Enterprises, Human Rights and the Environment: Profiles of Public and Private International Law), (Milano: Giuffrè, 2012).
[21] Filip Gregor and Frank Bold. *The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts.* Brno, 2014. Accessed on December 20th[th] 2019. *https://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf*
[22] FRA. Opinion 1/2017 [B&HR] *Improving Access to remedy in the area of business and human rights at the EU Level*. Vienna, 10 April 2017. Accessed on December 20th 2019.: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf

of-laws rules on these types of claims. It will focus on the EU's Rome II Regulation, specifically on the general rule set out in article 4 whereby the applicable law shall be the one of the country in which the damage occurs. The analysis will be centered on the effect the rule has on such claims and the viability of overcoming it using the public order exception under article 26.

## 2. Methodology and Research Questions

The methodology used in this thesis is legal research based on qualitative data from primary and secondary sources. Primary sources include the statutory law of the European Union, particularly Rome II Regulation, statutory law of EU Member States, statutory law of countries outside the EU, case-law of domestic courts of EU Member States, and, to the extent existing, case-law of the European Court of Justice. Secondary sources consist of legal encyclopedias, legislative history of Rome II Regulation, legal academic articles and opinions of legal experts.

The specific question addressed is: *Is the "Public policy" exception under Rome II Regulation a feasible resort in foreign direct liability case against multinationals for human rights violations in third countries?* And if not, *is there another possibility for victims of human rights violations by multinationals in third countries to argue, under Rome II regulation, that the applicable law should be the law of the home country?*

In order to answer these questions, the analysis is structured in five steps. The first step outlines the state of transnational litigation in the EU against corporations for human rights violations committed outside of the EU. The objective is to describe and define the scale of this trend and how lawyers are creatively trying to hold corporations accountable. While different areas of law will be explored, the focus is on transnational tort cases. The statute that regulates the applicable law to these cases is Rome II Regulation. The second step entails an overview of this regulation, its general rule, how it affects tort cases against corporations and a summary of the exceptions and special rules. This leads to the public policy exception in article 26. The third step is centered on the public policy exception, its legislative

history and its general principles. It includes a synopsis of few precedents where courts of member states have used this exception to deny the application of a foreign law regulating non-contractual obligations. These precedents provide legal arguments that can be extrapolated to the area of interest in this thesis. The fourth step focuses on the use of the public policy exception in tort cases against corporations in the EU. Finally, the last step complements the analysis with one comparative legal development in Canada. Each of the steps correspond with one section of the thesis.

## 3. Business and Human Rights Litigation in the European Union: an Overview

As noted in the introduction, the number of cases brought in European Union courts against multinationals for human rights violations committed abroad by their subsidiaries or by their business partners[23] is increasing.[24] Claimants in these cases normally share the same NGOs and law firms as legal representatives. In the UK, for example, the human rights law firm Leigh Day has brought several cases against multinationals to the UK Courts.[25] The firm has a practice that focuses on corporate accountability: "We represent women, men and children who have been injured or who have suffered loss as a result of the operations of British multinationals overseas."[26] Another relevant actor in this sphere is the European Center for Constitutional and Human Rights (ECCHR), which is based in Germany. This legal center has pursued several criminal and civil actions against multinationals in different EU countries, such as France or Germany.[27] The French NGO Sherpa has also been very active in the legal battle against French multinationals for human rights abuses.[28]

The legal arguments that claimants use are varied and underscore the holistic approach that lawyers are taking for holding corporations accountable. For example, advocates are creatively using consumer

[23] Business partners such as suppliers
[24] Liesbeth Enneking et al., "Duties of Care of Dutch Business Enterprises with Respect to International Corporate Social Responsibility. A Comparative and Empirical Study of the Status Quo of Dutch Law in Light of the UN Guiding Principles. Executive Summary" (Utrecht Center for Acccountability and Liability Law; University of Utrecht, December 2015), 12–13, https://www.wodc.nl/binaries/2531-summary_tcm28-124392.pdf.
[25] Leigh Day Solicitors, "Corporate Accountability Solicitors | Human Rights Law Firm," accessed November 22, 2019, https://www.leighday.co.uk/International/Corporate-accountability.
[26] Leigh Day Solicitors.
[27] ECCHR, "Programmbereich: Corporate Exploitation," accessed November 22, 2019, https://www.ecchr.eu/en/business-human-rights/.
[28] Sherpa, "Legal Actions," accessed November 22, 2019, https://www.asso-sherpa.org/category/litigations.

protection laws to sue companies to increase corporate due diligence and transparency: "these lawsuits seek to prove that the company in question was aware of the abuses taking place in its business operations cycle and knowingly failed to disclose this information to its customers or misled them in any other way."[29] Lidl,[30] Auchan[31] and Samsung[32] have been sued using this strategy in Germany and France.

In other cases, advocates have used criminal law to sue companies for being complicit in human rights violations and crimes against humanity in host countries. For example, NGOs filed a criminal complaint in France against the French cement company Lafarge for being complicit in, among others, war crimes and crimes against humanity committed in Syria by its subsidiary.[33] The same NGOs also filed a criminal complaint against Vinci Construction Grands Projets and its Qatari subsidiary, alleging "forced labour, servitude and concealment" in its construction sites for the football World Cup.[34] In France NGOs field a complaint against Qosmos, a French software components company that supplied surveillance equipment to the Syrian government. NGOs argued that Qosmos is complicit in human rights abuses, including torture, committed by the Syrian Government by providing it with surveillance equipment.[35] In Switzerland, a criminal complaint was filed against Nestlé and its senior management for failing to take precautionary measures to prevent the murder of a Colombian trade unionist and former employee of Nestlé's Colombian subsidiary.[36] In Switzerland a criminal investigation was opened against the gold refinery Argor-Heraeus SA for refining gold that had been pillaged by an illegal armed group in the Democratic Republic of Congo.[37]

[29] Business & Human Rights Resource Centre, "Quarterly Highlight: The Use of Consumer Protection Laws as a Strategic Tool for Corporate Due Diligence and Transparency in Global Supply Chain," *Corporate Legal Accountability Quarterly Bulletin* (blog), June 27, 2018, https://us3.campaign-archive.com/?e=%5bUNIQID%5d&u=bdd1a6a40fffad39c8719632f&id=4793e04c7a.
[30] Business & Human Rights Resource Centre, "Lidl Lawsuit (Re Working Conditions in Bangladesh)," December 20th, 2019, https://www.business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh.
[31] Business & Human Rights Resource Centre, "Auchan Lawsuit (Re Garment Factories in Bangladesh)," December 20th, 2019, https://www.business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh.
[32] Business & Human Rights Resource Centre, "Samsung Lawsuit (Re Misleading Advertising & Labour Rights Abuses)," accessed December 20th, 2019, https://www.business-humanrights.org/en/samsung-lawsuit-re-misleading-advertising-labour-rights-abuses.
[33] Business & Human Rights Resource Centre, "Lafarge Lawsuit (Re Complicity in Crimes against Humanity in Syria)," accessed November 13, 2019, https://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria.
[34] Business & Human Rights Resource Centre, "Vinci Lawsuits (Re Forced Labour in Qatar)," accessed November 14, 2019, https://www.business-humanrights.org/en/vinci-lawsuit-re-forced-labour-in-qatar.
[35] Business & Human Rights Resource Centre, "Qosmos Investigation (Re Syria)," accessed November 13, 2019, https://www.business-humanrights.org/en/qosmos-investigation-re-syria.
[36] Business & Human Rights Resource Centre, "Nestlé Lawsuit (Re Colombia)," accessed November 14, 2019, https://www.business-humanrights.org/en/nestl%C3%A9-lawsuit-re-colombia.
[37] Business & Human Rights Resource Centre, "Argor-Heraeus Investigation (Re Dem. Rep. of Congo)," accessed November 14, 2019, https://www.business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo.

Tort law is also being used to bring claims against companies in their home countries. Damage claims resulting from non-contractual obligations[38] are sometimes filed along with other types of claims (such as criminal ones) or as stand-alone claims. Companies in industries such as mining, oil and gas and retail have been targets of tort claims.[39]

In the mining industry, one of the key areas of concern is security. In 2015, the mining firm Tonkolili Iron Ore Ltd was sued in the UK High Court by 142 villagers from Sierra Leone for being complicit with two violent incidents with the police.[40] The first incident took place when the villagers protested against the clearing of land to facilitate mining operations. The second incident referred to a strike that was organized by mine workers at the operating mine.[41] The villagers alleged that the mining firm had encouraged the police to use violence against them and therefore was complicit in the human rights violations that took place (false imprisonment, rape and murder, among others). The villagers claimed compensation for injuries, loss and damages caused by these incidents.[42] African Barrick Gold was also sued in UK High Court for complicity in the killings and injuries of villagers by police at a mine in Tanzania.[43] The mine was operated by North Mara Gold Mine Limited, which was controlled by African Barrick Gold. The villagers alleged that the police were part of the mining company's security. African Barrick Gold had allegedly "failed to prevent the use of excessive force by security and police at the mine" and consequently it should compensate the villagers for the deaths and injuries.[44] Similar claims were brought against Xstrata Limited and its Peruvian subsidiary in the High Court in London.[45]

[38] I will It should be taken into account that in certain areas there is no clear difference between non-contractual and contractual obligations. For example, work accidents do not always clearly classify as damages arising from contractual obligations. It will depend on the type of accident and its relation with the work responsibilities. See for example Ángel Espiniella Menéndez, "Responsabilidad civil por accidentes de trabajo transfronterizos," (Civil liability for cross-border work accidents), *Revista Electrónica de Estudios Internacionales*, no. 37 (June 2019), https://doi.org/10.17103/reei.37.09.
[39] Business & Human Rights Resource Centre, "Complete List of Cases Profiled," accessed November 14, 2019, https://www.business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled.
[40] Business & Human Rights Resource Centre, "Tonkolili Iron Ore Lawsuit (Re Complicity in Violence against Villagers in Sierra Leone)," accessed November 14, 2019, https://www.business-humanrights.org/en/tonkolili-iron-ore-lawsuit-re-complicity-in-violence-against-villagers-in-sierra-leone.
[41] Business & Human Rights Resource Centre.
[42] Business & Human Rights Resource Centre.
[43] Business & Human Rights Resource Centre, "African Barrick Gold Lawsuit (Re Tanzania)," accessed November 14, 2019, https://www.business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania.
[44] Business & Human Rights Resource Centre.
[45] Leigh Day, "Peru-Xstrata," Leigh Day Corporate Accountability Security and Human Rights, accessed November 14, 2019, https://www.leighday.co.uk/International/Corporate-accountability/Security-human-rights/Peru/Peru-Xstrata.

Damage claims have also been brought for environmental pollution of mining operations. In the UK, Vedanta resources was sued over pollution caused by its subsidiary's copper mining operations in Zambia.[46] The claimants alleged the mining operations have resulted in damage to their land and water. The polluted water caused health problems, illnesses and permanent injuries. It has also "devastated crops and affected fishing, greatly impacting the earnings of the local people".[47] The villagers claimed compensation for these damages.

Claims against oil companies are similar to the ones against the mining industry. In 2013, Esther Kiobel filed lawsuit in Dutch Courts against Shell, after the dismissal of her case by the US Supreme Court.[48] She claims that Shell was complicit in the killings by the Nigerian Government of Ogoni activists who protested against Shell's operations in the country.[49] BP also faced a claim in UK courts for allegedly being complicit in the death of a trade unionist who worked in a subsidiary of BP in Colombia.[50] The worker was kidnapped, detained and tortured by a paramilitary group. The plaintiff filed his claim for damages against BP alleging that the paramilitaries were hired and paid by BP's subsidiary to protect the pipeline from guerrilla attacks.[51]

Oil companies are also facing damage claims for environmental pollution. Shell has been the subject of several damage claims in different European Union Courts for diverse oil spills. In 2012, villagers of the Bodo community in Nigeria filed a claim in UK High Court seeking compensation for the losses suffered to their health, livelihoods and land due to two oil spills in the Niger Delta.[52] The villagers claim that the cause of the spills was the poor maintenance of the pipelines, while Shell argues that it was due to sabotage. A similar claim was brought in the UK High Court by Ogale and Bille communities in Nigeria

[46] Business & Human Rights Resource Centre, "Vedanta Resources Lawsuit (Re Water Contamination, Zambia)," accessed November 14, 2019, https://www.business-humanrights.org/en/vedanta-resources-lawsuit-re-water-contamination-zambia.
[47] Business & Human Rights Resource Centre.
[48] Business & Human Rights Resource Centre, "Shell Lawsuit (Re Nigeria - Kiobel & Wiwa)," accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa.
[49] Business & Human Rights Resource Centre.
[50] Business & Human Rights Resource Centre, "BP Lawsuits (Re Casanare, Colombia)," accessed November 14, 2019, https://www.business-humanrights.org/en/bp-lawsuits-re-casanare-colombia.
[51] Business & Human Rights Resource Centre.
[52] Business & Human Rights Resource Centre, "Shell Lawsuit (Re Oil Spills & Bodo Community in Nigeria)," accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria.

against Shell and its Nigerian subsidiary.[53] Almost 42,500 villagers seek remedy "for extensive oil pollution which considerably affected their livelihoods and the environment" caused by oil spills which Shell had failed to adequately prevent and subsequently failed to adequately clean up.[54] Three other similar claims were brought by the villagers of Oruma, Goi and Ikot Ada Udo in Nigeria against Shell Nigeria and the Dutch parent company in Dutch courts for an oil spillage that affected their respective villages in 2005.[55] Eni is facing a similar claim in Italian courts brought by the Ikebiri community of Nigeria for an oil spill in the Niger Delta on 5 April 2010.[56]

Human rights violations in supply chains have also lead to tort claims against European buyers. KiK, a clothing retailer based in Germany, was sued for the death of 158 workers who were killed in a fire at their main supplier's factory in Pakistan. The factory did not have adequate health and safety measures.[57] A groundbreaking case is being filed against British American Tobacco for "unjust enrichment" in UK courts on behalf of thousands of Malawi child laborers and their families.[58] The law firm representing them claims that poverty wages resulting from BAT's extremely low payment to farmers force Malawi families to put their children to work in the fields.[59]

These cases indicate a clear trend in business and human rights litigation. More specifically, the use of tort law seems to be preferred by lawyers. However, as Dr Andrew Sanger, University Lecturer at the University of Cambridge, pointed out on a panel discussion on 'Business and Human Rights in Domestic Courts': "It is fair to say that people have been discussing or talking about it for a great many years and yet also fair to say that there are very modest developments in that time (...) It is a topic that is long lasting and structural in the way we think about the relation between international law and domestic

[53] Business & Human Rights Resource Centre, "Shell Lawsuit (Re Oil Spills & Ogale & Bille Communities in Nigeria - Okpabi v Shell)," accessed November 15, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell.
[54] Business & Human Rights Resource Centre.
[55] Business & Human Rights Resource Centre, "Shell Lawsuit (Re Oil Pollution in Nigeria)," accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria.
[56] Business & Human Rights Resource Centre, "Eni Lawsuit (Re Oil Spill in Nigeria)," accessed November 14, 2019, https://www.business-humanrights.org/en/eni-lawsuit-re-oil-spill-in-nigeria.
[57] Business & Human Rights Resource Centre, "KiK Lawsuit (Re Pakistan)," accessed March 11, 2019, https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan.
[58] Sarah Boseley, "BAT Faces Landmark Legal Case over Malawi Families' Poverty Wages," *The Guardian*, October 31, 2019, sec. Global development, https://www.theguardian.com/global-development/2019/oct/31/bat-faces-landmark-legal-case-over-malawi-families-poverty-wages.
[59] Boseley.

law."[60] Indeed, the trend indicates that the number of tort cases is increasing but it is still a nascendent area. International tort cases in business are human rights are complex. In the same panel discussion, Richard Hermer, attorney for the defendant in the Vedanta case expressed that while academia embraces complexity, courts prefer simpler arguments.[61] Hence, lawyers try to fit these complex international cases into simpler domestic tort law. The question is what domestic tort law is applicable to the case and how the rules of conflict of law affect victims' possibility of achieving justice.

Some of the cases described in this section have been analyzed in a 2019 report requested by the European Parliament's Sub-Committee on Human Rights.[62] The topic of the report was access to legal remedies for victims of corporate human rights abuses in third countries. The researchers analyzed twelve case studies and identified a number of procedural and substantive legal barriers for victims when seeking damages in home countries. One of these barriers was the applicable law to transnational tort claims, which is determined by Rome II Regulation.[63] In order to overcome this barrier, the report included several recommendations to strengthen the access to Member States law as applicable law.[64] One of those recommendations was the use of the public policy exception in Rome II Regulation.

Before examining the public policy exception, the next section will provide an overview of Rome II Regulation, its general principle, how it affects tort cases against corporations and a summary of the exceptions and special rules. The objective is to understand why the applicable law under Rome II Regulation is a barrier for achieving justice for foreign victims when seeking damages in home countries.

[60] Dr Andrew Sanger et al., "LCIL Panel Discussion: 'Business and Human Rights in Domestic Courts - Contemporary Developments and Future Prospects'" (December 6, 2019), https://sms.cam.ac.uk/media/3119807, min 1-2.
[61] Dr Andrew Sanger et al, min 15-16.
[62] Marx, Wouters, and Bright, "Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries."
[63] Marx, Wouters, and Bright.
[64] Marx, Wouters, and Bright.

## 4. Rome II Regulation

The general rule of Rome II Regulation is "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."(art. 4.1)[65] This rule shall apply when the parties have not reached an agreement on the applicable law (article 14) and when none of the exceptions (articles 4(2)[66] and 4(3))[67] or specific rules for special torts (articles 5-9 and 12) apply.

The choice of law system was highly debated during the legislative history of the adoption of the Regulation. Dr. Symeon C. Symeonides, Dean Emeritus and international law professor at the Willamette University College of Law,[68] takes a look at the past and focuses on the first draft proposal for the regulation put forward by the Groupe européen de droit international privé (GEIP) in 1998.[69] The general rule under this draft was flexible, and gave the judge the option of using different criteria depending on the individual case.[70] According to the author, this solution was a "missed opportunity" and could have been the best option to achieve a fair balance between harmonization and material justice. Judges would have had the opportunity of choosing the law that was best suited to resolve each case, taking into account the specificities of each situation. Contrary to this approach the first draft published by the Commission on 2003 follows the actual structure: "It is basically a rule-oriented and jurisdiction-selecting (...) it is based on an idea of a "spatially correct" law that should be applied. The content of the laws that are in question

[65] Rome II Regulation Article 4(1).
[66] Rome II Regulation article 4(2): "However, 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."
[67] Rome II Regulation article 4(3): "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."
[68] Symeon C. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity," *The American Journal of Comparative Law* 56, no. 1 (2008): 210.
[69] See Proposal for a European Convention on the Law applicable to Non-contractual Obligations adopted at the Luxembourg meeting of Sept. 25-28, 1998, available at: https://www.gedip-egpil.eu/documents/gedip-documents-8pf.html
[70] "1. L'obligation non contractuelle dérivant d'un fait dommageable est régie par la loi du pays avec lequel elle présente les liens les plus étroits. 2. Lorsque l'auteur du fait dommageable et la personne lésée ont leur résidence habituelle dans le même pays au moment du fait dommageable, il est présumé que l'obligation présente les liens les plus étroits avec ce pays. 3. Lorsque l'auteur du fait dommageable et la personne lésée ont leur résidence habituelle dans des pays différents au moment du fait dommageable, il est présumé que l'obligation présente les liens les plus étroits avec le pays dans lequel le fait générateur et le dommage se sont produits ou menacent de se produire. 4. Les présomptions des paragraphes 2 et 3 sont écartées lorsqu'il résulte de l'ensemble des circonstances que l'obligation présente des liens plus étroits avec un autre pays.5. Lors de l'appréciation des liens les plus étroits, il pourra être tenu compte d'une relation préexistante ou envisagée entre les parties"

is regarded as less relevant."[71] While this draft was subject to several modifications and debate within the European Institutions, the final version is similar to the original 2003 proposal.

The Preamble of the Regulation explains the principles underlying this choice of law. The Preamble states that having a non-flexible general rule followed by limited exceptions fulfils "the requirement of legal certainty and the need to do justice in individual cases."[72] It also strikes "a fair balance between the interests of the person claimed to be liable and the person sustaining the damage"[73] and reflects a "modern approach to civil liability and the development of systems of strict liability."[74]De Boer, Private International Law Professor of the University of Amsterdam, disagrees with this strict approach because legal certainty does not necessarily help to achieve substantive justice or just results.[75] The European regime understands "doing justice" as "selecting the proper law" irrespective of the material results.[76]

Other PIL regimes, such as the German one, have a more "plaintiff-friendly" system.[77] Article 40(1) of the German EGBGB states "Tort claims are governed by the law of the country in which the liable party has acted. The injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied. The option can be used only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure." The German system gives judges more flexibility when deciding what law should apply which can lead to a greater material justice in complex cases.

[71] Halfmeier in Gralf-Peter Calliess, ed., *Rome Regulations: Commentary*, Second edition (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015):463.
[72] Rome II Regulation Preamble 14. This has been a guiding principle in civil law countries for a long term.
[73] Rome II Regulation Preamble 16.
[74] Rome II Regulation Preamble 16.
[75] Th M. de Boer, "The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation," *Netherlands International Law Review; Dordrecht* 56, no. 3 (2009): 295–332, http://dx.doi.org/10.1017/S0165070X09002952, 313.
[76] Ibid. This idea of the conflict between flexibility and material justice in cases of human rights violations one hand, and the principle of foreseeability on the other, circles back around Dubinsky's theory explained above. It also relates to the differences between the common law concept of equity and the civil law concept of equity. For civil law jurisdictions, flexibility is not a value in itself and procedural law has a higher importance
[77] Von Hein in Gralf-Peter Calliess, ed., *Rome Regulations: Commentary*, 498. Article 40(1) of the German EGBGB states: "Tort claims are governed by the law of the country in which the liable party has acted. The injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied. The option can be used only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure"

This theoretical debate is quite important in human rights litigation. Law Professor Paul Dubinsky believes that there is an inherent conflict between human rights law and PIL harmonization.[78] In Europe, these programs have developed in opposite orientations due to their conflicting views towards procedural law. He argues that initially, the human rights movement and the unification movement complemented each other because they both supported universalism and offered a critique to positivism based on nation-state sovereignty.[79] However, the PIL unification movement in Europe has evolved to champion predictability of processes, where judges should act according to unified and general conflict-of-laws rules. In contrast, the human rights movement see national courts as the main instance for deciding violations of fundamental individual rights. Human Rights claims sometimes require specific conflict of law rules, in order to achieve justice in the particular case.[80] Consequently, national courts need to be prepared to innovate in their procedural rules to accomplish this task and not rely on general conflict of law principles which do not take into account the specificities of the case.[81]

If the conflict of laws' regime provides for a general non-flexible rule, victims of human rights violations may encounter difficulties. A number of legal scholars consider this rule particularly unfair to non-European victims of human rights abuses by corporations.[82] These victims are forced to apply the legal system of their host country and have little chance to apply European standards to their particular case.[83] These victims will not be able to use the more protective legal system between two countries with

[78] Paul R. Dubinsky, "Human Rights Law Meets Private Law Harmonization: The Coming Conflict," *Yale Journal of International Law* 30 (2005): 211–318.

[79] Enneking, L. in Juan José Alvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business, 44.* Today's international legal order is based on the key principle of sovereignty of nation states. Each state has the maximum authority to dictate and enforce rules within its territory. However, due to the increasing number of transnational actors and activities, domestic courts have found themselves ruling on claims which affect different states. The ability of one state to rule on actors and activities outside their territory is limited by public international law and private international law. Human Rights are part of public international law. They are universal and trascent boundaries. Hence, they present a limit to sovereignty.

[80] Dubinsky maintains that the early human rights movement shared with the unification movement a focus on harmonization and codification, but it failed in terms of implementation. National courts were not seen as the appropriate institutions to enforce international law. Courts would not adjudicate a case that had taken place outside of their geographic scope. However, he argues that global terrorism and the war on illegal drugs changed this approach, and as a consequence, domestic courts assumed the task of combating offenses that took place aboard. This change in the concept of jurisdiction was further complemented by the growth of passive personality jurisdiction and universal jurisdiction.

[81] Dubinsky, "Human Rights Law Meets Private Law Harmonization."
Dubinsky, 2016: "These rules may soon be caught in a crossfire-with those who desire to bring about uniformity for the sake of an international legal order based on greater cooperation and predictability on one side, and those who resist uniformity in the name of more effective enforcement of basic human rights norms on the other."

[82] Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law"; Van Hoek and Aukje A.h, "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," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 31, 2008), https://papers.ssrn.com/abstract=1113843; Liesbeth F. H. Enneking, "Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases," *The George Washington International Law Review; Washington* 40, no. 4 (2009): 903–38; de Boer, "The Purpose of Uniform Choice-of-Law Rules."

[83] Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law.", 189-190.

unequal levels of protection. In order to give a solution to this problem, scholars, lawyers and professors have explored what available avenues are left to avoid using the "lex loci damni".[84]

The basic general rule under 4(1) of the Regulation applies without prejudice to the exceptions contained in the same article. Article (2) is not relevant to the type of cases we are looking at because it requires that the victim and the perpetrator have their regular residence in the same country. Article 4(3) may provide a solution, but the possibility is very remote, as it requires the existence of a law that as "manifestly closer connection of the legal relationship" than the law of the host country.

Rome II Regulation also includes specific rules for special torts, such as product liability, unfair competition, intellectual property rights, industrial action or environmental damages[85]. From this list, environment is of particular interest, since many human rights violations arise from pollution.[86] Article 7 establishes that in cases of environmental damage, the victim can choose between the general rule (*lex loci damni*) or the law of the country in which the event giving rise to the damage occurred.[87] The motivation behind the rule is deterring transboundary pollution: "applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighboring country' s laxer rules."[88] It also benefits victims of transboundary environmental damage because they can choose between two legal systems.[89] However, it remains uncertain if it is only applicable in cases of neighboring countries, or also to situations of transboundary conducts that results in a damage in a country very distant from the EU.[90]

[84]Van Den Eeckhout; Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente*; Enneking, L.F.H., "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation."
[85] Rome II Regulation article 7
[86] Enneking in Alvarez Rubio and Yiannibas, *Human Rights in Business*, 75; Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law," 194; Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente*, 410.
[87] Rome II Regulation Article 7.
[88] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") /* COM/2003/0427 final - COD 2003/0168 */
[89]de Boer, "The Purpose of Uniform Choice-of-Law Rules.", 331.
[90] Enneking in Alvarez Rubio and Yiannibas, *Human Rights in Business*, 54.

Rome II Regulation also includes three general exceptions in articles 16 (overriding mandatory provisions),[91] 17 (rules of safety and conduct)[92] and 26 (public order).[93]

Article 16 states that instead of the law of the host country, if there are "mandatory overriding provisions" in the home country, those could apply. Van Hoek and Ennenking[94] consider this option exceptional and, as of today, remote. The only case when this provision would apply is: "if the country in which the court sits imposes statutory duties on its corporations with regard to extraterritorial compliance with human rights standards, such duties may override the otherwise applicable law."[95] Under the corporate law principle of the corporate veil, parent companies cannot be held liable for the acts of their subsidiaries. Nowadays, there is no effort to revise this principle. There is, however, an increase in the enactment of laws in EU states that impose legal duties to multinationals in relation to their activities abroad. For example, France has recently passed a law (*LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*) on the duty of care for large French corporations in relation to the activities of their suppliers, subsidiaries and subcontractors. The law creates a legally binding obligation for large businesses to identify and prevent adverse human rights and environmental impacts in their supply chain abroad. This law could be considered as an example of "mandatory overriding provisions." Still, it does not pierce the corporate veil and, as a consequence, it does not attribute legal responsibility to the parent company for the acts of its subsidiary

Article 17 states that "the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country".[96] Here, the "harmful act" refers to the event giving rise to the liability, not the damage itself. Again, both Ennenking and Van Hoek have pointed out that this exception could be relevant to foreign direct liability

[91] Rome II Regulation Article 16. Overriding mandatory provisions: "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."
[92] Rome II Regulation Article 17. Rules of safety and conduct: "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."
[93] Rome II Regulation Article 26. Public policy of the forum: The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."
[94] Hoek and A.h, "Transnational Corporate Social Responsibility," 166; Ennenking in Alvarez Rubio and Yiannibas, *Human Rights in Business*, 56.
[95] Hoek and A.h, "Transnational Corporate Social Responsibility."
[96] Rome II Regulation Preamble 34.

cases because it allows the courts of the home country to take into account the rules and standards of that country even when the law of the host country applies.[97] However, they both note that this exception only gives the courts the opportunity to "take into account" rules of the home country, it does not permit them to replace the applicable law of the host country.

Finally, under article 26 "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum." [98] Enneking considers the "public order" exception as an "important minimum guarantee in foreign direct liability cases"[99] which are addressed in EU member states courts but are governed by the law of a third country outside the EU. Fundamental human rights principles are considered part of the public policy of the home country and therefore an exception to the historic concept of sovereignty. Therefore, if the applicable law of the host country contradicted the fundamental principles of the home country, the court could apply this exception. Nevertheless, she frames this option as an "exceptional" ,and limited to cases of accepted serious violations of international human rights norms, such as child labour.[100] Bonfanti, Associate Professor at the University of Milan, also highlights the exceptionality of this recourse, especially in the area of non-contractual obligations.[101] Theoretically, this exception gives forum states the possibility "to apply its own law (at least in part) when the law of the host state is not protective enough of the human rights of the victims, or when damage levels in "host" countries are too low to deter business from further abuse."[102] For now, this is just a theoretical possibility to be used in very exceptional circumstances. The Committee of Ministers of the Council of Europe has encouraged EU member states to use this exception, but it has not been transferred into practice.[103] In order to bridge the gap between theory and practice, there needs to be further research that explores the content and limits of the public policy exception and any existing precedents where courts of member states have used this exception to deny the application of a foreign law regulating non-contractual

[97] Hoek and A.h, 166; Ennenking in Alvarez Rubio and Yiannibas, *Human Rights in Business*, 56.
[98] Ennenking in Alvarez Rubio and Yiannibas, *Human Rights in Business*; Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente*; Van Den Eeckhout, "Corporate Human Rights Violations and Private International Law,"
[99] Alvarez Rubio and Yiannibas, 60.
[100] Alvarez Rubio and Yiannibas, 60.
[101] Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente*, 417.
[102] Marx, Wouters, and Bright, "Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries," 106.
[103] Marx, Wouters, and Bright, 106.

obligations. These precedents provide legal arguments that can be applied to foreign direct liability cases against corporations. The next section focuses on this issue. It includes an analysis of the legislative history of the public policy exception and its general principles. It also summarizes few existing precedents and the legal conclusions which can be drawn from these cases.

## 5. The Public policy exception in Rome II Regulation

Before Rome II Regulation was adopted, member states had their own provisions on "public policy" as the basis to exclude foreign laws.[104] In some of these member states, such as the UK[105] and Spain,[106] the public policy clause is general and does not include any definition of the concept. In the case of Germany, the law specifies incompatibility with civil rights as part of the fundamental principles of German public policy.[107] Netherlands is the only country where public policy is not used to exclude foreign laws, but it does prevent enforcement when the "outcome of the application of the foreign law is unacceptable."[108] The differences among member states were not significant and, as a consequence, the debates around the content of the exception in Rome II Regulation were not adverse or challenging.[109]

### *5.1 Legislative history and general principles*

The first Proposal for a European Convention on the Law applicable to Non-contractual Obligations by the Groupe européen de droit international privé (GEIP) in 1998 suggested the following wording for the public order exception: *"Article 14 – Ordre public: L'application d'une disposition de la loi désignée par la*

[104] Dickinson, The Rome II Regulation.Dickinson, *The Rome II Regulation*, 8–22.
[105] Section 14(3)(a)(i) of the Private International Law Act 1995: "Without prejudice to the generality of subsection (2) above, nothing in this Part—(a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so— (i)would conflict with principles of public policy."
[106] Article 12.3 Spanish Civil Code: "In no event shall foreign law apply where it is contrary to the public policy."
[107] Article 6 of the EGBGB: "A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights"
[108] Dickinson, 19.
[109]European Parliament Legislative Observatory, "Procedure File 2003/0168(COD): 'Judicial Cooperation in Civil and Commercial Matters: Cross-Border Disputes, Non-Contractual Obligations, Rome II,'" accessed October 7, 2019, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2003/0168(COD). For a more complete analysis of the legislative history of the public policy exception, see von Hein in Calliess, *Rome Regulations*, 803–806.

*présente convention ne peut être écartée que si cette application est manifestement incompatible avec l'ordre public du for."*[110]

The European Union Commission used these exact same words in its first Rome II Regulation Proposal in 2003.[111] In the explanatory memorandum of the Proposal, the Commission specifies that the word "manifestly" incompatible with the public policy of the forum implies that this exception can only be used exceptionally. The Commission also makes an important clarification: "this concerns a State's public policy in the private international law sense, a more restrictive concept than public policy in the domestic law sense. The words "of the forum" were added to clarify that it refers to the rules of public policy in the private international law sense, which proceed solely from the national law of a State.[112] Accordingly, the concept of "public order" depends on each European Union state´s PIL.

The Commission reinforces this approach by drawing on existing case law of the European Union Court of Justice. In a Brussels Convention case[113] the Court held that public policy is a national concept insomuch "it is not for the Court to define the content of the public policy of a Contracting State."[114] The ECJ though can "review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State."[115] The ECJ also warns that the recourse to public policy exceptions should be exceptional and reserved to those infringements that "...constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order."[116] The 2003 Proposal also deliberately included a specific provision

[110] European Group for Private International Law, Proposal for a European Convention on the Law applicable to Non-contractual Obligations (final version).
[111] Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"): *"Article 22 – Public policy of the forum. The application of a rule of the law of any country specified by this Regulation #may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum."*
[112] Commission of the European Communities, 28.
[113] It referred to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. In this thesis, we are focusing on the conflict of rules laws in relation to non-contractual obligations, and not on the rules on recognition of foreign judgements. However, the same principles would apply, as both are part of the European Union´s Private International Law regime.
[114] Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento., No. C-38/98 (European Court (Fifth Chamber) May 11, 2000), 28
[115] *Renault v Maxicar*, 28.
[116] *Renault v Maxicar*, 30.

on Community public policy in article 23(1), 3rd paragraph. This implied that the Regulation contemplated two different public policies (the national ones and the European Community one).[117]

Two years after the first Commission's proposal, the European Parliament issued its 1st Reading Position.[118] It kept the specific provision on Community public policy in article 23(1), 3rd paragraph. But it modified the article of the Public policy of the forum[119] to include some examples of cases that would fall within this concept: "*fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions or international humanitarian law."* It also included foreign laws causing non-compensatory damages, such as exemplary or punitive damages, as contrary to the public order. This position tries to set out a common standard for all national public policies in the European Union and it includes human rights as part of these core instruments.

The European Parliament's version was not incorporated by the following Commission´s modified proposal in 2006, which reverted to the previous wording.[120] The Commission did not accept this list of core instruments because "...even though the public policy of the Member States will inevitably contain common elements, there are variations from one to another." [121] The specific provision on Community public policy in article 23(1) was still kept, which reinforced this dual vision of the concept of public policy.

[117] Von Hein in Calliess, *Rome Regulations*, 803–6.
[118] European Parliament, "Position of the European Parliament Adopted at First Reading on 6 July 2005 with a View to the Adoption of Regulation (EC) No .../2005 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ('ROME II')," T6-0284/2005 § (2005), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2005-284.
[119] *Article 24 – Public policy of the forum; 1. The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public ") of the forum. 2. In particular, the application of a rule of law of any country specified by this Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions or international humanitarian law. 3. Furthermore, the application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy ("ordre public") of the forum. 4. Where, under this Regulation, the law specified as applicable is that of a Member State, the public policy exception may only be applied at the request of one of the parties.*
[120] "The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum. In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum."
[121] Commission of the European Communities, "Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ('Rome II')," COM(2006)0083 § (2006), 4–5, http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2006/0083/COM_COM(2006)0083_EN.pdf.

The final version of the regulation changed the dual approach and kept only the public policy of the forum exception in article 26.[122] It mirrors the one originally proposed by the Commission in 2003 and does not define, in any way, the concept of "public policy" in the private international law sense. This concept remains a national one. This version dropped what Director Professor of the University of Freiburg, Jan von Hein, defined as the "superfluous"[123] provision of the Community public policy. He believes that "a separate rule on Union public policy is unnecessary because the Regulation is only to be applied by the courts of the Member States" and "for those courts, essential value judgements of EU primary and secondary law constitute part of the forum´s public policy anyway." [124] The author recognizes that there is conflicting doctrine on this issue, but even if the possibility of having two separate public policies might me "intellectually intriguing", is not practical.[125]

Rome II Regulation and the case law by the ECJ have set forth the following principles: the concept of "public policy" is determined by each EU State and it refers to the stricter "public policy" in the private international law sense than to the public policy in the domestic law sense. Further it should only be used exceptionally when applying the *lex loci damni* would constitute a manifest breach of a rule of law regarded as essential in the legal order of the State In which the case is being tried.[126]

The doctrine has also elaborated on the different principles that apply to this exception that are key to understanding its content and application. Von Hein, for example, states that even if the public policy in the PIL sense only protects the forum´s public policy, other instruments such as the European Convention on Human Rights or the Charter of the United Nations need to be respected as part of the forum´s law.[127] The author also draws the attention to the principle of "effet atténué" (mitigated effect), which means that the use of the public policy exception when denying recognition of foreign judgements has a mitigated

[122] Public policy of the forum. The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.
[123] Von Hein in Calliess, *Rome Regulations*, 806.
[124] Von Hein in Calliess, 802.
[125] Von Hein inCalliess, 802.
[126] *Renault v Maxicar*, 30.
[127] Von Hein in Calliess, 807. See also J. J. Fawcett, *Cheshire, North & Fawcett Private International Law* (New York: Oxford University Press, 2008), 853.

effect compared to its use when denying foreign laws.[128] This means that "actually applying odious laws violates public policy more strongly than merely recognizing a foreign judgement."[129]

The author includes different examples of non-contractual obligations that could be incompatible with the public policy of the Member States, such as punitive damages or treble damages, because they could be considered as "excessive".[130] The opposite situation could also be viewed as contrary to the public policy of the forum: repugnant limitations of liability or excessively short statutes of limitations.[131] Wildespring, Legal adviser to the European Commission, notes that it is not wise to create a dogmatic list of causes of action that would be contrary to public policy, as it really depends on the context and the legal system of which they form a part.[132]

Applying the public policy exception means that there is a "sufficient degree of proximity" with the State whose public policy is deemed to be violated.[133] The underlying reasoning behind specific choice of law rules is one of establishing which legal system is most interested in the case: "This means that even if the choice of law rules dictate that foreign law is to be applied to a dispute, there can still be a substantial domestic interest in the dispute."[134] This interest derives from a proximity with the case. However, in some human rights cases the connection with the forum is not as straightforward. Von hein argues that when applying the public policy in reference to International Human Rights Law, the necessity of "sufficient degree of proximity" is no longer applicable.[135] The Dutch State Commission for Private International Law has a similar view: "Where the breach of public policy concerns (...) the catalogue of 'fundamental rights principles and findamets of the rule of law of a character so absolute and immune...any incompatible foreign rule of law is excluded in all circumstances, even if the Dutch legal order is not, or only to a limited extent, connected with the situation."[136]

[128] Von Hein in Calliess, *Rome Regulations*, 808.
[129] Von Hein in Calliess, 808.
[130] Von Hein in Calliess, 810.
[131] Von Hein in Calliess, 811.
[132] Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 2015), 773.
[133] Von Hein in Calliess, *Rome Regulations*, 809.
[134] Alex Mills, "The Dimensions of Public Policy in Private International Law," *Journal of Private International Law* 4, no. 2 (August 2008): 201–36.
[135] Von Hein in Calliess, *Rome Regulations*, 809.
[136] Michael Wilderspin, *The European Private International Law of Obligations*, 27–028.

Finally, Rome II Regulation does not establish what law should apply in case the exception should apply[137] In the explanatory memorandum of the 2003 proposal, the Commission stated that the public policy exception "allows the court to disapply rules of the foreign law designated by the conflict rule and to replace it by the lex fori".[138] This text was not included in the final version of the Regulation and this view is not universally accepted. Moreover it is contested by different EU State's national legislations. Consequently, there is still no legal clarity as to which legal regime would substitute for the lex loci damni.

The use of the public policy exception as applied in private international law entails a value judgment by one state with respect to another in regard to the latter's laws and regulations. The underlying message of the exception is "your law contravenes our core values". In this regard, as Enneking points out, "the conflicting interests involved in this field go far beyond the interests of the parties directly involved in a transnational private law dispute and concern also societal, public and ultimately state interests."[139] This is not an easy exercise because it results in a limitation of the other state's sovereignty. That is why the use of the public policy exception to deny the application of a foreign law has to be exceptional. This exceptionality is reflected in the few available member state case law.

### *5.2 Member States case law*

The public policy exception can only be used in cases where the foreign law breaches a rule of law regarded as essential in the legal order of the State in which the case is being tried. For example, States can view the laws regulating the constitution of families are part of their "essential values" and consequently, part of their public order. In the area of personal law, such as marriage, filiation or civil status, courts feel more entitled to use the public policy exception. For example, Spanish courts do not apply foreign laws that allow polygamous marriages or recognize foreign polygamous marriage certificates arguing that it contravenes Spanish public policy.[140] Different courts of member states have

[137] Von Hein in Calliess, *Rome Regulations*, 812.
[138] Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), 28.
[139] Ennenking in Alvarez Rubio and Yiannibas, *Human Rights in Business,* 45.
[140] Maria Jose Valverde Martinez and Javier Carrascosa Gonzalez, "Poligamy in Morocco and Pension in Spain. The Spanish Supreme Court and the Public Policy Exception," *Cuadernos de Derecho Transnacional*, no. 2 (2018): 718–31; Ana Fernández-

also used the public policy exception to deny the filiation of babies born from surrogates in third countries.[141] UCL Private International Law Professor, Alex Mills, argues that the reason why courts and states are willing to apply the public policy exception to the area of personal law is because the disputes are strongly connected to the forum state.[142] In the case of surrogacy, the babies born from surrogates are going to be residents in the forum state, and therefore the forum state has a direct interest in the issue.

This position on personal law differs from the area of non-contractual obligations such as torts. Generally, it is more difficult for a court to justify that a foreign law regulating damages breaches a rule of law regarded as essential in their state. Following Mills analysis, courts and states are not willing to apply the public policy exception to the non-contractual obligations because those obligations have a weaker, or more indirect, connection with the forum state. Mills suggest that in cases where the connection with the forum state is weak, courts might apply the public policy only if the foreign law breaches "absolute" principles of the forum.[143] In fact, civil courts of member states have rarely used the public order clause in the area of non-contractual obligations.[144] One of the few exceptions is punitive damages. In continental Europe there is no recovery of punitive damages through civil litigation.[145] In the UK and Ireland, recovery of punitive damages is also rare and limited.[146] This contrasts with the frequent use of punitive damages in the U.S, that results in huge awards. European member states consider punitive damages as inconsistent with European legal culture and practices and could "have an adverse economic impact, create unpredictable results and be unfair."[147] As a result, courts of European member states have used

Coronado, "Matrimonio Islámico, Orden Público y Función Promocional de Los Derechos Fundamentales,"(Islamic Marriage, Public Order and Promotional Function of Fundamental Rights), *Revista Española de Derecho Constitucional*, no. 85 (2009): 125–56.
[141] Laurence Brunet et al., "A Comparative Study on the Regime of Surrogacy in EU Member States" (European Parliament. Directorate General for Internal Policies, 2013), https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf.
[142] Alex Mills, "The Dimensions of Public Policy in Private International Law,"201–36.
[143] Mills.
[144] Kadner Graziano, Thomas, "Le Nouveau Droit International Privé Communautaire En Matière de Responsabilité Extracontractuelle," *Revue Critique de Droit International Privé*, 2008, 508.
[145] Swiss Re, "Punitive Damages in Europe: Concern, Threat or Non-Issue?" (Zúrich), accessed December 6, 2019, http://www.biztositasiszemle.hu/files/201206/punitive_damage_in_europe.pdf.
[146] Swiss Re, 2.
[147] Swiss Re, 2.

the public order exception to deny the execution of foreign judgements or application of foreign laws that provide for high punitive damages.[148]

Apart from punitive damages, there are limited examples where courts of member states have used the public policy exception for non-contractual obligations. These few precedents refer either to laws that clearly contradict core principles of international law or laws that manifestly infringe the right to an effective remedy and to effective judicial protection. The English cases, *Kuwait Airways Corporation v Iraqi Airways Company* and *Oppenheimer v Cattermole,* and the German case, Frankfurt's Higher Regional Court case number Az. 16 U 209/17 on Kuwait Airways, fall within the first group of precedents. The French case, *Antunes c/dame Bakhayoko,* and the Protuguese case, C-149/18 *Agostinho da Silva Martins v Dekra Claims Services Portugal SA* fall within the second group of precedents.

Wilderspin[149] cites *Kuwait Airways Corporation v Iraqi Airways Company*[150] as the leading English authority on the application of the public policy exception to an otherwise applicable foreign law on non-contractual obligations. After invading and occupying Kuwait in 1990, the Iraqi forces took over the airport at Kuwait and seized ten commercial aircraft belonging to Kuwait Airways Corporation (KAC). On 9 September the Revolutionary Command Council of Iraq adopted a resolution dissolving KAC and transferring all its property worldwide, including the ten aircraft, to the state-owned Iraqi Airways Co (IAC). On 11 January 1991 KAC commenced proceedings in the English courts against the Republic of Iraq and IAC, claiming the return of its ten aircraft or payment of their value, and damages. When deciding if the English Courts should apply the Iraq resolution dissolving KAC, The House of Lords noted that: “Iraq's invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance. A breach of international law of this seriousness is a matter of deep concern to the world-wide community of nations. (...) Such a fundamental breach of international law can properly cause the courts of this country to say that (...) a law depriving those whose property has been plundered

[148] See, for example, Swiss Re, “Punitive Damages in Europe: Concern, Threat or Non-Issue?”. In Kadner Graziano, Thomas, “Le Nouveau Droit International Privé Communautaire En Matière de Responsabilité Extracontractuelle”, 508. The author includes two cases in footnote number 180, of the German BGH judgement on June 4th 1992 (BGHZ 118.312) and the Italian Corte di Cassazione (case number 1183, January 19th 2007).
[149] Wilderspin, *The European Private International Law of Obligations*, 773.
[150] Kuwait Airways Corporation v Iraqi Airways Company and Others (UK House of Lords May 16, 2002).

of the ownership of their property in favor of the aggressor's own citizens will not be enforced or recognized in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law."[151] The House of Lords referred to an earlier case (*Oppenheimer v Cattermole*)[152] when it refused to apply the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality. The court believed that "a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all."[153]

More recently in 2018, the German Frankfurt Higher Regional Court heard the appeal of a case concerning damages derived from contractual obligations with the airline Kuwait Airways. The appellant, an Israeli citizen living in Germany, had validly booked a flight with Kuwait Airways from Frankfurt to Bangkok with a stopover in Kuwait. The airline cancelled the booking arguing that fulfilling the contract would violate an anti-Israel boycott statute enacted by Kuwait in 1964.[154] The airline offered to fly him from Frankfurt to Bangkok at the expense of the company through another airline without stopping in Kuwait. The man did not accept the offer and demanded that Kuwait Airways comply with the original booking. Alternatively, he demanded compensation for what he considered discriminatory treatment.[155] The Frankfurt Lower Regional Court ruled in favour of Kuwait Airways and denied all claims because it held that it was impossible to conclude the contract. In other words, if the man had made a stopover in Kuwait, the Kuwaiti national authorities in the airport would not have let him embark on the following plane. However, the lower court made a controversial assertion stating that when judging a contractual impossibility, it is not for the German Courts to judge the substantive content of the foreign law (in this case, the law of Kuwait).[156] On appeal, the Higher Court did assess the foreign law and stated that it was against public order. The law was considered discriminatory, "unacceptable" and contrary to "European priorities as well as German value judgments and goals." Therefore, it did not have any legal effect in

[151] Kuwait Airways Corporation v Iraqi Airways Company and Others at 29.
[152] Oppenheimer v Cattermole (UK House of Lords February 5, 1975).
[153] Oppenheimer v Cattermole at 277–78.
[154] Jan von Hein, "Anti-Semitism – Responses of Private International Law," *Conflict of Laws.Net Views and News in Pritvate International Law* (blog), April 11, 2019, http://conflictoflaws.net/2019/anti-semitism-responses-of-private-international/.
[155] LTO, "LG Frankfurt zu Ansprüchen gegen Airline Beför-de-rung eines Israelis ist 'recht-lich unmög-lich,'" (LG Frankfurt on claims against airline Israeli transportation is "legally impossible"), Legal Tribune Online, accessed October 26, 2019, https://www.lto.de/recht/nachrichten/n/lg-frankfurt-224o37-17-kuwait-airline-passagier-israel-flug-verweigert/.
[156] LTO.

Germany.[157] Still, the Higher court made a narrow ruling in that it held that it was impossible for Kuwait Airways to perform the contract and therefore, it was not a legal but a factual impossibility which exempted the company from their obligation.[158]

The European Union Committee of the House of Lords[159] has recently addressed a similar concern submitted by AIRE Centre, JUSTICE and Redress. These organizations asked the Committee what would happen "if the law of the country where a victim was tortured did not recognize civil liability for torture or other violation of human rights or provide adequate relief (for example, as regards heads or measure of damages)."[160] Sir Lawrece Collins believed that the public policy exception would suffice: "If an English court had jurisdiction over someone who was alleged to have been guilty of torture, torture being contrary to various international Conventions, there was (...) no doubt that the English court would refuse on public policy grounds to apply a foreign law under which the conduct in question was lawful. If the foreign law gave the claimant inadequate redress by domestic standards that also might be contrary to public policy." [161]

In a similar vein, gender rights are increasingly part of states' public policy. In 2016, the Spanish Directorate General for Registers and Notaries denied registration of an inheritance acceptance and adjudication deed of an Iranian national, who was a resident in Spain, arguing that the Iranian law was incompatible with the principle of non-dissemination on the basis of sex. The conflict of laws rule determined that the applicable law was the Iranian one, which establishes that in cases where there is no will "if there are several sons and daughters, each son will take double the portion of each daughter." Both heirs, the son and the daughter, accepted this distribution but the Spanish Registry denied the registration of the deed. It considered that the Iranian Law was against the Spanish public order as it was "incompatible with fundamental principles such as the principle of non-discrimination enshrined both in

[157] LTO, "Airline Durfte Israeli Beförderung Verweigern. Skan-dalös, Anti-se-mi-tisch, Unver-meidbar?," (Airline was allowed to deny Israeli carriage. Scandalous, anti-Semitic, inevitable), Legal Tribune Online, September 25, 2018, https://www.lto.de/recht/nachrichten/n/olg-frankfurt-16u209-17-airline-israeli-kuwait-befoerderung-verweigert/.
[158] LTO.
[159] Angelica Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente : Profili Di Diritto Internazionale Pubblico e Privato*, 417.
[160] House of Lords, European Union Committee, "The Rome II Regulation. Report with Evidence," 8th Report of Session 2003-04 (London: Authority of the House of Lords, April 2003), 46, https://publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/66.pdf.
[161] House of Lords, European Union Committee, 47. This position was also supported by the Government and by the academia (Professor Beaumont ).

Article 14 of the Spanish Constitution and in the relevant international conventions."[162] This principle could be extrapolated to the area of non-contractual obligations.

Of these violations, two of them were racially discriminatory against the Jewish community, one of them was discriminatory against women and one was based on the invasion and occupation of a sovereign state. In these areas, there is an increasing consent of the international community. Hence, applying the public order exception could be viewed as straightforward exercise. In other words, courts felt entitled to publicly state that the values underlying those foreign laws were unacceptable.

The public order exception has also been used in relation to foreign rules regulating the prescription of actions derived from non-contractual obligations. In 1968, a minor was injured in a traffic accident in Spain but her case was overturned by the Spanish authorities. In 1974, her mother sued the driver and the car insurance company in France asking for damages. According to French conflict of laws rules, the law applicable to non-contractual obligations was the *lox loci damni.* The defendants argued that the Spanish Civil Code provided that the action for compensation for damage derived from an accident must be exercised within one year. In contrast, article 2252 of the French Civil Code stated that the limitation period did not apply to un-emancipated minors.[163] On final appeal, the French Cour de Cassation[164] held that the Spanish law was against French public order, which protected minors. The procedural rights of children were considered as part of the French public order. This position on procedural rights of minors differs from the Cour de Cassation's view on procedural rights of workers. In *Trans Team Grupo Vialle Iberica,*[165] the French Cour de Cassation considered whether the French prescription rules relating to actions contesting dismissals had a mandatory character over Spanish rules. The parties had chosen Spanish law as the law regulating the contract. Under this law, the action contesting the dismissal was subject to a limitation period of 20 days. The time limit set by French law was of 30 years. The Court

[162] Ana Moreno Sánchez-Moraleda, "No inscripción en un registro español de una escritura de herencia por aplicación del orden público internacional del foro.: Comentario de la Resolución de la Dirección General de Registros y Notariado núm. 8569/2016, de 20 de julio (RJ 2016, 4595)," (Non-registration in a Spanish registry of a deed of inheritance by application of the international public order of the forum: Commentary on the Resolution of the General Directorate of Registries and Notaries no. 8569/2016, of July 20 (RJ 2016, 4595) "), *Revista Aranzadi de derecho patrimonial*, no. 42 (2017): 355–70.
[163] An unemancipated minor is a minor who is subject to the control, authority, and supervision of his or her parents or guardians.
[164] Case number 77-13.556 Antunes c/dame Bakhayoko (Cour de Cassation, Chambre civile 1 March 21, 1979).
[165] Case number 07-44.655 Trans Team Grupo Vialle Iberica (Cour de cassation, civile, Chambre sociale July 12, 2010).

stated that prescription periods do not concern the procedure of dismissal, its effects, or the freedom to take legal action. In other words, prescription periods, even short ones, do not deprive the worker of the right to access to justice. Consequently, the Court concluded that the Spanish procedural law is not contrary to French public order in the international private law sense.[166]

The European Court of Justice has recently specified the principles that should be taken into account when using the public order exception to foreign procedural rules.[167] The Tribunal da Relação de Lisboa was deciding on a road traffic case which involved two countries: Spain, where the road traffic accident occurred, and Portugal, where Mr da Silva, one of the parties, resided. Mr da Silva sought compensation for indirect damage resulting from the accident. Portuguese law provides for a limitation period of three years for actions seeking compensation for damage resulting from accidents. Spanish Law provides for a limitation period of one year in respect of actions seeking compensation for damage resulting from accidents. The referring court noted that, in light of the Rome II Regulation, Spanish law, is applicable. However, the Portuguese court asked the European Court of Justice if the Portuguese law could be considered as an overriding mandatory rule within the meaning of Article 16 of the Rome II Regulation. While this case does not concern the public policy exception, the reasoning behind mandatory rules is similar and therefore, it provides a general criteria. The ECJ responded that "the application to an action seeking compensation for damage resulting from an accident of a limitation period other than that laid down in the law designated as applicable would require the identification of particularly important reasons, such as a manifest infringement of the right to an effective remedy and to effective judicial protection arising from the application of the law designated as applicable pursuant to Article 4 of the Rome II Regulation."[168] This type of analysis will need to be carried out by each court in a specific case.

[166] To read one critic to this decision see Sabine Corneloup, "Zur Unterscheidung zwischen Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden darf, und dem ordre public-Vorbehalt bei internationalen Arbeitsverträgen (Cour de Cassation, 12.7.2010 - 07-44655)," (To differentiate between provisions that cannot be deviated from by agreement and the public policy reservation for international employment contracts, Cour de Cassation, July 12, 2010 - 07-44655), *IPRax: Praxis des Internationalen Privat- und Verfahrensrechts* 32, no. 6 (2012): 569–72.
[167] Case C-149/18 Agostinho da Silva Martins v Dekra Claims Services Portugal SA (European Court of Justice (Sixth Chamber) January 31, 2019).
[168] Case C-149/18 Agostinho da Silva Martins v Dekra Claims Services Portugal SA at 34.

Von Hein proposed “repugnant limitations of liability or excessively short statutes of limitations”' as non-contractual obligations incompatible with the public policy of the Member States.[169] However, it is not about the length of the statute of limitations. As the European Court of Justice and the French Cour de Cassation stated, the use of the public order exception for foreign procedural rules is exceptional and reserved for those cases where the right to an effective remedy and to effective judicial protection are manifestly infringed. In *Trans Team Grupo Vialle Iberica* the difference between the statutes of limitations was significant (30 years compared to 20 days). Even so, the court did not apply the public policy exception.

The limited number of examples where courts of member states have used the public policy exception for non-contractual obligations could lead to the conclusion that courts are reluctant to apply this exception. Denying the application of a foreign law using the public order argument entails a value judgement of the host country’s legal system. It could be understood as a political or diplomatic confrontation because it could be viewed as violating the host country’s sovereignty. In areas such as family law or filiation, states feel more entitled to “protect their core values.” However, in relation to non-contractual obligations, the applicability of the public policy exception is less clear. Authors have theorized its general application for very “unjust” or “repugnant” foreign liability laws. There are a few precedents that support this view. These few cases, refer either to laws that clearly contradict core principles of international law (such as non-discrimination on the basis of race and sex and territorial integrity) or laws that manifestly infringe the right to an effective remedy and to effective judicial protection. Having said that, as values evolve over time, it is likely that the content of the states’ public order will also. Consequently, the application of the public policy exception remains rare but nevertheless is possible. Claimants pursuing its application need to identify particularly important reasons to persuade a court.

The next section will examine how lawyers are using the public policy exception argument in foreign direct liability cases against corporations in the European Union. The questions that are raised are: Are

[169] Von Hein in Calliess, *Rome Regulations*, 810.

these foreign laws so “repugnant”? Does it make sense to argue that the public policy exception is a good resource for these cases?

## 6. The public policy exception to the application of the “host countries” legislation in business and human rights transnational litigation

The possibility of using the public policy exception to the application of the host country legislation in business and human rights transnational litigation remains an open question. It has not been confirmed in practice by any member state court. Lawyers are however starting to argue the applicability of the home country legislation using the exceptions of Rome II Regulation. But this is still a nascendent argument so there is no conclusive precedent.

The UK case of Nigerian Ogale and Bille communities against Shell is the only example when the exceptions of Rome II Regulation were used. Almost 42,500 villagers of the Ogale and Bille communities sought remedy for the extensive oil pollution which considerably affected their livelihoods and the environment caused by oil spills which Shell had failed to adequately prevent and subsequently failed to adequately clean up.

For the oil spills that took place after 11 January 2009, the lawyers representing the Ogale used two exceptions to the general rule and one special rule of Rome II Regulation to argue that the applicable law was the law of England and Wales and not the Nigerian law.[170] The lawyers put forward four arguments to convince the court that the applicable law is the English one. First, “Pursuant to Article 7 of the Rome II Regulation [special rule for environmental damages] the applicable law is said to be the law of England and Wales, this being the jurisdiction where the acts and omissions of RDS giving rise to the damage in question occurred.”[171] Alternatively, pursuant to Article 4(3) of the Rome II Regulation the applicable law is said to be the law of England and Wales, it being the jurisdiction which is manifestly more closely

[170] Mr Justice Fraser, Okpabi & others v Royal Dutch Shell Plc, No. 2017 EWHC 89 (TCC) (High Court of Justice Queen´s Bench Division Technology and Construction Court January 26, 2017), para 50-53, Accessed November 22, 2019, https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/Judgment-26-Jan-17-FINAL.pdf.
[171] Mr Justice Fraser.

connected with the relevant torts committed by RDS."[172] The second alternative, pursuant to Article 26 "it is said by the claimants that it would be manifestly incompatible with the public policy of England and Wales to apply the law of Nigeria if, as the Defendants aver, Nigerian legislation excludes any claim in tort against an English domiciled parent company that knowingly and negligently permits its subsidiary to cause extensive environmental pollution and consequential damage."[173] Finally, the third alternative: "the claimants plead that if the law applicable to the claim against RDS is Nigerian law, the claimants aver that the Nigerian legislation does not exclude a claim in negligence against RDS, and that the relevant principles of Nigerian common law are materially the same as those found in the common law of England and Wales."[174]

This could have been a good opportunity for Justice Fraser to clarify the applicability of the different exceptions and special rules of Rome II Regulation. However, the judge avoided analyzing this point. He instead argued that:

> " In practice, given the substantial similarity between English and Nigerian common law, the difference is immaterial for the purposes of these jurisdictional challenges (...) Even if there is a claim in English law, that does not necessarily mean that it would be found that there would be a claim under the law of Nigeria. Lord Goldsmith used the phrase "necessary but not sufficient" to describe the ingredients of a common law duty of care in English law, and the effect of their absence upon any claim in Nigerian law. In those circumstances, it is agreed that I should apply English law principles to the claims advanced against RDS. If there is no claim in English law, it is agreed that there will be no claim in Nigerian law."[175]

The fact that the judge avoided giving an answer to the public policy claim could be interpreted as a symptom of its controversial character. As mentioned in the previous section, courts are reluctant to apply this exception. Denying the application of a foreign law using the public order argument entails a value judgement of the host country's legal system. This exception "crucially defines the outer limits of the 'tolerance of difference."[176] The judge preferred finding a simpler argument that gave an answer to the conflict of laws problem in this particular case instead of addressing whether the public order clause

[172] Mr Justice Fraser.
[173] Mr Justice Fraser.
[174] Mr Justice Fraser.
[175] Mr Justice Fraser, para 57.
[176] Mills, "The Dimensions of Public Policy in Private International Law," 202.

applied. Because English common law and Nigerian common law are viewed as substantially similar, the difference is immaterial for the purposes of these jurisdictional challenges. And precisely because both legal regimes share the same common law principles, it would not make sense to argue that one is against the public policy of the other. This could change if, at some point, English courts were to recognize that a parent company had an immediate duty of care for the activities of their subsidiaries in certain cases, and Nigerian courts decided not to not recognize that principle. Then there would be material differences between both legal systems and lawyers would have a legal argument for the public policy exception.

In this regard, the Vedanta case is of noteworthy importance.[177] Vedanta was sued in the UK over pollution caused by its subsidiary's copper mining operations in Zambia. Both parties agreed that the applicable law was the Zambian law. Zambia's judicial system is based on English common law and customary law. The claimants pursued two types of claims: 'common law causes of action' (tortious liability) and statutory causes of action by reference to particular obligations under the Zambian statutory code for environmental management. For the first type of claims, it might not be useful to argue the applicability of the public policy exception rule because Zambia shares with the UK the same common law principles of duty of care. As argued before, it would only make sense to use the exception if English courts were to recognize that a parent company had an immediate duty of care for the activities of their subsidiaries in certain cases and this precedent was not incorporated by Zambian courts. Due to the well-established principle of separate legal personality, it is very improbable that English courts would recognize such duty of care. In *Vedanta*,[178] the company claimed that the villagers were trying to create a new category of common law negligence by which a parent company has an immediate duty of care for the activities of their subsidiaries just by setting group wide policies and guidelines and expecting the management of the subsidiary to comply with them. Lord Briggs pointed out that it is not a new category of negligence. A parent company may be liable for the operations of their subsidiaries:

[177] Mr. Justice Coulson, Lungowe & Ors v Vedanta Resources Plc & Anor, No. EWHC 975 (TCC) (High Court of Justice Queen's Bench Division Technology and Construction Court May 27, 2016), para. 30. Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/TCC/2016/975.html.
[178] Lady Hale et al., Vedanta Resources PLC and another v Lungowe and others (The Supreme Court April 10, 2019), Accessed November 22, 2019, https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf

> " Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken."[179]

Lord Briggs is not stating that a parent/subsidiary relationship automatically gives rise to a common law duty of care. It depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary. A parent company could have a duty of care for the actions of its subsidiaries if it has group policies regarding social, environmental and governance issues and takes active steps to implement them. It could also have a duty of care if it publicly states that is taking such steps in sustainability reports, for example, even if those steps are not finally taken. It will depend on the specific facts of each particular case. Whether Vedanta has or has not a duty of care for the actions of its subsidiary will be further addressed by lower courts.

This precedent is an important specification of common law duty of care principles that will probably result in an increase in the number of claims brought in UK courts against parent companies. The applicable law to those cases would still be the law of the host country. If the host country has a common law system (for example Nigeria or Zambia), lawyers could argue that the Vedanta precedent applies. This argument might not stand if the courts in those host countries had decided not to incorporate the Vedanta precedent in their own system. If this is the case, lawyers defending the victims could try to pursue the applicability of the public policy exception so that English law applies. Similarly, if the host country has a civil law system which does not recognize this duty of care of parent companies, the lawyers defending the victims could also make the public policy exception argument. To this day, this is all a theoretical question which has not been useful from a practical point of view.

[179] Lady Hale et al, para 53.

On this subject, in 2015, before the Vedanta case, the Court of Appeal of The Hague arrived at a similar conclusion. The court was asked to decide the case of the Nigerian villagers of Oruma, Goi and Ikot Ada Udo against Shell and its subsidiary for damages caused by oil spills. The applicable law was not contested and both parties agreed that it was Nigerian Law.[180] The alleged harmful events occurred before 11 January 2009; this means that the case falls outside the temporal scope of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)".[181] The Dutch conflict of law regime, although more complex than the Rome II regulation, also indicated that the applicable law was the law of the place where the damage occurred (Nigeria). Nevertheless, the court noted that Nigerian law would not apply if the application of this law in this case would be manifestly incompatible with Dutch public order. However, in the court's view: "it has been insufficiently submitted or demonstrated that those exceptions occur in the case at issue."[182] As a consequence, Nigerian law was applied, using common law principles. Shell argued that "since there are no decisions by Nigerian courts recognizing the liability of a parent company for the damages arising out of the operations of its subsidiary then Nigerian law by definition provides no basis for assuming a violation of a duty of care by the parent company in the context of cleaning up pollution and preventing repeated spills."[183] The court rejected this argument. Looking at the English precedent of *Chandler v Cape,* the court stated that in some cases parent companies may, in certain circumstances, owe a duty of care for the acts of their subsidiaries. Since Nigerian law is a common law system, English case-law constitutes a relevant source. The Court of Appeal sent the case back to the lower court to decide. It has been said that the Dutch court is implying in this case that under English case-law, "the codes of conduct voluntarily adopted by the company can serve as a basis for establishing its duty of care, as well as the standard of overview and monitoring expected from the parent company."[184] The fact that Nigerian courts had not recognized this duty of care did not prevent the Dutch court of applying English case-law. Interestingly, these same facts were being tried in UK courts at the same time.[185] On the basis of an analysis of the Shell Group's corporate

[180] Geert Van Calster, "The Role of Private International Law in Corporate Social Responsibility," *Erasmus Law Review* 7, no. 3 (2014): 125–33.
[181] Milieudefensie et al v. Shell (District Court of The Hague January 30, 2013), para 4.3. Accessed November 22, 2019, https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf
[182] Milieudefensie et al v. Shell, para 4.3.
[183] Marx, Wouters, and Bright, "Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries," 73.
[184] Marx, Wouters, and Bright, 72.
[185] Marx, Wouters, and Bright, 72.

structure, the UK Court of Appeal found that the *Chandler v Cape* test was not satisfied and, consequently, the parent company was not liable for the acts of the subsidiary.[186] The claimants appealed to the Supreme Court which deferred its decision until the *Vedanta* case was resolved.

All these cases have one common feature: the host countries have common law systems. Hence, the applicability of the public policy exception has not been necessary, since courts have drawn from English case-law principles. In these cases, victims have been able to apply the principles of the English case-law to their claims. Before *Vedanta,* courts have been reluctant to recognize a general duty of care of parent companies for the acts of their subsidiaries. As a result, even using the principles of English case-law, victims have found it difficult to attribute legal responsibility to a parent company for the acts of its subsidiary. This means that it is not only about the choice of laws, but also the limits of traditional corporate law to deal with these complex cases. This could change if Vedanta, or any other company, is held accountable for the acts of its subsidiaries by the courts of EU member States. From that instance, victims would have available case-law supporting their claim. As argued before, the public policy exception would only be necessary if the courts of the host countries decided to rule contrary to the English duty of care principles. But again, to this day, this is still a theoretical question, which has not been useful from a practical point of view.

The reason why the use public policy exception was suggested in business and human rights cases in the first place was to give victims the possibility of choosing a more protective legal system. Until now, this resource has not been necessary. Because even when victims were arguing their claims using English common law principles, English courts have been cautious to recognize duty of care of parent companies. But this does not mean that in the future lawyers could use this exception as solution to an otherwise unjust applicable law. If this happens, lawyers must also be prepared to use other arguments because, as seen in *Nigerian Ogale and Bille vs Shell,* judges might try to avoid overruling the public policy exception. Denying the application of a foreign law using the public order implies a political choice. In the Vedanta case, one of the arguments admitted by UK Supreme court was that the UK was a valid

[186] Marx, Wouters, and Bright, 72–73.

forum because the facts in this case suggested that the claimants may not currently be likely to achieve substantive justice in Zambia. This statement is incredibly sensitive and makes a value judgement over other country's justice system. In fact, the Zambian Attorney General had submitted a letter accusing the court of 'neo-colonialism' by exporting justice from Zambia to the UK.[187] While this dispute refers to the issue of jurisdiction, the same logic applies to the choice of law question. Consequently, public policy is the last resort and judges will try to avoid applying it.

In section 5.1, it was argued that foreign laws recognizing punitive damages or treble damages, could be incompatible with the public policy of the Member States because they could be considered as "excessive." Von Hein also theorized that the opposite situation (very low level of damages) could also be contrary to the public policy of the forum. Lawyers could make the argument that if the host country law provides for very low level of damages or the process for quantifying the damages is unjust, it is against the public policy of the forum. This argument has not yet been made in foreign direct liability cases against corporations. However, in *Kalma v African Minerals Limited and Others* and *The Bodo Community and Others v Shell*, UK courts took into account the UK process standards for quantifying damages even if the applicable law was that of the host country. The reasoning was not based on an issue of public order. But it is an example of how courts might take into account standards of the home country even if the applicable law is that of the host country. This would provide victims a different legal argument to have part of the home country's law applied, without the need to justify the public policy exception.

In *Kalma v African Minerals Limited and Others* there was an agreement between the parties that the applicable law would be the law of Sierra Leone.[188] Tonkolili Iron Ore Ltd was being sued for complicity with the police on two violent incidents concerning workers in their mine site in Sierra Leone. Sierra Leone's judicial system is based on English common law and customary law. The judge ruled that it was

[187] Iankoid, "Can Zambian Claimants Get Justice in the UK Supreme Court? | Foil Vedanta," accessed December 11, 2019, http://www.foilvedanta.org/uncategorized/can-zambian-claimants-get-justice-in-the-uk-supreme-court/.
[188] Mr. Justice Turner, Kalma v African Minerals Limited and Others, No. [2018] EWHC 3506 (QB) (High Court of Justice Queen's Bench Division December 19, 2018), para 9. Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/QB/2018/3506.pdf: "The position with regard to quantum is less straightforward and its consideration may conveniently be postponed until later in this judgment."

uncontroversial that the law of Sierra Leone applies to the issues both of liability and quantum.[189] In respect of liability, the law of Sierra Leone can be treated, for all practical purposes, as being identical to that of England and Wales. However, the judge ruled that the position with regard to quantum is less straightforward. After analyzing liability and concluding that the company was not liable, Mr. Justice Turner still opined on the issue of quantum because it "is of general application to all claims and which may become relevant in the event that my findings on liability were to be disturbed."[190] The Judge found that it is difficult to assess damages based on Sierra Leonean Law because while

> " The parties are agreed that, by the application of the Rome II Regulations, the Court is required to assess damages on the same basis as would a Sierra Leonean court applying Sierra Leonean law. This, however, is a proposition easier to state than to apply. In contrast to the superabundance of guidance and case law which assists (or burdens, depending on one's appetite for complexity) English and Welsh practitioners, the cupboard of Sierra Leonean authority is but sparsely stocked."[191]

Justice Turner then proceeds to analyze the main precedent in Sierra Leonean case law[192] regarding general damages but concludes that it does not provide enough specificity and leaves a wide scope for the exercise of judicial authority.[193] In the absence of a Sierra Leonean equivalent to UK's Judicial College Guidelines on the Assessment of General Damages, the judge proceeds to value the two options presented by the parties. The first option was based upon the assessment of an expert of the specific circumstances of the case and his prediction, based upon his personal experience, of what a Sierra Leonean court would be likely to award.[194] The second option involved assessing general damages for pain, suffering and loss of amenity in accordance with the Judicial College Guidelines 14th Edition and other non-pecuniary losses in accordance with English law levels and applying a significant discount to reflect the comparatively lower level of the cost of living in Sierra Leone.[195]

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[189] Mr. Justice Turner, para 9.
[190] Mr. Justice Turner, para 375.
[191] Mr. Justice Turner, para 375.
[192] In Conteh v Koroma Supreme Court [1974-82] Sierra Leone Bar Association Law Reports, the Chief Justice held: "The most important principle applicable is that general damages must be fair and reasonable compensation for the damage suffered and that perfect compensation is neither possible nor permissible."
[193] Mr. Justice Turner, para 378-379.
[194] Mr. Justice Turner, para 382.
[195] Mr. Justice Turner, para 387.

This second approach was used by UK courts in *Alseran v Ministry of Defence*.[196] This case involved Iraqi citizens who alleged that they were unlawfully imprisoned and ill-treated by British armed forces in Iraq and claimed compensation from the Ministry of Defence. The legal basis for the claims was the Human Rights Act 1998, which makes a breach of the European Convention on Human Rights by a UK public authority unlawful as a matter of UK domestic law and gives the victim a potential claim for damages. The Court assessed general damages for pain, suffering and loss in accordance with the Judicial College Guidelines 14th Edition and other non-pecuniary losses in accordance with English law levels to calculate the damages for the claimants.

Judge Turner decided not to apply the *Alseran v Ministry of Defence* precedent in the *Kalma v African Minerals Limited and Others* because it "involved the quantification of damages for the breach of the claimant's Convention rights, pursuant to section 8(3) of the Human Rights Act 1998 and not, as here, in respect of tortious liability."[197] He concluded by proposing the first option (the expert advice) with a discount. Justice Turner did not question whether Sierra Leone's damages are "too low" and therefore against the UK's public policy. But he was still open to apply part of the home country's law to the case. .It is an example of how courts might take into account standards of the home country even if the applicable law is the one of the host country. This provides victims a different legal argument to have part of the home country's law applied, without the need to justify the public policy exception.

In the case of *Bodo Community and others against Shell* in the UK a similar question was raised.[198] The community members sought compensation for the losses suffered to their health, livelihoods and land due to two oil spills in the Niger Delta. The villagers claimed that the cause of the spills was the poor maintenance of the pipelines, while Shell argued that it was due to sabotage. One of the preliminary questions that Justice Akenhead needed to resolve was "Whether awards of just compensation under the Nigerian Oil Pipelines Act 1956, or awards of general damages at common law, should be valued by reference to previous awards made by the English Courts or by reference to the value of land and/or the

[196] Mr. Justice Leggatt, Iraqui Civilian Litigation v MOD, No. EWHC 3289 (QB) (High Court of Justice Queen´s Bench Division December 14, 2017). Accessed November 22, 2019,https://www.matrixlaw.co.uk/wp-content/uploads/2017/12/Alseran-Ors-v-Ministry-of-Defence-2017-EWHC-3289-QB.doc

[197] Mr. Justice Turner, Kalma v African Minerals Limited and Others, para 388.

[198] Mr Justice Akenhead, The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd, No. [2014] EWHC 1973 (TCC) (High Court of Justice Queen´s Bench Division Technology and Construction Court June 20, 2014), Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/TCC/2014/1973.html

cost of living in Nigeria?"[199] The applicable law in the case was determined by the Private International Law (Miscellaneous Provisions) Act 1995 which provides that: "11 (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur…" However, the Act has an exception to this rule: "14. (3) Without prejudice to the generality of subsection (2) above, nothing in this Part(b) affects any rules of evidence, pleading or practice or authorizes questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum." Justice Akenhead, citing Harding v Wealands [2006] UKHL 32, concluded that "This means in effect, and it is, rightly, common ground that, whilst the substantive law [of Nigeria] I must address and be determinative of liability as well as the basic heads of financial claim, quantification is to be carried out under English Law."[200] This does not mean that the value of the damages will be based on English levels. Any compensation based on the OPA, or, if applicable, awards of general damages at common law, would be valued primarily by reference to the value of land and/or the cost of living and/or incomes in Nigeria. However, quantification of those damages is to be by way of English law procedures and approaches.[201] Again, this is not a case that falls within the "public policy" exception rule, but it is an example of how courts might take into account standards of the home country even if the applicable law is the host country's law.

To this day, the applicability of the public policy exception has not been necessary. In the claims analyzed in this section, host countries had a common law system. As a result, even when judges were applying the law of the country were the damage occurred, they referred to precedents of English courts, as part of the common law of host countries. The public policy exception has been proposed as a resource to argue the applicability of the home country legislation. In these cases, victims have been able to apply the principles of the English case-law to their claims so there was no need to discuss the public order of the forum. In relation to the law applicable to the quantification of damages, in *Kalma v African Minerals Limited and Others* and *The Bodo Community and Others v Shell*, the UK courts stated that even if the applicable law is the host country law, they would take into account the UK process standards

[199] Mr Justice Akenhead, para 9.
[200] Mr Justice Akenhead, para 154.
[201] Mr Justice Akenhead, para 160.

for quantifying damages. The reasoning was not based on an issue of public order. But it is an example of how courts might take into account standards of the home country even if the applicable law is the one of the host country. This provides victims a different or additional legal argument to have part of the home country's law applied, without the need to justify the public policy exception.

But the fact that the public policy exception has not been necessary up to now does not mean that it might be, or that should not be considered. Each case is obviously different, so it cannot and should be be ruled out . As noted in *Okpabi & others v Royal Dutch Shell*, lawyers are starting to apply the public policy exception, as well as other special rules in Rome II Regulation, such as the manifestly closer connection (art. 4.3 Rome II Regulation) or the special rule in environmental damages (art. 7 Rome II Regulation). Legal developments in other jurisdictions also are following this trend. While judges have avoided addressing this topic, they will need to do it if the argument keeps appearing in tort suits.

## 7. Comparative Legal Developments in Canada: *Das v George Weston Limited*

In 2013, 1,130 people died and 2,520 people were seriously injured as a result of the collapse of the Rana Plaza. On April 2015, two garment workers and the father of three deceased workers that were all employed in a factory in Rana Plaza filed a class action in the Ontario Superior Court of Justice.[202] The claimants sued Loblaws and Bureau Veritas. The former is Canada's largest retailer which purchased clothes from a manufacturer whose factory was in the Rana Plaza. The latter is a consulting services enterprise that Loblaws had retained to conduct what is known as a "social audit" of factories in Bangladesh, including one of the factories in Rana Plaza. The claimants asked for damages alleging that "Loblaws had a duty to protect the safety of all individuals who worked in the Rana Plaza and breached that duty by, among other things, failing to instruct Bureau Veritas to inspect the structural integrity of the building and failing to require the local manufacturers to ensure safe working conditions existed."[203]

[202] Justice Perell, Das v George Weston Limited, No. 2017 ONSC 4129 (Ontario Superior Court of Justice July 5, 2017), accessed November 22, 2019, http://canlii.ca/t/h4pcg.
[203] Elie Farkas and Craig Lockwood, "Ontario Court of Appeal Applies Foreign Law, Dismisses Cross-Border Class Action," Osler, Hoskin & Harcourt LLP, accessed November 24, 2019, http://www.osler.com/en/blogs/classactions/january-2019/ontario-court-of-appeal-applies-foreign-law-dismisses-cross-border-class-action.

Under the Bangladesh's statute of limitations, the action had prescribed. Consequently, for the claimants, the application of the Ontario law was essential because the action was commenced within the two-year limitation period under Ontario's Limitations Act. In relation to the applicability of the Law of Ontario, the Ontario Superior Court of Justice answered the following questions:

"If the Ontario court has jurisdiction simpliciter, how is choice of law determined and what is the choice of law to determine liability?

If Bangladesh tort law applies, is it ousted to be replaced by Ontario law?

In this regard, is Bangladesh law ousted because it is uncertain, nascent, or underdeveloped?

In this regard, is Bangladesh law ousted on grounds of public policy because it includes Sharia law that discriminate between male and female heirs of a wrongful death claimant?"[204]

The choice of law regime in tort cases in Canada was set out by the Supreme Court of Canada in *Tolofson v. Jensen,* [1994]. In this case Justice La Forest wrote: "It seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong."[205] Justice La Forest also acknowledged that in certain circumstances, a rigid application of the *lex loci damni* at in international torts could give rise to injustice.[206] In those cases, the court would have the discretion to apply Canadian law to deal with such circumstances. Still, he could "imagine few cases where this would be necessary."[207]

The claimants argued that the applicable law was the Ontario law. First, they argued that the *lex loci delicti* test from Tolofson mandates that the law to be applied in torts is the law of the place where the activity occurred. The claimants further argued that the retailer's wrongful activities and decisions giving

[204] Justice Perell, Das v George Weston Limited, para 4.
[205] Tolofson v. Jensen (Supreme Court of Canada December 15, 1994), para 1049-50.
[206] Tolofson v. Jensen, para 1054.
[207] Tolofson v. Jensen, para 1054.

rise to liability took place in Ontario. In Ontario Loblaws assumed responsibility for the factories' worker safety, determined the scope of the audits, and decided not to require the supplier to take remedial action. This reasoning also applies to Bureau Veritas.[208] As a result, the law of Ontario should apply. Alternatively, even if the law of Ontario is not the *lex loci delicti*, the court should depart from the general rule because applying Bangladeshi law would result in an injustice. This injustice results, among other things, from the lack of sophistication of Bangladeshi jurisprudence and application of Sharia law principles. The claimants "submit that there is an absence of a developed body of Bangladesh law and this will impede the adjudication of their claims on their merits and force the court in Ontario to effectively develop foreign law, which is contrary to the principles of territoriality."[209] Second, Sharia law mandates an unequal distribution of damages to men and women and would therefore discriminate against women claimants. Applying Sharia law[210] would be contrary to Canadian public policy.[211]

In relation to the first argument, Justice Perell ruled that the principle of tort law is that there is no actionable wrong without injury. The alleged duty was owed to the people in Bangladesh who were killed or injured there. The wrong therefore occurred in Bangladesh and consequently, the applicable law is that of Bangladesh.[212]

In relation to the alternative argument, Justice Perell ruled that Bangladeshi law is sophisticated, the bench and the bar in Bangladesh are well-educated, and there is the normal body of judicial literature comprised of reported judgments.[213]

In relation to rejecting Bangladesh law on grounds of public policy, Justice Perell used a nuanced approach. Under Sharia law, male heirs receive twice as much as female heirs. The judge accepted that "an Ontario court should not apply a law that would discriminate as between men and women, but the first question to ask is whether in the case at bar this would ever be necessary."[214] The judge then calculated how many claimants would be affected by the Sharia law. He concluded that:

[208] Tolofson v. Jensen, para 234-238.
[209] Tolofson v. Jensen, 281.
[210] Sharia Law or Islamic Law is a religious law forming part of the Islamic tradition. It is derived from the religious precepts of Islam
[211] Tolofson v. Jensen, para 291-295.
[212] Tolofson v. Jensen, para 238-265.
[213] Tolofson v. Jensen, para 283-290.
[214] Tolofson v. Jensen, para 296.

> " although it will not be an extensive problem, there will, nevertheless, be some putative Class Members affected by the allegedly offensive Sharia law, but a substantial number, including all of the Surviving Class Members, are not affected by Sharia law, and thus, there is no public policy reason to not apply Bangladesh law to the substantial number of Class Members who are not affected by Sharia law in the calculation of their compensation."[215]

For those claimants who are affected by the Sharia law, he agreed with the argument of the claimants that the appropriate response of the court in Ontario is to sever the offensive Sharia law. However, this does not mean applying the law of Ontario. The appropriate response of the Ontario court is to apply the Bangladesh law to quantify the compensation but not the Sharia law.[216] Moreover, "the Plaintiffs' public policy argument is revealed to actually be motivated by a need to avoid the application of a Bangladesh limitation period and not by a genuine objection to the application of Sharia law, which will never occur."[217] The claimants appealed the decision but the Appeal Court agreed with Justice Perell and dismissed the substantive appeal.[218]

This ruling provides three key conclusions in relation to the public policy argument in business and human rights transnational litigation that is applicable to the EU. First, the public policy clause is an exceptional resource which cannot be used simply to overcome problems of prescribed actions. This means that if the court believes that the real reason why the victim is pursuing the application of the home country law is because the action was prescribed according to the host country law, the court will not allow the argument to proceed. Second, the argument that the home country law should apply because the host country law is not sophisticated and could lead to injustices is controversial. This entails asking the court to make a value judgement over a foreign judicial system, which can lead to political debate. The court might try to avoid that argument stating that the foreign system is sufficiently sophisticated. And in cases where the judge believes that the foreign system is less developed the solution would not necessarily require the rejection of the foreign law. In *Kalma v African Minerals Limited and Others,* the English judge

[215] Tolofson v. Jensen, para 296.
[216] Tolofson v. Jensen, para 298.
[217] Tolofson v. Jensen, para 300.
[218] Justice Feldman, Das v. George Weston Limited, No. 2018 ONCA 1053 (Court of Appeal for Ontario December 20, 2018), accessed November 24, 2019, http://www.ontariocourts.ca/decisions/2018/2018ONCA1053.htm.

ruled the law of Sierra Leone was "sparsely stocked" in relation to the quantification of damages. But the consequence was not the complete rejection of this law but the search for a compromise solution to the case by looking for expert advice. Hence, the English law was not imposed as the solution. Finally, the only argument that the Canadian court accepted was that the Sharia Law contradicted the Canadian public order because it was discriminatory. But even then, the solution put forward by the court was applying Bangladeshi law, and not Ontario law. Again, the court avoided imposing the home country law.

These conclusions exemplify the weakness of the public policy exception as a legal argument to convince courts of the applicability of the home country law. Denying the application of a foreign law using the public order argument entails a value judgement of the host country's legal system. It could be understood as a violation of the host country's sovereignty. Consequently, public policy must be considered as the last resort and judges will try to avoid applying it. And even in clear cases where, for example, foreign laws are discriminatory, the judge will try to look for an ad-hoc solution before imposing the forum laws.

One thing is clear however. As seen in *Das v George Weston Limited,* choice of law issues are becoming more important. As Farkas and Lockwood forewarned:

> " Das serves as a reminder to defense counsel to raise and prepare to argue choice of law issues at an early stage in cross-border class proceedings. Counsel should endeavor to review the law of all potentially governing jurisdictions and should consider tendering expert foreign law evidence prior to certification. Taking a proactive approach to choice of law issues can help courts narrow issues in complex cross-border class actions and can even result in the complete dismissal of an action."[219]

[219] Elie Farkas and Craig Lockwood, "Ontario Court of Appeal Applies Foreign Law, Dismisses Cross-Border Class Action."

## 8. Conclusion

This thesis has explored the possibility of using the public order exception to the application of the *lex loci damni* under Rome II Regulation in foreign direct liability cases against multinationals for human rights violations in third countries. An analysis of the content and limits of the public order clause has shown that, first, it has a political character that is linked with the concept of sovereignty. It is an exceptional resource for forum states to reject the application of foreign laws. One one side, it affects the sovereignty of foreign states because it rejects the application of their laws which are, in principle, more connected to the case. On the other side, it protects the sovereignty of the forum state in cases where the application of foreign law manifestly breaches a rule of law regarded as essential. Either way, it implies a value judgement of the foreign legal system and, as a consequence, judges try to avoid it.

Secondly, the concept of public order in Rome II Regulation is left undefined on purpose. EU member states determine what public order in the private international law sense means in each country and in what cases it can be applied. The only guidance that the ECJ has given is that it should only be used exceptionally when applying the *lex loci damni* would constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which the case is being tried. Rome II Regulation does not explicitly include human rights as part of the public order concept. As a consequence, there is no EU agreement on what constitutes public order in the private international law sense.

Thirdly, precisely because public order is a national concept that is linked to each state's values and priorities, it is a developing notion. There are a limited number of examples of EU member states' courts that used this clause to reject the application of a foreign tort law because it contravened human rights and international law. lawyers defending foreign victims of human rights violations by multinational in third countries litigating in EU member states have started to use this exception. There are no conclusive results yet so its applicability has not been confirmed in practice. As seen in *Das v George Weston Limited*, the public order exception presents certain weakness. In theory, it could be used, but more

research needs to be made, especially as more litigation is tried, not only in the UK but also in other EU civil law states.

Fourthly, Rome II Regulation does not prescribe what law applies in case the public order exception is used. It would be for each judge to decide what is the applicable law instead of the *lex loci damni.* Again, there is no agreement between EU member states on this point. Thus, the 'public order' exception does not guarantee the application of the law of the home country in foreign direct liability cases against multinationals. This is an additional weakness of the public order exception. In order to solve this, the European Commission should explore amending Rome II Regulation to include a specific choice-of law rule for business related human rights claims against EU companies. This rule would allow the claimant a choice between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled.

Fifthly, if the public order exception does not necessarily lead to the application of the home country law, more research needs to be done to find additional legal arguments under Rome II regulation to support this choice. These arguments include: the special rule for environmental damages (article 7), the exception related to the jurisdiction which is manifestly more closely connected with the relevant torts (article 4.3), the overriding mandatory provisions (article 16) and the rules of safety and conduct (article 17).

Finally, there needs to be a broader debate in relation to EU member states' corporate law. Ultimately, the objective of foreign direct liability cases is to hold parent companies liable for the activities of their subsidiaries. In general, the principle of the separate legal personality is well-established in EU corporate law codes. As a consequence, corporate law protects parent companies from being held liable for the acts of their subsidiaries. As seen in *Vedanta*, in certain cases a parent company can incur a duty of care to the victims affected by the activities of its subsidiary, following the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B. A parent/subsidiary relationship does not automatically give rise to this duty of care. It depends on the extent to which, and

the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary. But a hypothetical responsibility derived from a duty of care to third parties is not enough to hold parent companies liable. There needs to be further research and discussion on whether, under corporate law, parent companies should be automatically liable for the actions of their subsidiaries for the simple reason that, in many cases, subsidiaries do not act as independent companies.

*Bibliography*

Alex Mills, “The Dimensions of Public Policy in Private International Law,” *Journal of Private International Law* 4, no. 2 (August 2008): 201–36.

Ana Fernández-Coronado, “Matrimonio Islámico, Orden Público y Función Promocional de Los Derechos Fundamentales,”(Islamic Marriage, Public Order and Promotional Function of Fundamental Rights), *Revista Española de Derecho Constitucional*, no. 85 (2009): 125–56.

Ana Moreno Sánchez-Moraleda, “No inscripción en un registro español de una escritura de herencia por aplicación del orden público internacional del foro.: Comentario de la Resolución de la Dirección General de Registros y Notariado núm. 8569/2016, de 20 de julio (RJ 2016, 4595),” *Revista Aranzadi de derecho patrimonial*, no. 42 (2017): 355–70.

Andrew Dickinson, *The Rome II Regulation : The Law Applicable to Non-Contractual Obligations* (New York: Oxford University Press, 2008), 298.

Ángel Espiniella Menéndez, “Responsabilidad civil por accidentes de trabajo transfronterizos,” (Civil liability for cross-border work accidents), *Revista Electrónica de Estudios Internacionales*, no. 37 (June 2019), https://doi.org/10.17103/reei.37.09.

Angelica Bonfanti, *Imprese Multinazionali, Diritti Umani e Ambiente : Profili Di Diritto Internazionale Pubblico e Privato* (Milano: Giuffrè, 2012).

Axel Marx, Jan Wouters, and Claire Bright, “Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries” (European Parliament, 2019), https://lirias.kuleuven.be/retrieve/534258.

Business & Human Rights Resource Centre, “African Barrick Gold Lawsuit (Re Tanzania),” accessed November 14, 2019, https://www.business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania.

Business & Human Rights Resource Centre, “Argor-Heraeus Investigation (Re Dem. Rep. of Congo),” accessed November 14, 2019, https://www.business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo.

Business & Human Rights Resource Centre, “Auchan Lawsuit (Re Garment Factories in Bangladesh),” December 20th, 2019, https://www.business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh.

Business & Human Rights Resource Centre, “BP Lawsuits (Re Casanare, Colombia),” accessed November 14, 2019, https://www.business-humanrights.org/en/bp-lawsuits-re-casanare-colombia.

Business & Human Rights Resource Centre, “Complete List of Cases Profiled,” accessed November 14, 2019, https://www.business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled.

Business & Human Rights Resource Centre, “Eni Lawsuit (Re Oil Spill in Nigeria),” accessed November 14, 2019, https://www.business-humanrights.org/en/eni-lawsuit-re-oil-spill-in-nigeria.

Business & Human Rights Resource Centre, “KiK Lawsuit (Re Pakistan),” accessed March 11, 2019, https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan.

Business & Human Rights Resource Centre, “Lafarge Lawsuit (Re Complicity in Crimes against Humanity in Syria),” accessed November 13, 2019, https://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria.

Business & Human Rights Resource Centre, “Lidl Lawsuit (Re Working Conditions in Bangladesh),” December 20th, 2019, https://www.business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh.

Business & Human Rights Resource Centre, “Nestlé Lawsuit (Re Colombia),” accessed November 14, 2019, https://www.business-humanrights.org/en/nestl%C3%A9-lawsuit-re-colombia.

Business & Human Rights Resource Centre, “Qosmos Investigation (Re Syria),” accessed November 13, 2019, https://www.business-humanrights.org/en/qosmos-investigation-re-syria.

Business & Human Rights Resource Centre, “Quarterly Highlight: The Use of Consumer Protection Laws as a Strategic Tool for Corporate Due Diligence and Transparency in Global Supply Chain,” *Corporate Legal Accountability Quarterly Bulletin* (blog), June 27, 2018, https://us3.campaign-archive.com/?e=%5bUNIQID%5d&u=bdd1a6a40fffad39c8719632f&id=4793e04c7a.

Business & Human Rights Resource Centre, “Samsung Lawsuit (Re Misleading Advertising & Labour Rights Abuses),” accessed December 20th, 2019, https://www.business-humanrights.org/en/samsung-lawsuit-re-misleading-advertising-labour-rights-abuses.

Business & Human Rights Resource Centre, “Shell Lawsuit (Re Oil Pollution in Nigeria),” accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria.

Business & Human Rights Resource Centre, “Shell Lawsuit (Re Oil Spills & Bodo Community in Nigeria),” accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria.

Business & Human Rights Resource Centre, “Shell Lawsuit (Re Oil Spills & Ogale & Bille Communities in Nigeria - Okpabi v Shell),” accessed November 15, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell.

Business & Human Rights Resource Centre, “Shell Lawsuit (Re Nigeria - Kiobel & Wiwa),” accessed November 14, 2019, https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa.

Business & Human Rights Resource Centre, “Tonkolili Iron Ore Lawsuit (Re Complicity in Violence against Villagers in Sierra Leone),” accessed November 14, 2019, https://www.business-humanrights.org/en/tonkolili-iron-ore-lawsuit-re-complicity-in-violence-against-villagers-in-sierra-leone.

Business & Human Rights Resource Centre, “Trafigura Lawsuits (Re Côte d’Ivoire),” Business & Human Rights Resource Centre, accessed December 7, 2019, https://www.business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire.

Business & Human Rights Resource Centre, “Vedanta Resources Lawsuit (Re Water Contamination, Zambia),” accessed November 14, 2019, https://www.business-humanrights.org/en/vedanta-resources-lawsuit-re-water-contamination-zambia.

Business & Human Rights Resource Centre, “Vinci Lawsuits (Re Forced Labour in Qatar),” accessed November 14, 2019, https://www.business-humanrights.org/en/vinci-lawsuit-re-forced-labour-in-qatar.

Dr Andrew Sanger et al., “LCIL Panel Discussion: ‘Business and Human Rights in Domestic Courts - Contemporary Developments and Future Prospects’” (December 6, 2019), https://sms.cam.ac.uk/media/3119807, min 1-2.

ECCHR, “Programmbereich: Corporate Exploitation,” accessed November 22, 2019, https://www.ecchr.eu/en/business-human-rights/.

Elie Farkas and Craig Lockwood, “Ontario Court of Appeal Applies Foreign Law, Dismisses Cross-Border Class Action,” Osler, Hoskin & Harcourt LLP, accessed November 24, 2019, http://www.osler.com/en/blogs/classactions/january-2019/ontario-court-of-appeal-applies-foreign-law-dismisses-cross-border-class-action.

Enneking, “Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases,” *The George Washington International Law Review; Washington* 40, no. 4 (2009): 903–38.

Enneking et al., “Duties of Care of Dutch Business Enterprises with Respect to International Corporate Social Responsibility. A Comparative and Empirical Study of the Status Quo of Dutch Law in Light of the UN Guiding Principles. Executive Summary” (Utrecht Center for Acccountability and Liability Law; University of Utrecht, December 2015), 12–13, https://www.wodc.nl/binaries/2531-summary_tcm28-124392.pdf.

Enneking, L. in Juan José Alvarez Rubio and Katerina Yiannibas, eds., *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2017).

Enneking, L.F.H., “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation,” *European Review of Private Law* 16, no. 2 (2008).

Fawcett, *Cheshire, North & Fawcett Private International Law* (New York: Oxford University Press, 2008).

Filip Gregor and Frank Bold. *The EU’s Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts.* Brno, 2014. Accessed on December 20th$^{th}$ 2019. *https://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf*

FRA. Opinion 1/2017 [B&HR] *Improving Access to remedy in the area of business and human rights at the EU Level*. Vienna, 10 April 2017. Accessed on December 20th 2019.: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf

Geert Van Calster, “The Role of Private International Law in Corporate Social Responsibility,” *Erasmus Law Review* 7, no. 3 (2014): 125–33.

Halfmeier and Von Hein in Gralf-Peter Calliess, ed., *Rome Regulations: Commentary*, Second edition (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015).

House of Lords, European Union Committee, “The Rome II Regulation. Report with Evidence,” 8th Report of Session 2003-04 (London: Authority of the House of Lords, April 2003), 46, https://publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/66.pdf.

lankoid, “Can Zambian Claimants Get Justice in the UK Supreme Court? | Foil Vedanta,” accessed December 11, 2019, http://www.foilvedanta.org/uncategorized/can-zambian-claimants-get-justice-in-the-uk-supreme-court/.

Jan von Hein, “Anti-Semitism – Responses of Private International Law,” *Conflict of Laws.Net Views and News in Pritvate International Law* (blog), April 11, 2019, http://conflictoflaws.net/2019/anti-semitism-responses-of-private-international/.

Kadner Graziano, Thomas, “Le Nouveau Droit International Privé Communautaire En Matière de Responsabilité Extracontractuelle,” *Revue Critique de Droit International Privé*, 2008.

Laurence Brunet et al., “A Comparative Study on the Regime of Surrogacy in EU Member States” (European Parliament. Directorate General for Internal Policies, 2013), https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf.

Leigh Day Solicitors, “Corporate Accountability Solicitors | Human Rights Law Firm,” accessed November 22, 2019, https://www.leighday.co.uk/International/Corporate-accountability.

Leigh Day, “Peru-Xstrata,” Leigh Day Corporate Accountability Security and Human Rights, accessed November 14, 2019, https://www.leighday.co.uk/International/Corporate-accountability/Security-human-rights/Peru/Peru-Xstrata.

Leigh Day & Co, “Press Release: Toxic Waste Disaster Claim in the Hight Court on Behalf of Victims - Trafigura a Company Based in the West End of London,” November 9, 2006, https://www.trafigura.com/media/3931/leigh_day_initial_press_release_09_11_2006.pdf.

LTO, “Airline Durfte Israeli Beförderung Verweigern. Skan-dalös, Anti-se-mi-tisch, Unver-meidbar?,” (Airline was allowed to deny Israeli carriage. Scandalous, anti-Semitic, inevitable*)*, Legal Tribune Online, September 25, 2018, https://www.lto.de/recht/nachrichten/n/olg-frankfurt-16u209-17-airline-israeli-kuwait-befoerderung-verweigert/.

LTO, “LG Frankfurt zu Ansprüchen gegen Airline Beför-de-rung eines Israelis ist ‘recht-lich unmög-lich,’” (LG Frankfurt on claims against airline Israeli transportation is "legally impossible"), Legal Tribune Online, accessed October 26, 2019, https://www.lto.de/recht/nachrichten/n/lg-frankfurt-224o37-17-kuwait-airline-passagier-israel-flug-verweigert/.

Maria Jose Valverde Martinez and Javier Carrascosa Gonzalez, “Poligamy in Morocco and Pension in Spain. The Spanish Supreme Court and the Public Policy Exception,” *Cuadernos de Derecho Transnacional*, no. 2 (2018): 718–31

Marx, Jan Wouters, and Claire Bright, “Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries” (European Parliament, 2019), https://lirias.kuleuven.be/retrieve/534258.

Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 2015).

Paul R. Dubinsky, “Human Rights Law Meets Private Law Harmonization: The Coming Conflict,” *Yale Journal of International Law* 30 (2005): 211–318.

Sabine Corneloup, “Zur Unterscheidung zwischen Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden darf, und dem ordre public-Vorbehalt bei internationalen Arbeitsverträgen (Cour de Cassation, 12.7.2010 - 07-44655),” *IPRax: Praxis des Internationalen Privat- und Verfahrensrechts* 32, no. 6 (2012): 569–72.

Sarah Boseley, “BAT Faces Landmark Legal Case over Malawi Families’ Poverty Wages,” *The Guardian*, October 31, 2019, sec. Global development, https://www.theguardian.com/global-development/2019/oct/31/bat-faces-landmark-legal-case-over-malawi-families-poverty-wages.

Sherpa, “Legal Actions,” accessed November 22, 2019, https://www.asso-sherpa.org/category/litigations.

Swiss Re, “Punitive Damages in Europe: Concern, Threat or Non-Issue?” (Zúrich), accessed December 6, 2019, http://www.biztositasiszemle.hu/files/201206/punitive_damage_in_europe.pdf.

Symeon C. Symeonides, “Rome II and Tort Conflicts: A Missed Opportunity,” *The American Journal of Comparative Law* 56, no. 1 (2008).

Th M. de Boer, “The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation,” Netherlands International Law Review; Dordrecht 56, no. 3 (2009): 295–332, http://dx.doi.org/10.1017/S0165070X09002952, 313.

Van Hoek and Aukje A.h, “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,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 31, 2008), https://papers.ssrn.com/abstract=1113843;

Veerle Van Den Eeckhout, “Corporate Human Rights Violations and Private International Law,” *Contemporary Readings in Law & Social Justice* 4, no. 2 (September 2012): 178–207.

Wex Legal Dictionary, “Tort,” Wex legal dictionary, accessed April 29, 2019, https://www.law.cornell.edu/wex/tort.

*Case Law*

Case C-149/18 Agostinho da Silva Martins v Dekra Claims Services Portugal SA (European Court of Justice (Sixth Chamber) January 31, 2019).

Case number 77-13.556 Antunes c/dame Bakhayoko (Cour de Cassation, Chambre civile 1 March 21, 1979).

Case number 07-44.655 Trans Team Grupo Vialle Iberica (Cour de cassation, civile, Chambre sociale July 12, 2010).

Das v George Weston Limited, No. 2017 ONSC 4129 (Ontario Superior Court of Justice July 5, 2017), accessed November 22, 2019, http://canlii.ca/t/h4pcg.

Das v. George Weston Limited, No. 2018 ONCA 1053 (Court of Appeal for Ontario December 20, 2018), accessed November 24, 2019, http://www.ontariocourts.ca/decisions/2018/2018ONCA1053.htm.

German BGH judgement on June 4th 1992 (BGHZ 118.312) and the Italian Corte di Cassazione (case number 1183, January 19th 2007).

Iraqui Civilian Litigation v MOD, No. EWHC 3289 (QB) (High Court of Justice Queen´s Bench Division December 14, 2017). Accessed November 22, 2019,https://www.matrixlaw.co.uk/wp-content/uploads/2017/12/Alseran-Ors-v-Ministry-of-Defence-2017-EWHC-3289-QB.doc

Kalma v African Minerals Limited and Others, No. [2018] EWHC 3506 (QB) (High Court of Justice Queen’s Bench Division December 19, 2018), Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/QB/2018/3506.pdf.

Kuwait Airways Corporation v Iraqi Airways Company and Others (UK House of Lords May 16, 2002).

Lungowe & Ors v Vedanta Resources Plc & Anor, No. EWHC 975 (TCC) (High Court of Justice Queen's Bench Division Technology and Construction Court May 27, 2016), Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/TCC/2016/975.html.

Milieudefensie et al v. Shell (District Court of The Hague January 30, 2013), para 4.3. Accessed November 22, 2019, https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf

Okpabi & others v Royal Dutch Shell Plc, No. 2017 EWHC 89 (TCC) (High Court of Justice Queen´s Bench Division Technology and Construction Court January 26, 2017), Accessed November 22, 2019, https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/Judgment-26-Jan-17-FINAL.pdf.

Oppenheimer v Cattermole (UK House of Lords February 5, 1975).

Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento., No. C-38/98 (European Court (Fifth Chamber) May 11, 2000)

The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd, No. [2014] EWHC 1973 (TCC) (High Court of Justice Queen´s Bench Division Technology and Construction Court June 20, 2014), Accessed November 22, 2019, https://www.bailii.org/ew/cases/EWHC/TCC/2014/1973.html

Tolofson v. Jensen (Supreme Court of Canada December 15, 1994).

Vedanta Resources PLC and another v Lungowe and others (The Supreme Court April 10, 2019), Accessed November 22, 2019, https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf