Strategic Litigation against the Misconduct of Multinational Enterprises: An anatomy of Jabir and Others v KiK

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Abstract: The case Jabir and Others v KiK is not a regular court case but was filed with multiple incentives. On the one hand, it is a claim for compensating the immaterial damages caused by the Ali Enterprise (AE) factory fire in Pakistan. On the other, it forms part of a broader campaign to attach legal responsibility to all actors contributing to the catastrophic events of 2012 and to make visible the workers hidden in global chains of production by enabling their testimony in Germany. The lawsuit therefore also aims at facilitating a protest against the global economic system in a German court as a public forum in the country where KiK is headquartered and where its products are bought and worn. KiK's behavior does not represent a rare exception but the standard practice of multinational enterprises' (MNE) activity across borders and, from a litigation perspective provides for an archetype of the factual, procedural and substantive legal obstacles that arise in holding MNEs to account for violating human, environmental and labor rights. Therefore, we embed the KiK case in the structures of global MNE organization in order to highlight the regulatory frame for their transnational activity and the lack of accountability in the event of abuses. We discuss the legal peculiarities and hurdles that arise when developing a legal claim against a MNE such as KiK and provide the wider strategic deliberations and elements of transnational cooperation that influenced the lawsuit.

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A. Introduction

On 11 September 2012, 259 workers died and 32 people were – partly heavily – injured in a fire at the Ali Enterprises (AE) textile factory in the Baldia district of Karachi, Pakistan.[1] The factory workers suffocated or burned because windows were barred, emergency exits closed, and only one door of the building was open. The most notable customer of the burnt-out factory was the German textile company KiK Textilien und Non-Food GmbH (KiK). According to its own statements KiK purchased at least 70% of the production output of AE in 2011 and its Pakistani supplier could only thrive economically through the trade relationship with the German company.[2] Therefore, four claimants representing the group – two fathers and one mother of deceased factory workers as well as one survivor – with the support of the Berlin-based European Center for Constitutional and Human Rights (ECCHR), medico international, and the Pakistani National Trade Union Federation (NTUF) filed a court case against KiK in its home country, Germany. In March 2015, a civil lawsuit was brought against KiK at the District Court of Dortmund (Landgericht Dortmund), demanding € 30,000 per person as compensation for immaterial damage. The 7. Civil Chamber of the District Court with decision of 29 August 2016 declared jurisdiction, granted legal aid for the claimants and issued an order to obtain a written legal opinion on the applicability and outlook of the claim in Pakistani law.[3] On 29 November 2018, the case was heard orally for the first time. On 10 January 2019 the Dortmund court dismissed the case due to the two-year statute of limitation for such claims in Pakistani law as argued by the defendants.[4] The plaintiffs applied for legal aid in order to appeal the decision but were unsuccessful.[5]

The KiK case presents an archetype of the behavior of multinational enterprises (MNEs) abroad, as according to KiK, its practices leading to 259 deaths were not unique to its business dealings, but are the standard industry practice.[6] Therefore, above all else, the case at hand illustrates the structural flaws, or rather, contradiction, in the legal discourse surrounding the accountability of MNEs: On the one hand, there is a well-recognized self-regulatory practice of MNEs, especially in regards to their cross-border activities and its social impact.[7] On the other, we find little to no recognition of this self-given regulatory

1 Clean Clothes Campaign, Time line of the Ali Enterprises Case, 2018, p. 1, https://cleanclothes.org/safety/ali-enterprises/time-line-for-the-ali-enterprises-case (last accessed on 10 April 2019).

2 *Hasnain Kazim/Nils Klawitter,* Der Spiegel, Zuverlässiger Lieferant, on 22 October 2012, http://www.spiegel.de/spiegel/print/d-89234400.html (last accessed on 10 April 2019).

3 Court order in Case 7O95/15, 7th Civil Chamber, District Court of Dortmund, 29. August 2016; Press Statement, District Court of Dortmund, 30.8.2016, http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-KiK_docx.pdf (last accessed on 10 April 2019).

4 District Court of Dortmund Verdict of 10.1.2019, Az.: 7 O 95/15.

5 Appellate Court of Hamm, Verditct of 21 May 2019, Az. 9 U 44/19

6 KiK Response to claim (26 August 2015) p. 6, on file with the authors.

7 *Peter Muchlinski*, Multinational Enterprises and the Law, New York 2007, p. 113 f.

frame when claims are made against human, environmental or labor rights violations in the course of their activity.

The legal case against KiK takes the logic of current MNE (self-)regulation in relation to their cross-border activity seriously and argues that KiK's self-given code of conduct cannot be seen as a mere tool for the company's reputational management but constitutes a solid legal obligation. Therefore, as a first step, it is necessary to understand the current regulatory frame within which MNEs operate as well as the recent developments in this regard, as they illustrate both that self-regulation is the premise of MNE's transnational activity and that the legal frame is not sufficiently developed to provide an adequate remedy against abuses (II.). This overview can only give an introduction to the complexity of MNE regulation, but reveals the need for strategic deliberations before starting a legal battle. In (III.) we provide the facts of the KiK case as they currently stand and a discussion of jurisdiction, the applicable law, the legal argument and of supply chain liability as the legal concept vital for the case at hand. Lastly, we will discuss the incentives beyond a court win as well as the strategic deliberations and the aspect of transnational cooperation (IV.). This is important to the KiK case as transnational human rights violation claims – here through national tort law – are rarely easily admitted to the court room, let alone won and therefore rely on civil society and the broader public to create pressure in order to bring about compensation and, in the long run, change.

B. MNEs cross-border activity and the problem of accountability in a nutshell

The MNE as a concept and a reality (re-)emerged as a major actor of the global economy after World War II either through foreign direct investment (FDI) or owning or, in some way, controlling value-added activities in more than one country.[8] From the 1990s onwards, the patterns of MNE activity evolved to its contemporary modus operandi, with ever-growing and ever-changing global chains of production.[9] Only in recent years, as Muchlinski hopefully noted in 2011, are we 'waking up from the thirty-year experiment with the marketization of the global economy, and we are beginning to ask for something else,' other than the neoliberal narrative of financialization, liberalization, privatization, and deregulation.[10] This is partly because with the augmentation of MNE activity, the reports of their involvement in human rights abuses, environmental destruction and labor rights infringe-

8 *John H. Dunning/Sarianna M. Lundan*, Multinational Enterprises and the Global Economy, Cheltenham/Camberley 2008, p. 3.

9 *Muchlinski*, note 7, p. 21 f.

10 *Peter Muchlinski,* The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post- Financial Crisis World, Indiana Journal of Global Legal Studies Vol. 18 (2011), p. 666 f.

ments in the course of their cross-border operations increased massively, which has led to calls for greater corporate accountability.[11]

I. MNE accountability and the premise of self-regulation

Holding MNEs to account for their misconduct, however, still proves to be difficult as their regulatory frame in relation to human, environmental and labor rights is still largely based on Corporate Social Responsibility (CSR) – best understood as international private business self-regulation.[12] Even though CSR purports the idea of the socially responsible corporation, '[t]he empirical experiences of [MNEs´] external stakeholders in developing countries reinforce the need for recourse to a system of enforceable international mechanism to ensure accountability of [MNEs].'[13] The most notable development in this regard at the international level was the adoption of the UN Guiding Principles on Human Rights and Business (UNGPs) which were endorsed unanimously by the UN Human Rights Council in 2011, in part as a response to the failure of other international bodies to provide for just and universal remedy, such as the National Contact Point (NCP) grievance mechanisms of the 36 state-strong OECD.[14] The UNGPs as a soft law instrument introduced a standardized frame for CSR but aim at polycentric governance rather than the creation of an international frame of legal accountability by laying 'the foundation for the further development of business responsibility, as a coherent area of policy and regulation in its own right.'[15] Taylor concludes that the UNGPs framework 'is not law or a form of corporate accountability, at least not mostly. It is safe to say that while no company will end up in court this year on the grounds of a failure to meet its responsibility to respect, it is equally true that the Framework in no way constrains governments from putting those responsibilities into legislation, or the courts from drawing on them in specific cases.'[16] Hence, so far, the UNGPs have left

11 *Peter Muchlinski,* Human Rights and Multinationals: Is There a Problem?, International Affairs Vol. 77 (2001), p. 31 f.; *Wolfgang Kaleck/Miriam Saage-Maaß*, Unternehmen vor Gericht, Berlin 2016, p. 24–44.

12 *Benedict Sheehy*, Defining CSR: Problems and Solutions, Journal of Business Ethics Vol. 131 (2015), p. 625–648; *John G. Ruggie,* Multinationals as Global Institution: Power, Authority and Relative Autonomy, Regulation and Governance 12 (2017), p. 317; *Kamil Omoteso/Hakeem Yusuf,* Accountability of transnational corporations in the developing world: The case for an enforceable international mechanism, critical perspectives on international business Vol. 13 (2017), p. 58 f.

13 *Omoteso/Yusuf,* note 12, p. 66.

14 *John G. Ruggie,* Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Innovations 2008, p. 208, https://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189 (last accessed on 10 April 2019).

15 *Ruggie,* note 12, p. 317; *Mark B. Taylor*, The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility, Etikk i praksis. Nordic Journal of Applied Ethics (2011), p. 28.

16 *Taylor,* note 15, p. 27.

survivors of corporate rights abuses and the civil-society stakeholders involved in the struggle frustrated due to the lack of legal liability and enforceability, even though they did contribute to the visibility of the problems surrounding the transnational operations of MNEs and the debates on corporate human rights due diligence.[17]

II. Contemporary struggles for a legal frame of MNE operation

Therefore, contemporary policy developments, driven by the efforts of a global civil society movement under the umbrella of human rights and business strive to establish a solid legal frame to fence MNE activity, either through laws in the home country jurisdictions of MNEs or at the international level. In Europe, for instance, the most notable development is the new French law of March 2017, establishing a legal duty of vigilance obligation for parent and subcontracting companies of a certain size.[18] At the international level, the UN Human Rights Council-mandated Open-ended Intergovernmental Working Group (IGWG) in its fourth session in October 2018 heavily debated its zero draft, addressing inter alia questions of direct liability of MNEs for human rights abuses, extraterritorial jurisdiction and primacy of human rights law over investment treaties.[19] These developments illustrate that the pushes and struggles of survivors and civil society to bring about a standardized legal frame for the operations of MNEs and to provide uniform remedies for their misconduct slowly start to bear fruits.[20] They do, however, also testify to the fact that to this day, there is no such institutional legal path for remedy against corporate abuse, neither internationally nor in the MNEs home jurisdiction, in most countries of the globe, which is why claimants in these cases rarely experience the acknowledgement of corporate wrongdoing and adequate compensation for the damage done.[21]

17 *Chairman Okoloise*, Contextualising the corporate human rights responsibility in Africa: a social expectation or a legal obligation, African Human Rights Yearbook 191–220 (2017), p.194 ff.; *Omoteso/Yusuf,* note 12, p. 58 f.

18 *Stephane Brabant/Elsa Savourey,* French Law on the Corporate Duty of Vigilance – A Practical and Multidimensional Perspective, International Review of Compliance and Business Ethics (2017), p. 90 ff.

19 For further information, see the Business and Human Rights Resource Center's documentation of the Fourth UN Intergovt. Working Group session on proposed business & human rights treaty (15–19 Oct 2018)**,** https://www.business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/fourth-un-intergovt-working-group-session-on-proposed-business-human-rights-treaty-15-19-oct-2018, (last accessed on 10 April 2019).

20 Some regard those fruits as poisonous as they do not change the current structural inequalities in the global economy but rather legitimize them: *Grietje Baars*, 'It's not me, it's the corporation': the value of corporate accountability in the global political economy, London Review of International Law Vol. 4 (2016), p. 127–163.

21 *Miriam Saage-Maaß*, Holding Companies Accountable – Lessons from transnational human rights litigation, in: Brot für die Welt/ECCHR/Misereor (eds), 2014, p. 15 ff., https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Sonstiges/Brochure_HoldingCompaniesAccountable_Einzelseiten.pdf; *Harris Gleckman*, Counterbalancing disproportionate power:

C. Litigating against the odds: The legal case against KiK

To bring transnational claims through the use of general legal means, i.e. laws not specifically tailored to MNE activity, comes with massive legal and factual obstacles, especially, when brought against a supplier.[22] Of course, the case against KiK is not the first of its nature. As international policy developments are relatively slow and for the most part still lack enforceable provisions, affected persons of corporate abuse have explored national courts to gain reparation and justice. Some of the most prominent cases that established precedent are Doe v. Unocal Corp.[23] and Wiwa v. Royal Dutch Shell Co.[24] which were brought in the United States of America under Alien Tort Claims Act in the late 1990s and early 2000s. In parallel, a tort claim practice developed against U.K.-based parent companies. These lawsuits started with claims for asbestosis damage suffered by the employees of South African subsidiaries of British companies and soon targeted other environmental and human rights violations.[25] In continental Europe, criminal investigations were initiated against the management of MNE's headquarters.[26] An equally diverse legal practice against corporate abuse has been developed in the Global South, where victims started to use legal procedures from civil litigation and criminal investigations to administrative and public interest litigation claims.[27] The variety of legal pathways explored in these claims demonstrates that the scope of responsibility of the parent companies in their home countries re-

a response to John Ruggie, openDemocracy 4. November 2018, https://www.opendemocracy.net/harris-gleckman/counterbalancing-disproportionate-power-response-to-john-ruggie (last accessed on 10 April 2019).

22 Amnesty International, Injustice Incorporated, Corporate Abuses and the Human Right to Remedy, 2014, p. 113 ff., https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf; *Claudia Müller-Hoff/Carolijn Terwindt,* Anyone can make claims – Is the KiK case proof of access to remedy against corporate human rights violations?, OxHRH Blog, 26 February 2018, http://ohrh.law.ox.ac.uk/anyone-can-make-claims-is-the-kik-case-proof-of-access-to-remedy-against-corporate-human-rights-violations (last accessed on 10 April 2019).

23 Doe v. Unocal Corp., 248 F 3d 915 (9th Cir 2001).

24 Wiwa v. Royal Dutch Shell, 2009 WL 498088.

25 Lubbe v Cape Plc [2000] UKHL 41; Chandler v Cape Plc [2012] EWCA Civ 525 (25 April 2012); LeighDay, Gold mining silicosis legal team, https://www.leighday.co.uk/International/Further-insights/Detailed-case-studies/South-Africa-silicosis/The-history-of-the-silicosis-case (last accessed 10 April 2019); An overview of the UK litigation can be found here: *Richard Meeren*, Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States, City University of Hong Kong Law Review Vol. 3 (2011), p. 1–41.

26 Public Prosecutor v Frans Cornelis Adrianus van Anraat, District Court of The Hague, Criminal Law Section, Public Prosecutor's Office Number 09/751003–04 (23 December 2005); Business & Human Righst Ressource Centre, Nestlé lawsuit (re Colombia) https://www.business-humanrights.org/en/nestl%C3%A9-lawsuit-re-colombia (last accessed 10 April 2019); Guus Kouwenhoven (Judgment), District Court of The Hague, Criminal Law Section, Public Prosecutor's Office Number 09/750001–05 (7 June 2006) (The Netherlands). TRIAL, Trial Watch, Gus Kouuwenhoven, https://trialinternational.org/latest-post/guus-van-kouwenhoven/ (last accessed 10 April 2019).

27 *Kaleck/Saage-Maaß*, note 1, p. 57–80; *Peter Muchlinski/Virginie Rouas*, Foreign Direct-Liability Litigation Toward the Transnationalisation of Corporate Legal Responsibility, in: Corporate Re-

mains unclear and at the center of legal and political dispute. Therefore, from a litigation perspective, the case against KiK is both complex and remarkable. It is complex, because of the legal peculiarities faced when attempting to bring a transnational claim against MNEs in their home country. These include determining jurisdiction, competent court and applicable law (1.) and the task of overcoming these procedural obstacles along the way as well as developing a sound legal argument in a different legal sphere, in this case, Pakistani common law (2.).[28] It is remarkable, because it is not aimed at the Pakistani operator of AE, but at its most notable buyer, the German company KiK (3.).

I. Jurisdiction and applicable law

KiK has its registered office headquarters in Germany. German courts are therefore competent, Art. 2 (1) in conjunction with Art. 60 (1) of the Brussels I Regulation. A challenge, however, lies in determining the applicable law. According to Article 4 (1) of Regulation EC No 864/2007 (Rome II), in the case of non-contractual claims arising out of tort, the law of the country in which the damage occurs is applicable (lex loci damni), which is Pakistan.[29] With the overwhelming opinion in academic debate, the Rome II Regulation further applies in claims based on contracts with protective effect for third parties as non-contractual obligations.[30] Therefore, the plaintiffs' claims for damages are determined by Pakistani law, which was confirmed by the District Court.[31]

sponsibility for Human Rights Impacts: New Expectations and Paradigms, Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), New York 2014, p. 360.

28 For a more detailed analysis of the legal aspects of the KiK case see: *Carolijn Terwindt/Sheldon Leader/Anil Yilmaz-Vastardis/Jane Wright,* Supply Chain Liability: Pushing the Boundaries of the Common Law?, Journal of European Tort Law Vol. 8 (2017); *Philipp Wesche/Miriam Saage-Maaß*, Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK, Human Rights Law Review Vol. 16 (2016), p. 370–385;.

29 While the claim was thus taken forward on the basis of Pakistani law, a scholarly debate emerged about the possibilities to deal with the claim on the basis of German law, see *Chris Thomale/Leonhard Hübner*, Zivilgerichtliche Durchsetzung völkerrechtlicher Unternehmensverantwortung, Juristenzeitung (2017), p. 385–397; *Thomas Thiede/Andrew J. Bell*, Klagen clever kaufen! Zur Haftung einer deutschen Textilhändlerin für die Opfer eines Brandes in der Fabrik eines pakistanischen Zulieferersbetriebs, Recht der Internationalen Wirtschaft (2017), p. 265 f.; It was also considered that the claim could have been brought as a contractual claim, and thus on the basis of German law, see *Ingrid Heinlein*, Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten, Neue Zeitschrift für Arbeitsrecht (2018), 276–282.

30 *Boris Schinkels*, ‚Dritthaftung' von Gutachtern in Deutschland und England im Lichte der Verordnung Rom II, Juristenzeitung (2008), p. 272–280; *Anatol Dutta*, Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte, IPrax (2009), p. 293 ff.

31 LG Dortmund, note 4.

II. Developing the legal claim in Pakistani tort law

Neither German litigators nor German judges are experts in the laws that govern Pakistani torts. Therefore, the court commissioned an expert report, addressing the question of substantive legal claims.[32] Pakistani law is common law and largely based on and heavily influenced by British and Indian jurisprudence.[33] There are two possibilities under Pakistani common law in pursuing a liability claim for compensation under torts, both familiar attempts to bring claims against violations of human rights and labor standards in British jurisprudence.[34] The first is the principle of vicarious liability, which provides for the strict liability of the employer or liability in a relationship "akin to employment."[35] Vicarious liability is not necessarily based on a formal contractual relationship but instead examines the overall circumstances of a business relationship between two parties through a five-factor lens.[36] The second possibility is liability arising from the tort of negligence. This requires the breach of an obligation by way of a negligent act or omission. Following the established English case law, the claimants argued that KiK breached its direct or non-delegable duty of care towards the employees of the AE factory.[37] The requirements for a duty of care are largely based on the decision in Caparo v Dickman.[38] According to this case, a duty of care is established under the following three cumulative conditions: the harm that occurred was foreseeable, there was sufficient proximity between the parties and the imposition of a duty can be seen as fair, just and reasonable.[39] In other words, the German District Court of Dortmund was asked to assess the nature of the relationship between KiK and AE, the relevant duty of care, the applicable industry standards of CSR, the relevant standards for safety audits, and KiK's duty in relation to such audits.[40]

32 LG Dortmund, note 4.

33 Khan v. Haleem, (2012) CLD (SC) 6 (2011), 8 (Khilji Arif Hssain, J., concurring) (Pak.); Khanzada v. Sherin, 1996 CLC 1440 (Peshwar) (Pak.), citing Indian law authoritatively in case alleging medical malpractice.

34 *Meeran,* note 25, p. 5.

35 *Terwindt/Leader/Yilmaz-Vastardis/Wright*, note 28, p. 290.

36 E v. English Province of Our Lady of Charity [2012] EWCA (Civ) 938, [2013] 2 W.L.R. 958, 19, 70 ff.

37 *Terwindt/Leader/Yilmaz-Vastardis/Wright*, note 28, p. 276.

38 Caparo Industries plc v Dickman [1992] 2 AC 605; Connelly v RTZ Corporation Plc [1998] AC 854.

39 In accordance with the decision in Connelly v RTZ Corporation Plc [1998] AC 854 the decisive factor in determining a duty of care is the question of whether the party that caused the harm took on responsibility for the harmed party, Connelly v RTZ Corporation Plc [1998] AC 854.

40 *Terwindt/Leader/Yilmaz-Vastardis/Wright*, note 28, p. 268.

III. Closing the gaps: Establishing supply chain liability

The determination of the cause of action sparks factual and legal questions regarding the premise on which the present case is built and what makes it legally remarkable:[41] Is KiK, and consequently, are companies that entertain outsourced production networks, liable for their supply chain and if so, to what extent? This question is tripartite and represents the major obstacle for claimants in cases against MNEs. First, the factual connection of the MNE and its supplier in another country needs to be established. Second, the composition of this transnational relationship needs to be analyzed to unearth the extent of dependence of the supplier on the parent company. And third, the question arises – in the current self-regulatory system of global supply chain management – how to present this connection in a legal case, i.e. whether the company outsourced elements of its core business[42] and whether the victims were particularly vulnerable.[43]

1. MNEs: factually one, legally hundreds?

The complexity in such cases is due to the organization of MNEs. The MNE is not one singular legal entity, but a network, comprised of a parent company and other legally autonomous subsidiaries, suppliers and affiliates, mostly due to host state incorporation requirements.[44] To highlight the vastness of these networks, John Ruggie, in his open letter to the abovementioned IGWG, gave the illuminating example that '[his] iPhone was produced by 785 suppliers in 31 countries. None were Apple subsidiaries, and by current global standards that is a relatively small supply chain.'[45] These networks, of course, differ largely in size and scope. For instance, supply chains in the clothing industry are relatively straightforward in comparison to, for example, the car industry. According to its own records, KiK trades with around 500 suppliers.[46] Control of parent companies over their affiliates is mostly exercised through tight vertical management and control structures or by buying the majority of the supplier's output on the basis of purchasing orders. KiK falls into the second category, since it bought at least 70 % of AE's outputs over the course of five years. MNEs, however, can escape legal liability for their subsidiaries and suppliers because of

41 For a more nuanced analysis of the concept of supply chain liability see *Terwindt/Leader/Yilmaz-Vastardis/Wright,* note 28, p. 276 ff.

42 University of Essex, Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chain, A Legal Guide, 2017, p. 17.

43 Ibid., p. 21.

44 *Illias Bantekas/Lutz Oette*, International Human Rights, Theory and Practice, Cambridge 2016, p. 767 f.

45 *John G. Ruggie,* 'Guiding Principles' for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group, p. 3, https://www.business-humanrights.org/sites/default/files/documents/Guiding%20Principles%20for%20Treaty%20Negotiations_Open%20Letter%20from%20Professor%20John%20Ruggie.pdf (last accessed on 10 April 2019).

46 KiK Response to claim (26 August 2015) p. 5, on file with the authors.

the legal separation of network entities, even though mostly the lead company and their affiliates clearly form one economic entity.[47]

2. Unearthing Facts and Connecting Dots

For claimants in these cases, there is of course another problem arising from the vast network organization of MNEs. Understanding the connection between AE and KiK was possible because KiK's then Managing Director for Sustainability Management and Corporate Communications Dr. Michael Arretz stated their economic interdependence in an interview with Der Spiegel in 2012.[48] Furthermore, it was the discovery of KiK's labels on the premises after the fire at the AE factory that connected KiK and its supplier.[49] As this information is available in the KiK case, it was feasible to establish the link between the German company and its Pakistani supplier and the economic dependence of the latter on the former. Often, this connection is not easily revealed as companies are not commonly transparent about their supply chain and its management, even though a trend toward (more) transparency seems to have gripped the global garment industry in recent years.[50]

3. Self-regulation necessitates self-obligation

The third problem that needs further clarification is of legal nature. Because KiK purchased around three quarters of the production output of AE in 2011, the argument was made that it factually controlled its supplier by economic dependence. Therefore, KiK had the possibility and power to dictate the terms and conditions under which AE ought to conduct its business in Pakistan. But is there a legal obligation for the parent company to care for the employees of its supplier? The claim brought at the District Court of Dortmund constructs this obligation through a review of the code of conduct of 2009. Here, KiK stated in the section 'Standard for Employment' in regards to 'Health and Safety at Work' in its supply chain that '[t]he workplace and the practice of the work must not harm the employees' or workers' health and safety. A safe and clean working environment shall be provided. Occupational health and safety practices shall be promoted, which prevent accidents and injury in the course of work or as a result of the operation of employer facilities. These safety practices and procedures must be communicated to the employees as well as the workers;

47 *Glen Wright,* Risky Business: Enterprise Liability, Corporate Groups and Torts, Journal of European Tort Law Vol. 8 (2017), p. 54–77; *Bantekas/Oette,* note 40, p. 767 f.

48 *Kazim/Klawitter*, note 3.

49 *Terwindt/Leader/Yilmaz-Vastardis/Wright*, note 28, p. 266 f.

50 *Human Rights Watch,* Report, Follow the Thread – The Need for Supply Chain Transparency in the Garment and Footwear Industry, 2017, https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry (last accessed on 10 April 2019). H&M, for example, makes its supply chain transparent: http://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html.

they have to be trained in effective usage […].'[51] In an even clearer statement by KiK, its Managing Director explained weeks after the AE fire that '[t]he monitoring of adherence to safe and fire prevention [is] obligatory for us as a buyer.'[52] Furthermore, the code of conduct was incorporated in the terms and conditions of every purchasing order.[53] This begs the question if such commitments in codes of conduct are in fact legal obligations or if MNEs can publically pledge themselves to safe and ethical working conditions but refuse liability when the code is violated. If the organizational structure of MNEs is taken into consideration in that they operate transnationally in almost complete self-regulation the systemic, logical answer is obvious: Self-regulation must lead to self-obligation.[54]

D. The KiK case beyond compensation: Strategic deliberations and the role of transnational cooperation

Transnational human rights litigation, in the KiK case through the exploration of national tort law, has been increasingly used as a tool to reveal and protest systems of global economic exploitation. Lawsuits like the one against KiK seek to unearth and ultimately transform these unequal economic power structures by enabling testimony of concrete, real-life experiences of workers, their suffering and their demands. In doing so, they complement the longstanding traditions of activism and trade unionism through strikes, campaigns, public protests, boycotts and shareholder activism.[55] Hence, the KiK case was not filed quietly, but together with various other trade unions, NGOs, human rights campaigners and activists. Collaborating journalists, architects and lawyers turned the case into a transnational campaign to create a platform, visibility and political momentum to demand accountability in global supply chains in general and in KiK's supply chain in particular.

51 KiK Textilien und Non-Food GmbH, Code of Conduct, revised version, 1 August 2009, p. 3.

52 KiK Textilien und Non-Food GmbH, Statement on the Panorama Program of 6.12.2012.

53 *Terwindt/Leader/Yilmaz-Vastardis/Wright,* note 28, p. 278 f.

54 *Anna Beckers,* Legalization under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes, Indiana Journal of Global Legal Studies Vol. 15 (2017), p. 15 ff.; *Terwindt/Leader/Yilmaz-Vastardis/Wright*, note 28, p. 268.

55 *Carolijn Terwindt/Christian Schliemann,* Transnational strategic litigation: an emerging part of civil society's repertoire for corporate accountability, Guest Essays Civil Society and the Private Sector, State of Civil Society Report, 2017, https://www.civicus.org/documents/reports-and-publications/SOCS/2017/essays/transnational-strategic-litigation-an-emerging-part-of-civil-societyg%C3%A7%C3%B6s-repertoire-for-corporate-accountability.pdf (last accessed on 10 April 2019); It should, however, not be forgotten that especially the German labour movement in the late 19th and early 20th century also used law reform and lawsuits as one of their integral strategies: *Ralf Hoffrogge,* Sozialismus und Arbeiterbewegung in Deutschland. Von den Anfängen bis 1914, Stuttgart 2011.

I. Strategic legal interventions: Political protest through law

As John Berger puts it, '[e]very profound political protest is an appeal to a justice that is absent, and is accompanied by a hope that in the future this justice will be established; This hope, however, is not the first reason the protest is being made. One protests because not to protest would be too humiliating, too diminishing, too deadly. One protests […] in order to save the present moment, whatever the future holds. To protest is to refuse being reduced to a zero and to an enforced silence. Therefore, at the very moment a protest is made, if it is made, there is a small victory.'[56] For the relatives of deceased workers and the survivors, who are organized in the AEFFAA, justice has always been twofold. On the one hand, for many, the economic pressure of losing their family's main bread winner in the AE factory fire made financial compensation an imperative. On the other hand, the persons affected have been clear from the beginning that their loss could not be resolved by financial compensation only, but that they aim at attaching responsibility to all actors involved in the tragedy. Thus, the KiK case is not and never was solely about a win in court. Rather, it has been part of a wider strategy of the AEFFAA in "genuine transnational collaboration" with other Pakistani and European actors to make sure industrial disasters like the AE fire will not happen again.[57] Therefore, it was mandatory for the AEFFAA to formulate the legal responsibility of the Pakistani factory owners and government officials as well as of the European companies profiting from their outsourced cheap labor.

II. Joining forces: Seeking accountability in Pakistan and Europe

As a first step, accountability was sought in Pakistan. Therefore, shortly after the AE factory fire, Pakistani civil rights lawyers together with trade unions like the National Trade Union Federation (NTUF), and labor organizations like the Pakistan Institute for Labour Research and Education (PILER) initiated the representation of survivors in criminal proceedings against the factory owners.[58] They also launched public interest litigation cases before the High Court of Sindh against the government agencies that were responsible for labor inspections and worker's welfare.[59] In these proceedings ECCHR intervened with an Amicus Brief, pointing out that responsible actors are not solely located in Pakistan but also

56 *John Berger,* Bento's Sketchbook, Verso, London, New York 2015, p.79.

57 For more information on the concept of 'genuine transnational collaboration', taking into account the power asymmetries between partners in the Global North and the Global South, see: *Alejandra Ancheita/Carolijn Terwindt*, Towards Genuine Transnational Collaboration, in: Ansgar Klein/Hans Josef Legrand/Thomas Leif/Jan Rohwerder (eds), Forschungsjournal Soziale Bewegungen Vol. 28 (Stuttgart 2015), p. 56–61.

58 FIR No 343/2012.

59 Pakistan Institute of Labour and others v. Province of Sindh and others, CP No. D-3318 of 2012; Pakistan Institute of Labour and others v. Province of Sindh and others, Constiutional Petition No. D-295 of 2013.

in Europe: KiK in Germany as the main buyer of AE and the certification company RINA in Italy, which issued a SA8000 certificate declaring the factory fire-safe.

Hence, the quest for accountability was soon brought to Europe: There, transnational cooperation of Pakistani and European organizations for a united strategy was mandatory. First, out-of-court negotiations over voluntary compensation payments facilitated by the International Labor Organization (ILO) were pursued. After having payed $ 1 million in immediate relief, KiK agreed to negotiate about further long-term compensation with the PILER. When these negotiations stalled in 2013 and 2014, the by then founded AEFFAA nominated four representatives to bring a civil litigation claim against KiK in its home country. The lawsuit in Germany deliberately aimed solely at compensation for pain-and-suffering to not detrimentally affect the potential success of the ILO negotiations, which aimed at material damages. The filing of the court case against KiK in Dortmund, however, seemed to have created pressure, as shortly after the German District Court's decision to grant jurisdiction and legal aid in August 2016, an agreement was reached on 9 September 2016 in the ILO negotiations between KiK, IndustriALL, Global Union and the Clean Clothes Campaign, in which KiK committed to pay $ 5.15 million to those affected by the AE factory fire.[60]

In parallel, efforts were undertaken to address the role of the Italian certification company RINA for its decision to approve the SA8000 certificate for AE. In August 2014, Italian lawyers filed a report concerning RINA's role in the AE fire by approving a certificate that deemed the working conditions safe, to the prosecutor in Turin, prompting a criminal investigation for the falsification of documents. In addition to the pending investigation, in September 2018, a coalition of European NGOs together with the NTUF and the AEFFAA filed a complaint with the Italian OECD NCP in order to address the structural flaws of the social auditing system which reproduces unsafe working conditions.[61] Finally, in cooperation with Forensic Architecture, a research project of the Faculty of Progressive Architecture and Media Research at Goldsmiths College London, ECCHR developed a 3D digital simulation of the AE factory fire. The simulation reconstructs the technical details of the

60 Press Release: Hearing in KiK case in front of Regional Court in Germany, 29 November 2018, "From an international perspective, Ben Vanpeperstraete from Clean Clothes Campaign makes clear: 'The proceedings against KiK in Germany have contributed significantly to the compensation settlement.'"; International Labour Organization, Compensation arrangement agreed for victims of the Ali Enterprise factory fire in Pakistan, Press release, 10. September 2016, http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang--en/index.htm (last accessed on 10 April 2019).

61 *ECCHR*, Case Report, RINA certifies safety before factory fire in Pakistan, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_RINA_20181121.pdf (last accessed on 30 November 2018).

fire safety precautions as well as the circumstances and consequences of the fire and was submitted to the proceedings in Germany and Italy.[62]

III. Visibility and empowerment in the courtroom and beyond

On 29 November 2018, the claimants had their first chance to participate in the German court hearings, accompanied by a coordinated event series 'One Week for Justice' in Geneva, Dortmund, Bochum and Rome.[63] Unfortunately, the presiding judge of the Dortmund court did not allow the claimants to speak as he was of the opinion that they were not able to contribute to the determination of the legal questions most relevant for the case at the present stage. Still, he could not avoid being confronted with the realities and human costs of global supply chain production as the claimants were present in the room.

Such legal interventions, on a more abstract level, can have a disruptive effect, as they irritate the self-referential and hegemonic discourse in the court room and in society.[64] Therefore, legal interventions like the lawsuit against KiK in Germany open a small space to imagine and to eventually claim a different economic, social and legal world order.[65] Workers, villagers and peasants in the Global South, oppressed by globalized capitalist production systems, through cases like this have an opportunity to rise up against corporate power by claiming their rights and forcing the 'other side' to participate in legal procedures.[66] The principle of equality before the law develops rare momentum, when marginalized workers are able to force the MNE responsible for their losses and injuries to abide by civil procedure rules and to explain its legal position in lengthy writs to the court.[67] In this regard, claiming rights through legal proceedings can realize the 'revolutionary potential' inherent to human rights.[68]

62 More information about the Forensic Architecture project 'Outsourcing Risk – Investigating the Ali Enterprises Factory Fire on 11 September 2012' can be found here: https://www.forensic-architecture.org/case/outsourcing-risk/ (last accessed on 10 April 2019).

63 ECCHR, #WeekOfJustice, https://www.ecchr.eu/veranstaltung/eine-woche-fuer-gerechtigkeit/ (last accessed 10 April 2019).

64 *Sonja Buckel,* Zwischen Schutz und Maskerade – Kritik(en) des Rechts, in: Alex Demirovic (ed), Kritik und Materialität, Schriftenreihe der Assoziation für kritische Gesellschaftsforschung, Münster 2008, p. 129 ff.

65 *Thomas Seibert,* Menschenrechte verwirklichen & deuten, 15 May 2014, https://www.medico.de/menschenrechte-verwirklichen-deuten-14754/, (last accessed 10 April 2019).

66 *Jules Lobel,* Courts as Forums for Protest, Working Paper 213, Bepress Legal Series, 2004, http://law.bepress.com/cgi/viewcontent.cgi?article=1519&context=expresso (last accessed 10 April 2019).

67 *Buckel,* note 64, p. 110–131.

68 *Kolja Möller/Francesca Raimondi,* Mensch, Institution, Revolution. Zur Politik der Menschenrechte, in: Ansgar Klein/Hans Josef Legrand/Thomas Leif/Jan Rohwerder (eds), Forschungsjournal Soziale Bewegungen Vol. 28 (Stuttgart 2015), p. 38–46.

Furthermore, transnational lawsuits like the KiK case can have a self-empowering effect. One of the trade unionists closely working with the AEFFAA concluded that this 'is the first time in the recent labour history of Pakistan that, in the Baldia factory fire tragedy, workers' bodies along with the victims ran a successful campaign solely themselves. It became a reference point in the labor movement that if you organize and evolve a realistic strategy results will be achieved. In the last four decades, there are no success stories except of Ali Enterprises, unfortunately on the ashes of 260 beloved ones. It has broken, to some extent, the psychological barrier that workers were weak and couldn't win any struggle.'[69] Thus, such joint transnational efforts can strengthen local labor movements and mass tort litigation can have a positive impact on victims of rights violations when they are well organized.[70] The process of preparing and filing the lawsuit was an act of self-empowerment both for the four claimants as well as the AEFAA, enabling their transformation from perceived passive objects of charity somewhere else to visible acting legal subjects in Germany.

E. Conclusion

As we have seen, the case against KiK was filed with multiple incentives. On the one hand, it is a case brought by survivors and family members of deceased workers for compensation and the acknowledgment of a wrong that they have suffered. This case is part of their struggle for justice.[71] Here, the legal claim takes KiK by its word, taking seriously its self-given regulatory CSR frame in relation to human and labor rights in the company's code of conduct and argues that this must constitute a legal obligation. As long as there is no solid legal frame for MNE activity, the parent company must be liable for violations along its global supply chain when these self-given obligations are disregarded. The fashion industry in general and the case against KiK in particular provide for an archetype par excellence of these rights violations along MNEs' supply chains and the power imbalance in the event of abuse.[72] On the other hand, and because of the status quo in regards to MNEs' regulatory freedom, the case against KiK intends to create a moment of disruption and visibility of the structural inequalities in a global economic system where corporate companies of the Global North continue to exploit the workers of and the resources in the Global South.

69 Statement by Nasir Mansoor, National Trade Union Federation, August 2018.

70 *Karlijn van Doorn/Charles Dybus*, Are We Really Helping Them? – The Needs of Tort Victims in Mass Litigation Environments, Journal of European Tort Law Vol. 8 (2017), p. 100–121.

71 *Reiner Burger,* Frankfurter Allgemeine, Saeeda Khatoon gegen Kik: "Ich will Gerechtigkeit", 29 November 2018, http://www.faz.net/aktuell/gesellschaft/ungluecke/der-kampf-der-saeeda-khatoon-15916387.html (last accessed 10 April 2019).

72 For more information, see: Business and Human Rights Resource Center database for the textile industry at https://www.business-humanrights.org/en/sectors/apparel-textile; the Human Rights Watch Website at https://www.hrw.org/news/2018/05/02/when-clothing-labels-are-matter-life-or-death; Global Labor Justice Report "GAP Gender based violence in garment supply chains": https://www.globallaborjustice.org/gap-2016-report/ (last accessed on 10 April 2019).

The Global North must confront itself with the reality that MNEs' parent companies in their respective countries make massive economic gains abroad but in the wake of rights abuses, the road to justice for the people affected by their conduct is dependent on 'entrepreneurial lawyers and activists who are motivated to explore the development of such litigation and the extent of the awareness among policymakers of the need to provide redress in such cases,'[73] extensive transnational cooperation and massive civil society resources. All the legal proceedings, complaints, court cases and negotiations surrounding the KiK case are strategically coordinated efforts that aim at scandalizing the social cost of the prevailing economic system and at giving those affected by corporate business decisions an opportunity for resistance. This is why it was of particular importance to the AEFFAA and their four representatives to bring the legal claim against the MNE profiting from their exploitation in its home jurisdiction in order to create visibility of the working conditions in the location where KiK's consumers buy and wear the textiles the Pakistani claimants produced. Although the law has its constraints as a driver for social change, strategic legal interventions bear a revolutionary potential. They can disrupt legal and social discourses and bring forward concise but powerful demands for social justice and for a different model of the global economic order.

73 *Muchlinski/Rouas*, note 27, p. 391.