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Special Issue: Human Rights Violations in Global Supply Chains
Guest Editor: Martin Spitzer

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Human Rights, Global Supply Chains, and the Role of Tort

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Abstract: The author examines the difficult question of liability for human rights violations in global supply chains. After informing about the implications of the international aspect of such lawsuits, he analyses major concepts of liability in supply chains – clearly separating company law and tort law approaches from each other – and exemplifies the application of these concepts in current cases.

I Introduction

The Annual Conference on European Tort Law has long played the role of a legal seismograph, very sensitively anticipating major developments in tort law. The Special Session in 2019 did not have to be overly sensitive to detect commotion, though. It jumped right into a major ongoing discussion on 'Human Rights Violations in Global Supply Chains'.

II Human rights as a tort law issue

What sounds like a public law question at first – human rights – is actually tort law at its heart, because human rights, directed at the state, very often resemble absolutely protected rights, directed at possible tortfeasors.[1] Therefore, what it is all about is basically '"Killing and Injuring People and Ruining the Environment" in Global Supply Chains'. The fact that the international discussion was coined by the 'human rights' label should therefore not get in the way of tort lawyers realising that their attention is currently required in lawsuits all across Europe.

1 *C van Dam*, European Tort Law (2nd edn 2013) 222f; *G Wagner*, Haftung für Menschenrechtsverletzungen (2016) 80 Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 717, 752ff.

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But how are we responsible for human rights violations in global supply chains, for killing people in Pakistan,[2] injuring them in Bangladesh[3] or ruining their eco-system in India?[4]

A Outline of the problem

It just takes a short stroll in any European shopping street to immediately unmask some major culprits. Jeans for € 5.99 and t-shirts for € 1.99 per piece rank high on the 'Most Wanted' list of suspects. All of them come with 'Made in…' labels that identify production countries most people have never been to, and that could raise an eyebrow when it comes to production conditions.[5] Out of such prices there is rent to pay for the outlet; there are wages to pay for sales staff, and employees in European headquarters; there are costs for advertising; there are costs for shipping a t-shirt 25,000 km around the globe; there are costs for material; and on top of all of that, there is shareholder value to be created. So how much remains for production costs? How much remains for ensuring humane conditions of employment? And how much remains for the workers?[6]

This simple calculation should not mislead us to assume that it is low-price fashion only that can be a problem. Buying in high street boutiques is no guarantee against inhumane labour, either.[7] When it is usually said that about 2 % of the

2 Pakistan – cheap clothes, perilous conditions, European Center for Constitutional and Human Rights, <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_20190115.pdf> (viewed on 18 June 2019).

3 Sandblasted jeans: Should we give up distressed denim? BBC News, <https://www.bbc.com/news/magazine-15017790> (viewed on 14 July 2019).

4 H&M, Asda and Next supplier polluted rivers with chemicals linked to cancer and deaths, investigation finds, Independent, <https://www.independent.co.uk/news/business/news/hm-asda-next-supplier-leaks-cancer-causing-chemicals-factories-aditya-birla-india-a8232231.html> (viewed on 14 July 2019).

5 Share of the EU clothing market per county from 2006 to 2010, Statista, <https://www.statista.com/statistics/273234/shares-of-the-top-sourcing-countries-for-procurement-of-clothing-for-the-eu> (viewed on 8 July 2019).

6 Why are wages so low for garment workers in Bangladesh? The Guardian, <https://www.theguardian.com/business/2019/jan/21/low-wages-garment-workers-bangladesh-analysis> (viewed on 14 July 2019); cf Our love of cheap clothing has a hidden cost – it's time for a fashion revolution, World Economic Forum, <https://www.weforum.org/agenda/2016/04/our-love-of-cheap-clothing-has-a-hidden-cost-it-s-time-the-fashion-industry-changed/> (viewed on 14 July 2019).

7 Cf Revealed: the Romanian site where Louis Vuitton makes its Italian shoes, The Guardian, <https://www.theguardian.com/business/2017/jun/17/revealed-the-romanian-site-where-louis-vuitton-makes-its-italian-shoes> (viewed on 14 July 2019).

costs of a t-shirt are the wage of the worker,[8] we would be mistaken to believe that t-shirts ten or twenty times the price of budget textiles also create ten or twenty times the wages. Unfortunately, the price of clothes is not indicative of the fairness of the production circumstances.[9]

Everybody is aware of the fact that companies often choose to take their production to countries with the lowest production costs. That is what every beginner's course in business school teaches: cut costs and find a cheap supplier.

That is the essence of 'Made in China'. But the train obviously did not stop there. China is a reasonable choice for producing electronics, but it has long become far too expensive to produce clothes. For those, Bangladesh, Pakistan or Cambodia sound much better.[10]

However, the economically reasonable decision is not necessarily good for the environment or the rights of employees. In classical low cost production countries we see flagrant violations of environmental standards, and gross abuses of human rights, such as forced labour, and inhumane working conditions, falling short of even the most basic safety standards along the supply chain.[11]

It is therefore fair to say that sometimes European consumers enjoy low prices, while European companies enjoy high profits at someone else's expense. Workers suffer diseases like silicosis, a terminal lung condition, because they are working with sandblasters, but without any respiratory protection to give jeans a 'used look';[12] they suffer poisoning from toxic dyes used for clothes;[13] they are crushed when desolate factories collapse, like Rana Plaza in Bangladesh, killing 1,127 people, a tragedy that came to epitomise the problem.[14] While these exam-

8 Cf What does that $14 shirt really cost? Macleans, <https://www.macleans.ca/economy/business/what-does-that-14-shirt-really-cost/> (viewed on 8 July 2019).

9 Cf When Clothing Labels Are a Matter of Life or Death, Human Rights Watch, <https://www.hrw.org/news/2018/05/02/when-clothing-labels-are-matter-life-or-death> (viewed on 15 July 2019).

10 Is The 'Made In China' Clothing Label A Thing Of The Past? Forbes, <https://www.forbes.com/sites/kenrapoza/2015/10/11/is-the-made-in-china-clothing-label-a-thing-of-the-past/> (viewed on 4 July 2019).

11 Our love of cheap clothing has a hidden cost – it's time for a fashion revolution, World Economic Forum, <https://www.weforum.org/agenda/2016/04/our-love-of-cheap-clothing-has-a-hidden-cost-it-s-time-the-fashion-industry-changed/> (viewed on 14 July 2019).

12 Sandblasted jeans: Should we give up distressed denim? BBC News, <https://www.bbc.com/news/magazine-15017790> (viewed on 14 July 2019).

13 Hundreds of garment workers poisoned by factory water, AsiaNews, <http://www.asianews.it/news-en/Hundreds-of-garment-workers-poisoned-by-factory-water-28361.html> (viewed on 4 July 2019).

14 The Rana Plaza building collapse… 100 days on, International Labour Organization, <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_218693/lang–en/index.htm> (viewed on 4 July 2019).

ples draw on experiences from the textile industry, the problem is by no means limited to producing clothes. Oil leaks in drilling facilities and pipelines,[15] mining companies that join forces with the local police to suppress strikes and unions,[16] as well as factory workers killing themselves due to the terrible working conditions within the supply chain of global tech giants;[17] all these incidents prove that human rights violations are present in many industries.

B The task of tort law

When we hear about such outrageous conditions and learn that there is a connection to corporations domiciled in our home countries, we instinctively turn to law in order to avoid such externalities.[18] But do we have effective means to do so? In other words: Can we hold transnational corporations (TNCs) liable for what is happening in developing countries? Or at least: for what they let happen there? Are TNCs liable for harm caused to people by activities of their subsidiaries or independent suppliers somewhere in the world?

Such suits against TNCs in their home countries are the true battleground. Liability of the local subsidiary or supplier, and liability of the TNC in the victim's home country are of little interest. There are various reasons for this: adequate means of redress, adequate due process of law, and an adequate amount of assets to cover damages require plaintiffs to deal with such questions on our home turf, not theirs.[19] In addition to these legal factors, the high publicity of lawsuits against multinational corporations surely is a positive side effect.[20] High profile

15 Milieudefensie's lawsuit against Shell in Nigeria, Milieudefensie, <https://en.milieudefensie.nl/shell-in-nigeria> (viewed on 6 July 2019); China water contamination affects 2.4m after oil leak, BBC News, <https://www.bbc.com/news/world-asia-27002602> (viewed on 14 July 2019).

16 The British mine owners, the police and South Africa's day of blood, The Guardian, <https://www.theguardian.com/business/2013/nov/24/lonmin-mine-shooting-police> (viewed on 4 July 2019).

17 Life and death in Apple's forbidden city, The Guardian, <https://www.theguardian.com/technology/2017/jun/18/foxconn-life-death-forbidden-city-longhua-suicide-apple-iphone-brian-merchant-one-device-extract> (viewed on 4 July 2019).

18 *van Dam* (fn 1) 389.

19 *MP Weller/C Thomale*, Menschenrechtsklagen gegen deutsche Unternehmen (2017) 46 Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 509, 214f.

20 KiK lawsuit (re Pakistan), Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan> (viewed on 14 July 2019); Milieudefensie's lawsuit against Shell in Nigeria, Milieudefensie, <https://en.milieudefensie.nl/shell-in-nigeria> (viewed on 6 July 2019).

cases of corporate misconduct might therefore also serve an educational and deterring function.

The discussion so far has largely been driven by NGOs, and therefore focuses on the policy level.[21] It is fair to say that if it weren't for those NGOs, there would neither be a discussion nor would we see the lawsuits we see today, that are putting tort law to the test. For the taste of legal scholars, the discussion at times might seem to be a little too 'goal oriented'. However, NGOs cannot be faulted for arguing their case for comprehensive liability of TNCs. They want liability, no matter what, and no matter how. It is up to the legal academia to analyse the legal framework, to contribute a feasibility check to the discussion, and to put things into the contexts of the respective legal systems. Such input is particularly useful, because the questions at hand are very obviously extremely difficult.

III Internationality

One aspect is naturally the international nature of the disputes arising from human rights violations in global supply chains.

Any international lawsuit will have to deal with jurisdiction first. And jurisdiction will not be a major problem.[22] The Brussels Ia Regulation provides for a forum at the defendant's domicile in the EU (art 4 para 1 in conjunction with art 63 para 1).[23] This forum is available regardless of where the plaintiff comes from, and regardless of whether the actions under scrutiny were committed outside of the EU.[24] It thereby follows the ancient rule of *actor sequitur forum rei*, and establishes a forum without the reserve of *forum non conveniens*, which is em-

21 Milieudefensie's lawsuit against Shell in Nigeria, Milieudefensie, <https://en.milieudefensie.nl/shell-in-nigeria> (viewed on 6 July 2019); Blue Jeans Blue, IPG, <https://www.ipg-journal.de/schwerpunkt-des-monats/wirtschaft-und-menschenrechte/artikel/detail/blue-jeans-blues-1776/> (viewed on 8 July 2019); Pakistan – cheap clothes, perilous conditions, European Center for Constitutional and Human Rights, <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_20190115.pdf> (viewed on 18 June 2019).

22 *Wagner* (2016) 80 RabelsZ 717, 737 f.

23 *L Roorda/C Ryngaert*, Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction (2016) 80 RabelsZ 783, 803.

24 *M Stürner*, Die Rolle des Kollisionsrechts bei der Durchsetzung von Menschenrechten, in: Festschrift (FS) Coester-Waltjen (2015) 843, 844.

ployed by some national rules on civil procedure.[25] Therefore the forum at the defendant's domicile must not be second guessed.

What can be harder is establishing a joint forum for the TNC at its European domicile and the local tortfeasor. Such joint jurisdiction over defendants from non-EU Member States is not governed by the Brussels Regulation (art 8), but is dealt with under national law.[26]

The Royal Dutch Shell case had to deal with such a problem. Four Nigerian farmers filed a suit in the Netherlands against Royal Dutch Shell. They were claiming compensation from Shell for the damage suffered because of oil leakages from pipelines in Nigeria.[27]

In 2015 the court of appeals in the Netherlands decided that not only Shell could be taken to court in the Netherlands, but that the suit could be filed against Shell together with its Nigerian subsidiary.[28] This decision was based on Dutch civil procedure rules, but is noteworthy because it shows a possible way of gaining jurisdiction over third country subsidiaries or contractors by means of joint defendants.

Once an EU court is competent, the applicable law in tort cases is determined by Rome II,[29] which establishes the core rule to apply the law of the place where the damage occurred (art 4 para 1). When workers are injured, this will be the production country, like Bangladesh, Nigeria or Pakistan.[30]

The Royal Dutch Shell case proves to be interesting in this regard, too. The Dutch court sought to apply Nigerian law. When doing so, it took an interesting approach, though. First, it stated that it was not up to a Dutch court to start an entirely new legal development in Nigerian law. Then it noted that Nigerian law belongs to the common law family, and is therefore based on English law. And

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25 Ibid.

26 Art 8 only applies to defendants '*domiciled in a Member State*'; *L Roorda/C Ryngaert*, Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction (2016) 80 RabelsZ 783, 804; *L Enneking*, The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case (2014) 10 Utrecht Law Review 44f. Under Austrian law, international jurisdiction for claims against third-country defendants can be established under § 11 Z 1 ZPO (Code of Civil Procedure), § 93 JN (Act on Civil Jurisdiction), § 27a JN, if the requirements of these provisions are met; *DA Simotta* in: HW Fasching/A Konecny (eds), Kommentar zu den Zivilprozessgesetzen (2nd edn 2008) § 93 JN no 18.

27 For further information on this case, see the website of the Dutch NGO: Milieudefensie, <https://en.milieudefensie.nl/shell-in-nigeria> (viewed on 6 July 2019).

28 C/09/365482/HA ZA 10–1665 (Royal Dutch Shell), <http://jure.nl/ECLI:NL:GHDHA:2015:3586> (English translation, viewed on 6 July 2019);

29 Regulation (EC) No 864/2007 [2007] Official Journal (OJ) L 199/40.

30 *van Dam* (fn 1) 392.

therefore it was English case law that the Dutch court then turned to.[31] The court's assessment shows that taken as a whole, the on-going efforts in fundamental rights litigation are anything but fruitless and that the application of foreign law is not a dead end street, and does not mean that there is a lack of provisions allowing a parent company to be held liable.

The international aspect of our cases therefore turns out to be less troublesome than one would anticipate. That, however, is certainly only true from a strictly legal point of view, because the factual problems are obvious. Having a trial before the German *Landgericht* Dortmund, with plaintiffs from Pakistan, witnesses from Pakistan, expert witnesses from Pakistan, and the crime scene in Pakistan[32] is a nightmare for any trial judge. But that nightmare is not reserved to the cases at hand here, but is rather the inevitable essence of international litigation.

As a consequence, there can be litigation against European corporations in Europe, although foreign law is applicable.[33]

IV Concepts of liability

Regardless of the applicable law, some questions that every legal order has to address on a structural level can be identified. In doing so, the challenges are more or less the same everywhere. As several concepts that are not always clearly distinguished from each other are being brought forward, it is advisable to concentrate on highlighting the major points.

Three major questions are central to the current debate:

- Is it possible to lift the corporate veil of a European parent company and thereby establish liability by a company law approach?[34]
- Is it possible to attribute fault of a third country subsidiary or supplier to the European TNC by means of tort based vicarious liability?[35]

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31 C/09/365482/HA ZA 10–1665 (Royal Dutch Shell), <http://jure.nl/ECLI:NL:GHDHA:2015:3586> (English translation, viewed on 6 July 2019).

32 Landgericht (Higher Regional Court, LG) Dortmund 7 O 95/15; For further information on the case, see the case report of the European Center for Constitutional and Human Rights (ECCHR), <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_20190115.pdf> (viewed on 18 June 2019).

33 LG Dortmund 7 O 95/15.

34 *C Gerner-Beuerle/M Schillig* (eds), Comparative Company Law (2019) 884ff; *van Dam* (fn 1) 517.

35 *S Galand-Carval*, Comparative Report on Liability for Damage Caused by Others (Part 1), in: J Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003) 289, 289ff; *H Koziol*, Comparative Conclusions, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 8/250ff.

– Is it possible to establish liability as a consequence of wrongdoings by the TNC itself (or its representatives, respectively)?[36]

A Application in *Chandler v Cape*

One case that is always cited when it comes to parent company liability is the English case of *Chandler v Cape*.[37] Mr Chandler was employed by a subsidiary of Cape. During his employment, he was exposed to asbestos, causing a severe lung disease. As the subsidiary no longer existed, Mr Chandler brought a claim against the parent company, Cape, alleging the breach of a duty of care of Cape to him. Mr Chandler won. The court emphasised that it was not looking to 'pierce the corporate veil',[38] but it pointed out that Cape was not only in the asbestos business too (as well as its subsidiary), but that it also had superior knowledge about asbestos risks, that the subsidiary relied on that superior knowledge for worker protection, and that Cape knew about systematic failings of the factory where Mr Chandler worked.[39]

Those aspects established a duty of care to advise the subsidiary on what steps to take, and to ensure that those steps were taken.[40]

The *rationes decidendi* of the court are convincing. A closer look reveals that even though the case concerned the liability of a parent company, it was not decided as a case of liability of the parent for the wrongdoings of its subsidiary.[41] It is easy to see why the court chose that road.

The starting point is that Cape is a different legal entity than its subsidiary. It is shielded by its corporate veil from general liability for obligations of its subsidiary.[42] Therefore, the corporate veil is a major hindrance, and the question is whether we can and should tear it apart, or lift or at least pierce it a little by means of company law.[43] In other words: Can we and should we hold a parent company liable for what

36 *Gerner-Beuerle/Schillig* (fn 34) 869; *G Wagner*, Comparative Tort Law, in: M Reimann/R Zimmermann (eds), The Oxford Handbook of Comparative Law (2006) 1003, 2024ff; *Koziol* (fn 35) no 8/219ff.

37 *Chandler v Cape* [2012] England & Wales Court of Appeal, Civil Division (EWCA Civ) 525.

38 *Chandler v Cape* [2012] EWCA Civ 525, para 37. For the prerequisites for the possibility of 'piercing the corporate veil' see *van Dam* (fn 1) 517.

39 *Chandler v Cape* [2012] EWCA Civ 525, para 77ff.

40 *N Bueno*, Corporate liability for violations of the human right to just conditions of work in extraterritorial operations (2017) 21 The International Journal of Human Rights (IJHR) 565, 576; *Chandler v Cape* [2012] EWCA Civ 525, para 78.

41 *van Dam* (fn 1) 517f.

42 *Gerner-Beuerle/Schillig* (fn 34) 40f; *van Dam* (fn 1) 516.

43 *Gerner-Beuerle/Schillig* (fn 34) 884ff.

its subsidiaries do, just because they are the parent? This is where human rights organisations are headed.[44] And indeed, if one is not hindered by too many traditional doctrinal considerations, it seems appealing to hold a parent liable for the wrongdoings of its subsidiary. However, that is a big 'if', and caution is advised here, as the principles of limited liability and independent legal personality are pivotal to company law all over the world.[45] And even with less deference to company law, it seems doubtful whether it is a particularly promising approach to try to abolish what every legal order holds so dear. Therefore it is not surprising that the *Chandler* case did not explicitly seek to pull the veil away, but rather stuck to a very traditional company law rationale instead, and let tort law take over from there.

Liability under tort could arise due to fault on the side of Cape or due to fault on the side of its subsidiary, with the need to somehow attribute that fault to Cape.[46] Such attribution might sound like piercing the corporate veil as well, and it is sometimes not distinguished clearly enough, but this is the tort law based approach rather than the company law approach. It is a question of vicarious liability, which is obviously governed by markedly different principles in different legal orders.[47] The hurdles might be a little lower than ripping off the corporate veil, but in many legal systems attribution of fault by means of vicarious liability will be pretty much of an endeavour as well.[48] One question that does not receive the attention it would merit is whether and how contractual liability or quasi-contractual liability could play a role here.[49] There certainly is no lack of contracts; the only thing missing is a direct contractual relationship between the TNC and the victim. This does not need to be too discouraging; contracts with protective purposes for third parties are not unheard of,[50] neither is liability for self-binding declarations, eg about high workplace safety standards across the supply chain.[51]

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44 Cf Milieudefensie's lawsuit against Shell in Nigeria, Milieudefensie, <https://en.milieudefensie.nl/shell-in-nigeria> (viewed on 6 July 2019); cf Pakistan – cheap clothes, perilous conditions, European Center for Constitutional and Human Rights, <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_20190115.pdf> (viewed on 18 June 2019).

45 *Gerner-Beuerle/Schillig* (fn 34) 40 f.

46 *W van Gerven/J Lever/P Larouche*, Cases, Materials and Text on National, Supranational and International Tort Law (2000) 467; *Galand-Carval* (fn 35) 289, 289.

47 *Galand-Carval* (fn 35) 289, 289 ff; *Koziol* (fn 35) no 8/250 ff.

48 *van Gerven/Lever/Larouche* (fn 46) 514 ff.

49 Cf *van Gerven/Lever/Larouche* (fn 46) 32.

50 *van Gerven/Lever/Larouche* (fn 46) 71; *C Thomale/L Hübner*, Durchsetzung völkerrechtlicher Unternehmensverantwortung (2017) 72 JuristenZeitung (JZ) 385, 393; cf *H Koziol*, Österreichisches Haftpflichtrecht II (3rd edn 2018) 230 ff.

51 *P Rott/V Ulfbeck*, Supply Chain Liability of Multinational Corporations? (2015) 23 European Review of Private Law 415, 420; *Weller/Thomale* (2017) 46 ZGR 509, 221 f; *MP Weller/L Kaller/A Schulz*,

There was no need for such complicated reasoning in Cape. The facts supported liability for fault of Cape itself.[52] Such liability is grounded in well established principles. What is needed is wrongful conduct by the TNC – respectively their representatives – itself. Therefore, it all adds up to the question of what behaviour we expect from the TNC, which is nothing but a question about the standard of care or duties of care or unlawfulness or misconduct.[53]

Cape's awareness of the dangers of asbestos, and the poor safety measures taken by its subsidiary, combined with the fact that Cape's subsidiaries turned to the parent for guidance, establishes liability in a very traditional manner. It is therefore not surprising that the Dutch court in Royal Dutch Shell not only turned to English case law in general when it discussed liability of the European parent company, but to *Chandler v Cape* in particular.[54]

B Limits of Chandler: *Thompson v Renwick*

It does not always work that way, though, as another asbestos case, *Thompson v Renwick* shows, where *Chandler*-like-liability was dismissed.[55] The defendant in this case was merely a holding company, with no superior asbestos expertise that would have enabled it to protect the employees of its subsidiaries. In *Chandler*, the parent company had actually employed a group medical adviser with respon-

Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland (2016) 216 Archiv für die civilistische Praxis (AcP) 387, 410ff; *T Voland*, Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht (2015) 70 Betriebs-Berater (BB) 67, 68.

52 *Chandler v Cape* [2012] EWCA Civ 525, para 80 ('In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.'); *Gerner-Beuerle/Schillig* (fn 34) 869.

53 *Wagner* (fn 36) 1003, 2024ff; *Koziol* (fn 35) no 8/219ff; *K Horsey/E Rackley*, Tort Law (4th edn 2015) 39f, 60ff and 226; *E Finch/S Fafinski*, Tort Law (5th edn 2015) 5ff and 34.

54 C/09/365482/HA ZA 10–1665 (Royal Dutch Shell), para 3.2 ('As Nigerian law as a common law system is based on English law, and common law, especially English case-law are important sources of Nigerian law, a basis could also be found in decisions such as in the case of Chandler v Cape [2012] EWCA Civ 525'), <http://jure.nl/ECLI:NL:GHDHA:2015:3586> (English translation, viewed on 6 July 2019).

55 *Bueno* (2017) 21 IJHR 565, 576; *Thomson v The Renwick Group Plc* [2014] EWCA Civ 635.

sibility for the health of all employees within the group. It is for this reason that the court regards *Thompson* as 'far removed' from *Chandler*.[56]

C Driving forces of liability

What can we learn from these cases? The more a TNC knows, the more influence it has, the more it sees it coming, the higher the standard of care, and the TNC's obligation to not remain passive. Knowledge and influence can trigger responsibility.[57]

This should be borne in mind when thinking about the current French legislation,[58] and the most famous supply chain case, the KiK case.[59]

D La loi rana plaza

That knowledge and influence can trigger responsibility is a crucial point when analysing the French law, *La loi rana plaza*,[60] named after a terrible factory collapse. This Law provides for mandatory human rights due diligence in French companies with more than 10,000 employees.

The duty – usually referred to as a duty of vigilance – is explicitly extended to directly and indirectly controlled subsidiaries, suppliers and subcontractors. The practical implementation takes place via a so-called duty of care plan, which is the result of a risk management and controlling system. This system is intended to prevent harm caused by infringement of environmental and fundamental rights down the supply chain. The implementation of the duty of care plan is legally enforceable. Infringements may be subject to heavy fines, and – and this

56 *Thomson v The Renwick Group Plc* [2014] EWCA Civ 635, para 29.

57 *Bueno* (2017) 21 IJHR 565, 576; *Gerner-Beuerle/Schillig* (fn 34) 869ff; *T Thiede/AJ Bell*, Klagen clever kaufen! (2017) 63 Recht der internationalen Wirtschaft (RIW) 263, 271.

58 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, CMS Francis Lefebvre Avocats, <https://cms.law/fr/FRA/Publication/Loi-relative-au-devoir-de-vigilance-des-societes-meres-et-des-entreprises-donneuses-d-ordre> (viewed on 8 July 2019).

59 LG Dortmund 7 O 95/15.

60 *I Barsan*, Corporate Accountability: Non-Financial Disclosure and Liability – A French Perspective (2017) 14 European Company and Financial Law Review (ECFR) 399, 421ff; Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, CMS Francis Lefebvre Avocats, <https://cms.law/fr/FRA/Publication/Loi-relative-au-devoir-de-vigilance-des-societes-meres-et-des-entreprises-donneuses-d-ordre> (viewed on 8 July 2019).

is relevant for us of course – victims of fundamental rights violations are entitled to sue.

E KiK case

Such a right to sue presents itself as a solution for the heavily publicised KiK case.[61] In 2012, 258 people were killed and many other severely injured in a fire disaster in a garment factory in Pakistan.

The Pakistani factory had almost exclusively produced for KiK and the business ties between KiK and the Pakistani factory were particularly strong and particularly close. Furthermore, KiK had repeatedly made assurances about regular auditing visits to all their suppliers and about the degree of control KiK exerted. This is where the idea comes into play that knowledge and influence could trigger responsibility.

In 2015 four Pakistani plaintiffs sued KiK at its German domicile in Dortmund for damages. The plaintiffs were supported by the European Center for Constitutional and Human Rights (ECCHR) in Berlin and asserted joint responsibility of KiK for the fire safety deficiencies in the Pakistani factory. Therefore KiK should be liable for the damage resulting from the fire disaster.

The case was dealt with under Pakistani law, and expert witnesses from England were heard regarding the legal merits of the case, which resembles the steps the Dutch court had taken in the Shell case. The KiK case seemed to be unusually strong. But in the end the court denied granting damages, because in its view the statute of limitation had expired.

V Tentative conclusions

Where does all of that leave us?

Chandler and *La loi rana plaza* show that there are ongoing efforts in the field of fundamental rights litigation. The growing number of lawyers and organisations interested in this field will certainly lead to more litigation in the future. At the same time, we see an increasing number of legislative initiatives. France has already passed its law; however, the French legislator did not choose to make the

61 LG Dortmund 7 O 95/15; for further information on the case, see the case report of the ECCHR, <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_20190115.pdf> (viewed on 18 June 2019).

law an overriding mandatory provision with all the obvious flaws of this approach.[62] There are various other legislative initiatives, in part from parliaments, in part from NGOs and civil society,[63] as in Switzerland or Germany.[64]

On a policy level, NGOs are calling for international legislation.[65] But if we leave non-binding soft law such as the UN Guiding Principles on Business and Human Rights aside, what would be needed, and what NGOs push for very hard, is comprehensive EU legislation.[66] However, we must not forget that the EU does not have a general legislative competence,[67] and the basis for a tort of human rights violations in global supply chains is not the strongest.

It is all but certain whether the internal market competence would justify legislative action. The same holds true for art 81 TFEU on judicial cooperation in civil matters, as this competence is usually relied on for international private and international civil procedure law.

It is striking that the strongest trace of human rights in business so far relies on art 50 TFEU, the freedom of establishment, and therefore a company law competence. It can be found in the CSR Directive or Non-Financial-Reporting Directive,[68] which obliges big corporations to disclose information on environmental, social and employee-related fundamental rights matters.

This is quite remarkable, as this leads to the 'knowing and showing' of possible fundamental rights infringements. And even though this Directive is certainly not intended to serve as grounds for liability, we have already seen that knowledge and influence can trigger responsibility.

Therefore, ironically, company law providing for mandatory human rights due diligence (mHRDD) in combination with national tort laws might be the best chance to achieve accountability.

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62 Wirtschaft und Menschenrechte: die 'Loi Rana Plaza' vor dem französischen Conseil constitutionnel, Verfassungsblog, <https://verfassungsblog.de/wirtschaft-und-menschenrechte-die-loi-rana-plaza-vor-dem-franzoesischen-conseil-constitutionnel/> (viewed on 8 July 2019); *Barsan* (2017) 14 ECFR 399, 431ff.

63 Eidgenössische Volksinitiative ‚Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt', BBl 2015, 3245.

64 *P Kroker*, Menschenrechte in der Compliance (2015) 8 Corporate Compliance Zeitschrift (CCZ) 120, 125 with further reference.

65 Cf *Voland*t (2015) 70 Betriebs-Berater (BB) 67, 75.

66 *Voland* (2015) 70 BB 67, 70ff.

67 Art 5 para 2 TEU.

68 Directive 2014/95/EU.