Corporate Human Rights Violations and Private International Law
The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor?

I. Corporate Human Rights Violations and Private International Law
I.A. Ambition: Study of the Potential Role of Private International Law
I.A.1. A Self-Evident Rule that should apply in full …

It seems to go without saying and setting out the legal arguments for it should be a formality: victims should be able\(^1\) to hold those involved in a human rights violation liable for any damage or loss caused. This seems to be not only a self-evident rule but also one that should apply in full.

It is conceivable – and this is the central hypothesis of this contribution – that a non-European subsidiary of a European parent company has violated human rights outside Europe, in a conflict area\(^2\) or otherwise, and that the European parent company itself has been involved in that violation, too. The twofold fact that (a) the defendants (those causing the damage) are a non-European subsidiary and its European parent company and (b) the plaintiffs (or claimants) are non-European victims who have sustained damage or loss outside Europe should be no reason to depart from this self-evident rule. But on closer scrutiny, it turns out that several hurdles must be overcome in this specific situation. If these hurdles are not taken, the plaintiffs risk being deprived of compensation.

I.A.2. But the Road is Paved with Hurdles …

Some of the legal hurdles to be cleared by plaintiffs are to be found in the area of private international law (‘PIL’), because damage/loss can be recovered only if two basic conditions are satisfied: first, that an action can be brought before a competent court and second, that the legal norms on which the plaintiffs rely can be invoked before this court. In PIL terminology, this concerns the jurisdiction of the court before which the action has been brought and the law to be applied by this court, respectively. As it happens, PIL rules have traditionally provided the answers to both these issues: in private-law relationships with an international aspect PIL rules determine what court has jurisdiction and what law has to be applied.\(^3\)

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\(^{1}\) Possibly, in addition to criminal prosecution. As for some PIL aspects in relation to the interwovenness of civil and criminal liability, see infra Article 5(4) of the Brussels I Regulation (concerning jurisdiction) as well as infra footnotes 71, 86 and 88 (concerning applicable law).

\(^{2}\) The fact that damage is caused in a conflict zone does not make any essential difference for the purposes of this contribution: the fact that damage is caused in a conflict zone does not give rise to a completely different PIL system. Even so, I will mention some special items to be addressed in the case of conflict situations.

\(^{3}\) Please note, however, that PIL is national law, in principle: each country may, as a general rule, determine in what situations its own courts have international jurisdiction and what law they have to apply. However, PIL sources are sometimes supranational. Europe is currently undergoing a process of Europeanization or communitarization of PIL: the PIL of the EU Member States in increasingly European in origin, with national PIL sources losing ground all the time.
I.A.3. Recognition of PIL Hurdles Attached to the Hypothesis that Multinational Corporations Are Confronted with Liability Claims in Their Home Countries for Violations Committed outside Europe …

The question now arises what PIL rules apply in cases where non-European plaintiffs want to bring civil proceedings against a European parent company and/or a non-European subsidiary of this European parent company. Suppose, in particular, that plaintiffs want to file a lawsuit due to a human rights violation in an EU Member State court\(^4\) – the court of a country that pretends it attaches great value to human rights. A European parent company and its non-European subsidiary then have to account for the damage/loss caused by the subsidiary abroad before a court in Europe. In cases of human rights violations, the question arises whether non-European victims have any opportunity to bring a lawsuit in a competent court in Europe and whether rules of applicable law automatically refer to the relevant human-rights norm. The question can also be defined in broader terms: if we assume that legal systems of non-European countries and those of European countries compete with each other in this area and that the rules of the one legal system are much more favourable to plaintiffs than the rules of the other legal system\(^6\) and if we also recognize the dynamics of transnational business that could be relevant to this matter and realize that multinationals may try to cleverly take advantage of differences in legislation by focusing their operations on countries where norms less strict than in the ‘home country’ apply\(^7\), can we then conclude that PIL rules ensure that plaintiffs (victims) can invoke the substantive rules most favourable to them or, by contrast, are these PIL rules partly responsible for denying these plaintiffs – the ‘weaker parties’\(^8\) – legal protection by subjecting them to the substantive legal norms that are least favourable to them? And even if they can take their matter to a court in a European Member State, can they be denied access to the ‘highest norms’ after all – usually the norms of the home country of the parent company or, as the case may be, the norms derived from international law – and are they systematically ‘pushed back’ to the lower norms – usually those applicable in the host country where the subsidiary has operated its


\(^5\) ‘Broader’ in the sense that attention is focussed not only on human rights violations but also on other types of unauthorized actions that are liable to sanctions.

\(^6\) See, for example, Enneking 2009, p. 28, who takes the view that the substantive law of the home country is usually more favourable to the victim than the substantive law of the host country. In this article I do not assume that the substantive law of the home country is more favourable by definition than the law of the host country; rather, I address the question whether the law of the home country can be applied if this turns out to be advantageous to the victim. In this context, I will not discuss any substantive law itself and nor will I attempt to identify specific human rights. On the contrary, I will confine myself to PIL mechanisms that permit or require the application of a specific rule, with a few comments on the possibility of invoking norms that are independent of PIL.


business? If so, this would amount to ‘giving with one hand and taking away with the other’ and the plaintiffs have then been fobbed off with empty promises: even though they are formally granted access to a legal system of a European Member State, through the application of PIL rules concerning jurisdiction – specifically by enabling them to start an action before a court in Europe – the plaintiff’s efforts come to nothing due to the application of substantive PIL rules concerning applicable law of the relevant European legal system: in that case, the plaintiffs cannot invoke rules that offer a remedy but are referred to rules that are unfavourable to victims. In that case, PIL rules would by no means have any regulatory effect on the conduct of multinationals; on the contrary, PIL rules would then contribute to ‘liberalisation’ dynamics.  

I.A.4. The Necessity of Exploring European PIL Hurdles in this Area

This contribution seeks to explore and analyse the PIL rules that are important in this area. Given the central hypothesis of this contribution – the hypothesis that plaintiffs want to bring an action before an EU Member State court – this exploration and analysis will be based on the *European PIL* perspective. Where European PIL sources are available, these will be discussed, including any processes for amending these rules. Indirectly, a substantive comparison with American PIL will be made occasionally and some differences with the American Alien Tort Claims Act (the ‘ATCA’) will be highlighted as well.

The PIL analysis will address both rules on jurisdiction and rules on applicable law, because plaintiffs must clear both PIL hurdles: in an argument, which resembles a two-stage rocket, the plaintiff must prove (a) that the EU Member State court seised of the matter has international jurisdiction and (b) that this court can apply the norm invoked. For this reason, PIL rules are of paramount importance in determining access to a specific court and to a specific legal norm. Thus, it turns out that PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm – to be opened or to be kept closed. PIL rules grant or deny ‘access’.

I.B. Access to Justice as a Central Key Concept; Access to Justice and PIL

And ‘access to justice’ happens to be a key concept in the debate on this issue: in the reports by John Ruggie, ‘access to justice’ is a key element; various aspects of access to justice are highlighted in this context. It follows from the foregoing that PIL rules, too, are a key factor in achieving access to justice in this field. In his ‘Guiding Principles on

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9 Which are part of every legal system too. Where victims thought they could ‘use the legal system of a European country’, the PIL rules of the legal order of that country – PIL rules that are therefore part of that legal system too – may prevent them access to all or some of the rules of *substantive law* of that legal system.


Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, Ruggie addresses the responsibility of States for issuing suitable legislation and ‘access to remedies’ and it may be well argued that PIL legislation should be examined in this context, too.

Moreover, in recent years, the European institutions have defined access to justice to be one of the central objectives of the broader ongoing process of Europeanization of PIL: PIL is defined as a policy instrument to achieve better access to justice and a true Area of Freedom, Security and Justice.13

In short, given the importance attached to access to justice in both Ruggie’s reports and in PIL itself, it is appropriate to analyse the access to justice content of PIL rules in the context of corporate human rights violations. Below, the analysis of the access to justice content of PIL rules that are important in this context will be divided into two parts, based on the two classical PIL issues – two key stages relating to litigation: first (in Chapter II), the issue of jurisdiction, and next, (in Chapter III), the issue of applicable law.

II. Issues of Jurisdiction

II.A. PIL Sources: Brussels I Regulation and National PIL

Bringing an action before an EU Member State court for the purpose of holding a European parent company and/or its non-European subsidiary liable is subject to the preliminary condition that one – or more – EU Member State court(s) have international jurisdiction. To determine whether an EU Member State court has jurisdiction, this court must assess the relevant facts by reference to the rules of the Brussels I Regulation or – if this regulation is found to be inapplicable – by reference to jurisdiction rules included in a national PIL source. The crucial factor in determining whether the Brussels I Regulation or the national PIL source must be applied is the question whether or not the defendant is ‘domiciled’ in a European Member State.

Under Article 2 in conjunction with Article 60 of the Brussels I Regulation, an action taken by non-European plaintiffs against a European parent company comes within the scope of application of the Brussels I Regulation. Under Article 2 of the Brussels I Regulation, an action may be started before the court of the country where the defendant is domiciled. Under Article 60 of the Brussels I Regulation, this concerns the country where a company has its ‘statutory seat’ or ‘central administration’ or ‘principal place of business’.15 Accordingly, except where there is a choice of forum, jurisdiction is based on

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12 This concerns the process where an increasing number of PIL rules are determined at the European level (cf. supra footnote 3).
13 Incidentally, reference is often made to ‘access to justice of Community citizens’ or ‘easing European citizens’ daily lives’. The question arises whether European PIL rules are also designed to ease the lives of non-European citizens who stay outside Europe and who have suffered any loss or damage there; or does PIL constitute a factor that makes their lives even harder?
15 For example, the jurisdiction of the Dutch court in the pending ‘Shell case’ against the parent company is based on the fact that this parent company has its principal place of business in the Netherlands; the
the general rule of Article 2 of the Brussels I Regulation, even in actions where it is argued that human rights have been violated: the Brussels I Regulation does not provide for a special legal ground for cases involving human rights violations.\textsuperscript{16} Even so, one or more additional EU Member State courts may have jurisdiction under Article 5 of the Brussels I Regulation, subject to certain conditions. In this context, it is worth pointing to Article 5(4) of the Brussels I Regulation, under which a court that has jurisdiction in criminal proceedings may also acquire jurisdiction in civil liability proceedings. Another option is to seek the application of Article 5, paragraph 3, of the Brussels I Regulation, which confers jurisdiction on the EU Member State court of the ‘the place where the harmful event occurred or may occur’. The case law of the European Court of Justice\textsuperscript{17} shows that where there is any discrepancy between ‘the place where the event which gives rise to and is at the origin of the damage’ (known as the Handlungsort) and ‘the place where the damage occurred’ (known as the Erfolgsort), both the court of the Handlungsort and the court of the Erfolgsort has jurisdiction; thus, where ‘the event/the Erfolgsort/the Handlungsort occurred or is situated in a European country, jurisdiction may be conferred on such EU Member State court(s) under Article 5(3) of the Brussels I Regulation. In the legal literature\textsuperscript{18}, the following comment was made on the interpretation of the Handlungsort: ‘It can be argued that the Handlungsort is the place where the parent company is seated, as this is where decisions were made that resulted in the harmful effect abroad’. In this context, it should be borne in mind that the court of the country where the parent company is seated will already have jurisdiction under Article 2 in conjunction with Article 60 of the Brussels I Regulation. To ensure that Article 5(3) of the Brussels I Regulation provides for an additional ground of jurisdiction, it is required that this article should allow jurisdiction to be conferred on an EU Member State court other than the court(s) that already has/have jurisdiction under Article 2 in conjunction with Article 60 of the Brussels I Regulation – for example, where decisions have been taken in a Member State other than the Member State where the company is seated and that country is regarded as the Handlungsort!!

If plaintiffs wish to summon a non-European subsidiary before any EU Member State court, the requirement of Article 2 of the Brussels I Regulation that the defendant must be ‘domiciled’ in a Member State is not satisfied. In that case, the question concerning the jurisdiction of this court may be resolved by reference to the national PIL rules of the
country of this court.\textsuperscript{19} Whether these national rules allow a plaintiff to start an action against the non-European subsidiary depends on the contents of the relevant national provisions, for example, concerning ‘related actions’ or \textit{forum necessitatis}. The precise possibilities may vary from country to country.\textsuperscript{20} In the \textit{Shell} case, which is currently pending in the Netherlands, the court based its jurisdiction with regard to Shell’s Nigerian subsidiary on Article 7 of the Dutch Code of Civil Procedure, which deals with related actions\textsuperscript{21}; the defendants later attempted to induce the Dutch court to stay the proceedings, because there was already an action pending in Nigeria. In doing so they invoked the \textit{lis pendens} rule, as enshrined in Article 12 of the Dutch Code of Civil Procedure\textsuperscript{22}, but the Dutch court decided to continue the proceedings.\textsuperscript{23}

\textbf{II.B. Need to Scrutinize Proposals to Reform the Brussels I Regulation for their Impact on Access to Justice}

\textbf{II.B.1. Extension of the Scope of Application of the Brussels I Regulation to Non-European Defendants – Introduction of \textit{Forum Necessitatis}}

As the law stands at present, cases involving non-European defendants are subject to national PIL regimes, but a process for the revision of the Brussels I Regulation is currently under way\textsuperscript{24}, which might change this in the future: there are plans to extend the scope of application of the Brussels I Regulation to include non-European defendants.\textsuperscript{25} It is conceivable therefore that after the revision of the Brussels I Regulation, questions concerning the jurisdiction of EU Member State courts in proceedings against non-European subsidiaries will have to be answered by reference to the Brussels I Regulation as well. To enable plaintiffs to start an action against a non-European defendant, it is proposed to include \textit{a forum necessitatis} in the Brussels I Regulation\textsuperscript{26} in an attempt to prevent \textit{déni de justice} and ensure access to justice.\textsuperscript{27} Incidentally, this \textit{forum necessitatis}

\begin{footnotesize}
\textsuperscript{19} Compare the distinction made in the \textit{Shell} case in the consideration of the jurisdiction with regard to the European parent on the one hand and the non-European subsidiary on the other hand.
\textsuperscript{21} See the judgment of the District Court of The Hague of 30 December 2009, JOR 2010/41, with a note by R.G.J. de Haan.
\textsuperscript{22} Rather than the rules of \textit{lis pendens} of the Brussels I Regulation, see also \textit{infra} footnote 32.
\textsuperscript{23} See the decision by the District Court of The Hague, dated 1 December 2010.
\textsuperscript{25} See the proposed amendment to Article 4 of the Brussels I Regulation in the Commission’s proposal, as well as Recital 16 of the proposed preamble that goes with it.
\textsuperscript{26} See Article 26 of the Commission’s Proposal.
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may well provide special possibilities if in the non-European country where the subsidiary operates its business a conflict situation arises, rendering it difficult to litigate in this country. Apparently, Article 6 ECHR plays a role in the background. In national PIL regimes, incorporation of forum necessitatis has indeed already quite often been inspired by Article 6 ECHR.²⁸

To the extent that national PIL regimes already include a forum necessitatis, the fact that the jurisdiction issue will be governed in the future by the ground of jurisdiction of the Brussels I Regulation rather than any national ground of jurisdiction cannot be considered a step forward or a step back on the road to achieving access to justice: the PIL source relied on will be different but the substantive outcome remains more or less the same. Yet, to the extent that specific national PIL regimes currently do not provide for any possibility of invoking forum necessitatis, the revision of the Brussels I Regulation seems to be an improvement. In this context, the following point should however be made: including forum necessitatis in the Brussels I Regulation should be assessed in the context of the entire revision process. As it happens, the present plans to revise the Brussels I Regulation leaves no room for invoking national grounds of jurisdiction against non-European defendants. This would result in the disappearance of national grounds of jurisdiction other than forum necessitatis that are currently recognized in some EU countries and that provide alternatives in some cases – for example, national PIL provisions concerning related actions.²⁹ This means that forum necessitatis may well become the only option in proceedings against non-European defendants. If the scope of application of the Brussels I Regulation is extended and national jurisdiction rules are indeed abolished, it seems reasonable therefore to amend the present Article 6 of the Brussels I Regulation, which deals with related actions, so as to include a ground of jurisdiction based on related actions with respect to non-European defendants. The current Commission’s proposal to revise the Brussels I Regulation does not provide for this amendment of Article 6.³⁰ Thus, an issue of concern can be found here if one argues that the plans to revise the Brussels I Regulation should be effectively ‘scrutinized for their impact on access to justice for third-country victims of human rights and

²⁸ As to the parliamentary history of Article 9 of the Dutch Code of Civil Procedure, see, e.g., Kamerstuk [*Parliamentary Paper*] 1999-2000 (House of Representatives), 26855, no. 3. The rationale of Article 6 ECHR is a relevant factor in the background, but it should be possible in any case to subject the precise conditions of forum necessitatis to the test of Article 6 ECHR.

²⁹ See, in particular, the Shell case, in which it was found unnecessary in the action against the non-European subsidiary to turn to the ‘last resort’ of forum necessitatis (Article 9 of the Dutch Code of Civil Procedure), because it was possible to invoke Article 7 of the Dutch Code of Civil Procedure concerning related actions.

³⁰ In the literature, some authors have advocated an extension of Article 6 in a general sense. See, for example, Weber, pp. 8 and 23. Incidentally, amending Article 6 so as to include non-EU defendants would create possibilities for non-European victims especially if the present case law of the Court of Justice concerning a flexible approach of Article 6 of the Brussels I Regulation is also followed in situations where non-European defendants are involved too. In the decision of the District Court of The Hague concerning the application of Article 7 of the Dutch Code of Civil Procedure (see supra footnote 21), this case law was cited.
environmental abuses by European parent corporations and/or their third-country subsidiaries.\textsuperscript{31}

\textbf{II.B.2. Amendment of the \textit{lis pendens} rule}

The next issue to be addressed concerns the \textit{lis pendens} rule. Under Article 34 of the Commission’s proposal, the new version of the Brussels I Regulation would also provide for a \textit{lis pendens} rule for cases where there is an action in a \textit{non-European} country. As matters stand at present, the \textit{lis pendens} rule applies only between EU Member States and in \textit{lis pendens} situations involving non-EU Member States, the Member States’ national PIL rules must be resorted to.\textsuperscript{32} Here, too, it seems at first sight that amending the Brussels I Regulation will make hardly any difference, but again, a critical note is in order here, particularly if the case law of the Court of Justice concerning the refusal to sanction parties’ abuse of jurisdiction rules is taken into consideration:\textsuperscript{33} the risk exists that the party who expects to be summoned in an action before a non-European court deliberately initiates an action in the non-European country where the subsidiary is seated and subsequently relies on the \textit{lis pendens} rule of the Brussels I Regulation. This point needs to be addressed. It should be borne in mind, however, that in the Commission’s proposal, the EU Member State court has the opportunity – rather than the obligation – to stay the proceedings if another case is pending before a non-European court. Besides, it is worth mentioning that the court’s assessment may take account of considerations relating to the fact that the non-European country is facing a conflict situation.

\textbf{II.B.3. Introduction of \textit{forum non conveniens}?}

A revision of the Brussels I Regulation that may quite certainly have an adverse effect on non-European defendants is a potential amendment permitting the courts of the EU Member States to invoke the doctrine of \textit{forum non conveniens}: an EU Member State court that formally has jurisdiction under the jurisdiction rules of the Brussels I Regulation would then still be able to refuse to take jurisdiction because there is a more appropriate forum available to the parties. In a reaction\textsuperscript{34} to the English proposal to revise the Brussels I Regulation along these lines, the risks this entails for non-European defendants are also considered in a highly critical manner.


\textsuperscript{32} This is why, as stated above (see supra footnote 22), the dispute concerning \textit{lis pendens} in the \textit{Shell} case centred on Article 12 of the Dutch Code of Civil Procedure rather than the \textit{lis pendens} provision of the Brussels I Regulation.

\textsuperscript{33} See, in particular, the judgment handed down by the ECJ in the \textit{Gasser} case, Case C116/02, \textit{Erich Gasser GmbH and MISAT Srl}, 9 December 2003, where the Court strictly adhered to \textit{lis pendens} provisions. Even though the revision process of the Brussels I Regulation includes plans to reverse this decision, this relates only to cases where the parties have made a choice of forum and either party subsequently goes to another court all the same. In the actions discussed in this contribution, it is unlikely that the parties have selected a EU Member State court as the forum, as is shown by the frantic efforts made by the defendants in the \textit{Shell} case to persuade the Dutch court to decline jurisdiction.

\textsuperscript{34} See Leigh Day et al., ‘Proposal to change EU law would deny justice to multinationals’ human rights victims’. See also the Edinburgh study, which is also very critical on this subject.
defendants, particularly with regard to their ‘access to justice’ – even the phase ‘denial of justice’ is being used in this context – were already pointed out elaborately. Forum non conveniens may be at odds with Article 6 ECHR. What is more, it must be recognized that declining jurisdiction with respect to the European parent on the ground of forum non conveniens may also have negative consequences for jurisdiction with regard to the non-European subsidiary, because it would no longer be possible to invoke jurisdiction with regard to the non-European subsidiary on the ground that the action is related to the action against the parent. In brief, the consequences of the introduction of a forum non conveniens plea in the Brussels I Regulation could be immense. Nevertheless, the resolution of the European Parliament included a proposal for a forum non conveniens. And even though the Commission’s proposal does not contain any explicit forum non conveniens provision, the planned extension of the lis pendens rule of the Brussels I Regulation to include situations where actions are pending in a non-European country is sometimes represented as inspired by forum non conveniens. Continued vigilance is called for. Should any forum non conveniens option be included in the Brussels I Regulation, victims would lose a great advantage of the European rules compared to the American Aliens Tort Claims Act (ACTA), because under the system of the ATCA, forum non conveniens may be invoked, whereas at this point of time, this plea cannot be invoked under the Brussels I Regulation.

II.C. Acceptance of Jurisdiction of One or More EU Member State Court(s) as a Stepping Stone towards and a Preliminary Condition for Access to the Legal Standard Required

The application of the above jurisdiction rules result in a decision to allow or disallow a plaintiff to conduct proceedings before a specific EU Member State court. The effects of this decision can be significant for the continuation of the action. If an action is started before an EU Member State court, the rules of applicable law of the court seised must be

35 The earlier rejection of the use by English courts of this Anglo-American forum non conveniens (see the decision of the Court of Justice in the Owusu case, ECJ C-281/02, 1 March 2005) would then be reversed as a result of the amendment of this regulation. Incidentally, EU courts that never had the tradition of applying forum non conveniens could also start using it. This potential development already triggered the following comment: ‘A Phoenix rises from the ashes … and flies over all of Europe’ (see http://conflictoflaws.net/2010/european-parliament-resolution-on-brussels-ii/).
36 See also the discussion by Enneking 2009, p. 18 et seq.
37 Based on national PIL or, if an amendment extending Article 6 of the Brussels I Regulation is implemented, based, in the future, on the Brussels I Regulation.
38 In the resolution (no. 14), reference is made to the rules embodied in Article 15 of the Brussels II bis Regulation, which are already applicable, but in Brussels II bis, the relevant rules concern a situation between courts in Europe, whereas the resolution also concerns situations where a non-European court that is deemed better placed to hear the case – which may possibly mean that not a single court may have any jurisdiction left. Where at present litigants can be certain – under Article 2 in conjunction with Article 60 of the Brussels I Regulation – that at all times some EU Member State court has jurisdiction and must take jurisdiction in an action against a European parent company, this certainty is undermined if forum non conveniens is introduced. On this subject, see the critical comments by V. Van Den Eeckhout, ‘The Liability of European Parent Companies’, Working Paper 1 October 2010.
39 See Kessidjian as well as Weber, pp. 14-15. Through lis pendens provisions, a disguised form of forum non conveniens plea could then be entered, specifically in situations where proceedings are already pending in another country.
40 See Enneking 2009 p. 16 as well as Jägers and Van der Heijden p. 849.
applied. If an action is started before a non-European court, other rules of applicable law apply, which may lead to a different result.\(^{41}\)

Below (in Chapter III), I will assume that one – or possible even more than one\(^{42}\) – EU Member State court definitely has jurisdiction. In that case the court seised must apply a PIL regime concerning applicable law of European origin or – if the case is not governed by any PIL regime of European origin – its national PIL. Beforehand, I would like to draw attention to the characterization of a question of law as being a question of applicable law concerning *torts/delicts*, concerning *company law* or concerning *contracts*.\(^{43}\) Incidentally, it is conceivable that the characterization of specific legal relationships within Europe differs from court to court.\(^{44}\) Any characterization as a question of applicable law concerning contracts or company law and the corresponding application of the relevant PIL regimes may offer plaintiffs new – possibly alternative\(^{45}\) – possibilities as well as create new hurdles.

In Chapter III the focus will be on the situation where the Rome II Regulation, which contains rules of applicable law concerning ‘torts/delicts’, constitutes the applicable PIL regime. In analysing this regulation, I will endeavour to explore the extent to which the Rome II Regulation allows the application of a legal norm that is ‘favourable’ to plaintiffs.

**III. Issues of Applicable Law**

**III.A. Selection of the PIL Regime to Be Used – PIL Regimes of European and National Origin**

The Rome II Regulation\(^{46}\) has a very broad substantive scope and universal application. It is worth pointing out the restriction in the temporal scope of application, however.\(^{47}\) If a

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\(^{42}\) See the above-mentioned alternatives offered by Article 60 of the Brussels I Regulation (in respect of which no amendment is expected for the time being; see also European Resolution, no. 20) as well as Article 5(3) of the Brussels I Regulation.

\(^{43}\) As for the applicable law concerning contracts, see the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 2008 on the law applicable to contractual obligations (‘Rome I Regulation’)). Through the possibility of ‘accessory connection’, as included in Article 4(3) of the Rome II Regulation, the rules of this PIL regime may be significant, too. It should also be borne in mind that parties to international contracts may invoke force majeure or hardship in the hypothesis of conflict zones.


\(^{46}\) The importance of a PIL classification is also shown by the pending *Shell* case, for example, in relation to the question who may act as plaintiff and in the context of the application for disclosure.

case is excluded from the temporal scope of application of the Rome II Regulation, other sources of applicable law concerning torts/delicts must be resorted to: in that case, national regimes may be applicable after all.

It is difficult to give a general answer to the question whether the Rome II Regulation is an improvement compared to the national PIL rules of the EU Member States.\(^{48}\) the national regimes differ. Earlier,\(^ {49}\) I pointed out that the European rule of applicable law concerning *environmental damage* is an improvement compared to the Dutch rules. But a more thorough analysis of the Rome II Regulation is necessary before it can be concluded that the regulation meets the needs of non-European victims who want to seek recourse against a European parent company and/or its non-European subsidiary.

**III.B. The Hypothesis that the Rome II Regulation is the PIL Regime to be Applied**

**III.B.1. Basic Rule and Exceptions to the Rome II Regulation**

**III.B.1.a. Basic Rule**

Given the absence in Europe of a system like the American ATCA as well as the absence of any unified European tort law\(^ {50}\) — where also aspects such as regulation of ‘complicity’ and ‘negligence’ are regulated differently within the Member State\(^ {51}\) — the rules of applicable tort law play a crucial role in Europe, as these rules determine what tort law has to be applied.

As for the question what law *should be applicable* in a situation where non-European plaintiffs start an action against a European parent company and/or the non-European subsidiary, some have argued in favour of the application of the law of the country where the European parent company is seated: ‘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’, according to an attorney in the *Trafigura* case.\(^ {52}\) The application of the basic rule of the Rome II Regulation, however, appears to have exactly the opposite result: based on Article 4(1) of the Rome II Regulation, the *lex damni* is declared applicable, or ‘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.’ Consequently, in situations where the *Handlungsort* and the *Erfolgsort* are different, the law of the *Erfolgsort* is declared applicable.

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\(^{47}\) The tort/delict must have been committed after a specific date. There is some controversy about whether the relevant date is 11 January 2009 or another date; on this subject, see the pending case C-412/10, OJ C 301, 6 November 2010 (*Deo Antoine Homawoo v GMF Assurances SA*).

\(^{48}\) Cf. the question put by Enneking 2009, p. 30.

\(^{49}\) Van Den Eeckhout, FR 20.

\(^{50}\) Enneking 2009, pp. 20-21 and p. 25, points out that this is not expected to change in the near future.

\(^{51}\) See Van Hoek.

\(^{52}\) Quoted by Enneking 2009, p. 28.
About the choice to include this rule as the basic rule in the Rome II Regulation, the preamble\textsuperscript{53} provides that in applying the \textit{lex loci}, ‘a fair balance between the interests of the person claimed to be liable and the person sustaining damage’ is achieved and that this is in line with ‘the modern approach to civil liability’. It includes a negative assessment, however, of the impact of this rule on the issues raised in this contribution. The effects of adopting this ‘modern tort law vision’ would, in particular, be very \textit{unfair} for non-European victims, who are considered ‘weaker parties’.\textsuperscript{54} This is because the application of Article 4(1) of the Rome II Regulation means that there is not much of a chance that a European legal system applies in situations of this kind, which is considered disadvantageous to the plaintiffs\textsuperscript{55} and this would increase the parties’ inequality even further. Van Hoek\textsuperscript{56} writes that ‘the torts arising out of violations of human rights – or out of crimes committed against the victim – \textit{do not fit well} into this modern tort policy’ and that ‘(…) conflicts rule may be \textit{ill-adapted} to deal with serious human rights violations and other crimes.’

Even if it is argued that in the case of complicity of European companies – through ‘negligence’ or ‘failure of supervision’ – the \textit{Handlungsort} is situated at the company’s European headquarters, this alone does not justify the conclusion that the law of a European country can be declared applicable: Article 4(1) of the Rome II Regulation does not attach significance to the \textit{locus actus} (the \textit{Handlungsort}), just to the \textit{locus damni} (the \textit{Erfolgsort}).

If it is assumed that the systematic application of non-European law has an adverse effect on non-European victims but if one wishes to be loyal to the system of the Rome II Regulation, it is important, naturally, to ascertain whether the Rome II Regulation permits\textsuperscript{57} \textit{departures from} the basic rule. Various possibilities of making exceptions to the basic rule and/or making a reservation will be discussed briefly\textsuperscript{58} below.

\textbf{III.B.1.b. Exceptions and Reservations. Exploration of the Various Avenues Allowed by the Rome II Regulation}

First, it should be observed that the basic rule of Article 4(1) of the Rome II Regulation\textsuperscript{59} applies without prejudice to Article 4(2) and Article 4(3). The requirements imposed by

\textsuperscript{53} Preamble 16.
\textsuperscript{54} See \textit{supra} footnote 8.
\textsuperscript{55} In the words of Wray (Wray, p. 26), this results in a failure to achieve ‘true access to justice for victims’.
\textsuperscript{56} Van Hoek.
\textsuperscript{57} Possibly as an \textit{alternative}: because it is not inconceivable that the application of the basic rule is \textit{favourable} to victims. Cf. \textit{supra} footnote 6.
\textsuperscript{58} In earlier studies, written in Dutch, I dwelled on some of these possibilities in greater detail; see Van Den Eeckhout, FR 29 and Van Den Eeckhout, Working Paper 1 October 2010. Each of these possibilities, which will be briefly dealt with below, turned out to have its own hurdles \textit{and} chances.
\textsuperscript{59} As to the possibility of interpreting Article 4(1) of the Rome II Regulation in the case of an ‘offence of omission’ such that reference is ultimately made to the law of the country where the parent company has its seat or the law of the country where the parent company should have taken decisions, de Boer's discussion of a Dutch decision (based on Dutch rules of applicable law) concerning an offence of omission might provide reference points, see the Dutch Supreme Court decision dated 2 October 2001, N/Z 2002, 255, with a note by T. M. de Boer, particularly where de Boer deals with various views on the ‘localisation’ of an offence of omission, including the concurrence of act and harmful consequences in the place where action
Article 4(2), particularly that both the victim and the perpetrator should have their habitual residence in the same country, being a country different from that where the damage occurred, will not be easily satisfied in cases to which the central hypothesis of this contribution applies.\(^{60}\)

As it is based on a manifestly closer connection of the legal relationship with any law other than the law that would apply pursuant to Article 4(1) (or 4(2)), Article 4(3) – known as the ‘escape clause’ – may provide a solution in more cases. Nevertheless, the Castermans report\(^{61}\) observes somewhat cautiously that invoking this escape clause should be accepted only in exceptional cases, given the requirement of legal certainty; on the other hand, as the European legislator has deliberately opted for including this exception in the regulation, it should not be impossible to invoke it; incidentally, I could refer, *mutatis mutandis*, to the grounds taken by the Court of Justice in its judgment in the *Intercontainer* case\(^{62}\) with respect to its position on how to deal with the escape clause of Article 4(5) of the Rome Convention: in its judgment, the Court of Justice dismissed too strict an interpretation of the escape clause embodied in the Rome Convention. In addition, it is remarkable that in the literature\(^{63}\) the question had already been raised whether the legal system considered to be more closely connected could be the legal system of the *Handlungsort*: if so, the law of the *Handlungsort* could be declared applicable after all. Naturally, establishing the *Handlungsort* or *locus actus* is of paramount importance in this respect.

In applying the special reference rule of Article 7 of the Rome II Regulation, which derogates from Article 4(1), a *locus actus* must be specified in any case: Article 7 of the Rome II Regulation includes a special rule in respect of environmental damage, where the victim is offered a unilateral right to choose between *lex damni* on the one hand and ‘the law of the country in which the event giving rise to the damage occurred’ on the other hand (the law of the *Handlungsort*). This rationale behind this special rule is concern for environmental pollution.\(^{64}\) To enable the victim to opt for the law of a European country too might require that the *Handlungsort* be interpreted as the law of the

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\(^{60}\) See, however, the comments on the residence of parties in the *Shell* case in connection with the appearance of Friends of the Earth Netherlands (*Nederlandse Milieufense*) as co-plaintiff in this action and the question whether this could ultimately result in a decision concerning residence of the plaintiffs in the Netherlands.


\(^{62}\) ECJ 6 October 2009, Case C-133/08 (*Intercontainer*).


\(^{64}\) See the explanatory memorandum to the Rome II proposal (COM(2003)427 def).
country where the parent company law is seated and/or the law of the country where the parent company takes policy decisions or where these should have been taken.\textsuperscript{65}

The question whether, under specific circumstances, the Handlungsort can be in a European country may also arise in the context of the application of Article 17 of the Rome II Regulation. Article 17 provides that ‘in assessing the conduct of the person claimed to be liable, account shall be taken (...) of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability’. Accordingly, if Article 17 is interpreted to mean that ‘rules of safety and conduct’ could be the rules of a European country, specific EU Member State rules could be applicable after all.

\textit{Article 16} of the Rome II Regulation may also give rise to a possibility that, even though the law of a non-European country has been declared applicable in principle, specific EU Member State rules may be relevant all the same: Article 16 of the Rome II Regulation provides for the possibility that rules characterized as ‘overriding mandatory provisions’ prevail over the law that is otherwise applicable. However, this concerns only overriding mandatory rules of the law of the court seised, or ‘foral’ overriding mandatory rules.

Finally, \textit{Article 26} of the Rome II Regulation provides for the possibility of invoking the plea of international public policy – of the forum – and setting aside the rules of the law that is otherwise applicable. As for the law that should then be applied, the explanatory memorandum to the Rome II Regulation proposal referred to the application of \textit{lex fori} as ‘surrogate’ law\textsuperscript{66}, the Rome II Regulation itself does not refer to this. Remarkably, the national systems of the separate EU Member States do not systematically prescribe that the \textit{lex fori} be applied after foreign law has been set aside by virtue of the plea of international public policy.\textsuperscript{67} Incidentally, legal systems may also differ with respect to the required connection with their own legal order before the plea can be invoked.\textsuperscript{68}

\textbf{III.B.2. Potential Differences in Outcome Depending on the European Court Seised}

The foregoing shows that, even though the Rome II Regulation is a \textit{unified} PIL regime applicable within Europe, it is conceivable that the actual application of the Rome II Regulation may have different outcomes, depending on the EU Member State court in which the lawsuit has been filed: for example, the courts may deal with the plea of international public policy of Article 26 in different ways, particularly given the fact that Article 26 concerns the ‘public policy of the forum’; courts may apply a different surrogate system of law after the plea has been invoked; or different overriding mandatory rules may be applied given the fact that Article 16 refers to overriding mandatory rules ‘of the forum’. Finally, if the \textit{Handlungsort} of Article 7 of the Rome II

\begin{footnotesize}
\begin{enumerate}
\item For a rejection of this interpretation, see the Castermans report, p. 53. On the other hand, see especially Enneking 2009, p. 23, as a supporter of this interpretation; see also Van Den Eeckhout FR 29 for the arguments for this interpretation.
\item See page 32 of the explanatory memorandum to the Rome II proposal.
\item See also, briefly, the Edinburgh Study, p. 73, as well as the special in NIPR 2011 issue 1 in connection with the Conference in Amsterdam by the name of ‘The impact of the European Convention on Human Rights on Private International Law.’
\end{enumerate}
\end{footnotesize}
Regulation is interpreted as ‘the country where the parent company is seated’, differences could also arise from the fact that some EU countries apply the ‘statutory seat’ doctrine, and others the ‘real seat’ doctrine.

If several EU Member State courts are found to have jurisdiction, enabling plaintiffs to engage in ‘forum shopping’, plaintiffs may recognise these potential differences in outcome and the latter may affect their decision to bring an action before a specific court. In fact, the awareness of these potential differences may also affect companies’ decisions on where to establish the company: as Chapter II showed, elements such as the place where the company has its seat are relevant in determining jurisdiction; by taking account of these elements, companies may therefore exercise influence on the debate on jurisdiction as well as on the court(s) that will apply the Rome II Regulation.

If, however, a European/supranational plea of international public policy existed, if the rules of surrogate law were European/supranational\(^69\), or if the overriding mandatory rules were of European/supranational origin, the same outcome in all EU countries could be guaranteed. The question arises whether it is conceivable that human rights could constitute the basis for this plea and/or for the relevant surrogate law, or for overriding mandatory rules or rules of safety and conduct? This calls for a closer look at the relationship between human rights and PIL.

**III.B.3. Place within or in Addition to this System of International Norms and/or Human Rights**

International norms or human rights may be applicable *indirectly* through PIL rules: if the rule of applicable law refers to a legal system that incorporates human rights, the application of national law\(^70\), as designated by the rule of applicable law, can ensure that human rights are respected. But the question arises whether international norms may be applicable otherwise – that is, ‘directly’ – either through specific PIL techniques or even separately from PIL. *Within* the system of PIL rules of the Rome II Regulation, it is particularly the plea of international public policy and the system of overriding mandatory rules that appear to be mechanisms that can enforce respect for human rights. If respect for human rights is achieved *without* any rules of applicable law and/or special PIL mechanisms, it is enforced *independently of PIL rules*\(^72\).

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\(^69\)See K. Boele-woelki, ‘De toepassing van een surrogaatrecht’ in G.E. Schmidt and J.A. Freedberg (eds.), *Het NIPR geannoteerd, annotaties opgedragen aan M. Sumampow*, Den Haag TMC Asser Instituut 1996, p. 3-12, concerning the possibilities of using ‘uniform law as laid down in international conventions and supranational rules’ as well as ‘general legal principles to the extent these can be easily established’ as surrogate law.

\(^70\)In this context, it is conceivable that international norms may play a role in fleshing out ‘open norms’ such as ‘proper social conduct’, provided for in a specific system of substantive law. See P.A. Nollkaemper, ‘Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands’, in: M.T. Kamminga, S. Zia-Zarifi (eds.), *Public International Law in transnational litigation against multinational corporations: prospects and problems in the courts of the Netherlands*, Den Haag/London/Boston: Kluwer Law International 2000.

\(^71\)See, *inter alia*, van Hoek and Nollkaemper. Incidentally, the comments made by both these authors about two other possibilities are worth mentioning too. See, first of all, van Hoek, where she writes about Article 4(3) of Rome II: ‘(…) one could argue that the escape clause in Article 4 could be used in cases of civil liability based on criminal complicity. That would mean that a closer connection is deemed to exist to any
Yet, it is a problem, as the law stands at this juncture, that there are only a handful of international norms in this field that are direct applicable because they satisfy conditions like ‘direct effect’ and ‘horizontal effect’. Experiences gained in the application of the ATCA also show that there are not many international norms that could be used as a basis. The question arises whether Europe should not adopt in the future a policy oriented towards allowing more human rights to be invoked.

III.B.4. Confrontation with the Pretended Goals and Ambitions of Europe when Regulating PIL. Need to Revise/Ammend the Rome II Regulation?

If the results of the current rules are compared to the goals and ambitions presented, such as ensuring ‘access to justice’ or achieving an Area of Freedom, Security and Justice, striking ‘a fair balance’, reflecting ‘modern tort policy’, fighting environmental pollution, the question arises whether Europe should not take some further action anyway. As the law stands at this juncture, the prevailing view is that the position of non-European victims in this area under the current version of the Rome II Regulation is not very good. For example, openings that PIL rules may offer are described as ‘last straws’ and more generally, PIL rules are represented as ‘a potential obstacle for victims who want to bring a lawsuit against a corporation.’ I am of the opinion that the current version of the Rome II Regulation already has rather a great deal of potential, even though non-

state which criminally sanctions the litigious behaviour’, and, subsequently, Nollkaemper, where he states the following: ‘(…) it might be argued that the choice of the applicable national law should be determined by public international law. (…) Should the court let the choice of law be determined by the question whether one of the possible systems of law is more or less acceptable in the light of public international law?’

72 About establishing a ‘PIL for fundamental rights’, see, e.g., C. Labrusse, ‘Droit constitutionnel et droit international privé en Allemagne fédérale (à propos de la décision du Tribunal constitutionnel en Allemagne fédérale)’, RCDIP 1974, p. 1-46; see also the NIPR special of 2011, issue 1. Incidentally, another option could be the application of human rights as open norms of a kind that manifest themselves in PIL (see, briefly, V. Van Den Eeckhout ‘De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?’, Rechtskundig Weekblad 1999-2000, p. 1249-1265), which is a procedure that is to be distinguished from the above-mentioned (supra footnote 70) possibility of fleshing out open norms provided for by the law declared applicable.

73 See Nollkaemper.

74 See Enneking 2009, pp. 22-23. The violation of an international norm is a condition for applicability of the ATCA (As for the extent to which PIL rules are relevant to the assessment of complicity in the context of the application of the ATCA, see Enneking 2009 p. 14, footnote 64, and p. 25, footnote 124; on the assessment of complicity under the ATCA, see also C.J. Keitner, ‘Conceptualizing Complicity in Alien Tort Cases’, Hastings Law Journal 2008, Vol. 60/61, p. 61-105). The application of the Rome II Regulation is not conditional upon the submission of an international norm. Accordingly, the outcome of discussions such as the current one in connection with the Kiobel decision dated 17 September 2010 about the (im)possibility of applying the ATCA in cases involving corporations (in respect of which specific international rules are said to be lacking) cannot simply be translated into the Rome II Regulation: the rules of the Rome II Regulation refer only to a specific legal system and in this context, the violation of domestic norms of due care is the initial question to be addressed, as these norms define who can be held liable etc. However, the question arises whether in the context of the application of the Rome II Regulation, submitting an international norm may provide additional possibilities.

75 C. van Dam, Onderneming en mensenrechten, Den Haag: Boom Juridische Uitgevers 2008, p. 35.

76 Jägers and Van der Heijden, p. 843.

European plaintiffs usually have to rely on exceptions and/or a ‘flexible’ interpretation of the rules. The mere approval by the Court of Justice of these exceptions and options in favour of plaintiffs, particularly with regard to the central hypothesis of this contribution, might already guarantee a minimum degree of legal protection.

But even if this potential is recognized, there are restrictions, too, which should be recognised. This is why the question arises whether the system of the Rome II Regulation requires amendments and/or whether it should be supplemented with a set of rules.

The special conflict of law rule of Article 7 of the Rome II Regulation may constitute a point of departure for a debate on the potential amendment of this Regulation: this rule, which offers the application of the basic rule of Article 4(1) as an alternative in addition to the application of the law of the Handlungsort, has been received well in the literature – at least, if Handlungsort can be interpreted such that there is chance that the legal system of an EU Member State may be applicable too. But it remains true that in the current version of the Rome II Regulation Article 7 is an exception in a system that has essentially been set up quite differently. For this reason, some have already advocated applying a conflict of law rule such as the one envisaged by Article 7 of the Rome II Regulation in cases other than environmental damage; it is argued that this way, rules of international tort law could have an effect on the conduct of multinationals. Except for its Article 7, the current version of the Rome II Regulation has been criticized for its failure to produce an effect on conduct and to reflect modern ideas in PIL sufficiently. In modern PIL trends, issues of substantive law are incorporated into PIL rules as well; in modern PIL trends, Von Savigny’s reference system, which is traditionally indifferent to rules, has been departed from and PIL is given a more instrumental function. Really modern PIL rules on this subject could be oriented on protecting the interests of tort victims a great deal more than is the case at present, particularly by issuing PIL rules aimed at a substantive outcome favourable to the weaker party. By issuing PIL rules to this effect – in line with modern PIL trends – PIL may serve political policy objectives such as achieving access to justice for victims of human rights violations and/or regulating conduct of multinationals in international situations etc.

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78 See supra footnote 65. Incidentally, it was already clear that the discussion about the details of the Handlungsort can be relevant to the application of Article 17 as well – in addition, see also Article 23, which includes a reference to ‘the event giving rise to the damage’; see also the interpretation possibilities of Article 5(3) of the Brussels I Regulation.

79 See, for example, the critical comments on the basic system of the Rome II Regulation, also in comparison with American PIL developments, in S. Symeonides, ‘Rome II and tort conflicts: a missed opportunity’, American Journal of Comparative Law 2008, p. 173.


81 See, for example, Symeonides.

82 Even though the drafters of the Rome II Regulation pretend, through the issue of Article 4(1) of the Rome II Regulation, that this regulation is in line with ‘modern tort law’, I already made it clear above that this provision protects the interests of multinationals rather than those of victims.

83 Viewed from this perspective, no internal ‘resistance’ is to be expected from the discipline of PIL against using PIL rules to lend a helping hand to structurally weaker parties. Hence, ‘modern’ PIL may be a good ‘conductor’ of human rights.
If modern PIL trends are to be followed, emphasizing the importance of the modern PIL mechanism of **overriding mandatory rules** may well be highly productive. It should be recognized that enforcing specific rules – of supranational, unified, or of national origin – as overriding mandatory rules\(^8\) offers great potential in this area. In this context, EU Member States could consider issuing ‘home state requirements for corporate citizens to undertake human rights impact assessments, such as environmental assessments, before granting them an investment permit or similar instrument\(^9\), or rules concerning extraterritorial corporate responsibility for human rights violations\(^10\), if possible, focusing on situations where multinationals operate in **conflict situations**.

One way to ensure respect for such rules is codifying a uniform set of overriding mandatory rules at European level and issuing these as minimum rules and/or a lower limit to be heeded by all courts in Europe, in addition to the Rome II Regulation, analogous to the adoption of the Posting Directive. Drawing a parallel with the regulation of international posting seems appropriate in this context: it was recognized that applying classical European PIL rules in the field of contract law to situations of international posting – where companies within Europe know how to take advantage of a situation of ‘competing norms’ – may well have adverse effects on mobile workers\(^11\); accordingly, the European legislator decided on the unification of overriding mandatory rules in the Posting Directive. Does the European legislator have a similar role to play in the field discussed here?

Incidentally, it is conceivable that these overriding mandatory rules will be issued in the field of company law rather than tort law – as measures in **substantive** company law have been considered, too\(^12\). Anyway, whatever measures in whatever domain are taken – tort law, company law, contract law – it is paramount to ensure that the provisions concerned will be applicable in **international** situations as well: if rules of substantive law are merely amended without considering the mechanisms that can ensure the application of such rules of substantive law in international situations, amending substantive law may well be futile. Accordingly, the system of PIL rules should include either a PIL ‘vehicle’ enabling the preferred rules to be applied or a mechanism that allows PIL rules to be overridden.

A preceding condition is the granting of jurisdiction. Thus, issues of jurisdiction and issues of applicable law appear to be interwoven and interdependent. Remarkably, during

\(^8\) Or – an another option – as rules of safety and conduct within the meaning of Article 17 of the Rome II Regulation (in which context, rules on extraterritorial corporate criminal responsibility for human rights violations could be ‘taken into consideration’) or as rules of surrogate law after the submission of the plea of international public policy as envisaged by Article 26 of the Rome II Regulation.

\(^9\) See, e.g., briefly, Wray p. 16.

\(^10\) See, e.g., van Hoek’s discussion of Articles 16 and 17 of the Rome II Regulation, where she states that it could concern ‘statutes sometimes not only prescribing an extraterritorial duty of care, but also stipulating that violation of that duty will lead to civil liability towards the victim.’

\(^11\) See, *inter alia*, the recitals in the preamble on ‘guaranteeing respect for the rights of workers’ as well as ‘a climate of fair competition’.

\(^12\) For example, several legislative proposals of the MVOPlatform of 11 February 2010 (available at [http://mvoplatform.nl/publications-nl/Publication_3416-nl](http://mvoplatform.nl/publications-nl/Publication_3416-nl)), pertain to international company law.
the revision process of the Brussels I Regulation, some already underlined the importance
of conferring jurisdiction on an EU Member State court for the purposes of ensuring
application of ’mandatory secondary law’, particularly in order to protect weaker
parties.\footnote{Impact assessment SEC(2010)1547, p. 21.} The same reasoning could be applied \textit{mutatis mutandis} in this context.

\textbf{IV. Conclusion. Private International Law as a Tool for Enhancing Human Rights?}
Clearly, PIL can play a key role in the efforts to offer victims of human rights violations a
real possibility of recovering damage suffered by them in civil proceedings against those
who were actually involved in this violation. PIL can open doors for victims, as PIL can
also close doors for victims.

Care should be taken to ensure that PIL is not reduced to an instrument of power in the
hands of the stronger party, who can use it in order to benefit even more from a situation
of ’competing norms’. In the dynamics of a situation of competing norms, PIL should not
lend itself to be used to the detriment of the structurally weaker party and close all doors
for victims.

But PIL can also open doors. PIL does have the potential to facilitate rather than
complicate access to justice for victims. If PIL effectively makes victims’ lives easier in
this way, it may act as a \textit{conductor of human rights}, or as a ‘\textit{tool for enhancing human
rights}’. If PIL functions this way, PIL will not be a legal obstacle for victims. Invoking
PIL rules will then form a solid part of the rigid technical substantiation of their
arguments.

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