

RESEARCH ARTICLE

# Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor

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This article examines the feasibility of using the jurisdiction by necessity doctrine to promote the accountability of transnational corporations (TNCs) for extraterritorial human and environmental rights abuses committed in developing countries with weak accountability mechanisms. Under the doctrine, a court devoid of jurisdiction may nevertheless hear a dispute where it considers that there is no other court where the dispute may be heard or where the plaintiff may be reasonably expected to bring the action. The article analyzes the inadequacy of existing jurisdictional doctrines in light of the complex web of operations of TNCs, which shields them from the reach of traditional jurisdictional doctrines. After exploring the origin of the jurisdiction by necessity doctrine, the article critically examines the elements of the doctrine to see how they may be applied to the regulation of TNCs. The article argues that the emergence of the jurisdiction by necessity doctrine offers plaintiffs in transnational corporate human rights litigation a new jurisdictional possibility to weigh, as the doctrine has the potential to address some of the jurisdictional difficulties encountered in such litigation.

**Keywords:** jurisdiction; necessity jurisdiction; transnational corporations; human rights violations; extraterritorial regulation

## I. Introduction

When a court lacks territorial jurisdiction to adjudicate a dispute, it may turn to an emerging doctrine in jurisdictional law, which allows the court to assume jurisdiction over the dispute where the court considers that there is no other forum in which the dispute may be adjudicated or in which the plaintiff may reasonably be expected to initiate the suit. A court exercising such jurisdiction is said to be acting as a forum of necessity or, as it is called in civil law parlance, *forum necessitatis*. Such jurisdiction serves as 'a safety valve' to avoid a total denial of access to justice.<sup>1</sup> The rationale provides that there could be extraordinary circumstances where the normal jurisdictional standards would be impractical, because the insistence on the satisfaction of their requirements might totally bar the adjudication of the dispute anywhere in the world.<sup>2</sup> The dominant concern is therefore the need to avoid a denial of access to justice – a fundamental objective of modern international law.<sup>3</sup>

The purpose of this article is to examine the possibilities for the utilization of this doctrine to promote the accountability of transnational corporations (TNCs) for extraterritorial human and environmental rights violations. The nature and reach of the operations of TNCs have rendered them almost impervious to traditional standards of jurisdiction. So far, few countries have been the destination for such suits. Foremost among them is the United States, where, using the Alien Tort Statute,<sup>4</sup> many victims of human rights abuses

<sup>1</sup> John P McEvoy, 'Forum of Necessity in Quebec Private International Law: CcQ Article 3136' (2005) 35 *Review General* 61 at 90 (hereinafter 'McEvoy').

<sup>2</sup> *ibid* at 64.

<sup>3</sup> See, for instance, the European Convention on Human Rights, 4 November 1950, Europ TS No 5, article 6(1) of (hereinafter 'ECHR').

<sup>4</sup> 28 USC §1350 (1988).

in Africa, Asia and Latin America have brought suits in US courts against corporations. Other countries that have seen such litigation include the Netherlands,<sup>5</sup> the UK<sup>6</sup> and Canada.<sup>7</sup>

After an analysis of the inadequacy of existing jurisdictional doctrines for the effective regulation of the transnational corporate actor, this article explores the origin of the jurisdiction by necessity doctrine and indicates which countries have adopted it. Then follows a critical analysis of the elements of the doctrine to see how the doctrine may be applied to the regulation of the transnational corporate actor. The last section concludes the discussion. The central argument of this article is that with the emergence of the jurisdiction by necessity doctrine, victims of transnational corporate human rights violations in countries with weak accountability mechanisms now have a new jurisdictional tool with which they may seek justice in foreign countries. It should be noted, however, that this article is concerned with civil jurisdiction alone and does not extend to criminal jurisdiction.

## II. The Inadequacy of Existing Jurisdictional Doctrines for the Regulation of the Transnational Corporate Actor

### A. The Growth of Corporate Power

It is well-settled that TNCs have become such powerful global actors that many individual countries lack the resources and will to regulate them.<sup>8</sup> Many TNCs have grown into entities of such 'astonishing magnitude' that, in terms of economic power, they fully measure up to individual countries.<sup>9</sup> Crucial to the growth in their power is their ability to incorporate in one country and operate in many other countries simultaneously through a complex web of subsidiaries.<sup>10</sup> The nature and grasp of their operations are such that 'they often operate in jurisdictions in which human rights violations occur, obtain benefits from subsidized arrangements with governments that commit human rights violations, provide goods and services that result in human rights violations, or organize in ways that violate the rights of workers.'<sup>11</sup> The Canadian Lawyers Association for International Human Rights (CLAIHR) cites four ways in which a corporation's activities may 'bolster the repressive capacity and the staying power of a regime that systematically violates human rights':

1. It can provide goods and services that support the regime's despotic capability;
2. It can be a main source of revenue that reinforces the despotic capability of the regime;
3. It can provide the regime infrastructure (like roads, railways, power stations, *et cetera*) that increases its repressive capability; and
4. Its presence there may provide the repressive regime international credibility.<sup>12</sup>

<sup>5</sup> See, eg, District Court of The Hague, 30 January 2013, ECLI:NL:RBDHA:2013:BY9854, *Friday Alfred Akpan v Royal Dutch Shell*; *Oguru, Efang & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, ECLI:NL:RBSGR:2009:BK8616.

<sup>6</sup> See, eg, *Bodo Community v Shell Petroleum Dev Co of Nigeria*, [2012] EWHC (QB) (a case brought by farmers and fishermen from the Nigerian village of Bodo against oil giant Shell for environmental damage caused by oil spills); *Guerrero v Monterrico Metals Plc*, [2009] EWHC 2475, [2010] EWHC 3228 (case brought by Peruvian environmental protesters who were allegedly tortured and maltreated by British mining company Monterrico Metals); *Lubbe v Cape Plc*, [2000] 1 WLR 1545 (HL) (a case brought by South Africans over damaged caused by a UK company in South Africa); *Connelly v RTZ Corporation Plc*, [1998] AC 854 (also a case brought by South Africans over damaged caused by a UK company in South Africa).

<sup>7</sup> See, eg, *Recherches Internationales Québec v Cambior Inc*, [1998] QJ No 2554 (a case brought against a Canadian miner over a mining disaster that occurred in Guyana); *Yassin v Green Park International Inc*, 2010 QCCA 1455 (CanLII) (a case relating to forced removal of the plaintiffs to pave way for construction work being done by the plaintiff corporation in the Israeli-occupied West Bank); *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191 (CanLII) (a case brought by Ecuadorean plaintiffs against a Canadian mining company for various torts allegedly committed by the mining company); *Anvil Mining Ltd v Association canadienne contre l'impunité*, 2012 QCCA 117 (CanLII) (a class action brought against a Canadian mining over alleged complicity in war crimes and crimes against humanity in the Democratic Republic of Congo); *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 (a case brought by an indigenous group in Guatemala against Canadian mining companies operating in Guatemala for acts of rape, murder and forced removal).

<sup>8</sup> Stephen R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 461.

<sup>9</sup> Philip Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2001) 24 *Hastings International and Comparative Law Review* 297. Fiona McLeay adds that '[t]he problem is accentuated by the benefits TNCs receive from the establishment of export processing zones and the guarantees afforded under bilateral investment treaties.' Fiona McLeay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations – A Small Piece of a Large Puzzle', *Global Law Working Paper 01/05*, at 5, Symposium – 'Transnational Corporations and Human Rights', New York University School of Law. Online, NYU, <[http://www.law.nyu.edu/global/workingpapers/2005/ECM\\_DL\\_V\\_015787](http://www.law.nyu.edu/global/workingpapers/2005/ECM_DL_V_015787)>.

<sup>10</sup> Jonathan Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' (2008) 33 *Brooklyn Journal of International Law* 900.

<sup>11</sup> Patrick Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7(4) *Int Law FORUM du droit international* 281.

<sup>12</sup> CLAHR, 'Backgrounder: Options Available to the Government of Canada in Responding to Canadian Corporate Complicity with Human Rights Abuses' (2000) at 5-6, online, University of Ottawa, <<http://aix1.uottawa.ca/~cforcese/other/complicity.pdf>>. See

In many instances, TNCs operate in countries that are split by violent conflicts and sometimes fall 'prey to one faction or another.'<sup>13</sup> In other instances, their operations generate opposition that sparks violent unrest. When violence erupts, some have responded by 'tapping directly into the military expertise and firepower of both state and private armies.'<sup>14</sup>

Orthodox methods of regulation through host-countries' domestic laws have proved ineffective to regulate TNCs. This is because the developing countries where virtually all of the violations occur are concerned that severe regulation of TNCs might drive TNCs away to other countries and thereby hamper the countries' economic development. As the editors of *Liability of Multinational Corporations Under International Law* observe:

With foreign direct investment replacing intergovernmental aid as the most important means of transferring capital and technical know-how from the developed to the developing world, governments in developing countries are tempted to – and in some cases compelled to – attract investors by minimizing the potential costs facing investing MNCs. This desire, compounded in many instances by the relative weakness of host States compared to the larger and more experienced MNCs, means that injured citizens of these host States are left without any legal recourse [in their country].<sup>15</sup>

Professor Forcese cites a US State Department Report that observes that in some of the developing countries where such corporate abuses occur, the courts are short-staffed. Judges are often absent from court, frequently because they are pursuing other means of livelihood to supplement their meagre salary. Courtrooms lack modern equipment and court officials often lack the proper training and motivation for work, due also to inadequate salary and poor work environment.<sup>16</sup>

Jonathan Clough has summarised the key features of the scenarios that make exclusive host-country regulation of TNCs difficult:

- The defendant is a large, well-resourced transnational corporation.
- The alleged human rights abuses occurred in a country (the 'host jurisdiction') other than the transnational corporation's country of incorporation (the 'home jurisdiction').
- The host jurisdiction is unable and/or unwilling to investigate and prosecute the alleged abuses.
- The transnational corporation is alleged to be complicit in the human rights abuses either directly or, more commonly, indirectly through the interposition of subsidiaries or other intermediaries such as independent contractors.<sup>17</sup>

For their part, Western countries – the 'birthplace' of most of the TNCs – have shown strong reluctance, even opposition, to the regulation of the activities of their corporations abroad. A notorious example was the George W Bush administration's relentless efforts to eviscerate the Alien Tort Statute – the major legal recourse for most victims of corporate human rights abuses in the developing world.<sup>18</sup> In 2003, following

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also Craig Forcese, *Putting Conscience into Commerce: Strategies for Making Human Rights Business as Usual* (Montreal: International Centre for Human Rights and Democratic Development, 1997) 18.

<sup>13</sup> Craig Forcese, 'Deterring 'Militarized Commerce': The Prospects of Liability for 'Privatized' Human Rights Abuses' (2000) 31 *Ottawa Law Review* 173 (hereinafter Forcese, 'Deterring Militarized Commerce').

<sup>14</sup> *ibid.*

<sup>15</sup> Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations Under International Law: An Introduction' In: MT Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000) 2. See also Chika B Onwuekwue, 'Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country's Nightmare' (2006) 7(1) *Journal of World Investment and Trade* 115 (arguing that the quest for economic development puts many developing countries' governments under severe pressure to approve foreign direct investment without adequately taking into account its environmental impacts).

<sup>16</sup> Forcese, *Deterring Militarized Commerce* (n 13) 185.

<sup>17</sup> Jonathan Clough, 'Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses' (2005) 11(1) *Australian Journal of Human Rights* 5. See also Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2001) 20 *Berkeley Journal of International Law* 45 at 54 ('A review of the history and focus of the transnational enterprise demonstrates that the multilayered, multinational division of labour and responsibility of the modern corporation, its single-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target.')

<sup>18</sup> See EarthRights International, 'In Our Court: ATCA, Sosa and the Triumph of Human Rights', July 2004, online: EarthRights International, <<http://www.earthrights.org/publication/our-court-atca-sosa-and-triumph-human-rights>>; Human Rights Watch, 'Defend the Alien Tort Claims Act', online: Human Rights Watch, <<http://www.hrw.org/campaigns/atca/>>; Jim Lobe, 'Attorney-General Attacks Key Law', 15 May 2003, online: Inter Press Service, <<http://www.ipsnews.net/interna.asp?idnews=18218>>.

the US-UK invasion of Iraq and the ousting of President Saddam Hussein, President Bush issued Executive Order 13303 immunising US corporations from any suit arising from any activity, including environmental damage and human rights violations, undertaken by a US corporation in furtherance of the Iraq invasion.<sup>19</sup> The order prevented lawsuits by US citizens against corporations and precluded foreigners from invoking the statute. Such acts of corporate protectionism by Western countries symbolize, arguably, the extent of the influence of TNCs even within their home countries.

### **B. The Current State of International Law**

The current state of international law offers little to no assistance to victims of corporate human rights abuses in developing countries without effective accountability mechanisms. Traditionally, international law applies to States alone, although, since the Nuremberg trials that followed World War II, international law has been held to apply also to individuals.<sup>20</sup> All other non-State actors, such as corporations, are still held to relate indirectly with international law via their national governments.<sup>21</sup> Attempts by victims of egregious corporate human rights abuses to frame their claims in terms of international law violations always meet with the almost insurmountable challenge that corporations are 'incapable of violating international law' or 'cannot be held accountable for international law violations' – depending on the intellectual sensitivity of the particular challenger. In a 2008 report to the UN Human Rights Council, Professor John Ruggie noted that the international community had yet to adapt the human rights regime to protect individuals and communities against corporate human rights abuses.<sup>22</sup> He decried the 'governance gap created by globalization' as 'the root cause of the business and human rights predicament today.'<sup>23</sup> Thus while the international community condemns violations of international fundamental norms, 'it provides limited effective remedies for individual victims of [those violations].'<sup>24</sup> Yet the need for accountability is readily apparent and compelling. As Professor Naomi Roht-Arriaza puts it, '[a]ccountability [for corporate human rights violations] is now routinely demanded ... in part due to a recognition that the seeds of future violations are sown, in part, in the failure to come to terms with past cycles of violations.'<sup>25</sup> Necessity jurisdiction may have partially come to the rescue.

### **C. Existing Jurisdictional Doctrines**

Beyond executive efforts by home-countries to block corporate accountability for human rights violations committed by their corporations in developing countries, the aforementioned features of transnational corporate conduct have rendered existing jurisdictional doctrines ineffective to allow litigation in

<sup>19</sup> See Executive Order No 13303 Protecting Development Fund for Iraq and Certain Other Property in Which Iraq has an Interest, 22 May 2003, 68 Fed Reg, 31,931. See also R Khavari, 'Executive Order 13303: Is the Bush Administration Choosing Corporations over Human Rights Actions Instituted via the Alien Tort Claims Act?' (2006) 14(1) *Tulsa Journal of Comparative and International Law* 119 at 120; C.R. Kelly, 'The War on Jurisdiction: Troubling Questions about Executive Order 13303' (2004) 46 *Arizona Law Review* 483-517.

<sup>20</sup> See, eg, the decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T10, para 155 (Judgment of 10 Dec 1998); *The Nurnberg Trial (United States v Goering)*, 6 FRD 69, 110 (International Military Tribunal at Nuremberg 1946) (rejecting the argument that only States could be liable under international law and affirming that international law recognises individual responsibility); Robert H Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial (1946)* 20 Temp LQ 338 at 342; Brigadier General Telford Taylor, USA, Chief of Counsel for War Crimes, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No 10*, 15 August 1949, at 109 online: US Government, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_final-report.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf) ('[T]he major legal significance of the [Nuremberg] judgments lies, in my opinion, in those portions of the judgments dealing with the area of personal responsibility for international law crimes.'). The establishment of the ICC with jurisdiction to prosecute individuals suspected to have committed crimes of serious concern to the international community is the high point of the recognition of individual responsibility in international law.

<sup>21</sup> Some scholars, however, have challenged this orthodox notion of international law. For instance, Myres S McDougal and Gertrude CK Leighton argue that the notion that international law deals only with relations among states is a 'nineteenth century canard': Myres S McDougal & Gertrude CK Leighton, 'The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action' (1949) 59(1) *Yale Law Journal* 74. And Philip Jessup has contended that recent developments have made the notion no longer true: Philip Jessup, *A Modern Law of Nations: An Introduction* (New York: Macmillan, 1948) 15-16.

<sup>22</sup> See John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Human Rights Council, Eight Session, A/HRC/8/5, p 3 at para 1, 7 April 2008, online: UN Global Compact, <[http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Human\\_Rights\\_Working\\_Group/29Apr08\\_7\\_Report\\_of\\_SRSG\\_to\\_HRC.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf)>.

<sup>23</sup> *ibid*, para 3.

<sup>24</sup> Anne C McConville, 'Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality' in Craig Scott, (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Portland: Hart Publishing, 2001) at 161 (hereinafter 'McConville').

<sup>25</sup> Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59:4 *Law and Contemporary Problems* 93.

the courts of home-countries. First, jurisdiction is traditionally based on territorial considerations aimed at establishing the existence of some link between the forum country and the dispute. Depending on the jurisdiction, such link is described as 'a real and substantial connection'<sup>26</sup> or as 'minimum contacts'<sup>27</sup> between the dispute and the forum seized. The connection or contacts may relate to the subject matter of the litigation (the tort, contract or the property that is the subject matter of the litigation) or to the parties (especially the defendant). But what exactly amounts to the requisite connection depends on the specific facts of each case. The rules serve as a check upon excessive jurisdiction. In some jurisdictions, such as Canada and the US, they are regarded as constitutional imperatives, preventing courts and legislatures from derogating from them.<sup>28</sup>

In addition, there are other jurisdictional standards that are usually considered independently of the above connection tests, although they do reflect the spirit of the tests. Especially in common law jurisdictions, the presence of the defendant within the forum, consent or attornment to the jurisdiction of the forum court, can serve as independent bases of (*in personam*) jurisdiction. In some civil law jurisdictions, such as France, jurisdiction is tied to the nationality of the parties, especially that of the defendant.<sup>29</sup> In many other civil law countries, such as Austria,<sup>30</sup> Germany,<sup>31</sup> Denmark,<sup>32</sup> Sweden<sup>33</sup> and Switzerland,<sup>34</sup> it is even tied to the existence of the defendant's property within the forum. The rules thus differ jurisdiction to jurisdiction.

Some regional treaties have however been created to establish uniform jurisdictional rules for the State parties to them. There is, for instance and perhaps most notably, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Regulation)<sup>35</sup> which applies to EU member States. Difficulties encountered in the recognition and enforcement of foreign judgments due to differing jurisdictional rules between national borders necessitated the emergence of the regulation. The effect of the differing rules was that States denied recognition and enforcement to foreign judgments that

<sup>26</sup> *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (Canada) (hereinafter 'Morguard').

<sup>27</sup> *International Shoe Co v Washington*, 326 US 310 (1945) (US).

<sup>28</sup> In Canada, it is traced to s 92 of the Constitution Act, 1867, 30 & 31 Vict, c 3. See *Hunt v T & N Plc* (1993), 109 DLR (4th) 16. In the US it is traced to the Due Process Clause of the Fourteenth Amendment.

<sup>29</sup> French Civil Code, Article 14.

<sup>30</sup> Lothar Hoffman, 'Austria' in Christian Campbell, (ed.), *International Civil Procedure*, vol 1 (Salzburg: Yorkhill Law Publishing, 2007) at 24 (citing s 99 of Jurisdiktionsnorm) (provided the defendant's property within the Austrian forum is not unduly smaller than the amount in dispute). An Austrian court has taken jurisdiction over a French skier based on the skier having left his underwear in his hotel room in Austria. Christopher B Kuner, 'Personal Jurisdiction Based on Defendant's Property in German law: Past, Present and Future' (1992) 5(2) *Transnational Law* 691 at 693 n 4 (citing Jan Kropholler, 'International Zuständigkeit' in 1 *Hanbuch Des Internationalen Zivilverfahrensrechts* 183, 320 n 681 (1982)).

<sup>31</sup> Under the doctrine of *Vermögensgerichtsstand*, defendant's ownership of property within a German forum was sufficient for the exercise of *in personam* jurisdiction over such defendant regardless of his place of domicile. Kuner, *ibid*, 692. This doctrine is codified in section 23 of the German Code of Civil Procedure 1877 that remains in force till date: 'For complaints asserting pecuniary claims against a person who has no domicile (*Wohnsitz*) within the country, the court of the district within which this person has property (*Vermögen*), or within which is found the object claimed by the complainant, has jurisdiction.' Under this provision, jurisdiction is not limited to claims having some nexus with the property that is the basis of jurisdiction. Jurisdiction may be asserted against any defendant, natural or legal person. The plaintiff may be German or foreign and need not be domiciled in Germany. Once jurisdiction is established, it continues to inhere in the court even if the defendant ceases to have property in the German forum. The value of the property need not correspond in any particular relation to the value of the claim. Property may be a physical object, debt or some other claim to property or performance but must have an independent value, 'some sort of monetary value on the open market'. Even a debt owed a defendant suffices even though it may not lead to actual payment and even if it is the plaintiff that owes the debt. However, the defendant's property must be owned in good faith, so that, for example, the plaintiff may not rely on the defendant's claim for costs following a previous lawsuit dismissed with costs. See Kuner, *ibid*, 695-700 (observing that the expansive nature of *Vermögensgerichtsstand* has led to controversial decisions).

<sup>32</sup> Danish Law on Civil Procedure, Article 248.

<sup>33</sup> Under the famous 'Swedish Umbrella Rule', a Swedish court can assume jurisdiction based on the presence of the defendant's property within the Swedish forum. Hans Smit, 'Common and Civil Law Rules of *In Personam* Adjudicatory Authority: An Analysis of Underlying Policies' (1972) 21 *International and Comparative Law Quarterly* 335 (observing that '[t]he danger of leaving one's umbrella in Sweden is known the world over. For if a non-resident leaves his umbrella in Sweden, he creates the authority for a Swedish court to cast him in a personal judgment for a debt obligation in any amount.')

<sup>34</sup> Swiss Federal Code on Private International Law, 1987, 8 December 1987: 'If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction.'

<sup>35</sup> OJ L351/1, 20 December 2012. This Regulation modified the EU Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12, 16 January 2001, which itself replaced the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 8 ILM 229 (1969).

arose from jurisdictional assumptions that were based on standards that were inconsistent with the jurisdictional standards of the recognising State. As one scholar puts it, this had the practical effect of 'one hand taking back what the other hand conferred.'<sup>36</sup> To ensure 'decisional harmony', 'predictable and easily administered jurisdictional norms' and 'free movement of judgments'<sup>37</sup> regional jurisdictional rules were conceived. The collapse of negotiations of the Hague Conference on Private International Law for a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters<sup>38</sup> thwarted international efforts to create a treaty with world-wide application.

Brussels I Regulation established the defendant's domicile as the primary jurisdictional standard.<sup>39</sup> This is regardless of the defendant's nationality and regardless of the plaintiff's domicile. But a member State reserves the right to assert jurisdiction, in accordance with its national law, over a defendant who is not domiciled within its territory.<sup>40</sup> In cases of multiple defendants, jurisdiction over one defendant automatically confers on the court jurisdiction over all the other defendants, provided there is a close relationship among the claims against the defendants, rendering it pragmatic to adjudicate all the claims together to avoid the risk of conflicting decisions from separate proceedings.<sup>41</sup> Jurisdiction over original proceedings equally triggers jurisdiction to adjudicate third party proceedings relating to the same facts.<sup>42</sup> The same applies to counterclaims.<sup>43</sup> In situations where there are parallel proceedings, however, the first-seized rule applies, enabling the court first-seized of jurisdiction to take precedence over the court later seized.<sup>44</sup>

Besides domicile, alternative bases of jurisdiction are established under Article 7 of the Regulation. In matters relating to contracts, the court of the member State where the contract is to be performed is the valid jurisdictional forum.<sup>45</sup> In matters relating to tort, the court of the member State on whose territory the wrong occurred has jurisdiction, provided the defendant is domiciled in the territory of a member State.<sup>46</sup> Where the civil claim relates to an act over which a court is exercising criminal jurisdiction, the same court can assert jurisdiction over the civil claim as well.<sup>47</sup>

But these jurisdictional rules have not always met the dictates of justice. In an increasing number of cases, strict adherence to them has resulted in denials of access to justice. Such denials violate fundamental international principles of justice. Article 6(1) of the ECHR, for instance, provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. This provision has been construed as granting a right of access to justice or a right of access to a court.<sup>48</sup> The provision speaks to the need for exceptional jurisdictional policies that, serving as safety valves, cater for cases in which the established jurisdictional standards would be unworkable from an access-to-justice standpoint. Jurisdiction by necessity may represent such a safety valve.

<sup>36</sup> Stephen B Burbank, 'Jurisdictional Equilibrium, The Proposed Hague Convention and Progress in National Law' (2001) 49 Am J Comp L 203 at 216.

<sup>37</sup> Arthur T von Mehren, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?' (2001) 49 American Journal of Comparative Law 191 at 194 (hereinafter Mehren, 'Drafting a Convention International Jurisdiction').

<sup>38</sup> See the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 30 October 1999, Prel Doc No 11 (August 2000), online: Hague Conference on Private International Law, <[http://www.hcch.net/upload/wop/jdgm\\_pd26e.pdf](http://www.hcch.net/upload/wop/jdgm_pd26e.pdf)> (last accessed 18 May 2011) For a history of the negotiations, see Mehren, 'Drafting a Convention International Jurisdiction' (n 37) 191-202 (observing, at 195, that the negotiations failed due to fundamental differences in the views of the negotiating states (in particular, between the US and European Union states) regarding a range of issues, including, in particular, the role of adjudication in modern society). There is also the 2005 Hague Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294 (2005), which, though not yet into force and which focuses on exclusive jurisdiction clauses, has a section (Article 8) on recognition and enforcement of foreign judgments resulting from such clauses.

<sup>39</sup> Brussels I Regulation (n 35) Article 4(1).

<sup>40</sup> *ibid*, Article 4(2).

<sup>41</sup> *ibid*, Article 8 (1).

<sup>42</sup> *ibid*, Article 8(2).

<sup>43</sup> *ibid*, Article 8(3).

<sup>44</sup> *ibid*, Articles 29-32. The court later seized is required to stay its proceedings until the court first-seized has determined its jurisdiction. Where the court first seized has determined that it has jurisdiction, the court later seized shall decline jurisdiction. But this rule applies only as between courts of member States. Where one of the proceedings is in a court of a non-member State, the national rule of the court of the member State applies.

<sup>45</sup> *ibid*, Article 7(1)(a).

<sup>46</sup> *ibid*, Article 7(2).

<sup>47</sup> *ibid*, Article 7(3).

<sup>48</sup> *Airey v Ireland*, 32 Eur Ct HR Ser A (1979). See also JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 International Criminal Law Report 1 at 2.

Indeed, Canadian courts have explicitly recognized the inadequacy of the real and substantial connection test to meet the demands of justice in civil proceedings for extraterritorial human rights violations. In *Bouzari v Islamic Republic of Iran*<sup>49</sup> – a case in which the plaintiff claimed to have been tortured in Iran by the Islamic Republic of Iran – the Ontario Court of Appeal found that Iran had no connection with Ontario beyond its diplomatic presence. Finding that this did not suffice for jurisdiction under the real and substantial connection test, the Court looked to international law and found ‘no broadly shared international practice among states to assume jurisdiction over civil actions in similar circumstances.’<sup>50</sup> The Court then opined:

[36] [T]here are several circumstances that make the presumptive conclusion of no jurisdiction troubling. First, the action is based on torture by a foreign state, which is a violation of both international human rights and peremptory norms of public international law. As the perpetrator, Iran, has eliminated itself as a possible forum, although it otherwise would be the most logical jurisdiction. This would seem to diminish significantly the importance of any unfairness to the defendant due to its lack of connection to Ontario.

[37] Second, if Ontario does not take jurisdiction, the appellant will be left without a place to sue. Given that the appellant is now connected to Ontario by his citizenship, the requirement of fairness that underpins the real and substantial connection test would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere.<sup>51</sup>

The Court did not however proceed to determine how the real and substantial connection test should be applied to meet the requirements of justice and fairness that are embedded in it, because the doctrine of state immunity would bar suit against Iran in any case. But the above statements speak clearly to the need for something more in jurisdictional considerations to meet the demands of justice in transnational human rights cases. As McConville has argued, ‘[t]ransnational human rights torts litigation ... does not easily fit into the framework of territorial jurisdiction.’<sup>52</sup> Although the *Bouzari* case involved a State defendant, rather than a corporate defendant, cases involving corporate defendants present similar – perhaps even more – jurisdictional difficulties (with the exception of the doctrine of immunity).

In 2010, the Ontario Court of Appeal took the matter further. In *Van Breda v Village Resorts Ltd*<sup>53</sup> – a consolidated appeal from two separate tort claims for damages for personal injury suffered by Canadian tourists during scuba diving accidents that occurred when they were vacationing at resorts in Cuba – the Court explicitly recognised the inadequacy of the real and substantial connection test and went on not only to reformulate the doctrine to meet the demands of justice, but also to adopt the doctrine of ‘forum of necessity’ as a jurisdictional corrective applicable to cases ‘where there is no other forum in which the plaintiff could reasonably seek relief’.<sup>54</sup> The Court wrote:

The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace ‘forum of last resort’ cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.<sup>55</sup>

This acknowledgement marked a remarkable development in the law of jurisdiction in Ontario. Although on appeal, the Supreme Court declined to pronounce on the doctrine’s validity within the Canadian legal system because the case was not argued on that term, this has not restrained the courts of other provinces

<sup>49</sup> (2004) 71 OR (3d) 675 (hereinafter ‘*Bouzari*’).

<sup>50</sup> *ibid*, para 35.

<sup>51</sup> *ibid*, paras 36 and 37.

<sup>52</sup> McConville (n 24) 165.

<sup>53</sup> (2010), 98 OR (3d) 721 (hereinafter ‘*Van Breda*’).

<sup>54</sup> *ibid*, para 54.

<sup>55</sup> *ibid*, para 100.

from citing the decision, usually with explicit approval.<sup>56</sup> A leading Canadian scholar has stated: '[a] flexible approach to jurisdiction that takes into account and gives appropriate weight to the particular subject matter of the proceedings and that does not insist on direct territorial connections in cases where none could ever exist is surely a welcomed development.'<sup>57</sup> Jurisdiction by necessity may fulfill this important role.

### III. The Provenance of the Doctrine of Jurisdiction by Necessity

The provenance of the doctrine of jurisdiction by necessity is credited to civil law traditions, although there is some probability that the doctrine appeared at an earlier time in US jurisprudence than it did in the law or jurisprudence of any other country.<sup>58</sup> The doctrine has roots in Article 6(1) of the ECHR which establishes a right of access to justice. Early adoptions of the doctrine were not based on statutory authority. In the Netherlands, for instance, where the doctrine was statutorily adopted at a relatively early time, even before the statutory adoption Dutch courts avoided jurisdictional injustices by extensively interpreting jurisdictional statutes 'or by assuming jurisdiction as *forum necessitatis*', where there was a sufficient connection with the Netherlands.<sup>59</sup> The doctrine's first formal adoption may be found in the 1985 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, Article 2 of which provides:

The requirements for jurisdiction in the international sphere shall also be deemed to be satisfied if, in the opinion of the judicial or other adjudicatory authority of the State Party in which the judgment is to be given effect, the judicial or other adjudicatory authority that rendered the judgment assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority.<sup>60</sup>

Switzerland was among the first countries to statutorily adopt the doctrine. Article 3 of its Federal Code on Private International Law provides: 'If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction.' In 1991, it was adopted under Article 3136 of the Civil Code of Quebec<sup>61</sup> (Canada), and in the late 1990s and early 2000s, a number of Canadian common law provinces adopted it under the Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA).<sup>62</sup> Some of the provinces that have yet to adopt the UCJPTA have referred approvingly to the doctrine. In Ontario, for instance, the Court of Appeal referred to the doctrine in *Van Breda* as 'a significant jurisdictional doctrine'<sup>63</sup> and explicitly recognised it as a residual basis for assuming jurisdiction in the absence of the real and substantial connection test and as an exception to it.<sup>64</sup> Other jurisdictions where the doctrine has been adopted, either implicitly through case law or

<sup>56</sup> See, eg, *Piscadda Mining Construction International Inc v Crew Gold Corp*, 2011 YKSC 79 at paras 59-60 (Yukon Territory); *Ayles v Arsenault*, 2011 ABQB 493 at paras 32-33 (Alberta); *Sears Canada Inc v C & S Interior Designs Ltd*, 2012 ABQB 573 at para 15 (Alberta); *Fewer v Ellis*, 2011 NLCA 17 at paras 45-46 (Newfoundland and Labrador).

<sup>57</sup> François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicatory Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010) at 173.

<sup>58</sup> See Chilene Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) 47:1 UBC Law Review (Forthcoming) (hereinafter 'Nwapi') (exploring the early emanations of the doctrine, and suggesting that the application of the doctrine may be read into the 1950 US Supreme Court decision in *Mullane v Central Hanover Bank and Trust Co*, 339 US 306 (1950) and a few other subsequent cases).

<sup>59</sup> Mirjam Freudenthal & Frans van der Velden, 'The Netherlands' in JJ Fawcett, ed, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Athens, August 1994 (Oxford: Oxford University Press, 1995) 321 at 322, footnote 3 (citing a 1984 case, HR, 26 October 1984 [1985] NJ 696 as an example).

<sup>60</sup> 24 May 1984, 24 ILM 468 (1985).

<sup>61</sup> 8 December 1987.

<sup>62</sup> The provinces that have adopted it include Prince Edward Island (PEI) in late 1997: *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, s 23 (although the statute has not yet come into force, but it will come into force on a date to be announced by the provincial cabinet, which has not yet been announced); the Yukon Territory in 2000: *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 64a 3136, where, like PEI, the statute has also not yet come into force; British Columbia in early 2003: *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; and Nova Scotia in late 2003: *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2. In Alberta and Manitoba, their law reform commissions have recommended the adoption of the doctrine but the recommendations have not yet been implemented. Saskatchewan was the first province to adopt the UCJPTA, but did not adopt the necessity jurisdiction provision of the Act.

<sup>63</sup> (n 53) para 54.

<sup>64</sup> *ibid*, para 100. As noted earlier, when the case reached the Supreme Court of Canada, the Court declined to consider the doctrine's validity within the Canadian legal framework because the appeal was not argued on necessity jurisdiction. Had it been so argued, the Court would not only have decided whether without legislative authority, Ontario courts could assume necessity jurisdiction,



explicitly by statute include: Belgium,<sup>65</sup> Mexico,<sup>66</sup> the Netherlands,<sup>67</sup> Uruguay,<sup>68</sup> Argentina, Austria, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, and Turkey.<sup>69</sup> In the UK, the following statement of the Privy Council in *AK Investments CJSC v Kyrgyz Mobil*<sup>70</sup> speaks to the application of the doctrine:

But the practical reality of the matter is that if the KFG Companies are confined to their remedies against the Appellants in Kyrgyzstan they will not in fact be able to pursue any of their claims there. Consequently, although this is in form a case about the appropriate forum, in reality it is a case in which, if the Isle of Man is not the appropriate forum, the KFG Companies will have no practical remedy at all.<sup>71</sup>

A 2007 study commissioned by the EU to provide a comparative analysis of residual jurisdiction in the twenty-seven EU member States and to recommend ways of harmonising the rules reported that in States where there was no basis (case law or statutory) for assuming jurisdiction by necessity, jurisdiction by necessity would not automatically be denied should an appropriate case come before them. The study noted that some national reporters believed that while there was no statute or case law in their countries adopting jurisdiction by necessity, there was no theoretical basis to say that a party would be denied access to a court if access to a court was essential to uphold his/her rights.<sup>72</sup> The study concluded that jurisdiction by necessity was a 'general principle of public international law'.<sup>73</sup>

At the regional level, the doctrine is explicitly adopted in the EU Council Regulation (EC) No 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations,<sup>74</sup> Article 7 of which provides:

Where no court of a Member State has jurisdiction pursuant to [the Regulation] the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.

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but also whether even with legislative adoption, the doctrine would have passed a constitutional test, given the constitutionalisation of jurisdiction in Canadian private international law. See *Morguard* (n 26).

<sup>65</sup> Article 11 of Belgian Code of Private International Law Code, 15 July 2004, states: 'Notwithstanding the other provisions of the present statute, the Belgian courts will exceptionally have jurisdiction when the subject matter presents close connections with Belgium and proceedings abroad seem impossible or when it would be unreasonable to demand that the action be brought abroad.'

<sup>66</sup> See Jorge A Vargas, 'Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure' (1994) 14:2 *Northwestern Journal of International Law and Business* 376 at 392 (citing Mexican Federal Civil Procedure Code, 2008, Article 565).

<sup>67</sup> Article 9 of the Dutch Code of Civil Procedure, 2002, provides: When Articles 2 up to and including 8 indicate that Dutch courts have no jurisdiction, then they nevertheless have if: (a) the case concerns a legal relationship that only affects the interests of the involved parties themselves and the defendant or a party with an interest in the legal proceedings has appeared in court, not exclusively or with the intention to dispute the jurisdiction of the Dutch court, unless there is no reasonable interest to conclude that the Dutch court has jurisdiction; (b) a civil case outside the Netherlands appears to be impossible; or (c) the legal proceedings, which are to be initiated by a writ of summons, have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court.

<sup>68</sup> Uruguay Private International Law Act 2009, Article 56(8).

<sup>69</sup> See Mario JA Oyarzábal, 'Jurisdiction over International Electronic Contracts: A View on Inter-American, Mercosur, and Argentine Rules' (2005) 19 *Temple International and Comparative Law Journal* 87 at 95; Julian Feichtinger & Karin Lehner, 'Comparative Study of 'Residual Jurisdiction' in Civil and Commercial Disputes in the EU: National Reporter: Austria', (2006) p 11, online: EU, <[http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_austria\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_austria_en.pdf)>; and Ubertazzi, 'Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law' (2011) 15:2 *Marquette IP L Rev* 357 at 387-388. In Finland, it is 'somewhat unclear' whether jurisdiction by necessity is a valid ground for jurisdiction. But it is believed in Finland that a Finnish court can assume jurisdiction on the basis of the absence of a valid forum abroad. Juci Ikonen, 'Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU: National Report for: Finland', (2006) p 8, online: EU, <[http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_finland\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_finland_en.pdf)>.

<sup>70</sup> [2011] UKPC 7.

<sup>71</sup> *ibid*, para 6.

<sup>72</sup> Arnaud Nuyts, 'Study of Residual Jurisdiction: Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations', 3 September 2007 at 64, online: EC, <[http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf)> (hereinafter 'Nuyts').

<sup>73</sup> *ibid*, 64.

<sup>74</sup> 18 December 2008, 2009 OJ (L7/8).

The doctrine has also been included in a proposed EU regulation that seeks to establish uniform rules throughout Europe for the regulation of matrimonial property proceedings.<sup>75</sup> Article 7 of the proposal provides: 'Where no court of a Member State has jurisdiction under [the Regulation], the courts of a Member State may, exceptionally and if the case has a sufficient connection with that Member State, rule on a matrimonial property regime case if proceedings would be impossible or cannot reasonably be brought or conducted in a third State.'<sup>76</sup> Lastly, the doctrine's adoption was included in the proposed recast of Brussels I Regulation but was deleted in the version that was finally agreed to by the member States.<sup>77</sup> It has been suggested that the earlier inclusion in, and subsequent deletion from, the recast Regulation does not destroy the view that the doctrine is not incompatible with international law.<sup>78</sup> Rather, the obligatory nature of the Regulation might have worried member States that have not yet adopted the doctrine.<sup>79</sup>

#### IV. Analysis of the Doctrine and its Application to Transnational Corporate Wrongs

The jurisdictions where the doctrine has been adopted may be divided into three categories: (1) those explicitly requiring some connection between the dispute and the forum; (2) those that are silent on the requirement of a connection; (3) and those in which absence of fair trial, even though not explicitly contained in the relevant statute, has already been recognised in case law as a basis for the exercise of jurisdiction under the doctrine. Of note, no case has been found in which absence of fair trial was, as a matter of principle, rejected as a basis. These categories of jurisdictions all have identified three common elements: (1) the absence of jurisdiction in the forum court; (2) the impossibility of the plaintiff bringing proceedings abroad; and (3) the reasonableness of requiring the plaintiff to bring the proceedings abroad. Article 3136 of the Civil Code of Quebec belongs to the first category. It states:

Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required.

To the second category – silence on a connection requirement – belong the common law provinces of Canada that have adopted the CJPTA. Section 6 thereof provides:

A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that (a) there is no court outside British Columbia in which the plaintiff can commence the proceedings, or (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

In this category of jurisdictions, it is doubtful that the courts would fail to insist on the existence of some connection with the forum.<sup>80</sup> In both Belgium and the Netherlands, although their Codes do not explicitly recognise absence of fair trial as a valid basis for necessity jurisdiction, their courts have read absence of

<sup>75</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition of decisions in matters of matrimonial property regimes' COM (2011) 126 of 16 March 2011.

<sup>76</sup> For a review of the proposed regulation, see CMV Clarkson, 'Matrimonial Property: The Proposed EU Regulation' (2011) 17: 9 *Trusts and Trustees* 846-854.

<sup>77</sup> Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 20 December 2012, OJ L 351.

<sup>78</sup> Nwapi (n 58).

<sup>79</sup> *ibid.*

<sup>80</sup> Commenting on the absence of a connection requirement in section 6 of the Canadian CJPTA and relating it to the requirement of a sufficient connection under the Civil Code of Quebec, Black, Pitel and Sobkin opine that the drafters of the CJPTA might have thought that the requirement of a connection was implicit in section 6 of the CJPTA. To them, it cannot be assumed that the section was intended to create 'unrestricted authority to hear a case whenever the court was satisfied it was appropriate to do so.' An alternative explanation, according to them is that the drafters might have thought that in light of the connection requirements of the real and substantial connection test, inclusion of a connection requirement under the section, which was intended to provide a distinct basis of jurisdiction from the real and substantial connection test, might 'confuse the analysis' and distract attention from the primary focus of the section, which is to avoid a denial of access to justice. They offer a third alternative, which is that the drafters might have intended that no connection was required. They consider this alternative 'unlikely' because it would go against the caution issued by the Supreme Court of Canada against unrestrained jurisdictional assertions, and favour the first alternative which considers the requirement of some connection implicit in the section. Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 164-165.

fair trial into their Codes.<sup>81</sup> Both Codes also contain a requirement of some connection with their territory. However, it is doubtful that, in jurisdictions where absence of fair trial has not been considered, their courts would reject the absence of fair trial in the foreign forum as a valid basis for jurisdiction under the doctrine. Granted, the degree of unfairness of trial that is likely to be considered sufficient to warrant assertion of necessity jurisdiction may vary from jurisdiction to jurisdiction.

Five elements of the doctrine thus emerge. Stated in more logical order, they include: (1) the absence of jurisdiction in the forum seized of the matter; (2) the requirement of some connection with that forum; (3) the impossibility of bringing the proceedings in the forum with jurisdiction; (4) the reasonableness of requiring that the proceedings be brought in the forum with jurisdiction; and (5) the absence of fair trial in the foreign forum. The first element may be regarded as an indicium (rather than a requirement as such of the doctrine) in that it is a circumstance which tends to suggest that the application of the doctrine is likely, or, perhaps put more accurately, which prompts thoughts about the possible application of the doctrine in order to avoid a denial of justice. The other elements are not to be regarded as mere indicia of the doctrine but as requirements that the plaintiff must establish before the court can ultimately invoke the doctrine. As will be seen in the discussion that follows, these requirements are not to be cumulatively present before the court can apply the doctrine, except of course the second element – the requirement of some connection with the forum, which must be shown to exist – particularly in jurisdictions where it is explicitly required – before the court can apply the doctrine and before even any of the remaining three elements can be considered. Thus, where elements (1) and (2) are present, the presence of either (3), (4) or (5) can ground the assumption of jurisdiction by necessity. The relationship of these elements to the doctrine is that they are intended to show that refusal to adjudicate the action would result in an unacceptable denial of access to justice. The most basic of all the elements is the first element – the absence of jurisdiction in the forum seized of the matter – and it would be easy to apply because the plaintiff asking the court to invoke jurisdiction by necessity would be implicitly conceding that the court lacks jurisdiction in the matter. It would be inconceivable that the defendant would insist that the court has jurisdiction and should not even consider jurisdiction by necessity. Thus, arguably, the ‘absence of jurisdiction’ referred to therein relates to the absence of ordinary or normal jurisdiction to adjudicate the dispute based on well-established jurisdictional rules. It cannot relate to absence of jurisdiction by necessity. This first element of the doctrine is thus non-contentious and does not require further discussion. The following discussion therefore addresses the other four elements.

### **A. The Requirement of a Connection with the Forum**

The national statutes explicitly requiring a connection with the forum have used such concepts as ‘sufficiently connected’,<sup>82</sup> ‘sufficient connection’,<sup>83</sup> ‘close connections’,<sup>84</sup> ‘adequate relation’,<sup>85</sup> or ‘strong linking factor’.<sup>86</sup> But they do not define what constitutes such connections. Nuyts writes that in Belgium, the ‘close contacts’ requirement is not applied stringently.<sup>87</sup> The Belgian nationality or domiciliary or habitual residence of the plaintiff satisfies the requirement, as do cases where the parties have assets in Belgium.<sup>88</sup> In jurisdictions, such as France, Austria and Germany, where assets in the province constitute a valid ground for jurisdiction, the existence of such assets would obviate the need to consider necessity jurisdiction. In Austria, there is an explicit requirement that the plaintiff be an Austrian national, domiciliary or resident.<sup>89</sup> In Quebec, because the doctrine applies as an exception to the real and substantial connection test due to ‘the impossibility of having access to a foreign court *in a litigation that has a sufficient link with Québec*’,<sup>90</sup> a ‘sufficient connection’ with Quebec must be understood as a lesser degree of connection than the real and substantial connection test requires. This must be so because the Quebec Code permits jurisdiction ‘even though a Quebec authority has no jurisdiction to hear a dispute’. The requirement of a ‘sufficient connection’ may thus not be applied stringently, as otherwise, jurisdiction by necessity may become indistinguish-

<sup>81</sup> Nuyts (n 72).

<sup>82</sup> Swiss Federal Code of Civil Procedure (n 25).

<sup>83</sup> Civil Code of Quebec (n 58) Art 3136; Dutch Code (n 64).

<sup>84</sup> Belgian Code of Private International Law (n 62).

<sup>85</sup> This is the case in Poland. See Nuyts (n 72), 66.

<sup>86</sup> This is the case in Portugal. See Nuyts, *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> *Lamborghini (Canada) Inc v Automobili Lamborghini SPA*, [1997] RJQ 58 at para 48 (*italics mine*) (hereinafter ‘Lamborghini’).

able from the real and substantial connection test. Hence, it has been suggested that temporary residence of one of the parties in Quebec, or the fact that 'a juridical act is to be used here,' or the existence of any of the parties' property in Quebec, may supply the required 'sufficient connection'.<sup>91</sup> What is not clear, however, is whether the residence or property in the forum must be shown to have existed when the cause of action arose. Given the exceptional nature of the doctrine, however, and the fact that the doctrine aims at avoiding a denial of access to a court, it would appear that a cause of action threshold would not be required.

Applying this to litigations concerning transnational corporate wrongs, the plaintiffs can establish that the action has a connection with the chosen forum by showing that any of the plaintiffs resides within the forum. A majority of the transnational human rights cases that have been litigated against corporations have this feature.<sup>92</sup> The existence of the corporation's parent or subsidiary within the forum may also supply the needed connection even if that parent or subsidiary is not implicated in the alleged violations. Normal jurisdictional doctrines would generally not regard the mere existence of the corporation's parent or subsidiary in the forum as a sufficient link where the parent or subsidiary is not also implicated in the violations,<sup>93</sup> but there is no reason why a court should not regard it as sufficient for the purpose of asserting jurisdiction by necessity, as a stronger link would most likely give the court normal jurisdiction and thereby render jurisdiction by necessity unnecessary.

### **B. Impossibility of Bringing Proceedings Abroad**

None of the statutes adopting jurisdiction by necessity define the meaning of impossibility of bringing proceedings abroad. It is therefore not clear whether it refers to legal impossibility or to practical impossibility or to both. In the absence of statutory clarification, the general practice has been to interpret impossibility as both legal impossibility and practical impossibility.<sup>94</sup> But given the existence of the fourth element – the reasonableness of requiring proceedings abroad – it makes more sense to regard this element as speaking to legal impossibility alone, as otherwise the two elements will inextricably overlap. Thus, in *Anvil* – a case involving allegations of human rights abuses in the Democratic Republic of Congo by a company incorporated under the laws of the Northwest Territories of Canada but with its headquarters in Australia – the Quebec Court of Appeal rejected the plaintiff's claim that difficulties in getting Australian lawyers to take up the case in Australia met the impossibility requirement.<sup>95</sup>

It has been suggested that legal impossibility arises 'where no foreign court has jurisdiction,' or where 'only a court which has annulled a clause choosing the forum' has jurisdiction,<sup>96</sup> or 'when there is a legal obstacle to accessing the foreign court'<sup>97</sup> or when 'the foreign court lacks jurisdiction under the foreign law or has already dismissed the claim for lack of jurisdiction'.<sup>98</sup> In Germany and, debatably, in France, the fact that the foreign judgment is unenforceable in the forum has been accepted as a valid ground.<sup>99</sup> But a court cannot decide that it is not impossible to bring the action elsewhere simply by showing that another forum might exercise necessity jurisdiction. In other words, the existence of necessity jurisdiction in another forum cannot defeat the successful application of the impossibility element.

Legal impossibility would also include cases where the claim is non-justiciable in the forum that otherwise has jurisdiction. The non-justiciability could be due to the existence of a legal immunity protecting the defendant from liability. Cases in which particular types of claims are ousted from the jurisdiction of the courts in the foreign forum are also included. In the former case, however, policy considerations might call

<sup>91</sup> JA Talpis & J-G Castel, 'Interpreting the Rules of Private International Law' in Reform of the Civil Code, vol 5B: Private International Law, translated by Me Susan Altschul, (Montreal: Barreau du Quebec and the Chambre des notaires du Quebec, 1993) 1 at 55.

<sup>92</sup> For instance, in *Wiwa v Royal Dutch Petroleum*, 226 F 3d 88 (2d Cir 2000) (US), the lead plaintiff was a Nigerian national who relocated to the US. In the Dutch case *Akpan v Royal Dutch Shell*, supra note 5, the second plaintiff was a corporate personality domiciled in Amsterdam. And in the Canadian case *Cambior*, the plaintiff was an organisation incorporated in Canada for the purpose of initiating the proceedings on behalf of the foreign victims of the alleged environmental disaster.

<sup>93</sup> In their application of the real and substantial connection test, for instance, Canadian courts routinely require a connection with the province where the proceedings are initiated. Such a connection may be provided by the occurrence of the activity or part thereof within the territory of the province, or by prima facie evidence that the Canadian arm of the corporation participated in the alleged foreign conduct. See, for instance, *Anvil Mining Ltd v Canadian Association Against Impunity*, 2012 QCCA 117 at para 85 (CanLII) (hereinafter 'Anvil') (holding that since "Anvil's activities in Quebec had absolutely nothing to do with 'complicity' to commit 'war crimes' or 'crimes against humanity' while operating a mine", Quebec lacked jurisdiction in the matter).

<sup>94</sup> McEvoy (n 1) 107.

<sup>95</sup> *Anvil* (n 93) paras 102-103.

<sup>96</sup> Talpis and J-G Castel (n 91).

<sup>97</sup> Nuyts (n 72) 65.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

for respect for certain immunity clauses, specifically, where the immunity clause was created as part of an amnesty mechanism – as was the case in *Phillips v Eyre*<sup>100</sup> – to promote peace in countries recovering from conflicts. Disregard of such clauses might do irreparable harm to such countries and cannot be regarded as consistent with international public policy.

Given the typical nature of transnational corporate wrongs litigation, the legal impossibility element is not likely to be relied upon, for it would rarely be the case that the country where the conduct occurred would lack jurisdiction in the matter or bar legal proceedings. It is to the ‘reasonableness of requiring proceedings abroad’ element that the plaintiffs would more likely turn.

### **C. The Reasonableness of Requiring Proceedings Abroad**

Unreasonableness has been expressed in different ways. In Belgium, requiring foreign proceedings must be considered ‘unreasonable’; in Austria, it must be ‘unacceptable’; in Portugal it must involve an ‘unreasonable difficulty’; and in Estonia the plaintiff ‘cannot be expected’ to bring proceedings in the foreign forum.<sup>101</sup> This requirement thus speaks to non-legal or practical difficulties in bringing the suit in the foreign forum. Minus those practical difficulties, there is no legal barrier to bringing the action in the foreign forum. Such practical difficulties must be so onerous that it would be unreasonable to require the plaintiff to bring the suit in that foreign forum. The problem then in the application of this element is how to determine what amounts to an unreasonable requirement.

An undoubted example is the existence of war or other violent conflicts in the foreign forum, causing a shutdown of the legal system or making it unsafe for the plaintiff to travel there to initiate the action. Such a situation constitutes a genuine obstacle rendering it unreasonable to require the plaintiff to risk his/her life to initiate the proceedings in the foreign forum. A plaintiff’s well-founded fear that he/she might be politically persecuted if found in that foreign forum, or might lose his/her life or be subjected to torture or other inhuman treatment if he/she is found there, should be respected. In a case of unlawful imprisonment and torture in Libya brought by a Libyan plaintiff in 2012 during the Libyan crisis that resulted in the killing of Muammar Gaddafi, a Dutch court held that in view of the situation in Libya, the plaintiff could not reasonably be required to bring the action in Libya.<sup>102</sup> It may also happen that asking the plaintiff to wait for the end of the war or conflict to bring the suit in the foreign forum might result in the suit becoming statute-barred under the laws of the foreign forum.

Also in *Solvochem v Rasheed Bank*,<sup>103</sup> the Hague Court of Appeal affirmed the Hague District Court’s assumption of jurisdiction in a case that should have been brought in Iraq, because at the time the claim was initiated in the Netherlands, the Dutch plaintiff could not have been expected to bring the action in Iraq at a time when the Iraqi crisis was still raging.

In *Kiefer v Canada (Minister of Justice)*, the Quebec Superior Court of Justice (Canada) stated that ‘[m]ere inconvenience’ is not enough.<sup>104</sup> In *Lamborghini*, the Court considered the relative inconvenience of accessing the foreign court as not meeting the reasonable requirement test.<sup>105</sup> In *Obégi v Kilani*,<sup>106</sup> the Ontario Superior Court of Justice (Canada) relied on the defendant’s ‘past conduct and ability to evade potential future obligations’<sup>107</sup> to rule that the plaintiff could not reasonably be required to bring proceedings abroad, although it found that the case met the requirements of the real and substantial connection test and so did not ultimately base its jurisdiction on necessity.

Other circumstances have been suggested: (1) the fact that the country is affected by natural disasters;<sup>108</sup> (2) where the exercise of jurisdiction in the foreign forum is ‘discretionary’;<sup>109</sup> (3) where ‘the defendant

<sup>100</sup> See, generally, *Phillips v Eyre* (1870), LR 6 QB 1 (UK).

<sup>101</sup> Nuyts (n 72) 65.

<sup>102</sup> See ‘Brief of Professor Alex-Geert Castermans (Leiden University), Professor Cees van Dam (Utrecht University), Dr. Liesbeth Enneking (Utrecht University), Dr. Nicola Jaegers (Tilburg University), Professor Menno Kamminga (Maastricht University), as Amici Curiae in support of the petitioners’, in *Kiobel v Royal Dutch*, 13 June 2012, No 10-1491, p 23-24, online: Chamber Litigation, <[http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Professor%20Alex-Geert%20Castermans%20et%20al.%20Supplemental%20Amicus%20Brief%20in%20Support%20of%20Petitioners%20--%20Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum%20REARGUMENT%20\(U.S.%20Supreme%20Court\).pdf](http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Professor%20Alex-Geert%20Castermans%20et%20al.%20Supplemental%20Amicus%20Brief%20in%20Support%20of%20Petitioners%20--%20Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum%20REARGUMENT%20(U.S.%20Supreme%20Court).pdf)>.

<sup>103</sup> High Court, November 30, 2010, ECLI:NL:GHSGR:2010:BO6529.

<sup>104</sup> 2012 QCCS 5655 at para 52 (CanLII).

<sup>105</sup> *Lamborghini* (n 90).

<sup>106</sup> 2011 ONSC 1636 (CanLII).

<sup>107</sup> *ibid*, para 116.

<sup>108</sup> According to Nuyts (n 69) 65, this is the case in the Netherlands.

<sup>109</sup> *Talpis and Castel* (n 91).

benefits from a certain immunity';<sup>110</sup> (4) where the plaintiff is 'a refugee who cannot act in the country he has fled';<sup>111</sup> (5) 'cases of superior force such as war';<sup>112</sup> (6) where there is a defect in the foreign proceedings, such as delay in the administration of justice, corrupt judiciary or an 'ideological imperative';<sup>113</sup> (7) where the remedy sought is 'specific to the domestic purposes' of the forum and 'an effective decision can be achieved by [that forum] alone';<sup>114</sup> (8) where 'an unacceptable risk' to the plaintiff is involved if he is to litigate in the foreign forum, and if the plaintiff is financially incapable of litigating the suit there.<sup>115</sup>

Some of the above suggestions are however problematic. For instance, where the foreign court's jurisdiction is discretionary, it is not clear how that makes it unreasonable to require the plaintiff to initiate the proceedings there. There is no reason to speculate on how the foreign court would exercise its discretion. The plaintiff should be required to give the foreign court an opportunity to exercise its discretion before it can be said that it would be unreasonable to require the plaintiff to initiate the suit in the foreign court. But even this would appear to give rise to a case of legal impossibility rather than practical impossibility to which the reasonable requirement test speaks, since, if the foreign court exercises its discretion negatively, it becomes legally impossible for the plaintiff to litigate there.<sup>116</sup> Similarly, where the defendant would benefit from a certain immunity in the foreign forum, it becomes a matter of legal impossibility rather than practical impossibility.<sup>117</sup> In addition, claims that the foreign judiciary is corrupt, or what McEvoy calls an 'ideological imperative' – such as in commercial transactions where the parties entered into a choice of court agreement in favour of a capitalist State that subsequently transformed into a Marxist State – may raise imperialism concerns where the foreign country is a former colony of any Western country.<sup>118</sup> Lastly, factors like delays in the administration of justice may create too low a threshold for the application of the doctrine.

In Belgium, the reasonableness requirement covers cases where fair trial is not guaranteed in the foreign forum.<sup>119</sup> This however does not include cases where the foreign jurisdiction 'would declare the plaintiff's claim inadmissible or would dismiss it on the merits.'<sup>120</sup> In *Olney v Rainville*, the British Columbia Supreme Court (Canada) stated that necessity jurisdiction 'refers to the ability [of the plaintiff] to commence an action, not to barriers to success.'<sup>121</sup> This means that that the plaintiff may not be successful in the competent forum cannot render it unreasonable to require him/her to litigate in that forum.

But, in Belgium, the fact that bringing the action in the foreign forum would be 'out of proportion' with the financial interests involved would suffice, provided its practical effect would deprive the plaintiff of effective access to the court.<sup>122</sup> By contrast, in the Netherlands, poverty alone, or the fact that the costs of bringing the foreign proceedings would be prohibitively high, is not enough.<sup>123</sup>

To apply the doctrine in a balanced manner, in jurisdictions where the plaintiff's financial incapacity to bring the suit in the foreign jurisdiction is accepted as a valid ground, the financial capacity of the defendant to litigate in the plaintiff's chosen forum ought to be considered as well. For if the defendant cannot reasonably be expected to afford to defend the suit in the plaintiff's chosen forum, the essence of jurisdiction by necessity would be missed, which is to ensure that a forum is provided where the plaintiff can ventilate his/her grievances and the defendant present his/her defence. Justice is for both parties. 'Even in times of war, where the plaintiff cannot reasonably be expected to institute the suit in the warring State, the ability of the defendant to travel out of that warring State (assuming the defendant resides there) to the plaintiff's chosen forum is an important consideration.'<sup>124</sup>

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> McEvoy (n 1) 111.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

<sup>116</sup> Nwapi (n 58).

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*

<sup>119</sup> Nuyts (n 72) 65.

<sup>120</sup> *ibid.*, 65 (referring to the rule in France).

<sup>121</sup> 2008 BCSC 753, 83 BCLR (4th) 182. On appeal, the British Columbia Court of Appeal held that British Columbia had jurisdiction in the matter, but stayed the action in favour of litigation in Quebec on the grounds of forum non conveniens. 2009 BCCA 380, 94 BCLR (4th) 118 at para 34-53.

<sup>122</sup> Nuyts (n 72) 65.

<sup>123</sup> *Mourant & Co Retirement Trustees Ltd*, Zutphen District Court, 16 January 2008, ECLI:NL:RBZUT:2008:BC9336.

<sup>124</sup> Nwapi (n 58).

The court must thus endeavour to balance the relative capacity of both parties to litigate in the forum,<sup>125</sup> although care must be taken to avoid the analysis reverting into a *forum non conveniens* analysis.<sup>126</sup> That the plaintiff cannot reasonably be expected to bring the action in the foreign forum does not mean that just any other forum should take up the adjudication of the dispute based on jurisdiction by necessity. There could be several other forums permitting jurisdiction by necessity. In fact, it may be desirable for the court to invoke the doctrine of *forum non conveniens* to decide whether it should proceed to adjudicate the dispute where there exists another forum that allows jurisdiction by necessity and the dispute at bar is shown to meet the requirements of jurisdiction by necessity under the laws of that other forum – that is, where that other forum is deemed more suitable for the litigation. It is fair to not unreasonably require the plaintiff to litigate in the foreign forum; but the plaintiff cannot be given an absolute right to decide the forum of necessity.

Attempts to use statutes of limitation as the basis to invoke the necessity jurisdiction of the court have been made in Canada. In *Wolfe v Wyeth*,<sup>127</sup> the requirements of the real and substantial connection test were met, but the Ontario Superior Court of Justice ignored this finding and resorted to the 'exceptional doctrine of Forum of Necessity.'<sup>128</sup> The court appeared to suggest that the expiration of the limitation period in the natural forum for the litigation (Pennsylvania) was a relevant consideration in the application of the doctrine.<sup>129</sup> On appeal, the Ontario Court of Appeal affirmed the finding that the real and substantial connection test was met and declined to consider necessity jurisdiction.<sup>130</sup> In *Jordan v Schatz*,<sup>131</sup> the British Columbia Supreme Court stated that 'simple fairness and justice' justified the exercise of jurisdiction where the action had become statute-barred in the foreign forum.<sup>132</sup> The learned trial judge appeared to have been persuaded by the plaintiff's claim that the defendant 'lulled' him to sleep until the limitation periods in the forums where the action might have been brought expired. Although the defendant denied lulling the plaintiff to sleep, the British Columbia Court of Appeal overturned the decision, stating that 'jurisdiction *simpliciter* cannot be founded on the simple fact that the Alberta and Saskatchewan limitation periods expired, whether or not the plaintiff was lulled to sleep by the defendant.'<sup>133</sup> In *Josephson v Balfour Recreation Commission*<sup>134</sup> – a case where a claim for contribution and indemnity was made against a third party defendant – the limitation period in Idaho where the action should have been brought had expired, but the British Columbia Supreme Court either inadvertently overlooked or did not want to consider its significance and assumed necessity jurisdiction on the basis that it was not reasonable to require the defendant to proceed against the third party defendant in Idaho since any suit filed there would not be recognized under Idaho law.<sup>135</sup> It was a case in which, if the defendant failed to join the third party, he would never again be able to bring proceedings against the third party.

The question is whether the consequences of a statute of limitation can be avoided through third party proceedings for contribution and indemnity in another forum. Jurisdiction by necessity does not seem to comprehend a situation like this. Statutes of limitation are well-established legal rules that have sound foundations. They cannot become objectionable merely because the plaintiff has nowhere else to turn to. The *Josephson* situation was quite complicated in that case the purpose for which the defendant sought to invoke jurisdiction by necessity was to enable him claim contribution and indemnity against a third party he truly believed was responsible for the harm and against whom he would otherwise not be able to make the claims again. But sad as his situation may be, would it be fair to deny the third party the benefits of a statute of limitation the third party was fully entitled to? The answer is most likely in the negative. However, in cases

<sup>125</sup> Tracy Lee Troutman, 'Jurisdiction by Necessity: Examining one Proposal for Unbarring the Doors of our Courts' (1988) 21 *Vanderbilt Journal of Transnational Law* 401 at 415; Arthur von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279 at 311.

<sup>126</sup> Nwapi (n 58).

<sup>127</sup> 2010 ONSC 2368 (CanLII).

<sup>128</sup> *ibid*, paras 41-42.

<sup>129</sup> *ibid*.

<sup>130</sup> *Wolfe v Pickar*, 2011 ONCA 347 at para 51 (CanLII).

<sup>131</sup> 1999 CanLII 6035 (BC SC).

<sup>132</sup> *ibid*, para 26. The learned trial judge appeared to have been motivated by the fact that the defendant appeared to have 'lulled' the defendant to sleep until the limitation periods in Alberta and Saskatchewan, either of where the action might have been brought, expired.

<sup>133</sup> *Jordan v Schatz*, [2000] 7 WWR 442 at para 20 (BCCA) (stressing, at para 26, that '[t]he fact that no other forum is available to the plaintiff, due to the lapse of a limitation period in another jurisdiction, unfortunately does not bear upon the question of whether British Columbia has jurisdiction.')

<sup>134</sup> 2010 BCSC 603.

<sup>135</sup> *ibid*, para 102.

of gross violations of international fundamental norms, where the limitation period provided under the laws of the foreign country may be described as unreasonably short given all the circumstances of the case, and the party seeking to invoke necessity jurisdiction can show that he/she was unable to bring the action in time due to no fault or negligence on his/her part, it may be just to allow the case to proceed.

To apply the above analysis to the context of the transnational corporate actor, it is useful to observe the features of a typical transnational lawsuit alleging human rights violations by multinational corporations in developing countries. In these cases, the plaintiffs are typically poor villagers in developing countries ravaged by the activities of the corporation. The corporation is often a subsidiary of another corporation headquartered in a country other than where the alleged conduct occurred. In some cases, the parent corporation is implicated. Due to the importance of the corporation to the national economy of the plaintiffs' country, the plaintiffs' government is hardly able or willing to bring the corporation to justice. In some cases, the plaintiffs' government is complicit in the violations. In addition, the cases often present complex evidentiary difficulties that would require expensive means of proof as well as experienced and frequently very expensive lawyers to conduct the case effectively. The plaintiffs are hardly able to afford such expertise. Without financial assistance, they may not be able to bring the action in the first place. Further, legal aid is often not available in the plaintiffs' country, or is generally available, but not for actions of this nature. Contingency fee services may be outlawed. Following protests by the villagers against the conduct of the corporation, the kingpins of the protests (who frequently become the named plaintiffs) are often forced to self-exile in another country by harassments, threats and intimidation from their government, and are often unable to return to their homeland. In exile, they connect with human rights NGOs who help them to initiate the proceedings in the foreign land. The suits are thus brought in the courts of a country other than the country where the alleged violations occurred. This is a typical case; individual cases may not share all of these characteristics.

But with those facts, the plaintiffs stand a chance of being able to establish practical difficulties in initiating the suit in their home country that render it unreasonable to require them to initiate the suit there. Such difficulties may be comprised in their inability to return to their country for the purpose of the litigation. On the relative capacity of the parties to litigate the dispute either in their home country or in their chosen forum, the fact that the defendant is a multinational corporation weighs in favour of litigation in the plaintiffs' chosen forum. For it will hardly be the case that a multinational corporation with offices and businesses in several countries around the world will be financially unable to send one of its officers to any forum to defend the corporation. Moreover, the suits are typically brought where the headquarters of the parent corporation is located. So the issue of the defendant's capacity to litigate in the plaintiffs' chosen forum poses no serious difficulties in transnational corporate wrongs litigation.

#### ***D. Absence of Fair Trial in the Foreign Forum***

Fair trial has to do with the prospect that the plaintiff may not receive fair trial in the foreign jurisdiction if compelled to initiate the proceedings there. As indicated earlier, none of the statutes adopting the doctrine explicitly contains a fair trial element. But according to Nuyts, a fair trial element has been read into the statutes in some jurisdictions, Belgium, for example.<sup>136</sup> It is likely that other jurisdictions will follow suit when a proper case comes before them.

The attitude of Dutch courts – in commercial cases – has been to ascertain whether the likelihood of an unfair trial in the foreign jurisdiction was foreseeable to the plaintiff at the time of entering into the transaction and to hold, if it was foreseeable, that the plaintiff must accept that forum as he/she finds it. In *Tbilisi Central Plaza BV v JSC BTA Bank*,<sup>137</sup> the parties entered into a contract which stipulated Kazakhstan as the jurisdiction where any dispute arising from the contract would be settled. The plaintiff sought to avoid settlement in Kazakh courts on the basis of systemic corruption in Kazakhstan. The District Court of Rotterdam began by noting that corruption and lack of impartiality were a valid basis of jurisdiction in exceptional circumstances. Those circumstances, the court argued, should in this particular case, take into consideration the fact that the parties freely entered into the choice of jurisdiction agreement stipulating Kazakhstan. While it does not appear that the choice of jurisdiction agreement was the principal theory of the decision, it certainly was considered relevant.<sup>138</sup>

<sup>136</sup> Nuyts (n 72) 65.

<sup>137</sup> District Court Rotterdam, 8 June 2011, ECLI:NL:RBZUT:2008:BC9336.

<sup>138</sup> See Xandra E Kramer, 'Private International Law Responses to Corruption: Approaches to Jurisdiction and Foreign Judgments and the International Fight against Corruption' in HG van de Bunt et al, eds, *International Law and the Fight against Corruption: Med-*



Similarly, in *Llanos Oil Exploration Ltd v Republiek Colombia and Ecopetrol SA*,<sup>139</sup> the plaintiff claimed that it was impossible to obtain fair trial in Columbia, particularly in cases in which the Republic of Columbia was a party, due to pervasive corruption in that country. It furnished documentary evidence showing that Columbia was one of the most corrupt nations in the world where lawyers and judicial officers were frequently under death threats. The case related to an oil concession contract which the plaintiff claimed the defendants – which included the Republic of Columbia and an oil company – illegally terminated. It claimed damages in tort and in contract. In the contract were choice of jurisdiction and choice of law clauses in favour of Columbia. The Hague District Court stated that the plaintiff knew the existence of the alleged circumstances in Columbia when it chose Columbian law as the governing law of the contract and Columbian courts as the court to which they shall turn to in the event of a dispute. The court regarded the circumstances as not so unforeseen or exceptional that trial in Columbia ought reasonably not to be required. The court also found that the case lacked a sufficient connection with the Netherlands.<sup>140</sup> This last finding appeared to be a subsidiary issue in the decision while the plaintiff's knowledge of corruption in Columbia was the principal issue. The court thus disregarded a more important element in the application of the doctrine and focused on an element that was only read into the text of the adopting statute. Although the result would have been the same, the court's approach raises questions about the integrity of the decision.

Given that negative judicial pronouncements regarding the justice system of other countries can create international relations problems<sup>141</sup> and can destroy inter-judicial cooperation between the courts of different legal systems, courts should avoid venturing into such pronouncements whenever they can. In fact, such pronouncements may well destroy the doctrine's credibility and honour.

## V. Conclusion

The enormous power at the disposal of the transnational corporate actor has rendered traditional regulatory mechanisms in developing countries ineffective to police it and to bring justice to those harmed by its activities. In Western countries that are home to most of these corporations, the complex web of subsidiaries with which the corporations operate have also rendered the transnational corporate actor difficult to regulate. Traditional jurisdictional doctrines hardly reach far enough to bring the actions of a corporation's foreign subsidiaries under the legal watch of the home country. With the emergence of jurisdiction by necessity, however, and its adoption in many legal systems, victims of transnational corporate human rights violations now have a new jurisdictional possibility to assert. In situations where it would be impossible for the plaintiff to initiate the suit in the foreign country where the dispute ought to be decided, or where for practical reasons the plaintiff cannot reasonably be expected to initiate the suit there, a court may assume jurisdiction by necessity where failure to do so might prevent the suit from being heard at all. The application of the doctrine generally requires the existence of five elements: (1) the absence of jurisdiction in the forum seized of the matter; (2) the requirement of some connection with that forum; (3) the impossibility of bringing the proceedings in the foreign forum with jurisdiction; (4) the reasonableness of requiring the plaintiff to bring the proceedings in that foreign forum; and (5) the absence of fair trial in the foreign forum. While each jurisdiction is free to interpret these factors as it deems appropriate, as Nuyts' study shows, the interpretations advanced by most countries so far are reasonably uniform. Given the nature of the factors, the most contentious cases will most likely turn on the reasonableness of requiring proceedings abroad. As shown in this article, plaintiffs in transnational corporate human rights lawsuits stand a good chance of establishing practical difficulties in initiating the suit in their home country that render it unreasonable to require them to initiate the suit there. Jurisdiction by necessity thus has the potential to address some of the jurisdictional difficulties encountered transnational corporate human rights litigation.

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<sup>139</sup> *LlanosOilExplorationLtdvRepubliekColombiaandEcopetrolSA*, District Court The Hague, 30 May 2012, ECLI:NL:RBSGR:2012:BX1740.

<sup>140</sup> Kramer (n 138) 125-126.

<sup>141</sup> Koji at 6 (stating that 'the need to determine whether a claimant will obtain a 'fair trial' in a non-Member State may have an adverse impact on foreign relations').

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