A step in the right direction, but nothing more – A critical note on the Draft Directive on mandatory Human Rights Due Diligence

Written by Bastian Brunk, research assistant at the Humboldt University of Berlin and doctoral candidate at the Institute for Comparative and Private International Law at the University of Freiburg.

In April of 2020, EU Commissioner Didier Reynders announced plans for a legislative initiative that would introduce EU-wide mandatory human rights due diligence requirements for businesses. Only recently, Reynders reiterated his intentions during a conference regarding "Human Rights and Decent Work in Global Supply Chains" which was hosted by the German Federal Ministry of Labour and Social Affairs on the 6. October, and asseverated the launch of public consultations within the next few weeks. A draft report, which was prepared by MEP Lara Wolters (S&D) for the European Parliament Committee on Legal Affairs, illustrates what the prospective EU legal framework for corporate due diligence could potentially look like. The draft aims to facilitate access to legal remedies in cases of corporate human rights abuses by amending the Brussels *Ibis* Regulation as well as the Rome II Regulation. However, as these amendments have already inspired a comments by Geert van Calster, Giesela Rühl, and Jan von Hein, I won't delve into them once more. Instead, I will focus on the centre piece of the draft report – a proposal for a Directive that would establish mandatory human rights due diligence obligations for businesses. If adopted, the Directive would embody a milestone for the international protection of human rights. As is, the timing could simply not be better, since the UN Guiding Principles (UNGPs) celebrate their 10th anniversary in 2021. The EU should take this opportunity to present John Ruggie, the author of the UNGPs, with a special legislative gift. However, I'm not entirely sure if Ruggie would actually enjoy this particular present, as the Directive has obvious flaws. The following passages aim to accentuate possible improvements, that would lead to the release of an

appropriate legal framework next year. I will not address every detail but will rather focus on the issues I consider the most controversial – namely the scope of application and the question of effective enforcement.

General Comments

To begin with a disclaimer, I believe the task of drafting a legal document on the issue of business and human rights to be a huge challenge. Not only does one have to reconcile the many conflicting interests of business, politics, and civil society, moreover, it is an impossible task to find the correct degree of regulation for every company and situation. If the regulation is too weak, it does not help protect human rights, but only generates higher costs. If it is too strict, it runs the risk of companies withdrawing from developing and emerging markets, and – because free trade and investment ensure worldwide freedom, growth, and prosperity – of possibly inducing an even worse human rights situation. This being said, the current regulatory approach should first and foremost be recognised as a first step in the right direction.

I would also like to praise the idea of including environmental and governance risks in the due diligence standard (see Article 4(1)) because these issues are closely related to each other. Practically speaking, the conduct of companies is not only judged based on their human rights performance but rather holistically using ESG or PPP criteria. All the same, I am not sure whether or not this holistic approach will be accepted in the regulatory process: Putting human rights due diligence requirements into law is difficult enough, so maybe it would just be easier to limit the proposal to human rights. Nonetheless, it is certainly worth a try.

Moving on to my criticism.

Firstly, the draft is supposed to be a Directive, not a Regulation. As such, it cannot impose any direct obligations on companies but must first be transposed into national law. However, the proposal contains a colourful mix of provisions, some of which are addressed to the Member States, while others impose direct obligations on companies. For example, Article 4(1) calls upon Member States to introduce due diligence obligations, whereas all other provisions of the same article directly address companies. In my eyes, this is inconsistent.

Secondly, the Directive uses definitions that diverge from those of the UNGPs. For example, the UNGPs define "due diligence" as a process whereby companies "identify, prevent, mitigate and account for" adverse human rights impacts. This seems very comprehensive, doesn't it? Due diligence, as stipulated in the Directive, goes beyond that by asking companies to identify, cease, prevent, mitigate, monitor, disclose, account for, address, and remediate human rights risks. Of course, one could argue that the UNGP is incomplete and the Directive fills its gaps, but I believe some of these "tasks" simply redundant. Of course, this is not a big deal by itself. But in my opinion, one should try to align the prospective mechanism with the UNGPs as much as possible, since the latter are the recognised international standard and its due diligence concept has already been adopted in various frameworks, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the ISO 26000. An alignment with the UNGP, therefore, allows and promotes coherence within international policies.

Before turning to more specific issues, I would like to make one last general remark that goes in the same direction as the previous one. While the UNGP ask companies to respect "at minimum" the "international recognized human rights", meaning the international bill of rights (UDHR, ICCPR, ICESCR) and the ILO Core Labour Standards, the Directive requires companies to respect literally every human rights catalogue in existence. These include not only international human rights documents of the UN and the ILO, but also instruments that are not applicable in the EU, such as the African Charter of Human and People's Rights, the American Convention of Human Rights, and (all?) "national constitutions and laws recognising or implementing human rights". This benchmark neither guides

companies nor can it be monitored effectively by the authorities. It is just too ill-defined to serve as a proper basis for civil liability claims or criminal sanctions and it will probably lower the political acceptance of the proposal.

Scope of Application

The scope of application is delineated in Article 2 of the Directive. It states that the Directive shall apply to all undertakings governed by the law of a Member State or established in the territory of the EU. It shall also apply to limited liability undertakings governed by the law of a non-Member State and not established within EU-territory if they operate in the internal market by selling goods or providing services. As one can see, the scope is conceivably broad, which gives rise to a number of questions.

First off, the Directive does not define the term "undertaking". Given the factual connection, we could understand it in the same way as the Non-Financial Reporting Directive (2014/95/EU) does. However, an "undertaking" within the scope of the Non-Financial Reporting Directive refers to the provisions of the Accounting Directive (2013/34/EU), which has another purpose, i.e. investor and creditor protection, and is, therefore, restricted to certain types of limited liability companies. Such a narrow understanding would run counter to the purpose of the proposed Directive because it excludes partnerships and foreign companies. On the other hand, "undertaking" probably does mean something different than in EU competition law. There, the concept covers "any entity engaged in an economic activity, regardless of its legal status" and must be understood as "designating an economic unit even if in law that economic unit consists of several persons, natural or legal" (see e.g. CJEU, Akzo Nobel, C-97/08 P, para 54 ff.). Under EU competition law, the concept is, therefore, not limited to legal entities, but also encompasses groups of companies (as "single economic units"). This concept of "undertaking", if applied to the Directive, would correspond with the term "business enterprises" as used in the UNGP (see the Interpretive Guide, Q. 17). However, it would ignore the fact that the parent company and its subsidiaries are distinct legal entities, and that the parent company's legal power

to influence the activities of its subsidiaries may be limited under the applicable corporate law. It would also lead to follow-up questions regarding the precise legal requirements under which a corporate group would have to be included. Finally, non-economic activities and, hence, non-profit organisations would be excluded from the scope, which possibly leads to significant protection gaps (just think about FIFA, Oxfam, or WWF). In order to not jeopardise the objective – ensuring "harmonization, legal certainty and the securing of a level playing field" (see Recital 9 of the Directive) – the Directive should not leave the term "undertaking" open to interpretation by the Member States. A clear and comprehensive definition should definitely be included in the Directive, clarifying that "undertaking" refers to any legal entity (natural or legal person), that provide goods or services on the market, including non-profit services.

Secondly, the scope of application is not coherent for several reasons. One being that the chosen form of the proposal is a Directive, rather than a Regulation, thus providing for minimum harmonisation only. It is left to the Member States to lay down the specific rules that ensure companies carrying out proper human rights due diligence (Article 4(1)). This approach can lead to slightly diverging due diligence requirements within the EU. Hence, the question of which requirements a company must comply with arises. From a regulatory law's perspective alone, this question is not satisfactorily answered. According to Article 2(1), "the Directive" (i.e. the respective Member States' implementation acts) applies to any company which has its registered office in a Member State or is established in the EU. However, the two different connecting factors of Article 2(1) have no hierarchy, so a company must probably comply with the due diligence requirements of any Member State where it has an establishment (agency, branch, or office). Making matters worse (at least from the company's perspective), in the event of a human rights lawsuit, due diligence would have to be characterised as a matter relating to non-contractual obligations and thus fall within the scope of the new Art. 6a Rome II. The provisions of this Article potentially require a company to comply with the due diligence obligations of three additional jurisdictions, namely lex loci damni, lex loci delicti commissi, and either the law of the country in which the parent company has its domicile (in this regard, I agree with Jan von Hein who proposes the use not of the company's domicile but its habitual residence as a connecting factor according to Article 23

Rome II) or, where it does not have a domicile (or habitual residence) in a Member State, the law of the country where it operates.

That leads us to the next set of questions: When does a company “operate” in a country? According to Article 2(2), the Directive applies to non-EU companies which are not established in the EU if they “operate” in the internal market by selling goods or providing services. But does that mean, for example, that a Chinese company selling goods to European customers over Amazon must comply fully with European due diligence requirements? And is Amazon, therefore, obliged to conduct a comprehensive human rights impact assessment for every retailer on its marketplace? Finally, are states obliged to impose fines and criminal sanctions (see Article 19) on Amazon or the Chinese seller if they do not meet the due diligence requirements, and if so, how? I believe that all this could potentially strain international trade relations and result in serious foreign policy conflicts.

Finally, and perhaps most controversially in regard to the scope, the requirements shall apply to all companies regardless of their size. While Article 2(3) allows the exemption of micro-enterprises, small companies with at least ten employees and a net turnover of EUR 700,000 or a balance sheet total of EUR 350,000 would have to comply fully with the new requirements. In contrast, the French duty of vigilance only applies to large stock corporations which, including their French subsidiaries and sub-subsidiaries, employ at least 5,000 employees, or including their worldwide subsidiaries and sub-subsidiaries, employ at least 10,000 employees. The Non-Financial Reporting Directive only applies to companies with at least 500 employees. And the due diligence law currently being discussed in Germany, will with utmost certainty exempt companies with fewer than 500 employees from its scope and could perhaps even align itself with the French law’s scope. Therefore, I doubt that the Member States will accept any direct legal obligations for their SMEs. Nonetheless, because the Directive requires companies to conduct value chain due diligence, SMEs will still be indirectly affected by the law.

Value Chain Due Diligence

Value chain due diligence, another controversial issue, is considered to be anything but an easy task by the Directive. To illustrate the dimensions: BMW has more than 12,000 suppliers, BASF even 70,000. And these are all just Tier 1 suppliers. Many, if not all, multinational companies probably do not even know how long and broad their value chain actually is. The Directive targets this problem by requiring companies to "make all reasonable efforts to identify subcontractors and suppliers in their entire value chain" (Article 4(5)). This task cannot be completed overnight but should not be impossible either. For example, VF Corporation, a multinational apparel and footwear company, with brands such as Eastpack, Napapijri, or The North Face in its portfolio, has already disclosed the (sub?)suppliers for some of its products and has announced their attempt to map the complete supply chain of its 140 products by 2021. BASF and BMW will probably need more time, but that shouldn't deter them from trying in the first place.

Mapping the complete supply chain is one thing; conducting extensive human rights impact assessments is another. Even if a company knows its chain, this does not yet mean that it comprehends every potential human rights risk linked to its remote business operations. And even if a potential human rights risk comes to its attention, the tasks of "ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating" (see Article 3) it is not yet fulfilled. These difficulties call up to consider limiting the obligation to conduct supply chain due diligence to Tier 1 suppliers. However, this would not only be a divergence from the UNGP (see Principle 13) but would also run counter to the Directive's objective. In fact, limiting due diligence to Tier 1 suppliers makes it ridiculously easy to circumvent the requirements of the Directive by simply outsourcing procurement to a third party. Hence, the Directive takes a different approach by including the entire supply chain in the due diligence obligations while adjusting the required due diligence processes to the circumstances of the individual case. Accordingly, Article 2(8) states that "[u]ndertakings shall carry out value chain due diligence which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of

their supply chain, the size of the undertaking, its capacity, resources and leverage". I consider this an adequate provision because it balances the interests of both companies and human rights subjects. However, as soon as it comes to enforcing it, it burdens the judge with a lot of responsibility.

Enforcement

The question of enforcement is of paramount importance. Without effective enforcement mechanisms, the law will be nothing more than a bureaucratic and toothless monster. We should, therefore, expect the Directive – being a political appeal to the EU Commission after all – to contain ambitious proposals for the effective implementation of human rights due diligence. Unfortunately, we were disappointed.

The Directive provides for three different ways to enforce its due diligence obligations. Firstly, the Directive requires companies to establish grievance mechanisms as low-threshold access to remedy (Articles 9 and 10). Secondly, the Directive introduces transparency and disclosure requirements. For example, companies should publish a due diligence strategy (Article 6(1)) which, inter alia, specifies identified human rights risks and indicates the policies and measures that the company intends to adopt in order to cease, prevent, or mitigate those risks (see Article 4(4)). Companies shall also publish concerns raised through their grievance mechanisms as well as remediation efforts, and regularly report on progress made in those instances (Article 9(4)). With these disclosure requirements, the Directive aims to enable the civil society (customers, investors and activist shareholders, NGOs etc.) to enforce it. Thirdly, the Directive postulates public enforcement mechanisms. Each Member State shall designate one or more competent national authorities that will be responsible for the supervision of the application of the Directive (Article 14). The competent authorities shall have the power to investigate any concerns, making sure that companies comply with the due diligence obligations (Article 15). If the authority identifies shortcomings, it shall set the respective company a time limit to take remedial action. It may then, in case the company does not fulfil the respective

order, impose penalties (especially penalty payments and fines, but also criminal sanctions, see Article 19). Where immediate action is necessary to prevent the occurrence of irreparable harm, the competent authorities may also order the adoption of interim measures, including the temporary suspension of business activities.

At first glance, public enforcement through inspections, interim measures, and penalties appear as quite convincing. However, the effectiveness of these mechanisms may be questioned, as demonstrated by the Wirecard scandal in Germany. Wirecard was Germany's largest payment service provider and part of the DAX stock market index from September 2018 to August 2020. In June of 2020, Wirecard filed for insolvency after it was revealed that the company had cooked its books and that EUR 1.9 billion were "missing". In 2015 and 2019, the Financial Times already reported on irregularities in the company's accounting practices. Until February 2019, the competent supervisory authority BaFin did not intervene, but only commissioned the FREP to review the falsified balance sheet, assigning only a single employee to do so. This took more than 16 months and did not yield any results before the insolvency application. While it is true that the Wirecard scandal is unique, it showcased that investigating malpractices of large multinational companies through a single employee is a crappy idea. Public enforcement mechanisms only work if the competent authority has sufficient financial and human resources to monitor all the enterprises covered by the Directive. So how much manpower does it need? Even if the Directive were to apply to companies with more than 500 employees, in Germany alone one would have to monitor more than 7.000 entities and their respective value chains. We would, therefore, need a whole division of public inspectors in a gigantic public agency. In my opinion, that sounds daunting. That does not mean that public enforcement mechanisms are completely dispensable. As Ruggie used to say, there is no single silver bullet solution to business and human rights challenges. But it is also important to consider decentralised enforcement mechanisms such as civil liability. In contrast to public enforcement mechanisms, civil liability offers victims of human rights violations "access to effective remedy", which, according to Principle 25, is one of the main concerns of the UNGP.

So, what does the Directive say about civil liability? Just about nothing. Article 20 only states that "[t]he fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law." Alright, so there shouldn't be a safe harbour for companies. But that does not yet mean that companies are liable for human rights violations at all. And even if it were so, the conditions for asserting a civil claim can differ considerably between the jurisdictions of the Member States. The Directive fails to achieve EU-wide harmonisation on the issue of liability. That's not a level playing field. This problem could be avoided by passing an inclusive Regulation containing both rules concerning human rights due diligence and a uniform liability regime in case of violations of said rules. However, such an attempt would probably encounter political resistance from the Member States and result in an undesirable delay of the legislative process. A possible solution could be to only lay down minimum requirements for civil liability but to leave the ultimate drafting and implementation of liability rules to the Member States. Alternatively, the Directive could stipulate that the obligations set out in Articles 4 to 12 are intended to determine the due care without regard to the law applicable to non-contractual obligations. At least, both options would ensure that companies are liable for any violation of their human rights due diligence obligations. Is that too much to ask?

Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft report with recommendations to the Commission on corporate due diligence and corporate accountability. This report has already triggered first

online comments by Geert van Calster and Giesela Rühl; the present contribution aims both at joining and at broadening this debate. The draft report consists of three proposals: first, a directive containing substantive rules on corporate due diligence and corporate accountability; secondly, amendments to the Brussels I*bis* Regulation that are designed to grant claimants from third states access to justice in the EU Member States; and thirdly, an amendment to the Rome II Regulation on the law applicable to non-contractual obligations. The latter measure would introduce a new Art. 6a Rome II, which codifies the so-called principle of ubiquity for business-related human rights claims, i.e. that plaintiffs are given the right to choose between various laws in force at places with which the tort in question is closely connected. While the basic conflicts rule remains the place of damage (*lex loci damni*) under Art. 4(1) Rome II, Art. 6a of the Rome II-draft will allow plaintiffs to opt for the law of the country in which the event giving rise to the damage occurred (the place of action or *lex loci delicti commissi* in the narrow sense), the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates.

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law – a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci damni* is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of

law.

Insofar, the question must be answered as to whether the ubiquity approach has major advantages compared with the mandatory rule approach. The first factor in favour of applying the principle of ubiquity to business-related human rights claims as well is that it considerably reduces the need for the frequently difficult delineation between human rights violations (Art. 6a Rome II draft) and environmental damages (Art. 7 Rome II). Thus, intricate problems of characterisation and, if necessary, adaptation, are avoided at the outset. In addition, tortious human rights claims may also be rooted in a violation of ILO labour standards (see the definition of "human rights risk" in Art. 3 of the proposed directive). In light of the fact that Art. 8(1) Rome I favours the employee as well by providing for an alternative connection of contractual claims, having a *favor laboratoris* for labour-related human-rights claims fits into the normative framework of EU law, too.

A second advantage is that the ubiquity approach respects party autonomy (Art. 14 Rome II), whereas the parties could not derogate from a truly mandatory rule (Art. 16 Rome II). Thus, the ubiquity approach facilitates settlements, particularly in human rights cases that involve a large number of claimants.

Thirdly, claimants from the Global South are frequently compelled by the "weak legal systems and enforcement" of their home country to seek their fortune abroad rather than by weaknesses of their own substantive laws. In many former colonies, the Common Law or the French Code Napoléon are still in force (with modifications) and would in principle allow a successful suit based on a tortious claim. In this regard, giving claimants the option to sue a company in a Member State, while at the same time applying their own law if they so wish, avoids a paternalistic, neo-colonialist stance that rests on the implicit assumption that our Western laws are inherently better than those of developing countries.

A fourth factor arguing for giving plaintiffs the right to choose the applicable law is that the mandatory rule approach will frequently not sufficiently cover the risks inherent in cross-border litigation. In the German *Rana Plaza* case, the claims of the plaintiffs failed because, under the law of Pakistan, they were barred by the statute of limitations, which was extremely short (just one year) compared with German standards, particularly for a cross-border case (see OLG Hamm NJW 2019, 3527). In light of the CJEU case law on Art. 16 Rome II, however, German

limitation periods could hardly be characterised as being of an overriding mandatory nature (ECLI:EU:C:2019:84). Under Art. 6a Rome II-draft, the claimants could simply have chosen German law to govern their case.

On the other hand, the ubiquity approach has been criticised as leading to an impairment of foreseeability because the question of the applicable law remains unanswered until the plaintiffs have made their choice. However, under the mandatory rule approach as well, foreseeability of the applicable law is not necessarily guaranteed. Only a Member State court would apply the due diligence standard as a part of its own *lex fori* (Art. 16 Rome II), but a company would always face the risk of being sued in a third state where it would not be ensured that a local court would take a foreign mandatory rule into account. Even among the Member States, such a courtoisie could not be taken for granted because, unlike Art. 9(3) Rome I, the Rome II Regulation contains no rule on the applicability of *foreign* overriding mandatory rules. One might argue that this concern is purely academic because the proposed directive would harmonise the standards of corporate due diligence in the EU anyway. Yet this would be a serious error because the proposal (Art. 1(1) subpara. 2) only establishes *minimum* requirements.

Thus, the advantages inherent in the ubiquity approach clearly outweigh those of the mandatory rule approach. Nevertheless, it is certainly true that there can be too much of a good thing. Allowing the plaintiffs to choose between *four* different laws is hardly practical and sets up a very dangerous liability trap for lawyers who would have to perform extremely difficult studies in comparative law before advising their clients on where to sue a defendant. Thus, the number of options should simply be reduced to two: either the place of damage or the habitual residence of the defendant.

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23 Rome II). There is no practical need to replace it with “domicile” which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

In sum, Article 6a Rome II-draft certainly leaves room for further refinement, but its basic approach rests on a sound doctrinal rationale and has major practical advantages compared with the mandatory rule model so far favoured in domestic

due diligence laws. Thus, the EP draft deserves an appropriate and thorough consideration rather than a hasty judgment.

Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not

completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.

A few thoughts on the HCCH Guide to Good Practice on the

grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part II)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED (forthcoming)

As indicated in a previous post, the comments on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention (subsequently, Guide to Good Practice or Guide) will be divided into two posts. In a previous post, I analysed the Guide exclusively through the lens of human rights. In the present post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law.

Please refer to Part I. All the caveats mentioned in that post also apply here.

The Guide to Good Practice is available here.

I would like to touch upon three topics in this post: 1) the examples of assertions that can be raised under Article 13(1)(b) and their categorisation; 2) measures of protection and 3) domestic violence.

1) One of the great accomplishments of the Guide to Good Practice is the categorisation of the ***examples of assertions that can be raised under Article 13(1)(b) of the Child Abduction Convention***. While at first sight the categorisation may appear to be too simplistic, it is very well thought through and encompasses a wide range of scenarios.

I include below the assertions as stated in the Guide:

Examples of assertions that can be raised under Article 13(1)(b)
a. Domestic violence against the child and / or the taking parent
b. Economic or developmental disadvantages to the child upon return
c. Risks associated with circumstances in the State of habitual residence

d. Risks associated with the child's health
e. The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child
i. Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention
ii. Immigration issues faced by the taking parent
iii. Lack of effective access to justice in the State of habitual residence
iv. Medical or family reasons concerning the taking parent
v. Unequivocal refusal to return
f. Separation from the child's sibling(s)

Nevertheless, while this categorisation is very comprehensive, there are a few matters that are mentioned only very briefly in the Guide and could have benefited from a more in-depth discussion. One of them is the extensive case law on what constitutes "***zone of war***" ***or a place where there is conflict***. See footnotes 88 and 89 of the Guide under the heading *c. Risks associated with circumstances in the State of habitual residence*.

Perhaps due to political sensitivities, it would be hard to pinpoint in the Guide jurisdictions that have been discussed by the courts as possibly being a "zone of war". Among these are Israel (most of the case law), Monterrey (Mexico – during the war on drugs) and Venezuela. See for example: Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) [INCADAT reference: HC/E/USf 530] (United States); Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81 [INCADAT reference: HC/E/AU 995] (Australia) and other references in footnotes 88 and 89 of the Guide.

Some of course may argue that "zone of war" is a gloss on the Convention and that as such it should not be analysed. However, one may also describe such situations without labelling them as "zone of war", such as a State where there is conflict, be it military, social, political, etc. Perhaps this could have been expanded under the heading *c. Risks associated with circumstances in the State of habitual residence* of the Guide referred to above.

While the "zone of war" exception has hardly been successful, it would have been beneficial to discuss some of the arguments set forth by the parties such as: the fluctuation of violence throughout the years, terrorist attacks, a negative travel advice by a government concerning the State of habitual residence of the child,

the specific place where the family lives and the risks of terrorism, the violence of drug cartels, and the fact of being a political refugee in the State where the child was abducted. The negative travel advice is particularly apposite to our times of Covid-19 as that would have given some guidance to the courts.

Another assertion made under Article 13(1)(b) of the Child Abduction Convention that could have been analysed in more depth by the Guide – perhaps under *a. Domestic violence against the child and/or the taking parent* – is the ***sexual abuse of children***. The Guide includes very brief references to sexual abuse in the glossary, paragraphs 38 and 57, and footnote 76.

Undoubtedly, sexual abuse is a terrible and unbearable experience for children but it is still a taboo to single out this topic, let alone explain the current trends existing in the case law when this issue has been raised. Nevertheless, from my research there seems to be a very clear distinction in the case law: when the sexual abuse has been raised in the State of habitual residence and no action or insufficient action was taken by such authorities, and there is evidence of sexual abuse, the State where the child has been abducted tends to reject the return of the child to his or her State of habitual residence. In cases where this is not the case, the child is ordered back to the State of habitual residence, often with measures of protection. See for example: the multiple-layered decisions in the case of *Danaipour v. McLarey*, see for example the decision Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004) [INCADAT reference: HC/E/USf 597] (United States). This brings us to:

2) The second topic of this post: ***measures of protection*** (also referred to as protective measures). The paragraphs dedicated to this topic in the Guide are 43-48. The Guide is absolutely at the forefront of the latest developments and social research on the effectiveness of measures of protection. It has answered the call of many professors/scholars and practitioners, who have cautioned about the indiscriminate use of measures of protection, in particular of undertakings, when the person causing the violence is known to infringe orders and not to heed the warnings of the courts. The Guide is to be commended for this great step forward.

The Guide defines undertakings as follows: “an undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain

jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned." Because undertakings are a voluntary promise, their enforcement is fraught with problems, especially if the left-behind parent refuses to comply once the child has been returned. Where the primary carer (usually the mother) returns with the child to a "domestic violence" situation and it is not possible to enforce undertakings, both the mother and the child may be subject to a grave risk of harm. For more information, see Taryn Lindhorst, Jeffrey L. Edleson. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Boston: Northeastern University Press, 2012). This leads us to:

3) The third topic of this post: ***domestic violence***. Many claim that domestic violence is a human rights violation. In a wider context, there is indeed a correlation between domestic violence and human rights and this has been recognised by resolutions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and the judgment of the European Court of Human Rights. See for example *AT (Ms) v. Hungary, (Decision) CEDAW Committee* and *Opuz v. Turkey (Application No. 33401/02)*, respectively.

While the issue of domestic violence in the context of Article 13(1)(b) of the Child Abduction Convention was the one topic that sparked concern among the Contracting States to the Child Abduction Convention, as well as judges and the legal profession alike, the Guide only dedicates a few paragraphs to it. See paragraphs 57-59 of the Guide. It also arrives at a conclusion, which raises some doubts.

In particular, the Guide states that "***Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child***." There are a few problems with such a statement. Domestic violence comes in different shapes and sizes and the level of violence can be high or low. This statement is a "one-size-fits-all" and thus is necessarily flawed. In addition, it does not say what it means by "in and of itself", does it mean *prima facie*? Also, it does not elaborate on what is necessary to invoke and substantiate domestic violence in order for this assertion to be considered sufficient. It also appears to set a standard of proof when it says that it

“is not sufficient”, which might perhaps not be appropriate for a soft law instrument, such as a Guide to Good Practice, to do.

Some scholars have analysed and criticised this statement of the Guide. In particular, Rhona Schuz and Merle H. Weiner in the following article “A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice” (Family Law LexisNexis©, January 2020) I refer to their arguments and prefer not to replicate them in this post.

Despite the weakness mentioned above and in Part I of this post, I believe that this Guide would be of great benefit to the legal profession.

Having all the above in mind, I would like to conclude with some words of the renowned American judge Richard Posner: “[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations.” (Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) [INCADAT reference: HC/E/USf 812] (United States)).

A few thoughts on the Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part I)

Written by Mayela Celis – The comments below are based on the author’s doctoral thesis entitled “The Child Abduction Convention – four decades of evolutive

interpretation" at UNED

As mentioned in a previous post, after many years in the making, the *Guide to Good Practice on the grave-risk exception (Article 13(1)(b)) under the Child Abduction Convention* (grave-risk exception Guide or Guide) has been published. Please refer to our previous posts here and here. This Guide to Good Practice deals with a very controversial topic indeed. The finalisation and approval of this Guide is without a doubt a milestone and thus, this Guide will be of great benefit to users.

For ease of reference, I include the relevant provision dealt with in the Guide. Article 13(1)(b) of the Child Abduction Convention sets out the following: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – […] b) there is a ***grave risk*** that his or her return would expose the child to ***physical or psychological harm*** or otherwise place the child in an ***intolerable situation***. […]" (our emphasis).

The comments on the grave-risk exception Guide will be divided into two posts. In the present post, I will analyse the Guide exclusively through the lens of human rights. In the second post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law. These posts reflect only my personal opinion. Given the controversial nature of this topic, there might be other different and valid opinions out there so please bear that in mind.

At the outset, it should be noted that this Guide is only advisory in nature and thus nothing in the Guide may be construed as binding upon Contracting Parties to the 1980 Convention (and any other HCCH Convention) and their courts (paras 7 and 8 of the Guide) Therefore, courts have enough leeway to supplement it and take on board what they see fit.

Human rights law is gaining importance every day, also in private international law cases. However, apart from some fleeting references to the United Nations Convention on the Rights of the Child (pp. 16 and 56), there are no references to human rights case law in the Guide. Indeed, the increasing number of judgments of the European Court of Human Rights (ECtHR) is not mentioned in the Guide,

even though dozens of these judgments have dealt with the grave-risk exception (Art. 13(1)(b)) of the Child Abduction Convention); thus there appears to be an "elephant in the room". We will try to respond in this post to the following questions: what has been the contribution of the ECtHR on this topic and what are the possible consequences of the absence of references to human rights case law in the Guide.

In this regard, I refer readers to our previous post regarding the interaction of human rights and the Child Abduction Convention here and my article entitled: The controversial role of the ECtHR in the interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with special reference to *Neulinger and Shuruk v. Switzerland* and *X v. Latvia* (in Spanish only but with abstracts in English and Portuguese in the Anuario Colombiano de Derecho Internacional). To view it, click on "*Ver artículo – descargar artículo*", currently pre-print version, published online in March 2020.

Before going into the substance of this post, it is perhaps important to clarify why the case law of the ECtHR in child abduction matters is of such great importance in Europe and beyond, perhaps for the benefit of our non-European readers. First, in addition to being binding upon ***47 States*** party to the European Convention on Human Rights, *which represent about half of the total number of Contracting Parties to the Child Abduction Convention (45%)*, the case law of the *ECtHR not only applies to child abduction cases between European States*. It will also apply, for example, if the requested State in child abduction proceedings is a party to the European Convention on Human Rights and the requesting State is not. Indeed, the geographical location of the requesting State and whether it is a party to the European Convention on Human Rights are not relevant. See for example, *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber, where the requesting State was Israel, and *X v. Latvia* (Application No. 27853/09), Grand Chamber, where the requesting State was Australia, both of which are not a party to the European Convention. Secondly, not only European citizens can launch proceedings before the ECtHR. All of this is nicely summarised in Article 1 of the European Convention on Human Rights, which sets out that "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (our emphasis).

In *X v. Latvia*, the Grand Chamber of the ECtHR has established a legal standard

in the handling of child abduction cases where the 13(1)(b) exception has been raised (and indeed other exceptions of the Child Abduction Convention such as Articles 12, 13(1)(a), 13(2) and 20), which is the following:

"106. The Court [ECtHR] considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, ***the factors*** capable of constituting an exception to the child's immediate return in application of ***Articles 12, 13 and 20 of the Hague Convention***, particularly where they are raised by one of the parties to the proceedings, ***must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point***, in order to enable the Court to verify that those questions have been effectively examined. Secondly, ***these factors must be evaluated in the light of Article 8 of the Convention*** (see *Neulinger and Shuruk*, cited above, § 133)." (our empahsis)

[…]

"118. As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see paragraph 25 above), the Court reiterates that while Article 11 of the Hague Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an ***effective examination*** of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case." (our emphasis)

In addition, the ECtHR indicates that domestic courts must conduct "meaningful checks" to determine whether a grave risk exists (paragraph 116 of *X v. Latvia*), and to do so a court may obtain evidence on its own motion if for example, this is allowed under its internal law.

Importantly, this case also underlines the need to secure "tangible" measures of protection for the return of the child (paragraph 108 of *X v. Latvia*).

Moreover, there are *at least two issues in the Guide* that could have benefited from a human rights analysis, namely the incarceration of (mainly) the abducting mother upon returning the child to the State of habitual residence and the separation of siblings.

With regard to the first issue, it should be noted that the fact that the mother will be ***incarcerated upon returning the child*** to the State of habitual residence could have serious consequences for the child. The Guide has correctly explained the different ways in which such an outcome could be avoided. However, the Guide concludes with the following: "*The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception*" (paragraph 67).

In my view, where *objective* reasons have been raised by the mother to refuse to return to the State of habitual residence, such as incarceration, there should be a human rights analysis in the light of Article 8 of the European Convention on Human Rights. While there might be some cases where incarceration may not be sufficient to refuse a return, there might be other cases where this would place the taking parent and the child in grave risk of harm or intolerable situation. By way of example, objective reasons for not returning could include a long incarceration or a disproportionate sanction, the fact the other parent cannot take care of the child upon the incarceration of the other parent, the inability to contest custody while imprisoned, etc. According to the ECtHR, an analysis should be undertaken as to whether these actions are necessary in a "democratic society". Accordingly, the decision of the mother not to return based on a whim should not be considered seriously. See, for example, the ECtHR cases, *Neuliger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber (as clarified by X v. Latvia (Application No. 27853/09), Grand Chamber)), and *B. c. Belgique* (Requête No. 4320/11). Arresting and handcuffing the mother at the airport has undoubtedly a tremendous impact on children; so all efforts should be geared via judicial co-operation and direct judicial communications to make sure that charges are dropped as mentioned in the Guide (first part of paragraph 67 of the Guide).

As regards the second scenario, it is important to note that the ***separation of siblings when one of them has successfully objected to being return under Article 13(2) of the Child Abduction Convention*** may inflict harm on the children and may be difficult to enforce. The Guide noted that every child should be considered individually and concluded that "*Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child*" (paragraph 74).

According to article 12 of the UN Convention on the Rights of the Child, the views of the child should be given due weight in accordance with the age and maturity of the child. By ordering the return of usually the younger sibling(s) and forcing the mother to make a choice between returning with one child and staying with the child who objected, a judge could not be giving enough weight to the views of the child objecting to being returned. This is especially the case when we are dealing with full siblings and all are subject to return proceedings. In my view, and given that the reason for not returning are the views, in particular, of the older child, this should be factored in when the judge exercises his or her discretion. See, for example, the ECtHR case, *M.K. c. Grèce* (Requête n° 51312/16). Obviously, if the separation of siblings is due to the action of the mother by not wanting to return, then a separation of the siblings would most likely not be a ground for refusing the return.

The underlying basis of the above is that the Child Abduction Convention is for the protection of children and not to vindicate the position of adults who are immersed in a legal battle or to merely sanction the abductor.

The standard in *X v. Latvia* should be kept in mind when dealing with international child abduction cases. Given that the grave-risk exception Guide is silent on this, practitioners would need to ***supplement the Guide with relevant literature and case law on human rights*** if they are dealing with a case in Europe. Practitioners outside Europe having a child abduction case which is being resolved in Europe may need to do the same in order to know what their possibilities of success and options are.

In this day and age, and as mentioned by the honorable Eduardo Vio Grossi, judge of the Inter-American Court of Human Rights, in a recent virtual forum ("Challenges to Inter-American Law"), the focus should not only be on sanctioning States for violations of human rights but we should assist States in not getting sanctioned by providing the necessary guidance and if possible, paving the way.

Public international law requirements for the effective enforcement of human rights

Written by Peter Hilpold, University of Innsbruck

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. The UN Guiding Principles on Business and Human Rights (2011) have set forth a process by which Corporate Social Responsibility (CSR) rules are to be further specified. The approach followed is not to impose specific results but to create procedures by which CSR is given further flesh on the basis of a continuing dialogue between all relevant stakeholders.

2. The operationalization of this concept takes place by a three pillar model („protect", „respect", „remedy") based on an approach called „embedded liberalism" according to which the creation of a liberal economic order allowing also for governmental and international intervention is pursued.

3. The „remedies" pillar is the least developed one within the system of the Guiding Principles. Intense discussion and studies are still needed to bring more clarity into this field.

4. In the attempt to bring more clarity into this area guidance can be obtained by discussions that have taken place within the UN in the field of general human rights law and by ensuing academic studies referring to the respective documents.

5. The remedies mentioned in the Guiding Principles are formulated in a relatively „soft" manner, after attempts to create „harder" norms have failed. There are, however, initiatives underway to create a binding instrument in this field. According to the „Zero Draft" for such a treaty much more restrictive rules are envisaged. It is, however, unlikely that such an instrument will meet with the

necessary consensus within the foreseeable future.

6. In Europe, within the Council of Europe as well as within the European Union, various attempts have been undertaken to give further substance to the „remedies". The relevant documents contain both an analysis of the law in force as well as proposals for new instruments to be introduced. These proposals are, however, in part rather far-reaching and thus it is unclear whether they can be realized any time soon.

7. If some pivotal questions shall be identified that have emerged as an issue for further discussion, the following can be mentioned:

7.1. The extraterritorial application of remedies

a) In this context, first of all, the specific approach taken by the US Courts when applying the Alien Tort Statute (ATS) has to be mentioned. However, after „Kiobel" this development seems to have come to a halt.

b) Some hopes are associated with the application of tort law in Europe according to the „Brussels I"- and the „Rome II"-Regulation. However, on this basis European tort law can be applied to human rights violations by companies and subsidiaries abroad only to a very limited measure.

7.2. Criminal law as a remedy

According to some, remedies should be sought more forcefully within the realm of international criminal law. A closer look at the relevant norms reveals, however, that expectations should not be too high as to such an endeavour. International Investment Agreements (IIAs) and Counterclaims

Due to their „asymmetrical" nature (As are intended to protect primarily the investor) IIAs do not offer, at first sight, a suitable basis for holding investors responsible for human rights abuses in the guest state. Recently, however, in the wake of the „Urbaser" case, hopes have come up that counterclaims could be used to such avail. For the time being, however, these hopes are not justified. Nonetheless, attempts are under way to re-draft IIAs so that counterclaims are more easily available and, in general, to emphasize the responsibility of investors.

7.3. The national level

The national level is of decisive importance for finding remedies in the area of CSR. In this context, National Contact Points, National Action Plans and Corporate Social Reporting have to be mentioned. A wide array of initiatives have been taken in this field. Up to this moment the results are, however, not really convincing.

8. The Guiding Principles envisage a vast panoply of judicial and non-judicial initiatives, of State-based and non-State based measures. Many of these measures have to be further specified and tested. It is most probably too early to impose binding obligations in this field as the „Zero Draft“ ultimately intends. Further discussion and a further exchange of experience, as it happens within the „Forum on business and human rights”, seem to be the more promising way to follow.

Full (German) version: *Peter Hilpold,* Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten: Völkerechtliche Anforderungen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 185 et seq.

Private international law requirements for the effective enforcement of human rights

Written by Tanja Domej, University of Zurich

Note: This blogpost is part of a series on „Corporate social responsibility and international law“ that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. It is essential for the effective enforcement of human and workers' rights to create effective local institutions and procedures. This encompasses functioning, trustworthy and accessible civil courts, but also other public, private and criminal institutions and mechanisms (e.g. permission, licencing or inspection procedures to ensure safety in the workplace; accident insurance; trade unions). Civil litigation cannot be a substitute for such mechanisms – particularly if it takes place far away from the place where the relevant events occurred.

2. This, however, is not a reason against ensuring effective enforcement mechanisms, including judicial mechanisms, for private law claims arising from violations of human rights or claims aiming to prevent or to terminate such violations. Such judicial proceedings can also help to promote the establishment of effective local mechanisms for preventing and remedying violations.

3. The usual difficulties arising in cross-border litigation tend to be aggravated in cases concerning human rights violations in developing countries. In addition to issues of jurisdiction and choice of law, there are often considerable challenges particularly with respect to litigation funding, fact-finding and establishing the content of foreign law, if required.

4. Legal aid alone usually is not a viable financial basis for corporate human rights litigation. The funding of such claims largely depends on market mechanisms, particularly on success-based lawyers' fees or commercial litigation funding. Because of the moral hazard that may arise in this context, it is desirable to promote the establishment of public-interest litigation funders. Nevertheless, "entrepreneurial litigating" in the field of corporate human rights cases cannot be considered as per se abusive. There seems to be a need, however, to monitor practices in this field closely to assess whether further regulation is required.

5. Where cross-border judicial cooperation is not functioning, taking of evidence located in a foreign state without involving authorities of the state where such evidence is located becomes increasingly important. A generous approach should be adopted in cases where "direct" taking of evidence neither violates legitimate third-party interests nor involves the use or threat of compulsion in the territory of a foreign state.

6. In cases where liability for damage inflicted by the violation of human rights standards depends on a business's internal operations, it is essential for an

effective access to remedy that either the burden of proof with respect to the relevant facts is on the business or that there is a disclosure obligation that ensures access to relevant information. Where such disclosure could endanger legitimate confidentiality interests (particularly with respect to trade secrets), appropriate mechanisms to protect such interests should be put in place.

7. Collective redress mechanisms can improve access to justice with respect to corporate human rights claims. Meanwhile, reducing an excessive burden on the courts that could result from a large number of parallel proceedings currently does not seem to be as important a consideration in practice in the field of corporate human rights litigation as it can be in other fields of mass tort litigation. Appropriate safeguards have to be put in place to protect both the legitimate interests of defendants and those of the members of the claimant group. When designing such safeguards, it is important to ensure that they do not lead to the obstruction of legitimate claims. Particularly in collective redress proceedings, the court should have strong case management and control powers, both during the proceedings and in the case of a settlement.

8. In addition to claims aiming at remedies for victims of violations, private law claims brought by non-government organisations, by public bodies or by individuals can at least indirectly contribute to the enforcement of human rights standards. Possible examples are claims on the basis of unfair competition, and possibly also contractual claims, because of false statements about production standards. Actions by associations or popular actions for injunctive or declaratory relief could also contribute to private enforcement of human rights standards. It remains to be seen whether litigation among businesses concerning contractual obligations to comply with human rights standards will play a meaningful role in this field in the future as well.

9. Soft law mechanisms and alternative dispute resolution can supplement judicial law enforcement mechanisms, but they are not a substitute for judicial mechanisms. In particular, human rights arbitration depends on a voluntary submission. Its practical effectiveness therefore requires the cooperation of the parties to the dispute. It would, however, be possible to create incentives for such cooperation.

Full (German) version: *Tanja Domej,* Zivilrechtliche Rechtsdurchsetzungsmechanismen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 229 et seq.

Jurisdiction for claims against transnational companies for human rights violations

Written by Anatol Dutta, University of Munich

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. The question of the reach of courts' jurisdiction is highly significant for claims against transnational enterprises based on human rights violations or environmental damages abroad. It does not only determine the applicable law but also the access to a particular justice system.

2. Universal jurisdiction of national courts for human rights and environmental damages claims against enterprises cannot be established, neither on the basis of existing law nor from a legal policy perspective. Rather, such claims have to be handled under the traditional jurisdictional mechanisms.

3. From a global perspective, a remarkable shift regarding jurisdiction can be noted: Whereas the courts in the United States are increasingly limiting access to their justice system in cases with foreign elements, jurisdictional limits are no significant hurdle for human rights and environmental damages claims in the European Union.

4. Domestic enterprises can be sued at their seat. Yet, the *forum non conveniens* doctrine allows US courts – and perhaps soon English courts as well – to decline jurisdiction, also for human rights and environmental damages claims.

5. Yet, human rights and environmental damages claims against foreign enterprises can also only be brought under certain circumstances in the EU.

6. Claims against foreign enterprises for human rights violations and environmental damages abroad can only rarely be brought before domestic courts based on special jurisdiction related to specific subject matters, for example the jurisdiction for tort claims at the place where the harmful event occurred.

7. If human rights and environmental damages claims are simultaneously directed against a domestic enterprise, for example a mother company or a buyer company in the EU, at least partially, foreign subsidiaries and suppliers can be sued on the basis of special jurisdiction over multiple defendants which can be used strategically.

a) If foreign enterprises have their seat in a third State outside the European Union, the jurisdiction of the domestic courts over the foreign co-defendant is governed by the national law of the forum Member State.

b) However, the current trend to establish a separate liability of domestic enterprises, for example, by extending human rights and environment-related duties of care for the supply chain, could endanger this special jurisdiction over multiple defendants, which, on the other hand, could lose significance.

8. Extending the general jurisdiction at the domicile of the defendant by relying on a personal criterion different to the seat of the defendant enterprise is not a viable solution.

a) Today US courts refuse to exercise jurisdiction based solely on the foreign enterprise 'doing business' within the territory. In some EU Member States, for claims against foreign enterprises at least with a seat in a third State, exorbitant jurisdiction can be established, for example, based on assets of the foreign defendant enterprise within the territory.

b) At the most from a policy perspective, for claims against foreign subsidiaries of a domestic enterprise the introduction of an enterprise jurisdiction could be

considered.

9. For claims against foreign enterprises jurisdiction of the domestic courts can often only be based on a *forum necessitatis* if proceedings cannot reasonably and effectively be brought or conducted abroad; the hurdles for such an exceptional jurisdiction are, however, high.

10. To hear human rights and environmental damages claims against enterprises lies within the powers of the domestic courts.

a) Foreign enterprises do not enjoy State immunity even if they violate human rights or damage the environment abroad in collaboration with foreign States.

b) The power to adjudicate is also not limited by the fact that a decision of the court on human rights and environmental damages claims potentially has implications on the foreign policy relations of the forum State.

c) The domestic courts are often even not barred from deciding on human rights and environmental damages claims of foreign States against enterprises.

Full (German) version: *Anatol Dutta*, Internationale Zuständigkeit für privatrechtliche Klagen gegen transnational tätige Unternehmen wegen der Verletzung von Menschenrechten und von Normen zum Schutz der natürlichen Lebensgrundlagen im Ausland, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 39 et seq.

Opening Pandora's Box – The interaction between human rights

and private international law: the specific case of the European Court of Human Rights and the HCCH Child Abduction Convention

Written by Mayela Celis

It is undeniable that there is an increasing interaction between human rights and private international law (and other areas of law). This of course adds an additional layer of complexity to private international law cases, whether we like it or not. Indeed, States can be sanctioned if they do not fulfill specific criteria specified by the European Court of Human Rights (ECtHR). Importantly, the European Convention on Human Rights has been considered to be an instrument of European public order (*ordre public*), to which 47 States are currently parties.

I have recently published an article entitled "The controversial role of the ECtHR in the interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with special reference to *Neulinger and Shuruk v. Switzerland* and *X v. Latvia*" (in Spanish only but with abstracts in English and Portuguese in the Anuario Colombiano de Derecho Internacional). To view it, click on "*Ver artículo*" and then click on "*Descargar el archivo PDF*", currently pre-print version, published online in March 2020.

Below I include briefly a few highlights and comments.

As its name suggests, this article explores the controversial role of the ECtHR in the interpretation of the HCCH Child Abduction Convention. It analyses two judgments rendered by the Grand Chamber: *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) and *X v. Latvia* (Application no. 27853/09). And then it goes on to analyse three more recent judgments and in particular, whether or not they are in line with *X v Latvia*.

The article seeks to clarify the applicable standard that should be applied in child abduction cases as there has been some confusion as to the extent to which *Neulinger* applies and the impact of *X v. Latvia*. Indeed *Neulinger* seemed to

suggest that courts should conduct a full examination of the best interests of the child during child abduction proceedings, which is blatantly wrong. *X v. Latvia* clarifies *Neulinger* and provides a detailed and thoughtful standard to avoid conducting "an in-depth examination of the entire family situation and of a whole series of factors…" but at the same time upholds the human rights of the persons involved and strikes, in my view and as noted by the Court, a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order.

The article then examines three recent judgments rendered by several chambers of the ECtHR (not the Grand Chamber): *K.J. v. Poland* (Application no. 30813/14), *Vladimir Ushakov v. Russia* (Application no. 15122/17), and *M.K. v. Grèce* (Requête n° 51312/16). *M.K. v. Grèce*, which was rendered in 2018, has put the ECtHR in the spotlight again. Surprisingly, this precedent has ignored the standard established in *X v. Latvia* and has followed only *Neulinger*. The precedents of the Grand Chamber of the ECtHR are binding on the chambers so it is stupefying that this could happen. Nevertheless, I have concluded that the outcome of the case is correct.

By way of conclusion, the legal community seems to be divided as to whether or not *X v Latvia* sets a good precedent. Human rights lawyers seem to regard this precedent favourably, whereas private international law lawyers seem to be more cautious. This article concludes that *X v. Latvia* was correctly decided for several reasons based on Article 13(1)(b), Article 3 of the HCCH Child Abduction Convention and the need to provide for measures of protection. Both human rights and private international law can interact harmoniously and complement each other. The efforts of the human rights community to understand the Child Abduction Convention are evident in the change of direction in *X v. Latvia*. Both human rights lawyers and private international law lawyers should make an effort to understand each other as we have a common goal and objective: the protection of the rights of the child.

ERA: Recent European Court of Human Rights Case Law in Family Matters (conference report)

Report written by Tine Van Hof, researcher at the University of Antwerp

On the 13th and 14th of February 2020, the Academy of European Law (ERA) organized a conference on 'Recent ECtHR Case Law in Family Matters'. This conference was held in Strasbourg and brought together forty participants coming from twenty-one different countries. This report will set out some of the issues addressed at the conference.

The presentation, made by ***Ksenija Turkovi?***, Judge at the European Court of Human Rights, focused on children on the move and more specifically on minors in the context of migration. On this topic the European Court of Human Rights (ECtHR) has developed a child-specific human rights approach. This approach implies taking into account three particular concepts: vulnerability, best interests and autonomy. Judge Turkovi? pointed to the interesting discussion on whether vulnerability could only apply to young migrant children. On this discussion, there is now agreement that the vulnerability applies to all children under the age of 18 and regardless whether they are accompanied by adults. The ECtHR made very clear in its case law that migrant children are especially vulnerable and that this vulnerability is a decisive factor that takes precedence over the children's migrant status. This vulnerability also plays a role in the cases on the detention of children. The more vulnerable a person is, the lower the threshold for a situation of detention to fall within the scope of Article 3 of the European Convention on Human Rights (ECHR), encompassing the prohibition of torture.

Family unification and the free movement of family

status was the second topic of the day. ***Michael Hellner***, professor at Stockholm University, discussed several cases of the ECtHR (Ejimson v Germany) and the Court of Justice of the EU (CJEU) (K.A. v Belgium, Coman and S.M.). He concluded that family life does not automatically create a right of residence but it can create such a right in certain circumstances. In the Coman case for example, the CJEU decided that Romania had to recognize the marriage between the two men for the purpose of enabling such persons to exercise the rights they enjoy under EU law (i.e. free movement). Professor Hellner noted that it seems to be quite easy to circumvent national law in the future if one looks at the Coman case. He considered it positive if the consequence was that same-sex marriages and surrogacy arrangements created abroad were recognized. However, he made the interesting observation that it might be a very different story if one thinks about child marriages and the recognition thereof.

Maria-Andriani Kostopoulou, consultant in family law for the Council of Europe, thereafter shared her insights on parental rights, pre-adoption foster care and adoption. She discussed i.a. the evolution in the case law of the ECtHR on the representation of the child before the Court. In the Strand-Lobben case, the Court stated that the issue of representation does not require a restrictive or technical approach and thus made clear that a certain level of flexibility is necessary. In the Paradisio and Campanelli case, the ECtHR provided three criteria that should be taken into account for assessing the representation of the child: the link between the child and the representative, the subject-matter of the case and any potential conflict of interests between the interests of the child and those of the representative. The latest case, A. and B. against Croatia, introduced a security safeguard. In this case, the ECtHR asked the Croatian Bar Association to appoint a legal representative for the child for the procedure before the ECtHR since the Court was not sure that there were no conflict of interests between the child and the mother, who proposed to be the representative.

To end the first conference day, ***Dmytro Tretyakov***, lawyer at the Registry of the ECtHR, enlightened us about the misconceptions and best practices of submitting a case to the Court. His

most important tips for a submission to the Court are the following:

- Use the current application form and not an old one;
- Submit well in time and certainly within the six-month period;
- Summarize the facts of the case on the three pages provided. This summary has to be clear, readable (for those that do it in handwriting) and comprehensible;
- To state claims, refer to the relevant Article from the ECHR (do not cite it) and explain what the specific problem is with regard to that Article;
- Support each claim with documents; and
- Sign the form in the correct boxes and carefully look where the signature of the applicant and where the signature of the representative is required.

The second day of the conference started with the presentation of ***Nadia Rusinova***, attorney-at-law and lecturer at the Hague University of Applied Science, on international child abduction. She discussed i.a. the issue of domestic violence in child abduction cases. Several questions can be raised in this regard, for example: what constitutes domestic violence? When should a court accept the domestic violence to be established? What is adequate protection in light of the Hague Convention on International Child Abduction (1980) and who decides on this? In the case O.C.I. and others v Romania, one of the questions was whether there is such a thing as light violence that does not amount to a grave risk in the sense of Article 13(1)(b) of the Hague Convention. The ECtHR approached this issue very critically and stated that no form of corporal punishment is acceptable. Regarding the adequate measures, the Court stated that domestic authorities have a discretion to decide what is adequate but the measures should be in place before ordering the return of the child. Another point raised by Ms. Rusinova is the time factor that is required. If one looks at Article 11(2) of the Hague Convention and at Article 11(3) of the Brussels IIbis Regulation together, six weeks is the required time period for the return proceedings. The Brussels IIbis Recast clarified

that the procedure should take no more than six weeks per instance. However, according
to Ms. Rusinova it is hardly possible to do the procedures in six weeks; it will only work when the proceeding is not turned into an adversarial proceeding in which all kinds of claims of both parents are dealt with.

Samuel Fulli-Lemaire, professor
at the University of Strasbourg, addressed the interesting evolution of reproductive rights and surrogacy. In the case of C. and E. v France, the French Court of Cassation asked the ECtHR for an advisory opinion on the question whether the current state of the case law in France was compatible with the obligations under Article 8 ECHR (the right to respect for private and family life). The status of the French case law was that the genetic parent was fully accepted but the other intended parent was required to adopt the child if he or she wished to establish parentage links. The ECtHR replied that the obligation under Article 8 entailed that there must be a possibility of recognition of the parent-child relationship but that it is up to the States to decide how to do this. Adoption is a sufficient method of recognizing such relationship,
provided that it is quick and effective enough. The Court also refers to the possibility of transcription of the birth certificate as an alternative to adoption. However, professor Fulli-Lemaire pointed out that there is a misconception on what transcription means under French law. The mere transcription of the birth certificate does not establish legal parentage in France. The fact that the ECtHR says that an intended parent can adopt or transcribe the birth certificate is therefore tricky because under French law the effects of the two methods are not at all the same.

The very last presentation of the conference was given
by ***Gabriela Lünsmann***, attorney-at-law and member of the Executive Board of the Lesbian and Gay Federation in Germany. She spoke about LGBTQI rights as human rights and hereby focused i.a. on transsexuals' gender identity and the case of X. v North-Macedonia. The question raised in that case is whether the state must provide for a procedure to recognize a different gender. The applicant had tried to change their gender but North-Macedonia did not offer any possibility to undergo an operation or to have medical treatment in that regard.

The applicant then went abroad for treatment. Back in North-Macedonia, he had his name changed but it was not possible to change his officially registered gender.
The applicant claimed that this amounted to a violation of Article 8 ECHR and specially referred to the obligation of the state to respect a person's physical and psychological integrity. The Court found that there was indeed a violation. What is as yet unclear, and is thus an interesting point for reflection, is whether states are under an obligation to provide for a procedure for the recognition of a change of gender without the person having had an operation.

The author would like to thank ERA for the excellent organization of the conference and for the interesting range of topics discussed.