

TABLE OF CONTENTS

Foreword	1
Acknowledgements	2
Abbreviations	5
General Introduction	11
A. Definition of the notion of TNCs	14
B. The progressive growth of TNCs on the international stage	17
C. The definition of the notion of corporate social responsibility	21
D. The difficulties to seek redress for victims of corporate wrongs	24
E. The relevance of tort law remedies to provide reparation to victims	26
F. Methodology and structure of the study	31
Chapter I The role of public international law to hold TNCs accountable	35
A. The development of international norms for business and human rights	41
1. <i>International soft law regulations</i>	41
a) The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	43
b) The OECD Guidelines	44
c) The UN Global Compact	46
d) The UN Guiding Principles	49
e) ISO Norms	53
f) The relevance of soft law norms	54
2. <i>Regional regulations</i>	57
a) In Europe	57
i) Instruments adopted by the European Union	57
ii) Instruments adopted by the Council of Europe	58
b) The Inter-American Court of Human Rights	61
c) The African Commission on Human Rights and People's Rights	64
B. Relevant stakeholders and their responsibilities under international law	66
1. <i>The concept of legal personality</i>	67

2. <i>The historical position of States as the main subjects of international law</i>	70
3. <i>The status of corporations under international law</i>	72
4. <i>The status of corporations under international environmental law</i>	76
5. <i>Should corporations be subject to human rights obligations?</i>	79
a) Arguments in favour.....	79
b) Arguments in contra	82
6. <i>The notion of due diligence in international law</i>	83
a) Due diligence conducted by States.....	83
b) Due diligence conducted by corporations.....	86
C. <i>The prospect of a new instrument and its practicability</i>	87
1. <i>Assessing the prospects of success of the treaty and its potential impact</i>	89
a) The application of international law norms in national legal systems	89
i) The integration of international law obligations in domestic legal systems.....	89
ii) The application of international law rules by national tribunals	92
b) The benefits of a new treaty and its feasibility	99
2. <i>The early stages of the UN draft treaty</i>	102
a) Strengths and positive aspects of the draft	103
i) The priority awarded to victims' access to justice before national courts.....	103
ii) The focus on States' mutual legal assistance and international cooperation	108
b) Points of contention.....	111
i) A missed opportunity to recognize companies as international law subjects	111
ii) A debated personal scope of application	113
iii) An uncertain material scope of application.....	115
c) <i>The recourse to usual international law reporting mechanisms</i>	120
i) The utopian idea of an International Corporate Court	120
ii) The creation of a monitoring committee of experts	124
D. <i>The role of investment law</i>	128
1. <i>The effects of the incorporation of human rights in Bilateral Investment Agreements</i>	130
2. <i>The adequacy of arbitral tribunals to handle corporate human rights breaches</i>	141
3. <i>The effects of the incorporation of corporate diligent conduct in State-investors contracts</i>	147
4. <i>The progressive inclusion of investors' obligations</i>	151
E. <i>Conclusion of Chapter I</i>	156

Chapter II Conflict of laws rules and access to justice for victims before Western courts	161
A. The notion of extraterritorial jurisdiction	168
1. <i>The exercise of prescriptive jurisdiction</i>	169
2. <i>The exercise of adjudicative jurisdiction</i>	171
B. The U.S. conception of extraterritorial jurisdiction	175
1. <i>A forerunning system</i>	175
2. <i>The change brought by Kiobel (the presumption against territoriality)</i>	182
3. <i>The impact of Kiobel and subsequent case law</i>	185
4. <i>Other obstacles to the access to the U.S. judicial system</i>	194
a) <i>Forum non conveniens</i>	194
b) <i>The consideration for foreign states' sovereignty : the rule of comity</i>	199
C. The European conception of extraterritorial jurisdiction	203
1. <i>The application of the Brussels I Regulation</i>	204
a) <i>The need to establish the liability of parent companies for their subsidiaries and to recognise their joint responsibility</i>	204
b) <i>The necessity to facilitate the joining of proceedings between the parent company and its subsidiaries</i>	207
c) <i>The limitations of special rules of jurisdiction</i>	210
2. <i>Reforming the RBI Regulation : a way forward towards access to justice and protection of fundamental rights in Europe</i>	212
D. The forum necessitatis doctrine	215
1. <i>The concept of forum necessitatis under international law</i>	215
2. <i>The forum necessitatis doctrine in European national legal systems</i>	219
a) <i>Switzerland</i>	220
b) <i>The Netherlands</i>	221
c) <i>France</i>	223
3. <i>The failed RBI reform</i>	224
4. <i>An alternative to the forum necessitatis: the forum arresti</i>	226
5. <i>Proposals from the UN draft treaty</i>	229
E. The issue of the applicable law to corporate wrongs' claims	231
1. <i>The determination of the applicable law in U.S. courts</i>	233
2. <i>The determination of the applicable law before European courts</i>	236
a) <i>The lex loci delicti rule under Article 4 RII and its exceptions</i>	236

- b) The special conflict of law rules for environmental damage under Article 7 RII 239
- c) The application of rules of safety and conduct under Article 17 RII..... 241
- d) The application of mandatory overriding principles under Article 26 RII 242
- 3. *The determination of the applicable law in Switzerland*..... 244
- 4. *The idea of the codification of overriding mandatory rules* 246
- F. Non-judicial remedies 248
 - 1. *Grievance mechanisms administered by States*..... 249
 - 2. *Grievance mechanisms supervised by private actors*..... 254
- G. Conclusion of Chapter II..... 259

Chapter III The national legal mechanisms to establish the liability of parent companies 263

- A. Piercing the corporate veil..... 268
 - 1. *The debate around piercing the corporate veil*..... 268
 - 2. *Veil piercing techniques*..... 277
 - a) The agency theory and related vicarious liabilities 278
 - b) The single economic unit..... 282
 - c) The South African veil piercing method..... 285
 - d) Piercing the corporate veil in Hispanic countries..... 287
 - e) Piercing the corporate veil using the notion of control in international investment law 290
- B. The development of the “duty of care” of parent corporations 295
 - 1. *The recent developments in common law* 297
 - a) The United Kingdom..... 297
 - i) The emergence of the duty of care to regulate TNCs’ activities 297
 - ii) The use of the duty of care to determine the exercise of their jurisdiction by English courts 301
 - b) Canada 306
 - 2. *Assessing the application of the duty of care and its efficiency in establishing parent corporations’ liability*..... 312
 - a) The modalities of the application of the corporate duty of care..... 312
 - i) Foreseeability 313
 - ii) Proximity 314
 - iii) The “Fair, Just and Reasonable” condition / the public policy consideration ... 319
 - b) The duty of care : a notion in constant evolution 321

c) Proposals of reforms for the establishment of the duty of care	323
i) Establishing a duty of care comprising the presumption of control of the parent company over the subsidiary	323
ii) Establishing a statutory tort liability of parent corporations for the activities of their subsidiaries.....	326
C. The due diligence approach.....	328
1. <i>The 2017 reform introducing a due diligence duty in France</i>	331
a) The conditions of companies' civil liability.....	336
i) The existence of a wrongdoing	336
ii) The damage	338
iii) The proof of a causal link.....	339
b) The presentation of the claim in the French legal system	341
2. <i>The prospects of a reform in Switzerland</i>	346
a) The current state of the law in Switzerland	347
b) The reform project	348
3. <i>The creation of duties to report to increase transparency in the supply chains</i>	351
a) In common law countries.....	352
i) The United States	352
ii) The United Kingdom.....	355
b) In civil law countries.....	360
i) EU Rules on the duty to report.....	360
ii) Germany.....	363
iii) The Netherlands.....	365
D. Other relevant legal mechanisms likely to impose liability on TNCs.....	367
1. <i>Corporate Codes of conduct</i>	367
2. <i>The use of protective areas of the law</i>	377
a) The relevance of consumer law.....	377
b) The recourse to competition law	383
3. <i>The need to broaden the scope of responsibilities</i>	388
a) Getting at the top of the decision-making process : pointing at the individual directors' responsibility.....	389
b) Thinking out of the box : the necessity of a "smart mix" approach to tackle the issue of corporate social responsibility.....	393
4. <i>Provisions set out in the UN draft treaty and proposals for the way forward</i>	400

a) The attempt to define the triggering elements of TNCs' liability for their supply chains' activities	400
b) The need to provide a general reversal of the burden of proof in favor of claimants	402
c) The necessity to recognize the relevance of precautionary measures	403
E. Conclusion of Chapter III	405
General Conclusion	409
Bibliography	417