

Civil Remedies and Human Rights in Flux

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On 22-26 October 2020, the [Bonavero Institute of Human Rights](#) (Faculty of Law, University of Oxford) hosted an online roundtable to discuss challenges and opportunities for using civil claims against state and non-state actors as a mechanism for human rights accountability ("**Roundtable**"). This Roundtable was part of the research project funded by the [Oak Foundation](#) to conduct a [comparative study of civil liability for human rights violations across several jurisdictions in the Global South and Global North \("Project"\)](#). The Project focuses on the operation of the substantive provisions of the law of civil remedies in the context of the three case studies: (i) assault or unlawful arrest and detention of persons; (ii) environmental pollution; and (iii) harmful or unfair labour conditions. This blogpost reflects on the insights and key lessons learnt during the Roundtable. These ideas will be further developed in a volume under the title "*Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions*" (edited by Dr Ugljesa Grusic and Dr Ekaterina Aristova). The Bonavero Institute is grateful to the speakers, moderators, and participants for a knowledgeable and engaging discussion at the Roundtable.

Differences between the forms and application of civil remedies

One of the key purposes of the Project is to examine the range of the existing causes of action under the law of civil remedies and how they have been employed by the victims of human rights violations and their representatives. Papers presented at the Roundtable demonstrated that forms of civil remedy vary greatly across the jurisdictions. In civil law systems, the law on non-contractual obligations operates through general clauses contained in the national civil codes. In the Netherlands, for instance, Article 6:162 BW (Dutch Civil Code) is the general basis for claims for damages arising from the wrongful act. It is complemented by special liability regimes for certain types of activity or behaviour, such as rules for product liability, unfair competition, and misleading advertising (Art 6:3:3 to 6:3:4A) and liability regimes for damage caused by hazardous substances (Art 6:175), waste dumps (Art 6:176) and mining operations (Art 6:177). Similarly, in Ukraine, the principle of so-called 'general tort' is set out in Article 1166 of the Civil Code, while special torts regulate damage caused by the enactment of the normative legal acts and during criminal or administrative proceedings (Art 1173-1176). By contrast, the common law systems provide for a collection of individual torts which have, often casuistically, emerged in case law and occasionally were introduced by statute law. Thus, assault, battery, negligence, nuisance have been inter alia used in Ghana to protect interests and values embodied by the human rights framework. In the US, the Alien Tort Claims Act, the Torture Victim Protection Act, 42 U.S. Code §1983, the Federal Tort Claims Act and *Bivens* claims created civil causes of action that could be used against the state or non-state actors.

Besides, the domestic legal systems differ, sometimes widely, in how they define civil remedies. In this context, several jurisdictions have witnessed an emergence of compensatory claims that are not easily classified as belonging to public or private law. This is true, for example, about the direct enforcement of the fundamental human rights protected by the national constitutions both in cases brought against state actors and those against private parties. In India and Bangladesh, constitutional torts are the main avenues relied on by victims of human rights violations to seek civil remedies (see Art 32 of the Constitution of India and Art 102 of the Constitution of Bangladesh). A weak tradition of the 'conventional' tort litigation in these jurisdictions could be explained by the procedural challenges associated with this type of proceedings. A growing role of special statutory mechanisms, especially in the field of environmental law, is another indication that the traditional public-private law divide is challenged (e.g., the Environmental Management and Control Act 1999 in Kenya; the National Environmental Management Act 107 of 1998 in South Africa). There is also an evident divergence between legal systems in (i) the application of civil remedies to the different types of perpetrators (state vs non-state actors), and (ii) in providing remedies for different types of human rights violations (civil and political rights vs economic and social rights). With regard to the former, it was reported that the National Law 26.944 of State Responsibility in Argentina explicitly provides that the domestic framework for civil liability is not applicable to the federal state and its agents. Similarly, in France and China, administrative law, rather than civil law, is the principal avenue for holding the state accountable for human rights violations.

When it comes to different types of human rights violations, [civil and political rights generally receive stronger protection via the law of civil remedies](#), while the situation with the second and third generation rights is less straightforward. This is particularly true

concerning the Project's case study on harmful or unfair labour conditions. In many jurisdictions, labour rights violations are not immediately associated with civil liability, and breaches of health and safety laws are routinely compensable through the law of social security. However, in other jurisdictions, test cases have been brought which raise the possibility of bringing a civil claim alleging liability for harmful or unfair labour conditions, including for the abusive labour practices that occurred within the supply chains. In Germany, in [Jabir and Others v KiK](#) case, the court was asked to assess whether a German-domiciled company (KiK) breached a legal obligation to secure a healthy and safe working environment at the Pakistani factory (Ali Enterprises) and prevent death and personal injuries of the factory's employees resulting from the fire. KiK was Ali Enterprises' main customer and purchaser of goods at the time. The case was dismissed based on the statute of limitations.

Variety of case studies

As mentioned in the opening paragraph, the Project focuses on the analysis of the existing mechanisms or principles in domestic law for bringing civil claims in three specified categories of human rights violations. Occasionally, contributors have suggested additional case studies where civil liability developed into an instrumental means of redress for victims. In the Netherlands, the [Urgenda case](#) tested the scope of the state's duty of care to protect Dutch citizens against the imminent danger caused by climate change. In an unprecedented decision, the Supreme Court confirmed that the Dutch government must reduce greenhouse gas emissions in line with its obligations under Articles 2 and 8 of the European Convention on Human Rights. In the Philippines, a group of Filipino citizens and civil society organisations initiated [an inquiry](#) asking the Philippines Human Rights Commission to investigate the responsibility of the world's largest fossil fuel producers for climate-related human rights harms. [Preliminary findings of the ground-breaking investigation](#) suggest that in appropriate circumstances corporations can be held accountable under both civil and criminal law to ensure remedy for affected individuals and communities. In Australia, numerous civil law actions alleging mistreatment and negligence of the government and its agents have been commenced by [asylum seekers and refugees held in immigration detention centres](#). The cases had a varying degree of success and demonstrated the [difficulties of pursuing strategic litigation](#) with an extraterritorial dimension against states and corporate contractors. Finally, [compensatory claims for damages commenced under the Law on Combatting Terrorism](#) were utilised as a mechanism to address the losses resulting from the [armed conflict in Donetsk and Luhansk regions in eastern Ukraine](#). These case studies suggest that the potential of the law of civil remedies to respond to the global contemporary challenges is broad. At the same time, the overall efficacy of civil liability for human rights violations is often tied to the strength and weaknesses of both litigation and human rights culture in a particular jurisdiction.

Liability in modern business structures

An important aspect of the Project's inquiry is the operation of the law of civil remedies in modern business structures. Over the last decades, companies have developed and transformed into a series of complex vertically- and horizontally-integrated corporate structures with parent companies at the head of a web of subsidiaries, associates and affiliated established and operating worldwide. Often, when subsidiary's activities have adverse human rights impacts, the ability to seek the legal liability of the parent company becomes a necessary factor in ensuring redress for the victims (e.g., if the subsidiary's funds are insufficient to offer a meaningful compensation). Across jurisdictions, fundamental corporate concepts of 'separate legal personality' and 'limited liability' play a vital role. It was reported during the Roundtable that parent company liability continues to be treated as a matter of company law and by the recourse to the doctrine of 'piercing the corporate law' in China and Ukraine.

At the same time, there is an emerging trend in many jurisdictions towards civil liability claims brought against multinationals (see [quarterly updates from the Business & Human Rights Resource Centre](#)). Victims of human rights violations are increasingly attempting to hold parent companies liable for the wrongful acts and/or omissions based on their own fault for the failure to prevent harm caused by the subsidiary's operations. In common law jurisdictions, human rights practitioners have often relied on the tort law concept of negligence to establish parent company's liability. Interestingly, the Canadian Supreme Court in [Choc v Hudbay Minerals](#) case confirmed that claimants pleaded a novel duty of care in relation to the involvement of the Canadian corporation in the severe human rights abuses committed by mine security personally in Guatemala. At the same time, the UK Supreme Court stated in [Vedanta](#) that the existence of a duty of care in parent - subsidiary relationship is not a novel or controversial extension of the boundaries of tort law. Tort litigation against legal entities of transnational corporations usually does not employ human rights terminology. The decision of the Canadian Supreme Court in [Nevsun](#) case confirming that customary international law can ground claims for damages against Canadian corporations can become an important step towards integrating human rights terminology in the litigation. In the UK, the CORE Coalition and the International Commission of Jurists have made interventions in two landmark cases ([here](#) and [here](#)) persuasively arguing that the parent company's duty of care is grounded in the international and domestic standards on human rights and environmental responsibilities of business enterprises.

There are significant [legal, financial, practical, and procedural barriers](#) faced by the victims of business-related human rights abuses. The scope of parent company's duty of care is highly fact-sensitive and is often assessed by the courts based on the degree of parent company's control, decisive influence, or active involvement in the subsidiary's affairs. These factors could be very difficult to establish because victims often [lack access to information](#) and confidential corporate documents. The burden of proof is

even more puzzling when it comes to testing the [liability of the lead companies for the human rights abuses arising in the supply chains](#) which refer to the activities of the independent contractors such as manufacturers, wholesalers, distributors, retailers involved in the process of sourcing, procurement and logistics. There is a glimpse of hope. In Brazil, a fashion giant [Zara failed to challenge in court](#) the results of the investigation on the modern slavery conditions in its supply chain.

Civil remedies for business-related human rights abuses can get a new lease of life in the context of the legislative trend towards mandatory human rights due diligence. The [French Corporate Duty of Vigilance Law](#) set an obligation for the largest French companies to establish and effectively implement a vigilance plan to identify and prevent human rights violations and environmental damage. It also establishes a remediation mechanism allowing individuals to file a civil liability claim if the failure to comply with the vigilance obligations caused damage, which could have been otherwise prevented had the company complied. The enforcement mechanism has been [triggered](#) in several cases, but there have been no rulings on the merits. The claimants have been facing barriers in advancing the cases. On 30 January 2020, the [Nanterre High Court decided](#) that the case challenging human rights implications of [two oil-related projects operated by Total in Uganda](#) did not fall within its jurisdiction and should be heard by the Commercial Court instead. The Versailles Court of Appeal on 10 December 2020 upheld the decision of the court of the first instance. Another significant setback recently occurred in Switzerland when the [Responsible Business Initiative failed to receive support](#) in a majority of Swiss cantons despite winning the popular vote. That said, the [EU committed to legislation on mandatory due diligence for companies](#), and civil remedies are considered to be one of the [core elements of the efficient proposal](#).

This blog is produced as part of the Bonavero Institute of Human Rights Oak Foundation project on a comparative study of civil liability for human rights violations across several jurisdictions in the Global South and Global North, for which BIICL Senior Research Fellow in Business and Human Rights, [Lise Smit](#), acts on the Steering Committee.

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Related pages:

- [A UK Failure to Prevent Mechanism for Corporate Human Rights Harms](#) (11 February 2020)
- [European Commission study on due diligence requirements through the supply chain](#) (24 February 2020)
- [BIICL Business and Human Rights page](#)

URL: <https://www.biicl.org/blog/19/civil-remedies-and-human-rights-in-flux>