



## Corporate accountability for human rights abuses in international law

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Subsidiaries and suppliers of European companies often ignore human rights and fundamental labour standards. The parent company is typically accused of non-compliance with basic workplace safety standards in subsidiaries or suppliers despite knowing the standards, or owing to negligent ignorance. But offenses are typically perpetrated by other actors attributing their actions to a European transnational in the background. These harms (known as torts when they may result in legal compensation) typically take place in countries where national legislation is insufficient to oblige companies to uphold human rights, or which lack effective law enforcement. Therefore remedies are required in the home states of the transnationals responsible.

While the US hears claims of tort-based violations of international law via the Alien Tort Claims Act, European civil law is seldom designed to hold companies accountable for human-rights abuses. The cascade of soft-law regulations such as the Organisation for Economic Co-operation and Development (OECD) Guidelines, the United Nations (UN) Guiding Principles on Business and Human Rights, the Guidelines for Corporate Social Responsibility, and voluntary self-restrictions are too weak because they are not binding.

Since human rights can mostly be subsumed under legal interests protected under national tort law - such as life, health and property - this article considers ways to fill the legal gaps using existing national tort law (see Meeran, 2011). An example is the UK case *Chandler v Cape*, in which South African employees of a mining company took its British parent to court for asbestos exposure. The jurisdiction in that case may be relevant for others, such as the ongoing case *Jabit and others v KiK Textilien* in Germany, in which surviving Pakistani workers and relatives claimed damages from the German textile manufacturer, arguing that it shares responsibility for the death of 250 workers in a factory fire in Karachi.

The reasoning in the *Chandler v Cape* judgement is consistent with common-law tort principles applicable in South Africa and, likely, in other common-law jurisdictions. In principle, the national law of the state where the abuse occurred applies to tort actions abroad in Article 4 of the Rome II regulation. In the textile industry, abuses often occur in previous colonies of the British Empire, where civil laws are primarily influenced by common law. In Pakistani law, derived from common law and relevant to *Jabit vs KiK*, English cases are still considered highly relevant for its interpretation (ECCHR, 2015).

*Jabit v KiK* differs from *Chandler v Cape* because there is no relationship of corporate structure in the KiK case, but the argument of the plaintiffs is similar: KiK had a duty of care to the workers of their subcontractor, as they received nearly 100% of the subcontractor's production. This includes adherence to basic fire safety standards in KiK's supplier companies. The court has not decided yet, but the following should be considered for advancing such cases.

### Vicarious liability

Under common law, a transnational company may be liable for human rights abuses by subsidiaries or subcontractors via vicarious liability, which holds a superior responsible for the acts of their subordinate. Although a subsidiary or subcontractor is not a subordinate of a parent or consumer company, liability may be transmitted if the relationship is akin to employment. This depends on the influence over content, the work's nature, the parent/consumer company's potential control, and the subsidiary's or supplier's degree of dependency. A relationship akin to employment could be argued in the KiK case because the supplier provided KiK with almost all of their production. Even if there is insufficient evidence for a relationship akin to employment, the customer company may be vicariously liable for its independent contractor (a) if the customer retains control over affected suppliers or the subsidiary's department; (b) due to a negligent engagement with an incompetent contractor; or (c) when using the contractor for inherently dangerous activities (Güngör, 2016).

### Duty of care

A duty of care is a legal obligation to adhere to reasonable standards of care while performing any act that could foreseeably harm others, and its breach is a liability under tort law. Most European countries do not explicitly regulate a human-rights-related duty of care for companies regarding their suppliers or their subsidiaries. Therefore a controversial point in tort litigation against transnational companies for human rights abuses abroad is whether the parent company has such a duty.

French legislation recently regulated the organisational liability of parent companies for foreign subsidiaries regarding human rights in Article 1340 of its *Code Civil*, explicitly subjecting it to a third-party effect in favour of employees. A duty of care does not need to be defined by law, although it will often develop through jurisprudence. The British court acknowledged in *Chandler v Cape* that the parent company had a duty of care to employees of the subsidiary and violated it by neglecting health

standards. The criteria developed by the British court for imposing such a responsibility for the health and safety of a subsidiary's employees are: (a) they are in the same industry; (b) the parent company had superior knowledge on health and safety in the particular industry; (c) the parent knew or should have known that the subsidiary's system of work was unsafe; and (d) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using its superior knowledge to protect employees. For (d) to apply, it is enough to have a practice of intervening in trading operations such as production and funding issues.

This line of argumentation creates a duty of care due to the parent company's power to control. A breach leads to a liability due to own negligence and therefore does not contradict the 'Corporate Veil Doctrine' – the most common shield for transnational companies in cases of human rights abuses abroad – which is a principle of company law stating that shareholders, like parent companies, are not liable for the company's obligations. In *Chandler v Cape* the court disagreed that liability required lifting the corporate veil: 'The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.'

The criteria developed in *Chandler v Cape* could be used to argue KiK's liability: (a) KiK and the supplier are both in textiles; (b) KiK should be familiar with health and safety in textiles and building security standards; (c) KiK knew, or should have known, that the subsidiary's system was unsafe through its security management, improvement plans, qualification programs, regular employee visits, and the involvement of a certification company; and (d) KiK's active involvement. As the court stated in *Chandler v Cape*, the assumption of responsibility does not rely on the group's structure and is not related to ownership but to actual control. There is no reason this should not also apply for supply chains.

Which measures are required by a duty of care depends on the concrete standard of care of a 'reasonable' corporation. This standard can be formed by voluntary self-restrictions set forth in companies' codes of conduct, stating that they want to maintain certain standards of protection abroad. These create a public expectation, to which they may be held (Thomale & Hübner, 2017). Self-restrictions do not result in direct legal obligations, but they help to form a general perception defining the extent of a duty of care.

International standards, like the UN Guiding Principles on Business and Human Rights, can also determine the expected standard of care. As the UN Human Rights Council unanimously approved these principles, they reflect the international community's consensus about appropriate, careful conduct of

business in global economic relations. In other contexts, it is settled case law in Germany to refer to public law guidelines or established standards to define a duty of care. The German Federal Court clarified that such standards are not legally binding norms with third-party effect, but as recommendations of experts they are especially suitable for determining what is expected in terms of safety (Saage-Maaß & Leifker, 2015).

Despite these promising developments, there is still very little litigation in Europe regarding human rights abuses abroad. Trade 'secrets' often block fact finding and potential plaintiffs may lack remedies to start litigation. This is a golden opportunity for trade unions to show international solidarity by working with trade unions located in the Global South. Civil society and trade unions can promote such cases by gathering and processing information or providing the necessary remedies for the plaintiff. Media attention arising from these cases is potentially powerful to prevent bad practices by transnational companies and due to its legal complexity, tort litigation can help to develop or to fill the legal regulation gaps with consistent case law.

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