

# **Business and Human Rights Litigation in Europe: the Promises Held by *Forum of Necessity*-based Jurisdiction**

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## **Abstract**

In the international debate over the human rights impact of transnational corporations' activities, access to judicial remedies for corporate misbehavior 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, the 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 without problems, however. Whereas, 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 article does not give an exhaustive overview of forum of necessity. Instead it draws attention to the potential of this doctrine as a tool to offer 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 area. In the Council of Europe (CoE), a lively debate is currently going on regarding the remedies that Council of Europe member States should provide to implement the UN Guiding Principles. The European Union (EU) 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. 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.

## **1. Introduction**

In the international debate over the human rights impact of transnational corporations' activities, access to judicial remedies for corporate misbehavior has acquired a rather

prominent place. In particular, operational Principle nr. 26 of the influential UN Guiding Principles on Business and Human Rights (2011) 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’.<sup>1</sup>

In the classic conception, the ‘natural’ States to take such steps are in principle the corporation’s host State (the State where the corporation is active and the alleged violation took place)<sup>2</sup> and home State (the State where the corporation is incorporated). These States may exercise jurisdiction on the basis of well-recognized principles of jurisdiction, respectively the territoriality principle and the domicile principle.<sup>3</sup> 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. So much is in fact 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.’<sup>4</sup> In such situations, victims of corporate misbehavior risk being denied justice. This is, unless bystander States exceptionally offer a forum to hear the claim.

This contribution examines the opportunities offered by such an ‘exceptional’ forum. In particular, it will ascertain under what circumstances bystander State courts could exercise jurisdiction in civil matters over 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

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<sup>1</sup> UN Human Rights Council, United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011) (UN Guiding Principles on Business and Human Rights).

<sup>2</sup> This example refers to situations where a corporation incorporated in one State directly operates in another State. In practice, corporate groups are often divided in a parent company, an independently incorporated subsidiary and local contractors.

<sup>3</sup> 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, and advance 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).

<sup>4</sup> UN Guiding Principles on Business and Human Rights, Commentary to Operational Principle nr. 26.

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 of the claim/plaintiff/ defendant, and the forum, such courts may be considered to offer a subsidiary *forum of necessity* (*forum necessitatis*).<sup>5</sup> Such a forum of necessity is not without problems. Whereas, 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.<sup>6</sup> The principal investigator of that study even went as far as to state that necessity-based jurisdiction was a ‘general principle of public international law’.<sup>7</sup> That may appear to be somewhat exaggerated. Still, such jurisdiction seems to exist in various other countries from diverse legal systems, also outside Europe.<sup>8</sup> 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 apply it in practice, the exact scope and conditions of application of *forum of necessity* remain underdetermined. Most importantly, some States

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<sup>5</sup> Compare *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.), 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 Dutch Code of Civil Procedure). 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 District Court of The Hague (Rechtbank ’s Gravenhage), *Akpan and others v. Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, Ltd.*, LJN: BY9854, C/09/337050/HA ZA 09-1580, Judgment of 30 January 2013.

<sup>6</sup> *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’, available at <[http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf)>.

<sup>7</sup> *Ibid.*, p. 64.

<sup>8</sup> *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*).

require a *connection* with the forum for necessity-based jurisdiction to be triggered,<sup>9</sup> whereas others (in fact a minority) do not require any connection.<sup>10</sup>

It is not the aim of this contribution to flesh out in detail the nature, scope, and conditions of application of *forum of necessity* in various jurisdictions. Others have done so before, and have done so well at that.<sup>11</sup> Rather, we want to draw attention to the potential of this doctrine as a tool to offer 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 area. In the Council of Europe (CoE), a lively debate is currently going on regarding the remedies that Council of Europe member States should provide to implement the UN Guiding Principles. 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.<sup>12</sup> The European Union (EU) for its part has recently adopted a new regulation on jurisdiction in civil and commercial matters known as the recast Brussels-I Regulation.<sup>13</sup> 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 obviously relevant for business and human rights litigation. These principles form the legal framework that plaintiffs have to factor in when they consider bringing claims in an EU member State forum. The Regulation is exhaustive, meaning that in cases where it applies, it

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<sup>9</sup> *E.g.*, Art. 3 of the Swiss Code of Private International Law ('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 Québec Civil Code ('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).

<sup>10</sup> *E.g.*, Art. 9 Rv. (Dutch Code of Civil Procedure); Section 6 of the Uniform Law Conference of Canada's ('ULCC') model Court Jurisdiction and Proceedings Transfer Act (1994), discussed in more detail below. The Dutch approach is nuanced, however: under Art. 9 Rv. a connection is not required in case legal proceedings outside the Netherlands prove impossible, but a connection *is* required in case it is unacceptable to require that the plaintiff initiate proceedings in a foreign jurisdiction.

<sup>11</sup> See notably *Nwapi*, U.B.C.L.Rev. 47 (2014) 211.

<sup>12</sup> Drafting Group on Human Rights and Business (CDDH-CORP), Meeting Report, 1<sup>st</sup> Meeting, Appendix III (Draft revised Declaration of the Committee of Ministers on the United Nations Guiding Principles on Business and Human Rights), available at <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/hr\\_and\\_business/Documents/Web\\_CDDH-CORP%282013%29R01\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/Documents/Web_CDDH-CORP%282013%29R01_en.pdf)>.

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

supersedes all domestic private international law rules on jurisdiction and enforcement. Still, the Brussels-I regime only applies to cases brought against defendants domiciled in the EU;<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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 of *forum of necessity* in the proposal. However, this need not mean that States oppose *forum of necessity* as a *permissive* principle of adjudicatory jurisdiction under international law.<sup>17</sup> But 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 discussions taking place at the EU on the further development of *forum of necessity* is at the heart of this contribution.

This contribution 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 advisable 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 cognizant of the differences in legal culture between Canada and Europe, it is observed that Canada draws on 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. At least to some extent, this may inoculate Europe from rejecting Canadian 'legal transplants'.

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<sup>14</sup> Art. 4(1) Brussels I Regulation Recast; Art. 2 Brussels I Regulation.

<sup>15</sup> Art. 6(1) Brussels I Regulation Recast; Art. 4(1) Brussels I Regulation.

<sup>16</sup> Draft Arts. 25 and 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 (Recast) 2010/0383 (COD), available at [http://www.europarl.europa.eu/registre/docs\\_autres\\_institutions/commission\\_europeenne/com/2010/0748/CO\\_M\\_COM\(2010\)0748\\_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2010/0748/CO_M_COM(2010)0748_EN.pdf).

<sup>17</sup> *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 1, we give an overview of the application of *forum of necessity* in 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. Starting from the assumption that given 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 2, we inquire whether progress on this count can be expected from normative developments at the level of the EU and the CoE. In section 3, we provide a conclusion.

## **2. *Forum of necessity* in domestic legal orders**

*Forum of necessity* exists as a separate jurisdictional category in a considerable number of domestic legal orders. Notably in Europe (Section 2.1) and Canada (Section 2.2) 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 victims' right of access to justice is nonetheless crucial. As Section 2.3 demonstrates, restrictive conditions pertaining to the application of *forum of necessity* have resulted in jurisdiction on this basis only rarely being established.

### *2.1 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.<sup>18</sup> As said, 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 be born out of Article 6(1) of the European Convention on Human Rights (ECHR), which provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a

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<sup>18</sup> See Nuyts, Study on Residual Jurisdiction (n. 7) 83.

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 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.<sup>19</sup> 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 to access to court.<sup>20</sup> 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.<sup>21</sup>

*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 legislator can be telling about how the doctrine is viewed. One example is the Netherlands, where a *forum of necessity* doctrine was quite well developed in case-law before its statutory adoption in 2002.<sup>22</sup> The way Dutch courts treated the doctrine was largely tied in with the doctrine of *forum non conveniens*.<sup>23</sup> 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 such would leave the plaintiff without an appropriate forum, provided at least that the case had a sufficient connection with the Netherlands.<sup>24</sup> In the course of the revision of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in 2002, the Dutch legislator ended the connection between *forum non conveniens* and *forum of necessity* and adopted a statutory *forum of necessity* provision in its revision of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in 2002. The current articles 9b and 9c of this Code establish *forum of necessity* as an independent counterweight for the 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.<sup>25</sup>

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<sup>19</sup> See also *Golder v. United Kingdom*, [1975] 1 EHRR 524. The Court has 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 domestic forum law in *Markovic and Others v. Italy*, Appl. No. 1398/03, Judgment of 14 December 2006.

<sup>20</sup> See below for a more extensive discussion on access to court under the European Convention.

<sup>21</sup> *Luc Strikwerda*, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2012) 234-235. See more specifically in the Dutch context: Kamerstukken II 1999/00, 26855, nr. 3, ‘Men kan iemand niet de toegang tot een rechter algeheel ontzeggen; dat zou waarschijnlijk ook op gespannen voet staan met artikel 6 EVRM.’

<sup>22</sup> *Ibid.*, pp. 218-219.

<sup>23</sup> *Fatih Ibili*, *Gewogen rechtsmacht in het IPR: Over forum (non) conveniens en forum necessitatis* (2007) 108.

<sup>24</sup> *Ibid.* See also HR 26 October 1984 [1985] NJ 696.

<sup>25</sup> *Ibid.*

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’.<sup>26</sup> Belgium’s Private International Law Code contains a similarly worded provision in its Article 11.<sup>27</sup> Amongst 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.<sup>28</sup>

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.<sup>29</sup> Other successful appeals to *forum of necessity* have concerned property law<sup>30</sup> and contract law.<sup>31</sup>

## 2.2 Canada

A similar picture emerges in Canada, although there, *forum of necessity* has come to play a somewhat larger, but nevertheless still modest, role in human rights litigation, including against corporations.<sup>32</sup> *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*

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<sup>26</sup> Bundesgesetz über das International Privatrecht [IPRG], 8 December 1987, SR, 291, Art. 3.

<sup>27</sup> Wet houdende het Wetboek van Internationaal Privaatrecht of 16 July 2014, MB, 27 July 2004, 57344, Art. 11: ‘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.’

<sup>28</sup> Nuyts, Study on Residual Jurisdiction (n. 7) 83.

<sup>29</sup> See *El-Hojouj*, Rechtbank Den Haag, 21 March 2012, ECLI:NL:RBSGR:2012:BV9748.

<sup>30</sup> Obergericht ZH, 26 February 1992, ZR 90 (1991) 289, n. 89

<sup>31</sup> See *Tbilisi Central Plaza BV v. JSC BTA Bank*, Rechtbank Rotterdam, 8 June 2011, ECLI:NL:RBZUT:2008:BC9336 and *Solvochem v. Racheed Bank*, Gerechtshof Den Haag, November 30, 2010, ECLI:NL:GHSGR:2010:BO6529; for a more extensive discussion of *Solvochem* see below.

<sup>32</sup> 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 US 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.’).



*Proceedings Transfer Act* (1994), which has been implemented by a number of English-speaking Canadian provinces and territories,<sup>33</sup> 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* provision 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.<sup>34</sup>

Like in Europe, *forum of necessity* is only applied on an exceptional basis in Canada, and has been invoked successfully only twice.<sup>35</sup> None of the cases heard under the Canadian common law (unlike under Québec civil law – see below) has pertained specifically to business and human rights claims, although one of them (*Bouzari v Bahremani*) related to 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 jurisdiction, particularly, the state where the torture took place, Iran’.<sup>36</sup> 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, instead it required that the *defendant* establish that another forum was more appropriate,

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<sup>33</sup> Court Jurisdiction and Proceedings Transfer Act, S.Y. 2000, c. 7, s. 6; Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003, c. 2, s. 7; Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 6.

<sup>34</sup> One may note that Art. 9(b) of the Dutch Code of Civil Procedure 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.

<sup>35</sup> *Bouzari v. Bahremani*, [2011] O.J. No. 5009; *Josephson v. Balfour*, 2010 BCSC 603, 10 B.C.L.R. (5<sup>th</sup>) 369.

<sup>36</sup> *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 (C.A.). 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*.

applying an analysis akin to the *forum non conveniens* doctrine.<sup>37</sup> In other cases, plaintiffs relying on *forum of necessity* were unsuccessful.<sup>38</sup> 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.<sup>39</sup> In this respect, the courts did usually not accept that practical difficulties, inconvenience,<sup>40</sup> or the inability to obtain counsel abroad were sufficient to establish a *forum of necessity* in Canada.<sup>41</sup>

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 (2012) is a case in point here.<sup>42</sup> *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 Québécois 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.<sup>43</sup>

Before the court was the question 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 whether Anvil had an establishment in Canada and whether there was a sufficient link between Anvil's activities in

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<sup>37</sup> *Bouzari v. Bahremani*, 2013 ONSC 6337.

<sup>38</sup> 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 Misplace - The Future of Forum of necessity Jurisdiction in Canada*, *Can.Bus.L.J.* 48 (2009) 135.

<sup>39</sup> *West Van Inc. v. Daisley*, 2014 ONCA 232, para. 39.

<sup>40</sup> *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.) (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 Québec Civil Code which requires a sufficient connection with Québec for *forum of necessity* to apply.

<sup>41</sup> *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.

<sup>42</sup> *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117.

<sup>43</sup> *Forum of necessity* is governed by Art. 3136 of the Québec Civil Code, whereas establishment-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'.

Québec and the wrongful acts committed in the DRC. The Court held that Anvil's (sole) representative in Canada was only tasked to maintain relations with investors and shareholders,<sup>44</sup> that Anvil's activity in Canada had nothing to do with the exploitation of a mine in the DRC<sup>45</sup> 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 Québecan law, there should at least be a *connection* between these acts and an activity of the corporation in the forum State.<sup>46</sup>

In principle, this absence of a connection should also have sufficed to dismiss the suit on the basis of *forum of necessity*, as Québec law, unlike the Uniform Law Conference of Canada, statutorily requires that the dispute have 'a sufficient connection with Québec'.<sup>47</sup> 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 plaintiffs show that proceedings could not be instituted before other more natural fora: the DRC 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,<sup>48</sup> that difficulties of cooperation with DRC authorities in the Australian proceedings could equally have arisen in Québec<sup>49</sup> and that there was insufficient proof that lawyers elsewhere did not want to bring proceedings.<sup>50</sup> Ultimately, *Anvil* shows that, like in transnational proceedings before other Canadian courts, practical difficulties faced by the 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*.<sup>51</sup>

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<sup>44</sup> *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117, para. 83.

<sup>45</sup> *Ibid.*, para. 85.

<sup>46</sup> *Ibid.*, para. 89.

<sup>47</sup> Art. 3136 of the Québec Civil Code.

<sup>48</sup> *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117, para. 100.

<sup>49</sup> *Ibid.*, para. 101.

<sup>50</sup> *Ibid.*, para. 102.

<sup>51</sup> 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 (*ibid.*, 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.

### 2.3 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.

#### 2.3.1 Impossibility or unreasonableness

Firstly, the plaintiff has to show that it is either impossible or unreasonable to bring the claim in a more appropriate court.<sup>52</sup> From the text of most statutes, *forum of necessity* (impossibility to bring the claim elsewhere) can refer to both the practical or legal impossibility to bring 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 limitations to bring the claim outside of the plaintiff's control, 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 can therefore not be sued locally.<sup>53</sup>

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<sup>52</sup> *Nwapi* Utrecht J.Int'l.Eur.L. 30 (2014) 24, 33. Discussing Arts. 9(b) and 9(c) of the Dutch Code of Civil Procedure ('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* refers to impossibility and unreasonableness as absolute and relative *forum of necessity*, respectively. *Ibili*, Gewogen rechtsmacht in het IPR (n. 23) 109-110.

<sup>53</sup> *Al Shimari v. CACI Int'l, Inc.*, 1:08-CV-00827, 933 F.Supp.2d 793, 2013 WL 1234177 (E.D.Va. Mar. 19, 2013), where the 4<sup>th</sup> Circuit Court granted a motion to dismiss a case against a private military contractor for

Additionally, the plaintiff may face practical impossibilities to bring a case, such as where the legal infrastructure of the state that would be most suited to hear the claim has been destroyed or is unavailable because of armed conflict or natural disasters. As this overlaps with the practical difficulty to bring the proceedings – as discussed below – it may be disputed what circumstances pass the threshold for factual impossibility. In most States this will be largely a theoretical exercise as practical impossibility or unreasonableness are lumped together, but in the Netherlands, absolute impossibility to bring proceedings abroad negates the requirement of a connection with the Netherlands as a forum state.<sup>54</sup> Thus, the distinction can have very real consequences.

Alternatively, plaintiffs 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, what Ibili refers to as ‘relative’ *forum of necessity*.<sup>55</sup> As the burden of proof to demonstrate 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 when 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*, a case where the Hague Court of Appeal confirmed necessity jurisdiction for a case that would otherwise have to be brought in Iraq in the midst of the Iraqi conflict, exposing the plaintiff to the risks of conflict areas.<sup>56</sup>

There are also grounds upon which courts have exercised jurisdiction on the basis of ‘relative’ *forum of necessity* that are more controversial. Belgian courts have entertained cases where the financial burden of litigating abroad outweighed the interests of the claim,<sup>57</sup> whereas

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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 4<sup>th</sup> Circuit Court of Appeals, see <<http://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-1-3-0#c17777>>. Note that while SOFAs generally only bind the contracting States, courts in bystanders States may equally decline necessity jurisdiction for reasons of international comity.

<sup>54</sup> Wetboek van Burgerlijke Rechtsvordering, Art. 9(b), see below.

<sup>55</sup> *Ibili*, *Gewogen rechtsmacht in het IPR* (n. 23) 120.

<sup>56</sup> *Solvochem v. Rasheed Bank* (n. 31).

<sup>57</sup> *Nuyts*, *Study on Residual Jurisdiction* (n. 7) 83, referring to the National Report for Belgium.

Dutch courts have explicitly rejected this as a ground for necessity jurisdiction.<sup>58</sup> 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,<sup>59</sup> but those grounds invite tricky assessments of the functioning of foreign legal systems.<sup>60</sup> 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 of litigating 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.<sup>61</sup>

### 2.3.2 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 phrase this requirement differently: 'sufficiently connected' in Switzerland<sup>62</sup> and the Netherlands,<sup>63</sup> 'adequate relation' in Poland<sup>64</sup> or 'strong linking factor' in Portugal, and the 'sufficient connection with Québec' in the Québec Civil Code<sup>65</sup>. The extent of such connections also varies, ranging from residence of the plaintiff in

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<sup>58</sup> *Mourant & Co Retirement Trustees Ltd*, Rechtbank, 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 – would've resulted in a financial loss for the plaintiff even if the plaintiff's claim would have been awarded.

<sup>59</sup> *Olney v. Rainville*, 2008 BCSC 753, 83 BCLR (4th) 182.

<sup>60</sup> See *Ibili*, Gewogen rechtsmacht in het IPR (n. 23) 128-129.

<sup>61</sup> 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.

<sup>62</sup> Bundesgesetz über das International Privatrecht [IPRG], 8 December 1987, SR 291, Art. 3.

<sup>63</sup> Wetboek van Burgerlijke Rechtsvordering, Art. 9(b).

<sup>64</sup> See *Nuyts*, Study on Residual Jurisdiction (n. 7) 85.

<sup>65</sup> Art. 3136 of the Québec Civil Code.

the forum state to the presence of assets of the defendant.<sup>66</sup> 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.<sup>67</sup>

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,<sup>68</sup> and art. 6 of the Canadian ULCC does not mention a connection requirement at all. Especially in Europe, as opposed to Canada, connection requirements are usually not very strictly interpreted, nor do they have a well-defined autonomous meaning. This gives courts leeway to decide whether or not to accept necessity jurisdiction on the facts of each individual case.<sup>69</sup> In respect of business and human rights claims, however, it may not be overly difficult to find some form of connection of the corporation with the forum, where necessary, as multinational companies typically operate or at least have some sort of presence in a wide variety of States.

### 2.3.3 Discussion

As is clear from the overview provided here, *forum of necessity* provisions typically are substantively neutral, in the sense that they apply to all civil and commercial claims, irrespective of the nature of the injurious acts or abuses 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 claims. 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.<sup>70</sup> In the same vein, a Canadian member of Parliament – unsuccessfully – introduced a bill to confer jurisdiction on the Federal Court of

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<sup>66</sup> It needs to 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 discussed below.

<sup>67</sup> Cf. the *Akpan* litigation (n. 6). 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, 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.

<sup>68</sup> Wetboek van Burgerlijke Rechtsvordering. Art. 9(c).

<sup>69</sup> *Nwapi*, U.B.C.L.Rev. 47 (2014) 211.

<sup>70</sup> 28 U.S.C. para. 1350 ( '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.').

Canada to hear claims brought by foreigners with respect to ‘a violation of international law or a treaty to which Canada is a party’, which takes place outside Canada.<sup>71</sup> 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.<sup>72</sup>

Still, in both Canada and Europe, it is likely that it will rather be incumbent on 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.<sup>73</sup> Courts will 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’.<sup>74</sup> 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,<sup>75</sup> which is very unlikely to be enforced against the Libyan torturers. Whether this risk is similar in cases against

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<sup>71</sup> 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, S.C. 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/>>.

<sup>72</sup> See *Rechtsvergleichender Bericht. Sorgfaltsprüfung bezüglich Menschenrechten und Umwelt im Zusammenhang mit den Auslandaktivitäten von Schweizer Konzernen*, Report of 2 May 2014, available at <<http://www.ejpd.admin.ch/content/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-d.pdf>>.

<sup>73</sup> *Stephen Pitel*, Conflict of Laws: News and Views in Private International Law (29 February 2012): Quebec Court Refuses Jurisdiction on *Forum of necessity* Basis, available at <<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’).

<sup>74</sup> *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/>>.

<sup>75</sup> *El-Houjouj* (n. 29).



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 very reluctant to enforce judgments they perceive as overbroad or possibly exorbitant use of jurisdictional rules like *forum of necessity*.

Whether because of enforcement concerns, other procedural hurdles or simple opacity regarding 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, 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 bite, also in respect of 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, evidenced for instance by the Canadian *Anvil* case.

Especially in respect of business and human rights claims, in line with the 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 however not be as easy as to just ‘import’ necessity jurisdiction into their domestic private international law. As discussed above, *forum of necessity* is not even uniform amongst 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 pile of unenforceable judgements.

This discussion is not only relevant for 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 in the field of private international law that is binding on the Member States. 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 the next section, the activities of the EU and the Council of Europe with respect to *forum of necessity*, with a particular focus on business and human rights claims, will be discussed in turn.

### **3. *Forum of necessity* in regional legal orders: the EU and the Council of Europe**

As shown in the first section, *forum of necessity* is a technique of establishing exceptional jurisdiction that has been adopted by a number of domestic legal systems. Where such systems become more integrated, notably through an increase in cross-border transactions, calls for some form of supranational regulation, or harmonization of judicial jurisdiction, including *forum of necessity*, may emerge. In Europe, this process started with the adoption of the Brussels Convention (1968)<sup>76</sup> and the Lugano Convention (2007)<sup>77</sup> on jurisdiction and enforcement of judgments in civil and commercial matters. As far as the EU is concerned, in 2001 the Brussels Convention was replaced by the so-called Brussels-I Regulation<sup>78</sup> which was replaced by the so-called Brussels-I recast Regulation in 2012, which will enter into force in 2015.<sup>79</sup>

#### *3.1 The EU and the Brussels-I Regulation*

##### *3.1.1 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 both the plaintiff and 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. 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, *i.e.*, 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

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<sup>76</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 8 ILM 229 (1969).

<sup>77</sup> Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 28 ILM 620 (1989).

<sup>78</sup> Brussels I Regulation (n. 14).

<sup>79</sup> Brussels I Recast Regulation (n. 14). The recasting process was started in 2009 with a Green Paper initiated by the European Commission, produced as a Commission Proposal for a new regulation in 2009, and ended with the eventual Recast Regulation.

resort to national rules on jurisdiction to either accept or decline jurisdiction, as the ECJ elaborated on in *Owusu v. Jackson*.<sup>80</sup> 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 the discussion at hand regarding 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<sup>81</sup> is determined by the national law of the forum state. 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 treatment of civil claims against non-EU-based defendants across EU Member States.

### 3.1.2 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.<sup>82</sup> Drawing on the study by Nuyts discussed above, the Commission published a Green Paper highlighting possible changes and remaining questions.<sup>83</sup> 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.<sup>84</sup> As part of that proposal, article 26 contained a *forum of necessity* provision, which stipulated as follows:

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<sup>80</sup> 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.

<sup>81</sup> Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 30 October 2007, L 339/3.

<sup>82</sup> See, *e.g.*, Green Paper on the Brussels I Regulation, House of Lords European Union Committee, 21<sup>st</sup> Report, Session 2008-2009, available at [http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms\\_parliaments/united\\_kingdom\\_house\\_of\\_lords\\_en.pdf](http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_parliaments/united_kingdom_house_of_lords_en.pdf). For a more extensive discussion of the extension of the EU's extension of the Brussels I Regulation to third states, see *Johannes Weber*, *Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation*, *Labels J Comp & Int'l Priv L* 75 (2011) 619.

<sup>83</sup> 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, Brussels, 21.4.2009, COM(2009) 174 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>

<sup>84</sup> See proposed Art. 4(2), Proposal for a Regulation of the European Parliament and Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast).

## ‘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.’<sup>85</sup>

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 bears evidence of the Commission’s confidence that *forum of necessity* is commonplace in the national legal orders of EU Member States. Of course, these terms are just as open-ended as their national counterparts. For instance, it is unclear whether the Commission intended the ‘required connection’ to have an autonomous meaning or to leave it up to the Member States’ courts..

### 3.1.3 Brussels-I recast: implications for business and human rights

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. Especially considering the demand for some connection between the case and the forum, it is hardly a stretch of the imagination to see a case that might have no connection with a State that does have *forum of necessity* 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

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<sup>85</sup> *Ibid.*, proposed Art. 26.

be the case in another Member State – for instance, because it does more business in that State, or its parent company is seated there.<sup>86</sup> On the other hand, full harmonization of the law of jurisdiction in civil cases would have ended domestic grounds for jurisdiction that are more liberal than the Commission’s proposal. Amongst such grounds are domestic *forum of necessity* rules,<sup>87</sup> but also several of the more liberal grounds for jurisdiction discussed above,<sup>88</sup> each of which might be used to bring human rights claims against a corporate entity. So, while an extension of the scope of Brussels-I and an inclusion of a *forum of necessity* provision would have benefited legal certainty, one can dispute whether it would have actually extended the overall possibility 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, both articles were omitted from the eventual recast regulation as put to, and adopted, by the European Parliament. The likely reasons for this omission did not necessarily constitute a rejection of *forum of necessity* as a concept, however. Two things need to be noted here. Firstly, the introduction of necessity jurisdiction was not raised by any of the Member States as a possible problem. This may be an indication that the conclusion of the Green Paper and the European Commission in its draft, that necessity jurisdiction is generally accepted in the Member States. Secondly however, one should not read too much into this, because the issue of business, human rights and the problems of jurisdiction in adjudicating human rights violations was not a general topic of discussion either. Consequently, one must be careful in drawing overbroad conclusions with regard 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 is a bridge too far for most EU Member States, and without full harmonization adoption of a fully harmonized *forum of necessity* provision would be superfluous.

In this respect, the negative response of the Netherlands to the original Commission proposal is exemplary, considering the fact that the Netherlands already at an early stage adopted a *forum of necessity* provision with a relatively liberal interpretation of the concept. The arguments underlying this response can be found in an advisory opinion from the joint Dutch

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<sup>86</sup> See for instance *Akpan* as discussed above, which absent the connected claims doctrine might have been decided on this basis.

<sup>87</sup> For example, the absolute *forum of necessity* as present in the Dutch legal order.

<sup>88</sup> Connected claims doctrine, English bases for jurisdiction.

advisory committees on Private International Law and Civil Law, which was followed by the Minister of Justice and both parliamentary chambers.<sup>89</sup> These committees advised that full harmonization of jurisdiction rules with respect to defendants from third States was not desirable,<sup>90</sup> for two reasons.

Firstly, 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.<sup>91</sup> 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 fundament beneath that regime is the Union principle of mutual trust in other Member States' legal systems, a principle that does not apply for third States.<sup>92</sup> 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.<sup>93</sup> While no other reasoned rebuttals were publicly submitted to the Commission's proposal, the fact that articles 25 was omitted suggests that the above arguments also resonated with other Member States in the closed negotiations. If that is true, it implies that the omission of articles 25 and 26 did not constitute a rejection of *forum of necessity per se*, but merely of its place within the Brussels-I context.

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 elsewhere, for two reasons already mentioned above. Firstly, the rejection of the Commission's proposal for a recast Brussels-I centered on its full harmonization of rules of jurisdiction in private international law of EU States, and did not concern *forum of necessity* specifically. Secondly, full harmonization would be

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<sup>89</sup> See Reasoned Opinion Dutch parliament (States-General) on proposal Brussel I, available at <[www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc5420d8f48014270e004837310.do](http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc5420d8f48014270e004837310.do)>.

<sup>90</sup> Advies ontwerp-Verordening Brussel I (document COM (2010) 748 d.d. 14 december 2010), No. 5689654/11/6, available at <[https://www.eerstekamer.nl/eu/publicatie/20110909/advies\\_ontwerp\\_verordening\\_brussel/document](https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document)>.

<sup>91</sup> *Ibid.*, section 4.1.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

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 the Commission proposed. These remain dependent on the willingness of individual EU Member States to provide an exceptional forum. And where such a forum is formally available, as laid out in the first section, procedural and substantive requirements imposed on the exercise of necessity-based jurisdiction may circumscribe the access to justice potential held by *forum of necessity*.

### 3.2 Access to justice and the Council of Europe

#### 3.2.1 The European Convention of Human Rights and jurisdiction in general

While the discussion regarding *forum of necessity* may have ceased in the context of the EU for the moment, victims wishing to access a European forum in the absence of available local fora, may perhaps want to pin their hopes on another regional organization in Europe, the 47-states 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 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) saw the light, has a strong human rights and rule of law programme, 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 an exponent of the right to a fair trial as enshrined in article 6(1) ECHR. The European Court of Human Rights in *Delcourt v Belgium* 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.'<sup>94</sup> According to *Golder v the United Kingdom*,<sup>95</sup> that right includes access to a court. It extends to all cases arising within the jurisdiction of State Parties to the Convention, which will be mostly when the act on which the claim is based took place on the territory of one of the Member States' territories. Whether this right also extends to plaintiffs that are only incidentally present on that territory and the facts took place extraterritorially, is however

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<sup>94</sup> *Delcourt v. Belgium*, App. No. 2689/65, Judgment of 17 January 1970, para. 25.

<sup>95</sup> *Golder v. the United Kingdom*, App. No. 4451/70, Judgment of 21 February 1975, para. 35, '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.'

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,<sup>96</sup> as can also be inferred from the Court's decision in *Markovic*.<sup>97</sup> 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'<sup>98</sup> under domestic law. To what extent 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.<sup>99</sup>

The answer to the fundamental question of article 6(1) indeed requires States to provide access to their courts in civil cases where plaintiffs would otherwise face denial of justice, is similarly unclear. The only guidance provided thus far is found in *Hans-Adam II v Germany*,<sup>100</sup> which the Court however 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 just refuse jurisdiction over claims that are incidentally connected to them if there is no alternative forum available.<sup>101</sup> While such a formula sounds relatively close to relative necessity jurisdiction as discussed above, the Court does not explicitly say that this is indeed mandated by article 6(1), and in any case does not require States to fully scrutinize whether the alternative forum would live up to Convention standards. Similarly, the other case where possible denial of justice was raised, *Gauthier v Belgium*,<sup>102</sup> the Court evaded the issue by referring to the plaintiff's contracting away of his right to have a contract 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 stops short of squarely confronting the issue and declaring *forum of necessity* to be mandated by the Convention.

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<sup>96</sup> Louwrens Rienk. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (2014) 64.

<sup>97</sup> *Markovic*, App. No. 1398/03, Judgment of 14 December 2006.

<sup>98</sup> *Golder*, App. No. 4451/70, Judgment of 21 February 1975, para. 36.

<sup>99</sup> See *Al-Adsani v. the United Kingdom*, App. No. 35763/97, Judgment of 21 November 2001. See also Aukje Van Hoek et al, *Making Choices in Public and Private International Immunity Law* (2011).

<sup>100</sup> *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, Judgment of 12 July 2001.

<sup>101</sup> Aukje Van Hoek, *Transnational corporate social responsibility – some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers*, in: *Social responsibility in Labour Relations: a European and Comparative Perspective*, ed. by Frans Pennings/Yvonne Konijn/Albertine Veldman (2008) 12-13.

<sup>102</sup> *Gauthier v. Belgium*, App. No. 12603/86, Judgment of 6 March 1989, concerning a dispute over an employment contract between Air Zaire and a Belgian pilot where Kinshasa had been named as the exclusive jurisdiction. The pilot argued that Belgian courts should adjudicate his dispute with the airliner, because he would not receive fair treatment of the dispute in the Congo. The European Commission of Human Rights considered that he had entered freely and of his own will into the contract containing the clause. Concerns of impartiality of the Congolese judiciary could not override this, rendering his complaint moot.



It stands to reason that against this background and in absence of uniform standards between different European States and a clear answer from the Court, the right to an effective forum can, and should, be made topic of discussion in the Council of Europe. Of course, 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*. And indeed, parallel to the recast of Brussels-I by the EU, the CoE has taken up work regarding 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 on-going, however, so that the analysis given below can only be provisional.

### *3.2.2 The CoE 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 UN Guiding Principles on Business and Human Rights 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’.<sup>103</sup> While several States have adopted or are in the process of drafting national action plans in order to implement this and other principles emanating from the Guiding Principles, the CoE has started its own process of implementation and integration with the existing human rights framework.

The first steps in this respect were taken by the CoE’s parliamentary assembly in its Resolution 1757<sup>104</sup> and Recommendation 1936<sup>105</sup> 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’.<sup>106</sup> It thereby echoed the concerns of the Guiding Principles, namely that it falls to States to offer an effective remedy for victims of

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<sup>103</sup> UN Guiding Principles on Business and Human Rights (n. 1).

<sup>104</sup> Council of Europe Parliamentary Assembly, Resolution 1757 (2010) on Human rights and business, available at <<http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1757.htm>>.

<sup>105</sup> Council of Europe Parliamentary Assembly, Recommendation 1936 (2010) on Human rights and business, available at <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1936.htm>>.

<sup>106</sup> *Ibid.*

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 remedy applying extraterritorially,<sup>107</sup> the Parliamentary Assembly specifically discussed the problem of human rights violations occurring in third countries not directly subject to the Convention's legal order.<sup>108</sup> 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.<sup>109</sup>

The response by the Committee of Ministers was to direct its Steering Committee for Human Rights to address the issue. This Steering Committee 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 raised in neither study, but both addressed the problem of extraterritorial jurisdiction over human rights abuses affecting individuals in third States. The Steering Committee came to the conclusion that on this issue protection by the ECHR is currently lacking, considering that the ECHR only applies extraterritorially to acts or omissions of State organs. 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.<sup>110</sup>

Curiously, the Steering Committee did not address in detail how this relates to the perception of several State parties that article 6(1) ECHR might mandate 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 coming from the CoE's human rights instruments. With that conclusion, the matter was relegated back to meetings of the Steering Committee, with the instruction that while the issue of jurisdiction should be given attention, it should not be the main focus of any new (non-binding) instrument<sup>111</sup> as called upon by

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<sup>107</sup> See for a more extensive discussion on the Guiding Principles, Special Representative of the Secretary-General John Ruggie and extraterritoriality, *Larry Catá Backer*, From Institutional Misalignments to Socially Sustainable Governance: the Guiding Principles for the Implementation of the United Nation's 'Protect, Respect and Remedy' and the Construction on Inter-Systemic Governance', *Global Bus.Dev.J.* 25 (2012) 91.

<sup>108</sup> See Recommendation 1757 (n. 106) at 3.

<sup>109</sup> *Luc Strikwerda*, Inleiding (n. 22).

<sup>110</sup> Council of Europe Steering Committee for Human Rights, Drafting Group on Human Rights and Business, Meeting Report, 1<sup>st</sup> Meeting, 14-16 October 2013, CDDH-CORP(2013)R1, available at <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other\\_Committees/HR\\_and\\_Business/Documents/Web\\_CD\\_DH-CORP\(2013\)R01\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/Web_CD_DH-CORP(2013)R01_en.pdf)>, p. 3.

<sup>111</sup> Council of Europe Steering Committee for Human Rights, Drafting Group on Human Rights and Business, Meeting Report, 2<sup>nd</sup> Meeting, 12-14 February 2014, CDDH-CORP(2014)R2, available at

Recommendation 1936.<sup>112</sup> Conversely, in the preparatory documents for the Steering Committee's September 2014 meeting, Poland and the United Kingdom warned strongly against the CoE getting stuck in the complexity of extraterritorial jurisdiction and recommended that other mechanisms be explored first before addressing the issue.<sup>113</sup>

Accordingly, it appears that the CoE, unlike the EU, is willing to explicitly address access to justice problems confronting business and human rights claims, in accordance with its human rights mandate. Still, the discussion has not yet moved beyond the exploratory stage. It is not unlikely that it will get bogged down after all, with sensitive questions of extraterritorial overreach proving intractable. And if the discussion were to bear fruit, it is not clear what outcomes can be expected. Whether these will enable victims of corporate human rights abuses to access a European forum will depend on their exact content (liberal/strict), as well as on the legal character of the instrument and the willingness of Member States to implement it.

#### **4. 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. Possibly, States fear that their courts will function as some type of U.S 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 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

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<[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other\\_Committees/HR\\_and\\_Business/Documents/Web\\_CD\\_DH-CORP\(2014\)R2\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/Web_CD_DH-CORP(2014)R2_en.pdf)>, p. 3.

<sup>112</sup> Recommendation 1936 (n. 107).

<sup>113</sup> Council of Europe Steering Committee for Human Rights, Drafting Group on Human Rights and Business, Corporate social responsibility in the field of human rights – Proposals and suggestions of issues for further consideration – updated version (June 2014), 3<sup>rd</sup> Meeting, 20 June 2014, CDDH-CORP(2014)007 add, available at <[http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH-CORP\(2014\)007add\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH-CORP(2014)007add_en.pdf)>, pp. 17 and 20-21.

drain on scarce judicial resources and could even cause diplomatic tensions with other States.<sup>114</sup> 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.<sup>115</sup> A middle course may have to be steered, 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 nudging more connected fora to assume enhanced responsibility for corporate human rights litigation.<sup>116</sup>

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<sup>114</sup> *Uta Kohl*, Corporate Human Rights Accountability: the Objections of Western Governments to the Alien Tort Statute, I.C.L.Q. 63 (2014) 665, 685.

<sup>115</sup> 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 favor on the moveable assets owned by the defendant in the forum State

<sup>116</sup> 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 and 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).