Human Rights Law Clinic Papers 2021

Financial Complicity in International Human Rights Violations

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To: Minority Rights Group International

Submitted by: Katie Wootton and Zoe Corderoy

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1. Introduction

This report will identify, discuss, and evaluate the necessary elements for a viable legal claim against corporate actors and other non-state entities for financial complicity in international human rights violations. It will do this by first presenting potential elements necessary for a viable claim, and then identifying the relevant standards and laws, both extant and pending. The analysis will seek to establish any statutory basis for such a claim at the international, regional, and domestic level. Specifically, the report will highlight the relevant German legal context, as Germany is the second largest funder of environmental projects, having provided a total of 500 million euros toward global biodiversity in 2011,[1] and whose funded projects continue to have a significant presence in sub-Saharan Africa where related rights violations are common.[2]

In section 2, the report will discuss the relevant factual context, and section 3 will outline knowledge and substantial contribution as the essential elements in a potential general model for a financial complicity claim. Section 4 identifies the relevant international, regional, and national legal instruments and examines the extent to which these model elements are established in both soft and binding law and evaluates relevant gaps in these instruments. This discussion will show that the issue of financial complicity is captured under current and pending human rights due diligence (HRDD) requirements. The report concludes, in section 5, with an examination of the current legal environment around due diligence, and the potential utility of pending legislation.

2. Background

Financial complicity means the enabling, facilitating, or 'exacerbating' [of] human rights abuses through financing.'[3] It generally falls under the concept of indirect, secondary, or vicarious liability. Despite the volume of existing research, financial complicity in human rights violations remains an underdeveloped area of law.[4] Juan Pablo Bohoslavsky, former Expert to the United Nations on Foreign Debt and Human Rights, describes a lacuna and a 'historical deficit of legal and analytical precedents connecting the particular commodity of money to

[1] UN, 'Background Note on Germany's Development Policy Priorities' (*UN*, 2014) < https://www.un.org/en/development/desa/policy/organigramme/note_docs/2014-BN-4.pdf> accessed 20 March 2021.
[2] Lara Dominguez and Colin Luoma, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 Land 1, 6.
[3] Brona Higgins, Wassim Ghantous and Mads Melin, 'Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine' (*BADIL Resource Centre for Palestinian Residency and Refugee Rights*, December 2015) 38.
[4] Juan Pablo Bohoslavsky, Mariana Rullli 'Corporate Complicity and Finance as a 'Killing Agent': The Relevance of the Chilean case' (2010) 8 *JICJ* 830 [Chilean Case].

legal liability.'[5] Some scholars have suggested this is due to the fungibility of money, and the difficulty tracing its use through a supply chain.[6]

Growing economic globalisation and the increasing prominence of multinational corporations creates added pressure to address this legal lacuna,[7] with the UN Conference on Trade and Development estimating that approximately 80% of international trade can now be linked to the global production networks of multinational enterprises.[8] Furthermore, the International Trade Union Confederation estimates 60% of global trade in the real economy depends on the supply chains of 50 corporations.[9] Despite benefits developing countries may enjoy (increased tax revenue and employment),[10] there is also evidence of an increase in human rights violations directly or indirectly connected to the activities of these corporate actors, where the obscurity of business contracts facilitates exploitation.[11] For instance, the majority of European corporate and non-state entities involved in extraterritorial activities are not taking steps to avoid contributing to human rights violations, with a survey published by the European Commission showing that only 16% of the respondent businesses were undertaking due diligence throughout their entire supply chains.[12] This is especially concerning where corporate supply chains extend into developing countries in the Global South, where rules, regulations, or their enforcement protecting human rights may be weak.[13]

These adverse impacts are of particular concern for indigenous peoples and other vulnerable minorities, especially in relation to certain environmental projects. For example, continued instances of colonial or fortress conservation, wherein indigenous communities are displaced to create national parks, result in communities losing access to their traditional homes, lands,

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[5] ibid.
[6] ibid*;* Sabine Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations.' *Berkely J. Int'l L.* 30 (2012): 451.
[7] The Interministerial Committee on Business and Human Rights, 'National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020' (*Global NAPs*, September 2017) <www.globalnaps.org> accessed 20 April 2021.
[8]Justine Nolan and Martin Boersma, 'The Long and Winding Road to Respecting Workers' Rights in Supply Chains' (*Social Europe*, 1 October 2019) <www.socialeurope.eu> accessed 23 April 2021.
[9] ibid.
[10] Philipp Wesche and Miriam Saage-Maaβ, 'Holding Companies Liable for Human Rights Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir v KiK*' (2016) 16 HRLR 370, 370.
[11]Sharon Burrow, 'UN Treaty on Business and Human Rights Vital for Economic and Social Justice' (*Social Europe*, 28 October 2019) <www.socaileurope.eu> accessed 21 April 2021.
[12] Cecilia Navarra, 'Corporate Due Diligence and Corporate Accountability: European Added Value Assessment' (*European Parliamentary Research Service*, October 2020) 14. <www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf> accessed 21 April 2021.
[13] Ionel Zamfir, 'Towards a Binding Treaty on Business and Human Rights' (*Member Research Service*, April 2018) 5 <www.europarl.europa.eu> accessed 20 April 2021.

and ways of life. In extreme cases, there are reports of eco-guards perpetrating physical and sexual violence against these communities.[14] These projects are facilitated by continued investment from institutions in the Global North, thus their financing of these projects contributes to, or facilitates, the resulting human rights violations. Though binding law and jurisprudence on financial complicity remains very limited, increased focus on these issues has resulted in an upward trend in accountability measures addressing corporate (and other non-state actors) complicity in extraterritorial human rights violations at the international, regional, and domestic level.

3. Necessary Elements for a Proposed Model Legal Claim of Financial Complicity

In this section, the report will outline a potential model for a claim of financial complicity. Professor John Ruggie, Special Representative on Business and Human Rights, and author of the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), indicates the following essential elements for a claim of complicity:

- knowledge,
- substantial contribution.

Ruggie indicates that 'it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere,'[15] owing to the limited jurisprudence on companies and the differing definitions of complicity across jurisdictions. Therefore, he examines international criminal law and cases on aiding and abetting as 'these cases exhibit several key principles that can form the basis of useful guidance for companies' and because international criminal law 'can influence domestic criminal and non-criminal standards.'[16] Ruggie advises caution about analogising legal standards between natural persons and legal persons, but he uses these precedents to identify and define (i) acts or omissions having substantial effects on commission of an international crime (substantial contribution) and (ii) knowledge of contributing to the crime,[17] as the essential elements for a claim of corporate complicity in human rights violations.[18]

3.1 Substantial Contribution

[14] Dominguez and Luoma (n 2) 2.
[15] Professor John Ruggie, 'Clarifying the Concepts of 'Sphere of influence' and 'Complicity'' (2008) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.
[16] ibid.
[17] ibid.
[18] ibid.

Ruggie defines substantial contribution as an act, or omission, that is aimed at assisting, encouraging, lending moral support, or facilitating the main perpetrators' actions, and which has a substantial effect on a human rights violation.[19] This act or omission does not have to be the sole contributing factor or cause of harm.[20] Research by the International Council of Jurists (ICJ) supports this idea, pointing to a long chain of causation flowing from human rights violations. The ICJ indicates that where an entity's actions are located within this chain, then the substantial contribution element of the claim is established.[21] Ruggie suggests that substantial means significant, although the ICJ suggests a lower threshold in civil cases, which is met where there was harm to a legally protected interest.[22] The ICJ indicates that substantial contribution is a question of fact, and whether this is sufficient for liability is a matter of legal and policy consideration. Relevant factors that may strengthen a claim include:[23]

- nature and/or value of the interest/right harmed
- nature of the good or service contribution
- remoteness of contribution to harm
- intervening act(s)
- relationship between entities in a supply chain

For the purposes of this memo, establishing liability for financial complicity in supply chains is challenging because money is general in nature and the more general a contribution, the less likely a court will be to find that the substantial contribution threshold has been met.[24] However, liability is more likely to be found where there is a close relationship between the accused corporate entity and the perpetrating party, such as where the accused entity is the only, or one of few, financial contributors to a perpetrating entity.[25] An intervening act could break a chain of causation causing a court to find that the contribution was too remote or attenuated from the resultant harm. However, this is unlikely where an intervening act was foreseeable, and where the relationship between the complicit entity and the perpetrating entity is close.[26] The more remote an accused entity's contribution is from the ultimate harm,

[19] ibid.
[20] ibid.
[21] International Commission of Jurists, Expert Legal Panel on Corporate Complicity and Legal Accountability' (2009) 3 Civil Remedies.
[22] The ICJ enumerates such interests as life, liberty, mental or physical integrity, or property, ibid.
[23] ibid.
[24] ibid; *see also* Michalowski (n 6) generally.
[25] ibid 24.
[26] For example, see the *James Stutt* case, the US District Court did not find that the harm to the plaintiffs was foreseeable to the defendant banks who supplied letters of credit to the Iraq government, which were used in transactions with chemical suppliers. *James Stutt et al v the De Dietrich Group et al*, United States District Court, ED New York, F Supp 2d, 2006 WL 1867060, [17], 30 June 2006 *cited in* ibid 25.

the less likely a court will be to find that there was a substantial contribution, but where an entity is found to act intentionally, the ICJ argues that courts are more likely to be flexible on finding a causal link, even across jurisdictions.[27] An entity is likely to be found to have acted intentionally if it knew, or reasonably ought to have known, that there was a likelihood human rights violations would occur and they acted regardless.[28] This suggests that the substantial contribution element can be satisfied in a financial complicity claim for human rights abuses where it can be established that the accused entity knew, or reasonably ought to have known, that its financial contributions are part of a chain of causation leading to human rights violations. The viability of such a claim is also more likely where there is harm to mental or physical integrity, life, liberty, or property.[29]

3.2 Knowledge and Intent

Following from the above discussion, the knowledge element will be discussed in two parts: knowledge itself and then the issue of intent. According to Ruggie's model, claims of corporate complicity must establish that the accused (i) 'know the criminal intentions of the principal perpetrator' and (ii) '[know] that their own acts provide substantial assistance to the commission of a crime.'[30] The accused is not required to know the exact plans of the perpetrator, nor which specific criminal act the perpetrator intends to commit, 'but only that one of several possible crimes might be committed'.[31] They do not have to share the intent of the perpetrator.

Knowledge can be constructive, and it can be established through direct, indirect, and circumstantial evidence. For example, in the *Tesch*[32] case, the accused parties were tried for knowingly supplying Zyklon B gas to Nazi concentration camps. The prosecutors established the first prong of knowledge intent through records of meetings, witness testimony, and 'the context of the business transaction,'[33] including sworn affidavits stating 'that it was common knowledge in 1943 in Germany that gas was being used for killing people.'[34] To establish the second prong, the prosecutors pointed to the facts that the accused's company held a monopoly over Zyklon B supply in the relevant area; that Auschwitz was the accused's second largest customer for 1942 and 1943; that the company was wholly owned and its operations

[27] *see Quinn v Leathem* [1901] AC 495, 537 'intention to injure the plaintiff disposes of any questions of remoteness of damages' cited in ibid 27.
[28] ibid.
[29] ibid.
[30] Ruggie (n 15) 12-3.
[31] ibid.
[32] *The Zyklon B Case of Bruno Tesch and Two Others*, Law Reports of Trials of War Criminals, vol 1 95.
[33] Ruggie (n 15); *see also The Zyklon B Case* (n 32) 96 & 101.
[34] *The Zyklon B Case* ibid 96.

closely monitored by the accused, as such 'it was unbelievable that [the accused] did not know that anything wrong went on in the concentration camps.'[35] Despite the prosecution acknowledging that 'direct knowledge…available to Tesch' was scant, the Court did find the accused guilty of knowingly supplying Zyklon B.[36]

Unlike in criminal law, in a civil or private law matter, Ruggie argues it is not necessary to prove knowledge beyond a reasonable doubt. Instead, it is likely sufficient to establish knowledge based on a reasonableness test: would a reasonable party know, or should it have known, that its actions would substantially contribute to the violation of human rights?[37] Ruggie also indicates that '[what] would be required to prove knowledge on the part of a company would depend on the context.'[38]

Questions of foreseeability of harm are also relevant to knowledge and can be determined through an examination of other context-based factors. These include the actual information the accused entity has about potential risks, available information about any past human rights violations by the perpetrator, the existence of public information drawing attention to potential risks of violations, whether another actor brought information about human rights risks to the attention of the accused, or whether the accused conducted their own investigations into potential risk, and if they took preventative measures against such risk.[39] It is possible a claim for financial complicity will satisfy the knowledge requirement if it can be demonstrated that an accused entity financially contributed to a perpetrator, and any resultant harm is found to have been foreseeable.

Intent and knowledge can be established together according to the ICJ.[40] If a court establishes that an accused entity knows they are contributing to a party's actions, then they are considered to have intentionally contributed to it.[41] In the case of a corporate entity, the ICJ found that across several jurisdictions, courts examine the state of mind of a select group of employees within that entity. Generally, these will be senior officers and not 'mere servants' the entity employs.[42] Intent here is the intent to substantially contribute to the commission of harm, which is distinct from the criminal intent of the perpetrator.

3.3 Negligence

[35] ibid 101.
[36] Ruggie (n 15).
[37] ibid.
[38] ibid 13.
[39] ICJ (n 21).
[40] ibid.
[41] ibid.
[42] ibid 15.

If knowledge cannot be established, it may be argued that the party was negligent.[43] Negligence is a useful avenue for a claim of corporate financial complicity because the ICJ 'found that in cases of harm to life and liberty, dignity, physical and mental integrity, and property, negligent conduct will very often be sufficient to ground liability.'[44] Further, in civil law jurisdictions such as Germany, the distinction between negligence and intent is generally not emphasised if it can be established that a corporate actor was at least negligent.[45] Bohoslavsky argues in cases of financial contribution to human rights violations, foreseeable use is the fundamental criteria to establish liability for corporate financial complicity.[46]If a corporate entity financially contributes to another actor when it is foreseeable that the money will be used in a way that contributes to human rights violations, that corporate entity should be liable for financial complicity in those violations. This is supported by the finding in *Boim*, wherein the US 7th Circuit Court held that financial donations to a terrorist organisation triggered civil liability, despite the silence on secondary liability under the relevant statute.[47]

3.4 Omissions

Liability for financial complicity in human rights violations may be imposed if there is a relevant standard of care, and a corporate entity failed to take necessary measures to meet this. The finding in *Caparo*[48] established the tripartite test to determine the existence of a standard of care. A standard will exist if,

(i) the damage (harm) is foreseeable;

(ii) there is a proximity of relationships between parties;

(iii) it is fair, just, and reasonable for such a duty to exist under relevant policy considerations.[49]

All three elements of this test are mandatory. *Caparo* is an English case, but the relevance of this test for establishing a standard of care is supported by the ICJ which indicates that across common and civil law jurisdictions, a standard of care can be imposed where a corporate entity has a special relationship with the parties involved, the locus of the events, or the means

[43] ibid.
[44] ibid 14.
[45] ibid.
[46] Bohoslavsky, Rulli (n 4) 829.
[47] *Boim v. Holy Land Found for Relief and Development*, 549 F 3d 685 (7th Cir 2008).
[48] *Caparo Industries plc v Dickman* [1990] UKHL 2.
[49] ibid.

by which damage is caused.[50] Article 823(1) of the German Civil Code is considered to include liability for omissions where there is a relevant standard of care.[51]

4. Relevant Laws and Standards

Having discussed model elements of a financial complicity claim, the report now examines existing legal frameworks (and pending instruments) and how they support this model.

Under the current legal frameworks at all levels, a negligence claim may be the most viable approach. While financial complicity is not explicitly addressed, there is robust evidence for corporate and non-state entities' obligations to conduct HRDD. The scope and extent of this obligation varies across legal instruments, but HRDD obligations arguably creates a standard of care and addresses the issue of foreseeability of harm. Under these instruments corporate and non-state actors are unlikely to avoid liability because it may be argued that if they met their obligations, human rights violations could have been avoided or lessened. They are also unable to claim ignorance of potential risks, because this in itself represents a violation of their due diligence obligations.

The following instruments create HRDD obligations extending throughout corporate supply chains and provide a potential foundation for claims of extraterritorial financial complicity. These obligations create the necessary substantial contribution, knowledge and standard of care elements to establish a claim for negligence, if not intentional complicity. They also create obligations establishing 'an evidence trail that can help assess whether the assessment and its outcome is reasonable or whether it discloses failings and possible liabilities.'[52]

4.1 International Laws and Standards

First, the UNGPs, though not explicit on financial complicity, address corporate complicity and HRDD obligations in several places. They require business enterprises to 'respect human rights'[53] and to 'seek to prevent or mitigate adverse impacts…linked to their operations, products or services by their business relationships.'[54] UNGP Operational Principle 17 tells businesses and institutions to undertake due diligence, including 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses

[50] ICJ (n 21) 20.
[51] ibid 19.
[52] Action4Justice, 'Do Businesses Have Human Rights Responsibilities?' (*Action4Justice*) < www.action4justice.org/legal_areas/business-and-human-rights/do-businesses-have-human-rights-responsibilities/> accessed 10 April 2021.
[53] UNHROHC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) HR/PUB/11/04, principle 11.
[54] ibid 13 (b).

and communicating how impacts are addressed, even if they have not [directly] contributed.'[55] This process should be ongoing. Businesses should also be 'prepared to communicate [how they address human rights impacts]'[56] and should 'establish/participate in effective operational level grievance mechanisms for individuals and communities who may be adversely impacted.'[57] Commentary on HRDD interprets these obligations as applying to financial actors, because 'institutional investors, like all businesses, including banks, have their own responsibility to respect human rights' by 'conduct[ing] meaningful due diligence across their operations, value chains and business/investment practices and relationships.'[58] This has been reiterated in investor toolkits and frameworks.[59] Other international instruments addressing HRDD include the OECD Guidelines,[60] the International Labour Organisation (ILO) Tripartite Declaration,[61] and the UN Global Compact (Compact).[62] The Compact explicitly references financial complicity by recommending donors 'conduct a human rights impact assessment consisting of an analysis of the functions of a proposed investment and the possible human rights impacts (intended and unintended) they may have on [a] community or region.'[63]

These instruments are limited, however. For example, though the UNGPs create HRDD obligations on all enterprises, regardless of 'size, sector, operational context, ownership and structure,'[64] these obligations are intended to be adapted to context. Subsequently, there is concern 'about the lack of capacity of small and medium-sized companies'[65] to meet HRDD obligations, creating a protection gap where these entities may be unable to establish requisite HRDD procedures.

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[55] ibid.
[56] ibid Principle 21.
[57] ibid Principle 29.
[58] Johannes Blankenbach and Saskia Wilks, 'EU Mandatory Due Diligence Legislation: What Investors Need to Know and Why They Should Care' (*Business and Human Rights Resource Centre*, 16 February 2011) < https://www.business-humanrights.org/en/blog/eu-mandatory-due-diligence-legislation-what-investors-need-to-know-and-why-they-should-care/> accessed 20 April 2021.
[59] ibid.
[60] OECD (2011), *OECD Guidelines for Multinational Enterprises* OECD Publishing < https://www.oecd.org/corporate/mne/48004323.pdf> accessed 20 April 2021.
[61] ILO (2017), *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* International Labour Office < https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 21 April 2021.
[62] UN Global Compact, 'The Ten Principles of the UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 10 March 2021.
[63] ibid.
[64] Guiding Principles (n 53) Principle 15.
[65] OHCHR, 'Holding Businesses Accountable for Human Rights Abuses' (*OHCHR*, 21 January 2011) < https://www.ohchr.org/EN/NewsEvents/Pages/HoldingbusinessaccountableHRabuses.> accessed 15 March 2021.

Most importantly, the UNGPs and the other instruments are not legally binding.[66] They do, however, have normative influence. The UNGPs recommend states and regional institutions implement their own binding HRDD obligations according to the UNGPs, which implicitly address financial complicity. The UNGPs have also been referenced in domestic litigation. Both the British Columbia Supreme Court and Ontario Superior Court have permitted submissions into evidence about the UNGPs, and the Inter-American Court of Human Rights found Suriname failed its obligations to protect human rights within their territory by not upholding the UNGPs.[67] The UNGPs have also been incorporated into domestic legislature, such as the French *Law on the Duty of Vigilance,*[68] which is recognised as a model for national HRDD law.

Furthermore, both the Pension Fund and the Equator Principles demonstrate the normative value of the UNGPs for addressing financial complicity in human rights violations by establishing alternative HRDD enforcement mechanisms that require financial institutions to consider their impact on human rights, and to encourage other entities to act likewise. The Norwegian government incorporated the UNGPs into eligibility requirements for potential corporate beneficiaries seeking investment from the Government Pension Fund.[69] Businesses must 'define qualitative and quantitative indicators that enable monitoring and tracking abuses of human rights and their efforts to address these' and 'carry out relevant impact and risk assessments before making significant investments.' Businesses also must publicly disclose their human rights strategies.[70] These requirements extend through business supply chains and relationships. If an entity fails to maintain this standard, the Pension Fund will divest from that entity, and publicly display its name.[71]

Similarly, the Equator Principles are another non-binding instrument applying globally across all industries, that 'aim to fulfil [the financial institutions'] responsibility to respect Human Rights in line with the UNGPs' via divestment.[72] Signatory banks must ensure businesses and

[66] *see* Leigh A. Payne and Gabriel Pereira, 'Corporate Complicity in International Human Rights Violations' (2016) 12 Annual Review of Law and Social Science 63.
[67] Inter-American Court of Human Rights *Case of the Kalina and Lokono Peoples v Suriname* (2015) 39 Series C [224]-[226]*; Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 (CanLII) [64]-[65]; *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 (CanLII) [32] – [39].
[68] Law inserted in Article L. 225-102-4 of the French Commerical Code, 'Duty of Vigilance Law' (2017).
[69] Norwegian Council on Ethics for the Government Pension Fund on Global Expectations for Companies on Human Rights ('Norwegian Council') (2019), 'Guidelines for Observation and Exclusion from the Government Pension Fund Global' < https://nettsteder.regjeringen.no/etikkradet3/files/2019/12/guidelines-for-observation-and-exclusion-from-the-gpfg-01.09.2019.pdf> accessed 10 March 2021.
[70] ibid.
[71] ibid.
[72] Equator Principles (2020) < https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf> accessed 12 February 2021.

enterprises fulfil HRDD criteria before receiving financing,[73] 'categoris[ing] the Project based on the magnitude of potential environmental and social risks and impacts'[74] and in the case of high-risk projects the Equator Principles Financial Institution (EPFI) requires the establishment of an effective grievance mechanism.[75] Signatory lenders are to deny or withdraw support if these obligations are not met.[76] In 2017, the Dakota Access Pipeline lost EPFI funding due to human rights violations.[77] While this shows that it has impact, the fact that there was financing from these institutions to begin with suggests a shortcoming in practical implementation.[78]

4.2 Regional Laws and Standards

Within the European Union (EU) there are multiple legal instruments and standards addressing financial complicity, or HRDD, several of which are legally binding. For instance, the *EU Regulation 2017/821 on Conflict Minerals*[79] creates binding HRDD requirements that apply throughout corporate supply chains.[80] Entities importing relevant materials must conduct supply chain due diligence to avoid potential 'conflict minerals' and are required to design and implement a strategy to respond to these risks, carry out an independent third-party audit, and to report annually on supply chain due diligence procedures.[81] These procedures are based on the OECD Guidance documents and EU Member States are responsible for ensuring importers adhere to these requirements.[82]However, the Regulation only applies to large-scale operations in one sector. Furthermore, while the Regulation incorporates the entire supply chain, suggesting potential applicability to financial actors, this is still limited and the length and complexity of supply chains in mineral imports may create a significant barrier to litigation against corporate actors.

Furthermore, the *Non-Financial Reporting Directive* amends the *EU Accounting Act*, creating supply chain transparency obligations applicable to large corporate entities (500+

[73] ibid.
[74] ibid Principle 1.
[75] ibid Principle 6.
[76] ibid.
[77] Delaney Grieg, 'Responsible Banking – Part 1: Reforming the Equator Principles for Indigenous Rights in Project Loan Finance' (*SHARE*, 12 September 2019) <www.share.ca/responsible-banking-series-reforming-equator-principles-for-indigenous-rights-project-loan-finance> accessed 18 February 2021.
[78] ibid.
[79] European Commission, 'The EU's New Conflict Minerals Regulation: A Quick Guide if You're Involved in the Trade in Tin, Tungsten, Tantalum, or Gold' (*Trade EU*, March 2017) < http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf> accessed 22 April 2021.
[80] ibid.
[81] ibid art. 5 -7.
[82] ibid.

employees).[83] The *Directive* advises entities to prepare non-financial statements addressing respect for human rights, stipulating that statements should include 'a description of the policies, outcomes, risks related to those matters and … information on the due diligence processes implemented by the undertaking.'[84] These risks 'may stem from the undertaking's own activities or may be linked to its own operations, and where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains.'[85] This is significant for enhancing business transparency[86]; a key aspect to increasing corporate social responsibility. It also 'ensure[s] that investors have access to adequate non-financial information from companies so as to be able to take account of sustainability-related risks, opportunities, and impacts in their investment decisions.'[87] Most importantly for the aim of this report, the information (or lack of) on an entities due diligence plans 'can be used by victims of corporate misconduct to prove negligence, 'speed[ing] up the implementation of human rights due diligence concepts in the tort of law concept of duty of care.'[88]

However, due to the lack of a mandatory, standardised reporting system, reports have shown that the non-financial information disclosed by companies does not meet the needs of investors, with the quality and relevance of information remaining 'critically poor.'[89] Thus, while the *Directive* may be useful for providing evidence of a duty of care in a tort claim, this benefit is likely to be limited due to poor information resulting from a lack of binding guidelines. It also does not provide any specific requirements for investors to divest from high-risk entities.

4.3 Domestic Laws and Standards

[83] Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJEU L.330/1, para 14.
[84] ibid para 6.
[85] ibid para 8.
[86] European Coalition for Corporate Justice (ECCJ), 'Assessment of the EU Directive on the Disclosure of Non-Financial Information by Certain Large Companies' (*Business and Human Rights*, May 2014) < https://media.business-humanrights.org/media/documents/files/media/documents/eccj-assessment-eu-non-financial-reporting-may-2104.pdf> accessed 15 May 2021.
[87] Nora Hahnkamper-Vandenbulcke, 'European Parliament Briefing, Implementation Appraisal: Non-Financial Reporting Directive' (*European Parliamentary Research* Service, January 2021) 2 <www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf> accessed 15 May 2021.
[88] ECCJ (n 86).
[89] German Watch, 'Reform of the EU Non-Financial Reporting Directive: A Push Towards Future-Proof Reporting Obligations' (2021) Full Disclosure: Monthly Briefing on EU Corporate Transparency Regulation 1, 1.

There are also domestic HRDD laws and standards, providing a basis for a claim of financial complicity. First, the French *Law on the Duty of Vigilance*[90] creates a civil cause of action for human rights violations ('damage').[91] The law obligates companies to prepare a vigilance plan in line with the UNGPs, implement it effectively and publicly report implementation.[92] The law provides a variety of remedies including injunctions and fines. It is also significant, because it will likely be used as a 'template' for future EU law.

However, its scope is limited, only applying to companies with a certain number of employees, affecting only 150 to 300 companies in France. Critics also identify the lack of clear definition of effective implementation for a vigilance plan. The law does not specify which actors have standing, nor identify which courts are competent to rule on its provisions. It is also largely untested because to date only three cases have been brought under it, all of which are still pending. The law also puts the burden of proof on complainants, despite company information being mainly private, making gathering evidence difficult, particularly for individual complainants lacking the necessary resources to pursue a claim.[93]

Germany, on the other hand, does not currently have a specific HRDD legal framework. Instead, obligations exist in a variety of legal instruments, tailored to aims of specific laws,[94] such as laws against unfair competition and consumer protection.[95] In these cases, liability may be triggered if working conditions in foreign jurisdictions violate human rights standards.[96] Germany also participates in other industry-specific standards, such as the 2014 Partnership for Sustainable Textiles – an entity of 150 representatives from across five sectors, aiming 'to make social, ecological, and economic improvements along the supply chain.'[97] Members are subject to sanctions and exclusion for failing to meet obligations,

[90] Art L 225-102-4 – I – Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan.
[91] Elsa Savourey and Stephane Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 Business Human Rights Journal 142.
[92] ibid.
[93] ibid.
[94] Daniel Augenstein, 'German Country Report' in Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, 'Study on Due Diligence Requirements through the Supply Chain. Part II, Country Reports (*EU Publications*, 20 February 2020) 95 < https://op.europa.eu/en/publication-detail/-/publication/0268dfcf-4c85-11ea-b8b7-01aa75ed71a1/language-en/format-PDF/source-search> accessed 14 April 2021.
[95] ibid.
[96] ibid 106.
[97] These include mandatory measures such as introducing mechanisms to address violations by business partners, *see* Augenstein (n 94).

including the implementation of due diligence measures.[98] As of 2018, seven members have been excluded.[99]

Furthermore, the German law of torts provides a potential foundation to bring a claim against a German entity for financial complicity in human rights violations abroad. Article 823 (1) of the German Civil Code states that 'a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another rights of another person, is liable to make compensation to the other party for the damage arising from this.'[100] To establish liability under this article, the claimants must prove that the defendant caused damage to one of the aforementioned rights, either through intentional or negligent conduct.

However, before bringing a claim, the court must first have jurisdiction over the case. Under article 32 of the German Code for Civil Procedure, the specific jurisdiction for tort is 'the court in the jurisdiction of where the tortious act was committed.'[101] For cross-border litigation, this means the courts in the country where the injury occurred. However, under the EU Brussels Recast Regulation, the location of the tortious act, provided the location is an EU member state, 'includes both the location at which the harmful event occurred and the location where the perpetrator has acted.'[102] Both the Regulation and a precedent set in *Owusu v Jackson and Others*,[103] indicates that courts of EU member states cannot decline jurisdiction where the defendant is a company domiciled in that member state.[104] The domicile of a company is defined under the Brussel Regulation as 'the place where a company has its statutory seat, or its central administration or its principle place of business.'[105] In Germany, this is defined by 'their registered seat'; 'the place at which it has its administrative centre.'[106] Since EU regulations take precedence in cross-border litigation, German courts may have jurisdiction

[98] ibid.
[99] ibid.
[100] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719) s 823.
[101] Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBI Federal Law Gazette) page 3202; 2006; page 432; 2007, page 1781), last amended by Article 1 of the Act dated 10 October 2013, art 32.
[102] Federal Ministry of Justice and Consumer Protection, 'The Responsibility of Business Enterprises for Human Rights Violations: Access to Justice and the Courts' (*BJVD*) www.bmjv.de/SharedDocs/Publikationen/DE/Menschenrechtsverletzungen_Wirtschaftsunternehmen_engl.pdf?__blob=publicationFile&v=3> accessed 20 March 2021.
[103] C-281/02 *Owusu v Jackson and Others* [2002] ECR I-1445.
[104] Norton Rose Fulbright, 'UK Supreme Court Clarifies Issues on Parent Company Liability in *Lungowe v Vedanta*' (*Norton Rose Fulbright*, April 2019) <www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta> accessed 19 April 2021.
[105] Jennifer Zerk, 'Multinationals Under National Law: The Problem of Jurisdiction' in *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), 117.
[106] The German Code for Civil Procedure, art 17.

in a case of financial complicity, where the provision of funds could be regarded as the tortious act. This may be advantageous to a claimant, since taking a claim against an entity in its home state may lead to higher rewards or reduced delay times.[107]

However, though German courts may have jurisdiction, under the Rome II Regulation, the case will generally apply the law of the country where the damage occurred.[108] For the purpose of this memo, this could be problematic as applicable law in the Global South may have lower standards for human rights protection.[109] While, under article 4 of the Rome II Regulation, it may be possible to apply German law to damage occurring overseas, 'where it is clear from all circumstances of the case that the tort/delict is manifestly more closely connected with a country other than individuated in paragraph 1 or 2',[110] this is rarely applicable.[111] Furthermore, the application of German law may also be possible under 'universal jurisdiction', wherein the 'activities of foreign subsidiary would rebound on the home state to an extent to justify extraterritorial application of social or environmental standards.'[112] However, this only applies in the cases of most extreme violations, 'such as where a multinational was implicated in crimes of torture, terrorism, genocide, or possibly forced labour.'[113] Thus, under current regulations, the application of German tort law regarding transnational human rights violations is a difficult avenue for bringing a financial complicity claim.

Overall, existing HRDD requirements in current laws and standards at the international, regional, and domestic level may provide the foundations for the knowledge and intent elements needed to make a viable claim of financial complicity against an entity for extraterritorial human rights violations. These requirements differ between instruments, but there are certain common criteria increasing the viability of a claim. For example, large companies with many employees will have higher burdens of due diligence because they have greater resources and a potentially more significant impact on human rights. Furthermore, companies operating in, or sourcing materials from, conflict-affected areas may have higher HRDD obligations, as well as banks and financial institutions whom are expected to have

[107] Zerk (n 105) 120.
[108] Action4Justice, 'How Can I Bring a Civil Claim Against a Business in a Foreign Court?' (*Action4Justice*) < www.action4justice.org/legal_areas/business-and-human-rights/how-can-i-bring-a-civil-claim-against-a-business-in-a-foreign-court> accessed10 March 2021.
[109] ibid.
[110] European Parliament and Council Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJEU L. 199/40, Art. 4(3).
[111] Chukwuma Samuel Adesina Okoli and Emma Roberts, 'The Operation of Article 4 of Rome II Regulation in English and Irish Courts' (2019) 15 Journal of Private International Law 605, 605.
[112] Zerk (n 105) 111.
[113] ibid 112.

reasonable knowledge about the potential use of invested funds.[114] Finally, proximity between a corporate entity providing funds and the perpetrator of human rights violations is also key. The closer this relationship is, the greater the HRDD obligation, and the stronger a claim for financial complicity under existing standards.

5. Current Changes in the Law

Along with these conducts, there are prominent gaps existing in HRDD requirements relating to financial complicity. At the international level the largest gap is its non-binding nature, while regional and domestic frameworks are currently piecemeal and inconsistent. For instance, in France, law may provide an important but narrow avenue for litigation, while Germany offers few options for financial complicity claims, with significant procedural hurdles. There are, however, pending legislation at each level that may reduce these shortcomings.

5.1 Pending German Law

Domestically, the German Parliament is set to pass new legislation aimed at enforcing corporate HRDD throughout business supply chains extending into foreign jurisdictions. The German Cabinet passed the draft proposal on 3 March 2021, but the new Supply Chain Act has already garnered wide criticism.[115] A key drawback is its lack of capacity to create a civil cause of action for corporate complicity in human rights violations. It will contain sanctions such as fines for a company's failure to comply with enumerated obligations (i.e. establishing a complaints procedure or 'putting an end to all known human rights violations'),[116] but it has a limited scope. Furthermore, the use of fines has been criticised as many enterprises will simply absorb this as a cost. This is particularly relevant, considering the regulation only applies to larger institutions. The law also only mandates due diligence in a company's business area and that of their direct suppliers. Companies are only obligated to extend HRDD assessments farther down the supply chain if the company receives substantial knowledge of human rights violations. Professor John Ruggie indicates this only qualifies as remedial action under the UNGPs, and the NGO German Watch criticised the law as only affecting HRDD within Germany.[117] Furthermore, the law will not take effect until January 2023 and it will only

[114] Michalowski (n 6).
[115] Business and Human Rights Resource Centre, 'Germany: Cabinet Passes Mandatory Due Diligence Proposal; Parliament Now to Consider & Strengthen' (*Business & Human Rights Resource Centre* 3 March 2021) <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> accessed 21 March 2021.
[116] Federal Ministry of Labour and Social Affairs, 'Law on Corporate Due Diligence in Supply Chain' (*Federal Ministry of Labour and Social Affairs*) <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 22 April 2021.
[117] German Watch 'Opinion to the Federal Ministry of Labour and Social Affairs to the Draft Bill a Law on Corporate Due Diligence in Supply Chains' (*German Watch,*1 March 2021) <https://germanwatch.org/de/19955> accessed 29 March 2021; *see also* Business and Human Rights Resource Centre, 'John Ruggie Writes to German Ministers Welcoming Draft Due Diligence Law

apply incrementally, first to companies with 3,000 or more employees and extending to companies with 1,000 or more employees in January 2024.[118] It is unclear if it will extend to smaller companies in future. As of 22 April 2021, the Supply Chain Act was being debated in German Parliament.[119]

5.2 Pending Law at the International Level

At the international level, there is a proposed binding treaty on businesses and human rights law, referred to as the 'UN Legally Binding Instrument to Regulation in International Human Rights Law, the Activity of Transnational Corporations and Other Business Enterprises.' This proposal arose from the belief that 'the absence of a central mechanism'[120] to effectively implement the UNGPs is a main cause of ongoing human rights violations by businesses.[121] There is also concern that relying on states and domestic laws to enforce the UNGPs is unrealistic as 'states hosting powerful [businesses] often lack the capacity to act against them or do not take action over fear of losing foreign investment. Nor do [business] home states take action to avoid placing them at a competitive disadvantage.'[122] If a state does take action, '[businesses] can easily use the most favourable jurisdiction to fend off responsibility and to shift it instead to their subsidiaries and suppliers.'[123] The treaty then aims to address these problems.

To date, there have been three drafts of this treaty. The Second Revised Draft obligates states parties to take all legal and policy measures necessary to ensure businesses domiciled in their territory or jurisdiction respect human rights and take steps to prevent and mitigate any abuses 'throughout their operations.'[124] To this end, states must ensure compliance with enumerated due diligence obligations that apply to all impugned businesses.[125] These include regular

While Seeking Stronger UNGP-Alignment' (*Business and Human Rights,* 10 March 2021) <https://www.business-humanrights.org/en/latest-news/john-ruggie-writes-to-german-ministers-welcoming-draft-due-diligence-law-while-raising-need-to-ensure-ungp-alignment/> accessed 29 March 2021.

[118] 'Law on Corporate Due Diligence in Supply Chain' (n 116).

[119] Business and Human Rights Resource Centre, 'Supply Chain Act: Bundestag Debates Draft on April 22nd in First Reading' (*Business & Human Rights Resource Center* 19 April 2021) <https://www.business-humanrights.org/en/latest-news/lieferkettengesetz-bundestag-debattiert-entwurf-am-22-april-in-erster-lesung/>accessed 22 April 2021.

[120] Zamfir (n 13) 3.

[121] ibid 5.

[122] ibid.

[123] ibid 4.

[124] OEIGWG, 'Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (Second Revised Draft, August 2020 <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 10 April 2021, art 6(1).

[125] ibid art 3(1).

environmental and human rights impact assessments throughout their operations,[126] and meaningful consultations with potentially affected individuals and communities.[127] Consultations must include indigenous peoples when appropriate and undertaken in accordance with the 'standards of free, prior and informed consent.'[128] Businesses must also report publicly on non-financial matters, including information about group structures and suppliers,[129] and to integrate HRDD requirements into contracts within their business relationships.[130] Failure to comply is subject to sanctions.[131]

One of the key issues debated by drafters is jurisdictional scope, with some advocating for a broad jurisdiction to allow greater access to justice 'either in the country where the violation occurred or in the country where the parent company has its seat.'[132] If realised, this could address and clarify issues of parent company liability for extraterritorial human rights violations by capturing whole supply chains. At present, multinational corporations benefit the most from this governance gap.[133] This is already the reality for corporations domiciled in EU member states but expanding this reality may prove beneficial.

However, there are also criticisms of the treaty, with the vast and complex subject area containing 'the inherent risk…that negotiations would last many years, without leading to a conclusive outcome endorsed by all.'[134] Some critics also argue that the pursuit of a binding treaty risks undermining effective implementation of the UNGPs by redirecting public attention and resources by implicitly acknowledging its non-binding nature.[135] Other critics worry that states could use the treaty to obscure their incapacity to uphold human rights by blaming multinational corporations.[136] Furthermore, though it would obligate state parties to adopt relevant domestic legislation, states are allowed to formulate their own implementation strategies, and states must volunteer to be bound,[137] which is not necessarily a stronger provision than found within the UNGPs. Thus, the creation of a legally binding treaty may not have a substantial impact on existing standards and may instead undermine the UNGPs.

5.3 Pending Law at the Regional Level

[126] ibid 6(3)(a).
[127] ibid 6(3)(c).
[128] ibid 6(3)(d).
[129] ibid 6(3)(e).
[130] ibid 6(3)(f).
[131] ibid 6(6).
[132] Zamfir (n 13) 6.
[133] ibid 7.
[134] ibid 5.
[135] ibid.
[136] ibid.
[137] OEIGWG (n 124) arts 6(1) and 3(2).

In contrast, resulting from an upward trend of domestic measures and civil society advocacy,[138] the pending EU Due Diligence Law is more likely to have a significant impact, with the European Commission promising to table it by June 2021.[139] The law's overarching aim is to 'create legal certainty and increase environmental and human rights protection across European Supply Chains.'[140] It would apply to all EU companies and any non-EU company selling goods or providing services in the EU, and will require companies to implement HRDD processes.[141] These processes will obligate companies to identify and specify human rights risks, publicly disclose the information about the value chain,[142] and set up grievance mechanisms and complaint procedures.[143] It will also obligate member states to ensure that 'the governing body of the undertaking's business decisions has the necessary qualifications, knowledge and expertise as regards due diligence'[144] and that 'Member State competent authorities shall have the power to carry out investigations.'[145] Failure for businesses to comply with these regulations means that penalties can be given by Member States and shall ensure that 'a repeated infringement by an undertaking of the national provisions…constitutes a criminal offence, when committed intentionally or with serious negligence.'[146]

As well as encompassing a wide due diligence scope, the draft of the legislation is also promising in other ways. It explicitly addresses what is considered as causing adverse impacts, making direct reference to adverse impacts resulting from business relationships, including, importantly for a financial complicity case, the investee undertakings.[147] It is also important for the choice of law - one of the main hurdles for taking an effective case in Germany. Under the preamble, the draft states that 'victims of human rights abuses committed by EU undertakings should be allowed to choose the law of a legal system with high human rights standards, which would be that of the place where the defendant undertaking is domiciled.'[148] This would be important for closing a number of gaps that allows TNCs to continue exploiting States with weak governance. Furthermore, the implementation of a

[138] ibid.
[139] ibid.
[140] Benjamin Fox and Kira Taylor, 'EU Will Ensure Consistency Between Due Diligence Proposal and Non-Financial Reporting Directive Reform to Enhance Corporate Accountability' (*Business and Human Rights Resource Centre*, 25 March 2021) < www.business-humanrights.org/en/latest-news/eu-will-ensure-consistency-between-due-diligence-proposal-non-financial-reporting-reform/> accessed 10 April 2021.
[141] Committee on Legal Affairs Draft Report of 11 September 2020 with recommendations to the Commission on Corporate Due Diligence and Corporate Accountability [2020] 2129 INL art 4(4)(I) and (II).
[142] ibid.
[143] ibid annex para 33.
[144] ibid art 12(1).
[145] ibid art 15(1).
[146] ibid art 19(1)(2).
[147] ibid annex para 22.
[148] ibid Preamble para 15.

mandatory due diligence framework at Union level would be important for ensuring a level playing field for the responsibility for companies to respect human rights'[149] with national legislation under the UNGPs unlikely to be implemented voluntarily due to the desire for states to stay economically competitive. The draft also makes note of help given to small, medium-sized and micro undertakings to help support them in fulfilling their due diligence obligations, including financial support.[150] This then may be likely to close the gaps found in existing legislation that has very little impact on SMEs.

However, the draft still includes the formalisation of due diligence processes that take into account elements like the sector of activity, the size of the undertaking, the context of its operations, its business value, its position in value chains, and the nature of its products and services.[151] Thus, there are still likely to be limitations. Furthermore, most importantly, the legislation is a draft and thus not everything will necessarily be included. Presently, however, the existence of an EU Due Diligence Law looks promising for increasing the viability of a claim for financial complicity in human rights violations.

While there is notably an increasing turn to the issue of business and human rights more generally and including the issue of financial complicity, pending legislation does not at present look to make a significant difference to the possibility of making a civil claim for financial complicity in human rights violations. This is particularly true for the pending German legislation. However, the EU draft seems to have some promising qualities that may help to resolve the gaps within the possibility of taking a German case, though this is of course not finalised and so it is impossible to know the scope of the impact it will have. Thus, even with the pending legislation it seems the conducts most likely to make a case for financial complicity viable relies on companies or institutions being of a significant size, in a sector which increases their foreseeability, such as in a place of conflict or banking, and with close proximity to the actual damage. These instances all strengthen the evidence of the knowledge requirement needed in Ruggie's model test to establish the duty of care needed to make a claim and is also likely to lead to the necessary substantial contribution element, as well. From the consideration of both the existing legislation and the likely impacts of the pending legislation, the viability of taking such a case in Germany seems, though possible, a difficult avenue, and the consideration of such litigation strategy may be better placed elsewhere, such as in France, whose laws are more hospitable to these types of claims.

[149] ibid Annex para 8.
[150] ibid art 17(1) and (2).
[151] ibid Preamble para 5.

6. Conclusion

This report aimed to contribute to the ongoing litigation strategy of Minority Rights Group International, to realise prospective litigation goals and avoid human rights abuses and violations in the Global South by stopping projects that might contribute to such harms from coming to fruition at the funding stages. To do this, the report has attempted to establish potential elements and challenges to a viable claim in tort of financial complicity. Existing legal frameworks, both binding and non-binding instruments, have been examined at the international, regional, and domestic levels to this end. A review of jurisprudence and scholarly analysis of trends on corporate complicity have also been conducted.

The analysis in this report shows that existing and pending due diligence mechanisms will be key for realising such prospective litigation due to a culture of hesitancy in ascribing liability for financial complicity. Thorough due diligence requirements will provide stronger grounds for establishing a duty of care and negligence claims, but these will ultimately be on a case-by-case basis owing to the fluid nature of financial resources as contributions.

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UN Guiding Principles on Business and Human Rights (UNGPs)

UN Global Compact

Regional

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iii Table of Abbreviations

CSR – Corporate Social Responsibility

EPFI – Equator Principle Financial Institution

ICJ – International Commission of Jurists

ILO – International Labour Organisation

MNEs – Multinational Enterprises

NAP – National Action Plan

NGO – Non-Governmental Organisation

Norwegian Council – Norwegian Council on Ethics for the Government Pension Fund on Global Expectations for Companies on Human Rights

OECD – Organisation for Economic Co-Operation and Development

Regulation on Conflict Minerals – EU Regulation 2017/821 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores and Gold Originating from Conflict Affected and High-Risk Areas

SMEs – Small and Medium-Sized Enterprises

TNCs – Transnational Corporations

UNGPs – UN Guiding Principles on Business and Human Rights

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Appendices

Law

International Laws and Standards

UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework

Foundational Principle 11

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Foundational Principle 13(b)

The responsibility to respect human rights requires that business enterprises:

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Foundational Principle 15

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Operational Principle 17

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve

Operational Principle 21

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Foundational Principle 29

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

The Equator Principles

Principle 1

Review and Categorisation When a Project is proposed for financing, the EPFI will, as part of its internal environmental and social review and due diligence, categorise the Project based on the magnitude of potential environmental and social risks and impacts, including those related to Human Rights, climate change, and biodiversity. Such categorisation is based on the International Finance Corporation's (IFC) environmental and social categorisation process.

The categories are:

Category A – Projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented;

Category B – Projects with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures2 ;

and Category C – Projects with minimal or no adverse environmental and social risks and/or impacts.

The EPFI's environmental and social due diligence is commensurate with the nature, scale and stage of the Project, and with the categorised level of environmental and social risks and impacts

Principle 6

Grievance Mechanism

For all Category A and, as appropriate, Category B Projects, the EPFI will require the client, as part of the ESMS, to establish effective grievance mechanisms which are designed for use by Affected Communities and Workers, as appropriate, to receive and facilitate resolution of concerns and grievances about the Project's environmental and social performance. Grievance mechanisms are required to be scaled to the risks and impacts of the Project, and will seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate, readily accessible, at no cost, and without retribution to the party that originated the issue or concern. Grievance mechanisms should not impede access to judicial or administrative remedies. The client will inform Affected Communities and Workers about the grievance mechanisms in the course of the Stakeholder Engagement process.

Principle 10

Reporting and Transparency Client Reporting Requirements The following client reporting requirements are in addition to the disclosure requirements in Principle 5. For all Category A and, as appropriate, Category B Projects

The client will ensure that, at a minimum, a summary of the ESIA is accessible and available online and that it includes a summary of Human Rights and climate change risks and impacts when relevant 11 .

The client will report publicly, on an annual basis, GHG emission levels (combined Scope 1 and Scope 2 Emissions, and, if appropriate, the GHG efficiency ratio12) during the operational phase for Projects emitting over 100,000 tonnes of CO2 equivalent annually. Refer to Annex A for detailed requirements on GHG emissions reporting.

The EPFI will encourage the client to share commercially non-sensitive Project-specific biodiversity data with the Global Biodiversity Information Facility13 (GBIF) and relevant national and global data repositories, using formats and conditions to enable such data to be accessed and re-used in future decisions and research applications.

EPFI Reporting Requirements: The EPFI will, at least annually, report publicly on transactions that have reached Financial Close and on its Equator Principles implementation processes and experience. The EPFI will report according to the minimum reporting requirements detailed in Annex B, taking into account appropriate confidentiality considerations.

The Ten Principles of the UN Global Compact

Principle 2

Make sure that they are not complicit in human rights abuses

LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (OEIGWG CHAIRMANSHIP SECOND REVISED DRAFT 06.08.2020)

Article 3. Scope

1. Unless stated otherwise, this (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character.
2. Notwithstanding Art 3.1 above, when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), State Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context and the severity of impacts on human rights.
3. This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.

Article 6. Prevention

1. State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.

2. For the purpose of Article 6.1, State Parties shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows:

a. Identify and assess any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships;

b. Take appropriate measures to prevent and mitigate effectively the identified actual or potential human rights abuses, including in their business relationships;

c. Monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships; d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships.

3. State Parties shall ensure that human rights due diligence measures undertaken by business enterprises under Article 6.2 shall include:

a. Undertaking regular environmental and human rights impact assessments throughout their operations;

b. Integrating a gender perspective, in consultation with potentially impacted women and women´s organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls;

c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent;

e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards throughout their operations, including in their business relationships;

f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate;

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation.

4. States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by small and medium sized business enterprises conducting business activities.

5. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential human rights abuses resulting from the business enterprises´ size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory or jurisdiction, or otherwise under their control, including those of transnational character.

6. Failure to comply with the duties laid down under Articles 6.2 and 6.3 shall result in commensurate sanctions, including corrective action where applicable, without prejudice to the provisions on criminal, civil and administrative liability under Article 8.

7. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character.

Article 8. Legal Liability

1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate

system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.

2. Liability of legal persons shall be without prejudice to the liability of natural persons.

3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.

4. States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal and/or administrative sanctions where legal or natural persons conducting business activities, have caused or contributed to criminal offences or other regulatory breaches that amount or lead to human rights abuses.

5. States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, and gender responsive reparations to the victims of human rights abuses in the context of business activities, including those of a transnational character, in line with applicable international standards for reparations to the victims of human rights violations. Where a legal or natural person conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

Article 9. Adjudicative Jurisdiction

1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

a. the human rights abuse occurred;

b. an act or omission contributing to the human rights abuse occurred; or

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including

those of a transnational character, are domiciled. The above provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or national law.

2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:

a. place of incorporation; or

b. statutory seat; or

c. central administration; or

d. principal place of business; or

3. Where victims choose to bring a claim in a court as per Article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*.

4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.

5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing

Regional European Laws and Standards

Committee on Legal Affairs Draft Report of 11 September 2020 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability [2020] 2129 INL

Preamble, Para 5.

Considers that small, medium-sized and micro-enterprises may need less extensive and formalised due diligence processes, and that a proportional approach could take into account, amongst other elements, the sector of activity, the size of the undertaking, the context of its operations, its business model, its position in value chains and the nature of its products and services;

Preamble, Para 15.

Stresses that victims of business-related adverse impacts are often not sufficiently protected by the law of the country where the harm has been caused; considers, in this regard, that

victims of human rights abuses committed by EU undertakings should be allowed to choose the law of a legal system with high human rights standards, which could be that of the place where the defendant undertaking is domiciled;

Art 4

Due diligence strategy

1. Member States shall lay down rules to ensure that undertakings carry out due diligence with respect to human rights, environmental and governance risks in their operations and business relationships.

2. Undertakings shall in an ongoing manner identify and assess by means of an appropriate monitoring methodology whether their operations and business relationships cause or contribute to any human rights, environmental or governance risks.

Art 12.1

Expertise on due diligence

1. Member States shall ensure that the governing body of the undertaking has the necessary qualifications, knowledge and expertise as regards due diligence

Art 15.1

Investigations on undertakings

1. Member State competent authorities shall have the power to carry out investigations to ensure that undertakings comply with the obligations set out in this Directive. Competent authorities shall be authorised to carry out checks on undertakings and interviews with affected or potentially affected stakeholders or their representatives

Art 17

Specific measures in support of small, medium-sized and micro enterprises

1. Member States shall ensure that a specific portal for small, medium-sized and micro undertakings is available where they may seek guidance and obtain further support and information about how best fulfil their due diligence obligations.

2. Small, medium-sized and micro undertakings shall be eligible for financial support to perform their due diligence obligations under the Union's programmes to support small, medium sized and micro enterprises.

Art 19

Penalties

1. Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that a repeated infringement by an undertaking of the national provisions adopted in accordance with this Directive constitutes a criminal offence, when committed intentionally or with serious negligence. Member States shall take the necessary measures to ensure that these offences are punishable by effective, proportionate and dissuasive criminal penalties.

Annex Para 8

In order to ensure a level playing field the responsibility for companies to respect human rights under international standards should be transformed into a legal duty at Union level. By coordinating safeguards for the protection of human rights, the environment and good governance, this Directive will ensure that all undertakings operating in the internal market are subject to harmonised minimum due diligence obligations, which will improve the functioning of that market

Annex Para 22

Adverse impacts or violations of human rights and social and environmental standards by undertakings can be the result of their own activities or of those of their business relationships, in particular suppliers, sub-contractors and investee undertakings. In order to be effective, undertakings' due diligence should encompass the entire value chain.

Annex Para 33

In order to be effective, a due diligence framework should include grievance mechanisms at company or sector level and in order to ensure that such mechanisms are effective the participation of stakeholders should be ensured. Those mechanisms should allow stakeholders to raise concerns and should function as early-warning risk awareness systems. Grievance mechanisms should be entitled to make suggestions as to how risks should be addressed by the undertaking. They should also be entitled to propose an appropriate remedy when it is brought to their attention that the undertaking has caused or contributed to harm.

EU Regulation 2017/821 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum, and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas

Article 5

Risk management obligations 1. Union importers of minerals shall:

(a) identify and assess the risks of adverse impacts in their mineral supply chain on the basis of the information provided pursuant to Article 4 against the standards of their supply chain policy, consistent with Annex II to, and the due diligence recommendations set out in, the OECD Due Diligence Guidance;

(b) implement a strategy to respond to the identified risks designed so as to prevent or mitigate adverse impacts by:

(i) reporting findings of the supply chain risk assessment to senior management designated for that purpose, in cases where the Union importer is not a natural person;

(ii) adopting risk management measures consistent with Annex II to, and the due diligence recommendations set out in, the OECD Due Diligence Guidance, considering their ability to influence, and where necessary take steps to exert pressure on suppliers who can most effectively prevent or mitigate the identified risk, by making it possible either to: — continue trade while simultaneously implementing measurable risk mitigation efforts, — suspend trade temporarily while pursuing ongoing measurable risk mitigation efforts, or — disengage with a supplier after failed attempts at risk mitigation;

(iii) implementing the risk management plan; monitoring and tracking performance of risk mitigation efforts; reporting back to senior management designated for this purpose, in cases where the Union importer is not a natural person; and considering suspending or discontinuing engagement with a supplier after failed attempts at mitigation;

(iv) undertaking additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.

2. If a Union importer of minerals pursues risk mitigation efforts while continuing trade or temporarily suspending trade, it shall consult with suppliers and with the stakeholders concerned, including local and central government authorities, international or civil society organisations and affected third parties, and agree on a strategy for measurable risk mitigation in the risk management plan.

3. Union importers of minerals shall, in order to design conflict and high-risk sensitive strategies for mitigation in the risk management plan, rely on the measures and indicators referred to in Annex III to the OECD Due Diligence Guidance and measure progressive improvement.

4. Union importers of metals shall identify and assess, in accordance with Annex II to the OECD Due Diligence Guidance and the specific recommendations set out in that Guidance, the risks in their supply chain based on available third-party audit reports concerning the smelters and refiners in that chain, and, by assessing, as appropriate, the due diligence practices of those smelters and refiners. Those audit reports shall be in accordance with Article 6(1) of this Regulation. In the absence of such third-party audit reports from the smelters and refiners in their supply chain, Union importers of metals shall identify and assess the risks in their supply chain as part of their own risk management system. In such cases, Union importers of metals shall carry out audits of their own supply chain due diligence via an independent third-party in accordance with Article 6 of this Regulation.

5. In cases where they are not natural persons, Union importers of metals shall report the findings of the risk assessment referred to in paragraph 4 to their senior management designated for this purpose and they shall implement a response strategy designed to prevent or mitigate adverse impacts, consistent with Annex II to the OECD Due Diligence Guidance and with the specific recommendations set out in that Guidance

Article 6

Third-party audit obligations

1. Union importers of minerals or metals shall carry out audits via an independent third party (‘third-party audit’). That third-party audit shall:

(a) include in its scope all of the Union importer's activities, processes and systems used to implement supply chain due diligence regarding minerals or metals, including the Union importer's management system, risk management, and disclosure of information in accordance with Articles 4, 5 and 7 respectively;

(b) have as its objective the determination of conformity of the Union importer's supply chain due diligence practices with Articles 4, 5 and 7;

(c) make recommendations to the Union importer on how to improve its supply chain due diligence practices; and

(d) respect the audit principles of independence, competence and accountability, as set out in the OECD Due Diligence Guidance.

2. Union importers of metals shall be exempted from the obligation to carry out third-party audits pursuant to paragraph 1 provided they make available substantive evidence, including third-party audit reports, demonstrating that all smelters and refiners in their supply chain comply with this Regulation. The requirement of substantive evidence shall be deemed to be fulfilled where Union importers of metals demonstrate that they are sourcing exclusively from smelters and refiners listed by the Commission pursuant to Article 9

Article 7

Disclosure obligations

1. Union importers of minerals or metals shall make available to Member State competent authorities the reports of any third-party audit carried out in accordance with Article 6 or evidence of conformity with a supply chain due diligence scheme recognised by the Commission pursuant to Article 8.

2. Union importers of minerals or metals shall make available to their immediate downstream purchasers all information gained and maintained pursuant to their supply chain due diligence with due regard for business confidentiality and other competitive concerns.

3. Union importers of minerals or metals shall, on an annual basis, publicly report as widely as possible, including on the internet, on their supply chain due diligence policies and practices for responsible sourcing. That report shall contain the steps taken by them to implement the obligations as regards their management system under Article 4, and their risk management under Article 5, as well as a summary report of the third-party audits, including the name of the auditor, with due regard for business confidentiality and other competitive concerns.

4. Where a Union importer can reasonably conclude that metals are derived only from recycled or scrap sources, it shall, with due regard for business confidentiality and other competitive concerns: (a) publicly disclose its conclusion; and (b) describe in reasonable detail the supply chain due diligence measures it exercised in reaching that conclusion

Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

Paragraph 6

In order to enhance the consistency and comparability of non-financial information disclosed throughout the Union, certain large undertakings should prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters and should

be included in the management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. It should be possible for Member States to exempt undertakings which are subject to this Directive from the obligation to prepare a non-financial statement when a separate report corresponding to the same financial year and covering the same content is provided.

Paragraph 8

The undertakings which are subject to this Directive should provide adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised. The severity of such impacts should be judged by their scale and gravity. The risks of adverse impact may stem from the undertaking's own activities or may be linked to its operations, and, where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains. This should not lead to undue additional administrative burdens for small and medium-sized undertakings

Paragraph 14

The scope of those non-financial disclosure requirements should be defined by reference to the average number of employees, balance sheet total and net turnover. SMEs should be exempted from additional requirements, and the obligation to disclose a non-financial statement should apply only to those large undertakings which are public-interest entities and to those public-interest entities which are parent undertakings of a large group, in each case having an average number of employees in excess of 500, in the case of a group on a consolidated basis. This should not prevent Member States from requiring disclosure of non-financial information from undertakings and groups other than undertakings which are subject to this Directive.

European Parliament and Council Regulation 864/2007 on the law applicable to non-contractual obligations

Article 4

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Domestic Laws and Standards

Law on the Corporate Duty of Vigilance **Loi no 2017-399 du 27 Mars 2017**

Article 1

"Art. L. 225-102-4. – I. – Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan."

"The controlled subsidiaries or companies that exceed the thresholds mentioned in the first paragraph are deemed to satisfy the obligations laid down in this Article from the moment that the company which controls them, within the meaning of Article L. 233- 3, establishes and implements a vigilance plan for the company's operations, as well as the operations of all the subsidiaries or companies that it controls.

"The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls within the meaning of Article L.233-16, II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.

"The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures:

"1° A mapping that identifies, analyses and ranks risks;

"2° Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;

"3° Appropriate action to mitigate risks or prevent serious violations;

"4° An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;

“5°(new) A monitoring scheme to follow up on the measures implemented and assess their efficiency.

“The vigilance plan and its effective implementation report shall be publicly disclosed and included in the report mentioned in Article L. 225-102.

“A Council of State decree can add to the vigilance measures laid down in 1° to 5° of this Article. It can specify the modalities for elaborating and implementing the vigilance plan, within multiparty initiatives that exist in the subsidiaries or at territorial level where appropriate.

“II. – When a company does not meet its obligations in a three months period after receiving formal notice to comply with the duties laid down in I, the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties.

“An application may be made to the president of the court, ruling in interlocutory proceedings, for the same purpose. Article 2 After the same Article L. 225-102-3, an Article L. 225-102-5 shall be inserted reading as follows:

“Art. 225-102-5. – According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid.

“The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so.

“The court may order the publication, distribution or display of its decision or an extract thereof, in accordance with its procedures. The costs shall be paid by the person convicted.

“The court may order its decision to be carried out under financial compulsion.”

***Civil Code* in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para 5 of the *Act* of 1 October 2013 (Federal Law Gazette I page 3719)**

Section 823

Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

***Code of Civil* Procedure as promulgated on 5 December 2005 *(*Bundesgesetzblatt (BGBl, Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781*)*, last amended by Article 1 of the *Act* dated 10 October 2013 (Federal Law Gazette I page 3786)**

Section 17

General venue of legal persons

(1) The general venue of the municipalities, corporate bodies, and of those companies, co-operatives or other associations as well as of those foundations, institutions, and available assets that may be sued as such is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre.

(2) Mining companies have their general venue with the court having jurisdiction over the location of the mine; public authorities – provided they can be sued as such – have their general venue with the court of their official seat.

(3) It is admissible to determine a venue, in derogation from what is determined by the stipulations of the present subsection, by statute or by other special provision

Article 32

Specific jurisdiction for tort

For complaints arising from tort, the court in the jurisdiction of which the tortious act was committed shall have jurisdiction

Jurisprudence

***Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 (CanLII)**

[63] Mr. Lipsett stated that throughout the assessment, he experienced cooperation from senior management at Nevsun, BMSC, and ENAMCO, as well as from various Eritrean government officials and judges in the Eritrean labour tribunals. At the same time, he was of the view that he was at liberty to plan his site visits and conduct private and confidential interviews without interference.

[64] As part of his assessment he stated:

I have extensively relied upon the UN's Guiding Principles on Business and Human Rights for framing the assessment. Obviously, these UN guiding principles are the relevant global standard for business and human rights; however, I find them particularly useful because they emphasize a procedural approach to ongoing human rights due diligence.

[65] His conclusions included:

(a) there were some differences between external reports and what he was able to observe on the ground. He expected a more militarized and overtly repressive environment than he witnessed in Asmara and at the mine site;

(b) he acknowledged that his investigation did not delve into some of the complex civil and political rights issues that are reported about Eritrea. But his" first and second impressions of the country, and particularly the mine site, do not concord with the characterization of Eritrea as the North Korea of Africa";

(c) an overarching theme of his conversations with all Eritrean stakeholders was that the Bisha Mine is serving as an important precedent for mining in Eritrea. Even in casual conversations on the streets of Asmara, people are aware of and interested in Bisha's activities;

(d) there were clearly sensitivities on the part of the Eritrean government about framing the assessment in terms of international human rights standards that it believes had been politicized. Without detracting from the importance of those standards, it was often much more productive and constructive to have conversations about underlying principles, such as respect, equality, freedom, and fairness. Moreover, in his report he tried to link these international standards to national legislation and the policies in place at the Bisha Mine in order to provide reference points for local actors;

(e) he believed that Nevsun's approach to transparency about the assessment and its engagement with stakeholders about the report's recommendations and a follow up action plan should be commended.

Boim v. Holy Land Foundation for Relief & Development, 549 F.3d 685, 687-91 (7th Cir. 2008)

POSNER, Circuit Judge.

In 1996 David Boim, a Jewish teenager who was both an Israeli citizen and an American citizen, living in Israel, was shot to death by two men at a bus stop near Jerusalem. His parents filed this suit four years later, alleging that his killers had been Hamas gunmen and naming as defendants Muhammad Salah plus three organizations: the Holy Land Foundation for Relief and Development, the American Muslim Society, and the Quranic Literacy Institute. (A fourth, the Islamic Association of Palestine-National, appears to be either an alter ego of the American Muslim Society or just an alternative name for it, and need not be discussed separately. There are other defendants as well but they are not involved in the appeals.) The complaint accused the defendants of having provided financial support to Hamas before David Boim's death and by doing so of having violated 18 U.S.C. § 2333(a), which provides that "any national of the

United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."

The district court denied the defendants' motion to dismiss the complaint for failure to state a claim, 127 F.Supp.2d 1002 (N.D.Ill. 2001); the defendants had argued that providing financial assistance to a terrorist group is not an act of international terrorism and therefore is not within the scope of section 2333. We authorized an interlocutory appeal, 28 U.S.C. § 1292(b), and the panel that heard the appeal affirmed the district court. Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002). The case then resumed in that court. The court granted summary judgment in favor of the plaintiffs with respect to the liability of the three defendants other than the Quranic Literacy Institute. 340 F.Supp.2d 885 (N.D.Ill. 2004). A jury was convened and, after a trial lasting a week, found the Institute — which having filed a statement of "nonparticipation" attended but did not participate in the trial — liable. The jury then assessed damages of $52 million against all the defendants (including the ones not before us) jointly and severally. The amount was then trebled and attorneys' fees added.

These defendants again appealed, this time from a final judgment. The panel vacated the judgment and directed the district court to redetermine liability. 511 F.3d 707 (7th Cir. 2007). Judge Evans agreed with the reversal as to the Holy Land Foundation but otherwise dissented.

The plaintiffs petitioned for rehearing en banc, and the full court granted the petition, primarily to consider the elements of a suit under 18 U.S.C. § 2333 against financial supporters of terrorism. The parties have filed supplemental briefs. A number of amici curiae have weighed in as well, including the Department of Justice, which has taken the side of the plaintiffs.

The first panel opinion rejected the argument that the statute does not impose liability on donors to groups that sponsor or engage in terrorism. The supplemental briefs do not revisit the issue, and at oral argument counsel for Salah and the Holy Land Foundation disclaimed reliance on their former position concerning the liability of donors. But in a letter to the court after oral argument, Salah's counsel indicated that the disclaimer had been based solely on a belief that the doctrine of law of the case foreclosed any further consideration of the statutory issue in this court. That was a mistake. The full court can revisit any ruling by a panel. All arguments that the defendants have presented in their appeals are open today — and will be open in the Supreme Court. It is better to decide the question than to leave it hanging; why bother to address the elements of a legal claim that may not exist? Before deciding what a plaintiff must prove in order to recover from a donor under section 2333, we should decide

whether the statute applies. United States National Bank of Oregon v. Insurance Agents of America, Inc., 508 U.S. 439, 445-48, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

Section 2333 does not say that someone who assists in an act of international terrorism is liable; that is, it does not mention "secondary" liability, the kind that 18 U.S.C. § 2 creates by imposing criminal liability on "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." See also 18 U.S.C. § 3 (accessory after the fact). The Supreme Court in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), held that section 10(b) of the Securities and Exchange Act of 1934, which prohibits securities fraud, does not reach aiding and abetting because it makes no reference to secondary liability, the kind of liability that statutes such as 18 U.S.C. §§ 2 and 3 create in criminal cases. The Court discussed the securities laws at length, but nothing in its holding turns on particular features of those laws.

So statutory silence on the subject of secondary liability means there is none; and section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors. Nevertheless the first panel opinion concluded that section 2333 does create secondary liability. It distinguished Central Bank of Denver as having involved an implied private right of action (for it was a private suit, yet section 10(b) does not purport to authorize such suits), while section 2333(a) expressly creates a private right. But as the dissenting Justices in Central Bank of Denver had pointed out, the majority's holding was not limited to private actions. 511 U.S. at 200, 114 S.Ct. 1439. It encompassed suits by the SEC, which section 10(b) authorizes expressly.

Congress agreed with this understanding of Central Bank of Denver, for the next year it enacted 15 U.S.C. § 78t(e) to allow the SEC in section 10(b) suits to obtain relief against aiders, abettors, and others who facilitate primary violations. Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., ___ U.S. ___, 128 S.Ct. 761, 771-72, 169 L.Ed.2d 627 (2008). The enactment of section 78t(e) would have been pointless had Central Bank of Denver allowed secondary liability to be imposed in suits, such as suits by the SEC under section 10(b), that the statute expressly authorizes. Years later, reaffirming Central Bank of Denver, the Supreme Court repeated that the earlier decision had not been limited to private suits under section 10(b). Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., supra, 128 S.Ct. at 768-69.

The first panel opinion relied on Harris Trust Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000), an ERISA case involving an

application of trust law. Trust law permits trust beneficiaries to maintain actions against third parties who have received trust assets improperly. ERISA not only does not upset this principle of trust law; it authorizes the Secretary of Labor to penalize third parties who "knowing[ly] participat[e]" in a fiduciary's misconduct. 29 U.S.C. §§ 1106(a), 1132(l (1)(B). Harris Trust did not cite Central Bank of Denver and did not purport to limit its holding. Stoneridge, decided eight years after Harris Trust, also did not treat Harris Trust as circumscribing Central Bank of Denver — it did not even cite Harris Trust.

To read secondary liability into section 2333(a), moreover, would enlarge the federal courts' extraterritorial jurisdiction. The defendants are accused of promoting terrorist activities abroad. Congress has the power to impose liability for acts that occur abroad but have effects within the United States, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004), but it must make the extraterritorial scope of a statute clear. Small v. United States, 544 U.S. 385, 388-89, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

The first panel opinion discussed approvingly an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333. The ground involves a chain of explicit statutory incorporations by reference. The first link in the chain is the statutory definition of "international terrorism" as "activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States," that "appear to be intended . . . to intimidate or coerce a civilian population" or "affect the conduct of a government by . . . assassination," and that "transcend national boundaries in terms of the means by which they are accomplished" or "the persons they appear intended to intimidate or coerce." 18 U.S.C. § 2331(1). Section 2331 was enacted as part of the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 1003(a)(3), 106 Stat. 4506, 4521. Section 2333 (having been originally enacted in 1990 and repealed for a technical reason the next year) was reenacted in 1992 as part of that same Federal Courts Administration Act. So the two sections are part of the same statutory scheme and are to be read together. Nicholas J. Perry, "The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails," 30 J. Legis. 249, 257 (2004).

Section 2331(1)'s definition of international terrorism (amended in 2001 by the PATRIOT Act, Pub.L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376, but in respects irrelevant to this case) includes not only violent acts but also "acts dangerous to human life that are a violation of the criminal laws of the United States." Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an "act dangerous to human life." And it violates a federal criminal statute enacted in 1994 and thus before the murder of David Boim — 18 U.S.C. §

2339A(a), which provides that "whoever provides material support or resources . . ., knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing (whether classified as homicide, voluntary manslaughter, or involuntary manslaughter), conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.

By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333. Which makes good sense as a counterterrorism measure. Damages are a less effective remedy against terrorists and their organizations than against their financial angels. Terrorist organizations have been sued under section 2333, e.g., Ungar v. Palestine Liberation Organization, 402 F.3d 274 (1st Cir. 2005); Biton v. Palestinian Interim Self-Government Authority, 252 F.R.D. 1 (D.D.C. 2008); Knox v. Palestine Liberation Organization, 248 F.R.D. 420 (S.D.N.Y. 2008), but to collect a damages judgment against such an organization, let alone a judgment against the terrorists themselves (if they can even be identified and thus sued), is, as the first panel opinion pointed out, 291 F.3d at 1021, well-nigh impossible. These are foreign organizations and individuals, operating abroad and often covertly, and they are often impecunious as well. So difficult is it to obtain monetary relief against covert foreign organizations like these that Congress has taken to passing legislation authorizing the payment of judgments against them from U.S. Treasury funds. E.g., Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106-386, § 2002, 114 Stat. 1464. But that can have no deterrent or incapacitative effect, whereas suits against financiers of terrorism can cut the terrorists' lifeline.

And whether it makes good sense or not, the imposition of civil liability through the chain of incorporations is compelled by the statutory texts — as the panel determined in its first opinion. 291 F.3d at 1012-16. But in addition the panel placed a common law aiding and abetting gloss on section 2333. The panel was worried about a timing problem: section 2339A was not passed until 1994, and the defendants' contributions to Hamas began earlier. But that is not a serious problem on the view we take of the standard for proving causation under section 2333; we shall see that the fact of contributing to a terrorist organization rather than the amount of the contribution is the keystone of liability.

***Caparo Industries plc v Dickman* [1990] UKHL 2**

BINGHAM LJ—The many decided cases on this subject, if providing no simple ready-made solution to the question whether or not a duty of care exists, do indicate the requirements to be satisfied before a duty is found.

The first is foreseeability. It is not, and could not be, in issue between these parties that reasonable foreseeability of harm is a necessary ingredient of a relationship in which a duty of care will arise: *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] A.C. 175, 192A. It is also common ground that reasonable foreseeability, although a necessary, is not a sufficient condition of the existence of a duty. This, as Lord Keith of Kinkel observed in *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53, 60B, has been said almost too frequently to require repetition.

The second requirement is more elusive. It is usually described as proximity, which means not simple physical proximity but extends to "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act:" *Donoghue v Stevenson* [1932] A.C. 562, 581, per Lord Atkin. Sometimes the alternative expression "neighbourhood" is used, as by Lord Reid in the *Hedley Byrne case* [1964] A.C. 465 , 483 and Lord Wilberforce in *Anns v Merton London Borough Council* [1978] A.C. 728 , 751H, with more conscious reference to Lord Atkin's speech in the earlier case. Sometimes, as in the *Hedley Byrne* case, attention is concentrated on the existence of a special relationship. Sometimes it is regarded as significant that the parties' relationship is "equivalent to contract" (see the *Hedley Byrne case*, at p. 529, per Lord Devlin), or falls "only just short of a direct contractual relationship" *(Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, 533B, per Lord Fraser of Tullybelton), or is "as close as it could be short of actual privity of contract:" see p. 546C, per Lord Roskill. In some cases, and increasingly, reference is made to the voluntary assumption of responsibility: Muirhead v Industrial Tank Specialities Ltd [1986] Q.B. 507, 528A, per Robert Goff L.J.; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] A.C. 175, 192F, 196G; *Simaan General Contracting v Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758, 781F, 784G; *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd.* [1989] Q.B. 71, 99, 106, 108. Both the analogy with contract and the assumption of responsibility have been relied upon as a test of proximity in foreign courts as well as our own: see, for example, *Glanzer v Shepard* (1922) 135 NE 275, 276; *Ultramares Corporation v Touche* (1931) 174 N.E. 441, 446; State Street Trust Co v Ernst (1938) 15 N.E. 2d 416, 418; *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553, 567. It may very well be that in tortious claims based on negligent misstatement these notions are particularly apposite. The content of the requirement of proximity, whatever language is used, is not, I think, capable of precise definition. The approach will vary according to the particular facts of the case, as is reflected in the varied language used. But the focus of the inquiry is on the closeness and directness of the relationship between the parties. In determining this, foreseeability must, I think, play an important part: the more obvious it is that A's act or omission will cause harm to B, the less likely a court will be to hold that the

relationship of A and B is insufficiently proximate to give rise to a duty of care. The third requirement to be met before a duty of care will be held to be owed by A to B is that the court should find it just and reasonable to impose such a duty: *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210, 241, per Lord Keith of Kinkel. This requirement, I think, covers very much the same ground as Lord Wilberforce's second stage test in *Anns v Merton London Borough Council* [1978] A.C. 728, 752A, and what in cases such as *Spartan Steel & Alloys Ltd v Martin & Co. (Contractors) Ltd* [1973] Q.B. 27 and *McLoughlin v O'Brian* [1983] 1 A.C. 410 was called policy. It was considerations of this kind which Lord Fraser of Tullybelton had in mind when he said that "some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence:" *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 25A. The requirement cannot, perhaps, be better put than it was by Weintraub C.J. in *Goldberg v Housing Authority of the City of Newark* (1962) 186 A. 2d 291, 293: "Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." If the imposition of a duty on a defendant would be for any reason oppressive, or would expose him, in Cardozo C.J.'s famous phrase in *Ultramares Corporation v Touche*, 174 N.E. 441, 444, "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class," that will weigh heavily, probably conclusively, against the imposition of a duty (if it has not already shown a fatal lack of proximity). On the other hand, a duty will be the more readily found if the defendant is voluntarily exercising a professional skill for reward, if the victim of his carelessness has (in the absence of a duty) no means of redress, if the duty contended for, as in *McLoughlin v O'Brian* [1983] 1 A.C. 410, arises naturally from a duty which already.

***Choc v Hudbay Minerals Inc.,* 2013 ONSC 1414 (CanLII)**

<u>The Submissions of Amnesty International Canada</u>

[32] Pursuant to my Order of February 14, 2013, Amnesty made submissions with respect to international norms, authorities and standards which, it argued, support the view that a duty of care may exist in circumstances where a parent company’s subsidiary is alleged to be involved in gross human rights abuses. Amnesty submits that transnational corporations can owe a duty of care to those who may be harmed by the activities of subsidiaries, particularly where the business is operating in conflict-affected or high-risk areas, such as Guatemala. Amnesty also argued that the transnational character of the dispute should not exempt the defendants from the application of established principles of tort law.

[33] The human rights implications of transnational corporate activity have received the attention of numerous international and intergovernmental organizations over the past few decades and have resulted in a range of voluntary codes of conduct developed in conjunction with multinational corporations. Such codes of conduct include the *Voluntary Principles on Security and Human Rights*, which were established in 2000 and elaborate norms for corporate conduct in the extractive industry when engaging public and private security forces to protect business interests in areas with a potential for violence or conflict. The *Voluntary Principles* call for a risk assessment of the human rights impacts of security forces and require corporations to screen and train security personnel and establish clear parameters for their use of force. Hudbay stated that this code guided their corporate conduct.

[34] As well, Amnesty referred to the OECD *Guidelines for Multinational Enterprises*, the *United Nations Global Compact,* the United Nations' *Protect, Respect and Remedy: Framework for Business and Human Rights*, the *United Nations Guiding Principles on Business and Human Rights*, and the International Standards Organization's involvement in corporate responsibility. These documents have emphasized the heightened risk of becoming complicit in human rights violations in certain environments, such as conflict-affected areas.

[35] Amnesty submits that the existence of these international norms and standards of conduct demonstrate the recognition by corporations in the extractive industries of the risks of security forces, both public and private, violating human rights and otherwise causing injury to members of local communities in high risk areas.

[36] Amnesty submits that the Canadian government has endorsed the main relevant standards, including the *UN Guiding Principles on Business and Human Rights*, the *OECD Guidelines for Multinational Enterprises* and the *Voluntary Principles on Security and Human Rights*. As such, Canadian courts should have no difficulty in recognizing these principles and drawing upon international norms and standards of conduct in considering whether a Canadian corporation owes a duty of care in the circumstances of this case.

[37] Amnesty further argues, as do the plaintiffs, that the concept of direct parent liability is not new to tort law, and Canadian courts have recognized that a parent company may be directly liable for its own negligent conduct with respect to managing or failing to properly manage the actions of its subsidiaries. It relies on *United Canadian Malt Ltd. v. Outboard Marine Corp. of Canada* (2000), 2000 CanLII 22365 (ON SC), 48 O.R. (3d) 352 (Sup. Ct.) and *Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.*, 2008 ABQB 419, [2008] A.J. No. 758. Amnesty further refers to the U.K. decision of *Guerrero and others v. Monterrico Metals PLC.* [2009] EWHC 2475 (Q.B.), which held that a parent company could owe a duty

of care to plaintiffs who may be harmed by foreseeable risks arising directly or indirectly from a subsidiary's business operations in a known high-risk area.

[38] Amnesty argues, based on the international norms and standards and on the foregoing authorities, that a reasonable cause of action may be found to exist where a parent company is alleged to have knowledge of risks to others posed by a subsidiary and has a degree of control over its response to those risks. It submits that the transnational character of the dispute should have no bearing on the application of these well-established principles of law.

[39] Finally, Amnesty makes submissions with respect to policy reasons for recognizing a duty of care in these circumstances. It states that the essence of the defendants' argument on this issue is that the plaintiffs are proposing a radical departure in the common law and that the issue of accountability for corporate human rights abuses abroad should be left to legislative reform. Amnesty submits that cases involving parent corporation liability have been upheld in the U.K. courts, including the House of Lords; that issues of access to justice must be considered; and that, in order to preserve Canada's reputation, Canadian society has a strong interest in ensuring that Canadian corporations respect human rights, wherever they may operate and whatever ownership and business structure they may put in place to advance their operations in foreign countries.

James Stutt et al v the De Dietrich Group et al, United States District Court, ED New York, F Supp 2d, 2006 WL 1867060

In Palsgraf v. Long Island R.R.,248 N.Y. 339, 344 (1928), Judge Cardozo, although in a decidedly different context and yet with peculiar relevance to what we decide here, penned the following familiar phrase: "The risk reasonably to be perceived defines the duty to be obeyed." What the plaintiffs essentially ask the Court to accept is that by providing letters of credit to the manufacturers of chemicals, the Bank Defendants should have perceived the risk that those chemicals would be sold to Iraq; that Saddam Hussein would use those chemicals to manufacture lethal weapons; that those weapons would be stockpiled in a location that would one day be bombed by coalition forces; that the bombs would hit and detonate those weapons; that the detonation would cause the toxic emissions to be released; that those emissions would permeate the atmosphere; that the plaintiffs would be present in that atmosphere, inhale those emissions and sustain the injuries alleged. Given that procession of events, this Court is driven to conclude that there was nothing to suggest to the most cautious mind that a letter of credit would cause the harm the plaintiffs allege.

***Inter-American Court of Human Rights Case of the Kalina and Lokono Peoples v Suriname* (2015) 39 Series C [224]-[226]**

224. In this regard, the Court takes note of the “Guiding Principles on Business and Human Rights,” 261 endorsed by the Human Rights Council of the United Nations, which establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities.262 Hence, as reiterated by these principles, “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

225. Thus, the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises has indicated that businesses must respect the human rights of members of specific groups or populations, including indigenous and tribal peoples, and pay special attention when such rights are violated.

226. Based on the above, the Court finds that, because the State did not ensure that an independent social and environmental impact assessment was made prior to the start-up of bauxite mining, and did not supervise the assessment that was made subsequently, it failed to comply with this safeguard; in particular, considering that the activities would be carried out in a protected nature reserve and within the traditional territories of several peoples

***Owusu v Jackson and Others* [2002] ECR I-1445 C-281/02**

15. Mr Jackson and the third, fourth and sixth defendants applied to that court for a declaration that it should not exercise its jurisdiction in relation to the claim against them both. In support of their applications, they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice.

16. By order of 16 October 2001, the Judge sitting as Deputy High Court Judge in Sheffield (United Kingdom) held that it was clear from Case C-412/98 UGIC v Group Josi [2000] ECR I-5925, paragraphs 59 to 61, that the application of the jurisdictional rules in the Brussels Convention to a dispute depended, in principle, on whether the defendant had its seat or domicile in a Contracting State, and that the Convention applied to a dispute between a defendant domiciled in a Contracting State and a claimant domiciled in a non-Contracting State. In those circumstances the decision of the Court of Appeal in In re Harrods (Buenos Aires) Ltd [1992] Ch I - 1452 OWUSU 72, which accepted that it was possible for the English courts, applying the doctrine oí forum non conveniens, to decline to exercise the jurisdiction conferred on them by Article 2 of the Brussels Convention, was bad law.

17. Taking the view that he had no power himself under Article 2 of the Protocol of 3 June 1971 to refer a question to the Court of Justice for a preliminary ruling to clarify this point, the Judge sitting as Deputy High Court Judge held that, in the light of the principles laid down in Group Josi, it was not open to him to stay the action against Mr Jackson since he was domiciled in a Contracting State.

18. Notwithstanding the connecting factors that the action brought against the other defendants might have with Jamaica, the judge held that he was also unable to stay the action against them, in so far as the Brussels Convention precluded him from staying proceedings in the action against Mr Jackson. Otherwise, there would be a risk that the courts in two jurisdictions would end up trying the same factual issues upon the same or similar evidence and reach different conclusions. He therefore held that the United Kingdom, and not Jamaica was the State with the appropriate forum to try the action and dismissed the applications for a declaration that the court should not exercise jurisdiction.

19. Mr Jackson and the third, fourth and sixth defendants appealed against that order. The Court of Appeal (England and Wales) Civil Division states that, in this case, the competing jurisdictions are a Contracting State and a non-Contracting State. If Article 2 of the Brussels Convention is mandatory, even in this context, Mr Jackson would have to be sued in the United Kingdom before the courts of his domicile and it would not be open to the claimant to sue him under Article 5(3) of the Brussels Convention in Jamaica, where the harmful event occurred, because that State is not another Contracting State. In the absence of an express derogation to that effect in I - 1453 JUDGMENT OF 1. 3. 2005 — CASE C-281/02 the Convention, it is therefore not permissible to create an exception to the rule in Article 2. According to the referring court, the question of the application of forum non conveniens in favour of the courts of a non-Contracting State, when one of the defendants is domiciled in a Contracting State, is not a matter on which the Court of Justice has ever given a ruling.

20. According to the claimant, Article 2 of the Brussels Convention is of mandatory application, so that the English courts cannot stay proceedings in the United Kingdom against a defendant domiciled there, even though the English court takes the view that another forum in a non-Contracting State is more appropriate

Quinn v Leathem **[1901] AC 495, 537**

The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their

liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff - not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of damnum absque injuria, but of damnum cum injuria.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the Mogul Steamship Co. v. MacGregor[1] and Allen v. Flood[2], and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to Allen v. Flood[2] in favour of the appellant. His sheet-anchor is Allen v. Flood[2], which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in Allen v. Flood[2] Lord Herschell[3] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in Allen v. Flood[1] there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is primâ facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to

work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country.

***The Zyklon B Case of Bruno Tesch and Two Others*, Law Reports of Trials of War Criminals, vol 1 95-101**

4; THE EVIDENCE FOR THE PROSECUTION Emil Sehm, a former bookkeeper and accountant employed by Tesch and Stabenow, supplied information, regarding· the legitimate business activities of the firm and the positions of the three accused therein, which substantially bore out the opening statements of the Prosecutor on these points. He went on to state that in the Autumn of 1942 he saw in the files of the firm's registry one of the reports, dictated by Tesch, which gave accounts of his business journeys. In this travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers' was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings. " Sehm had written down a note of these facts and taken it away with him, but had burnt it the next day on the advice of an old friend, named Wilhelm Pook, to whom he had related what he had seen.

Dr. Marx, a German Barrister practising since 1934, who was called upon to define the status of a Procurist in German law, said: " The procurist had the right to act in the name and on behalf of the firm. He is a man who, out of all the others mentioned in the \aw who have also the right to act on behalf of the firm, has most of these rights. He has the right to act on behalf of the firm and to conclude any transactions or any sort of act on behalf of the firm, and to conclude any transactions or any sort of legal proceedings in which the firm might find itself involved. One can say that anybody who has any sort of transactions with a man who holds

the ' Procura ' and who is called the Procurist is. in exactly the same position as if he had had that transaction with the head of the firm."

Erna Biagini, a former stenographer of the firm, who was also in charge of the registry, claimed to have read, in "approximately 1942," a travel report of Dr. Tesch which stated that Zyklon B could be used for killing human beings as well as vermin. Anna Uenzelmimn, a former stenographer of the firm, said that in about June· 1942 Tesch, after he had dictated a travel report on returning from Berlin, had told her that Zyklon Bwas being used for gassing human beings, and had appeared to be as terrified and shocked about the matter as she was. Karl Ruehmling, who had been a bookkeeper and assistant gassing master with the firm, said that Zyklon B was sent by the concern to the concentration camps at Auschwitz, Sachsenhausen and Neuengamme, but Auschwitz was sent the largest consignments. Alfred Zaun, who was in charge of the firm's bookkeeping, said that, in his opinion; Auschwitz of all the concentration camps had received the most Zyklon B during the war. Wilhelm Bahr, an ex-medical orderly at Neuengamme, described a prussic acid course which he had attended in the S.S. Hospital at Oranienburg in and which Dr. Tesch had conducted. He said that he himself had· gassed two hundred Russian prisoners of war in Neuengamme in 1942, using prussic acid gas, but that it was not Dr. Tesch who had taught him the procedure which he had applied. Perry Broad, who had been a Rottenfiihrer in the Kommandatur of the Auschwitz. camp from June 1942 until early 1945, described how persons were gassed there with Zyklon B. The people being gassed, to his knowledge, at Auschwitz and Birkenau were German deportees, Jews from Belgium, Holland, France, North Italy, Czechoslovakia and Poland, and Gypsies. Dr. Bendel, who had been a prisoner at Auschwitz and had acted as a doctor to the inmates, said that from February 1944 to January 1945 a million people had been killed there by Zyklon B. The remaining Prosecution witnesses were a member of aBritish war crimes investigation team, who identified pre-trial statements made by the accused; Wilhelm Pook and his wife; and five more employees of Tesch and Stabenow. The evidence of Pook and his· wife supported that of Sehm to a degree, though not in every detail, but the fact that they had discussed the events of 1942 between his and their giving evidence was recognised by the Judge Advocate to be " undoubtedly unfortunate." The Prosecution, acting in accordance with Regulation 8 (i) (a) of the Royal Warrant, submitted to the Court a sworn affidavit in which Dr. Diels, a former high-ranking German government official, stated that it was common knowledge in 1943 in Germany that gas was being used for killing people. Among various other documents, Dr. Tesch's S.S. subscription card was produced before the Court; the Defence pointed out, however, that this did not prove that Dr. Tesch had been an active member of the S.S.

5. THE OPENING STATEMENTS OF DEFENCE COUNSEL

(i) Counsel for Tesch Before calling Tesch to the witness-box, his Counsel stated that he intended to prove to the court, first, that Tesch had no knowledge of the killing of human beings by means of Zyklon B; secondly, that Zyklon B was delivered only for normal purposes of disinfection and for medical reasons ; thirdly, that parts of gas chambers were sold only for the purpose of exterminating vermin; fourthly, that concentration camps got the .gas only in amounts which were quite normal in relation to the number of inhabitants, and only for killing vermin; and fifthly, that instruction courses 'were held only according to the relevant laws and regulations, and again only for the purpose of teaching the method of exterminating vermin.

(ii) Counsel for Weinbacher Dr. Stumme, defending Weinbacher, said that by the evidence which he would call, he would try to prove that Weinbacher had no knowledge of any note or report by Dr. Tesch to the effect that human beings were being killed by poison gas, and that until the capitulation of Germany he never (1) Of the various documents admitted as evidence in the trial (including five affidavits, and the pre-trial statements by all of the accused) the Secretariat of the United Nations War Crimes Commission has only been able to examine an extract from the affidavit of Dr. Diels. had any reason to believe that Zyklon B was being used for any other purpose than the destruction of vermin.

(iii) Counsel for Drosihn Counsel for Drosihn set out to prove, by the evidence which he called, first, that Dr. Drosihn had nothing to do with the business concerning the supply of gas; secondly, that, being on journeys for considerable periods, he had only a very scanty knowledge of the activities of the business; thirdly, that he heard about the gassing of human beings only after the capitulation of Germany; and fourthly, that he never carried out instruction either in concentration camps or for S.S. personnel.

6. THE EVIDENCE FOR THE DEFENCE

(i) Dr. Tesch All three accused gave evidence on oath. Dr. Tesch stated that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference or having been approached by any official or military authority on the subject or having written in any document that human beings should be killed by prussic acid. He specifically denied that he had made the remarks referred to by Anna Uenzelmann. He had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run. He did not think that deliveries to Auschwitz were very high because it was a large camp and, further, it " administered more camps in the General Government of Poland." He could not remember Dr. Drosihn ever having instructed S.S. men. Although the witness had paid subscriptions to both the S.S. and the Nazi Party, he had never been an active member of either. He thought that the passage in the travel report which Erna Biagini had read might have been a record of an answer put to him by pupil.

Drosihn, stated Tesch, was a technical expert and was not concerned with the administration of the firm or the office Weinbacher, however, had complete control when Tesch was away from' the office.

(ii) Karl Weinbacher This accused, giving evidence on oath, said that his work was, briefly, t9 look after the current business affairs in the absence of Dr. Tesch, seeing to the incoming and the outgoing mail, answering any queries, and confirming any orders received. He read some of Dr. Tesch's travel reports but not all, because there were too many; in particular, he had not read any dealing with the possibility of destroying Jews with Zyklon B. Dr. Tesch had not mentioned any such possibility to him, nor had the witness heard during the war that Jews were being gassed. He had never been inside a concentration camp, nor had he received unfavourable reports during the war about such camps. He, too, stated that Drosihn had nothing to do with the business management. He could not agree that the S.S. would necessarily come to Dr. Tesch for advice on the extermination of human beings with Zyklon B, since, although Dr. Tesch was an expert on the use of the gas, there were plenty of books avallable on prussic acid.

(iii) Dr. Drosihn Drosihn claimed that his part in the activities of the firm consisted in collaborating on scientific issues, being in charge of the gassing, for instance, of ships in Hamburg docks, and examining delousing chambers to see whether they were working correctly. He spent about 150 to 200 days a year in travelling on business. He had been to check the working of the delousing chambers in Sachsenhausen and Ravensbruck and had been to Neuengamme; but had neither been to Auschwitz, nor given instructions to the S.S. in any place. He knew nothing of the size of consignments of gas to Auschwitz. Contrary to Tesch's evidence, the witness claimed to have reported to him once that he had seen happening in the camps things that were contrary to human dignity.

(iv) The Remaining Defence Witnesses Nine other witnesses called by the Defence did not add very substantially to the evidence before the Court. The subjects covered by their remarks included the character of Dr. Tesch, and the extent of general knowledge in Germany concerning the killing of Jews. Inter alia, they were called to prove that Zyklon B was widely used for the legitimate purpose of killing vermin. These witnesses were two Medical Officers from Hamburg, a doctor and two chemists employed by the German Hygiene Institute, a retired professor of the same institute, the Manager of the Disinfection Institute of Hamburg, a stenotypist formally employed by Tesch and Stabenow, and Dr. Stumme, one of the Defence Counsel, who gave evidence regarding the German law regarding State secrets.

7. THE CLOSING ADDRESSES OF THE DEFENCE COUNSEL

(i) Counsel for Tesch In his closing address, Dr. Zippel, dealing with the point of law involved, submitted that, since the charge was not one of destroying human life but only of supplying the means of doing so, such action would only be contrary to the laws and usages of war if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was no war crime. Turning to the facts, Counsel claimed that while supplies of Zyklon B to the S.S. were large, it was the duty of the S.S. to see that the state of health in the eastern provinces was kept at a high level, and it was concerned not only with the Wehrmacht itself, but also with the state of health of those parts of the eastern provinces whose population was repatriated to Germany before the entry of Germany into war with Russia. Supplies were not too great to have been used wholly for legitimate purposes. Since 1944 the S.S. had had unlimited permission to use the gas for the destruction of vermin and the prevention of epidemics. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose. The English translation of Dr. Zippel's speech subsequently contains the following passage .: " I have two duties to perform. The first would be to try to prove that Tesch supplied this gas not knowing for what purposes it might be used. My second duty is that, even if he knew something about it, still the laws of this procedure would not suffice to find him guilty." Counsel then questioned whether the Zyklon B. used at Auschwitz for killing human beings had been supplied by Tesch and Stabenow. The fact that Auschwitz was situated in the district which the firm were the agents could not be decisive, for other firms were able to supply that district, especially since during the war the boundaries of the districts were not so much respected as before. Further, the S.S. had been active all over the occupied territories during the war and had had various means of securing the gas. So many people were killed by gassing in Auschwitz that the S.S. must necessarily have used sources other than Tesch and Stabenow. Counsel observed that the witnesses who were called to prove that Dr. Tesch knew about the unlawful use of his gas had given different versions as to how he must or should have known about such use. He proceeded also to throw doubts on the reliability of Sehm, for instance, in. view of a statement of his, denied by many other witnesses, that the files of the firm in which he had found the travel report were kept under lock and key. Miss Biagini had denied that she saw anything in this report about a conference with the High Command of the Wehrmacht or any propositions made by Dr. Tesch to this authority. None of the typists who could have typed the travel report in question knew of it or of any rumour in the office regarding it. Under the existing war-time regulations of secrecy, it seemed impossible that a man as careful as Tesch should have dictated a report on an interview with the High Command on such a secret matter, placed the report where anyone in the office could read it, as was the case with all travel reports, and then discussed the facts with his employees. Dr. Tesch had been shown to be a fair and honest man, and his concentration on his work explained why he

had not heard any rumour which may have circulated Germany concerning the gassing of human beings. Regarding the large supplies of gas to Auschwitz in particular, Counsel submitted that Dr. Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon was not as important to the firm ~s were its gassing activities. Furthermore, Dr. Tesch had regarded Auschwitz as a transit camp needing therefore unusually frequent delousing. Counsel concluded that Dr. Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme.

(ii) Counsel for Weinbacher In his closing address, Dr. Stumme submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. Not one of the witnesses could say really that Weinbacher had any knowledge of a travel report or any observation of Dr. Tesch that human beings had been killed by Zyklon B, or that Dr. Tesch had conversations with Weinbacher on such a subject. Nor had the trial shown that Weinbacher should have had reasonable suspicion, 'or grounds for suspicion, that Zyklon B had been used for the killing of human beings. Even if Dr. Tesch had written such a travel report as the one alleged, Weinbacher need not have read it, because he was a busy man, and witnesses had shown that many of the travel reports were filed and read by no one. Even Sehm claimed to have come across the particular report by accident, and Miss Biagini because she had to file it. He repeated Dr. Zippel's argument that Dr. Tesch would not write a State secret in a El document which all the staff could read. If Sehm had found any other document, it must have been purely by accident; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz. Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) Counsel for Drosihn Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while c;laiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed 'his 'subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn. Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews; his client could not therefore have acquired such knowledge from rumours.

8. **THE PROSECUTOR'S CLOSING ADDRESS** In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest, due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann. Counsel said that it was unbelievable that Dr. Tesch did not know that anythIng wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which ·were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient aman to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing howcontradictions existed between his statements and those of otherwitnesses on certain details unrelated to the main issue. Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the

periods when his principal was away. Prosecuting Counsel claimed that Drosihn must to ·some extent have shared the confidence of Tesch and Weinbacher, 6Jlen although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side. He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by Tesch and Stabenow; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction. Mter summarising the evidence of the Prosecution witnesses, the Judge Advocate said: "To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his .business. The Prosecution ask you to say that the accused and his secondin-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time ofthe size ofthe deliveries of poison gas to Auschwitz. The Prosecution then ask: "Why is it that these competent business men are so sensitive about these particular deliveries? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing· clothing or for the purpose of disinfecting buildings ? " 102 THE ZYKLON B CASE In Weinbacher's case, there was no direct evidence, either by way of con'" versation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. "But ihe Prosecution," said the Judge Advocate, "ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary. The Judge Advocate emphasised Drosihn's subordinate 'position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT Tesch and Weinbacher were found guilty. Drosihn was acquitted.