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[Home](#) - [Blog](#) - [Tort law](#) - Putting an End to the Application of Foreign Law in Cross-Border Tort Cases for Serious Human Rights Violations?

Tort law

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Putting an End to the Application of Foreign Law in Cross-Border Tort Cases for Serious Human Rights Violations?

I. Introduction

In cross-border tort cases for human rights violations, there is the strict rule that the law of the State where the harm occurred applies to the determination of civil (tort) liability.¹ One can think of situations in which victims of alleged human rights violations from State A hold a company with its seat in State B accountable before the courts of State B. Civil jurisdiction can be based on the seat of the company being in State B, but since the alleged violations of human rights law took place in State A, the tort law of that State has to be applied.

This rule imposing the applicable law of the *lex loci damni* in tort suits was introduced in the European Union by the Rome II Regulation. Before Rome II, the standard rule in EU Member States was to apply the law of the State where the tortious act took place (*lex loci delicti*).² Parties to a civil suit can agree to apply the law of a different State, such as that of the trial forum instead, but may not be inclined to do so if at least one of them believes that the *lex loci damni* may deliver a better result.³ Rome II contains two further exceptions to the *lex loci damni* rule. Firstly, when the tortfeasor and claimant both have their habitual residence in the same State, the law of that State is applied. Furthermore, the law of a State to which the tort is “manifestly more connected” than the *loci damni* is also applied instead. Some States have made other exceptions to the rule as well.⁴

The replacement of the *lex loci delicti* with the *lex loci damni* rule was justified in reference to the uncertainty that existed under the former, which resulted from the fact that Member States had different rules for determining when a tort is committed in a certain State.⁵ In practice, the State in which the unlawful act takes place and the State where the damages occur will often be the same. The *lex loci damni* rule also has a number of advantages over the *lex fori* rule. For one, it serves legal certainty, for parties will know what law is applicable to a tortious act once it is clear what damages it has caused. Furthermore, there is an argument to be made that the State where the harm occurred has an interest in seeing the case being adjudicated under its law.

II. Against *lex loci damni*

The prevailing approach also has significant drawbacks. The nature and scope of foreign tort law generally develops into a battle of so-called experts. There is a significant risk that courts will commit errors in the interpretation and application of foreign law and that the fundamental principle of *iura novit curia* ('the court knows the law') can hardly be observed if foreign law needs to be applied. These problems are exacerbated by the fact that the difficulty of establishing foreign law is not recognized as a reason not to apply it.⁶ When courts do err in applying foreign law, such mistakes can often not be corrected by higher courts. In the Netherlands, for instance, the incorrect application of foreign law is not a ground for cassation before the supreme court.⁷ Finally, it may also be an impediment to the expeditious administration of justice when parties and courts have to delve into the details and finesses of foreign torts law.

The question arises whether the rule of *lex loci damni* is in need of modernization. This question is particularly relevant in cases in which the application of foreign torts law would -in addition to the aforementioned problems- have the effect of restricting victims' access to an effective remedy.

III. Introducing a double tort liability-requirement

When reflecting on this question, it may be helpful to make a comparison with the exercise of extraterritorial criminal jurisdiction. Like many other countries, the Netherlands has full criminal jurisdiction over Dutch nationals who have committed a crime in another country, provided that the conduct is also punishable under the laws of that other country (double criminality requirement).⁸ In case of very serious crimes, such as rape, genital mutilation, torture or crimes against humanity, this so-called double criminality requirement does not exist at all.⁹

Once the double criminality requirement in relation to 'ordinary crimes' is satisfied, the Netherlands has criminal jurisdiction and the determination of criminal liability is based fully and exclusively on Dutch criminal law.

It is true that the judicial evaluation of the double criminality requirement can sometimes be complex, requiring more than a cursory, or proximate, analysis of foreign criminal law. This is especially true when the definitions of crimes differ or when modes of criminal liability are involved, which may not exist in the same way in the trial forum (conspiracy, as it is applied in the US, offers a good example in this regard when compared to other jurisdictions' approaches to common design liability).

Yet the determination of double criminality, with a view to ascertain whether or not criminal

jurisdiction is available, appears far more efficient than the continuing application of foreign law after jurisdiction has already been established (which happens in extraterritorial torts cases). In our view, it makes far more sense to connect the interpretation and application of foreign law to the jurisdiction determination, and to make the existence of jurisdiction dependent upon significant discrepancies (such as a cause of tort action not being available in the State *loci damni*) between the law of the State where the crime was committed (or the harm occurred) and the law of the State where proceedings -civil or criminal- are being conducted. In case such discrepancies cannot be determined, we see no reason why a civil suit could not also proceed on the basis of the tort law of the trial forum only. And in case there would be significant discrepancies between the tort law of the trial forum and the tort law of the State where the harm occurred, this could be a reason to deny jurisdiction over the suit. We think it would be worthwhile to consider the advantages of a double tort liability-requirement as a condition for nationality-based jurisdiction (seat of the company), and to have it replace the practice of applying foreign law in cross-border torts suits.

IV. Tort liability and (serious) human rights violations

There is another reason to look critically at the present practice of applying foreign tort law, and that is that it fails to distinguish between the nature of torts cases. In cross-border tort cases, foreign law is being applied to both simple tort situations and those arising out of (serious) human rights violations. As far as application of foreign law would practically limit the access to justice and an effective remedy for human rights victims, one could consider this problematic, more so than in 'ordinary torts' cases.

In tort cases, the protection of human rights is of increasing importance. As far as the application of foreign law would hinder the protection of international human rights law, this may in and of itself be a strong reason to reconsider such application. In relation to the accountability of companies for human rights violations, it is important to have regard to the UN Guiding Principles on Business and Human Rights (UNGPs). UNGP 25 obliges States to provide victims access to an effective remedy with respect to business-related human rights abuses within a State's jurisdiction. And UNGP 26 obliges States to reduce barriers that could lead to a denial of access to remedy. This could also be interpreted as an incentive to ensure the application of the law that best favours victims' access to an effective remedy.

This then brings us to the dilemma that there are scenarios in which foreign law can be more favourable to victims of business-related human rights abuses than the law of the trial forum. Should this situation, in the interest of human rights protection, allow for the exceptional application of foreign law? Authorizing the shopping between systems of tort law that best favours the interests of victims may seem highly sympathetic, but also has its drawbacks.

First of all, how should one determine whether foreign law is actually more favourable to the victim? This triggers, again, the problem of interpreting and applying foreign law, and making errors therein. Second, and more fundamental, it may not be just and fair to allow for full and unimpeded 'tort law' shopping in favour of the best human rights protection. Making again the comparison with criminal law, it would be unthinkable to engage in shopping among the substantive law of the trial forum and the *lex loci delicti* with a view to best ensure a criminal conviction. Rather the opposite applies; any doubt or uncertainty should favour the accused (*in dubio pro reo*). Although a

company in a civil suit related to human rights violations is of course not in a similar position as a suspect in a criminal case, there are nevertheless considerations of fairness that caution against opting for the torts law that by definition favours the plaintiffs, even if we are dealing with a human rights based tort claim.

V. Conclusion

In conclusion, we think that when jurisdiction is available in cross-border tort cases, it makes sense in many ways to have that determination of jurisdiction, followed by fully applying the tort law of the trial forum that exercises jurisdiction. This should arguably be the case even when the *lex loci damni* would offer better prospects in obtaining an effective remedy for the human rights violations that have been suffered. It is in our view preferable to improve justice systems of the trial fora, i.e. countries where (multinational) corporations have their seats, and eliminate in these countries' tort laws barriers against access to effective remedies for victims of human rights violations.

1. For European Union States this '*lex loci damni*' rule is laid down in art. 4(1) of Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199.
2. See point 15 of the preamble of Rome II.
3. Art. 14 Rome II.
4. In Germany, for instance, the claimant can choose between the *lex loci delicti* and the *lex loci damni*, see art. 40(1) Introductory law to the German Civil Code [*Einführungsgesetzes zum Bürgerlichen Gesetzbuche*].
5. See point 15 of the preamble of Rome II.
6. The *ordre publique* exception to applying foreign law as recognized in article 26 of Rome II and article 6 of book 10 of the Dutch Civil Code is not understood to apply to situations in which it is difficult or impossible to determine the content of foreign law. See A.P.M.J. Vonken, commentaar op art. 10:6 BW, *Tekst & Commentaar Burgerlijk Wetboek*, Deventer: 2012.
7. Art. 79(1)(b) Judiciary(Organisation)Act [*wet op de rechterlijke organisatie*].
8. Art. 7(1) Dutch Criminal Code [*wetboek van strafrecht*].
9. Art. 2(c) International Crimes Act [*wet internationale misdrijven*].

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