Rabels Zeitschrift/The Rabel Journal

Max-Planck-Institut
für ausländisches und internationales Privatrecht

Rabels Zeitschrift

für ausländisches und internationales Privatrecht

The Rabel Journal

of Comparative and International Private Law

RabelsZ 80/4 (2016) 717–998

Band 80 (2016) Heft 4 (Oktober)

Rabels Zeitschrift
für ausländisches und internationales Privatrecht

The Rabel Journal
of Comparative and International Private Law

Herausgegeben in Gemeinschaft mit
Ulrich Drobnig, Bernhard Großfeld, Klaus J. Hopt, Hein Kötz,
Ernst-Joachim Mestmäcker, Wernhard Möschel

von
Jürgen Basedow, Holger Fleischer und Reinhard Zimmermann
Direktoren am Institut

Redaktion: Max-Planck-Institut für ausländisches und internationales Privatrecht,
Mittelweg 187, D-20148 Hamburg
Telefon 040/41900-234 – Telefax 040/41900-288

Redaktionsausschuss: Christian Eckl, Jens Kleinschmidt, Christoph Kumpan,
Klaus Ulrich Schmolke, Kurt Siehr, Wolfgang Wurmnest

Redaktionsassistenz: Sebastian Gößling, Sophie Knebel

Manuskripte: **rabelsz@mpipriv.de**

All Rabel Journal articles are subject to peer review by at least two experts familiar with their subject matter. For more information on the submission procedure and for the style sheet in English and German please visit <www.mohr.de/rabelsz>.

Erscheinungsart: Bandweise, pro Jahr ein Band zu 4 Heften mit je etwa 225 Seiten. Empfohlener Verkaufspreis pro Band: € 294,– für Institutionen einschließlich IP-gesteuertem, elektronischem Zugang mit Hyperlinks für eine mittelgroße Institution (bis zu 20.000 Nutzer). Größere Institutionen (über 20.000 Nutzer) bitten wir um Einholung eines Preisangebots direkt beim Verlag. Kontakt: **elke.brixner@mohr.de.** Abonnement für Privatpersonen: € 149,–, einschließlich elektronischem Zugang über Benutzername und Passwort. *Einzelheftpreis:* € 81,–, jeweils zuzüglich Versandkosten. Abbestellungen sind nur zum Jahresende für das folgende Jahr möglich. Die Abbestellung muss bis spätestens 30. November erfolgen. Eine Einbanddecke ist zum Preis von € 18,– lieferbar. *Verlag:* Mohr Siebeck GmbH & Co. KG, Postfach 2040, 72010 Tübingen. *Vertrieb:* über den Buchhandel.

Satz und Druck: Gulde-Druck, Tübingen.
ISSN 0033-7250

Dieser Ausgabe der RabelsZ liegt ein Prospekt des Verlags C.H. Beck, München und unseres Verlags bei.

Inhalt dieses Heftes

Aufsätze

Literatur

Buchbesprechungen

Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction

By Lucas Roorda and Cedric Ryngaert, Utrecht*

Contents

* The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230 – UNIJURIS) and the Dutch Organization for Scientific Research (NWO) under the VIDI Scheme (No. 016.135.322). This publication took place in the context of the Utrecht Centre for Accountability and Liability Law (UCALL). The authors thank Ben Thompson and Raluca Racasan for their assistance.

RabelsZ 80, 783–816 – DOI: 10.1628/003372516X14697686262600
ISSN 0033-7250 – © 2016 Mohr Siebeck

I. Introduction

In the international debate over the human rights impact of transnational corporations' activities, access to judicial remedies for corporate misbehaviour has acquired a rather prominent place. Operational Principle 26 of the influential UN Guiding Principles on Business and Human Rights (2011) provides that "[s]tates should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy".[1]

In the classic conception, the "natural" states taking such steps are in principle the corporation's host state (the state where the corporation is active and the alleged violation took place)[2] and its home state (the state where the corporation is incorporated). These states may exercise jurisdiction on the basis of the well-recognized territoriality and domicile principles.[3] However, for various reasons, victims of human rights abuses involving corporations may not have access to these natural fora, e.g., because the judicial system of the host state is not functioning properly, or because home states are shielding their businesses from responsibility. This much is recognized by the Guiding Principles, which provide in the Commentary to the aforementioned Principle 26 that legal barriers could arise, in particular, "where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim".[4] In such situations, victims of corporate misbehaviour risk being denied justice (unless bystander states, as an exception, offer a forum to hear the claim).

This article examines the opportunities offered by such an "exceptional" forum. In particular, it will ascertain the circumstances under which by-

[1] UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UN Guiding Principles on Business and Human Rights), UN Doc. A/HRC/17/31 (21 March 2011).

[2] This example refers to situations where a corporation incorporated in one state directly operates in another state. In practice, corporate groups are often divided into a parent company, an independently incorporated subsidiary, and local contractors.

[3] In practice, jurisdictional constructions of territoriality or domicile will often be more complicated. A forum could rely on territoriality where a decision taken within the forum state's territory has caused harmful effects elsewhere. Courts may also uphold jurisdiction over a parent corporation incorporated in the forum with respect to violations committed by the parent's foreign subsidiary, on the basis that the parent may have a duty of care *vis-à-vis* (victims of) its foreign subsidiary. See, e.g., *Chandler v. Cape plc* [2012] EWCA Civ 525 (English Court of Appeal holding that a parent company may owe a duty of care towards the employees of its subsidiaries, including its foreign ones); *Choc v. Hudbay Minerals Inc.*, [2013] ONSC 1414 (Ontario Supreme Court declaring admissible a suit by indigenous Guatemalan plaintiffs against Ontario-based mining corporation Hudbay Minerals with respect to abuses allegedly committed by Hudbay's subsidiary in Guatemala).

[4] UN Guiding Principles (n. 1) Commentary to Operational Principle 26.

stander state courts can exercise jurisdiction in civil matters involving corporate human rights violations with a view to averting a denial of justice for the victims. "Bystander states" are defined here as states other than the home or host state. "Exceptional jurisdiction" is defined as jurisdiction that is not grounded on the traditional principles of jurisdiction, in particular territoriality and domicile/personality. When courts are exercising exceptional tort jurisdiction with a view to preventing a denial of justice, in the absence of a (strong) nexus between the claim (or plaintiff or defendant) and the forum, such courts may be considered to offer a subsidiary forum of necessity (*forum necessitatis*).[5] Such a forum of necessity is not without problems. While, on the one hand, it may provide access to justice for victims of human rights abuses, it also creates the risk of forum shopping and potentially increases uncertainty for corporate defendants. Adopting forum of necessity thus requires striking a delicate balance between the interests of plaintiffs, defendants and the states asserting necessity jurisdiction.

The legal category of forum of necessity is not an unknown quantity in domestic legal systems. A 2007 EU-commissioned study identified ten EU Member States offering such a forum.[6] The principal investigator of that study even went as far as stating that necessity-based jurisdiction was a "general principle of public international law".[7] That may appear to be somewhat exaggerated. Still, such jurisdiction seems to exist in various other countries from diverse legal systems, and also outside Europe.[8] The modest popularity of the concept may however mask local differentiations. While a considerable number of states may have forum of necessity on their statutory books or

[5] Compare *Lamborghini (Canada) Inc. v. Automobili Lamborghini SPA*, [1997] RJQ 58 (CA), para. 74 (discussing the *ratio legis* of the Québec *forum of necessity* clause, and pointing out that *forum of necessity* creates subsidiarity jurisdiction for the forum states with a view to preventing a denial of justice rather than just accommodating one of the parties). Note that "exceptional" jurisdiction could also be established for reasons of procedural economy rather than averting a denial of justice. In that case, it would be misguided to speak of forum of necessity, however. An example is offered by the doctrine of connected claims, pursuant to which jurisdiction obtains if a claim against person A is connected to – or is essentially the same as – another claim brought against person B over whom jurisdiction could duly be established on the basis of an accepted jurisdictional principle, e.g. territoriality or domicile (see, e.g., Art. 7 *Wetboek van Burgerlijke Rechtsvordering* (Rv.)). This will typically happen in parent-subsidiary relationships, where, in respect of the same factual scenario, the subsidiary is sued for committing the wrongful act, or allowing it to be committed, and the parent is sued for failing in its supervisory duties. See, for an example, Rechtbank Den Haag 30 January 2013, ECLI:NL:RBDHA:2013:BY9854 *(Akpan v. Dutch Shell plc)*.

[6] *Arnaud Nuyts*, Study on Residual Jurisdiction (3 September 2007): Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>.

[7] *Nuyts*, Study on Residual Jurisdiction (previous n.) 64.

[8] *Chilenye Nwapi*, A Necessary Look at Necessity Jurisdiction, U.B.C.L.Rev. 47 (2014) 211, 225 (who seconds Nuyts's international legal characterization of forum of necessity).

apply it in practice, the exact scope and conditions of application of forum of necessity remain underdetermined. Most importantly, some states require a *connection* with the forum in order to trigger necessity-based jurisdiction,[9] while others (in fact a minority) do not require any connection.[10]

It is not the aim of this article to flesh out in detail the nature, scope, and conditions of the application of forum of necessity in various jurisdictions. Others have done so before, and have done so well.[11] Rather, we want to draw attention to the potential of this doctrine as a tool offering access to justice for victims of *extraterritorial human rights violations* committed by *corporations*, especially in fora based in the European Union and the Council of Europe zones. In the Council of Europe (CoE), a lively debate regarding the remedies that CoE Member States should provide to implement the UN Guiding Principles is currently taking place. In this respect, the CoE's Drafting Group on Human Rights and Business recently highlighted "the exercise of jurisdiction by member states, including extraterritorial jurisdiction" and "obstacles to justice and remedies for victims of business-related human rights abuses" as particular issues to be addressed by the Council.[12] Furthermore, the European Union (EU) has recently adopted a new regulation on jurisdiction in civil and commercial matters, known as the recast Brussels I Regulation.[13] This Regulation, while not being specifically geared towards providing a remedy for extraterritorial business and human rights violations, sets out principles of adjudicatory jurisdiction in the EU that are

[9] E.g., Art. 3 *Loi fédérale sur le droit international privé* (LDIP) of 18 December 1987: "Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses *du lieu avec lequel la cause présente un lien suffisant* sont compétentes" (emphasis added); Art. 3136 Civil Code of Quebec, SQ 1991, c. 64: "Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, *if the dispute has a sufficient connection with Québec*, where proceedings cannot possibly be instituted outside of Québec or where the institution of such proceedings outside Québec cannot reasonably be required" (emphasis added).

[10] E.g., Art. 9 Rv.; Section 6 Court Jurisdiction and Proceedings Transfer Act 1994 (Uniform Law Conference of Canada, Proceedings of the Seventy-Sixth Annual Meeting, 1994), discussed in more detail below. The Dutch approach is nuanced, however: under Art. 9 Rv. a connection is not required where legal proceedings outside the Netherlands prove impossible, but a connection *is* required where it is unacceptable to require that the plaintiff initiate proceedings in a foreign jurisdiction.

[11] See notably *Nwapi*, U.B.C.L.Rev. 47 (2014) 211.

[12] Council of Europe, Drafting Group on Human Rights and Business (16 October 2013): Meeting Report, CDDH-CORP(2013)R1, available at <http://www.coe.int>.

[13] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast Regulation), OJ 2012 L 351/1. This Regulation replaced Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation, OJ 2001 L 12/1) on its implementation in 2015.

obviously relevant for business and human rights litigation. These principles form the legal framework that plaintiffs have to factor in when considering bringing claims in an EU Member State forum. The Regulation is exhaustive, meaning that in cases where it applies, it supersedes all domestic private international law rules on jurisdiction and enforcement. Nonetheless, the Brussels I regime only applies to cases brought against defendants domiciled in the EU;[14] its rules do not apply where the defendant is domiciled outside of an EU Member State, and thus outside of the territorial scope of the Brussels I Regulation.[15]

For our purposes, the recasting process of the Brussels I Regulation is of particular relevance, as the European Commission's proposal for the new Regulation contained a forum of necessity clause.[16] This clause was omitted from the version proposed by the European Council and adopted by the European Parliament, possibly because some states opposed the *obligatory* terms in the proposal for forum of necessity jurisdiction. However, this need not mean that states oppose forum of necessity as a *permissive* principle of adjudicatory jurisdiction under international law.[17] What it means for the *future* of the principle in the EU, and more broadly elsewhere, in particular the CoE, in respect of business and human rights litigation, remains to be seen. Clarification of the impact of discussions going on in the CoE and the EU on the further development of forum of necessity lies at the heart of this article.

This article does not limit itself to a European perspective on forum of necessity. As there are few relevant cases in Europe and the doctrine is generally in its infancy, it is pertinent to compare the European experience with the experience of a jurisdiction where forum of necessity has played a more prominent role, also in (business and) human rights cases: Canada. This comparison allows us to identify best practices that the EU, the CoE, and individual European (Member) States may want to draw on when further developing their versions of forum of necessity. While we are aware of the differences in legal culture between Canada and Europe, Canada does have both a common law and a civil law (Québec) tradition, not unlike the legal system of Europe, which unites the English common law and continental-European civil law tradition.

---

[14] Art. 4(1) Brussels I recast Regulation; Art. 2 Brussels I Regulation.

[15] Art. 6(1) Brussels I recast Regulation; Art. 4(1) Brussels I Regulation.

[16] Art. 26 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2013) 554 final – 2013/0268 (COD), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013PC0554>.

[17] *Chilenye Nwapi*, Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor, Utrecht J.Int'l Eur.L. 30 (2014) 24, 33.

In terms of structure, in Section II., we give an overview of the application of forum of necessity in the domestic legal orders in Europe and Canada. We identify commonalities as well as challenges faced in the various jurisdictions, with particular emphasis on the potential of forum of necessity in business and human rights claims. Considering the nature of such claims and given the need, in light of the UN Guiding Principles, to provide victims of corporate human rights violations with access to justice, we take the view that strict requirements conditioning the application of forum of necessity (if forum of necessity exists at all in relevant jurisdictions) may have to be abandoned. In Section III., we inquire whether progress on this count can be expected from normative developments at the level of the EU and the CoE. In Section IV., we provide a conclusion, suggesting that forum of necessity may indeed play a more prominent role in business and human rights litigation, followed by a summary of the major results in Section V.

II. Forum of necessity in domestic legal orders

Forum of necessity exists as a separate jurisdictional category in a considerable number of domestic legal orders. In Europe (*infra* II.1.) and Canada (*infra* II.2.) it is rather widespread, at least in legal codes. This does not mean, however, that forum of necessity is often applied in practice. It is not. Even less so in business and human rights cases, where a victim's right of access to justice is crucial. As Section II.3. demonstrates, restrictive conditions pertaining to the application of forum of necessity have resulted in jurisdiction on this basis only rarely being established.

1. European states

As of yet, in about ten EU Member States courts may exercise jurisdiction over transnational civil claims on the basis of some form of forum of necessity jurisdiction. Forum of necessity is a relatively new doctrine, which entered the domestic civil codes of the first adopting Member States in the late 1980s. It quickly gained more ground up to the point that the aforementioned study by Nuyts could qualify it as an emerging principle of international law.[18] Again, this may be overstating it slightly, but the principles on which the doctrine is based are well established.

Most states consider forum of necessity jurisdiction to have been born out of Article 6(1) of the European Convention on Human Rights (ECHR), which provides that "[i]n the determination of his civil rights and obliga-

[18] See *Nuyts*, Study on Residual Jurisdiction (n. 6) 83.

tions or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." While not explicitly present in the text, the European Court of Human Rights (ECtHR) has taken Article 6 ECHR to imply a right to access to court, in civil and criminal cases alike, that is both effective and practical.[19] This implies that a refusal to establish jurisdiction in cases where no other court is competent, or the case cannot reasonably be brought in another court, could amount to denial of the right of access to court.[20] In such cases, some states recognize that the court seized of the procedure can offer a forum of necessity to the plaintiff, in order to prevent a denial of justice.[21]

Forum of necessity in EU Member States can be based on case law or statute. In some countries, the doctrine was already developed in case law before statutory adoption. In such cases, formal adoption by the legislature can reveal much about how the doctrine is perceived. One example is the Netherlands, where a forum of necessity doctrine was quite well developed in the case law before its statutory adoption in 2002.[22] The way Dutch courts treated the doctrine was largely tied to the doctrine of *forum non conveniens*.[23] In practice, this meant that forum of necessity would function as a bottom line for *forum non conveniens*, preventing a court from dismissing the case on this basis if doing so would leave the plaintiff without an appropriate forum, provided at least that the case had a sufficient connection with the Netherlands.[24] In the course of the revision of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in 2002, the Dutch legislator severed the connection between *forum non conveniens* and forum of necessity and adopted a statutory forum of necessity provision in the Code. Its Articles 9b and 9c establish forum of necessity as an independent counterweight to the

[19] See also ECtHR 12 February 1975 – no. 4451/70 *(Golder v. United Kingdom)*, [1975] ECHR 1. In ECtHR 14 December 2006 – no. 1398/03 *(Markovic and Others v. Italy)*, [2006] ECHR 1141, the Court also discussed whether Art. 6(1) also applies to cases where the plaintiff is only incidentally present in the forum, but where it may have a civil claim under the forum's domestic law.

[20] See below III. 2. for a more extensive discussion on access to court under the European Convention.

[21] *Luc Strikwerda*, Inleiding tot het Nederlandse Internationaal Privaatrecht (2012) 234–235. See more specifically in the Dutch context: Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, Kamerstukken II (1999/2000) 26 855, no. 3: "Men kan iemand niet de toegang tot een rechter algeheel ontzeggen; dat zou waarschijnlijk ook op gespannen voet staan met artikel 6 EVRM." (One cannot deny another access to court altogether; this would probably run counter to Article 6 ECHR.)

[22] *Strikwerda*, Inleiding (previous n.) 218–219.

[23] *Fatih Ibili*, Gewogen rechtsmacht in het IPR: Over forum (non) conveniens en forum necessitatis (2007) 108.

[24] *Ibili*, Gewogen rechtsmacht in het IPR (previous n.). See also Hoge Raad (HR) 26 October 1984, [1985] NJ 696.

strict provisions of "conventional" grounds for jurisdiction. Ibili notes in this context that it may be strange to label forum of necessity as an exceptional grant of jurisdiction, since with the adoption of Articles 9b and 9c it has become a standard option for Dutch civil courts.[25]

Other European states have similar provisions on their books. Switzerland, one of the earliest adopters of a statutory forum of necessity provision, employs a clause in its Federal Code of Private International Law that reads: "If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction."[26] Belgium's Private International Law Code contains a similarly worded provision in its Article 11.[27] Among the states that have adopted the doctrine in their case law, France and Germany stand out. The French discussion is relevant because it points to doctrinal roots not just in Article 6(1) ECHR but also to the prohibition of denial of justice as a general principle of international law.[28]

While the issue of the applicability of these rules to human rights litigation will be discussed more extensively later, it is important to emphasize here that, thus far, no domestic cases arising in EU Member States under forum of necessity have specifically concerned issues of business and human rights. A few human rights cases have been filed under forum of necessity, but they all concern complaints against individuals rather than corporations.[29] Property law[30] and contract law[31] are amongst the areas in which successful use of the forum of necessity doctrine has been made.

---

[25] *Ibili*, Gewogen rechtsmacht in het IPR (n. 23).

[26] Art. 3 *Bundesgesetz über das Internationale Privatrecht* (IPRG) of 18 December 1987, SR 291; English translation by Andreas Bucher, available at <www.andreasbucher-law.ch>.

[27] Art. 11 *Wet houdende het Wetboek van Internationaal Privaatrecht* of 16 July 2004: "Onverminderd de andere bepalingen van deze wet zijn de Belgische rechters uitzonderlijk bevoegd wanneer de zaak nauwe banden met België heeft en een procedure in het buitenland onmogelijk blijkt of het onredelijk zou zijn te eisen dat de vordering in het buitenland wordt ingesteld."

[28] *Nuyts*, Study on Residual Jurisdiction (n. 6) 83. See also *Stephanie Redfield*, Searching for Justice: The Use of Forum Necessitatis, Geo. J. Int'l L. 45 (2014) 893, 911–912.

[29] See Rechtbank Den Haag 21 March 2012, ECLI:NL:RBSGR:2012:BV9748.

[30] Obergericht Kanton Zürich 26 February 1992, ZR 90 (1991) 289, n. 89.

[31] See Rechtbank Rotterdam 8 June 2011, ECLI:NL:RBZUT:2008:BC9336 and Gerechtshof Den Haag 30 November 2010, ECLI:NL:GHSGR:2010:BO6529.

2. Canada

A similar picture emerges in Canada, where forum of necessity has come to play a somewhat larger, but still modest, role in human rights litigation, including against corporations.[32] Forum of necessity in Canada finds its normative basis in Section 6 of the Uniform Law Conference of Canada's (ULCC) Model Court Jurisdiction and Proceedings Transfer Act (1994), which has been implemented by a number of English-speaking Canadian provinces and territories,[33] and provides as follows:

> "A court that […] lacks territorial competence in a proceeding may hear the proceeding […] if it considers that
>
> (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or
>
> (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required."

It is striking that this provision does *not* require that the dispute have a sufficient connection with the forum. This stands in contradistinction to, for instance, the forum of necessity provisions in the Swiss Code of Private International Law or the Québec Code of Civil Procedure (see below), which all require a sufficient connection with the forum before jurisdiction can be exercised on a necessity basis.[34]

Like in Europe, forum of necessity is only applied in Canada on an exceptional basis, and has been invoked successfully only twice.[35] None of the cases heard under the Canadian common law (unlike under Québec's civil law – see below) has pertained specifically to business and human rights claims, although one of them (*Bouzari v. Bahremani*) involved a state torture claim and could thus have some precedential value for our research object. In *Bouzari*, the court established Ontario as a forum of necessity under the common law on the ground that there was "no reasonable basis upon which [the plaintiffs could be] required to commence the action in a foreign juris-

---

[32] On a comparative note, in the United States, *forum of necessity* does not exist as a separate category of jurisdiction. See *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408, 419 n. 13 (1984): "We decline to consider adoption of a doctrine of jurisdiction by necessity – a potentially far-reaching modification of existing law – in the absence of a more complete record."

[33] Section 6 Court Jurisdiction and Proceedings Transfer Act 2000, c. 7; s. 6 Court Jurisdiction and Proceedings Transfer Act, S.N.S. (Nova Scotia) 2003, c. 2; s. 6 Court Jurisdiction and Proceedings Transfer Act, S.B.C. (British Columbia) 2003, c. 28.

[34] One may note that Art. 9(b) Rv. also does not require a connection with the forum, but this is only the case where there is an absolute impossibility of bringing the claim elsewhere.

[35] *Bouzari v. Bahremani*, [2011] O.J. No. 5009; *Josephson v. Balfour*, [2010] BCSC 603, 10 BCLR (5th) 369.

diction, particularly, the state where the torture took place, Iran".[36] It is of note that the only nexus of this case with Canada was the Iranian victim's presence there, the act of torture being committed against him by a fellow Iranian in Iran. Moreover, the court did not place the burden of establishing that Ontario was a necessary forum on the plaintiff, but instead required that the *defendant* establish that another forum was more appropriate, applying an analysis akin to the *forum non conveniens* doctrine.[37] In other cases, plaintiffs relying on forum of necessity were unsuccessful.[38] The Canadian courts typically dismissed cases on the ground that the plaintiff did not discharge the burden of establishing that no relief could be sought in a foreign jurisdiction.[39] In this respect, the courts usually did not accept that practical difficulties, inconvenience,[40] or the inability to obtain counsel abroad were sufficient to establish a forum of necessity in Canada.[41]

Nonetheless, as defendant *businesses* are often incorporated in countries with developed legal systems, plaintiffs are bound to face an uphill struggle in convincing the court of their inability to obtain counsel abroad. *Anvil Mining v. ACCI*, before the Québec Court of Appeal in 2012, is a case in point here.[42] *Anvil* is the leading – and perhaps only – transnational business and human rights case arising in Québec, a province of Canada with its own French law-inspired legal system. Given its salience, it warrants a somewhat more extensive discussion. The question of whether the Québecan courts had jurisdiction in *Anvil* revolved partly around the issue of forum of necessity and partly around whether the defendant corporation had an establishment in Canada, and whether the dispute related to its activities in Québec.[43]

---

[36] *Bouzari v. Bahremani*, [2011] O.J. No. 5009, para. 5. Note that the plaintiff had earlier sued the state of Iran in an Ontario court regarding the same factual scenario. The court held however that the suit was barred by the State Immunity Act, so that it did not have to address the jurisdictional question. See *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R. (3d) 675 (CA). Sharpe J.A. pointed out, however, in *Van Breda v. Village Resorts Ltd.*, [2010] ONCA 84, 98 O.R. (3d) 721, para. 54, that the court in the latter case was hinting at the application of the *forum of necessity* doctrine. This reversal of the burden of proof only pertained to the choice of England as another forum, since the defendant initially did not take issue with Ontario as a forum of necessity.

[37] *Bouzari v. Bahremani* [2013] ONSC 6337.

[38] See lately *West Van Inc. v. Daisley*, [2014] ONCA 232, giving an overview of previous cases at paras. 34–37. See for a discussion of pre-2009 cases: *Janet Walker*, Muscutt Misplaced – The Future of Forum of necessity Jurisdiction in Canada, Can.Bus.L.J. 48 (2009) 135.

[39] *West Van Inc. v. Daisley*, [2014] ONCA 232, para. 39.

[40] *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (CA) (holding that the cost and inconvenience of a trial in Italy is insufficient to establish Québec as a *forum of necessity*). Note that the latter case was based on the provision of the Civil Code of Québec which requires a sufficient connection with Québec for forum of necessity to apply.

[41] *West Van Inc. v. Daisley*, [2014] ONCA 232, para. 41; *Van Kessel v. Orsulak*, [2010] ONSC 6919; *Elfarnawani v. International Olympic Committee*, [2011] ONSC 6784.

[42] *Anvil Mining Ltd. v. Association canadienne contre l'impunité,* [2012] QCCA 117.

[43] *Forum of necessity* is governed by Art. 3136 Civil Code of Québec, whereas establish-

Before the court was the question of whether Québec, rather than the Democratic Republic of Congo (DRC) or Australia, should provide a forum regarding a claim brought against the company Anvil, which was incorporated under the laws of the Northwest Territories of Canada, headquartered in Australia, and had a representative in Québec. The claim pertained to Anvil's alleged complicity in human rights violations committed by government forces in the DRC, where Anvil exploited a mine. The question arose as to whether Anvil had an establishment in Canada and whether there was a sufficient link between Anvil's activities in Québec and the wrongful acts committed in the DRC. The Court held that Anvil's (sole) representative in Canada was only tasked with maintaining relations with investors and shareholders,[44] that Anvil's activity in Canada had nothing to do with the exploitation of a mine in the DRC,[45] and that, accordingly, there was no link between the alleged acts and Anvil's activity in Québec. This illustrates that, while the decision to commit the extraterritorial impugned acts need not have been taken in the forum state for jurisdiction to arise under the law of Québec, there should at least be a *connection* between these acts and an activity of the corporation in the forum state.[46]

In principle, this absence of a connection should also have sufficed to dismiss the suit based on forum of necessity, as the law of Québec, unlike the Uniform Law Conference of Canada, requires by statute that the dispute have "a sufficient connection with Québec".[47] Still, the Court went on to examine the other requirement of forum of necessity – namely that proceedings cannot be instituted outside the forum – in a way that could be instructive for other jurisdictions that have a more absolute form of forum of necessity, requiring no connections in the first place. The Court posited in particular that Québec could only assume its jurisdiction as a forum of necessity if the plaintiffs showed that proceedings could not be instituted before the other more natural fora: the Democratic Republic of Congo and Australia. In the Court's view, the plaintiffs did not adequately discharge this burden of proof, as the victims could arguably have accessed the DRC Supreme Court of Justice,[48] that difficulties of cooperation with DRC authorities in the Australian proceedings could equally have arisen in Québec[49] and that there was insufficient proof that lawyers elsewhere did not want to bring proceed-

ment-based jurisdiction is based on Art. 3148(2) of the Code, which provides that "[i]n personal actions of a patrimonial nature, a Québec authority has jurisdiction where the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec".

[44] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 83.

[45] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 85.

[46] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 89.

[47] Art. 3136 Civil Code of Québec.

[48] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 100.

[49] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 101.

ings.[50] Ultimately, *Anvil* shows that, like in transnational proceedings before other Canadian courts, practical difficulties faced by plaintiffs in foreign jurisdictions, such as the inability to obtain counsel, do not carry much weight in the analysis of whether Canada should be a forum of necessity.[51]

3. Commonalities and challenges

From the design and practice of forum of necessity in the European and Canadian national or subnational legal orders, two conditions for its application seem to be emerging: (1) the impossibility or "unreasonableness" of the plaintiff bringing his case in an alternate forum; and (2) a connection between the case and the forum where the plaintiff requests the assertion of necessity jurisdiction. While these two traits are common to most forum of necessity provisions, their precise content and the thresholds that have to be met differ between states, with some still being a matter of internal debate.

a) Impossibility or unreasonableness

First, the plaintiff has to show that it is either impossible or unreasonable to bring the claim in a more appropriate court.[52] From the text of most statutes, *forum of necessity* can refer to both the practical or legal impossibility of bringing the case. Practical impossibility is generally understood to mean situations where the legal infrastructure is inaccessible, for instance because of armed conflict or natural disaster. Legal impossibility occurs when the claim is non-justiciable in the forum that would otherwise have jurisdiction. Several factors could lead to such a situation, including jurisdictional immunities of the defendant where the harm occurred, the passing of time limits

[50] *Anvil Mining Ltd.*, [2012] QCCA 117, para. 102.

[51] Where this is understandable with respect to Australia, where Anvil was incorporated, it is less evident with respect to the DRC, hardly a paragon of judicial accessibility and independence. The Court appears to have implicitly accepted this, where it held that – unlike other countries (such as the DRC) – Australia has courts which provide fair and equitable treatment to its citizens (para. 101), but then it relied on the expert testimony of just one academic to hold that the victims could have applied with the DRC Supreme Court, without inquiring whether such an application could be successful and effective.

[52] *Nwapi*, Utrecht J.Int'l Eur.L. 30 (2014) 24, 33. Discussing Arts. 9(b) and 9(c) Rv., Ibili refers to forum of necessity on the ground of impossibility and on the ground of unreasonableness as absolute and relative forum of necessity, respectively: "Komt de Nederlandse rechter niet op grond van de artikelen 2 tot en met 8 rechtsmacht toe, dan heeft hij niettemin rechtsmacht indien: a. […]; b. een gerechtelijke procedure buiten Nederland onmogelijk blijkt, of; c. een zaak die bij dagvaarding moet worden ingeleid voldoende met de rechtssfeer van Nederland verbonden is en het onaanvaardbaar is van de eiser te vergen dat hij de zaak aan het oordeel van een rechter van een vreemde staat onderwerpt"; *Ibili*, Gewogen rechtsmacht in het IPR (n. 23) 109–110.

(outside of the plaintiff's control) in which to bring the claim, or even the impossibility of enforcing a foreign judgment in the forum. Other situations could include negative conflicts of jurisdiction, i.e., where no court finds itself competent to adjudicate the case. This sort of legal impossibility is however rare, especially in cases against corporations that usually have connections to more than one state, and where immunity does not play a role. One example may be civilian contractors in armed conflicts, who may benefit from immunity under Status of Forces Agreements (SoFAs) and therefore cannot be sued locally.[53]

The circumstances that bring practical *impossibilities* to a case may sometimes overlap with the practical difficulty to bring the proceedings. As discussed below, the circumstances that pass the threshold for factual impossibility may be disputed. In most states this will largely be a theoretical exercise as practical impossibility or unreasonableness are lumped together, but in the Netherlands, absolute impossibility of bringing proceedings abroad negates the requirement of a connection with the Netherlands as a forum state.[54] Thus, the distinction can have very real consequences.

Alternatively, a plaintiff may bring proceedings under necessity jurisdiction if it is found that it would be unreasonable or unacceptable to require him to bring the case in a foreign court; this is what Ibili refers to as "relative" forum of necessity.[55] As the burden of proof for demonstrating unreasonableness is lower, plaintiffs may be expected to resort to this ground more often than to absolute forum of necessity. The question is of course what hurdles are sufficient to trigger necessity jurisdiction. Some of these answers are self-evident, such as when the foreign forum is situated in a conflict zone or amidst natural disasters that may not have entirely disabled the legal infrastructure, but have left it weakened and overburdened. Other uncontroversial examples are where the plaintiff faces unfair or discriminatory treatment, or threats to his life or security when trying to bring a claim abroad. The latter was the case in *Solvochem v. Rasheed Bank*, where the Hague Court of Appeal confirmed necessity jurisdiction for a case that would otherwise

---

[53] *Al Shimari v. CACI Int'l, Inc.*, 933 F.Supp.2d 793, 2013 WL 1234177 (E.D.Va. 19 March 2013), where the 4th Circuit Court granted a motion to dismiss a case against a private military contractor for human rights abuses it allegedly committed while under contract in the Abu Ghraib prison, whereas Iraqi courts would not have jurisdiction over the case because of the SoFA in force at the time of the alleged abuses. The case has since then been reinstated by the 4th Circuit Court of Appeals, see <http://business-humanrights.org/en/abu-ghraib-law-suits-against-caci-titan-now-l-3-0#c17777>. Note that while SoFAs generally only bind the contracting states, courts in bystander states may equally decline necessity jurisdiction for reasons of international comity.

[54] Art. 9(b) Rv., see below.

[55] *Ibili*, Gewogen rechtsmacht in het IPR (n. 23) 120.

have to be brought in Iraq in the midst of the Iraqi conflict, exposing the plaintiff to the risks of the conflict areas.[56]

There are also more controversial grounds upon which courts have exercised jurisdiction on the basis of "relative" forum of necessity. Belgian courts have entertained cases where the financial burden of litigating abroad outweighed the interests of the claim,[57] whereas Dutch courts have explicitly rejected this as a ground for necessity jurisdiction.[58] At the far end of the spectrum, Canadian courts have in general been quite restrictive in entertaining practical difficulties as a ground for necessity jurisdiction. Absence of fair trial or corruption of the judiciary have been put forward as alternative grounds,[59] but those grounds invite tricky assessments of the functioning of foreign legal systems.[60] Moreover, there is a fine line between the expectation of not receiving a fair trial and the expectation of losing the case on the merits – the latter, of course, can never be a ground for necessity jurisdiction.

Thus, the relative ground for establishing necessity-based jurisdiction, which is based on the practical difficulties that the claimant may face in a foreign jurisdiction, necessarily involves a weighing of interests by the court. These include not just the interests of the plaintiffs, but also those of the defendants; the capacity of a defendant to appear before the forum may for instance be a relevant counterweight to the plaintiff's need to litigate in that forum. In cases of claims against multinational corporations, which usually have offices worldwide and have sufficient knowledge and capital to litigate in various fora, this will be less of a problem than in cases brought against private individuals. However, most states will be wary of becoming a global judicial forum called on to counteract worldwide procedural inequities.[61]

b) Connection

This leads us to the second element of forum of necessity that can be discerned across the jurisdictions discussed: the requirement of a connection with the forum state. As with the first requirement, different legal orders

---

[56] Gerechtshof Den Haag 30 November 2010, ECLI:NL:GHSGR:2010:BO6529.

[57] *Nuyts*, Study on Residual Jurisdiction (n. 6) 83, referring to the National Report for Belgium.

[58] Rechtbank Zutphen 16 January 2008, ECLI:NL:RBZUT:2008:BC9336. Note that the District Court kept open the possibility of accepting necessity jurisdiction if the proceedings in front of a different court – which in this case, was Jersey – were to result in a financial loss for the plaintiff even if the plaintiff's claim had been awarded.

[59] *Olney v. Rainville*, [2008] BCSC 753, 83 BCLR (4th) 182.

[60] See *Ibili*, Gewogen rechtsmacht in het IPR (n. 23) 128–129.

[61] In that respect, it is important to note that most courts still regard necessity jurisdiction as an exceptional rather than regular ground, as manifested in the residual place it takes up in most states' statutory law, as discussed above.

phrase this requirement differently: "sufficiently connected" in Switzerland[62] and the Netherlands;[63] "adequate relation" in Poland;[64] "strong linking factor" in Portugal; and the "sufficient connection with Québec" in the Québec Civil Code.[65] The extent of such connections also varies, ranging from residence of the plaintiff to the presence of assets of the defendant in the forum state.[66] The latter requirement is of consequence, since the presence of assets in the forum state facilitates the enforcement of the ruling without the intervention of the state where the defendant is domiciled.[67]

Not all states require a connection with the forum, however: as mentioned, the Dutch Code of Civil Procedure does not require a connection if the case is wholly impossible to bring outside of the Netherlands,[68] and Article 6 of the Canadian ULCC Court Jurisdiction and Proceedings Transfer Act does not mention a connection requirement at all. In Europe, connection requirements are usually not very strictly interpreted, nor do they have a well-defined autonomous meaning. This gives courts leeway to decide whether to accept necessity jurisdiction on the facts of each individual case.[69] In respect of business and human rights claims, however, it may not be overly difficult, where necessary, to find some form of connection of the corporation with the forum as multinational companies typically operate or at least have some sort of presence in a wide variety of states.

c) Discussion

As is clear from the overview provided here, forum of necessity provisions are typically substantively neutral, in the sense that they apply to all civil and commercial claims, irrespective of the nature of the injurious acts or abuses

[62] Art. 3 IPRG.

[63] Art. 9(b) Rv.

[64] See *Nuyts*, Study on Residual Jurisdiction (n. 6) 85.

[65] Art. 3136 Civil Code of Québec.

[66] It must be noted that neither of these factors can be grounds for jurisdiction in and of themselves; in fact, the plaintiff's presence in the forum state was "blacklisted" as an exorbitant ground for jurisdiction under The Hague Preliminary Draft Convention on Jurisdiction and Judgments.

[67] Cf. Rechtbank Den Haag 30 January 2013, ECLI:NL:RBDHA:2013:BY9854. This case concerned a tort case against a Nigerian subsidiary of Royal Dutch Petroleum and its parent company. The Hague District Court established jurisdiction over the subsidiary based on the argument that the two cases were sufficiently connected on the facts, and because the Court had jurisdiction over the parent company, they could also claim jurisdiction over the subsidiary. It is conceivable that in situations where there is no connected claim against the parent corporation, or the forum state does not recognize the connected claims doctrine, the link between parent and subsidiary is used to satisfy this connection requirement and assume necessity jurisdiction against the subsidiary.

[68] Art. 9(c) Rv.

[69] *Nwapi*, U.B.C.L.Rev. 47 (2014) 211.

on which they are based. Thus, forum of necessity has not specifically been created for human rights, or business and human rights claims – although the mechanism may obviously lend itself to application to this kind of claim. Exceptionally, however, legislators may tailor forum of necessity provisions to particular substantive claims, including international human rights claims. The well-known US Alien Tort Statute, for instance, provides for a cause of action in respect of torts committed in violation of international law.[70] In the same vein, a Canadian member of Parliament – unsuccessfully – introduced a bill to confer jurisdiction on the Federal Court of Canada to hear claims brought by foreigners with respect to "a violation of international law or a treaty to which Canada is a party" that has taken place outside Canada.[71] While no such bill has yet materialized in European states, Swiss legislators have debated introducing a bill that would require Swiss-incorporated companies to exercise a far greater degree of due diligence over their subsidiaries, and expose them to liability by omission if they refrain from doing so.[72]

Still, in both Canada and Europe, it is likely that it will be for the courts to further tailor the general category of forum of necessity to human rights cases, and to offer guidance regarding the type of evidence plaintiffs need to show to successfully invoke forum of necessity in such cases.[73] Courts will

---

[70] 28 U.S.C. § 1350 (ATS): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[71] Private Member's Bill C-323 (2011), introduced by MP Peter Julien. Given the threat that such a bill may pose to the Canadian mining industry, it is unlikely to be accepted. See *Fred McMahon*, Fraser Institute (8 April 2012): Bill C-323: Another threat to Canada's mining industry, available at <http://www.fraserinstitute.org/research-news/news/display.aspx?id=18240>. Note, however, that the Canadian Parliament has adopted a Justice for Victims of Terrorism Act, SC 2012, c. 1, s. 2, which provides for Canada as a forum of necessity for victims of terrorist acts suing for damages, provided however that there is a "real and substantial connection" to Canada. See Art. 4(1) of the Act ("Any person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the Criminal Code, may, in any court of competent jurisdiction, bring an action to recover an amount equal to the loss or damage proved to have been suffered by the person and obtain any additional amount that the court may allow […]") in combination with Art. 4(2) ("A court may hear and determine the action referred to in subsection (1) only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident […]"). Note that, as Provost has pointed out, the "real and substantial" connection can be interpreted quite broadly, "to include not only any phase of the crime but also its repercussions". See *René Provost*, EJIL: Talk! (29 March 2012): Canada's Alien Tort Statute, available at <http://www.ejiltalk.org/canadas-alien-tort-statute/>.

[72] See Schweizerische Eidgenossenschaft (2 May 2014): Rechtsvergleichender Bericht – Sorgfaltsprüfung bezüglich Menschenrechten und Umwelt im Zusammenhang mit den Auslandaktivitäten von Schweizer Konzernen, <http://www.ejpd.admin.ch/content/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-d.pdf>.

[73] *Stephen Pitel*, Conflict of Laws: News and Views in Private International Law (29 February 2012): Québec Court Refuses Jurisdiction on Forum of necessity Basis, available at

have to navigate, as Bruce Broomhall has pointed out, between taking unduly wide decisions that "might do little but engender a pile of unenforceable default judgments" and unduly narrow rulings that "would entail a denial of justice across a wide area".[74] This navigation problem may in fact be one of the reasons why necessity jurisdiction is still rare in both European and Canadian case law. One may think of the above-mentioned *El-Houjouj* case before a Dutch court,[75] which is unlikely to be enforced against the Libyan torturers. Whether this risk is similar in cases against multinational corporations remains to be seen; on the one hand, corporations may have assets located in various places against which a judgment can be enforced. On the other hand, states will be reluctant to enforce judgments they perceive as constituting an overly broad, or possibly exorbitant, use of jurisdictional rules like forum of necessity. Whether because of enforcement concerns, other procedural hurdles or simple opacity as to which state requires what level of connectedness to entertain a forum of necessity case, the body of case law surrounding necessity jurisdiction is meagre. Moreover, a large part of this case law appears in the realm of family or contract law and has little bearing on human rights tort claims.

That being said, in the aforementioned *El-Houjouj* and *Bouzari* cases, the Dutch and Canadian courts respectively have established necessity jurisdiction over foreign *torture* claims brought by victims residing in the forum. In both cases, the courts reasoned that the territorial forum (the state where the alleged acts of torture had been committed) was not reasonably available. As human rights violations are often committed in areas with weak institutional structures, forum of necessity has the potential to remedy violations committed by corporations active in weak-governance zones. Strict requirements pertaining to territorial connection and exhaustion of foreign remedies may however wreck this potential, as seen for instance in the Canadian *Anvil* case.

Particularly in respect of business and human rights claims, and in line with the UN Guiding Principles mentioned above, states may consider introducing more liberal forum of necessity requirements similar to the Swiss initiative, so as to ensure access to justice for victims of corporate human rights abuses and effectuate their right to remedy. It may not be simple,

---

<http://conflictoflaws.net/2012/quebec-court-refuses/> (critically reflecting on the decision in *Anvil*, noting that the Court's "application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence provided by the plaintiff and relied upon by the trial judge").

[74] *Bruce Broomhall*, EJIL:Talk! (1 May 2012): Extraterritorial Civil Jurisdiction: Obstacles and Openings in Canada, available at <http://www.ejiltalk.org/extraterritorial-civil-jurisdiction-obstacles-and-openings-in-canada/>.

[75] Rechtbank Den Haag 21 March 2012, ECLI:NL:RBSGR:2012:BV9748 (n. 29 above).

however, just to "import" necessity jurisdiction into their domestic private international law. As discussed above, forum of necessity is not even uniform among the states that use it. This may be because individual states may balance differently the interests of victims in having access to justice against the state's interest in maintaining legal certainty for defendants and not becoming a "world forum" with a number of unenforceable judgments.

Exorbitant grounds for jurisdiction in human rights cases often lead to comparisons with the US Alien Tort Statute (ATS)[76] and Belgium's use of universal jurisdiction,[77] although neither are fully comparable to forum of necessity. The ATS springs to mind, as it has repeatedly been used to hold both corporations and individuals to account for human rights violations. Granting US Federal Courts jurisdiction over torts committed in violation of international law,[78] the ATS has since its rediscovery in 1980 often been interpreted as granting US Courts almost universal civil jurisdiction[79] over some violations of international law.[80] Viewed this way, the ATS could be seen as even more far-reaching than the most liberal forum of necessity grounds, as it would not require the plaintiff to show impossibility or unreasonableness in order to bring proceedings abroad. Such an interpretation would however be mistaken; on the basis of the *Kiobel* judgment (2013) the ATS confers upon the Federal Courts *subject matter jurisdiction* over violations of international law that have taken place abroad, albeit only if the case sufficiently "touches and concerns" US territory.[81] The ATS in and of itself does not confer *personal* jurisdiction. This means that courts seized of ATS-based claims involving non-US claimants or defendants will still need to ascertain that they have personal jurisdiction over the parties to the lawsuit in order to establish whether they have the authority to rule on the law and the facts of the claim. This may not be a given, as: (i) claimants in ATS-based cases are always non-US citizens ("aliens"); (ii) the once liberal US approach to personal jurisdiction over foreign corporate defendants has in

[76] 28 U.S.C. § 1350; ATS.

[77] See *Loi relative à la répression des violations graves de droit international humanitaire* of 10 February 1999.

[78] ATS, see n. 70 above.

[79] For example, *Paul Barker*, Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute: the Case of Kiobel before the United States Supreme Court, U. Miami Int'l Comp.L.Rev. 20 (2012) and *Donald Francis Donovan/Anthea Roberts*, The Emerging Recognition of Universal Civil Jurisdiction, AJIL 100 (2006). Even with the hindsight of *Kiobel* this view is repeated, see *Julian Ku*, Opinio Juris (17 April 2013): The Death of Universal Civil Jurisdiction under the ATS, available at <http://opiniojuris.org/2013/04/17/the-death-of-universal-civil-jurisdiction-under-the-ats/>.

[80] The Supreme Court limited the scope of customary norms applicable in ATS cases to those norms that were definable, universal and obligatory. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[81] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

recent years become more restrictive;[82] and (iii) the cases brought on the basis of the ATS are prone to dismissal on the basis of *forum non conveniens* as they typically concern indirect involvement by US-based actors in norm violations that have taken place outside of the United States.

Belgium's universal jurisdiction statute, which created the possibility for Belgian authorities to prosecute foreign perpetrators – even *in absentia* – for certain international crimes perpetrated outside of Belgium, seems an even more remote comparison. It concerned regulatory criminal jurisdiction rather than adjudicative jurisdiction for civil claims,[83] initially granting unlimited universal jurisdiction to Belgian courts for certain international crimes.[84] Belgium initially adopted universal jurisdiction in 1993,[85] but it was the 1999 amendment that substantially broadened its scope by allowing cases against persons not present on Belgian territory in respect of crimes committed anywhere in the world, and by not recognizing official immunity from prosecution for international crimes. Combined with Belgium's *partie civile* mechanism, which makes it possible for private individuals to initiate criminal proceedings, the law led to a string of controversial cases. Some were filed against incumbent or former heads of state, such as George Bush or Ariel Sharon.[86] Unsurprisingly, these investigations led to serious international protests, with the US even threatening to take NATO's headquarters away from Belgium.[87] The law was restricted, and ultimately repealed in 2003.[88]

These two examples concern unique statutes with few parallels in the world, and are not fully comparable to forum of necessity. Nevertheless, there are some similarities. Like forum of necessity, Belgium's universal jurisdiction statute was enacted out of concern for possible denials of justice in

---

[82] *Daimler AG v. Bauman et al.*, 134 S.Ct. 746 (2014).

[83] Even though the debate surrounding this statute cannot be appreciated without taking into account Belgium's *partie civile* claim mechanism, whereby a private individual can force the prosecutor to take investigative steps. This makes it slightly more akin to civil claim mechanisms as the initiative lies not with the state but with an individual. It also generated the more controversial cases.

[84] The original Law of June 16 only covered war crimes, but was extended through the 1999 amendment to also cover crimes against humanity and genocide.

[85] *Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* of 16 June 1993.

[86] Including, incidentally, an arrest warrant against Abdoulaye Yerodia Ndombasi, then-incumbent minister of Foreign Affairs of the Democratic Republic of the Congo, for crimes of torture. The DRC's complaint to the International Court of Justice, claiming that Belgium failed to respect Mr. Yerodia's immunity, led to the well-known *Arrest Warrant* case. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Rep 3 (2002).

[87] *Roozbeh (Rudy) Baker*, Universal Jurisdiction and the Case of Belgium: A Critical Assessment, ILSA J.Int'l Comp.L. 16 (2009) 141, 155–157.

[88] *Loi relative á la repression des violations graves du droit international humanitaire* of 5 August 2003.

respect of international crimes. The rediscovery of the ATS as a human rights instrument,[89] while it was arguably not written for that purpose,[90] was done with that same goal in mind. In fact, some cases brought as civil cases under forum of necessity, like *El-Houjouj* and *Bouzari*, could perhaps also have been brought under the ATS or as a criminal case under universal jurisdiction – or at least appear factually comparable to earlier cases under those statutes.[91] However, the fact that the ATS and genocide law may (have) provide(d) possible alternative legal avenues for addressing similar issues does not mean that these legal instruments are comparable (or that there is a point in comparing them) to forum of necessity clauses for the purposes of this article. More relevant for our purposes here is that both statutes generated controversial rulings that incurred significant protests from other states. This may be what states will try to avoid when introducing liberal grounds for jurisdiction, including forum of necessity. The US, being the world's dominant political and economic power, may have been able to resist economic and diplomatic pressure against broad jurisdictional claims regarding extraterritorial harms, but smaller or weaker states may think twice – lest they put themselves in Belgium's shoes. It may be that such protests are exactly what states try to avoid by narrowing their forum of necessity provisions and emphasizing its exceptional nature, as discussed below.

III. Forum of necessity in regional legal orders: the EU and the Council of Europe

One cannot only look at the problem of forum of necessity from the perspective of individual states. Regional organizations to which states have transferred competences may play an important role in this respect, especially where such organizations – the EU in particular – have the power to enact legislation that is binding on their Member States in the field of private international law. As far as the delimitation of jurisdiction in cross-border cases is concerned, this process started with the adoption of the Brussels (1968)[92] and Lugano (2007)[93] conventions on jurisdiction and enforcement

[89] *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980).

[90] The origins of the ATS are slightly obtuse. See *Martha Lovejoy*, From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth Century Paradigm of the Law of Nations for the Alien Tort Statute, Yale H.R.Dev.L.J. 12 (2009) 64, 245–246.

[91] See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y. 2003) and *Sarei v. Rio Tinto PLC*, 550 F.3d 822 (9th Cir. 2008).

[92] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention), 8 ILM 229 (1969).

[93] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention), OJ 2007 L 339/3.

of judgments in civil and commercial matters. The Brussels Convention was replaced by the so-called Brussels I Regulation[94] which was in turn replaced by the so-called Brussels I Recast Regulation in 2012 (and which came into force in 2015).[95] But even where regional organizations, such as the Council of Europe, only have the power to enact recommendations ("soft law") or to prepare conventions subject to state ratification, their activities may provide the momentum for legislative and judicial relaxation of forum of necessity requirements at the state level. In this section, the activities of the EU and the Council of Europe in respect of forum of necessity, with a particular focus on business and human rights claims, will be discussed in turn.

1. The EU and the Brussels I Regulation

a) The Brussels I Regulation

The Brussels I regime harmonizes rules of jurisdiction within the Member States of the EU, and applies to both contractual and non-contractual disputes. The general rule of the Brussels I regime is formulated in Article 2, namely that the courts of the Member State where the defendant is domiciled shall have jurisdiction, irrespective of the nationality of either the plaintiff or the defendant. What counts as "domicile" for a corporate actor is determined by Article 60 of the Regulation, namely a place where the actor has its statutory seat, central administration or principal place of business.[96] Section 2 of the Regulation gives a number of exceptions to, and expansions of, the general rule. The closed system of the Regulation means that whenever a claim falls within the scope of the Regulation (that is, when it concerns a civil claim against a defendant domiciled in one of the Member States), a court can only assume jurisdiction based on the Regulation. In other words, the Member State courts can no longer resort to national rules

[94] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ 2001 L 12/1.

[95] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast Regulation), OJ 2012 L 351/1. The recasting process began in 2009 with a Green Paper initiated by the European Commission – which became a Commission Proposal for a new Regulation in 2009 – and ended with the eventual recast Regulation.

[96] While Arts. 2 and 60 are supposed to have an autonomous meaning, the ECJ has thus far not ruled on the interpretation of Art. 60. Only some domestic cases have considered these Articles, as for example the UK Court of Appeal did in *Young v Anglo American South Africa Ltd and others* [2014] EWCA Civ 1130 on the question of whether the main office of the parent company of a multinational corporate enterprise can be regarded as its "principal place of business".

on jurisdiction to accept or decline jurisdiction, as the ECJ elaborated on in *Owusu v. Jackson*.[97] Only when a case falls outside of the scope of Brussels I, such as when the defendant is not domiciled in any of the EU Member States, can courts apply national jurisdiction rules.

What is most relevant to overseas human rights violations committed by multinational corporations is that, under the Brussels I regime, jurisdiction over persons domiciled outside the EU Member States or any of the EFTA states signatories to the Lugano Convention is determined by the national law of the forum state[98] and the applicable Convention respectively. This means that under the Brussels I regime, EU Member State courts may assume jurisdiction over civil claims against corporations domiciled in the EU and committing violations outside the EU, but *not* over non-EU-based corporations committing such violations. In respect of the latter, which fall outside the Brussels I regime, the domestic law of a Member State may – but need not – provide grounds for jurisdiction, e.g., on the basis of forum of necessity. This obviously leads to discrepancies in the treatment of civil claims against non-EU-based defendants across EU Member States.

b) The Brussels I Regulation recast

This different treatment of legal persons domiciled outside of EU Member States was one of the complaints that prompted the Commission to review the Regulation.[99] Drawing on the study by Nuyts discussed above, the Commission published a Green Paper highlighting possible changes and outstanding questions.[100] This resulted in a Commission proposal that fully harmonized private international law rules on jurisdiction of EU Member States, including those pertaining to defendants domiciled outside of the EU.[101] As part of that proposal, Article 26 contained a forum of necessity provision, which stipulated as follows:

---

[97] ECJ 1 March 2005 – Case C-281/02 *(Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others)*, [2005] ECR I-01383.

[98] Art. 6(1) Brussels I Recast Regulation.

[99] See, e.g., House of Lords, European Union Committee (27 July 2009): Green Paper on the Brussels I Regulation, <http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_parliaments/united_kingdom_house_of_lords_en.pdf>. For a discussion of the proposed universal scope of Brussels I, see *Johannes Weber*, Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation, RabelsZ 75 (2011) 619.

[100] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final.

[101] See Art. 4(2) Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2013) 554 final – 2013/0268 (COD).

"*Article 26.* – Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised."[102]

Notice how all the elements of forum of necessity used in the national legal orders described above are explicitly present: the right to a fair trial and access to justice as a policy goal, a reference to the exceptional nature of the rule, absolute and relative forum of necessity, and the requirement of at least some connection with the forum seized. This provides support for the Commission's confidence that forum of necessity is commonplace in the national legal orders of EU Member States.

The proposed forum of necessity provision in Brussels I recast would not have been the first provision of necessity jurisdiction in an EU Regulation. The EU Maintenance Regulation[103] and the Succession Regulation[104] already contain forum necessitatis clauses in their Articles 7 and 11 respectively. These Articles (with virtually identical wording) grant jurisdiction in an EU Member State on an "exceptional basis", when proceedings "cannot reasonably be brought or conducted or would be impossible" in a third state to which the dispute is more closely connected, provided there is a "sufficient connection" with the EU Member State as well.

It stands to reason that the interpretation of a Brussels I recast forum necessitatis would have followed that of the Maintenance and Succession Regulations. This implies that both the impossibility and unreasonableness requirements, and the sufficient connection requirement, would have to be given an autonomous meaning rather than being left to the discretion of the Member States, in order to achieve uniform application.[105] What these meanings are with respect to the aforementioned requirements is however

[102] COM(2013) 554 final – 2013/0268 (COD), Art. 26.

[103] Council Regulation (EU) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation), OJ 2009 L 7/1.

[104] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation), OJ 2012 L 201/107.

[105] See also ECJ 8 November 2005 – Case C-443/03 *(Götz Leffler v. Berlin Chemie AG)*, [2005] ECR I-9611, para. 47.

unclear, as there has yet to be a case or question for a preliminary ruling on the *forum of necessity* provisions of these Regulations. Recital 16 of the Maintenance Regulation mentions the nationality of one of the parties as a possible "sufficient connection",[106] but otherwise little guidance is given.[107] Consequently, while the existence of necessity jurisdiction in other EU instruments is informative as to the general acceptance of the concept in EU jurisdictions – if treated as an exception – one can only speculate as to what the reach of the proposed necessity jurisdiction under Brussels I recast would have been.

c) Brussels I recast: implications and responses

As to the possible effects of harmonizing necessity jurisdiction, one can have different perspectives. On the one hand, Article 26 would have opened up a whole range of possibilities in EU Member States that as of yet do not recognize forum of necessity as a ground for jurisdiction. In particular, considering the demand for some connection between the case and the forum, it is not difficult to conceive of a case that might have no connection with a state that does have forum of necessity jurisdiction incorporated in its legal order, but is more connected with a state that currently does not. This is especially relevant for corporate human rights litigation under forum of necessity; where a company might not have the contacts or business in one Member State to satisfy the "sufficient connection" requirement, this may well be the case in another Member State – for instance, because it does more business in that state, or its parent company is seated there.[108]

On the other hand, full harmonization of the law of jurisdiction in civil cases would have extinguished the domestic grounds for jurisdiction that are more liberal than the Commission's proposal. Among such grounds are some domestic forum of necessity rules,[109] but also several of the more liberal grounds for jurisdiction discussed above,[110] each of which might be used

[106] Recital 16, sentence 3 Maintenance Regulation.

[107] Note that nationality of the plaintiff is generally considered to be an exorbitant or unreasonable ground for jurisdiction. It is generally not recognized by states as a separate ground, and was included on the "black list" of prohibited grounds of jurisdiction in the Preliminary Draft Convention on Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law, <http://www.hcch.net/upload/wop/jdgmpd11.pdf>. In that respect, it is curious to see it used as the sole example of a sufficient connection under necessity jurisdiction.

[108] See for instance Rechtbank Den Haag 30 January 2013, ECLI:NL:RBDHA:2013:BY9854, as discussed above, which absent the connected claims doctrine might have been decided on this basis.

[109] For example, the absolute forum of necessity as present in the Dutch and English legal orders.

[110] Such as the Dutch "connected claims" doctrine mentioned in relation to the *Akpan* case (above, n. 5).

to bring human rights claims against a corporate entity. Accordingly, while an extension of the scope of Brussels I with the inclusion of a forum of necessity provision would have benefited legal certainty, one can dispute whether it would have actually extended the overall opportunity for human rights abuse victims to gain access to justice.

Whatever could be speculated about the possible consequences of Article 26 for business and human rights litigation, it was omitted from the eventual recast regulation as proposed to, and adopted by, the European Parliament. The reasons for this omission had little to do with Article 26 specifically or forum of necessity generally. While the negotiations surrounding this final proposal are not publicly accessible, it is clear that a number of Member States, if not the majority, took issue with the Commission's proposal to extend the territorial scope of the Brussels I regime to every case, rather than just those against EU-domiciled defendants. This would have given the Brussels I regime universal application, rather than limited territorial application, in a similar fashion to several other regulations – incidentally, the Maintenance and Succession Regulations. The extension would have fully and exhaustively harmonized all Member States' rules on jurisdiction in civil cases, and eliminated all grounds for jurisdiction not contained in the Regulation; just as the current regime has eliminated refusal of jurisdiction on the basis of *forum non conveniens* in cases within the scope of application of the Brussels I regime. The forum of necessity provision in Article 26 was inserted as a safeguard against negative conflicts of jurisdiction, should the situation arise where no EU Member State would have jurisdiction under the Regulation, and redress in a third state is impossible or unreasonable. It may well be that this attempt at full harmonization simply went too far.

While few states publicly expressed their opinion on the Commission's proposal, the negative response of the Netherlands to the original Commission proposal can be considered exemplary, given its comprehensiveness and the fact that the Netherlands is generally not particularly restrictive in its grounds for jurisdiction in civil cases. The arguments underlying this response can be found in an advisory opinion from the joint Dutch advisory committees on Private International Law and Civil Law, which was followed by the Minister of Justice and both parliamentary chambers.[111] These committees advised that full harmonization of jurisdiction rules with respect to defendants from third states was not desirable,[112] for two reasons.

---

[111] See Reasoned Opinion of the Dutch Parliament (States-General) on the Brussels I proposal, English translation available at <www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc5420d8f48014270e004837310.do>.

[112] Staatscommissie voor het Internationaal Privaatrecht, Adviescommissie voor Burgerlijk Procesrecht, Advies ontwerp-Verordening Brussel I (document COM(2010) 748 d.d. 14

First, the committees felt that the EU should leave full harmonization of private international law rules on jurisdiction to the Hague Conference for Private International Law rather than take it upon itself.[113] Secondly, in the committees' view, the Brussels I regime is *distributive* rather than *attributive* in nature. In other words, Brussels I was not meant to create new grounds for jurisdiction, but "merely" to create a practical division of jurisdictional powers between the Member States – a roadmap for civil litigants, so to speak. The basis of that regime is the Union principle of mutual trust in other Member States' legal systems, a principle that does not apply to third states.[114] Consequently, there would be no guarantee that third state courts will assume jurisdiction where an EU state cannot; nor would an EU Member States' assumption of jurisdiction on the basis of the revised Brussels I regime guarantee recognition and enforcement by the courts in the third state concerned. Thus, the committees concluded, the closed nature of the Brussels I regime does not lend itself to extension to disputes involving third state defendants.[115] While no other reasoned rebuttals to the Commission's proposal were publicly submitted, the fact that Article 26 was omitted suggests that the above arguments also resonated with other Member States in the closed negotiations.

This need not mean that the Member States took issue with forum of necessity *per se*. The introduction of necessity jurisdiction was not raised by any of the Member States as a possible problem – in fact, the aforementioned Succession Regulation was drafted around the same time as Brussels I recast, with little to no attention paid to its forum of necessity provisions. This may be an indication that, given also the European Commission's drafting of the Green Paper, necessity jurisdiction is generally accepted in the Member States, if used as an exception and with restraint. Secondly, the issue of business, human rights and the problems of jurisdiction in adjudicating human rights violations was not a general topic of discussion either. One must thus be careful in drawing overly broad conclusions as to the possible adoption of forum of necessity and its application to business and human rights cases in the EU. Rather, it appears that full harmonization of rules on jurisdiction of private international law was a bridge too far for most EU Member States, and without full harmonization the inclusion of a forum of necessity provision would be superfluous.

Thus, the EU's reluctance to incorporate forum of necessity into the recast Brussels I Regulation need not signal a substantive rejection of forum of necessity as a legitimate last resort mechanism in case of a denial of justice

---

december 2010), No. 5689654/11/6, available at <https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document>.

[113] Advies No. 5689654/11/6, Section 4.1.

[114] Advies No. 5689654/11/6, Section 4.1.

[115] Advies No. 5689654/11/6, Section 4.1.

elsewhere, for the reasons mentioned above. The rejection of the Commission's proposal for a recast Brussels I centred on its full harmonization of EU states' rules of jurisdiction in private international law, and did not concern forum of necessity specifically. Moreover, full harmonization might even have been disadvantageous for plaintiffs that wish to bring cases in states that currently have more liberal grounds for jurisdiction, including more liberal forum of necessity rules than those proposed by the Commission. These remain dependent on the willingness of individual EU Member States to provide an exceptional forum. Moreover, where such a forum is formally available, as laid out above, procedural and substantive requirements imposed on the exercise of necessity-based jurisdiction may circumscribe the access to justice potential held by forum of necessity.

2. Access to justice and the Council of Europe

a) The European Convention on Human Rights and jurisdiction in general

While the discussion regarding forum of necessity may have come to a momentary standstill in the EU, victims wishing to access a forum in the absence of available local fora may perhaps pin their hopes on another European regional organization, the 47-state strong Council of Europe (CoE). Like the EU, the CoE is competent for the approximation of legal standards, although its power is less far-reaching than the EU in that it cannot impose binding legislation on its Member States. Yet, importantly, the CoE, under whose auspices the European Convention on Human Rights (ECHR) was created, has a strong human rights and rule of law program, in the context of which the exercise of jurisdiction over business and human rights could be taken up.

Starting from the remedial protection offered by the ECHR, it is recalled that several EU states consider the forum of necessity doctrine to be a component of the right to a fair trial as enshrined in Article 6(1) ECHR.[116] In *Delcourt v. Belgium* the European Court of Human Rights held, with respect to this right, that "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision."[117] According to *Golder v. the United*

[116] For example The Netherlands, Kamerstukken II (1999/2000) 26 855, nr. 3 (see n. 21 above). Some authors discuss this as a more general principle under international law, see *Francesco Francioni*, The Right of Access to Justice under Customary International Law, in: Access to Justice as a Human Right, ed. by idem (2007) 1, 10–11.

[117] ECtHR 17 January 1970 – no. 2689/65 *(Delcourt v. Belgium)*, [1970] ECHR 1, para. 25.

Kingdom,[118] that right includes access to a court. It extends to all cases arising within the jurisdiction of state Parties to the Convention, which is generally where the act on which the claim is based took place in the territory of one of the Member States. Whether this right also extends to plaintiffs that are only incidentally present on that territory (and the principal events having taken place extraterritorially) is however debated. Kiestra contends that where a state can exercise adjudicatory jurisdiction in civil dispute, this brings the parties to that dispute within the jurisdiction of that state in the sense of Article 1 ECHR,[119] as can also be inferred from the Court's decision in *Markovic*.[120] Under *Golder v. UK*, Article 6(1) grants access to a court if a plaintiff can produce "any claim related to his civil rights and obligations"[121] under domestic law. The extent to which states can extend or limit actionable claims is however vague, as the Court gives states significant leeway to balance their interests against the interests of potential plaintiffs.[122]

The answer to the fundamental question of whether Article 6(1) indeed requires states to provide access to their courts in civil cases where plaintiffs would otherwise face a denial of justice is similarly unclear. The only guidance provided thus far is found in *Hans-Adam II v. Germany*,[123] which the Court repeatedly stressed is an exceptional case that should in no way be read as solid precedent for subsequent case law. Nevertheless, the Court does suggest that states cannot simply refuse jurisdiction over claims that are incidentally connected to them if there is no alternative forum available.[124] While such a formula sounds fairly close to relative necessity jurisdiction as discussed above, the Court stops short of explicitly holding that this is mandated by Article 6(1), and in any case it does not require states to fully scrutinize whether the alternative forum would abide by Convention standards.

---

[118] ECtHR 12 February 1975 – no. 4451/70 *(Golder v. United Kingdom)*, [1975] ECHR 1, para. 35: "[…] the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in light of these principles."

[119] *Louwrens Rienk Kiestra*, The Impact of the European Convention on Human Rights on Private International Law (2014) 64.

[120] ECtHR 14 December 2006 – no. 1398/03 *(Markovic and Others v. Italy)*, [2006] ECHR 1141.

[121] ECtHR 12 February 1975 – no. 4451/70 *(Golder v. United Kingdom)*, [1975] ECHR 1, para. 36.

[122] See ECtHR 21 November 2001 – no. 35763/97 *(Al-Adsani v. United Kingdom)*, [2001] ECHR 761. See also *Aukje Van Hoek/Marcel Brus/Ige Dekker/Cedric Ryngaert*, Making Choices in Public and Private International Immunity Law (2011).

[123] ECtHR 12 July 2001 – no. 42527/98 *(Prince Hans-Adam II of Liechtenstein v. Germany)*, [2001] ECHR 467.

[124] *Aukje Van Hoek*, Transnational Corporate Social Responsibility, in: Social Responsibility in Labour Relations: A European and Comparative Perspective, ed. by Frans Pennings/Yvonne Konijn/Albertine Veldman (2008) 147, 158–159.

In another case where a possible denial of justice resulting from deference to the jurisdiction of a state not party to the Convention arose, *Gauthier v. Belgium*,[125] the Court evaded the issue by basing its decision on the plaintiff's contracting away its right to have a claim examined by a Belgian court. Consequently, while the ECtHR's case law seems to suggest that some form of necessity jurisdiction has to be asserted in exceptional circumstances, it does not squarely confront the issue by declaring forum of necessity to be mandated by the Convention.

It stands to reason that, in the absence of uniform standards among the different European states and a clear answer from the Court, the right to an effective forum can, and should, be made a topic of discussion in the Council of Europe. Clearly, the Convention provides minimum requirements and states are fully within their right to apply better protection than the Convention affords – hence the French conception of Article 6(1) and the liberal Dutch take on forum of necessity. Furthermore, parallel to the recast of Brussels I by the EU, the CoE has taken up work on access to justice as regards business and human rights cases in its parliamentary assembly and in its Human Rights Commission. The CoE's work is ongoing, however, so that the analysis below can only be provisional.

b) The Council of Europe and jurisdiction as a condition for access to justice

Within the CoE, issues of jurisdiction have largely been discussed in the context of the Council's operationalization of the UN Guiding Principles on Business and Human Rights. As mentioned, Operational Principle 26 of the principles provides that "states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy".[126] While several states have adopted or are in the process of drafting national action plans in order to implement Principle 26 and other Guiding Principles, the CoE has started its own process of implementation and integration with the existing human rights framework.

---

[125] ECtHR 6 March 1989 – no. 12603/86 *(Gauthier v. Belgium)*, [1989] ECHR 1, concerning a dispute over an employment contract between Air Zaire and a Belgian pilot where the courts of Leopoldville (now Kinshasa) had been named as having exclusive jurisdiction. The pilot argued that the Belgian courts should adjudicate his dispute with the airliner, because he would not receive fair treatment of the dispute in Zaire (now the Democratic Republic of Congo). The ECtHR considered that he had entered freely and of his own will into the contract containing the clause. Concerns as to the impartiality of the Zairean judiciary could not override this, rendering his complaint moot.

[126] UN Guiding Principles on Business and Human Rights (n. 1 above).

The first steps in this respect were taken by the CoE's Parliamentary Assembly in its Resolution 1757[127] and Recommendation 1936[128] on business and human rights. The Parliamentary Assembly highlighted "the existing imbalance in the scope of human rights protection between individual and businesses", and stated that "while a company may bring a case before the Court claiming a violation by a state authority of its rights protected under the [ECHR], an individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction".[129] It thereby echoed the concerns articulated by the Guiding Principles, namely that it falls to states to offer an effective remedy for victims of human rights abuses by private actors. What is interesting about these comments is that while the Guiding Principles are deliberately brief on the issue of the right to a remedy capable of extraterritorial application,[130] the Parliamentary Assembly specifically discussed the problem of human rights violations occurring in third countries not directly subject to the Convention's legal order.[131] While not discussing forum of necessity *per se*, the Assembly hereby highlighted the same concerns that have prompted the states discussed above to adopt necessity-based jurisdiction in their national legal orders.[132]

The response by the Committee of Ministers was to direct its Steering Committee for Human Rights to address the issue, which in turn set up a specific Draft Group on Human Rights and Business (CDDH-CORP) tasked with drafting recommendations to the Committee. The Steering Committee also produced a preliminary study and a feasibility study on corporate social responsibility in the field of human rights. The specific doctrine of forum of necessity was not raised in either study, but both addressed the problem of the lack of extraterritorial jurisdiction over human rights abuses in third states. It thus concluded that further exploration and additional instruments may be necessary to fully address access to justice problems regarding business and human rights claims.[133]

---

[127] Council of Europe Parliamentary Assembly, Resolution 1757 (2010) on Human rights and business, available at <http://www.assembly.coe.int>.

[128] Council of Europe Parliamentary Assembly, Recommendation 1936 (2010) on Human rights and business, available at <http://assembly.coe.int>.

[129] Council of Europe Parliamentary Assembly, Recommendation 1936 (previous note).

[130] See, for a more extensive discussion on the Guiding Principles, the Special Representative of the Secretary-General John Ruggie, Online Forum (17 January 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf>, and for a critique of the Guiding Principles' approach to extraterritoriality *Larry Catá Backer*, From Institutional Misalignments to Socially Sustainable Governance, Pac. McGeorge Global Bus. & Dev.L.J. 25 (2012) 69, 91.

[131] Council of Europe Parliamentary Assembly, Resolution 1757 (2010) on Human rights and business, available at <http://www.assembly.coe.int>, 3.

[132] *Strikwerda*, Inleiding (n. 21).

[133] Council of Europe, Meeting Report (n. 12) 3.

The reports did not address in detail how this relates to the perception of several state parties that Article 6(1) ECHR might require necessity jurisdiction. What it did highlight, and what was also echoed by the Committee of Ministers' declaration in support of the Guiding Principles, was that existing standards between Member States of the CoE vary widely, and that there is little guidance from the CoE's human rights instruments. With that conclusion, the matter was relegated to meetings of the Draft Group, with the instruction that while the issue of jurisdiction should be given attention, it should not be the principal focus of any new (non-binding) instrument,[134] as called upon by Recommendation 1936.[135] While Poland and the United Kingdom warned against the CoE getting stuck in the complexity of extraterritorial jurisdiction in the preparatory documents for the Draft Group's September 2014 meeting,[136] the issue of extraterritorial jurisdiction in civil cases did find its way into the draft recommendations for the Committee of Ministers in the spring of 2015,[137] which were confirmed in the fifth meeting.[138] The recommendations discuss both the importance of access to remedy, and make recommendations as to what grounds of jurisdiction Member States should adopt. Among those recommendations is a discouragement of *forum non conveniens* even when Brussels I does not apply,[139] and encouragement for the extension of the connected claims doctrine[140] and forum of necessity.[141]

Accordingly, it appears that the Council of Europe, unlike the EU, is willing to explicitly address access to justice problems confronting human rights claims with respect to business, in accordance with its human rights mandate. Still, the discussion has not yet moved beyond the exploratory stage, as the draft recommendations have neither been formally adopted by the Steering Committee of the Committee of Ministers, nor put back to the Parliamentary Assembly. It is not unlikely that the draft will stall, with sensitive questions of extraterritorial overreach proving intractable. Furthermore, even if the discussion were to bear fruit, it is not clear what outcomes

[134] Council of Europe, Drafting Group on Human Rights and Business (14 February 2014): 2nd Meeting Report, CDDH-CORP(2014)R2, available at <http://www.coe.int>, 3.

[135] Council of Europe Parliamentary Assembly, Recommendation 1936 (2010) on Human rights and business (n. 128 above).

[136] Council of Europe, Drafting Group on Human Rights and Business (20 June 2014): Corporate social responsibility in the field of human rights – Proposals and suggestions of issues for further consideration – updated version, CDDH-CORP(2014)007 add, available at <http://www.coe.int>, 17 and 20–21.

[137] Council of Europe, Drafting Group on Human Rights and Business (27 February 2015): 4th Meeting Report, CDDH-CORP(2015)R4, available at <http://www.coe.int>.

[138] Council of Europe, Drafting Group on Human Rights and Business (29 September 2015): 5th Meeting Report, CDDH-CORP(2015)R5, available at <http://www.coe.int>.

[139] CDDH-CORP(2015)R5, Appendix III, no. 34.

[140] CDDH-CORP(2015)R5, Appendix III, no. 35.

[141] CDDH-CORP(2015)R5, Appendix III, no. 36.

can be expected. Whether victims of corporate human rights abuses will be able to access a European forum will depend on the instrument's exact content (liberal/strict), its legal character, and the willingness of Member States to implement it. Learning from the experiences of both the US with its Alien Tort Statute, and Belgium with its genocide law, the Member States might not necessarily be unwilling, but understandably cautious and careful in implementing forum of necessity jurisdiction. However, the CoE's method of addressing the issue, by making suggestions and appealing to the human rights responsibilities of its Member States, might bear more fruit than the one-size-fits-all harmonization model of the European Union.

IV. Concluding observations

The omission of a general forum of necessity provision in the recast Brussels I Regulation and the slow progress in the Council of Europe both suggest that states are reluctant to accept overly broad forum of necessity rules. In a sense, this can be seen as a setback for the right of access to justice of victims of corporate human rights violations. It is possible that these states fear their courts will function as a US Alien Tort Statute-style "world forum" for foreign claims. Given the small number of cases currently based on necessity jurisdiction, even where the provision is interpreted rather liberally, this fear may be misplaced.

States – or their courts – may, in accordance with the UN Guiding Principles, want to tailor the conditions applicable to forum of necessity-based jurisdiction to the specific case of corporate human rights claims, and abandon overly strict requirements pertaining to territorial connection and the burden of proof. As Kohl has recently observed, exercising extraterritorial tort jurisdiction over such claims may simply be "the right thing to do", even if it appears to be a drain on scarce judicial resources and could even cause diplomatic tensions with other states.[142] Overly liberal jurisdictional rules, on the other hand, are not desirable either, as they may result in international cooperation problems and failures to enforce judgments abroad.[143] A middle course may have to be pursued, doing justice to the moral imperative to provide a forum to those who need it most, and the more mundane concern over the effectiveness of necessity jurisdiction, also in terms of

[142] *Uta Kohl*, Corporate Human Rights Accountability: the Objections of Western Governments to the Alien Tort Statute, ICLQ 63 (2014) 665, 685.

[143] As noted by the UK's response to the recast Regulation, the Commission deliberately left out a uniform approach regarding enforcement and recognition *vis-à-vis* third states while retaining several proposals affecting third states. In that sense, Art. 25 had greater practical applicability in that it allowed plaintiffs to vindicate judgments in their favour on the moveable assets owned by the defendant in the forum state.

nudging more connected fora to assume enhanced responsibility for corporate human rights litigation.[144]

V. Summary

In the international debate over the human rights impact of transnational corporations' activities, access to judicial remedies for the human rights consequences of corporate misbehaviour has acquired a rather prominent place. For various reasons, victims of human rights abuses involving corporations may not have access to the fora offered by corporations' home and host states. Therefore, attention can be turned to bystander states offering an exceptional "forum of necessity" to avert a denial of justice. Such a forum of necessity is not, however, without problems. While, on the one hand, it may provide access to justice for victims of human rights abuses, it also creates the risk of forum shopping and potentially increases uncertainty for corporate defendants. Adopting forum of necessity thus requires the striking of a delicate balance between the interests of plaintiffs, defendants and the states asserting necessity jurisdiction.

The debate on forum of necessity takes place in different fora. The doctrine is found in several European jurisdictions, but its contents and the degree to which it is developed vary significantly. Thus, whether it can be expected to play a noticeable role in business and human rights cases is uncertain. As there are few relevant cases in Europe and the doctrine is generally in its infancy, the article compares the European experience with the experience of Canada, where forum of necessity has played a more prominent role, also in (business and) human rights cases. The European Union for its part has recently adopted a new regulation on jurisdiction in civil and commercial matters known as the recast Brussels I Regulation; the Commission's initial proposal for this new regulation contained a forum of necessity clause. This proposal was however significantly amended, not specifically because of forum of necessity, but because EU Member States likely re-

[144] There is a rich literature on "nudging", a concept from behavioural sciences that refers to factors that change people's (or entities') behaviour, without forcing them to do so. See notably *Richard Thaler/Cass R. Sunstein*, Nudge: Improving Decisions About Health, Wealth, and Happiness (2008). Applied to our research object, the exercise of necessity jurisdiction, being only a second- or third-best option triggered to avert a denial of justice, should nudge corporations' host or home state to provide a forum – eventually making the bystander forum redundant. Little empirical research has so far been conducted regarding the effect of bystander states' exercise of jurisdiction on the ability and willingness of host or home states. That being said, the impact of the exercise of universal criminal jurisdiction over Latin American torturers, by bystander states (notably by Spain), on the willingness of Latin American States to bring proceedings has been well documented. See *Naomi Roht-Arriaza*, The Pinochet Effect: Transnational Justice in the Age of Human Rights (2005).

jected the Commission's extension of the Regulation's scope to cover all civil cases in the EU, even those against defendants domiciled in third states. Consequently, the initiative to pursue forum of necessity as a helpful tool in business and human rights cases may fall to the Council of Europe. A lively debate is currently going on regarding the remedies that CoE Member States should provide to implement the UN Guiding Principles, and proposals are currently on the table to encourage CoE Member States to adopt certain grounds for jurisdiction, including forum of necessity, in their civil procedure law.