Part I
Setting the scene: access to justice and corporate accountability in Europe

Chapter 1
Introduction

The belief that corporate benevolence and social responsibility can and should be achieved through market forces, to the point where government regulation becomes unnecessary, is premised on a dangerous diminishment of the importance of democracy.

Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004) 151

1 In search of justice and corporate accountability in Europe

Following World War II, multinational enterprises (MNEs) emerged as the main actors of economic globalization.[1] The rapid growth of foreign investments, and the adoption of international legal rules that encourage international trade, allowed MNEs, based mainly in Western countries, to develop their activities throughout the rest of the world. As a result, they now dominate economic activity across the world and operate in all sectors.[2] MNEs can contribute to economic prosperity and social development in the countries where they operate. However, their activities may also directly or indirectly cause, or benefit from, harm to humans and the environment.[3] Following a number of widely publicized corporate scandals over the past years, MNEs have faced growing criticism from international organizations, civil society

1 Luzius Wildhaber, 'Asser Institute Lectures on International Law: Some Aspects of the Transnational Corporation in International Law' (1980) 27 Netherlands International Law Review 79, 80.

2 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, CUP 2002) 183; Michael Kerr and Marie-Claire Cordonier Segger, 'Corporate Social Responsibility: International Strategies and Regimes' in Marie-Claire Cordonier Segger and Christopher Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers 2005) 135.

3 For an overview of corporate-related human rights abuse, see SRSG, 'Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse' (23 May 2008) UN Doc A/HRC/8/5/Add.2. See also Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law 45; Karen Erica Bravo, Jena Martin and Tara Van Ho (eds), *When Business Harms Human Rights: Affected Communities that Are Dying to Be Heard* (Anthem Press 2020).

organizations (CSOs),[4] and academics over their involvement in human rights abuses and environmental damage, especially in developing countries.[5]

The case of the oil industry in Nigeria provides a clear example of poor environmental practices by MNEs resulting in severe environmental destruction and human rights abuses.[6] For example, intensive use of gas flaring has resulted in severe air pollution and acid rain. Continuous oil spills have also contaminated land and water, destroying important natural resources and the livelihoods of local communities. In turn, the impact of oil pollution on local communities in the Niger Delta has been severe and has resulted in health problems, polluted drinking water, and unproductive soils and ponds.[7] In addition to violations of the right to a clean environment, constant abuses of other human rights, such as the rights to property and to life, have been reported.[8] In general, the worst cases of corporate-related human rights abuses occur in countries where governance challenges are greatest. According to the United Nations (UN), the risk of business-related harm is especially high in low-income countries, in conflict-affected or post-conflict countries, and in countries where the rule of law is weak and the level of corruption is high.[9]

In various cases, victims of business-related harm have sought to obtain redress in the country where the abuse took place. However, they have faced various legal, procedural, and political obstacles, such as inadequate regimes of liability or procedural rules. In poor countries, MNEs may provide the State with its

4 In this book, the expression CSOs includes various actors such as non-governmental organizations (NGOs), trade unions, and faith-based organizations. However, it excludes business actors.

5 Brandon Prosansky, 'Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo' (2007) 5 Northwestern Journal of International Human Rights 236; Priscilla Schwartz, 'Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009); 'The True Cost of Chevron: An Alternative Annual Report' (The True Cost of Chevron 2009, 2010, 2011). The Business and Human Rights Resource Centre (BHRRC) also publishes daily information on reported cases of corporate abuse. See the Home page of the BHRRC website: <http://business-humanrights.org/en> accessed 1 May 2021.

6 Joshua Eaton, 'The Nigerian Tragedy of Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 Boston University International Law Journal 261; Jedrzej Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LIT 2000); *Environmental Assessment of Ogoniland* (UNEP 2011).

7 Alison Shinsato, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4 Northwestern Journal of International Human Rights 186, 192.

8 *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (Friends of the Earth Nigeria and Climate Justice Programme 2005).

9 UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (UN Framework) (7 April 2008) UN Doc A/HRC/8/5, para 16.

main source of income, thus creating a situation where States are reluctant to regulate corporate activities. Furthermore, judicial institutions may be unreliable, as a result of severe delays in legal proceedings or corruption. MNE subsidiaries may also become financially insolvent, preventing victims from obtaining financial compensation.[10] Moreover, the political situation of the host country may be unstable, thereby creating a risk of State abuse of human rights and a lack of real legal protection.[11]

During the 1990s, new types of claims emerged that challenged MNEs' activities in developing countries. In order to have access to remedy, and to hold MNEs liable for the abuse of human rights and environmental damage occurring in the context of their global business activities, victims and non-governmental organizations (NGOs) started bringing liability claims against MNEs directly in their home countries. An increasing number of claims have been brought for human rights abuse or environmental damage occurring in foreign countries (host countries) against MNEs in the country where they are headquartered or have their main business activity (home country).[12] In this book, this legal phenomenon will be referred to as 'transnational litigation against MNEs'. The character of the claims falling under this type of litigation varies considerably, ranging from tort suits for environmental pollution caused by oil spills to criminal proceedings alleging forced labour, or contractual liability claims for violations of international law. In addition, these cases raise complex legal questions and require overcoming important procedural obstacles. To date, these claims have rarely resulted in a court ruling in favour of the plaintiffs. Nonetheless, the number of transnational claims against MNEs is increasing and expanding to more countries.

Until recently, transnational litigation against MNEs was mainly concentrated in common law jurisdictions in the global North, most notably in the United States (US) and England.[13] In the 1990s in the US, foreign victims brought the first tort claims against MNEs under the Alien Tort Statute (ATS)[14] for violations of international customary law or international treaties to which the US was a contracting State. At the same time in England, the first tort claims against MNEs were based in common law. In these proceedings, plaintiffs raised the

10 Kerr and Cordonier Segger, 'Corporate Social Responsibility', 141.

11 Hari Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights' (2005) 24 Stanford Environmental Law Journal 71, 75.

12 Kerr and Cordonier Segger, 'Corporate Social Responsibility', 140.

13 See Saman Zia-Zarifi, 'Suing Multinational Corporations in the US for Violating International Law' (1999) 4 UCLA Journal of International Law and Foreign Affairs 81; Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 International and Comparative Law Quarterly 1; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004).

14 28 USC § 1350 (1789) Alien's Action for Tort.

tort liability of the parent company for damage arising out of its subsidiary's activities in foreign countries, often under the law of negligence.

Nonetheless, since the beginning of the 21st century transnational litigation against MNEs has developed significantly in European countries of civil law tradition. If cases against MNEs in common law and civil law countries hold in common the search for remedy and corporate accountability, they are different in their form. While the use of tort claims has been the favoured approach in common law countries, plaintiffs have used both civil and criminal litigation against MNEs in European civil law countries. For instance, Total, a French oil and gas MNE, faced various criminal lawsuits in France and Belgium for gross human rights abuses which had taken place in Myanmar in the 1990s.[15] In 2013, an NGO filed a tort claim in Sweden against Boliden Mineral AB, a Swedish company, for dumping 20,000 tonnes of toxic mining waste in Chile in the 1980s.[16] In Germany, a senior manager of Danzer, a timber trading company, was accused of failing to prevent its Congolese subsidiary from participating in State-sponsored violence against civilians in the Democratic Republic of Congo (DRC).[17] In Switzerland, Nestlé, a food MNE, faced a criminal lawsuit for its involvement in the murder of a trade unionist in Colombia.[18]

Overall, there is an increasing trend for MNEs to face liability claims in the national courts of European countries over human rights abuses and environmental damage taking place in developing countries.[19] Despite the difference in the nature of these claims, they share a common aim, which is to hold parent companies of MNEs liable for the negative impacts of their global activities. These claims represent 'the flip side of foreign direct investment',[20] as they target the parent company 'as the apparent "orchestrator" of company-wide investment standards and policies'.[21]

In parallel to the emergence of transnational litigation against MNEs, the debate on access to justice and corporate accountability has gained momentum

15 Benoît Frydman and Ludovic Hennebel, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in Manoj Kumar Sinha (ed), *Business and Human Rights* (SAGE 2013).

16 Rasmus Kløcker Larsen, 'Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v. Boliden Mineral AB*?' (2014) 83 Nordic Journal of International Law 404; Sebastián Ureta, Patricio Flores and Linda Soneryd, 'Victimization Devices: Exploring Challenges Facing Litigation-Based Transnational Environmental Justice' (2019) 29 Social and Legal Studies 161.

17 'Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The KiK, Lahmeyer, Danzer and Nestlé Cases' (ECCHR 2015).

18 'Case Report: Luciano Romero and the Nestlé Case' (ECCHR 2014).

19 Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 Hastings International and Comparative Law Review 451, 454.

20 Ibid.

21 Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 198.

with the development of the business and human rights (BHR) field. At the international level, States, NGOs, businesses, and international organizations have discussed the need to regulate MNEs to hold them responsible for the human rights abuses and environmental pollution they cause. In 2008, the UN Human Rights Council (UNHRC) adopted the UN 'Protect, Respect and Remedy' Framework (UN Framework). This policy document aims at 'adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm'. In 2011, the UN Framework was completed by the UN Guiding Principles on Business and Human Rights (UNGPs),[22] which aim at providing recommendations for the implementation of the UN Framework. Both the UN Framework and the UNGPs recognize three complementary and interdependent principles, or 'pillars': (1) the State duty to protect against human rights abuses by third parties, including businesses; (2) the corporate responsibility to respect human rights; and (3) the need for effective access to remedy.

Under the third pillar, or the 'remedy pillar', the UN Framework acknowledges that victims of corporate abuse have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. These challenges may deter claims and prevent victims from gaining effective access to remedy. In order to avoid such a situation, the UNGPs provide that States, as part of their duty to protect against business-related human rights abuse, must take appropriate steps, through judicial, administrative, legislative, or other means, to ensure that victims have access to effective remedy and to guarantee the effectiveness of domestic judicial mechanisms.

Also of importance is the inclusion, under the second pillar on corporate responsibility to respect human rights, of 'human rights due diligence' (HRDD), which is seen as 'a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it'.[23] It is also described as 'the steps a company must take to become aware of, prevent and address adverse human rights impacts'.[24]

Following the adoption of the UN Framework and the UNGPs, some States have enacted legislation, or have adopted policy instruments, to impose due diligence upon corporate actors and improve effective access to remedy. In Europe in 2017, France enacted groundbreaking legislation imposing a general 'duty of vigilance' on parent and controlling companies in respect of the impact

22 UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNGPs) (21 March 2011) UN Doc A/HRC/17/31.

23 UN Framework, para 25.

24 Ibid, para 56.

of their global activities on human rights and the environment.[25] Any damage resulting from the failure to respect this duty may lead to liability in tort for these companies. HRDD legislation has also been enacted in the Netherlands[26] and Germany,[27] while some countries such as Finland,[28] as well as the European Union (EU),[29] are discussing the adoption of such legislation. In most of these States, the growing influence of the corporate accountability movement has been a key trigger in the adoption of these legislative and policy instruments, and the inclusion of access to justice as a topic of major importance.

Regional supranational actors in Europe have also increasingly paid attention to the debate on corporate accountability and access to justice, especially since the adoption of the UN Framework and the UNGPs. First of all, the EU recognized the UNGPs as an 'authoritative policy framework' and stated the importance of working towards their implementation in the EU, as 'better implementation of the UNGPs would contribute to EU objectives – some of them enshrined in the Treaties – in relation to specific human rights issues'.[30] This is an important statement, as the EU is a major economic player. It is home to a large number of MNEs and has competence in fields touching upon the economic life of the Union. As a result, any policies and/or standards it adopts on BHR issues are likely to have a significant impact in the EU and beyond. However, until recently the EU has shied away from imposing legal obligations on companies, preferring a voluntary approach based on corporate social responsibility (CSR).[31] Moreover, the EU's contribution to the implementation

25 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

26 Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid).

27 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten vom 16. Juli 2021.

28 Ministry of Economic Affairs and Employment of Finland, 'Judicial Analysis Specifies the Planned Corporate Social Responsibility Act in Finland' (Ministry of Economic Affairs and Employment of Finland, 30 June 2020) <https://tem.fi/en/-/judicial-analysis-specifies-the-planned-corporate-social-responsibility-act-in-finland> accessed 1 May 2021.

29 RBC, 'European Commission Promises Mandatory Due Diligence Legislation in 2021' (RBC, 30 April 2020) <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> accessed 1 May 2021.

30 European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD(2015) 144 final, 2.

31 European Commission, 'A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility' COM(2011) 681 final. See also Olivier de Schutter, 'Corporate Social Responsibility European Style' (2008) 14 European Law Journal 203.

of the UNGPs has been insufficient so far. It has lacked a general vision on BHR and has adopted a piecemeal approach to the implementation of the UNGPs.

In relation to the effective access to remedy pillar, the Treaty of Lisbon has, over the years, strengthened the role and powers of the EU institutions in the field of civil and criminal justice, imposing a general requirement on the EU to facilitate access to justice.[32] Article 47 of the Charter of Fundamental Rights of the EU (EU Charter),[33] which has the same legal binding force as EU treaties, also guarantees the right to an effective remedy and to a fair trial. Despite this increase in power in the justice field, the EU has, however, neglected to offer a targeted and comprehensive response to the need for effective access to remedy in the context of corporate abuse, especially when such abuse takes place extraterritorially. To date, the 2017 opinion of the EU Agency for Fundamental Rights (EU FRA) on improving access to remedy in the area of BHR at the EU level[34] is the only policy document providing a general approach for further work on the third pillar.

Another important regional actor is the Council of Europe (CoE), which offers one of the most developed legal regimes protecting the right to an effective remedy through the European Convention on Human Rights (ECHR)[35] and the case law of the European Court of Human Rights (ECtHR). Following the adoption of the UN Framework and the UNGPs, the CoE initiated a reflection on the feasibility of setting new standards in the field of CSR. It stressed the central place of the UNGPs as an authoritative reference point for its work on this topic.[36] Notably, there were discussions on the elaboration of a complementary legal instrument, such as a convention or an additional protocol to the ECHR, on human rights and business. However, the CoE ultimately refrained from adopting binding standards for companies to respect human rights. Furthermore, while the CoE has recognized the importance of effective access to remedy in the context of corporate abuse, it has neglected to spell out a coordinated and effective approach to guarantee the adequate implementation of the third pillar.[37]

Finally, under the auspices of the United Nations Economic Commission for Europe (UNECE), the Aarhus Convention on Access to Information, Public

32 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1.

33 Charter of Fundamental Rights of the European Union [2012] OJ C326/392.

34 EU FRA, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level' FRA Opinion – 1/2017 [B&HR].

35 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953), ETS 5.

36 Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights (16 April 2014).

37 Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business (2 March 2016).

Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[38] guarantees the right of access to justice to members of the public in specific situations, including when private persons contravene national environmental law. However, the interplay between the Aarhus Convention and the third pillar of the UN Framework and the UNGPs has not been explored yet, and it remains to be seen whether the Aarhus Convention can play an effective role in improving access to remedy in the context of business-related environmental pollution. Overall, European supranational organizations have lacked an ambitious approach to imposing corporate accountability and improving access to justice for victims of business-related harm, despite their economic power (EU) or their role in guaranteeing human rights (CoE) and the protection of the environment (UNECE) in Europe.

2 Aim of the book

This book aims to explore the interplay between access to justice and corporate accountability through the study of transnational litigation against MNEs, especially in European civil law countries, and ongoing legal and policy reforms at the international, European, and national level. Using national litigation experiences as a starting point, and focusing on the European region, this book asks the following questions: how effective has litigation against MNEs been in achieving access to justice and corporate accountability in Europe? Furthermore, how will ongoing regulatory developments, both legal and policy, achieve access to justice and corporate accountability in the future?

To answer these questions, this book follows an analysis in three stages. It first describes the wider legal and social context in which demands for access to justice and corporate accountability have emerged. It then compares civil and criminal litigation against MNEs for their involvement in human rights abuse and environmental damage in two European civil law countries, namely France and the Netherlands. This second part assesses how the substantive and procedural laws applying to transnational litigation against MNEs create opportunities and/or challenges for foreign victims of business-related harm when they seek to obtain remedy and hold MNEs accountable before domestic courts. Finally, this book questions how recent international, European, and national regulatory developments may contribute to the realization of access to justice and corporate accountability in the future.

38 Aarhus Convention (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

3 Scope

This book focuses on European civil law countries for a number of reasons. Until recently, transnational litigation against MNEs had been predominantly practised in common law countries,[39] and most of the existing scholarship had, therefore, largely focused on litigation under the ATS in the US[40] and tort-based claims in England[41] and other common law countries (eg the US, Canada, and Australia).[42] For some time, scholars generally assumed that transnational litigation against MNEs was a legal phenomenon limited to, or mainly possible in, common law countries.[43] However, the significant development of transnational litigation against MNEs in European civil law countries since the beginning of the 21st century has provided material to reflect on the adequacy of the legal systems of these States to deal with such claims and the feasibility of seeking justice through their courts. Importantly, the progressive decline of the ATS as an instrument to hold corporations accountable in the US[44] and the threat of the potential reintroduction of the doctrine of *forum non conveniens* in

39 Ward, 'Securing Transnational Corporate Accountability through National Courts', 455. In 2001 Ward predicted that, although most of the claims against MNEs had been brought in common law countries where, she argued, legal cultural links between Anglo-Saxon lawyers and procedural rules probably facilitated FDL claims, in the longer term these cases would more likely emerge in European countries of civil law tradition, particularly the Netherlands and France.

40 For a discussion of the ATS, see Hari Osofsky, 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations' (1996) 20 Suffolk Transnational Law Review 335; Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law* (Martinus Nijhoff Publishers 2009); Beth Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89 Notre Dame Law Review 1467.

41 Peter Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 The Company Lawyer 168; Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 3 City University of Hong Kong Law Review 1.

42 Barnali Choudhury, 'Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses' (2005) 26 Northwestern Journal of International Law & Business 43; Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap.* Corporations, Globalisation and the Law (Edward Elgar 2015).

43 On the prospects of non-ATS claims, see Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012) 271–275.

44 On the decline of the ATS, see Paul Hoffman, 'The Implications of Kiobel for Corporate Accountability Litigation under the Alien Tort Statute' in Lara *Blecher*, Nancy Kaymar Stafford and Gretchen Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA 2014); Jonathan Kolieb, 'Jesner v Arab Bank: The US Supreme Court Forecloses on Accountability for Corporate Human Rights Abuses' (2018) 24 Australian International Law Journal 209.

the United Kingdom (UK) following Brexit[45] are likely to push litigators to look at other jurisdictions for litigation opportunities. In this respect, European civil law countries may look attractive, in particular in a context where an increasing number of these States and the EU are adopting mandatory HRDD statutes likely to open the door to a new type of litigation against corporations for their impact on human rights and the environment. As a result, research on the contemporary challenges of access to justice in European civil law countries is timely due to the likelihood of its growing importance.

This book focuses on France and the Netherlands for two main reasons. First, the recent increase in the number of claims brought against MNEs in these countries, especially in France, provides sufficient material from which to draw conclusions on the accessibility of their legal systems for victims of corporate abuse and the transformative potential they hold for corporate accountability. Second, France and the Netherlands are European countries of civil law tradition. They share a common legal history, which has, to some extent, influenced the shaping of their current legal systems.[46] Therefore, it is instructive from a comparative law perspective to assess the similarities and differences in the way these countries treat transnational claims against MNEs. It also allows for a better understanding of the influence of legal culture on transnational claims against MNEs and whether this type of litigation has developed its own characteristics in civil law countries. Furthermore, their legal and procedural frameworks are, to a certain extent, influenced by the existence of common institutions and rules in Europe. Since the end of World War II, various regional organizations, such as the EU, CoE, and the UNECE, have contributed to the development of a common legal and policy framework, which is now shared by a majority of countries in Europe.

It should be said that the above-mentioned developments and the growing popularity of access to justice as a research and advocacy topic within the BHR sphere have already led to an increasing interest by scholars and CSOs in the study of claims brought against MNEs in countries outside the common law tradition.[47] As a result, a number of academic and non-academic studies were published on claims against MNEs in Europe during the time of the research for

45 Axel Marx and others, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries' (European Parliament 2019) 16.

46 Jeroen Chorus and E. Chris Coppens, 'History' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds), *Introduction to Dutch Law* (4th edn, Kluwer Law 2006) 8.

47 Enneking, *Foreign Direct Liability and Beyond*; Gwynne Skinner and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, ECCJ and CORE 2013).

this book.[48] However, this book remains relevant as it provides a comparative study of both civil and criminal claims against MNEs in civil law countries. Until recently, the existing scholarship mainly focused on the study of tort claims and, as a result, the study of the role of criminal proceedings as a means to achieve MNE accountability remains largely unexplored.[49] Furthermore, this book analyses how the most recent BHR developments – that is the increasing adoption of mandatory HRDD legislation and the negotiations for a legally binding instrument on BHR[50] – will contribute to the achievement of access to justice and corporate accountability.

4 Key concepts

This book adopts a number of frequently used terms that need to be defined and understood from the outset.

Multinational enterprises

There is a multitude of types of business entities operating across borders and, consequently, various terms are used to describe them (multinational corporations, transnational corporations, etc).[51] Different definitions may focus on the type of foreign investment (direct/portfolio), the nature of operations (transnational/multinational), or the extent of managerial control.[52] In its 2011 Guidelines for Multinational Enterprises (OECD Guidelines), the Organisation

48 Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017); Marx and others, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries'.

49 For a discussion of access to remedy in the context of criminal proceedings in Europe, see Adriana Espinosa González and Marta Sosa Navarro, 'Corporate Liability and Human Rights: Access to Criminal Judicial Remedies in Europe' in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018).

50 In June 2014 the UNHRC decided to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. UNHRC, Res 26/9 (2014) UN doc A/HRC/26/L.22/Rev.1

51 Ebbesson argues, 'There is no general agreement on how to label the various forms of transboundary economic organization, and neither does the given distinction reveal the diversity of corporate structures. Rather, the difficulty in terming and defining them reflects the multitude of structures and relationships.' Jonas Ebbesson, 'Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework' in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspective from Science, Sociology and the Law* (CUP 2011) 200–201.

52 For a discussion of these definitions, see Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 5–9.

for Economic Co-operation and Development (OECD) provides for a flexible definition of MNEs:

> These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.[53]

The OECD's definition of MNEs is the one used in this book. This definition insists on 'the ability to coordinate activities between enterprises in more than one country'.[54] It is broad enough to encompass various legal forms of undertaking while emphasizing the notion of direct investment.[55] As this book will show, MNEs' structure, organization, and management are significant obstacles to holding parent companies and other entities of MNEs accountable.

Corporate accountability

This book explores the use of legal mobilization as a strategy to achieve corporate accountability. It is not concerned with the search for corporate responsibility through private regulation and other types of soft law instruments.[56] As a result of linguistic constraints imposed by the English language, and to represent various legal realities, this book distinguishes between the concepts of corporate responsibility, liability, and accountability.[57]

Responsibility refers to 'a moral obligation to behave correctly towards or in respect of' something or someone. Thus, corporate responsibility imposes

53 OECD Guidelines for Multinational Enterprises: 2011 Edition (OECD 2011) 17.

54 Muchlinski, *Multinational Enterprises and the Law*, 7.

55 Ibid.

56 There is already an extensive scholarship on the merits and challenges of private law regulation and corporate responsibility instruments. See Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309; Larry Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator' (2007) 39 Connecticut Law Review 1739; Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law* (Routledge 2011); Jedrzej Frynas, 'Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention' (2012) 17 Ecology and Society 4; Lara Blecher, 'Code of Conduct: The Trojan Horse of International Human Rights Law' (2016) 38 Comparative Labor Law and Policy Journal 437.

57 It should be noted that other languages may use the same word to represent various legal realities (eg French uses the word *responsabilité* for accountability, liability, and responsibility). Furthermore, various legal fields may use similar words in different ways (eg the word 'responsibility' as used in public international law compared with its use in other legal fields).

a moral, not a legal obligation upon companies.[58] Liability evokes 'the state of being legally responsible for something'.[59] As a result, corporate liability implies a legal obligation upon companies. Accountability refers to the fact or condition of being 'required or expected to justify actions or decisions'.[60] Therefore, corporate accountability is a wider concept than corporate liability. It encompasses 'the idea that those accountable should be answerable for the consequences of their actions' and refers to both legal and non-legal risks.[61]

Transnational litigation against MNEs

In the existing scholarship on transnational litigation against MNEs, authors use various expressions to talk about claims alleging the liability of corporate actors in the context of foreign investment, including 'foreign direct liability litigation' and 'transnational human rights litigation'.

Ward was the first author to use the expression 'foreign direct liability' (FDL). She described it as follows:

> The parent companies of an increasing number of multinational corporate groups in the extractive and chemical industries have found themselves in their home courts defending against 'foreign direct liability' – legal actions in which foreign citizens (mostly from developing countries) have claimed damages for the negative environmental or health impacts of the group's foreign direct investment.[62]

Ward distinguishes between domestic liability claims raising 'the direct responsibilities of corporations under international law' (eg the ATS in the US) and other domestic claims raising the liability of parent companies in home country courts.[63] However, she suggests that both types of litigation question the contribution and the adequacy of existing international or national legal

58 OUP, 'Responsibility' (*Lexico* 2021) <https://www.lexico.com/definition/responsibility> accessed 1 May 2021. Nonetheless, 'responsibility' may also evoke 'the state or fact of having a duty to deal with something or of having control over someone'. This word may be used to refer to State obligations under public international law.

59 OUP, 'Liability' (*Lexico* 2021) <https://www.lexico.com/definition/liability> accessed 1 May 2021.

60 OUP, 'Accountable' (*Lexico* 2021) <https://www.lexico.com/definition/accountable> accessed 1 May 2021.

61 Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 Journal of Business Ethics 493, 494.

62 Halina Ward, *Foreign Direct Liability: A New Weapon in the Performance Armoury* (The Royal Institute of International Affairs 2000) 1.

63 Ward, 'Securing Transnational Corporate Accountability through National Courts' 451.

frameworks to solve issues of transnational corporate accountability.[64] Following Ward, other authors have used the same expression, most notably referring to tort claims brought directly against the parent company of an MNE before its home country courts for its involvement in activities occurring in foreign countries. For instance, Enneking, who has written extensively on this topic, has used the term 'foreign direct liability cases' to refer to:

> tort-based civil liability claims brought against parent companies of multinational corporations before courts in their Western society home countries for harm caused to the people- and planet-related interests of third parties (local employees, neighbours, local communities, etc.) in developing host countries as a result of the local activities of the multinational corporations involved.[65]

As a result, other types of claims, such as criminal complaints, have rarely been regarded as FDL litigation. Other authors have used the expression 'transnational human rights litigation', especially in the context of tort claims for violations of international human rights law under the ATS in the US.

In this book, the use of both expressions is excluded. The expression 'transnational litigation against MNEs' is favoured in order to emphasize the cross-border dimension and, as a result, challenges of this type of litigation. Furthermore, the transnational nature of legal claims against MNEs echoes that of the economic activities of the same actors across borders. It also highlights the contemporary challenges created by economic globalization, particularly foreign investment, to classical theories of the domesticity of law, State sovereignty, and international law. The expression 'transnational litigation against MNEs' is also broader, as it includes not only tort proceedings, but also criminal proceedings, as well as liability claims against not only parent companies but also their subsidiaries, partners, or other companies under control. It also covers litigation not only for human rights abuse but also for environmental damage. Ultimately, the expression 'transnational litigation against MNEs' is broad enough to encompass the variety of legal strategies used by litigators to hold MNEs to account and obtain remedies.

5 Background to the book

Transnational litigation against MNEs is the indirect result of the imbalance between the economic and political power accumulated by MNEs following an increase in foreign investment and trade over the last decades, and the

64 Ibid.

65 Enneking, *Foreign Direct Liability and Beyond*, 92.

absence of legal responsibility for the harm they may cause in the context of their worldwide activities. This situation demonstrates a two-speed globalization: while companies have benefited from the considerable development of economic globalization, victims of corporate wrongdoing have been left behind as a result of unachieved legal globalization. This asymmetrical situation has led to counter-hegemonic globalization, or 'insurgent cosmopolitanism', where 'oppressed groups' organize their resistance on the same scale and through the same type of coalitions used by their 'oppressors' to victimize them.[66] The corporate accountability movement is the visible face of this insurgent cosmopolitanism and has organized in the same way as MNEs through transnational networks. Access to justice is a significant aspect of the identity of the corporate accountability movement. In this context, access to justice goes beyond simply access to a court or to a remedy. It also means holding businesses to account and claiming a paradigm shift in the way the law envisages business actors.

Globalization

Transnational litigation against MNEs is directly linked to the debate on corporate accountability in the context of globalization.[67] Generally, authors disagree on the nature and the novelty of globalization, as well as its normative values and processes.[68] De Sousa Santos insists on the fact that globalization comprises a very broad set of phenomena and dimensions and, as a result, there is no 'one sole entity called globalization, instead there are globalizations'.[69] The existing legal scholarship offers various definitions of the concept of 'globalization'. Twining defines it as economic, political, social, and cultural processes that 'tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it'.[70] Other authors insist on the fact that national frontiers are becoming irrelevant in the context of globalization.[71] For Garcia, globalization is 'the sum total of political, social, economic, legal and symbolic processes rendering the division of the globe into national boundaries increasingly less important for the purpose of individual

66 Boaventura de Sousa Santos, 'Globalizations' (2006) 23 Theory, Culture & Society 393, 398.

67 Ward, 'Securing Transnational Corporate Accountability through National Courts', 452.

68 Frédéric Mégret, 'Globalization' (MPEPIL 2009) <http://opil.ouplaw.com/> accessed 1 May 2021.

69 De Sousa Santos, *Toward a New Legal Common Sense*, 187.

70 William Twining, *Globalization and Legal Theory* (CUP 2000) 4.

71 On the relation between norms and space in the context of globalization, see Paul Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485, 511–518.

meaning and social decision'.[72] Ultimately, globalization is an economic, political, social, and legal phenomenon where the relevance of national borders and sovereignty to individual and societal decision-making processes is challenged.

In the more recent phase of economic globalization, MNEs have gained in power and influence.[73] However, the law has been slow to respond to this evolution and inadequate in controlling MNEs' behaviour.[74] Although the modern MNE emerged in the second half of the 19th century, MNEs started to acquire unprecedented importance in international production following World War II.[75] The period from the 1990s until the time of writing has seen the influence of MNEs grow as a result of various factors, including growth in foreign direct investment (FDI), the adoption of truly global production chains by MNEs, a marked shift from raw materials and manufacturing towards services-based FDI, and the development of major regional trade and investment liberalization regimes, alongside the establishment of the World Trade Organization (WTO). As a result, MNEs can potentially bring economic and social benefits to the countries where they operate. At the same time, they may also pose a threat to the enjoyment of human rights and a clean environment.[76]

If international law has allowed MNEs to increasingly gain rights in the fields of foreign investment and international trade, thus facilitating their global expansion, it has also been unable to ensure that MNEs respect human rights or the environment, especially in States where regulation provides little protection to individuals or the environment. MNEs may use their 'transboundary *subjectivity* and *structure*' to escape from liability when they cause harm to people or the environment in other countries.[77] Moreover, international law is fragmented into a myriad of treaties and institutions with different objectives, sets of values, and decision-making processes. The excessive specialization in

72 Frank Garcia, 'Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 25 Brooklyn Journal of International Law 51, 56.

73 Upendra Baxi, *The Future of Human Rights* (2nd edn, OUP 2006) 236. For a discussion of corporate power, see Jean-Philippe Robé, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in Gerd Teubner (ed), *Global Law without a State* (Ashgate 1997); Nicholas Connolly and Manette Kaisershot, 'Corporate Power and Human Rights' (2015) 19 International Journal of Human Rights 663.

74 Michael Addo, 'Human Rights and Transnational Corporations: An Introduction' in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 9.

75 Muchlinski, Multinational Enterprises and the Law, 15.

76 Jeffrey Dunoff, 'Does Globalization Advance Human Rights?' (1999) 25 Brooklyn Journal of International Law 125; Ward, 'Securing Transnational Corporate Accountability through National Courts', 452–453.

77 Ebbesson, 'Transboundary Corporate Responsibility in Environmental Matters', 201 (emphasis in original).

each field of international law, and the lack of coordination and dialogue among those various fields, contribute to the creation of conflicts, especially between international economic law and international human rights law. Garcia suggests that these conflicts raise a problem of justice, as 'the inquiry into the effects of market globalization on human rights law becomes an inquiry into how the economic facts and regulatory infrastructure of globalization enhance, or interfere with, the contributions which international human rights law seeks to make towards the attainment of justice'.[78] National law also appears ill-adapted, as its predominant focus on domestic issues and its devotion to the *economic persona* have impeded its effectiveness in regulating and controlling MNEs.[79]

At the same time, globalization has given rise to new demands on corporations to exercise their power responsibly and to account for it. It can exert a transformative effect on corporate accountability, turning it from a choice into an imperative.[80] Transnational litigation against MNEs is the visible face of these demands. Several aspects of the interplay between globalization and transnational litigation against MNEs must be considered here.

First, the processes of globalization are fundamentally changing the significance of national and societal boundaries, generally making them less important.[81] In the same way, transnational claims against MNEs challenge territorial conceptions of State jurisdiction firmly embedded in international and domestic legal systems. In particular, they point out 'the mismatch between the territorial scope of State regulatory jurisdiction and the globally integrated organisation of the MNE'.[82]

Second, globalization has renewed the debate on legal personality.[83] While businesses have insisted on keeping a traditional interpretation, advocates for greater corporate accountability have supported new definitions of legal personality under international law.[84] Similarly, plaintiffs in transnational

78 Garcia, 'Global Market and Human Rights', 57.

79 Addo, 'Human Rights and Transnational Corporations', 11–19.

80 Ward, 'Securing Transnational Corporate Accountability through National Courts', 453.

81 Twining, *Globalization and Legal Theory*, 7.

82 Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 Cambridge Journal of Economics 915, 920.

83 Twining, *Globalization and Legal Theory*, 10.

84 For an overview of the debate, see Dimitra Kokkini-Iatridou and Paul J I M de Waart, 'Foreign Investment in Developing Countries: Legal Personality of Multinationals in International Law' (1983) 14 Netherlands Yearbook of International Law 87; Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities' (ESIL Research Forum on International Law: Contemporary Problems, Geneva, 2005).

claims against MNEs have challenged the application of separate legal personality and limited liability to MNEs.

Third, a variety of significant actors who are relevant to the analysis of patterns of legal and law-related relations in the modern world are emerging in the context of globalization.[85] While MNEs are increasing their economic and political importance on the world stage, transnational activist movements advocating for new forms of corporate accountability are becoming influential in shaping international and domestic policies and laws through various strategies, including legal mobilization. Ultimately, transnational claims against MNEs represent one aspect of the globalization of the international legal system.[86] Paul holds that they 'represent both a frustration with the limits of traditional international institutions and cooperative regimes and a positive step toward building a new international legal order'.[87]

Another fundamental characteristic of the litigation discussed in this book, which is reinforced by globalization, is its transnational legal nature. Jessup defines the term 'transnational law' to include 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories'.[88] Importantly, transnational law may not be formally enacted by States, as it may be concerned with legal activity involving various actors, including States but also individuals, corporations, CSOs, and other groups.[89] Transnational litigation against MNEs reflects the intertwining of both public and private international law, as these claims raise not only questions of private international law (eg the choice of jurisdiction or applicable law) but also issues of public international law (eg the application of international human rights and environmental law to non-State actors in cross-border situations). It also involves a variety of actors, such as lawyers and CSOs, who seek to influence regulatory behaviour by challenging the application of legal norms and practice beyond borders.

Transnational claims against MNEs also provide an example of the concept of 'interlegality', described by De Sousa Santos as the phenomenological

85 Twining, *Globalization and Legal Theory*, 9.

86 Joey Paul, 'Holding Multinational Corporations Responsible under International Law' (2001) 24 Hastings International & Comparative Law Review 285, 290.

87 Ibid, 289.

88 Philip Jessup, *Transnational Law* (Yale University Press 1956) 136. For a discussion of transnational law, see also Harold Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181; Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 Yale Journal of International Law 301.

89 Carrie Menkel-Meadow, 'Why and How to Study "Transnational" Law' (2011) 1 UC Irvine Law Review 97, 103.

dimension of legal plurality in which 'everyday life crosses or is interpenetrated by different and contrasting legal orders and legal cultures'.[90] Interlegality is:

> the conception of different legal spaces surimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life. We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transition and trespassing.[91]

In Europe, transnational claims against MNEs reveal the interactions between various legal orders, namely EU/Member States, host/home countries, international/national. Furthermore, litigators have developed creative legal strategies, mixing aspects of different legal orders, to challenge the perceived increase in corporate power and force a debate on corporate accountability for human rights and environmental abuse.

Social movements and cause-lawyering

Since the 1990s, CSOs and lawyers have played an important role in ensuring that global companies are held accountable for human rights and environmental abuse.[92] Therefore, the concepts of social movements and cause-lawyering are useful for understanding how the development of transnational litigation against MNEs is closely associated with the existence and the demands of the corporate accountability movement.[93]

90 De Sousa Santos, *Toward a New Legal Common Sense*, 97.

91 Ibid.

92 On the role of CSOs in holding companies to account, see Robin Broad and John Cavanagh, 'The Corporate Accountability Movement: Lessons & Opportunities' (1999) 23 Fletcher Forum of World Affairs 151; Rory Sullivan, 'The Influence of NGOs on the Normative Framework for Business and Human Rights' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing 2005); Jonathan Doh and Terrence Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43 Journal of Management Studies 47; Jem Bendell, *The Corporate Responsibility Movement* (Greenleaf Publishing 2009).

93 For a history of the corporate accountability movement, see Jem Bendell, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement' (2004) UNRISD Technology, Business and Society Programme Paper No 13 <http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/504AF359BB33967FC1256EA9003CE20A?OpenDocument> accessed 1 May 2021.

Scholars from various fields of social sciences have written extensively on the concept of 'social movements'.[94] Therefore, there is no unique definition of what a social movement is. Diani provides a basic definition of social movements as 'networks of informal interactions between a plurality of individuals, groups and/or organisations, engaged in political or cultural conflicts, on the basis of shared collective identities'.[95] In general, social movements are different from interest groups, political parties, protest events, and coalitions.[96] According to Della Porta, four elements are common in social science definitions of social movements: a network structure, the use of unconventional means, shared beliefs and solidarity, and the pursuit of some conflictual aims.[97] Della Porta and Diani argue that the beginning of the 21st century saw the emergence of a wave of mobilizations for a 'globalization from below'.[98] They also call this new wave the 'global justice movement'. Della Porta and Diani suggest that the initiatives of the global justice movement are very heterogeneous and not necessarily connected to each other. Actors address a range of issues, from child labour and corporate human rights abuses to deforestation. Their initiatives take a myriad of forms and different points of view.[99]

Keck and Sikkink have also provided a landmark analysis of transnational advocacy networks.[100] They argue that activist networks, both transnational and national, share similar central values or principled ideas, make creative use of information, and employ sophisticated political strategies in targeting their campaigns.[101] In particular, Keck and Sikkink suggest that:

> [They] mobilize information strategically to help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments. Activists in networks try not only to influence policy outcomes,

94 Donatella della Porta and Mario Diani, *Social Movements: An Introduction* (2nd edn, Blackwell 2006) 1. On social movements, see David Snow, Sarah Soule and Hanspeter Kriesi (eds), *The Blackwell Companion to Social Movements* (Blackwell 2004); Daniel Cefaï, *Pourquoi se Mobilise-t-on? Les Théories de l'Action Collective* (La Découverte 2007); Suzanne Staggenborg, *Social Movements* (OUP 2011).

95 Mario Diani, 'The Concept of Social Movement' (1992) 40 The Sociological Review 1, 1.

96 Ibid.

97 Donatella della Porta, 'Social Movement' (*Oxford Bibliographies* 2011) <http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0050.xml> accessed 1 May 2021.

98 Della Porta and Diani, *Social Movements*, 2.

99 Ibid.

100 Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

101 Keck and Sikkink define 'principled ideas' as '[i]deas that specify criteria for determining whether actions are right and wrong and whether outcomes are just or unjust': ibid, 1.

> but also to transform the terms and nature of the debate. They are not always successful in their efforts, but they are increasingly relevant players in policy debates.[102]

It was pointed out earlier that De Sousa Santos describes different globalizations.[103] In this context, he distinguishes between hegemonic and counter-hegemonic globalizations. One mode of production of counter-hegemonic globalization is 'insurgent cosmopolitanism'.[104] De Sousa Santos describes this as follows:

> It consists of the transnationally organized resistance … through local/global linkages between social organizations and movements representing those classes and social groups victimized by hegemonic globalization and united in concrete struggles against exclusion, subordinate inclusion, destruction of livelihoods and ecological destruction, political oppression, or cultural suppression, etc. They take advantage of the possibilities of transnational interaction created by the world system in transition.[105]

An important feature of insurgent cosmopolitanism, as defined by De Sousa Santos, is 'the aspiration by oppressed groups to organize their resistance on the same scale and through the same type of coalitions used by the oppressors to victimize them, that is, the global scale and local/global conditions'.[106]

Insurgent cosmopolitanism lies at the heart of the mobilization and construction of the corporate accountability movement. At the beginning of the 21st century, CSOs, lawyers, and victims started grouping together to challenge corporate impunity and demand accountability for business-related human rights abuse and environmental damage resulting from the various processes of economic globalization. They have organized their resistance through transnational activist networks, thus operating on the same scale as MNEs.[107] They have also mobilized financial and modern communication resources to build campaigns and other activities, such as transnational litigation against

102 Ibid, 2.

103 De Sousa Santos, *Toward a New Legal Common Sense*, 187.

104 De Sousa Santos, 'Globalizations', 397.

105 Ibid.

106 Ibid, 398.

107 Similarly, Yaziji and Doh observe that, in the context of changes in the economic and political systems of Western industrialized societies, we have seen the parallel development of the societal importance of corporations on the one hand and NGOs on the other. Michael Yaziji and Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration* (CUP 2009) 27.

MNEs, which help them strategically to achieve their aims. In particular, the corporate accountability movement focuses on the role of States and national courts in imposing human rights and environmental obligations on companies. Ultimately, the corporate accountability movement is a major actor in counter-hegemonic globalization.

The interactions of the corporate accountability movement with cause-lawyers have contributed to the development of transnational litigation against MNEs as a strategic form of legal mobilization.[108] The concept of cause-lawyering poses a number of definitional challenges, as a result of the range of possible settings and styles of cause-lawyering.[109] Generally, cause-lawyers are activist lawyers who seek to use the courts as a vehicle to achieve social change or social justice beyond the individual claim at stake.[110] Menkel-Meadow defines cause-lawyering as 'any activity that seeks to use law-related means or to change laws or regulations to achieve great social justice – both for particular individuals (drawing on individualistic "helping" orientations) and for disadvantaged groups'.[111]

Cause-lawyering contrasts with conventional lawyering in the sense that cause-lawyers participate in parallel advocacy and legal reform activities for the benefit of the cause they fight for. Furthermore, scholars suggest that cause-lawyers have the propensity to transgress conventional or generally accepted professional ethical standards of legal practice, such as neutrality, client selection, or partisanship.[112] Another important aspect of cause-lawyering is that it is often said to be characteristic of common law countries, especially the US, where strategic litigation and public interest litigation are widely accepted.[113]

Various types of cause-lawyers have been involved in transnational claims against MNEs. While plaintiffs have been represented by lawyers practising in activist law firms in the UK, the Netherlands, and Belgium, claims against MNEs have been led by NGOs created by lawyers in France and Germany. One

108 On the relationship between cause-lawyering and social movements, see Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006).

109 Andrew Boon, 'Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression' (2004) 7 Legal Ethics 250, 252.

110 Thelton Henderson, 'Social Change, Judicial Activism and the Public Interest Lawyer' (2003) 33 Washington University Journal of Law and Policy 33, 37.

111 Carrie Menkel-Meadow, 'The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998) 37.

112 Boon, 'Cause Lawyers and the Alternative Ethical Paradigm', 254–257. However, such an allegation is difficult to establish due to the absence of empirical evidence.

113 Ibid, 251.

commonality between these lawyers is that they are specialized in human rights, environmental, and, in particular, corporate accountability litigation. These cause-lawyers demonstrate a particular legal entrepreneurship, as they make 'creative use of existing laws and procedures' to seek redress and challenge corporate impunity in the home country of MNEs.[114] Furthermore, they have been involved in advocacy and legal reform activities in parallel to litigation.

Access to justice

Access to justice is a central concept of this book. However, defining access to justice is a difficult task, as there is a lack of clarity or consensus about what it means.[115] In the context of this book, the multidimensional nature of access to justice raises several questions pertaining to the dichotomy between the procedural and the substantive nature of access to justice, the difference between access to justice and access to remedy, and the meaning of 'effective access to justice'.

Procedural versus substantive access to justice

Access to justice is often conceived from a procedural perspective.[116] However, its substantive nature is equally important. Discussing the problem of access to justice in the US context, Rhode rightly asks the following question: 'To what should Americans have access? Is it justice in a procedural sense: access to legal assistance and legal processes that can address law-related concerns? Or is it justice in a substantive sense: access to a just resolution of legal disputes and social problems?'[117] This question has been debated beyond the US legal

114 Peter Muchlinski, 'The Provision of Private Law Remedies against Multinational Enterprises: A Comparative Law Perspective' (2009) 4 Journal of Comparative Law 148, 167.

115 On access to justice, see Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Review 181; Deborah Rhode, *Access to Justice* (OUP 2004); Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007).

116 However, the extent of the procedural nature of access to justice is also subject to discussion. According to an OECD and Open Society's Workshop Background Paper on access to justice, 'One of the important recent developments is a shift to a broader understanding of access to justice needs and a more encompassing definition of legal assistance services in the public sector. While at one time access to justice was seen as synonymous with access to a lawyer and a court, today the legal and justice services are increasingly understood to encompass a continuum including access to legal information, advice, and representation, access to judicial and non-judicial proceedings, as well as access to alternative mechanisms, access to premises that provide possibilities for a fair resolution of a dispute, access to pre- and post-resolution support, and so on.' See 'Understanding Effective Access to Justice' (OECD and Open Society 2016) 14.

117 Deborah L Rhode, 'Access to Justice: An Agenda for Legal Education and Research' (2013) Journal of Legal Education 531, 532.

sphere for a long time now. In the 1970s, access to justice received particular attention in the work of Cappelletti and Garth.[118] According to these authors, the words 'access to justice' serve to focus on two basic purposes of the 'legal system'.[119] Access to justice means that the legal system must be 'equally accessible to all' and lead to results that are 'individually and socially just'.[120] Their basic premise is that 'social justice, as sought by our modern societies, *presupposes* effective access'.[121] The effectiveness of justice is undermined when litigants must overcome barriers resulting not only from procedural rules but also from the social realities and practicalities shaping the legal system, such as litigation costs, party capability (including financial resources and competence to recognize and pursue a claim or defence), and the existence of diffuse interests.[122] Cappelletti and Garth observe that 'the obstacles created by our legal systems are most pronounced for small claims and for isolated individuals, especially the poor; at the same time, the advantages belong to the "haves", especially to organizational litigants adept at using the legal system to advance their own interests'.[123] However, any reform to improve effective access to justice must take into account that barriers to access, as a result of their interrelationship, cannot simply be eliminated one by one.[124]

Access to justice is a central aspect of the rule of law and, as a result, the procedural and substantive aspects of access to justice take on a different meaning. Ghai and Cottrell argue that a critical feature of the rule of law is the equality of all before the law and, as a result, that all persons are entitled to the protection of their rights by State organs concerned with the enforcement of law, particularly the judiciary.[125] Nonetheless, in such a context, there is a narrow and broad meaning of the concept of access to justice. The narrow approach focuses on the courts and other institutions administering justice, and with the process whereby a person presents a case for adjudication.

118 Cappelletti and Garth, 'Access to Justice'.

119 Cappelletti and Garth have defined the legal system as 'the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the State.' Ibid, 182.

120 Ibid.

121 Ibid, emphasis in original.

122 Cappelletti and Garth have provided that diffuse interests 'are collective or fragmented interests such as those in clean air or consumer protection. The basic problem they present – the reason for their diffuseness – is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action'. Ibid, 194.

123 Ibid, 195.

124 Ibid, 196.

125 Yash Ghai and Jill Cottrell, 'The Rule of Law and Access to Justice' in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010) 3.

The broader approach, however, addresses the process of lawmaking, the contents of the law, the legitimacy of the courts, alternative modes of legal representation, and dispute settlement.[126] Ghai and Cottrell also suggest that access to justice means more than being able to raise one's case in a court or other judicial institution:

> Justice is defined as fairness; in the legal and political sphere; it usually means 'exercise of authority in maintenance of rights'. Fairness covers both the procedures of access and the substantive rules that determine the exercise of authority. Access to justice therefore means the ability to approach and influence decisions of those organs which exercise the authority of the State to make laws and to adjudicate on rights and obligations.[127]

Therefore, as a broad concept, access to justice goes beyond the processes of getting to the courts. It can be understood as covering 'the entire machinery of law making, law interpretation and application, and law enforcement'. It also covers 'the ways in which the law and its machinery are mobilized, and by whom or on whose behalf'.[128]

The way we understand the nature of access to justice may need to be extended for disadvantaged and marginalized groups in order to respond to the specific needs of these groups. Discussing access to justice by people with disabilities, Flynn adopts a definition 'which goes beyond the formal legal system and questions of "access" to this, to a more holistic understanding of what justice means for people with disabilities'.[129] To fully understand the various barriers experienced by people with disabilities in accessing justice, Flynn sets an intersectional frame for analysis in which she notably considers the work of Bahdi – who defines access to justice as comprising three distinct but interlinking components, namely substantive, procedural, and symbolic — with reference to the lived experience of people with disabilities.[130]

First, *substantive access to justice* 'concerns itself with an assessment of the rights claims that are available to those who seek a remedy'.[131] It focuses on

126 Ibid.

127 Ibid.

128 Ibid.

129 Eilionóir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2015) 11.

130 Bahdi developed that definition of access to justice in the context of women's access to justice in the Middle East and North Africa Region. See Reem Bahdi, 'Background Paper on Women's Access to Justice in the MENA Region' (31 October 2007).

131 Flynn, *Disabled Justice?*, 13.

the content of the legal rules and principles which shape the decisions made about those who make a 'justice' claim. Flynn argues that substantive access to justice 'extends beyond individual tribunal or court rulings into the realms of constitutional and statutory law reform processes and demands the adoption of laws promoting substantive equality which are sensitive to social context'.[132] The substantive element of access to justice requires the development of laws and policies that promote substantive equality. However, this cannot be achieved without the involvement of the disadvantaged group. Flynn notes that the negotiation of the Convention on the Rights of Persons with Disabilities (CRPD) is often acknowledged to be the most inclusive human rights treaty-drafting process with an overwhelming number of CSO participants. One result is that this 'involvement can be directly linked to the innovative articulation of equality of opportunity which appears in the CRPD'.[133]

Second, *procedural access to justice* 'is closer to the traditional, or narrow, interpretation of "access to justice" as the process by which claims are adjudicated, generally in legal or administrative systems'. However, a wider approach to the procedural component of access to justice should include 'the type of institutions where one might bring a claim, the rules that govern the complaint and conduct of the parties once the complaint is brought within a particular institution, the particular mandate of a given institution and the factors – outside of the substantive law itself – which influence the nature and quality of the encounter for [individuals] within a particular legal institution'. In order to achieve procedural justice, one should examine the opportunities and barriers to getting one's claim into court or another dispute resolution forum.[134]

Third, *symbolic access to justice* steps outside doctrinal law and asks to what extent a particular legal regime promotes citizens' belonging and empowerment. This requires a society in which individuals from marginalized communities are fully included and empowered to participate as equal citizens, thanks in part to that society's laws and justice system. Symbolic access to justice is closely linked to the 'precursor access to justice question', meaning 'the extent to which law can be harnessed to achieve progressive social change'.[135] Flynn argues that a participatory component of access to justice should be added to this definition, which reflects the importance of participation of disabled people in all aspects of the life of their communities.[136]

132 Ibid.

133 Ibid, 14.

134 Ibid, 15.

135 Ibid, 17.

136 Ibid.

Access to justice or to remedy?

When unpacking the concept of access to justice, the question of the relationship between access to *justice* and access to *remedy* arises. Is access to remedy comparable to access to justice? While both concepts are intertwined, access to remedy does not imply access to justice. From a lexical perspective, the words *remedy* and *justice* have different meanings. While the Oxford Dictionary defines *remedy* as 'a means of legal reparation',[137] it defines *justice* as 'just behaviour or treatment' or 'the quality of being fair and reasonable'.[138] While access to remedy entails obtaining 'reparation' or compensation for the loss suffered, access to justice appears to have a broader meaning than access to remedy, as it presupposes obtaining just or fair and reasonable treatment.

The distinction between access to remedy and access to justice is particularly relevant in the BHR context; both terms can be found in the BHR literature. However, there is no clear conceptual distinction between the two terms. The UNGPs, which have shaped the debate about BHR over the last decade, focus solely on access to remedy. They do not mention access to justice once. The UNGPs state that access to effective remedy has both procedural and substantive aspects. In particular, 'the remedies provided by the grievance mechanisms … may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred'.[139] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) has clarified the difference between access to remedy and access to justice.[140] The concept of access to effective remedies is derived from, and dependent on, the right to an effective remedy. However, simply providing access to remedial mechanisms will not suffice. At the end of the process, there should be an effective remedy in practice. This is why access to an effective remedy as having both procedural and substantive aspects is recognized in the UNGPs.[141] Access to justice, on the other hand, is a more elastic concept than the notions of the right to an effective remedy and access to an effective remedy. The UNWG explains:

> In a narrow sense, access to justice can be equated with the right of access to effective judicial remedies, and in this sense effective remedies should often result in justice being provided to rights

137 OUP, 'Remedy' (*Lexico* 2021) <https://www.lexico.com/definition/remedy> accessed 1 May 2021.

138 OUP, 'Justice' (*Lexico* 2021) <https://www.lexico.com/definition/justice> accessed 1 May 2021.

139 UNGPs, Commentary, 25.

140 UNWG, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (18 July 2017) UN Doc A/72/162, para 16.

141 Ibid, paras 14–15.

> holders. Nevertheless, access to justice can also be used in a broader sense to deal with larger issues of injustice that may not be addressed through individualized remedies offered for a given set of human rights abuses, but would require more fundamental changes in social, political or economic structures.[142]

As a result, the meaning of access to justice varies depending on whether it is understood from an individual perspective (where it can be equated with access to remedy) or a societal perspective (where it requires more than access to remedy to benefit others and society as a whole). Both meanings, however, produce different expectations and outcomes, which may lead to tension. This tension has been visible in the context of out-of-court settlements between plaintiffs and MNEs, as will be seen later in this book.

Effective access to justice

Even when there is access to justice, one can question whether this is effective. What does effectiveness mean in the context of access to justice? According to the Oxford Dictionary, *effectiveness* means 'the degree to which something is successful in producing a desired result' or success.[143] Therefore, based on the aforementioned understandings of access to justice, 'effective access to justice' can mean several things. From a procedural perspective, it means the successful opportunity to bring a legal complaint to the legal system, meaning the courts or other bodies with the authority to adjudicate, in order to solve a dispute. However, from a substantive perspective, it means the successful opportunity to see one's claim be treated in a fair manner or lead to just outcomes. Although interrelated, both visions of 'effective access to justice' differ.

The question of what effectiveness means in relation to access to justice has gained renewed interest over recent years.[144] Looking at civil legal services, Albiston and Sandefur claim that an explicit theory of 'effectiveness' is still lacking.[145] Nonetheless, the current socio-legal literature offers a broad base for conceptualizing effectiveness on the individual, institutional, and societal levels. Based on this literature, Albiston and Sandefur suggest defining effectiveness more broadly in order to shift the 'focus from individualistic measures limited to legal remedies to consider how legal problems affect the well-being of

142 Ibid, para 16.

143 OUP, 'Effectiveness' (*Lexico* 2021) <https://www.lexico.com/definition/effectiveness> accessed 1 May 2021.

144 See Catherine Albiston and Rebecca Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) Wisconsin Law Review 101, 111–114; OECD and Open Society, 'Understanding Effective Access to Justice'.

145 Albiston and Sandefur, 'Expanding the Empirical Study of Access to Justice', 111–114.

claimants, their families, and society in multiple, interconnected ways'.[146] They explain the need for such a theoretical move based on several arguments that resonate with the approach taken in this book. First, when looking at legal representation, effectiveness encompasses more than case outcomes, so any definition of effectiveness should therefore consider the broader, systemic effects of representation on individuals and those around them. Second, not all outcomes relevant to effectiveness are material; some operate at the level of social meaning, such as empowerment (or disempowerment) of individuals who claim their legal rights. Third, effective legal representation may help clients overcome subjective barriers to accessing legal rights that address, for instance, poverty and inequality. Importantly, legal representation may provide important benefits beyond an individual case. It can improve perceptions of fairness.

Access to justice and corporate accountability

The aforementioned conversations about the meaning of access to justice are relevant and, at times, resonate with ongoing debates on access to justice and corporate accountability in the context of transnational litigation against MNEs.

Transnational litigation against MNEs raises access to justice issues of both a *procedural* and *substantive* nature. Complainants have faced various procedural barriers when seeking to hold MNEs to account and obtain remedy for the harm they have suffered. One of these obstacles has been the victims' difficulty in accessing a court that will hear their claim, especially when legal doctrines such as *forum non conveniens* apply.[147] The inability for victims to bring group claims has also been a major hurdle. On a substantive level, existing international and domestic liability regimes have failed to take into account the reality of corporate groups' impacts on humans and the environment. In transnational claims against MNEs, current standards of corporate liability make it almost impossible for plaintiffs to hold the parent company of an MNE liable for the harm occurring in the context of its group activities.[148]

Transnational litigation against MNEs also raises access to justice issues of a *symbolic* nature. Plaintiffs, lawyers, and NGOs have challenged not only the perceived impunity of businesses towards human rights and the environment in the context of foreign investment, but also international, regional, and

146 Ibid, 113.

147 For an analysis of the impact of the application of the *forum non conveniens* doctrine on business-related victims, see Daysheelyn Anne P Brillo, 'The Global Pursuit for Justice for DBCP-Exposed Banana Farmers' in Karen Erica Bravo, Jena Martin and Tara Van Ho (eds), *When Business Harms Human Rights: Affected Communities that Are Dying to Be Heard* (Anthem Press 2020).

148 For a discussion of the implications of separate legal personality and limited liability for litigation against MNEs, see Muchlinski, 'Limited Liability and Multinational Enterprises'.

national lawmaking processes, the contents of corporate liability regimes, and the role of national and regional courts in protecting the interests of the most vulnerable. As such, transnational litigation against MNEs questions the extent to which the legal system can lead to fair and just outcomes regarding corporate accountability. Moreover, it has shed light on the inability of legal and justice systems to include, take into account the specific needs of, and empower victims of harm caused by MNEs, especially when they are poor and from developing countries. More broadly, this reflects the exclusion of citizens from economic, legal, and political decisions in both host and home States.

Ultimately, transnational litigation against MNEs is a search for justice for both the direct victims of corporate abuse and society at large. It aims to restore the balance between the interests of corporations and those of the most exposed elements in society by influencing policy-makers and courts.

6 Structure of the book

This book is divided into nine chapters grouped under three parts.

Part I aims to describe the legal and social backdrop against which demands for access to justice and corporate accountability have emerged in home countries, especially in Europe. **Chapter 1**, which is the present chapter, introduced the setting, aim, scope, key concepts, and background of this book. **Chapter 2** discusses how international and European legal systems regulate the activities of business actors and guarantee access to justice, and presents existing normative gaps. **Chapter 3** provides a historical, legal, and social account of the general development of transnational litigation against MNEs. It describes the main characteristics of the various cases brought in common law and European civil law jurisdictions. Finally, Chapter 3 sheds light on the relationship between social movements and transnational litigation against MNEs.

Part II aims to understand whether transnational litigation against MNEs in European home countries of civil law tradition has been an effective strategy to achieve justice for victims of business-related harm abroad. **Chapter 4** and **Chapter 5** compare the relevant legal and procedural aspects of civil and criminal litigation in France and the Netherlands respectively. They use case law to illustrate the opportunities and barriers faced by plaintiffs while seeking to hold corporations accountable, and highlight similarities and differences in the legal strategies used by plaintiffs. **Chapter 6** deals with the study of civil and criminal corporate liability regimes in the context of MNEs in France and the Netherlands.

Part III offers a comprehensive analysis of the most recent regulatory responses towards achieving access to justice in the field of BHR at international, European,

and national levels. **Chapter 7** discusses the development of mandatory HRDD legislation at national and European levels, and its potential impacts on access to justice. **Chapter 8** then examines the current negotiations on a potential legally binding instrument on BHR, as well as the potential options and impacts on access to justice. Finally, **Chapter 9** evaluates the achievements of transnational litigation against MNEs in Europe and discusses the potential future of access to justice in the context of BHR.