

INTERNATIONAL LAW ASSOCIATION

SOFIA CONFERENCE (2012)

INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC

Members of the Committee:

Professor Catherine Kessedjian (France): *Chair*
Mr Edward Ho (UK): *Co-Rapporteur*
Mr Jacob van de Velden (UK): *Co-Rapporteur*

Professor Stefania Bariatti (Italy)	Sameer Parekh (India)
Professor Lauro da Gama e Souza (Brazil)	Professor Hilmar Raeschke-Kessler (Germany)
Dr Ales Galic (Slovenia)	Genevieve Saumier (Canada)
Professor Richard Garnett (Australia)	Professor Ingeborg Schwenzer (Switzerland)
Professor Burkhard Hess (Germany)	<i>Alternate:</i> Mr Gregor Geisser
David P Joseph (UK)	Professor Amos Shapira (Israel)
<i>Alternate:</i> Mr Adam Martin Johnson	Linda Silberman (USA)
Professor Patrick Kinsch (HQ)	Professor Nozomi Tada (Japan)
Professor Alberto Malatesta (Italy)	Ms Vesna Tomljenovic (Croatia)
Professor Dmitry Maleshin (Russia)	Mr David J C Wyld (UK)
Judge Gustaf Moller (Finland)	Professor Wouter De Vos (until 2012)
Professor Marie-Laure Niboyet (until 2012)	

FINAL REPORT

INTERNATIONAL CIVIL LITIGATION FOR HUMAN RIGHTS VIOLATIONS

Submitted on behalf of the Committee by:
Catherine Kessedjian, *Chair*
Jacob van de Velden, *Co-Rapporteur*
Edward Ho, *Co-Rapporteur*

INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC.....	1
REPORT.....	2
A. THE COMMITTEE'S WORK.....	2
B. INTRODUCTION	2
C. SURVEY OF EXISTING NATIONAL PRACTICE	6
1. <i>Jurisdiction</i>	6
2. <i>Choice of Law</i>	22
3. <i>Recognition and Enforcement</i>	27
D. COMMENT ON THE GUIDELINES	28
1) <i>Scope</i>	28
2) <i>International Jurisdiction</i>	29
3) <i>Applicable law</i>	34
4) <i>Transnational Judicial Cooperation</i>	35
5) <i>Recognition and enforcement</i>	36
DRAFT RESOLUTION NO 2 /2012	38
1) <i>Scope</i>	39
2) <i>International Jurisdiction</i>	39
3) <i>Applicable law</i>	41
4) <i>Transnational Judicial Cooperation</i>	42

5) <i>Recognition and enforcement</i>	42
---	----

REPORT

A. *The Committee's Work*

The Committee on International Civil Litigation and the Interests of the Public was formed in November 2004. It finished its first project, on Transnational Group Litigation, in 2008,¹ and shortly thereafter began its current and now completed project: International Civil Litigation for Human Rights Violations.

Since then, the Committee has met annually to discuss and review its work. In June 2009, at the British Institute of International and Comparative Law (BIICL) in London,² a roadmap for the Committee's work, in particular the preparation of national reports summarising and analysing current legal practice, was agreed to.

In August 2010 at the ILA's 74th Conference in The Hague, the Committee presented an Interim Report to the Conference,³ summarising its work to date and setting out, by way of important background to this Report, the key concepts and policy issues which had been identified as underlying the Committee's work. The interim report was discussed in a session open to the public. In a further closed-session meeting held in The Hague, the Committee considered in detail the national reports which its members had prepared and began debating, in light of those reports, the terms of the Guidelines which the Committee is now proposing.

The Committee's third meeting was held in April 2011 in New York, at New York University School of Law.⁴ There the Committee, having reviewed developments in national practice, discussed in detail a first draft of the Guidelines which had been prepared. While achieving broad consensus on a number of areas, the Committee identified a range of issues upon which further research and study were required. A second draft of the Guidelines was circulated in July 2011. Comments were received and a third draft of the Guidelines was prepared and circulated in December 2011.

The Committee's final meeting before the Sofia Conference was held in Heidelberg in February 2012.⁵ The Committee continued work on the basis of a fourth draft of the Guidelines which had been circulated in January 2012. Most outstanding issues were resolved at this meeting and the Committee also considered recent developments in national practice. On the basis of the discussion a fifth draft was finalised and sent to the Committee in March 2012.

The Chair and Rapporteurs would like to thank the members of the Committee for their work and support throughout the course of this project, in particular Profs. Geneviève Saumier, Linda Silberman, Richard Garnett, Nozomi Tada, Wouter de Vos, and Mr Gregor Geisser all of whom submitted detailed national reports without which the Committee's Final and Interim Reports would not have been possible. Many thanks are also due to Séverine Menétréy and Alexander Kunzelmann who took minutes in The Hague; Daniel Kesack and Rui Dias, then students at NYU School of Law, for taking the minutes of the Committee's March 2011 meeting; and Katharina Raffelsieper, student at Heidelberg University, for preparing the minutes for the meeting of February 2012.

B. *Introduction*

The draft resolution proposed by the Committee for adoption by the full house of the International Law Association is aimed at proposing Guidelines or best practices to address the private international law issues which often face national courts when they are confronted with international civil litigation for human rights violations.

¹ *Paris-Rio de Janeiro Guidelines of Best Practices on Transnational Group Litigation*, (71st ILA Conference, 2008); see <http://www.ila-hq.org/en/committees/index.cfm/cid/1021>

² Many thanks are due to BICCL for hosting the meeting.

³ Available at: <http://www.ila-hq.org/download.cfm/docid/4343509C-6B6F-4E39-AF2BAB33E474D6AB>.

⁴ Many thanks are due to Professor L. Silberman (US branch) for having facilitated the meeting, and to New York University School of Law for having hosted it.

⁵ Many thanks are due to Professor B. Hess for having facilitated the meeting, and to Heidelberg School law of law for having hosted it.

This report has been prepared in support of those Guidelines and its objectives are twofold: to briefly survey and summarise existing national practices as they have evolved since the interim report (see: Section C), and to provide a commentary to the draft Guidelines which the Committee has proposed in light of those national practices (see: Section D).

A full introduction to the Committee's project can be found in the Committee's 2010 Interim Report,⁶ which set out the background to the Committee's work, discussed and provided a working definition of the term "civil litigation for human rights violations", and identified the private international law obstacles which in the Committee's view impede the efficient resolution of such litigation.

The Committee's work coincided with that of Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011. On 16 June 2011, the UN Human Rights Council endorsed Professor Ruggie's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereinafter: *UN Guiding Principles*). Principle 25 reads:

"As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."⁷

One of the areas of proposed action then involves States taking appropriate steps to ensure, through judicial means, that when abuses occur within their *jurisdiction* those affected have access to effective remedy. With a view to achieving this aim, the UN Human Rights Council decided to establish a "Working Group on the issue of human rights and transnational corporations and other business enterprises" (UN Working Group)⁸ and requested it, *inter alia*:

"To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas;"⁹

On 10 April 2012, the UN Working Group outlined as one of its strategic considerations, "[t]he need for greater access by victims of business-related human rights abuse to effective remedies, which is urgent both in and of itself, as well as an important opportunity to drive implementation by setting the right incentives",¹⁰ while noting that

"...it is specifically mandated to explore options and make recommendations at the national, regional and international levels for improving access to effective remedies. This could include, among other things, identifying opportunities to dismantle barriers to justice for victims of business-related human rights harm....."¹¹

The UN Human Rights Council further established a "Forum on Business and Human Rights" under the guidance of the UN Working Group.¹² This platform serves to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices. These and other ongoing discussions in the context of the UN on concrete steps to implement the *UN Guiding Principles* in international cases, may certainly benefit from the Guidelines presently proposed by this Committee.

Further coincidence occurred with the activities of the Organisation for Economic Co-operation and Development. The organisation prepared an updated version of its "OECD Guidelines for

⁶ <http://www.ila-hq.org/en/committees/index.cfm/cid/1021>. See further paragraphs 70-72 below.

⁷ See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) A/HRC/17/31, 22.

⁸ See <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

⁹ Available at <http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>.

¹⁰ Available at http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_en.pdf [48].

¹¹ Available at http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_en.pdf [56].

¹² See <http://www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx>.

Multinational Enterprises”,¹³ which was adopted on 25 May 2011 by forty-two countries. The 2011 edition includes a new human rights chapter (Chapter IV), which is consistent with the *UN Guiding Principles* framework. It provides that:

“Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: ... 6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

According to these new OECD guidelines, then, within the specific framework of internationally recognized human rights, corporations can be expected to co-operate in the remediation of adverse human rights impacts where they have caused or contributed to these impacts.

A final point should be made by way of introduction. Since the Committee first began its work in 2008, the incidence and profile of international civil litigation for human rights violations has steadily increased on a global scale.¹⁴ Litigation under the Alien Tort Statute (‘ATS’)¹⁵ in the United States of America’s has clearly driven this trend. The statute, though it does not obviate the need of personal jurisdiction over a defendant (i.e. the defendant must have “minimum contacts” with the forum state),¹⁶ has been used by foreign claimants to sue foreign defendants for torts in foreign countries.¹⁷

As late as November 2011, for instance, a US federal court exercised jurisdiction over a German corporation in a case under the ATS in which a group of Argentinian residents alleged that the defendant’s Argentinian wholly-owned subsidiary collaborated with Argentinian state security forces to kidnap, detain, torture, and kill the claimants or their relatives during that country’s “Dirty War” in the 1970s and 1980s.¹⁸

But whether this trend will continue largely depends on the US Supreme Court in *Kiobel v. Royal Dutch Petroleum*.¹⁹ In this case, Nigerian residents sued Dutch, British, and Nigerian oil corporations for abetting the Nigerian government in violating the law of nations in Nigeria, alleging that the three international oil companies had arranged for the Nigerian government to use its military forces to put down resistance to the companies’ drilling for oil in the Ogoni region of the Niger Delta in Nigeria. In a sweeping judgment the federal court dismissed the case for lack of jurisdiction under the ATS on the ground that claims against corporations—as opposed to individuals—fall outside the ATS altogether, because “no corporation has ever been subject to any form of liability under the customary international law of human rights [...]”²⁰ In October 2011, the Supreme Court stepped into the controversy and agreed to examine the ATS, for only the second time,²¹ in order to determine *inter alia*,²² “[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide”.²³

¹³ Available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

¹⁴ Litigation has occurred on all continents. Tracking the development of this type of litigation the Committee has used the highly efficient corporate legal accountability portal of the Business & Human Rights Resource Centre, which offers up-to-date case profiles on over 70 lawsuits in all parts of the world. The tool is available at: <http://www.business-humanrights.org/LegalPortal/Home>. For an overview of regional developments see Business & Human Rights Resource Centre, ‘Corporate Legal Accountability Annual Briefing’ (2012) 5 et seq, available at: <http://www.business-humanrights.org/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf>.

¹⁵ 28 USC §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.”).

¹⁶ See, for instance, *Bauman v. DaimlerChrysler Corp* (2011) 644 F.3d 909 C.A.9 (Cal.). See further the comparative survey, section 1.1.a.

¹⁷ Over forty ATS claims against corporations have been reported to date. A list is available at: <http://www.business-humanrights.org/LegalPortal/Home/Countrywherelawsuitfiled/Americas>.

¹⁸ *Bauman v. DaimlerChrysler Corp* (2011) 644 F.3d 909 C.A.9 (Cal.).

¹⁹ Docket No 10-1491, available at: <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

²⁰ C.A.2 (N.Y.) (2010) 621 F.3d 111, 121. The opinion of the court below is available at: http://www.bloomberglaw.com/public/document/Kiobel_v_Royal_Dutch_Petroleum_Co_621_F3d_111_2d_Cir_2010_Court_O.

²¹ The first time was in *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004).

²² The other question on the very nature of the statute is: “Whether the issue of corporate civil tort liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.”

²³ Docket No 10-1491, available at: <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

After the hearing of the arguments on this question of corporate immunity on 28 February 2012,²⁴ the case took a surprising turn on 5 March 2012, when the US Supreme Court restored the case to the calendar for reargument on the following, more fundamental, question: “Whether and under what circumstances the ATS, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²⁵ This expansion of the case came after the Supreme Court discussed a petition for certiorari in the case of *Sarei v. Rio Tinto, PLC*, another ATS case in which (former) residents of Papua New Guinea sued a group of foreign mining corporations in relation to their local operations and the uprising against their operations on the island in the late 1980's that resulted in the use of military force and many deaths. The US federal court held that “the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place.”²⁶ It further concluded that there is “no legitimate basis for [the defendants’] position that the statute itself is a complete bar to corporate liability.”²⁷

The US Supreme Court opinion in *Kiobel* is expected in 2013. The Court’s clarification of the scope of the ATS will no doubt impact on the development of this nascent legal field. But neither immunity for corporations from ATS claims, nor a territorial limitation of US federal courts’ jurisdiction under the ATS to acts occurring within the United States of America, would end international civil litigation for human rights violations as it is presently defined by the Committee for purposes of its proposed Guidelines.²⁸

The subject then is and will certainly remain a hot one. And in more ways than one. The topic is not only well reported and analysed by academic lawyers, NGOs and interested parties, but it is also one which raises frequently against a background of strongly contentious and emotive facts, strong and dynamic policy issues, whose resolution is difficult, often controversial, and not infrequently raises concerns of “pro-Claimant” or “pro-Defendant” bias.

Conscious of the charged environment in which it operates, the Committee has striven to be clear about the policy objectives it has sought to fulfil. In short: the Committee has sought to develop and propose fair and efficient rules for the resolution of the private international law obstacles to litigation of this kind and which adversely affect both Claimants and Defendants. Indeed in expressing its aim the Committee can little improve on the words of its Interim Report:

“Litigation should focus on the resolution of the merits of the dispute between the parties. That is particularly true in this context where the serious nature of the underlying claim demands effective and speedy resolution both for Claimants, who may have suffered significant physical or economic injury and for whom compensation is urgently required, and Defendants, who are otherwise left overshadowed by potentially unfounded accusations of the gravest kind.

Private international law should assist in that process by identifying the correct jurisdiction and applicable law to govern the dispute, providing means to obtain evidence from abroad, and facilitating the recognition and enforcement of any judgment rendered. It should not provide a playing-field for prolonged, expensive, tactical disputes, which at best hinder and at worst subsume entirely, the resolution of the underlying substantive dispute.”²⁹

The Committee has therefore worked to produce rules which strike a fair balance between, on the one-hand, the importance of safeguarding the legitimate interests of Defendants and, on the other, ensuring that no injury is left without redress.

²⁴ A transcript of the arguments of 28 February can be found [here](#).

²⁵ The order for reargument is available at: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf>. Those interested may access the briefs filed with the Supreme Court (including supplemental amici curiae briefs) on this question at: <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>.

²⁶ (2011) 71 F.3d 736, 746 C.A.9 (Cal.).

²⁷ Id. 748.

²⁸ See the Guideline No. 1 on Scope.

²⁹ ‘Interim report: Private International Law Aspects of Civil Litigation for Human Rights Violations’, 4-5, available at: <http://www.ila-hq.org/download.cfm/docid/4343509C-6B6F-4E39-AF2BAB33E474D6AB>.

C. *Survey of Existing National Practice*

The Committee received national reports from seven countries: Australia, England and Wales, Japan, The Netherlands, South Africa, Switzerland, the United States of America.³⁰ The national practice which those reports describe and which is supplemented where relevant with a description of (recent developments in) the law of other jurisdictions familiar to the Committee, are sub-divided into the traditional three general categories: (1) **Jurisdiction**, (2) **Choice of Law** and (3) **Recognition and Enforcement**.

1. **Jurisdiction**

None of the systems surveyed recognise a right to exercise adjudicatory jurisdiction for the sole reason that a claim was for a human rights violation, irrespective of any other connection to the jurisdiction. In fact, several national rapporteurs noted that given the breadth of the other jurisdictional rules available in their countries the need or desirability for this jurisdictional basis was questionable. The only instances of what may be called ‘universal (adjudicatory) jurisdiction’³¹ may occur in **Japan** and **The Netherlands**, where courts may in exceptional circumstances assume jurisdiction on the sole basis of necessity, to avoid a denial of justice, in which case those States do not require any further connection to the claim, the claimant or the defendant.³² By contrast, and perhaps contrary to popular belief, the **ATS** of the **United States of America** cannot be qualified as an instance of universal civil (adjudicatory) jurisdiction as it does not obviate the need of personal jurisdiction over a defendant, meaning that they must have “minimum contacts” with the forum state.³³

Unsurprisingly a number of jurisdictional rules were, in broad outline, common to all legal systems analysed:

1.1 **Domicile**

A defendant’s place of what is broadly referred to as ‘domicile’ for purposes of this report is an accepted basis for the exercise of jurisdiction in all systems surveyed. This jurisdictional basis is *general* (or “all-purpose jurisdiction”)³⁴ in the sense that it can be used for any civil claim against a defendant for any cause of action arising within the jurisdiction or elsewhere.

³⁰ To avoid duplication, the reports for countries which are parties to the harmonised European private international law regimes (i.e. Brussels I, Rome I and II, & Rome Convention 1980) detailed only national practice independent of those regimes. Where relevant, separate reference is made to those harmonised regimes.

³¹ See D Donovan and A Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *American Journal of International Law* 142, 144, who note that universal jurisdiction allows a state both to “proscribe extraterritorial conduct with which it has no connection, and to empower its courts to adjudicate such conduct.” Cf. Compare L Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (OUP, Oxford 2003) 5: “Positively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, ie conduct by and against foreigners, outside its territories and its extensions, and not justified by the need to protect a narrow self-interest. Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.”

³² See Section 1.4.

³³ See, for instance, *Bauman v. DaimlerChrysler Corp* (2011) 644 F.3d 909 C.A.9 (Cal.). See Section 1.1.a. However, in terms of *prescriptive* jurisdiction, the ATS has been applied to situations where there is no connection between the United States and the particular claim that is being asserted, and in that sense may represent an application of “universal jurisdiction” to prescribe. Thus, a claim may be asserted under the ATS that involves a foreign claimant, a foreign defendant, and a claim that arises outside the United States. Arguments have been made that the Alien Tort Statute does not have such an extraterritorial reach, but no case has yet so held. To the contrary, in *Sarei v. Rio Tinto, PLC* (n 26) the US Court of Appeal for the Ninth Circuit recently held that “the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place.” The US Supreme Court in *Kiobel* (n 19) is expected to clarify this point, when it addresses the question: “Whether and under what circumstances the ATS, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”

³⁴ For this description see *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 2850-2851.

a. Corporations

For corporations, ‘domicile’ understood as a basis for general jurisdiction, refers variously to the place of incorporation, statutory seat/ registered office or main administration and also, to changing degrees, the place where a corporation is established³⁵ or the place where a corporation carries on its business.

Application

In **Europe**, in States bound by the Brussels and Lugano Regime, corporations³⁶ may generally be sued in the courts of the State of their domicile,³⁷ which in the majority of cases³⁸ is deemed to be, at the claimant’s choice, in the State of their statutory seat, central administration, or principal place of business.³⁹ Corporations domiciled in Europe are typically not subject to general jurisdiction in the courts for the place in which they are established through a branch or agency.⁴⁰ Conversely, *foreign* corporations—i.e. corporations not domiciled in a Brussels or Lugano State—may be subject to general jurisdiction in the place where they have a local establishment. In **England and Wales**, for example, a foreign corporation is deemed present within the jurisdiction if it has an establishment there (i.e. a branch or place of business) regardless of whether the work done there related to the claim,⁴¹ though this jurisdictional basis is still subject to fine tuning under the *forum non conveniens* doctrine. As in England and Wales, no restriction on the jurisdiction at the place of establishment exists in **Czech Republic, Finland, Malta and Portugal**.⁴² By contrast, in **The Netherlands** courts will only exercise jurisdiction in relation to claims which are connected to that branch.⁴³ Similar restrictions to those in The Netherlands exist in **France, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden**.⁴⁴ In the **United States of America**, where the issue of jurisdiction is determined state by state and not for the US as one State (though the exercise of jurisdiction by any state is subject to review under the Fourteenth Amendment’s Due Process Clause of the US Constitution⁴⁵, for a court’s exercise of jurisdiction is seen as exposing a defendant to a state’s coercive

³⁵ As distinct from the place where a corporation has a subsidiary (i.e. a legal entity separated by the ‘corporate veil’).

³⁶ Or other legal persons or associations of natural or legal persons.

³⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘the Brussels I Regulation’), Article 2(1) (“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”). Cf. the equivalent general provisions in the Lugano Conventions (1988 and 2007) and the 1968 Brussels Convention.

³⁸ Under the 1968 Brussels Convention, Article 53 and the equivalent provision under 1988 Lugano Convention, the domicile of a legal person or association of legal persons is at the place of their seat. However, in order to determine that seat, a court is to apply the law designated by its rules of private international law.

³⁹ See the Brussels I Regulation, Article 60 and the equivalent provision in the Lugano Convention 2007. For United Kingdom and Ireland, ‘statutory seat’ means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place (see Article 60(2)).

⁴⁰ A person domiciled in a European State may further be sued in the courts for the place in which they are established (e.g. through a branch or agency) for a cause of action arising out of the operations of that specific establishment. See, for instance, the Brussels I Regulation, Article 5(5). Cf. the equivalent provisions in the Lugano Conventions (1988 and 2007) and the 1968 Brussels Convention.

⁴¹ Parts 37 and 34 of the Companies Act 2006 and the Overseas Companies Regulations 2009.

⁴² A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 36 et seq (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

⁴³ Dutch Civil Code, Article 1:14 (‘A person who has a branch or establishment, is domiciled there as far as concerns matters respecting this branch or establishment.’)

⁴⁴ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 36 et seq (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

⁴⁵ Two elements traditionally comprise this amorphous “due process” standard that is central to jurisdiction jurisprudence in the United States. First, the defendant is required to have “minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (see *International Shoe Co. v. Washington* (1945) 326 U.S. 310). Second, even where there are minimum contacts between the defendant and the forum state, the exercise of jurisdiction must meet the element of “reasonableness” established by the Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California* (1987) 480 U.S. 102. In *Asahi*, the Court specifically addressed judicial jurisdiction in the international context and indicated that factors such as the burden imposed on a foreign defendant in defending in the United States might make the assertion of jurisdiction over a foreign defendant unreasonable notwithstanding an otherwise sufficient connection between the defendant and the forum state. See L Silberman, ‘*Goodyear and Nicastro*: Observations from a Transnational and Comparative Perspective’ (2012) 63 South Carolina Law Review 591.

power⁴⁶) general jurisdiction depends equally on the relationship between the corporation and the US state addressed,⁴⁷ which may consist broadly in either domicile or presence within that state. A corporation is regarded as domiciled where it is incorporated, and present where it has its principal place of business; any of these two places is regarded as a “paradigm forum” for the exercise of general jurisdiction, as this is where the corporation “is fairly regarded as at home”.⁴⁸ But significantly, a corporation is also deemed present sufficient for the exercise of general jurisdiction where it is “doing business” in the sense of engaging in activities within a US state that are “systematic and continuous” (i.e. that are “neither irregular nor casual”).⁴⁹ Such “continuous corporate operations within a state [must be] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”,⁵⁰ because those operations “establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state [to exercise jurisdiction]”⁵¹. The question of what constitutes enough business for general jurisdiction has generated a degree of legal uncertainty in practice,⁵² because in any particular case the boundary line between activities which justify general jurisdiction, and those which do not, cannot be simply “mechanical or quantitative” (i.e. the question is not whether the activities are “a little more or a little less” than enough), but depends on “the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure”.⁵³ Nevertheless, as a rule, as in England and Wales (see above), carrying on business with an office is enough, though an office is not essential. In the recent case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the US Supreme Court rejected as insufficient the fact that a small percentage of the defendants’ products was distributed in the US state whose court was seized,⁵⁴ and considered (arguably to offer guidance) that mere distribution of some products was not enough as the defendants

“...are not registered to do business in North Carolina [i.e. the US state addressed]. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.”⁵⁵

In addition to a corporation’s own contacts with the forum state, under established corporate “veil piercing” or “agency” doctrines, a corporation’s control of another corporation,⁵⁶ the “integration” of the corporation and a subsidiary,⁵⁷ or a finding that a subsidiary acts as the agent of the parent⁵⁸, may justify the exercise of jurisdiction over a corporation, even though *per se* it has no contacts with the forum state, as the contacts of the corporation which has minimum contacts with a US state may then

⁴⁶ See *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 2850-2851 with further references.

⁴⁷ The jurisdictional reach of the federal courts is generally the same as that of the state courts. There are minor exceptions where the federal courts have a broader service reach and where particular federal statutes provide for nationwide and even world-wide service (see Federal Rule of Civil Procedure 4(k)(1)). However, the assertion of jurisdiction in these situations, like all others, is subject to the constitutional limits. One additional provision in the Federal Rules of Civil Procedure is important in the context of international litigation which authorizes federal courts to exercise personal jurisdiction over “any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state” for claims arising under federal law to the extent that the “exercise of jurisdiction is consistent with the United States Constitution and laws” (see Federal Rule of Civil Procedure 4(k)(2)). For purposes of this rule, the relevant contacts of the defendant are those with the United States *as a whole*, and not with any one state.

⁴⁸ *Id.*, 2853-2854. Cf. *McIntyre v. Nicastro* 131 S.Ct. 2780, 2787.

⁴⁹ *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 320.

⁵⁰ *Id.*, 318.

⁵¹ *Id.*, 320.

⁵² See L Silberman, ‘*Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*’ (2012) 63 South Carolina Law Review 591, 611-614, who suggests that: “A nationwide ‘doing business standard’ that requires some type of office or physical manifestation of the corporation’s presence might bring a greater measure of predictability to assertions of general jurisdiction, and perhaps subsequent cases will so interpret *Goodyear*.”

⁵³ *Id.*, 319.

⁵⁴ On specific jurisdiction see Section 1.2.

⁵⁵ (2011) 131 S.Ct. 2846, 2852.

⁵⁶ See, e.g., *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.* (2000) 230 F.3d 934, 943-44 (7th Cir.).

⁵⁷ See, e.g., *Color Systems, Inc. v. Meteor Photo Reprographic Systems, Inc.* (1987) WL 11085 (D.D.C.).

⁵⁸ See, e.g., *Bauman v. DaimlerChrysler Corp* (2011) 644 F.3d 909, 921-924.

be attributed to the corporation for purposes of the jurisdictional inquiry.⁵⁹ Even if a defendant has the required minimum contacts with the forum state, there may still be a violation of due process if the defendant establishes that, considering the international context, the heavy burden on the alien defendant, and the slight interests of the claimant and the forum state, the exercise of jurisdiction in the particular case is “unreasonable and unfair”.⁶⁰ For instance, in the recent case of *Bauman v. DaimlerChrysler Corp*⁶¹, a US federal court of appeal established that, due to an agency relationship, the contacts of the defendant corporation’s subsidiary with the forum state could be imputed to it so as to meet the requirement of sufficient contacts, but went on to weigh seven factors in resolving the question whether it should exercise jurisdiction:

“...the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum.”⁶²

In **Japan**, a corporation may be sued if it has in Japan its statutory seat or principal business office.⁶³ In addition, having of a business *office* in Japan subjects a foreign corporation to the general jurisdiction of Japanese courts,⁶⁴ while the mere presence of a subsidiary usually does not.⁶⁵ Under common law principles in **Australia**, a corporation may be served with process where it is present in the sense of carrying on business at a fixed and definite place in the forum, though jurisdiction is usually exercised over corporations by reason of their registration under the Corporations Act pursuant to their engaging in business in Australia.⁶⁶ Courts in Victoria (Australia) further exercise general jurisdiction over a foreign corporation who uses an agent to carry out its business on an exclusive basis in that state.⁶⁷ In **Canada** (Quebec) courts have general jurisdiction on the ground of domicile of the defendant (e.g. if the defendant has its head office in the forum),⁶⁸ or in case of an establishment in the forum if the claim is related to the activities of the defendant in the forum⁶⁹. As regards jurisdiction based on the presence of an office, not being the head office, reference can be made to the recent case of *ACCI v. Anvil Mining Ltd.*⁷⁰ The claim in question was for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine. The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the claimant alleged that the defendant collaborated with the army by providing them with trucks and logistical assistance. The first instance court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in

⁵⁹ However note that in the US as elsewhere it is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries (see *United States v. Bestfoods* (1998) 524 U.S. 51, 61). Nevertheless, the standards applied to “pierce the corporate veil” for purposes of jurisdiction appear to be less stringent than those applied for purposes of liability, meaning that jurisdiction can exist even where liability cannot.

⁶⁰ *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County* (1987) 480 U.S. 102, 116. On the question whether this condition applies to general jurisdiction at all and whether it has been abolished by subsequent Supreme Court decisions see L Silberman, ‘*Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*’ (2012) 63 South Carolina Law Review 591, 593 et seq. For a recent application see *Bauman v. DaimlerChrysler Corp.* (2011) 644 F.3d 909, 924 et seq.

⁶¹ (2011) 644 F.3d 909.

⁶² Id, 924.

⁶³ Japanese Code of Civil Procedure, Article 4(4), which adds that if a corporation has no business office or other office in Japan, it can be sued at the place of domicile of its representative or any other principal person in charge of its business assigned in Japan.

⁶⁴ Id, Article 4(5) as construed by the Japanese Supreme Court in the Malaysian Airlines case (judgment of 16 October 1981, Minshu Vol 35 No 7, 1224, available in English at: <http://www.courts.go.jp/english/judgments/text/1981.10.16-1980-O-No.130.html>).

⁶⁵ Tokyo District Court, Hanrei Jiho No 1275, 77 (1987) for which a summary in English appears at: <http://www.tomeika.jur.kyushu-u.ac.jp/result.php?s=cf296dfefc782475b5b6b19cf5cb1f85&c=ebd832ea2a68b410bc973a77039b493a>. Cf. Tokyo District Court, Hanrei Taimuzu No 1003, 292 (1998) for which a summary in English appears at: <http://www.tomeika.jur.kyushu-u.ac.jp/procedure/E-label/LA1-H10.11.02.pdf>). Nevertheless, while a subsidiary is not generally regarded as a business office, a subsidiary wholly controlled by its parent may be treated as such for jurisdictional purposes based on the Japanese piercing the corporate veil theory.

⁶⁶ Australian Corporations Act 2001, s 601CX(1).

⁶⁷ *Commonwealth Bank v White* [1999] 2 VR 681.

⁶⁸ Civil Code of Quebec, Article 3148(1).

⁶⁹ Civil Code of Quebec, Article 3148(2).

⁷⁰ (2012) QCCA 117, available at: <http://www.canlii.org/fr/qc/qcca/doc/2012/2012qcca117/2012qcca117.html>.

Montreal) and that the claim was related to the activities of the defendant in Montreal (given the foreign domicile of the defendant). The court's interpretation of the lastmentioned condition was decidedly broad: the court held that the vice president's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities. But on appeal the Court of Appeal of Quebec reversed, holding that the presence of an office for one of the vice presidents of the defendant corporation (and his secretary) was insufficient as it only opened *after* the alleged tort occurred. Besides, the Court observed that it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

b. Individuals

For individuals, though not separately surveyed, the concept of 'domicile' traditionally competes with 'habitual residence'.⁷¹ In the **ALI/UNIDROIT Principles of Transnational Civil Procedure**, for instance, a substantial connection is deemed to exist when an individual defendant is a "habitual resident" of the forum state.⁷² Both concepts, however, refer to something more than presence. In the **United States of America**, for instance, presence is not enough to say that a natural person is 'domiciled' in a state; the person must also have the intention to remain in that state. However, it should immediately be noted that for purposes of general jurisdiction the physical presence of the defendant (even if only transient) in the forum state *is* enough (and was held to be compatible with the requirements of due process),⁷³ both in **England and Wales** (in cases outside of the Brussels and Lugano Regime). In **Europe**, in States bound by the Brussels and Lugano Regime, an individual may be sued in the courts of the State of their domicile.⁷⁴ In the **Netherlands** for this purpose,⁷⁵ for example, courts regard a natural person as domiciled principally there where they live with their family and usually sleep, where they have their fortune, where they administer their business and property interests; in short, the place someone does not leave other than with a specific aim and also with the plan to return to this place when that aim has been achieved, or absent such a place, the place of their actual residence.⁷⁶

1.2 Tort

All of systems surveyed recognize that, irrespective of domicile, jurisdiction can be exercised over a defendant who has committed a tort within the jurisdiction and/or has committed a tort which caused damage within the jurisdiction. This jurisdiction is *specific* (or "case-linked")⁷⁷ in that it applies only to particular claims arising from or connected with the tort or the damage caused. This is not to say that this basis for jurisdiction is universal. For instance, in Europe alone, **Finland, Greece and Poland** do not have a specific head of jurisdiction for tort in cases where the defendant is domiciled outside a Brussels or Lugano State.⁷⁸

⁷¹ This term is preferred in many conventions, in particular those drawn up within the framework of the Hague Conference on Private International Law. This is also done in Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and the enforcement of judgments in matrimonial matters and the matters of parental responsibility ('the Brussels II bis Regulation').

⁷² ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 2.1.2, available at: <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

⁷³ See Section 1.4.b.

⁷⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation'), Article 2(1) ("Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."). Cf. the equivalent general provisions in the Lugano Conventions (1988 and 2007) and the 1968 Brussels Convention.

⁷⁵ The Brussels and Lugano Regime fails to define the concept 'domicile' for individuals (i.e. natural persons) and thus leave the matter to legal diversity. Article 59 of the Brussels I Regulation, for example, provides that in order to determine whether a natural persons is domiciled in the Member State whose courts are seised of a matter, the court is to apply its internal law, while, if a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State. The Lugano Conventions (1986 and 2007) and the 1968 Brussels Convention contain equivalent provisions (see respectively Articles 52, 59 and 52).

⁷⁶ Dutch Civil Code, Article 1:10(1).

⁷⁷ For this description see *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 2850-2851.

⁷⁸ A Nuyts, 'Study on Residual Jurisdiction: General Report' (2007) 32 (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

a. Variations in triggering circumstances

Nevertheless, the precise circumstances in which courts will exercise this jurisdiction vary. In the **United States of America**, where those not domiciled there have a constitutional due process right not to be subjected to general jurisdiction there,⁷⁹ a person may still be subject to jurisdiction for particular claims arising out of or connected with⁸⁰ his/her contact with and activity directed at that state⁸¹. But, it is insufficient that a defendant might have predicted that their acts elsewhere would have effects (e.g. cause injuries) in the forum state; they must have acted there intentionally.⁸² In **Japan**, a defendant can be sued in tort in the place where the tort was committed.⁸³ In **South Africa**, tort jurisdiction arises in the place where the cause of action arose but only if, in addition, property belonging to the defendant has been arrested within the jurisdiction so that the effectiveness of a resulting judgment is assured.⁸⁴ In **Australia**, a corporation not registered under the Corporations Act or carrying on business at a fixed and definite place in the forum, may be sued in tort if the tort was committed in the jurisdiction⁸⁵ or if the damage was suffered there from a tort wherever arising⁸⁶. In **Europe**, defendants domiciled in a Brussels or Lugano State may be sued in the courts for the place where the tort occurred (or may occur), which is intended to cover both the place where the damage occurred and the place of the event giving rise to the damage, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places.⁸⁷ In the **Netherlands** and **France**, in respect of claims against defendants domiciled outside of Brussels or Lugano States,⁸⁸ broadly the same rule applies.⁸⁹ In **England and Wales**, in the same circumstances of a defendant domiciled in a third State, a court must in addition be satisfied that it is the proper place (i.e. the *forum conveniens*) to hear the claim⁹⁰ and also the claim must further have a reasonable prospect of success⁹¹. Then again, in **Austria**, **Cyprus** and (arguably) the **Czech Republic** and **Malta**, jurisdiction is provided at the place where the damage is sustained by the injured party.⁹² In **Switzerland**, in respect of defendants domiciled outside a Lugano State, a claim in tort may be brought before the Swiss court at the place where the act was committed or had its effects.⁹³

⁷⁹ See Section 1.1a.

⁸⁰ *International Shoe Co v Washington* (1945) 326 US 310, 319.

⁸¹ *Helicopteros Nacionales de Colombia, SA v Hall* (1984) 466 US 408, 414, n 8.

⁸² *McIntyre v Nicastro* 131 SCt 2780, 2787 (2011). Generally, a defendant may be subjected to judgment only when they have sufficient contacts with the sovereign “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (see *International Shoe Co v Washington*, 326 US 310, 316 (1945)). In case of a tort as with other conduct, it is the defendant's purposeful availment that makes jurisdiction consistent with these traditional notions of fair play and substantial justice (see *McIntyre v Nicastro* 131 SCt 2780, 2787 (2011), while ‘purposeful availment’ requires some act by which the defendant avails themselves or itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws (see *Hanson v Denckla*, 357 US 235, 253 (1958)).

⁸³ Japanese Code of Civil Procedure, Article 5(ix).

⁸⁴ South African Supreme Court Act of 1959, Section 19(1)(c), which specifies that the purpose of this requirement is to ensure the effectiveness of a resulting judgment.

⁸⁵ See, for instance, the Victoria Supreme Court (General Civil Procedure) Rules 2005, Rule 7.01(1)(i).

⁸⁶ *Id.*, Rule 7.01(1)(j).

⁸⁷ Brussels I Regulation, Article 5(3) (see, for instance, joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-0000 [40]). Cf. the equivalent provisions in the Lugano Conventions (1988 and 2007) and the 1968 Brussels Convention. This ground of jurisdiction is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* [2012] ECR I-0000 [18]).

⁸⁸ Note that application of the national jurisdictional rules of the European Union Member States rather than the uniform rules of jurisdiction under the Brussels I Regulation is possible only if the court seised of the case holds firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union (see Case C-327/10 *Hypoteční banka* [2011] ECR I-0000 [44]).

⁸⁹ Dutch Code of Civil Procedure, Article 6(e) Rv (“The Dutch courts also have jurisdiction in cases involving: ... e. obligations arising from tort, if the harmful event occurred or may occur in the Netherlands ...”). See Hof ‘s-Hertogenbosch of 7 October 2008, LJN: BG2209 (Article 6(e) Rv derives is equivalent to Article 5(3) of the Brussels I Regulation and there is no reason to deviate from how that provision has been interpreted by the European Court of Justice).

⁹⁰ English Civil Procedure Rules, Rule 6.37(3).

⁹¹ *Id.*, Rule 6.37(1)(b).

⁹² A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 33 (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

⁹³ Swiss Private International Law Act, Article 129(1).

Greater divergence exist over more expansive jurisdictional bases.

1.3 Connected claims

Of the systems reviewed, courts in **Australia**,⁹⁴ **Japan**,⁹⁵ **South Africa**,⁹⁶ **Europe** (i.e. under the Brussels and Lugano Regime),⁹⁷ **England and Wales**,⁹⁸ and **Netherlands**,⁹⁹ will exercise jurisdiction over a party, though otherwise unconnected with the forum, on the ground that the claim against this party is closely connected to another claim against another party over whom the court has jurisdiction on some other basis. Beyond these systems, in the **European Union**, jurisdiction on the ground of a connection of claims in respect of defendants domiciled outside a Brussels or Lugano Regime State is recognised in at least twenty Member States: **Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Portugal, Romania, Scotland, Slovakia, Slovenia and Spain**.¹⁰⁰ Conversely, the proposed **Brussels I Regulation (Recast)** provides—for unspecified reasons—that only a person *domiciled in a Member State* may also be sued where they are one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.¹⁰¹

a. Application

In **Australia**, any defendant who is a ‘necessary and proper party’ to an action already pending against another party who has either been served within the forum or served outside.¹⁰² The necessary and proper party test, which Australian courts have interpreted liberally on the basis that fragmentation of actions is undesirable, requires that there be a genuine claim against both defendants and that the rules as to joinder have been satisfied; there must be a common question of law and fact between the two claims.¹⁰³ In **Japan**, this basis for jurisdiction requires that claims are ‘closely connected’ in the sense that the subject matter of the claims are the same or that the claims are based on the same factual or legal cause.¹⁰⁴ In **South Africa**, the jurisdictional ground appears to be derived from the internal rules on joinder which is either a matter of convenience (i.e. the facts in issue depend upon the determination of substantially the same question of law or fact) or compulsion (i.e. a person’s rights will be affected so directly by a potential judgment that his joinder as a party to the action is essential). In **Europe**, between States bound by the Brussels and Lugano Regime, courts must ascertain at the moment when proceedings are instituted whether various claims brought by the same claimant against different defendants, one of whom is domiciled in the forum, are ‘so closely connected’ that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments

⁹⁴ See, for instance, the Victoria Supreme Court (General Civil Procedure) Rules 2005, Rule 7.01(1)(l).

⁹⁵ Japanese Code of Civil Procedure, Article 7.

⁹⁶ South African Uniform Rules of Court, Rule 10.

⁹⁷ Brussels I Regulation, Article 6(1). Cf. the equivalent provisions in the Lugano Conventions (1988 and 2007) and the 1968 Brussels Convention.

⁹⁸ English Civil Procedure Rules, Practice Direction 6B, Paragraph 3(1)(3)–(4).

⁹⁹ Dutch Code of Civil Procedure, Article 7(1).

¹⁰⁰ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 50 et seq (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹⁰¹ 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) COM748final, Article 6(1). This rule then would not apply to defendants outside of the European Union; a limitation which has been criticized, for instance by Fentiman, on the ground that “[i]s discriminatory and perpetuates complexity to restrict any extension to cases involving claimants domiciled in Member States” and that “[i]t is also inconsistent with the established principle that Regulation 44/2001 operates irrespective of the claimant’s domicile, and with the current position under the Lugano Convention” (see R Fentiman, ‘Supplementary memorandum by Richard Fentiman’ in House of Lords European Union Committee ‘Green Paper on the Brussels I Regulation: Report with Evidence’ (2009) 21st Report of Session 2008–09, 12–13). However, Fentiman adds, at 13, that “[i]mportantly, there should be additional requirements for the exercise of jurisdiction over third-state defendants”, which he notes may take two forms: “(a) By requiring a claimant to seek permission before serving the claim. (b) By requiring a claimant to demonstrate that a ground for jurisdiction clearly exists, that there is an arguable case on the merits against the defendant, and that the forum is a proper one for trial.”

¹⁰² See, for instance, Victoria Supreme Court (General Civil Procedure) Rules 2005, Rule 7.01(1)(l).

¹⁰³ *The Brabo* [1949] 1 All ER 294.

¹⁰⁴ Japanese Code of Civil Procedure, Article 38.

¹⁰⁵ *Sadwani* (Supreme Court, Judgment, Minshu Vol 52 No 3, 853 (1998), an English translation is available at: <http://www.courts.go.jp/english/judgments/text/1998.04.28-1994-O-No.1838.html>. In this case the Supreme Court ruled, albeit in a case involving indirect jurisdiction, that joinder is acceptable if a claim is based on an identical cause at substantive law, and there is a close connection with the case.

resulting from separate proceedings.¹⁰⁶ If so, the court has jurisdiction to determine all claims, and defendant cannot plead that the claimant sued with the sole object of ousting the jurisdiction of the courts of the Member State of the domicile of the other defendant(s). The connection of the claims must be both factual *and* legal,¹⁰⁷ though the claims need not necessarily have the same legal basis.^{108, 109} The risk of irreconcilable judgments test implies that separate proceedings must potentially lead to judgments that are conflicting in the sense of being ‘contradictory’, which requires more than that judgment merely ‘diverge’ in terms of outcome, namely, that divergences arise in the context of the same situation of law and fact.¹¹⁰ Then again, the test does not require that judgments risk being ‘mutually exclusive’, which is the test applied in the context of foreign judgment recognition and enforcement.¹¹¹ In applying the test, a court is required to take account of all the necessary factors in the case-file and, if appropriate, it may take into consideration the legal bases of the claims, though claims may also be sufficiently closely connected if they are not based on identical legal bases.¹¹² In **England and Wales**, regarding defendants domiciled outside a Brussels or Lugano State, courts have been not regarded it as fatal that the predominant reason for suing the original defendant was to serve as an anchor to rope in a ‘necessary and proper party’ (or parties) so long as an action is brought in good faith and has a good chance of success.¹¹³ However, because such parties may lack any other connection with the jurisdiction, caution is exercised before permitting service out on this ground.¹¹⁴ The necessary and proper party test involves an application of the same criteria used to add additional parties in domestic cases, namely, that it is ‘desirable’ to add the new party.¹¹⁵ In practice, courts inquire whether the claims against the proposed defendant emanate from the same facts as the claim against the original defendant, whether common questions of fact arise in both claims, and whether it is otherwise appropriate or artificial to join the proposed defendants.¹¹⁶ In **The Netherlands**, also outside

¹⁰⁶ See (n68) (see Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co and others* [1988] ECR 5545 [13]; Case C-51/97 *Réunion Européenne and Others* [1998] ECR I-6511 [47]; Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535 [29]-[31]; and Case C-98/06 *Freeport* [2007] ECR I-8319 [54]).

¹⁰⁷ Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535 [29]-[31].

¹⁰⁸ Case C-98/06 *Freeport* [2007] ECR I-8319 [39]-[46].

¹⁰⁹ Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535 [37]-39]. In this case the Court of Justice of the European Union clarified why the required connectedness must be both factual and legal. It gave three reasons: (1) undermining legal certainty (Jurisdiction based solely on factual criteria would lead to a multiplication of the potential heads of jurisdiction and would therefore be liable to undermine the predictability of rules of jurisdiction and consequently to undermine the principle of legal certainty); (2) encouraging forum shopping (the application of solely factual criteria would give the defendant a wide choice, thereby encouraging the practice of forum shopping which the regime seeks to avoid); and (3) placing substance before jurisdiction (the determination as to whether the criteria concerned are satisfied, which is for the applicant to prove, would require the court seized to adjudicate on the substance of the case before it could establish its jurisdiction. Such a preliminary examination could give rise to additional costs and could prolong procedural time-limits where that court, being unable to establish the existence of the same factual situation and, therefore, a sufficient connection between the actions, would have to decline jurisdiction and where a fresh action would have to be brought before a court of another State).

¹¹⁰ Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535 [26]. Cf. Case C-98/06 *Freeport* [2007] ECR I-8319 [40]. See, in another jurisdictional context (*lis pendens*), Case C-406/92 *Tatry* [1994] ECR I-5439 [58].

¹¹¹ Case 145/86 *Hoffmann v Krieg* [1988] ECR 645 [24]. The discrepancies in the interpretation of the identical term “irreconcilable”; broadly in the context of jurisdiction, on the one hand, and strictly in the context of recognition and enforcement should be explained by reference to the system and objectives of the Brussels (and Lugano) Regime: (1) free movement of judgments (non-recognition of judgments should be exceptional, so that the available grounds—including irreconcilability of judgments—should be interpreted strictly) and (2) coordination of jurisdiction (at the stage of coordination, there is only a risk of irreconcilable judgments, which can therefore still be prevented, justifying a broader interpretation).

¹¹² Case C-98/06 *Freeport* [2007] ECR I-8319 [41].

¹¹³ *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.

¹¹⁴ *Arab Monetary Fund v Hashim* (No4) [1992] 1 WLR 553, 557, affirmed [1992] 1 WLR 1176 (CA). Hoffman J held that: “The jurisdiction must be exercised with caution, doubts on the construction of the rules should be resolved in favour of the foreigner and full and fair disclosure must be made. It is also true that the jurisdiction under rule 1(1)(c) [now Practice Direction 6B, Paragraph 3(1)(3)] is particularly exorbitant because it enables a foreigner to be impleaded when the dispute may have no connection with this country at all. Hence a need for even greater caution.”

¹¹⁵ English Civil Procedure Rules, Part 19, Rule 19(2) (see *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416. Cf. *Trumann Investment Group Ltd v Societe Generale SA* [2004] EWHC 1769 (Ch); and *Philips Domestic Appliances and Personal Care BV v Salton Europe Ltd* [2004] EWHC 2092 (Ch).

¹¹⁶ *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416. Cf. *Alberta Inc v Katanga Mining Limited, Tain Holdings Limited, Wayland Management SA* [2008] EWHC 2679 (Comm). Tomlinson J decided that the second and third defendants were indeed proper and necessary parties on the basis that: “There is a substantial factual overlap as between the claims brought against Tain and Wayland for breach of contract and the claim

the scope of the Brussels and Lugano Regime, the requirement is that the claims against the individual defendants must be “so closely connected” that “reasons of expediency” justify hearing and determining them together.¹¹⁷ Whereas the rule was inspired by the provisions in the Brussels and Lugano Regime, in practice the courts have given it a broader interpretation, for instance, by requiring no more than the same factual situation is to be judicially considered in two (or more) claims.¹¹⁸ In the other systems which recognise this jurisdictional basis, while there is a large consensus that there must be some kind of connection between the claims in question, there is divergence as to the exact nature and extent of that requirement.¹¹⁹ In **Belgium, Italy, Spain, Scotland, Slovakia**, for instance, claims must (as in **The Netherlands**) be “so closely connected that it is expedient to hear and determine them together” and reference is made in such countries to the interpretation of this requirement by the Court of Justice of the European Union in respect of the equivalent rule of the Brussels I Regulation¹²⁰ ¹²¹. Of these jurisdictions, at least **Italy, Scotland, Slovakia** apply the condition that there is a risk of irreconcilable judgments.¹²² In **Cyprus and Ireland**, the test of ‘a necessary and proper party to the action’ applies (as in **England and Wales** and **Australia**).¹²³ Other States like **France** and **Hungary** appear to focus on the connection between the subject matter (or ‘object’) of the claims.¹²⁴

b. Jurisdiction over the anchor defendant

Within the systems which allow for jurisdiction on the basis of a close connection between claims, there is further divergence as regards the required basis for jurisdiction over the so-called ‘anchor’ defendant. In **Japan** and in **Europe** (under the Brussels and Lugano Regime) the anchor defendant must be domiciled in the forum state. In **Australia**,¹²⁵ in **England and Wales**¹²⁶ as well as in the **Netherlands**¹²⁷ (outside the Brussels and Lugano Regime) any ground for jurisdiction over the anchor defendant appears to be sufficient (this is different in France which requires domicile of the anchor defendant even in its common rules outside the Brussels and Lugano Regime). At the same time, these systems do not require any connection between the defendant who is joined in the proceedings and the forum State.

brought against Katanga for inducing such breach. The same factual investigation is required in order to resolve all three claims The relief which the Claimant seeks is relief which would naturally be sought in a single action to which all three of Katanga, Tain and Wayland are party. There is nothing artificial or contrived in the Claimant using the presence of Katanga within this jurisdiction as a means of establishing jurisdiction over Tain and Wayland.”

¹¹⁷ See (n 99). Note that when proposing the rule, the government indicated that the proviso that the claims against the individual defendants are so closely connected that it is justified to hear and determine them together for reasons of efficiency was included for the reason that without such condition Article 7(1) might be characterised as exorbitant resulting in difficulties in relation to recognition and enforcement abroad (see *Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, Memorie van Toelichting* (1999-2000) 26855, nr 3) 37).

¹¹⁸ Rb The Hague of 30 December 2009, LJN: BK8616. In this case, the claimants alleged that Shell Plc, a corporation domiciled in the Netherlands had failed to take sufficient measures to prevent its subsidiary Shell Nigeria, a corporation domiciled in Nigeria, from causing damage during the oil extraction in the Niger Delta. Moreover, they alleged that Shell Plc took insufficient measures to ensure that Shell Nigeria cleaned up the pollution caused by an oil spill at a place called Oruma (Nigeria). In their claim against Shell Nigeria, the claimants asserted that Shell Nigeria as operator of the pipeline failed to prevent the oil spill and failed to take adequate measures to limit and clean up the damage.

¹¹⁹ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 52 et seq (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹²⁰ Brussels I Regulation, Article 6(1).

¹²¹ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 52 (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹²² Id, 53.

¹²³ Id, 52.

¹²⁴ Id.

¹²⁵ See, for instance, Victoria Supreme Court (General Civil Procedure) Rules 2005, Rule 7.01(1)(l) which refers to a defendant who has either been served within the forum or served outside.

¹²⁶ English Civil Procedure Rules, Practice Direction 6B, Paragraph 3(1)(3) refers to the situation where “[a] claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph)”.

¹²⁷ Article 7(1) of the Dutch Code of Civil Procedure fails to stipulate on what ground the jurisdiction in relation to the anchor defendant should be based, which has been taken to mean that any of the relevant grounds for jurisdiction in Articles 2 through 9 will suffice to position an anchor defendant in the Netherlands, including Article 2 (forum rei), Article 6(d) (tort), 9(a) (implicit choice of court) or 9(b)/(c) (forum *necessitatis*).

c. States rejecting this basis for jurisdiction

Conversely, courts in **Switzerland** and the **United States of America** cannot exercise jurisdiction on the basis of a close connection between claims. The same applies in the case of a defendant domiciled outside a Brussels or Lugano Regime State in seven Member States: **Denmark, Finland, Germany, Greece, Malta, Poland and Sweden**.¹²⁸ In **Switzerland**, various devices exist, to join another party in domestic proceedings, but these internal devices are available in international cases only in respect of defendants over which the Swiss courts already have jurisdiction. In the **United States of America**, a defendant not domiciled in the forum state must have certain minimum contacts with it, such that the exercise of jurisdiction by an American court does not offend traditional notions of fair play and substantial justice. Thus, it is improbable that, in the absence of any contacts of the proposed additional defendant to the forum state, jurisdiction can be lawfully based solely on a connection of claims. However, here again, under established corporate “veil piercing” or “agency” doctrines, where applicable, the contacts of a subsidiary may be attributed to a parent corporation for purposes of the jurisdictional inquiry, even though the corporation *per se* has no contacts with the forum state. In those circumstances there is also an anchor defendant, but the other defendant is drawn in on account of its *relation* with the anchor defendant, not the connection of the *claims*.¹²⁹

1.4 *Forum necessitatis*

Of the systems reviewed, necessity is a recognized jurisdictional basis in **Canada** (Quebec),¹³⁰ **The Netherlands**,¹³¹ **Switzerland**¹³² and (arguably) **Japan**.¹³³ Other States where the doctrine of necessity is accepted include **Austria, Belgium, Estonia, France, Germany, Luxembourg, Poland, Portugal and Romania**.¹³⁴ Furthermore, the Inter-American Bar Foundation has recently advocated adoption of a rule of necessity in **Latin America**.¹³⁵ The European Commission has proposed the same for the **European Union**, but only in matters in relations with third States¹³⁶. Finally, necessity is recognised

¹²⁸ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 50 et seq (with further references), available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹²⁹ See Section 1.1.a.

¹³⁰ Civil Code of Québec, Article 3136 (“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 Québec or where the institution of such proceedings outside Québec cannot reasonably be required.”).

¹³¹ Dutch Code of Civil Procedure, Article 9 (“Apart from jurisdiction derived from Articles 2 to 8, Dutch courts shall have jurisdiction if: ... b. it is impossible to bring a claim outside of the Netherlands; or c. the matter is sufficiently connected with the Dutch legal order and it would be unacceptable to oblige the claimant to bring their claim before a foreign court”).

¹³² Swiss Private International Law Act, Article 3 (“[The] Swiss courts and authorities at the place with which the case has sufficient connection shall have jurisdiction, if [the SPILA] does not provide for jurisdiction in Switzerland and if a proceeding abroad is not possible or cannot reasonably be expected”).

¹³³ While no specific legal basis for jurisdiction exists in Japanese law, the decision of the Japanese Supreme Court judgment of 24 June 1996, Minshu Vol. 50 No. 7, p. 1451 (an English translation appears at <http://www.courts.go.jp/english/judgments/text/1996.06.24-1993-O-No.764.html>) has been explained as recognising the doctrine.

¹³⁴ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 64 et seq with further references, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹³⁵ See Ley Modelo Latinoamericana de Protección Internacional de los Derechos Humanos (Latin American Model Law on the International Protection of Human Rights), Article 1 : “Civil District Courts of the Capital city shall have jurisdiction to hear civil lawsuits, filed by nationals or aliens, for human rights violation committed in a foreign country, when it would not be juridically or factually reasonable to request plaintiff to file the lawsuit in such country.” See http://www.interamericanbarfoundation.org/Ley_Modelo_Latinoamericana.html.

¹³⁶ 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) COM748final, 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.”). As of the date of finalizing this report, it is unclear whether the rule proposed will stay in the final revised Regulation.

as a generally acceptable ground for jurisdiction under the **ALI/UNIDROIT Principles of Transnational Civil Procedure**.¹³⁷

This jurisdiction is generally considered to be based on, or even required by, the right to a fair trial (e.g. article 6(1) of the European Convention on Human Rights) and the prohibition of a denial of justice, which is a general principle of public international law^{138, 139}. For example, when the European Commission proposed the introduction of a forum of necessity rule for the **European Union**, it argued that this rule, “guarantees the right to a fair trial of EU claimants”.¹⁴⁰ Interestingly, the Commission added that this rule would, “[be] of particular relevance for EU *companies* investing in countries with immature legal systems.”¹⁴¹

a. *Application*

In systems where necessity is recognized as a potential ground of jurisdiction, the exercise of that jurisdiction is, in the large majority of cases, subject to two cumulative conditions: first, that there is some kind of obstacle preventing the claimant from obtaining justice abroad and, second, that there is some kind of connection with the forum.

(i) **An obstacle to justice abroad**

Of the four systems reviewed where jurisdiction can be exercised on grounds of necessity, all require that there is an obstacle to justice abroad. In **Canada** (Quebec) the requirement is that proceedings cannot be instituted abroad or where the institution of such proceedings outside Québec cannot reasonably be required.¹⁴² Similarly, in **Switzerland**, courts will exercise jurisdiction of necessity in case proceeding abroad is not possible or cannot reasonably be expected.¹⁴³ Approximately the same condition applies in the **Netherlands**, where courts have jurisdiction if it is either impossible to bring a claim outside the Netherlands or if it would be unacceptable to oblige the claimant to bring their claim before a foreign court.¹⁴⁴ In **Japan**, where there is no statutory basis for necessity jurisdiction, case law suggests that courts will exercise jurisdiction if it is impossible for a claimant to obtain justice abroad.¹⁴⁵ In other systems where this jurisdictional ground is recognised, the conditions differ. In some, obtaining justice abroad must be proven to be impossible: for instance, in **Poland**, it must be

¹³⁷ ALI/UNIDROIT Principles of Transnational Civil Procedure (n 72) Principle 2.2 (“Jurisdiction may also be exercised, when no other forum is reasonably available, on the basis of: 2.2.1 Presence or nationality of the defendant in the forum state; or 2.2.2 Presence in the forum state of the defendant’s property, whether or not the dispute relates to the property, but the court’s authority should be limited to the property or its value.”), available at: <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

¹³⁸ Ch de Visscher, ‘Le déni de justice en droit international’ (1935) 52 *Recueil des Cours* 365 et seq; and A. Adede, ‘A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law’ (1976) 14 *Canadian Yearbook of International Law* 73 et seq.

¹³⁹ See Arroyo Diego P. Fernández, ‘Compétence exclusive et compétence exorbitante dans les relations privées internationales’ (2006) 323 *Recueil des Cours* 75 et seq; F Donovan and A Roberts Anthea, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *AJIL* 147 et seqq; International Bar Association, ‘Report of the Task Force on Extraterritorial Jurisdiction’ (2009) 122, available at: www.tinyurl.com/taskforce-etj-pdf; K Parlett, ‘Universal Civil Jurisdiction for Torture’ (2007) *EHRLR* 402; R Schütze, ‘Die Notzuständigkeit im deutschen Recht’ in L Bittner et al (eds), *Festschrift für Walter H. Rechberger zum 60. Geburtstag* (Vienna 2005) 576 et seq; and Harvard Law Review Association (ed), *The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm* (2008) 121 *Harvard Law Review* 2132 et seq.

¹⁴⁰ 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) COM748final, 9.

¹⁴¹ *Id.*

¹⁴² Civil Code of Québec, Article 3136.

¹⁴³ Swiss Private International Law Act, Article 3.

¹⁴⁴ Dutch Code of Civil Procedure, Article 9.

¹⁴⁵ While no specific legal basis for jurisdiction exists in Japanese law, the decision of the Japanese Supreme Court judgment of 24 June 1996, *Minshu Vol. 50 No. 7*, p. 1451 (an English translation appears at <http://www.courts.go.jp/english/judgments/text/1996.06.24-1993-O-No.764.html>) has been explained as recognising the doctrine. In a case where the husband, who is a Japanese national residing in Japan, initiated a divorce action against the wife in a Japanese court, the judgment of a German court accepting the claim of the wife in an action which the wife had initiated in Germany ahead of this action has taken force. However, this judgment of the German court does not have effect in Japan since it lacks the requirement as provided in Article 220(2) of the Japanese Code of the Civil Procedure and therefore, the marriage has not been terminated. Even if the husband initiates the divorce procedure in the German court, it is highly possible that because the marriage has already been terminated, the action would be found to be against the law. In such cases, the court held, the jurisdiction of the Japanese court in the action claiming divorce initiated by the husband had to be acknowledged.

established that the foreign court lacks jurisdiction to hear the claim, and, in **Romania**, the jurisdiction only exists if it is found that the foreign court has already rejected the claim for lack of jurisdiction.¹⁴⁶ In other States, there is no need to show absolute impossibility. In **Belgium**, the proceeding abroad must be ‘unreasonable’, in **Austria** it must be ‘unacceptable’, in **Portugal** it must be ‘unreasonably difficult’, while in **Estonia** it is required that the situation is so that the claimant ‘cannot be expected’ to seek justice abroad.¹⁴⁷ In **France**, it must be proven to be either materially or legally impossible to seize the foreign court. The **Latin American Model Law on the International Protection of Human Rights** provides that domestic courts have jurisdiction to hear claims of nationals or aliens for human rights violations committed in a foreign country in case it would not be legally or factually “reasonable” to ask a claimant to file a claim in that country.¹⁴⁸ In the proposed **Brussels I Regulation (Recast)** the jurisdiction of necessity implies that proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected, or where 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 would be necessary to ensure that the rights of the claimant are satisfied.¹⁴⁹ The **ALI/UNIDROIT Principles of Transnational Civil Procedure** provide that jurisdiction may be exercised when no other forum is reasonably available.¹⁵⁰

What obstacles justify the exercise of jurisdiction of necessity? In other words, when is a claim in the most appropriate forum ‘impossible’ or ‘unreasonable’? Recognised obstacles are both legal and practical in nature. Potential obstacles of a *legal* nature depend on the particular State addressed, but globally include situations where: (1) the foreign court lacks jurisdiction under the foreign law or has already dismissed the claim for lack of jurisdiction; (2) there is no guarantee the claimant would get a fair trial abroad;¹⁵¹ or (3) a foreign judgment could not be recognised and enforced in the forum.¹⁵² Obstacles of a *practical* nature include: (1) major threats faced by a claimant having to travel abroad;¹⁵³ (2) the foreign jurisdiction is affected by war, flooding or some other natural or man-made disasters;¹⁵⁴ or (3) the unreasonable cost of bringing proceedings abroad insofar as this in fact deprives the claimant of access to justice¹⁵⁵. For the purpose of illustration, reference can be made to the situation in **The Netherlands**, where recognised instances of legal obstacles include the absence of the rule of law, a lack of jurisdiction, inadmissibility (or non-justiciability) of claims abroad.¹⁵⁶ Recognised factual obstacles include circumstances where there is a denial of access to justice due to discrimination on grounds of race, religion etc., and cases where the foreign court is unavailable due to instances of war, floods or other disasters.¹⁵⁷ However, courts tend to interpret the rule restrictively. There are few examples where it has been tested. For instance, the prospect that a foreign court will dismiss a claim since it does not acknowledge extensions granted by the defendant of a limitation period (whereas in the same circumstances a Dutch court might) does not render the foreign proceedings impossible or even unacceptable.¹⁵⁸ Similarly, no forum of necessity will be available if the impossibility of proceeding abroad is attributable to the claimant themselves.¹⁵⁹ The high costs of civil proceedings are not, in principle, a sufficient reason to conclude that requiring the claimant to proceed abroad would be

¹⁴⁶ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 64-65 with further references, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹⁴⁷ Id, 65.

¹⁴⁸ Ley Modelo Latinoamericana de Proteccion Internacional de los Derechos Humanos (Latin American Model Law on the International Protection of Human Rights), Article 1. See http://www.interamericanbarfoundation.org/Ley_Modelo_Latinoamericana.html.

¹⁴⁹ 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) COM748final, Article 26.

¹⁵⁰ ALI/UNIDROIT Principles of Transnational Civil Procedure (n 72) Principle 2.2.

¹⁵¹ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 65 with reference to Belgium, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹⁵² Id, 65 with reference to Germany and France, while noting that the issue is debated in the latter State.

¹⁵³ Id, 65 with reference to France.

¹⁵⁴ See the position in The Netherlands.

¹⁵⁵ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 65 with reference to Belgium, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf. However, see the position in The Netherlands.

¹⁵⁶ *Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, Memorie van Toelichting* (1999-2000) 26855, nr 3) 42 (explanatory memorandum).

¹⁵⁷ Idem.

¹⁵⁸ Rb Zutphen, 10 November 2004, LJN: AS5661.

¹⁵⁹ Hof The Hague, 27 July 2007, LJN: BB3985.

impossible or unacceptable, unless the claimant would not be able to cover their litigation costs even if they recovered judgment.¹⁶⁰

(ii) The requirement of a connection to the forum

There is no uniformity of practice as regards the requirement of a connection to the forum State. In **Canada** (Quebec), the dispute must have a “sufficient connection” with Quebec.¹⁶¹ In this regard, the Quebec Court of Appeal held recently in *ACCI v. Anvil Mining Ltd* that the presence of a defendant’s office for one of its vice presidents, which opened after the alleged tort occurred, was an insufficient connection between the defendant and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction.¹⁶² The facts of the case are stated above.¹⁶³ The Court of Appeal thought that the timing of the connection should be the same as under the rule on general jurisdiction on the ground of domicile¹⁶⁴, given the exceptional nature of the forum of necessity jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.¹⁶⁵ Similarly, **Switzerland** requires that the case must have a “sufficient connection” with the jurisdiction, but appears to impose something above a *de minimis* standard: the claimant’s residence or domicile in current Swiss practice is for instance insufficient.¹⁶⁶ In **France**, the connection with the forum must exist, but it can be minimal. By contrast, **Japan** imposes no nexus requirement. **The Netherlands** imposes no such requirement where it is *impossible* for the claimant to proceed abroad.¹⁶⁷ In cases where it is *unacceptable* to oblige the claimant to proceed abroad, the standard appears to be a fairly light one.¹⁶⁸ For example, the standard may be satisfied by domicile or residency of the claimant in the jurisdiction, while a mere establishment of a corporation which had nothing to do with the cause of action underlying the claim is an insufficient connection¹⁶⁹. In **Austria**, unlike the position in **Switzerland**, a claimant’s Austrian citizenship or his/her domicile or residence in Austria is a sufficient connection.¹⁷⁰ Finally, in Belgium and France, the presence of assets of the defendant may be a sufficient connection for exercising the jurisdiction of necessity.¹⁷¹ The **Latin American Model Law on the International Protection of Human Rights** does not (explicitly) propose introducing a requirement that there be a sufficient connection.¹⁷² Then again, the proposed **Brussels I Regulation (Recast)** would require that the dispute has a sufficient connection with the Member State of the court seized, without defining what constitutes a sufficient connection.¹⁷³ Under the **ALI/UNIDROIT**

¹⁶⁰ Rb Zutphen 16 January 2008, LJN: BC9336.

¹⁶¹ Civil Code of Quebec, Article 3136.

¹⁶² (2012) QCCA 117, available at: <http://www.canlii.org/fr/qc/qcca/doc/2012/2012qcca117/2012qcca117.html>.

¹⁶³ See Section 1.1.a, paragraph 31 above.

¹⁶⁴ Civil Code of Quebec, Article 3148(2).

¹⁶⁵ On the legislative front, it is worth reporting that a private member’s bill on corporate accountability in the mining sector (Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries) was widely discussed in the media after it passed first reading in 2009 (very unusual for a private member’s bill). The Bill set up environmental and human rights guidelines for mining corporations with activities in developing countries and tied compliance to government financing. Ultimately, the Bill was defeated (140 against 135) on second reading in October 2007. One of the reasons invoked by the government to defeat the bill was its creation of the position of “Extractive Sector Corporate Social Responsibility Counsellor” within the Department of Foreign Affairs and International Trade. The mandate of the office is “to review CSR practices of Canadian companies operating outside of Canada and to advise stakeholders on the implementation of the endorsed performance standards.” Those standards include the OECD Guidelines for Multinational Enterprises and the Voluntary Principles on Security and Human Rights. Review of corporate activity prior to October 2009 is excluded from the mandate of the Counsellor. In any event, the office’s role appears to be limited to informal mediation to resolve any problems or disputes. To date, the Counsellor has travelled to two African countries (Mali and Senegal) and to Peru. There is no record of any mediation or reviews to date.

¹⁶⁶ In relation to tort law and to the violation of human rights, the rule on forum necessitatis has only been dealt with once by the Swiss Federal Supreme Court (see Swiss Federal Supreme Court, 22 May 2007, 4C379/2006). The Court held that Switzerland as a claimant’s domicile does not provide a sufficient nexus for jurisdiction in Switzerland.

¹⁶⁷ Dutch Code of Civil Procedure, Article 9(b).

¹⁶⁸ Id, Article 9(c).

¹⁶⁹ Rb The Hague, 16 February 2011, LJN: BP5387.

¹⁷⁰ A Nuyts, ‘Study on Residual Jurisdiction: General Report’ (2007) 66, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹⁷¹ Id.

¹⁷² Ley Modelo Latinoamericana de Proteccion Internacional de los Derechos Humanos (Latin American Model Law on the International Protection of Human Rights), Article 1. See http://www.interamericanbarfoundation.org/Ley_Modelo_Latinoamericana.html.

¹⁷³ 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) COM748final, Article 26.

Principles of Transnational Civil Procedure jurisdiction of necessity may only be exercised if the defendant is present in the forum state, has the nationality of the forum, or has property in the forum state.¹⁷⁴

b. States where this basis for jurisdiction is unknown

Necessity as a basis for jurisdiction is unknown in **Australia, South Africa and the United States of America**, as well as in Member States of the European Union not positively identified above, that is: **Bulgaria, Cyprus, Czech Republic, Denmark, England and Wales, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Slovakia, Slovenia, and Sweden**.¹⁷⁵ As regards the prospect of development of the law, reference can be made in illustration to the situation in the **United States of America**; it seems unlikely that the law there would develop to permit jurisdiction based on necessity (e.g. hardship in litigating in a foreign forum) in the absence of a defendant's contacts with the forum state. As noted above,¹⁷⁶ jurisdiction is limited by the Due Process Clause of the US Constitution whereby some connection with the forum is required to confer the necessary authority. Moreover, the question of adjudicatory jurisdiction is in the first instance a question of authority rather than fairness, which means that the fact that the claimant would suffer substantial hardship if forced to litigate in a foreign forum is unlikely to excuse a complete lack of contacts with the forum state.¹⁷⁷ Then again, jurisdiction in the United States of America based on service of process upon a defendant who happens to be physically present within a state has been held to be consistent with due process,¹⁷⁸ and the presence of the defendant's property in the United States may also confer jurisdiction in some circumstances¹⁷⁹. In contrast, the **ALI/UNIDROIT Principles of Transnational Civil Procedure** define "*forum necessitatis*" as the jurisdiction which is exercised on the basis that a defendant is *present* in the forum state, has the nationality of the forum, or has *property* in the forum state when no other forum is reasonably available,¹⁸⁰ it follows that the **ALI/UNIDROIT Principles**, by requiring the absence of an alternative forum *in addition* to presence, nationality or property, involve a less extensive jurisdiction than is the position of most states in the **United States of America**.

1.5 Declining jurisdiction

National practice in relation to the declining of jurisdiction is essentially of two sorts. First, some States (**Australia, Canada (Quebec)**,¹⁸¹ **England and Wales** (outside the Brussels and Lugano Regime), **Japan**, and **United States of America**) adopt a *forum non conveniens* approach, permitting their courts to decline jurisdiction when they are not the most appropriate forum to hear the dispute. And, second, other states (for instance, **The Netherlands** and, outside the Brussels and Lugano Regime, **Switzerland**) that do not recognise any doctrine of *forum non conveniens* but instead rely on their "positive" jurisdictional rules combined with some form of *lis alibi pendens* rule. In systems with a *forum non conveniens* doctrine, the existence of parallel proceedings is generally relevant; although none has a rigid or formal *lis alibi pendens* rule, the existence of parallel proceedings is in some States of effectively decisive importance. At the same time, variations arise in respect to both the application and implications of the doctrine in those systems adhering to *forum non conveniens*, which prevent a generalised comparative description of the doctrine and may be briefly explored for the purpose of illustration.

Application

In **Japan** a rule, which may be described as *forum non conveniens* for present purposes, operates as an exception to the general rule that a Japanese court will have jurisdiction if any of the grounds for

¹⁷⁴ ALI/UNIDROIT Principles of Transnational Civil Procedure (n 72) Principle 2.2.

¹⁷⁵ A Nuyts, 'Study on Residual Jurisdiction: General Report' (2007) 64 et seq with further references, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹⁷⁶ See Section 1.1.a, paragraph 34.

¹⁷⁷ See *McIntyre v Nicastro* 131 SCt 2780, 2789 (2011). Note to Linda: can this be said regarding the law in the US?

¹⁷⁸ *Burnham v Superior Court of California* 495 US 604 (1990).

¹⁷⁹ *Shaffer v Heitner* 433 US 186 (1977). In *Shaffer*, the Supreme Court held that an assertion of jurisdiction over the defendant's property must also meet the standard of "minimum contacts". However, it left open the question of whether the presence of the property alone would be a sufficient basis for jurisdiction when no other forum was available to the plaintiff (see 433 US 186, 211 n37).

¹⁸⁰ ALI/UNIDROIT Principles of Transnational Civil Procedure (n 72) Principle 2.2.

¹⁸¹ Civil Code of Quebec, Article 3135.

jurisdiction¹⁸² is present,¹⁸³ in the sense that the court will deny jurisdiction if hearing the claim in Japan would be contrary to the principles of fairness between the parties and contrary to requirements of a proper and speedy trial. This rule is one of *forum non conveniens* in the true sense of the word: a Japanese court will reject jurisdiction if it is not an appropriate court to determine a claim. As indicated above, *lis pendens* is taken into consideration as a special circumstance in many recent court decisions.¹⁸⁴ Other factors that are taken into account include (1) the location of the material evidence;¹⁸⁵ (2) the prospect of party participation; (3) the connection of the forum with the case (e.g. the doctrine is more likely to be applied when both parties are foreign nationals and the tort also occurred abroad); (4) the parties' ability to litigate in the forum (e.g. are the parties' financial means sufficient to conduct a proper trial?); (5) whether the parties are individuals or corporations (courts tend to favour the position of the individual);¹⁸⁶ and, finally, (6) the potential for difficulties and delays due to distance between the forum and the parties. Japanese courts do not appear to include in their analysis the question whether there is an appropriate alternative court. In **Australia** the approach is similar in that a defendant is required to show that Australia is a "clearly inappropriate forum" for the litigation to proceed in.¹⁸⁷ In practice, this is a very onerous test which requires the defendant to show vexation or oppression from having to litigate in Australia¹⁸⁸. For example, the fact that foreign law would govern the torts as the *lex causae* and that almost all the evidence was located outside Australia have been held to be insufficient under this standard to establish vexation or oppression for the defendant. A lower standard applies in **Canada**. The application of the doctrine in this jurisdiction may be illustrated by the recent decision of the Court of Appeal of Quebec in *Bil'in (Village Council) & Yassin et al. v. Green Park International Inc.*,¹⁸⁹ in which the Court confirmed the stay of proceedings ordered by the lower court on the basis of *forum non conveniens*. The dispute involved the construction of buildings in the West Bank, on land allegedly owned by one of the claimants, by the defendant, a legal person incorporated under Quebec law with its head office in Montreal. The claimants allege that this construction was in violation of the *Forth Geneva Convention*. Quebec courts have jurisdiction over the claim on the basis of the defendant's domicile in Quebec,¹⁹⁰ but the defendant objected to the exercise of this jurisdiction on the grounds that Israeli courts were "in a better position to decide", as provided for by provision on *forum non conveniens*¹⁹¹. The application of that provision involves the assessment of a large number of factors elaborated by the courts, including: (1) the parties' residence, that of witnesses and experts; (2) the location of the material evidence; (3) the place where the contract was negotiated and executed; (4) the existence of proceedings pending between the parties in another jurisdiction; (5) the location of the defendant's assets; (6) the applicable law; (7) the advantages conferred upon a claimant by its choice of forum, if any; (8) the interests of justice; (9) the interests of the parties; (10) the need to have the judgment recognized in another jurisdiction. The Court of Appeal considered the lower court's evaluation of these elements and confirmed its conclusion that Israeli courts were in a better position to hear the claim and resolve the dispute. In so doing, it held that "the dispute pits citizens of the West Bank against corporations carrying out work in the West Bank in compliance with the law applicable in the West Bank. It requires a great deal of imagination to claim that the action has a serious connection with Quebec."¹⁹² The **United States of America** is closer to

¹⁸² See Section 1.1.a.

¹⁸³ See, e.g., the *Family* case (Supreme Court, Judgment, 11 November 1997, Minshu Vol. 51 No. 10, 4055, available (in English translation) at: <http://www.courts.go.jp/english/judgments/text/1997.11.11-1993-O-No.1660.html>).

¹⁸⁴ See, e.g., Supreme Court, judgment of 8 June 2001, Minshu Vol. 55 No. 4, 727, available (in English translation) at:

<http://www.courts.go.jp/english/judgments/text/2001.6.8-2000-O-No.929%2C.2000-Ju-No.780.html>).

¹⁸⁵ In the *Far Eastern Air Transport* case, Tokyo District Court, 20 June 1986, Hanrei Jiho No. 1197, 87, available (in English translation) at:

<http://www.tomeika.jur.kyushu-u.ac.jp/result.php?s=d543e413daf7c995d61cbd07900ba237&c=aa89ee10f54fa610f9ac3d052391ff9a>.

¹⁸⁶ See, e.g., the *Family* case (Supreme Court, Judgment, 11 November 1997, Minshu Vol. 51 No. 10, 4055, available (in English translation) at: <http://www.courts.go.jp/english/judgments/text/1997.11.11-1993-O-No.1660.html>).

¹⁸⁷ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

¹⁸⁸ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; and *Puttick v Tenon Ltd* (2008) 83 ALJR 93. For criticism of this new, more rigid, approach, see R Garnett, 'Renault v Zhang: A Job Half Done?' (2002) 10 Tort Law Review 145.

¹⁸⁹ (2010) QCCA 1455 (CanLII) (leave to appeal to the Supreme Court of Canada denied March 3, 2011).

¹⁹⁰ Civil Code of Quebec, Articles 3134 and 3148.

¹⁹¹ Civil Code of Quebec, Article 3135.

¹⁹² In *ACCI v. Anvil Mining Ltd.* (n 70) the Quebec Court of Appeal rejected the alternative *forum non conveniens* defense after considering the other fora allegedly available to the claimants, namely Congo and Australia. A claim

Canada than Australia as far as concerns the application of *forum non conveniens*, though, unlike their Canadian counterparts, US courts dismiss the case rather than grant a stay. Courts applying the doctrine look first to whether there is (1) an ‘alternative’ forum which is (2) ‘adequate’, and if there is, they proceed to (3) balance both public and private interest factors of the respective fora.¹⁹³ Courts sometimes condition a dismissal on grounds of *forum non conveniens* to ensure that there actually is an alternative forum, for instance, by requiring the defendant to submit to the jurisdiction in the alternative forum and to waive any defence of the statute of limitations.¹⁹⁴ The adequacy of an alternative forum is not affected by the fact that the substantive law applied there is less favourable than that applied in the United States in the circumstances of the case,¹⁹⁵ nor by procedural differences, such as the lack of class actions or other group action mechanisms¹⁹⁶. Once an adequate alternative forum is identified, a court will balance competing public and private interests. Relevant public interest factors include the connection between the dispute and the United States, as well as the justification for making the resources of the United States judiciary available to adjudicating a particular dispute. Relevant private interest factors include the burden of litigating the case in the United States, rather than in the country where the defendant is domiciled or where the events giving rise to the suit took place; the availability of witnesses and physical evidence; and the ability to serve process on persons who should be made parties. Ordinarily there is a strong presumption in favor of a claimant’s choice to seize a United States court, but this presumption is less strong when the claimant or the real parties in interest are *foreign*¹⁹⁷ and, in addition, the claimant’s strategic motivations in suing in the United States may come under judicial scrutiny (e.g. a claimant with legitimate reasons will have better prospects than one who seeks to gain tactical advantage)¹⁹⁸. In its most recent consideration of the proper application of the doctrine, the Supreme Court held that a district court is not required to establish whether it has jurisdiction before dismissing a claim on the ground of *forum non conveniens*.¹⁹⁹ The practical significance of the doctrine can be illustrated by reference to the fact that in a number of **ATS** cases the doctrine has been the basis for dismissal when defendants were foreign corporations and the conduct giving rise to the claim occurred outside the United States.²⁰⁰ In **England and Wales** *forum non conveniens* involves a two stage inquiry whenever a defendant argues jurisdiction should be stayed: (1) does a clearly more appropriate forum exist? and, if so, (2) what does justice require?²⁰¹ The first condition is exacting and requires that there actually is a forum which has the most real and substantial connection with the case, so that it is insufficient to simply argue that England is not an appropriate forum. Some other forum must be shown to be clearly more appropriate.²⁰² If there is no particular forum which can be said to be

had already been made before a Congolese military court but it had been rejected. The claimant asserted that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the claimant contended that an attempt to secure legal representation in that country had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under Article 3135 of the Civil Code of Quebec. (Note that this decision was reversed on appeal as the Canadian Supreme Court held that there was no ground for jurisdiction in Canada to start with, meaning that application of *forum non conveniens* was not in question.)

¹⁹³ *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501.

¹⁹⁴ The imposition of other conditions on the alternative forum is likely to meet with less success. See the National Report for the United States of America, 6-7. Reference is made to the case of *Union Carbide Gas Plant Disaster Litigation* (1987) 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871, where it was held that the district judge’s attempt to condition the dismissal on the defendant’s agreement to submit to U.S. discovery and to allow enforcement of the judgment against it in the United States were inappropriate. In another case, *BCCI v. Bank of Pakistan*. (2001) 273 F.3d 241 (2d Cir.), the court, in remanding a case back to the district court to further consider the availability of an alternative forum, indicated that the district court “should add a condition to deal with the potentially serious problem of congestion and delay in the Pakistan courts”, directing the district court to condition dismissal on the assumption that the Pakistan Banking Court—a specialised and expedition court in Pakistan—would hear the case.

¹⁹⁵ *Piper Aircraft v. Reyno* (1981) 454 U.S. 235.

¹⁹⁶ *Aguinda v. Texaco* 142 F. Supp. 2d 534, 546 (S.D.N.Y.), aff’d as modified (2002) 303 F.3d 470 (2d Cir.).

¹⁹⁷ *Piper Aircraft v. Reyno* (n 195) 255.

¹⁹⁸ *Iragorri v. United Technologies Corp.* (2001) 274 F.3d 65, 73 (2d Cir.) (en banc).

¹⁹⁹ *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.* (2007) 549 U.S. 422.

²⁰⁰ See, e.g., *Turedi v. Coca-Cola Co.* (2009) 343 Fed. App’x 623 (2d Cir.); and *Aldana v. Del Monte Fresh Produce, N.A., Inc., Bandegua* (2009) 578 F.3d 1283 (11th Cir.).

²⁰¹ An identical *forum conveniens* analysis is conducted whenever service out is requested.

²⁰² The foreign forum need only have become available at the time the stay is sought. So for example, if at the application for a stay, the applicant undertakes to submit to the forum it alleges is more appropriate, then, even if that forum would not otherwise have jurisdiction, it will be deemed available (see *Lubbe v. Cape Plc* [2000] 1 WLR 1545 (HL), disagreeing with the Court of Appeal [1999] ILPR 113 (CA)). Further, it does not matter, at this

the ‘natural forum’, then there will be no reason to grant a stay.²⁰³ The analysis is undertaken through a consideration of a variety of connecting factors (which resemble those considered in Canada).²⁰⁴ The burden of establishing that a more appropriate forum exists is on the party making the applicant for a stay,²⁰⁵ while at the second stage the burden of proof is shifted onto the claimant²⁰⁶. If a foreign forum is shown to be more appropriate, the Court will then at the second stage in its inquiry consider what justice requires.²⁰⁷ In essence therefore claimant must demonstrate with clear evidence that if a stay is granted the effect will be to deny him of any claim at all,²⁰⁸ but courts have, it seems, been influenced by the context of the litigation and thus have been more sympathetic in applying this second stage of analysis where there is an imbalance of arms and litigation involves employment/human rights/personal injury issues (e.g. commercial disputes between equal parties will rarely engage this second limb.) An relevant example of the doctrine’s application is the well-known case of *Lubbe v. Cape Industries*. The some 3000 claimants were a group of workers and local residents who had contracted asbestos related illnesses from working at/living near the defendant’s subsidiary’s asbestos mining operation. The harmful events, the damage suffered and the witnesses and expert evidence concerning the injuries of the claimants were all located in South Africa. However South Africa did not provide legal aid. Without legal aid, funding the claim in South Africa would be practically impossible. The House of Lords (as it then was) refused to decline jurisdiction on the basis that, while South Africa might have been in all respects the more appropriate forum, it did not provide means of funding which the claimants required. Since a stay would in effect preclude the claimants from litigating at all, justice required that the English courts exercise jurisdiction to prevent a denial of justice. Another useful example is *Connelly v. RTZ Plc (No.2)*. In this case the claimant was employed by the Namibian subsidiary of the defendant English parent company. The claimant had worked in Namibia at the subsidiary’s uranium mine, as a result of which he had contracted throat cancer. Though all of the connecting factors pointed to Namibia, the claimant would be unable to litigate in Namibia due to the lack of funding. The House of Lords again refused to decline jurisdiction, as staying proceedings would be tantamount to denying the claimant substantial justice.

2. Choice of Law

No special choice of law rules for human rights violations exist.²⁰⁹ The choice of law rules applied are generally those in **tort**, considering that human rights violations usually do not result from a contractual relationship between the parties.

In the **United States of America**, in **ATS-claims**, courts can be expected to determine the substantive norm to be applied by looking directly to international law.²¹⁰ Then again, it remains unclear whether

stage, that in the more appropriate forum the respondent would be unable to fund its litigation or obtain a fair trial or properly manage the litigation (see *Connelly v. RTZ Corp* [1998] AC 854). These issues are considered at the second stage of analysis.

²⁰³ See, e.g., *European Asian Bank Ag v. Punjab and Sind Bank* [1982] 2 Lloyd’s Rep 356.

²⁰⁴ Factors which are considered and whose individual weight depends on the individual case, include: (1) The location of evidence/witnesses (see *The Prestrioka* [2003] 2 Lloyd’s Rep 327); (2) The language of documentary evidence (see *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460, 483 (Lord Goff of Chieveley)); (3) Whether proceedings have already commenced abroad (see *The Abidin Daver* [1984] AC 398); (4) The applicable law (see *Charm Maritime Inc v. Kyriakou* [1987] 1 Lloyd’s Rep 433 (CA); and *The Varna (No.2)* [1994] 2 Lloyd’s Rep 41); (5) The place where the parties reside or where they carry on business; (6) The place where the breach of contract or tort occurs (see *Lennon Scottish Daily Record* [2004] EWHC 359 (QB)); (7) The jurisdiction in which it will be most economical/efficient to litigate (see *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460).

²⁰⁵ Obviously in the case of service out, the burden is upon the applicant to show that England is the convenient forum (see *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460).

²⁰⁶ *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460; and *Hindocha v. Gheewala* [2003] UKPC 77

77.

²⁰⁷ Some examples of factors considered at this stage include: (1) Whether the courts of the more appropriate forum are able to adequately handle the claim (see *Amin Rasheed Shipping Corp v. Kuwait Insurance Co.* [1984] AC 50); (2) Whether the claimant will receive a fair hearing (*The Abidin Daver* [1984] AC 398); (3) Whether the claimant will lose a particular advantage which could cause injustice (see *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460 (Lord Goff of Chieveley) (4) Whether the claimant will receive legal aid and/or be able to afford litigation abroad (see *Lubbe v. Cape Plc* [2000] 1 WLR 1545).

²⁰⁸ ILA Human Rights Committee (British Branch), ‘Report on Civil actions in the English courts for Serious Human Rights Violations Abroad’ [2001] EHRLR 148.

²⁰⁹ As an example of this trend of specialisation of choice of law rules see the Rome II Regulation, Article 5 et seq; and Article 135 of the Swiss Private International Law Act.

²¹⁰ *Sosa v. Alvarez-Machain* (2004) 542 U.S. 692. Cf. *Bowoto v. Chevron Corp.* (2008) 557 F. Supp. 2d 1080, 1097-98 (N.D. Cal.) (“[T]he plain language of the ATS, as well as ATS jurisprudence, indicate that ATS claims

international law or federal common law or another country's laws should govern issues other than the substantive standard of liability, such as the applicability and scope of various forms of secondary liability, the application of alter-ego, veil piercing, and agency doctrines, and the nature of the remedy.²¹¹ In some cases, in considering the remedy to be awarded, courts have looked to the law of the country where the events occurred, and have awarded punitive damages when authorized under the foreign law.²¹² For instance, in the case of *Filartiga v. Pena-Irala*, involving a claim for torture by a Paraguayan Government official, a district court in New York found, by reference to the choice of law factors listed in Section 145(2) of the Restatement (Second) of Conflict of Laws (1971), that it was appropriate to look first to Paraguayan law in fashioning a remedy. These factors were the following: the torture took place in Paraguay, the plaintiffs and the defendant were all Paraguayan and lived in Paraguay when the torture took place, the parties' relationships with each other were centered in Paraguay, and Paraguayan law prohibited torture and provided recovery for wrongful death.²¹³

Otherwise, within this shared category of tort, choice of law approaches vary considerably:

2.1 Flexibility/ predictability

Broadly three approaches can be identified on the scale of flexibility—predictability. Flexibility is preferred in the **United States of America**²¹⁴ where courts tend to consider a variety of factors in determining the country most interested in seeing its law applied²¹⁵. Predictability is favoured by courts in **Australia**.²¹⁶ A balance is sought, finally, in the **European Union**,²¹⁷ **Switzerland**²¹⁸ and **Japan**,²¹⁹ where courts can displace the result of the basic choice of law rule (see below) in cases where the tort is (manifestly) more closely connected with another country, for instance, due to a pre-existing relationship between the parties, such as a contract²²⁰.

Basic tort choice of law rules differ:

are defined by and derived from the law of nations, making a choice of law analysis unnecessary”).

²¹¹ In *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (2009) 582 F.3d 244, 259 (2d Cir.) the Court of Appeals for the Second Circuit concluded that “Sosa and our precedents send us to international law to find the standard for accessory liability”. However, judges on panels of other courts have expressed a contrary view. See, e.g., Hall, J., concurring in *Khulumani v. Barclay Nat'l Bank, Ltd.* 504 F.3d 254, 284 (arguing that aiding and abetting liability should be determined by federal common law). On remand, the district court determined that questions relating to veil-piercing should be decided in accordance with the law of the place of incorporation but that questions about vicarious liability in the nature of an agency relationship should be determined under federal common law principles. See *In re South African Apartheid Litigation* (2009) 617 F. Supp. 228, 271-76 (S.D.N.Y.).

²¹² *Trajano v. Marcos* (1992) 978 F.2d 493, 496 (9th Cir.) (applying Philippine law in awarding damages and punitive damages).

²¹³ Nevertheless, the court eventually awarded punitive damages even though Paraguayan law did not provide for punitive damage awards, because it found that “the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages.” See for a discussion of public policy further Section 2.7.

²¹⁴ It should be noted for purposes of this comparative survey that choice of law in the United States is usually a matter of state law, and that choice of law rule usually applies in federal courts unless the claim being asserted is based upon federal law. States formulate their own choice of law rules, and thus there is no uniform approach to choice of law. However, both in states that have adopted an ‘interest analysis’ approach to choice of law as well as those that follow the Restatement (Second) of Conflict of Laws the focus is on the particular issue in each case having multistate elements, and often lead to application of different laws to distinct issues.

²¹⁵ To apply forum law there must be sufficient contacts creating interests of the state in applying its own law to satisfy the US Constitution. For instance, just because a court in the United States of America has judicial jurisdiction, it does not necessarily have the authority (as a constitutional matter) to apply its own law. See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797.

²¹⁶ National Report for Australia, 7.

²¹⁷ Rome II Regulation, Article 4(3).

²¹⁸ Swiss Private International Law Act, Article 15(1) (“[...] the law to which [the Act] refers shall not govern if, under the entire circumstances, it is obvious that the case has only a remote connection to that law but a much closer connection to another law.”). According to the National Report for Switzerland, at 16, this provision applies only under very rare and extremely restricted circumstances.

²¹⁹ Japanese Act on General Rules for Application of Laws, Article 20.

²²⁰ See, for instance, Rome II Regulation, Article 4(3). Cf. Swiss Private International Law Act, Article 133(3) (“If a legal relationship existing between the damaging and the damaged party is violated by tort, claims based upon tort shall, notwithstanding paragraphs (1) and (2), be subject to the law governing the pre-existing legal relationship.”).

2.2 Locus delicti/ locus damni

While courts in **Australia**²²¹ and **Switzerland**²²² apply the law of the place where the human rights violation occurred (*lex loci delicti*), courts in the **European Union**²²³ (excluding Denmark) and **Japan**²²⁴ apply the law of the place of the resulting damage (*lex loci damni*). Courts in **Switzerland**,²²⁵ unlike those in **Australia**,²²⁶ apply the law of the place of the resulting damage, if this place diverges from the place of the tort and the tortfeasor should have foreseen that the that the injury would occur there.

At the same time, various degrees of convergence can be reported on the following matters:

2.3 Relevance of common residence of the parties

In most systems surveyed, the common residence of the parties at the time of the tort/damage influences the applicable law. Courts in the **European Union**,²²⁷ **Japan**²²⁸ and **Switzerland**²²⁹ are bound to apply the law of that place, while courts in the United States of America take this factor into account in their choice of law analysis. Only courts in Australia do not attach significance to this fact.

2.4 Scope for party autonomy

Party autonomy hardly ever arises in tort cases. It is even less likely in cases involving alleged human rights violations. Nevertheless, in most systems, including the **European Union**,²³⁰ **Japan**²³¹ and **Switzerland**,²³² the theoretical option exists after the tort arises. In the **United States of America**, party autonomy is in general confined to contractual issues, though a choice of law clause may in a particular case be construed as to include claims in tort arising from the contractual relationship. Then there are systems, such as **England and Wales**,²³³ where the law of the forum is applied when and if parties fail to plead and, in contested cases, prove foreign law. This is also the case in **France**.

2.5 Exclusion of *renvoi*

Apart from courts in **Australia**,²³⁴ which apply foreign law inclusive of its choice of law rules, *renvoi* is explicitly ruled out for courts in the **European Union**²³⁵ and is neither mentioned in **Japan** or in **Switzerland**. In the **United States of America**, although the matter is subject to state law, the Restatement (Second) of Conflict of Laws (1971), which offers a good indication as to state practice, expressly rejects *renvoi* generally, but recognises two exceptions: first, where the objective is to reach the same result as would the courts of another state and, second, when the forum state has no substantial relationship and all interested states would concur in selecting a particular law.

A tendency in all countries surveyed is to apply different laws to discrete issues.

²²¹ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. However, This rule is applied strictly but a difficult question, especially in personal injury cases where the events occur across a number of borders, has been to identify where the tort was committed. Some courts have focused on the acts causing injury while others have considered *the place of injury* to be more determinative. For an illustration see *Puttick v Tenon Ltd* (2008) 83 ALJR 93.

²²² Swiss Private International Law Act, Article 133(2).

²²³ Rome II Regulation, Article 4(1).

²²⁴ Japanese Act on General Rules for Application of Laws, Article 17.

²²⁵ Swiss Private International Law Act, Article 133(2). The provision adds that this place has to be foreseeable to the damaging party.

²²⁶ However, some Australian courts have considered *the place of injury* to be more determinative than the place of the act causing injury in the process of determining the *loci delicti*.

²²⁷ Rome II Regulation, Article 4(2).

²²⁸ Japanese Act on General Rules for Application of Laws, Article 20.

²²⁹ Swiss Private International Law Act, Article 133(1).

²³⁰ Rome II Regulation, Article 14(1).

²³¹ Japanese Act on General Rules for Application of Laws, Article 21.

²³² Swiss Private International Law Act, Article 132. Under this provision the parties may agree any time after the event causing damage has occurred that the *law of the forum* shall be applicable.

²³³ *Carl Zeiss Stiftung Appellants v. Rayner & Keeler Ltd. and Others* [1967] 1 A.C. 853, 919 (Lord Reid).

²³⁴ *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331.

²³⁵ Rome II Regulation, Article 24.

2.6 Fragmentation of the choice of law result

The method of applying different laws to discrete issues is widely practised. The substance of a tort claim, for instance, may be governed by a different law than the issue of attribution of liability between corporations. To some extent, a patchy choice of law result is unavoidable in the **United States of America**²³⁶ where courts generally determine the law applicable to the ‘particular issue’. By contrast, fragmentation is less likely in courts in the **European Union**²³⁷ and **Switzerland**²³⁸ which designate the applicable law for ‘the non-contractual obligation’ as a whole, including such issues as limitation and prescription, division of liability or liability for the acts of another person, available remedies, assessment of damages, burden of proof, etc. At the same time, some degree of fragmentation cannot be avoided, because certain issues are not characterised as matters in ‘tort’ but, for example, ‘company law’, a category with its own choice of law rule.

Reference should finally be made to the mechanisms in the systems surveyed for the protection of human rights policies of the forum, which broadly include what may be referred to as the ‘public policy-exception’ and ‘(overriding) mandatory rules’:

2.7 Public policy

If public policy is understood, as it is for purposes of this comparative survey, as an (exceptional) mechanism that excludes the application of rules of foreign law which are (manifestly) incompatible with a fundamental principle of the forum, it is known to most if not all of the systems surveyed. In the **European Union**, in cases within the scope of the Rome II Regulation, the application of a provision of the law of any country specified by the regulation may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.²³⁹ For example, the regulation specifies that the application of a provision of the law designated which would have the effect of causing non-compensatory exemplary or punitive damages “*of an excessive nature*” to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy of the forum.²⁴⁰ This means that while the content of the public policy of a Member State is principally defined by that State, European limits apply within which the courts of a Member State may have recourse to that concept. These limits are defined in large part by the *fundamental rights* deriving from the constitutional traditions common to the Member States which amount to general principles of European law (e.g. the rights guaranteed by the European Convention of Human Rights).²⁴¹ In **Japan** too, where a foreign law is to apply but its application would be contrary to public policy, it will not apply.²⁴² Similarly in Switzerland, the application of provisions of foreign law is excluded if it would lead to a result incompatible with Swiss public policy.²⁴³ In cases outside the Rome II Regulation scope, in **England and Wales**,²⁴⁴ similarly in **Australia**, the applicable law does not apply in so far as to do so would (manifestly) conflict with principles of public policy, which are rarely invoked and restrictively applied. In the **United States of America**, most states recognise a public policy exception if application of a particular law would violate the state’s “strong public policy”.

Some divergences can be noted as regards the implications of the public policy exception. Most cases involving application of the public policy exception involve an exclusion of a foreign law rule which did not render the applicable law unable to deliver a solution. In consequence, it is sometimes unclear what the position would be if the applicable law was excluded to the extent it was unable to resolve the

²³⁶ It should be noted that choice of law in the United States is usually a matter of state law, and that choice of law rule usually applies in federal courts unless the claim being asserted is based upon federal law. States formulate their own choice of law rules, and thus there is no uniform approach to choice of law. However, both in states that have adopted an ‘interest analysis’ approach to choice of law as well as those that follow the Restatement (Second) of Conflict of Laws the focus is on the particular issue in each case having multistate elements, and often lead to application of different laws to distinct issues.

²³⁷ Rome II Regulation, Article 15 defines the so-called ‘scope of the applicable law’ and lists in a non-exhaustive manner the issues which are governed by the law designated as applicable by the regulation.

²³⁸ Swiss Private International Law Act, Article 142(1).

²³⁹ Rome II Regulation, Article 26.

²⁴⁰ Id, recital 32.

²⁴¹ Cf. Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935 (re public policy as a ground for the context of foreign judgment recognition).

²⁴² Japanese Act on General Rules for Application of Laws, Article 42.

²⁴³ Swiss Private International Law Act, Article 17.

²⁴⁴ Private International Law (Misc. Prov.) Act 1995, Section 14(3)(a)(i).

dispute. In the **European Union**, under the Rome II Regulation, as suggested by the European Commission, “[t]he mechanism of the public policy exception allows the court to disapply specific rules of the foreign law designated by the conflict rule and to replace it by the rules taken in the *lex fori*, where the application of the foreign rules would be contrary to the public policy of the forum.”²⁴⁵ In **England and Wales**, in cases not covered by the Rome II Regulation, it has been similarly contended that upon exclusion of a foreign law rule, the law of the forum would apply in its place.²⁴⁶ The same position arguably pertains in **Australia**. In **The Netherlands** also the law of the forum applies, albeit only if no other law seems more appropriate.²⁴⁷ In **Japan** too, courts tend to apply forum law instead.²⁴⁸

By contrast, in the **United States of America** the use of the exception traditionally implies that a party’s case (i.e. claim or defence) is dismissed; the public policy exception does not automatically lead to the application of the law of the forum, because under the US Constitution requires that the forum has contacts sufficient to create interests of the state in applying its own law.²⁴⁹ As a rule, then, in the absence of such connections, forum law cannot be applied. Nevertheless, though this is not exactly how the public policy exception in the U.S. is traditionally used,²⁵⁰ there have been cases in which courts have applied forum law to fashion a remedy in circumstances where it was found that application of the law of the most interested state would conflict with the public policy of the United States or international law.²⁵¹ For example, in *Filartiga v. Pena-Irala*,²⁵² an **ATS-claim** alleging torture by a Paraguayan Government official (which today would be a federal statutory claim under the Torture Victim Protection Act),²⁵³ a district court in New York found that it was appropriate to look first to Paraguayan law in fashioning a remedy. The court’s finding was based on the choice of law-factors listed in Section 145(2) of the Restatement (Second) of Conflict of Laws (1971): the torture took place in Paraguay, the plaintiffs and the defendant were all Paraguayan and lived in Paraguay when the torture took place, the parties’ relationships with each other were centered in Paraguay, and Paraguayan law prohibited torture and provided recovery for wrongful death. Nevertheless, the court awarded punitive damages even though Paraguayan law did not provide for punitive damage awards, because it found that “the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages.”²⁵⁴ The court specified that:

“That does not mean that traditional choice-of-law principles are irrelevant. Clearly the court should consider the interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States.”²⁵⁵

Interestingly, the court applied forum law despite the fact that the forum state lacked connections to the case sufficient to meet the conditions generally applicable under the US Constitution before a court has authority to apply forum law. The court appears to have considered that the lack of such connections was compensated by the interests of the global community in seeing international law on torture effectively enforced, as it observed that “where the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international ‘law,’ the interests of the global community transcend those of any one state.”

²⁴⁵ Explanatory Memorandum to the Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“ROME II”) (2003) COM427final, 28.

²⁴⁶ This conclusion is supported by *Dacey, Morris & Collins* (14th ed Sweet & Maxwell, London 2006) who contend, at Vol II [35-116] that where the applicable law fails to provide an adequate remedies to protect a claimant’s rights, this might amount to a breach in public policy “so that English law would be applied instead”.

²⁴⁷ HR 9 November 2001, NJ 2002, 279.

²⁴⁸ Supreme Court, Judgment, March 31, 1977, Minshu Vol. 31, No.2, 365.

²⁴⁹ *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797.

²⁵⁰ National Report for the United States of America, 20. These instances are discussed in relation to the inquiry into the existence of special choice of law rules for human rights violations.

²⁵¹ National Report for the United States of America, 20.

²⁵² (1984) 577 F. Supp. 860 (S.D.N.Y.).

²⁵³ 28 U.S.C. § 1350 (“An individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture shall, in a civil action, be liable for damages to that individual”).

²⁵⁴ Id 864.

²⁵⁵ Id 863-864.

2.8 Overriding mandatory rules

Most systems surveyed recognise the (theoretical)²⁵⁶ relevance in international civil litigation for human rights violations of overriding mandatory rules, understood as rules which a court seized applies without first looking at the content of the foreign law which would otherwise be applicable under a choice of law analysis. In **Switzerland** provisions of this nature apply where foreign law is otherwise applicable and ensure the application of Swiss basic provisions that are of fundamental meaning to the State and legal society in an international dimension, such as human rights.²⁵⁷ Unlike the Swiss public policy exception, which corrects the result of the application of the applicable foreign law, mandatory rules block the application of the applicable foreign law and replace it as far as necessary for their effectiveness. In the **European Union** also, in cases within the scope of the Rome II Regulation, nothing in the regulation restricts the application of provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable.²⁵⁸ Such rules include, as the Court of Justice of the European Union explained in *Arblade*;

“...national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State”.²⁵⁹

A similar analysis is required in circumstances where a case falls within the scope of application of European Union law, in which case rules (originally) imposed by or binding upon the European Union may qualify as overriding mandatory rules if they are both mandatory in nature and their application is crucial for the Union’s legal order.²⁶⁰ As in **Switzerland**, the functioning of overriding mandatory rules is to be distinguished from the public policy exception, which allows a court to displace a rule of the foreign law designated by the conflict rule and to replace it by the law of the forum where the application of the foreign law in a given case would be contrary to the public policy of the forum. In **Japan**, although there is no express statutory provision on the mandatory rules of the forum, it is unanimously accepted that mandatory rules of Japan would have to be applied to a case irrespective of the foreign aspects of the case, in parallel with the law applicable by virtue of the ordinary choice of law rules.²⁶¹ Of the systems surveyed, only in the **United States of America** is the concept of “mandatory” rules not usually used in the specific context of choice of law. Certain specific provisions provide for the application of rules of the forum or another state if application of the law otherwise applicable by virtue of the pertinent choice of law principles “would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue”²⁶² or “violates the strong public policy of another state which had the most significant relationship”.²⁶³ But these provisions are, in effect, applications of what has been defined for purposes of this comparative survey as the ‘public policy exception’,²⁶⁴ since they displace rules of foreign law which are designated as applicable but which are (manifestly) incompatible with a fundamental principle of the forum or, in an apparent wider application, with a fundamental principle of another state with a strong relationship with the matter.

3. Recognition and Enforcement

The issue of recognition and enforcement of foreign judgments is not separately considered in this comparative survey.²⁶⁵ As the comments on the Guidelines make clear, the law on this issue, in particular as to the grounds for a refusal to recognise a foreign judgment, is well known and subject to relatively small divergences compared to the issues of jurisdiction and choice of law.

²⁵⁶ No actual practice was reported in the country surveys received by the Committee.

²⁵⁷ Swiss Private International Law Act, Article 18.

²⁵⁸ Rome II Regulation, Article 16.

²⁵⁹ Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453 [30].

²⁶⁰ Case C-381/98 *Ingmar v. Eaton* [2000] ECR I-9305 [25].

²⁶¹ National Report for Japan, 28.

²⁶² Restatement (Second) of Conflict of Laws (1971), Section 187(2)(b) (re the application of the law chosen by the parties).

²⁶³ *Id.*, Section 283 (re the validity of a marriage).

²⁶⁴ See Section 2.7.

²⁶⁵ See, e.g., G Walter and S Baumgartner, ‘General report: The recognition and enforcement of judgments outside the scope of the Brussels and Lugano Conventions’ in G Walter and S Baumgartner (eds), *Recognition and enforcement of judgments outside the scope of the Brussels and Lugano Conventions* (Kluwer Law International, The Hague 2000) 1-45.

D. *Comment on the Guidelines*²⁶⁶

The following paragraphs are meant to help the reader to understand why the Committee proposes the rules mapped in the Guidelines. As usual in the work of an ILA Committee, the Guidelines are not meant to override States' laws. State courts are merely encouraged to take into consideration the Guidelines whenever they are seized of a matter dealing with civil actions arising out of the violation of human rights, and to interpret their national law in conformity with the Guidelines, as far as possible. State legislators are also encouraged, whenever possible, to ensure that existing national rules are consistent with the Guidelines.

1) Scope

1.1 These Guidelines apply to civil claims against corporations, individuals and other non-State actors arising out of or brought to redress a human rights violation, in view of the nature of the norm allegedly violated, or the gross or systematic nature of the breach alleged.

1.2. A court shall determine whether it is seized of such a claim by reference to contemporary international law, without prejudice to the issue of retroactivity which may arise when the claim is determined on the merits.

The scope of the Guidelines extends to claims against corporations,²⁶⁷ individuals and other non-state actors, thus excluding claims against States.²⁶⁸ By providing this, the Committee in no way wishes to undermine the necessity of continued vigilance and work to ensure the appropriate respect of human rights by States. However, its mandate being limited to private international law issues, it deemed it preferable to limit the aim of the Guidelines to non-State actors.²⁶⁹

The Guidelines do not propose a definition of "human rights violations". The Committee was sensitive to the ongoing discussion on the question whether non-State actors are bearers of duties under (international) human rights law at all (currently this question is being addressed, for instance, in the case of *Kiobel v. Royal Dutch Petroleum* by the Supreme Court of the United States of America).²⁷⁰ The Committee, mindful of its own limited mandate and the mandate of other ILA Committees whose remit is international human rights law,²⁷¹ chose not to preempt the outcome of discussions there. At any rate, the term "contemporary" in paragraph 1.2 signals that international law, insofar as relevant in defining the scope of the Guidelines, must be considered in its present state of development. Most members of the Committee were of the opinion that the problem of retroactivity does not (directly) arise in issues of private international law.

²⁶⁶ Professor Silberman asked the Chair and the Rapporteur to insert a reservation to the effect that, "although she supports in general the approach of the guidelines, she expresses reservations about the specific criteria adopted for adjudicatory jurisdiction and therefore forum law. She also endorses application of *forum non conveniens* and exhaustion of local remedies for these cases".

²⁶⁷ Claims against organs of a corporation are not excluded insofar as they have the capacity to sue and be sued.

²⁶⁸ On 3 February 2012 the International Court of Justice (ICJ) in *Germany v. Italy: Greece intervening (Jurisdictional Immunities of the State)* held, at [81] et seq, held that State immunity is at any rate not affected by the gravity of the violations of human rights that a State is alleged to have committed when it is sued in a domestic court. A State's entitlement to immunity, in other words, does not depend upon the gravity of the act of which it is accused or the preemptory (*jus cogens*) nature of the rule which it is alleged to have violated.

²⁶⁹ By reference to the abovementioned ICJ judgment (n 268) it has been suggested that permitting a claim against a non-State actor allegedly complicit in a human rights violation by a State logically contradicts the procedural bar to a claim against the main actor: the State. See, e.g., B Hess, 'State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)', available at: <http://conflictflaws.net/2012/hess-on-italy-v-germany/>. At the same time, the principle of sovereign equality of States, which underlies State immunity, provides no immediate rationale for recognising immunity for a non-State actor, unless it is accepted that allowing a claim (indirectly) affects the sovereign equality of States. While this possibility cannot be entirely excluded, the application of the same rigid and strict rule of immunity appears to be inappropriate. Such claims are not then excluded from the scope of these Guidelines.

²⁷⁰ Docket No 10-1491, available at: <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

²⁷¹ See <http://www.ila-hq.org/en/committees/index.cfm/cid/1027>. Other Committees address international human rights law as part of their mandate. For a list of Committees see <http://www.ila-hq.org/en/committees/index.cfm/cid/1027>.

The Guidelines do not rely on any specific view of the relationship between international human rights norms and domestic law, nor do they depend on the answer to the controversial question whether corporations or other non-State actors are the direct addressees of human rights norms existing under international law. If non-State actors are indeed themselves bearers of duties under (international) human rights law, a breach of these duties clearly qualifies as a human rights violation in the sense of the Guidelines. It should not be relevant for these purposes whether, under the national system of the forum State, international law norms of that kind, to the extent that they exist, are deemed to be directly applicable, or whether their content is merely reflected in rules of the domestic law applicable in the forum State. The Guidelines are not pointless if the conclusion is that non-State actors are not directly bound by human rights under international law. The Guidelines also apply where a non-State actor is sued for its involvement in a human rights violation by a State (on which international human rights norms are indubitably binding). In those circumstances, the claim arises out of an alleged human rights violation, even though the defendant is not necessarily accused of having directly violated human rights. In this regard, while there is no uniform definition, the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds may include systematic or grave violations of economic, social and cultural rights, for example violations taking place at a large scale or targeted at particular population groups.²⁷² Moreover, in all jurisdictions the law of civil remedies can be invoked to remedy harm to interests protected by human rights law, including *life, liberty, dignity, physical and mental integrity and property*.²⁷³ In this regard, paragraph 1.1 makes clear that a tort by a non-State actor can be characterised as a “human rights violation” for purposes of these Guidelines also by reason of the gravity of the violation of the private law norm alleged, in particular its gross or systematic nature.

2) International Jurisdiction

2.1. Defendant’s domicile

2.1(1) The courts of the State where the defendant is domiciled shall have jurisdiction.

2.1(2) Domicile in the sense of paragraph 2.1(1) refers to:

(a) for a natural person, her or his habitual residence;

(b) for a legal person, either the place where

(i) it has its statutory seat or is incorporated or under whose law it was formed; or

(ii) it has its central administration; or

(iii) its business, or other professional activity, is principally carried on.

The defendant’s domicile is the first, and almost universally accepted, basis of international jurisdiction.²⁷⁴ While States are presently not generally required under international human rights law

²⁷² Cf. UNHCR, ‘The corporate responsibility to respect human rights: An interpretive guide’ (2011). Some of the most serious human rights violations may constitute international crimes. International crimes have been defined by States under the Rome Statute of International Criminal Law, including genocide (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape, discriminatory persecution etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.

²⁷³ Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability* (Volume 3 ‘Civil Remedies’) (2008) 10. Cf. See, for instance, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) A/HRC/17/31, 13 (“business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.”).

²⁷⁴ See above at C.1(1). For example, under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ‘Brussels I Regulation’), the European Union Member States are obliged to exercise jurisdiction when civil claims are filed against persons (whether natural or legal persons) domiciled on their territory, wherever the damage has occurred, and whatever the nationality or the place of residence of the claimants, including in situations where an alternative forum open to the claimants would appear to present closer links to the dispute or to be more appropriate.

to exercise jurisdiction extraterritorially over the (foreign and domestic)²⁷⁵ activities of those domiciled on their territory, nor are they prohibited from doing so.²⁷⁶ Consequently, the Committee decided unanimously that there was no reason to exclude that basis of jurisdiction for civil actions for human rights violations. In fact, domicile is a predictable basis of jurisdiction for a defendant, and it is fair as it allows him/her to defend “at home” under procedural rules with which he/she is familiar, while at the same time it provides coherent and consistent messages, allowing the “home State” to preserve its reputation abroad.²⁷⁷ This basis of jurisdiction also serves to close perceived governance gaps. For instance, the international human rights regime cannot possibly work as intended in a conflict affected area where functioning institutions may not exist. Allowing alleged victims to pursue a remedy in the jurisdiction of the defendant’s domicile will help remedy human rights abuses when they do occur.²⁷⁸

The Committee included in the Guidelines, at paragraph 2.1(2), the most common definition of what is currently understood as “domicile” both for individuals and legal persons. It is the one that is found in the work of this Committee’s predecessor, the New Delhi Principles.²⁷⁹

2.2. Connected claims

2.2(1) The courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims.

2.2(2) Claims are closely connected in the sense of paragraph 2.2(1) if:

(a) it is efficient to hear and determine them together; and

(b) the defendants are related.

2.2(3) Defendants are related in the sense of paragraph 2.2(2)(b) in particular if at the time the cause of action arose:

(a) they formed part of the same corporate group;

(b) one defendant controlled another defendant;

(c) one defendant directed the litigious acts of another defendant; or

(d) they took part in a concerted manner in the activity giving rise to the cause of action.

²⁷⁵ See, for instance, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Keynote Presentation at EU Presidency Conference on the ‘Protect, Respect and Remedy’ Framework Stockholm, November 10 November 2009, 3, who distinguishes in this respect “extraterritorial jurisdiction exercised directly” and “domestic measures with extraterritorial implications”.

²⁷⁶ See, for instance, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) A/HRC/17/31, 7.

²⁷⁷ *ibid.*

²⁷⁸ In fact, it has been argued, for instance, that, “where the host State on the territory of which the transnational corporation has invested is unwilling or unable to react to such abuses, in particular by providing remedies to victims, the home State may have an important role to play in order to ensure that corporate abuses are not left unpunished.” See O de Schutter, ‘Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations’ (2006) background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November 2006 within the mandate of Professor J. Ruggie, the Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other enterprises, 1.

²⁷⁹ To illustrate, the Alien Tort Statute (“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”) has been read as implying that United States Federal Courts have jurisdiction over corporations either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, alleged victims of violations of international law, wherever such violations have taken place, seek damages from corporations which have are alleged to have committed those violations or are complicit in such violations as they may have been committed by State agents. Paragraph 2.1(1) of the Guidelines would cover corporations *incorporated* in the United States, though requires that a corporation sued has more than a continuous business relationship with the United States, namely, that its business, or other professional activity is *principally* carried on there.

When the Committee preceding the present Committee proposed a similar rule for groups of corporations, it conceded that: “This Principle introduces an innovation for which there is no direct prototype.”²⁸⁰ Indeed, though a majority of the Committee members accepted the rule, it was controversial. Nevertheless, the rule is clear that it applies only if it is both efficient to hear and determine the claims in question together and the defendants are related. The Committee is of the view that these combined requirements actually significantly reinforce the rule compared to existing rules that only require either that it is efficient to hear and determine the claims together or that the defendants are related in such a way as to justify imputing the contacts with the forum state of one defendant to another. Insofar as the rule goes beyond established practice in defining the grounds on which it can be said that defendants are related (in particular by paragraph 2.2(3)(d)), this extension is justified by the need to facilitate access to justice and is, moreover, balanced by the added requirement that it must indeed be efficient to hear and determine the claims together.

The first limitation is that the court seized must be situated at one of the defendants’ domicile. It is indeed of importance, for the working of this rule, that, at least for one of the defendants, the court seized exercises general jurisdiction.

The second condition is that the claims must be “closely connected”. Of course, the requirement is capable of being applied very diversely from one court to the other. This is why the Committee decided to incorporate a definition of what it meant by “closely connected”. This is the purpose of paragraph 2.2(2). This condition involves two cumulative requirements. First, it must be “efficient” to hear and determine the claims together. The test of efficiency in the administration of justice has become classic in international litigation, at least in Europe. The Court must evaluate whether joining the claims really advances the aim of justice. This requirement is satisfied, for instance, where there is a risk of conflicting judgments, which can materialise if those claims are decided by different courts.²⁸¹ Other reasons may include the presence of the claimant(s) in the place of domicile of one of the defendants, or the presence of the evidence and witnesses there.

Second, the claims to be consolidated must be against “related defendants”. For the purpose of clarity, the Committee included a list of situations where, for purposes of the jurisdictional rule, defendants are related; that is, either in person, or by acting together. Paragraphs (a) and (b) deal with the first category; defendants are clearly related if they belong to the same corporate group or one is controlled by the other.²⁸² Paragraphs (c) and (d) belong to the second category. Although defendants may be totally independent from one another, it may still be fair to join them in the same proceedings according to the way in which they have allegedly acted. The threshold for the test is fairly high. Either one defendant has induced or ordered another defendant to act in the way it did (para. c), or they have acted in a “concerted” way. This requirement is not met if the defendants’ acts were only coincidental. Accordingly, it is not sufficient for (d) that a defendant merely participated. All agreed that the rule should be framed in such a way to import a kind of “due process” analysis into the working of the rule, allowing the court seized to analyse the facts and decide whether the exercise of jurisdiction in such circumstances is appropriate.

The Committee is aware that these tests may require the court seized to go fairly far into the analysis of the facts just for jurisdictional purposes. However, most Committee members considered that human rights violations are grave accusations and necessitate that courts do appraise carefully their jurisdiction. Hence, they accepted the fact that this phase of the proceeding may take more time and effort than an ordinary civil or commercial action. For example, while a court will principally rely on the facts as asserted in the claimant(s)’ statement(s) of the case, it should give the defendant(s) the

²⁸⁰ See Principle 4.1 (Groups of Corporations): “4.1 Where a corporation that is a member of a group of corporations is properly sued in the courts of a state, the parent or other corporate member of the same group may also be joined to the proceedings for a closely connected claim.”

²⁸¹ See, for instance, Case 189/87 *Kalfelis v. Schröder* [1988] ECR 5565.

²⁸² While ‘control’ is normally defined on the basis of the *stock ownership* (the ‘investment nexus’), other forms of relevant control for purposes of paragraph 2.2(3)(b) are not excluded, such as where a contractual relationship between separate corporations without any investment nexus may obfuscate the actual control exercised by one over the other, for instance, where a task previously performed within the single firm has been externalised and another entity set up for that specific purpose, upon the initiative or with the help of the controlling corporation, or where there exists a relationship of dependency of the former on the latter, for example, in certain situations where suppliers depend on the orders of the global retailing company for their economic survival, or in franchising contracts. See De Schutter (n 278) 35 et seq.

opportunity to respond. At the same time, it is common that courts, although asked to investigate factual circumstances for jurisdictional purposes, may satisfy themselves of a prima facie analysis.²⁸³

2.3. Forum of necessity

2.3(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice.

2.3(2) A denial of justice in the sense of paragraph 2.3(1) occurs if the court concludes upon hearing all interested parties and after taking account of reliable public sources of information, that:

(a) no other court is available; or

(b) the claimant cannot reasonably be expected to seize another court.

2.3(3) A sufficient connection in the sense of paragraph 2.3(1) consists in particular in:

(a) the presence of the claimant;

(b) the nationality of the claimant or the defendant;

(c) the presence of assets of the defendant;

(d) some activity of the defendant; or

(e) a civil claim based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that court has jurisdiction under its own law to entertain civil proceedings.

The Committee unanimously considered that a forum of necessity was essential to the effectiveness of civil actions for human rights violations. The forum of necessity is increasingly recognised. This is the one instance when the Committee would encourage States that do not have such a rule to import it into their system. Having said that, however, some members of the Committee were concerned that States would use the forum of necessity too lightly. This is why the Committee imported into the rule some conditions that express its exceptional nature.

The rule is framed according to the most common contemporary standards.²⁸⁴ First the exercise of such a jurisdictional ground is made only in the face of a potential denial of justice.²⁸⁵ Paragraph 2.3(2) defines what the Committee understands by “denial of justice” (see below) and how the court seized should conduct its analysis. In this regard, the court should “hear all interested parties” before it concludes that there is a potential denial of justice or not. The Committee hesitated before importing such a requirement into the rule. Indeed, the Committee usually refrains from getting into details which may be considered as encroaching on the court’s specific procedural rules. However, on this occasion, the Committee considered it was important that the court conduct some hearing before making its decision. Indeed, the court has to conduct a delicate analysis, which involves difficult factual and legal appreciation, so that it cannot be conducted without the help of the parties. The Committee went one step further and asks the court to use “reliable public sources of information”. In drafting this part of paragraph 2.3(2), the Committee had in mind a number of recent cases in which the courts have (or have not) relied on NGO reports or media accounts of the situation existing in the country where the other courts potentially having jurisdiction are located. Of course, the court should weigh prudently all sources of information available. But it cannot shy away from public sources.

²⁸³ E Schumann, ‘Internationale Zuständigkeit: Besonderheiten, Wahlfeststellungen, doppelrelevante Tatsachen’, in W Habscheid Walter and K Schwab K (eds), *Festschrift für Heinrich Nagel* (Aschendorff, Münster 1987) 415. Cf. Swiss Federal Supreme Court in BGE 131 III 153 et seq, 5.1.

²⁸⁴ Cf. Art. 18.3 Jurisdiction and Foreign Judgments in Civil and Commercial Matters (The Hague Draft 2001).

²⁸⁵ See, for instance, Swiss Federal Supreme Court of 22 May 2007, 4C.379/2006, 3.4. See further S. Othenin-Girard, ‘Quelques observations sur le for de nécessité en droit international privé suisse (art. 3 LDIP)’ (1999) 9 SZIER 251 et seq. Also Brief of Amicus Curiae the European Commission in Support of Neither Party, 19, *Sosa v. Alvarez-Machain*, 542 US 692 (2004); in the same case see Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and The United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the petitioner, 24; both with reference to the local remedy rule.

Paragraph 2.3(2) as noted defines what is to be considered a “denial of justice”: either “no other court is available” or “the claimant cannot reasonably be expected to seize another court”. The first option is more objective in the sense that the court seized must be satisfied that, as an objective fact, courts which may have jurisdiction in theory, do not function properly, or at all, due to factual circumstances such as war or civil unrest. However, while it is the general status of the judicial system in the country concerned that is decisive, the rule allows courts in appropriate circumstances to consider, in applying this condition, whether the claimant has actually pursued local remedies, though it should be understood that it may be inappropriate to insist on the prior exhaustion of such remedies, especially in circumstances where it is clear that a local judgment cannot (or could not) be recognised and enforced within the forum. The second option asks the court to look specifically at the claimant’s position. For example, if the claimant has suffered in the country where the courts have jurisdiction but has left the country and cannot go back because of threats or otherwise, then it may be unreasonable to oblige the claimant to prosecute its claim in that country.

Finally, the Committee came to the conclusion that some link was necessary before a court could exercise jurisdiction under the rule on forum of necessity.²⁸⁶ The link need not be very strong, but must at least be sufficient. The Guidelines list a number of facts which are considered by the Committee to meet the threshold of “sufficiency” agreed by the members. The Committee discussed whether, when talking about the activity of the defendant, the threshold should be higher and require that the defendant has “conducted business” in the forum State. The Committee decided against such a high threshold and settled on “some activity”. As far as assets in the forum state, the Committee discussed whether they should consist of assets sufficient for enforcement purposes. Again, the Committee felt it was not necessary to impose such a threshold and passed no judgment on whether a minor asset (the famous “umbrella-practice”) is sufficient. The Committee agreed that courts should have a margin of appreciation, taking into consideration all the facts of the case at hand. This is also why the list provided in the Guidelines is not exhaustive.

2.4. Other grounds of jurisdiction under national law

These Guidelines apply without prejudice to alternative grounds of jurisdiction available under the law of the forum seized, provided that they are not contrary to international law.

Readers may be surprised to find this “non-rule” in the Guidelines. Indeed, paragraph 2.4 only states that other jurisdictional grounds may be used by States who want to allow their courts to hear civil actions for human rights violations if they deem it fit. It is here for pedagogical reasons. The only requirement is that the jurisdictional basis used by States is not contrary to international law. By this, the Committee does not want to reopen the controversy about what rules of international law do frame private international law jurisdictional bases.²⁸⁷ It calls the attention of States and courts to the potential interference of international law in that field.

²⁸⁶ This is what distinguishes “forum of necessity” from universal jurisdiction. On the issue of universal jurisdiction see Case Concerning the Arrest Warrant of 11 April 2000, DR Congo v. Belgium, ICJ Reports 2002, joint separate opinion Higgins/Kooijmans/Buergenthal [45] (“While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.”). Further see C Bradley, ‘Universal Jurisdiction and U.S. Law’ (2001) University of Chicago Legal Forum 347 et seq; F Donovan and A Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 AJIL 146 et seq; A McConville, ‘Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality’ in C Scott (ed), *Torture as Tort* (OUP, Portland Oregon 2001) 171 et seq; K Parlett, ‘Universal Civil Jurisdiction for Torture’ (2007) EHRLR 399 et seq; C Ryngaert, ‘Universal Tort Jurisdiction over Gross Human Rights Violations’ (2007) 38 Netherlands Yearbook of International Law 24 et seq; and B van Schaack, ‘In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention’ (2001) 42 HarvILJ 196 et seq.

²⁸⁷ See generally E Jayme, *Internationales Privatrecht und Völkerrecht* (Heidelberg 2003); and A Mills, *The Confluence of Public and Private International Law* (CUP, Cambridge 2009). F.A. Mann, “The doctrine of jurisdiction in international law”, RCADI 1964.I.3 and “The doctrine of jurisdiction revisited after twenty years”, RCADI 1984.III.9; Pierre Mayer, “Droit international privé et droit international public sous l’angle de la notion de compétence”, RCDIP 1979.1; Pascal de Vareilles-Sommières, *La compétence internationale de l’Etat en matière de droit privé (droit international public et droit international privé)*, LGDJ, 1997; In this context see P Dubinsky, ‘Human Rights Law meets Private Law Harmonization: The coming Conflict’ (2005) 30 YJIL 218 et seq; C Scott, ‘Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms’ in C Scott (ed), *Torture as Tort* (OUP, Portland Oregon 2001) 45 et seq.

2.5. Forum non conveniens

2.5(1) Except when the court is seized in accordance with paragraph 2.1, 2.2 or 2.3, the court seized in accordance with these Guidelines may exceptionally stay proceedings in favour of the courts of another State, as long as it is allowed under the law of the forum.

2.5(2) Application of paragraph 2.5(1) is conditional upon:

(a) the defendant(s) undertaking to accept the jurisdiction of the courts of the State in whose favour jurisdiction is stayed; and

(b) the actual exercise of jurisdiction by the courts of the State in whose favour jurisdiction is stayed within a reasonable time and in accordance with fundamental standards of access to justice.

The Committee has weighed carefully the advantages and inconveniences of *forum non conveniens* in the peculiar field of civil actions for human rights violations. It came to the conclusion that, in this field even more than in other fields, *forum non conveniens* applied in a manner unconstrained as proposed in paragraph 2.5(1) upsets predictability of the rules and puts the parties in a position which is detrimental to the good administration of justice. This is why, when a court is seized of such an action and has jurisdiction under the rules set out in paragraphs 2.1, 2.2 and 2.3 of the Guidelines, the court may not decline jurisdiction for the reason that there may be another more convenient forum in another country. Therefore, the only time when a court may decline jurisdiction is when it has jurisdiction under the forum rules as provided in paragraph 2.4 of these Guidelines. But even then, the Committee has taken a restricted position. It is of the opinion that the courts should decline only exceptionally. Some members of the Committee felt it was not necessary to add this precision, as the theory itself may well be understood generally as applying only exceptionally. However, a majority of the Committee was of the opinion that it is better to spell out such a limit.

As regards paragraph 2.3 the exclusion of *forum non conveniens* is logical and should be uncontroversial, since the forum of necessity is available only in circumstances where either there is no other available court or the claimant cannot reasonably be expected to seize another court. By contrast, in circumstances where a court has jurisdiction by virtue of paragraph 2.1 or 2.2 of the Guidelines, the barring of *forum non conveniens* does actually constrain courts that would otherwise be able to apply the doctrine. However, as explained elsewhere, the Committee is of the view that jurisdiction based on domicile or the connection of claims (as defined by these Guidelines) is largely uncontroversial and in substance both reasonable and fair, so that it is appropriate for reasons of predictability and a good administration of justice to recognise these grounds as certain bases of jurisdiction.

Finally, if a court does exercise some power to decline jurisdiction it must do so in accordance with the two factors set out in paragraph 3.5(2) which ensures that the claimant has effective access to the alternative more convenient forum, thereby supporting a balanced approach.²⁸⁸

2.6. Venue

The allocation of domestic jurisdiction is a matter for the law of the court seized.

Some members of the Committee considered that a rule on the allocation of domestic jurisdiction was not necessary, as it is well known that rules on “venue” are not rules on international jurisdiction. However, other members shared the view that it is better to set out such a rule expressly.

3) Applicable law

3.1 The court seized shall apply its own choice of law rules only.

3.2 The court seized shall apply its own law to the extent that the law designated by its choice of law rules:

²⁸⁸ Rule set out in Paragraph 2.5(2) (a) of the Guidelines is meant to avoid the situation found in the West Caribbean case, where claimants seized a US court which had jurisdiction under the Montreal Convention. That court declined jurisdiction because the courts in Martinique was a more convenient forum. But the Cour de cassation in France said that these courts did not have jurisdiction as the claimants had the right to seize one of the competent courts under the Convention.

- (a) conflicts with internationally recognised human rights;**
- (b) attributes legal responsibility among members of a corporate group in a manner that avoids appropriate accountability; or**
- (c) fails to provide an effective remedy.**

Most civil claims for human rights violations are for choice of law purposes characterised as claims in tort. After discussing the matter, the Committee decided against introducing a special choice of law rule. In doing so, the Committee resisted a modern trend of integrating policy considerations into the context of choice of law.²⁸⁹ On balance, the Committee considered that the conventional choice of law rules, which tend to designate either the *lex loci delicti* or the *lex loci damni*, are reasonable alternatives for establishing the law closely connected with an alleged human rights violation, while the unclear benefits of offering victims of human rights violations a choice of laws do not outweigh certain difficulties for defendants who are faced with legal uncertainty as to the applicable law.

Having said that, the Committee felt it was important to propose a guideline for the application of what most systems refer to as the ‘public policy exception’. This, indeed, may be specific to human rights violations and may not be usual in conflict rules for other torts. Therefore, the Committee decided to incorporate three circumstances when it felt that a court would at any rate have to apply its own law instead of the otherwise applicable law in order to give a satisfactory solution to the case at hand.

Conversely, the Guidelines do not propose a specific approach to the application of what most systems refer to as ‘overriding mandatory rules’. To date, the use of such rules in the context of civil litigation for human rights violations is non-existent, perhaps due to the lingering uncertainty whether non-State actors have direct responsibilities under human rights law the rules of which might qualify as being overriding mandatory rules. The Committee considers that, in those systems where the existence of overriding mandatory rules is recognised, the existing rules are adequate to ensure the application of human rights law provisions where directly applicable in the case.

4) Transnational Judicial Cooperation

4.1. The courts of States adhering to these Guidelines shall cooperate with one another.

4.2. A Court may communicate with a Court or authority in another country in connection with matters relating to such proceedings with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the administration of justice. A court may appoint a special judge to carry forward the communication.

4.3. These means of cooperation must not be carried out in such a way as to prejudice the rights of the parties to the proceedings. The adversarial principle (right to be heard) must always be respected by judges during the cooperative process, even if it may be adapted in case of emergency.

4.4. The courts using these Guidelines should clearly inform the parties as to their intention to do so and keep them informed of each step they intend to take.

4.5. Courts using these Guidelines may communicate at any stage of the proceedings, including as to questions of jurisdiction, the matters of evidence, and, more generally, all the issues which are peculiar to civil claims arising out of human rights violations.

4.6. Courts may use various means of communication, be they in writing, by telephone, via video conferencing, or other electronic means to communicate with one another. Counsel or representatives of affected parties should be entitled to participate during the communication or, where this is not feasible, to be informed of them. An official transcript of the communication should be kept by the court and made available to all affected parties.

²⁸⁹ For instance, Article 7 Rome II Regulation offers a person seeking compensation for environmental damage a choice between the *lex loci damni* and the *lex loci delicti*, because “there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.”

4.7. Courts may also conduct one or more joint hearings via video conferencing or other techniques available to the courts. Submissions made during such joint hearings will be considered to be made to all participating courts, unless the courts provided otherwise in advance of the hearing or unless the person making the submission decides that it is directed to only the specified court or courts.

4.8. Courts may wish to coordinate their orders so that they are rendered at the same time and do not conflict with one another.

The Committee, in the same vein as its predecessor, is of the opinion that transnational cooperation between courts is an essential part of international litigation in the XXIth century. In the human rights field, it is all the more important that courts do coordinate their proceedings, if it happens that a case concerns several territories.

Readers who are familiar with this Committee's work will find section 4 of the Guidelines very close to section 8 of the Rio Resolution. Indeed, section 4 has been adapted from the Rio resolution for, as shown from the research conducted, nothing really new has evolved in the field since 2008, apart from the fact that court-to-court communication continues to be proposed and accepted in different fields.²⁹⁰ This is why reasons elaborated for the Rio resolution which may be found in the Rio report are, *mutatis mutandis*, applicable here.

5) Recognition and enforcement

5.1 If the court of origin took jurisdiction in accordance with paragraphs 2.1, 2.2, or 2.3, the requested court shall not reopen the jurisdictional issue.

5.2 Reciprocity cannot be imposed as a condition for recognition and enforcement.

5.3. Subject to the rules in paragraphs 5.1 and 5.2, the requested court shall apply its own rules on recognition and enforcement.

The last section of the Guidelines concerns the recognition and enforcement of foreign judgments. Again, the Committee came to the conclusion that no specific rule was necessary, apart from the two limited guidelines specified in paragraphs 5.1 and 5.2. Indeed, a careful analysis of recent work conducted under the auspices of the Hague Conference (the failed worldwide convention and the 2005 Choice of Court Convention) shows that nothing has really changed in that respect over the years. It is very striking to compare the 1971 Hague Convention²⁹¹ and the chapter on recognition and enforcement of the 2005 Choice of Court Convention. Their rules are very similar, if not identical. The only real difference is the absence of bilateralisation in the 2005 Convention. But, in the substance of the rules, very little has changed. This is due to the fact that the law on recognition and enforcement is settled, both in international law and comparative law. The list of potential obstacles to the recognition and enforcement of foreign judgments is the same and is very much a closed list. The only real divergence among countries deals with the reciprocity requirement and the wording of the public policy exception.

Accordingly, the Committee incorporated two rules into the Guidelines. The first rule concerns the verification of the jurisdictional basis upon which the court of origin accepted the case. In order to preserve the coherence of the Guidelines, when the court of origin took jurisdiction in accordance with the rules set out in the Guidelines, the requested court may not reopen the jurisdictional issue.

The second rule relates to reciprocity which continues to be a requirement in some countries. In the opinion of the Committee, the condition of reciprocity, while originally intended as a means to foster recognition and enforcement by other States, has not achieved this aim and in practice it has proven to be an obstacle to recognition and enforcement even in circumstances where otherwise the judgment could be recognised and enforced.

²⁹⁰ A report was presented at the American Law Institute's 2012 Annual meeting entitled "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" which endorses court-to-court communication at a global level.

²⁹¹ Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and its Supplementary Protocol of same date.

On the whole, it is also to be hoped that, when courts have cooperated as indicated in section 4 of the Guidelines, there will be less reason for the requested court to find objections to the recognition and enforcement of the judgment(s) rendered.

Paragraph 5.3 was added after the discussion in Sofia showed there was a misunderstanding in the Committee's intention not to foreclose application of the requested State's rules on recognition and enforcement, apart from the two rules provided by the Guidelines. Thus, this paragraph makes clear that, apart from the questions of jurisdiction as provided in the Guidelines and of reciprocity, all other rules of the requested State on recognition and enforcement remain untouched.

DRAFT RESOLUTION No 2 /2012**INTERNATIONAL CIVIL LITIGATION AND THE INTERESTS OF THE PUBLIC**

The 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012:

HAVING CONSIDERED the Report on International civil Litigation for Human Rights Violations by the Committee on International Civil Litigation in the Interests of the Public;

ADOPTS the Sofia Guidelines on Best Practices on International Civil Litigation for Human Rights Violations, as incorporated in the Report and annexed to this Resolution;

COMMENDS the Guidelines to the attention of:

- (1) National courts and law reform agencies, with a view to facilitating the progressive development of the law on this subject;**
- (2) Organisations concerned with international legal co-operation, with a view to considering measures at the international level of mutual co-operation in the field of transnational human rights violations;**
- (3) The Working Group on the issue of human rights and transnational corporations and other business enterprises;**

REQUESTS the Secretary General of the Association to transmit this resolution and the Committee's Report to international organisations such as the United Nations, the Hague Conference on Private International Law and regional organisations such as the European Union;

THANKS the Committee for its work and for having completed its mandate;

RECOMMENDS to the Executive Council that the Committee on International Civil Litigation and the Interests of the Public, having accomplished its mandate, be dissolved.

**SOFIA GUIDELINES ON BEST PRACTICES FOR INTERNATIONAL CIVIL LITIGATION
FOR HUMAN RIGHTS VIOLATIONS**

**AS ADOPTED BY THE INTERNATIONAL LAW ASSOCIATION AT ITS 75th
CONFERENCE HELD IN SOFIA, BULGARIA, August 2012**

RECOGNISING that civil litigation for human rights violations against corporations and individuals occurs increasingly in jurisdictions around the world;

MINDFUL of the fundamental nature of the rights of the parties involved in these claims and the related duties of States, including their domestic courts, under international law;

DESIRING to promote private international law conducive to a fair and efficient resolution of issues relating to the international jurisdiction of courts, the law applicable to claims and issues, and the recognition and enforcement of judgments;

DESIRING to promote transnational cooperation between courts with a view to increasing judicial fairness and efficiency in the absence of an international convention dealing with the issues addressed in the present resolution;

HEREBY STATES the following Guidelines on best practices:

1) Scope

- 1.1 These Guidelines apply to civil claims against corporations, individuals and other non-State actors arising out of or brought to redress a human rights violation, in view of the nature of the norm allegedly violated or the gross or systematic nature of the breach alleged.
- 1.2. A court shall determine whether it is seized of such a claim by reference to contemporary international law, without prejudice to the issue of retroactivity which may arise when the claim is determined on the merits.

2) International Jurisdiction

2.1. Defendant's domicile

- 2.1(1) The courts of the State where the defendant is domiciled shall have jurisdiction.
- 2.1(2) Domicile in the sense of paragraph 2.1(1) refers to:
 - (a) for a natural person, her or his habitual residence;
 - (b) for a legal person, either the place where

- (i) it has its statutory seat or is incorporated or under whose law it was formed; or
- (ii) it has its central administration; or
- (iii) its business, or other professional activity, is principally carried on.

2.2. Connected claims

- 2.2(1) The courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims.
- 2.2(2) Claims are closely connected in the sense of paragraph 2.2(1) if:
- (a) it is efficient to hear and determine them together; and
 - (b) the defendants are related.
- 2.2(3) Defendants are related in the sense of paragraph 2.2(2)(b), in particular if at the time the cause of action arose:
- (a) they formed part of the same corporate group;
 - (b) one defendant controlled another defendant;
 - (c) one defendant directed the litigious acts of another defendant; or
 - (d) they took part in a concerted manner in the activity giving rise to the cause of action.

2.3. Forum of necessity

- 2.3(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice.
- 2.3(2) A denial of justice in the sense of paragraph 2.3(1) occurs if the court concludes upon hearing all interested parties and after taking account of reliable public sources of information, that:
- (a) no other court is available; or
 - (b) the claimant cannot reasonably be expected to seize another court.
- 2.3(3) A sufficient connection in the sense of paragraph 2.3(1) consists in particular in:
- (a) the presence of the claimant;
 - (b) the nationality of the claimant or the defendant;
 - (c) the presence of assets of the defendant;

(d) some activity of the defendant; or

(e) a civil claim based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that court has jurisdiction under its own law to entertain civil proceedings.

2.4. Other grounds of jurisdiction under national law

These Guidelines apply without prejudice to alternative grounds of jurisdiction available under the law of the forum seized, provided that they are not contrary to international law.

2.5. Forum non conveniens

2.5(1) Except when the court is seized in accordance with paragraph 2.1, 2.2 or 2.3, the court seized in accordance with these Guidelines may exceptionally stay proceedings in favour of the courts of another State, as long as it is allowed under the law of the forum.

2.5(2) Application of paragraph 2.5(1) is conditional upon:

(a) the defendant(s) undertaking to accept the jurisdiction of the courts of the State in whose favour jurisdiction is stayed; and

(b) the actual exercise of jurisdiction by the courts of the State in whose favour jurisdiction is stayed within a reasonable time and in accordance with fundamental standards of access to justice.

2.6 Venue

The allocation of domestic jurisdiction is a matter for the law of the court seized.

3) Applicable law

3.1 The court seized shall apply its own choice of law rules only.

3.2 The court seized shall apply its own law to the extent that the law designated by its choice of law rules:

(a) conflicts with internationally recognised human rights;

(b) attributes legal responsibility among members of a corporate group in a manner that avoids appropriate accountability; or

(c) fails to provide an effective remedy.

4) Transnational Judicial Cooperation

- 4.1. The courts of States adhering to these Guidelines shall cooperate with one another.
- 4.2. A Court may communicate with a Court or authority in another country in connection with matters relating to such proceedings with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the administration of justice. A court may appoint a special judge to carry forward the communication.
- 4.3. These means of cooperation must not be carried out in such a way as to prejudice the rights of the parties to the proceedings. The adversarial principle (right to be heard) must always be respected by judges during the cooperative process, even if it may be adapted in case of emergency.
- 4.4. The courts using these Guidelines should clearly inform the parties as to their intention to do so and keep them informed of each step they intend to take.
- 4.5. Courts using these Guidelines may communicate at any stage of the proceedings, including as to questions of jurisdiction, the matters of evidence, and, more generally, all the issues which are peculiar to civil claims arising out of human rights violations.
- 4.6. Courts may use various means of communication, be they in writing, by telephone, via video conferencing, or other electronic means to communicate with one another. Counsel or representatives of affected parties should be entitled to participate during the communication or, where this is not feasible, to be informed of them. An official transcript of the communication should be kept by the court and made available to all affected parties.
- 4.7. Courts may also conduct one or more joint hearings via video conferencing or other techniques available to the courts. Submissions made during such joint hearings will be considered to be made to all participating courts, unless the courts provided otherwise in advance of the hearing or unless the person making the submission decides that it is directed to only the specified court or courts.
- 4.8. Courts may wish to coordinate their orders so that they are rendered at the same time and do not conflict with one another.

5) Recognition and enforcement

- 5.1 If the court of origin took jurisdiction in accordance with paragraphs 2.1, 2.2, or 2.3, the requested court shall not reopen the jurisdictional issue.
- 5.2 Reciprocity cannot be imposed as a condition for recognition and enforcement.
- 5.3 Subject to the rules in paragraphs 5.1 and 5.2, the requested court shall apply its own rules on recognition and enforcement.