A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses

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This article calls on the EU to fill the governance gap developing as the United States retreats from holding companies responsible for extraterritorial human rights abuses. Doing so would facilitate the location of a new European identity in human rights leadership. The leadership would provide a compelling justification for European integration, one that the public could more easily understand and support. In the current economic climate, this is more necessary than ever.

I. INTRODUCTION

¶1 The European Union should enable jurisdiction over foreign direct liability claims against companies. In April, the United States retreated from holding companies responsible for extraterritorial human rights abuses.1 No alternative means for imposing accountability currently exists.2 If the EU were to act to fill the governance gap that has resulted, it would facilitate the redress of grave wrongs and contribute to a revitalized European identity based on human rights leadership.3

¶2 For several decades, the U.S. offered victims of international corporate human rights abuses access to justice in its courts. A 1789 law that permits foreigners to file suit under the Alien Tort Statute (ATS) evolved to enable American jurisdiction over the claims.4 No other country offered noncitizens such straightforward access to its courts for the judicial review of actions that took place abroad.5

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2 See Kiobel, 569 U.S. at parts II and V.
4 28 U.S.C. § 1350 (2006). Enacted in 1789 with little surviving legislative history, the ATS states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id.
5 For cases demonstrating the use of the statute, see Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), aff’d in part and rev’d in part, 395 F.3d 932 (9th Cir. 2002), vacated, 395 F.3d 978 (9th Cir. 2003); see also OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS 6 (Dec. 2006), available at http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (report prepared as a background paper for a seminar organized
Pursuant to the ATS, the U.S. adjudicated claims of corporate complicity in foreign
torture, execution, genocide, and slavery. Successful outcomes included settlements on
behalf of Nigerian children killed from drug tests secretly conducted by the
pharmaceutical company Pfizer; survivors of the Holocaust for losses to Banque Paribas
which appropriated their assets during the German occupation of France; and Chinese
dissidents who were detained and tortured after Yahoo! revealed that they were
disseminating pro-democracy materials.

In interviews, survivors have stressed the importance of having their suffering
recognized in a judicial forum. They believe that the judicial process in America
contributed to the strengthening of human rights norms around the world.

The U.S., however, has now drawn back from its leadership in human rights. This
April, the U.S. Supreme Court barred most “case[s] seeking relief for violations of the
law of nations occurring outside the United States.” Claims under the ATS always faced
obstacles, and they occupied an increasingly uncomfortable position within the American
legal system. In 2004, the U.S. Supreme Court narrowed the statute in Sosa v. Alvarez-
Machain to include only claims based on principles of customary international law so
fundamental that they could be incorporated into American federal common law. In
2010, the U.S. Court of Appeals for the Second Circuit decided Kiobel v. Royal Dutch
Petroleum, finding that the statute applied only to natural persons and did not reach
corporate defendants. The Supreme Court reviewed the decision of the Second Circuit

in collaboration with the Office of the U.N. High Commissioner for Human Rights in Brussels on
November 3–4, 2006).


The statute provided only a narrow basis for jurisdiction and required plaintiffs to allege a specific wrong that violates an established norm of international law. The claims remained subject to dismissal for reasons that include the case being better suited to the legal system of a different country. Only four cases proceeded to trial, but some achieved substantial settlements. See Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (11th Cir. 2009); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); In re Union Carbide Corp. (Gas Plant Disaster at Bhopal, India in December, 1984), 634 F. Supp. 842 (S.D.N.Y. 1986), aff’d, 809 F.2d 195 (2d Cir. 1987). The doctrine of foreign sovereign immunity developed in the common law prior to the enactment of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); Carpenter v. Republic of Chile, 610 F.3d 776 (2d Cir. 2010); Belhas v. Ya’Alon, 515 F.3d 1279 (D.C. Cir. 2008).

542 U.S. 692, 732 (2004) (citing In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)) (noting that “[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory”).

621 F.3d 111 (2d Cir. 2010). Since the Kiobel decision, other circuit courts considered whether the ATS allows for extraterritorial jurisdiction over corporate defendants. Conflicting authorities resulted. Compare Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), with Flomo v. Firestone Natural Rubber Co., 643
pertaining to jurisdiction over corporations, solicited additional briefing on extraterritoriality, and foreclosed most extraterritorial applications of the statute.\(^{14}\)

The Supreme Court decision appears to have left the widow of the Nigerian activist Dr. Barinem Kiobel no remedy for his execution by the Nigerian military with the alleged complicity of Royal Dutch Petroleum.\(^{15}\) Kiobel and other residents of the Ogoni region resisted unregulated oil exploration that Royal Dutch Petroleum was undertaking through contracts with the Nigerian military dictatorship.\(^{16}\) As a result, they were arrested, tortured, convicted of murder in a sham trial, and shot.\(^{17}\) With no redress available in Nigeria, Kiobel’s widow turned to the American courts, but they must now withdraw from imposing extraterritorial corporate human rights accountability.

The retrenchment has provided the EU with an opportunity to step forward. Allowing foreign direct liability claims against companies to find a home in the courts of the EU Member States would enable the EU to project a moral example around the world.\(^{18}\) It would also help it to demonstrate a commitment to human rights leadership.\(^{19}\) The leadership would provide a compelling justification for European integration, one that citizens of the EU could easily understand and support.\(^{20}\) In the current economic climate, this is more necessary than ever.\(^{21}\)

II. THE GOVERNANCE GAP FOR MULTINATIONAL CORPORATIONS

Extraterritorial jurisdiction has become essential for imposing accountability on multinational companies. The Alien Tort Statute in the U.S. provided such jurisdiction.\(^{22}\)


\(^{15}\) Id.

\(^{16}\) Shapiro, supra note 14, at 213.

\(^{17}\) Id.

\(^{18}\) See, e.g., Andrew T. Williams, Taking Values Seriously: Towards a Philosophy of EU Law, 29 O.J.L.S. 549, 576–77 (2009) (“[M]erely preserving the EU is no longer sufficient. Its survival must also reflect a ‘moral politics’ that respects articulated values in a concrete fashion.”); Von Bogdandy, supra note 3, at 1308.


\(^{20}\) See infra Section II.

\(^{21}\) See infra Section II.

\(^{22}\) See supra Introduction.
The recent withdrawal of the jurisdiction by the U.S. Supreme Court has produced a governance gap.\textsuperscript{23}

Corporate structures have grown increasingly complex, necessitating extraterritorial jurisdiction. Corporate groups clustering multiple separate companies into global networks of subsidiaries have supplanted earlier companies that sold shares only to individual investors.\textsuperscript{24} “Cross-shareholding,” “inter-enterprise contracts,” linked directorships, and “concentrated voting rights” have become common.\textsuperscript{25}

These attributes have allowed companies to evade the territorial legal systems designed to govern them.\textsuperscript{26} The international structures have enabled more efficient delivery of goods and the standardization of products, but the scope and financial strength of multinational companies have eclipsed individual nations and their laws.\textsuperscript{27} Transnational corporate strategies have conflicted with circumscribed national legal regimes.\textsuperscript{28}

Multinational companies have eluded territorial jurisdiction in several ways.\textsuperscript{29} First, they have distributed actions that collectively amount to illegality across separate entities

\textsuperscript{23} See infra Section I.
\textsuperscript{24} See, e.g., DE SCHUTTER, supra note 5, at 40 (“the multinational [corporation] appears as a coordinator of the activities of its subsidiaries, which function as a network of organisations working along functional lines . . . ”). The first holding company act, which allowed corporations to buy and hold stock in other corporations, was not adopted until 1888. See Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385; Act of Apr. 7, 1888, ch. 295, § 1, 1888 N.J. Laws 445; see also Meredith Dearborn, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, 97 CAL. L. REV. 195, 203 (2009) (“In 1888, New Jersey was the first state to grant permission for any corporation chartered in the state to own stock in any other corporation.”).
\textsuperscript{26} See, e.g., Beth Stephens, Amorality of Profit, 20 BERKELEY J. INT’L L. 45, 58 (2002) (“Regulatory schemes are largely domestic, based upon national laws, administrative bodies and judicial systems, while transnationals operate across borders.”); Wayne Ellwood, Multinationals and the Subversion of Sovereignty, 246 NEW INTERNATIONALIST 4, 7 (1993) (“Companies are less attached today than ever to their country of origin.”).
\textsuperscript{28} See, e.g., Stephens, supra note 26, at 54 (“Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms.”); see also ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 81 (1996) (“[T]he law has not kept up with reality. . . . [L]aw was developed with a view to a single firm operating out of a single state, owned by shareholders who . . . were not other corporations.”); Ellwood, supra note 26, at 7.
in different countries, so that each has operated within the law.\textsuperscript{30} Second, they have carried out harmful conduct in countries other than where its effects are felt.\textsuperscript{31} Alternatively, companies have partitioned their assets, shifting money within the corporate group, so that no funds are recoverable in the territorial jurisdiction.\textsuperscript{32} Companies have also acted in complicity with the ruling government of the host country, and they have threatened to withhold future patronage in order to pressure the regime not to pursue accountability.\textsuperscript{33}

Corporate law, moreover, has deemed each incorporated unit of a corporate group separate and distinct from its shareholders. The legal separation has contributed to the susceptibility of multinational companies to abuse by actors who treat human rights norms lightly.\textsuperscript{34} The notion of separation developed to limit the liability of individual shareholders in order to encourage them to invest, allowing companies to pool capital and put it to efficient use.\textsuperscript{35} Individual units of corporate groups, however, now generally own


\textsuperscript{31} See, e.g., DE SCHUTTER, supra note 5, at 21.


\textsuperscript{35} REINIER H. KRAAKMANN, The Economic Functions of Corporate Liability, in CORPORATE GOVERNANCE AND DIRECTORS’ LIABILITIES 178 (Klaus J. Hopt, Gunther Teubner, & Walter de Gruyter, eds., 1985); WILLIAM A. GROENING, The Modern Corporate Manager: Responsibility and Regulation 11 (1981); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, Limited Liability and the Corporation, 52 U. CHI. L.
other units of the same group, and limited liability continues to apply to corporate owners within multinational companies. The law does not distinguish their incentives from those of human investors.

Multinational companies have exploited this legal separation to shield parent companies from accountability. These companies have strategically insulated dangerous activities within separate entities. Each entity remains legally distinct in spite of its overall economic interdependence, and limited liability protects the parent companies that own them.

Regulating corporate behaviour therefore demands legal liability beyond national borders and across corporate groups. Without the exercise of judicial authority outside of territorial jurisdictions, no single judicial system has the capacity to impose responsibility on multinational companies. The Member States of the EU can provide extraterritorial jurisdiction, and doing so would benefit European integration.

III. HUMAN RIGHTS LEADERSHIP WOULD BENEFIT THE EU

Support for extraterritorial jurisdiction in the courts of the EU Member States would help to ensure the future success of the European Union. In the current climate, with the project of economic integration in disarray, leadership in human rights provides a clearer purpose for a unified Europe. A new European identity located in the extraterritorial promotion of international rights could attract crucial popular support.
Human rights leadership has appeared to provide a strong rallying purpose easier for EU citizens to understand and support than the single market.\textsuperscript{47} Polling conducted by the European Commission has indicated that “the promotion of democracy and peace in the world” at the European level enjoyed 84\% popularity, far outpacing support for European-level decision-making on economic issues.\textsuperscript{48} In 2011, 76\% of EU citizens polled believed that globalization required “worldwide governance,” up from 68\% since 2010.\textsuperscript{49} “Social equality and solidarity” was frequently selected as a goal that European society should emphasize,\textsuperscript{50} and 84\% felt that the EU should require developing countries to follow its dictates on democracy, human rights, and governance as a condition for receiving development aid.

By contrast, the polling data has borne out the absence of support for economic integration. A growing number of EU citizens have reported the belief that the internal market has affected them adversely. In a recent poll conducted by the European Commission, 35\% of participants could not explain what the internal market was, and responses to a subsequent poll indicated a sustained decrease in support for the Euro.\textsuperscript{51} In 2011, 62\% of EU citizens felt that the single market was only for the benefit of large companies, up from 55\% in 2009, and 58\% felt it had introduced cheap competing labour, up from 50\% in 2009.\textsuperscript{52} Only 39\% of those polled said that the single market had increased their standard of living.\textsuperscript{53}

The focus of the EU on economic unity initially engendered support from disparate political groups and elided cultural differences.\textsuperscript{54} The European project began conservatively, with the unification of the coal and steel industries.\textsuperscript{55} It gradually hence to conscientise the EU’s vision of itself as a global entity, whose ‘one boundary is democracy and human rights.’\textsuperscript{\textdagger}.

\textsuperscript{47} See, e.g., Von Bogdandy, \textit{supra} note 3, at 1308; see also Williams, \textit{supra} note 18, at 576–77 (“merely preserving the EU is no longer sufficient. Its survival must also reflect a ‘moral politics’ that respects articulated values in a concrete fashion.”); see also Besson, \textit{supra} note 19, at 324.


\textsuperscript{49} \textit{Id.} at 92.

\textsuperscript{50} \textit{Id.} at 72.


\textsuperscript{52} \textit{Special Eurobarometer 363}, \textit{supra} note 51, at 18.

\textsuperscript{53} \textit{Id.}


\textsuperscript{55} Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 2; see also Gerard Quinn, \textit{The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?}, 46 MCGILL L.J. 849, 858 (2001) (“The founders of the EU decided to stay away from high politics and to concentrate instead on the integration of limited but important cross-border economic sectors.”);
expanding to a broader common market, recognizing rights of the free movement of goods, services, and people, and trade flows expanded. Later, it introduced the Euro, which developed into a dominant world currency, used in foreign reserves and international debt securities.

Popular support for the EU, however, has not increased. Difficulty ratifying the Maastricht and the Lisbon treaties appeared to weaken the legitimacy of the EU. Tensions over the Eurozone bailout have further highlighted divisions. The European Parliament and European Commission have not played significant roles in the resolution of the crisis and the rationales behind proposed solutions have tended more towards national self-interest than towards solidarity. A faction of British conservatives has led a bid to hold a referendum on EU membership. Slovakia refused to participate in bailout packages for Greece. Journalists have debated the prospects for dissolution of the Union.

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Carlos A. Ball, The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order, 37 HARV. INT’L L.J. 307, 308–310 (1996) (“The primary concern of the Community has always been economic integration; issues relating to social policy are viewed as secondary, to be addressed only to the extent that they impact upon economic integration. Economic integration, however, has not occurred in a political or social vacuum, and it is generally agreed that the Community has developed a social policy component that arises from, and is consistent with, its broader economic objectives.”) (citations omitted).


IV. COMPARATIVE ADVANTAGE OF EU HUMAN RIGHTS LEADERSHIP

Not only does human rights leadership appear more likely to attract popular support for European integration, but the history of the EU seems to have helped the Member States of the EU to provide better forums for foreign direct liability claims against corporations than the U.S. has via the Alien Tort Statute.63

First, the ATS has required an amorphous application of international law.64 In order to apply the statute, American courts have had to find that a claimant pled a cause of action in international law sufficiently fundamental to have developed into a customary norm.65 The inquiry became an obstacle to remedying human rights claims.

The determination of whether a human rights abuse violated a customary norm, so that a claim under the ATS could proceed, grew increasingly restrictive. In Tel-Oren v. Libyan Arab Republic, a claim by Israeli citizens against a Palestinian organization for a terrorist attack in Haifa, a split-panel of the U.S. Court of Appeals for the D.C. Circuit stated that because only Congress could create a cause of action, the ATS would only allow redress of the handful of norms of international law in existence in 1789, when Congress adopted the statute.66 Using similar logic, the U.S. Supreme Court in Sosa v. Alvarez-Machain rejected the claim of a Mexican physician that he had been abducted at the behest of the U.S. Drug Enforcement Agency and detained for one day.67 According to the Court, the ATS could only address claims in international law containing principles “universally” and “obligatorily” defined to include the “specific” conduct alleged.68 While detention violated a norm of international law, insufficient evidence indicated that the general prohibition against it included the specific conduct in dispute, captivity for

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63 See infra Section III.

64 Curtis A. Bradley, The Costs of International Human Rights Litigation, 2 CHI. J. INT’L L. 457, 472 (2001) (“Another reason why this litigation is difficult to contain is that the principal statutory vehicle for this litigation, the Alien Tort Statute, provides no guidance on the procedural or substantive issues surrounding this litigation. The statute (because it was not intended for this type of litigation) does not specify the defendants who can be sued, the nature of the claims allowed, or the limitations on such claims. Courts instead must look to customary international law and other common law principles. As noted above, however, there is significant uncertainty today surrounding both the method of customary international law formation and its content.”).

65 See, e.g., Filártiga v. Peña-Irala, 630 F.2d 876, 879–83 (2d Cir. 1980).


68 Id. at 732 (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.” (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994))).
one day.\(^{69}\) Cases following \textit{Sosa}, although often inconsistent, continued to narrow the range of international laws that could sustain a cause of action in an American court. The Eleventh Circuit, for example, excluded all non-torture cases involving cruel, inhuman, or degrading treatment.\(^{70}\)

Second, criticisms emerged in the U.S. that plaintiff-side lawyers, working on contingency, used the ATS as a tool to extract large settlements from corporate defendants. For example, \textit{Wiwa v. Royal Dutch Petroleum}, a case filed on behalf of murdered activists in Nigeria, concluded in a settlement of $15.5 million.\(^{71}\) The Center for Constitutional Rights, a non-profit legal and educational organization, brought the claims in conjunction with EarthRights International, a non-profit human rights and environmental organization, and several private law firms.\(^{72}\) These groups have stated that the settlement funded only a portion of the costs of litigating the case.\(^{73}\) Nevertheless, the settlement contributed to the perception that attorneys had exploited the statute for personal gain.\(^{74}\)

Neither criticism would pertain to cases heard in the courts of the EU Member States. First, national courts in the EU have grown adept at dealing with international law. The establishment of the EU has exposed transnational companies to foreign laws and extraterritorial enforcement.\(^{75}\) The EU Member States must routinely accept

\(^{69}\) \textit{Id.} at 737-38.


\(^{73}\) \textit{Can We Sue Our Way to Prosperity?: Litigation’s Effect on America’s Global Competitiveness: Hearing Before the Subcomm. on the Constitution if the H. Comm. on the Judiciary, 112th Cong. 2 (2011) (statement of John H. Beisner, on behalf of the U.S. Chamber Institute for Legal Reform) (“In far too many lawsuits, citizens are simply pawns in an entering attorney/investor’s business model, the goal of which is not to achieve justice for the citizen, but rather to secure profits for the attorney/investor.”); Earl Silbert et al., \textit{The Alien Tort Statute: Next Bonanza for the Trial Bar}, DLA PIPER LITIGATION RISK ALERT (Feb. 5, 2007), \url{http://files.dlapiper.com/files/upload/LitigationRisk_070205.html (“Hoping for the next litigation bonanza, some of America’s most aggressive contingency fee law firms have begun filing large-scale class actions under the Alien Tort Statute (ATS).”)}; Press Release, USA Engage, New Report Describes the Rising Tide of Global Alien Tort Cases (Feb. 1, 2007), \url{available at http://usaengage.org/News/News.asp?id=16&Msid=840}.

\(^{74}\) \textit{Id.} at 473 (“Now that Alien Tort Statute litigation has expanded to include corporate defendants, which have deeper pockets than individual foreign officials, the incentives to bring this litigation are only heightened, as are the dangers of its abuse by some plaintiffs’ attorneys.”); \textit{but see Judith Chomsky, 33 Suffolk Transnat’l L. Rev. 461, 470 (Symposium 2010) (“These charges are simply contrary to the facts. They ignore the key role that public interest law centers, such as the Center for Constitutional Rights, Earthrights International, and the International Labor Rights Fund have played in the developing ATS corporate litigation. As a result of the limited success of corporate ATS cases, with the exception of litigation arising out the Second World War, it is unlikely that this litigation will attract practitioners looking for massive contingency fees. ATS litigation is more likely to remain a field dominated by the public interest and pro bono bar.””).

\(^{75}\) \textit{See, e.g.}, Kirshner, \textit{ supra} note 54, at 1279–80. “The end of World War II was a time of heroic plans for institutionalizing inter-state relations so as to bring order into international affairs and thus blot out the
regulations drafted in Brussels and interpreted in Luxembourg. They implement supranational directives and invalidate conflicting national legislation. The Court of Human Rights analyzes the content of the national rules of its Member States for compliance with the Convention on Human Rights.

Second, human rights cases brought in the EU would not rely on complicated funding arrangements, nor would they generate large damage awards. Comparative studies have shown that damages in the U.S. vastly exceed those typical in the EU. Under many of the laws of the Member States that criminalize corporate actions, victims may join proceedings as partie civiles and receive reparation or restitution. The possibility for these recoveries reduces the cost of litigation for private claimants, as they may rely on the investigations that the prosecutors have already completed. The compensation awarded to victims in the EU has also been generally low and predominantly symbolic. In the Netherlands, for example, it has amounted to roughly $600, on average. Nonetheless, legal aid is available: the Court of Human Rights has
danger of another war. Nowhere were these feelings expressed more strongly than in Western Europe, where a federation of European states was considered to be the only sound basis upon which to build a lasting peace.”

Victoria Curzon, The Essentials of Economic Integration 28–29 (1974); but see Magdalena Ličková, European Exceptionalism in International Law, 19 EUR. J. INT’L L. 463, 489 (2008) (suggesting that the European Member States only “embrace” their EU obligations without “infringing international ones” by negotiating exceptions from international standards).


European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 78, at art. 50. Indeed, the European Commission has stated that incentives for bringing frivolous cases such as punitive damages and contingency fees “increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition.” Section of International Law of the American Bar Association, Comments on the European Commission Staff’s Working Document: “Towards a Coherent European Approach to Collective Redress” 10, available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/aba_2sd_en.pdf (citation omitted).


But see Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) (human rights violations are treated as “no more (or less) than a garden-variety municipal tort”).

ruled that the right to a fair trial requires it.\(^{85}\) Tort cases brought against multinational companies in the United Kingdom, discussed below, received funding for expenses and legal fees from the U.K. Legal Services Commission. Further, British lawyers that have brought winning claims receive compensation and can impose uplift fees on losing defendants.\(^{86}\) The lawyers may not arrange for contingency-fee payments, and none of the compensation awarded to plaintiffs contributes to the uplift fees.\(^{87}\)

V. CURRENT STATE OF THE LAW IN THE EU MEMBER STATES

In spite of these potential advantages, it has not been possible for foreign plaintiffs to redress extraterritorial corporate human rights abuses in a straightforward manner in the Member State courts of the EU.\(^{88}\) The national courts of many Member States have become adept at imposing criminal accountability on companies, but not for their extraterritorial acts; further, they have become adept at policing human rights abuses, but not against companies.\(^{89}\) Jurisdictional provisions hamper civil claims, and plaintiffs have had to stretch the provisions in order to gain forums in national courts of the EU.\(^{90}\)

A. Corporate Accountability, But Not Extraterritorial

Both the criminal and civil laws of most Member States of the EU have offered pathways to corporate liability, but neither has allowed for jurisdiction over harms that companies cause outside of the EU. The legal systems that have offered criminal rules that apply to companies have imposed the rules with geographic restrictions. Even where jurisdiction has been possible, public prosecutors have demonstrated their reluctance to pursue extraterritorial human rights claims, and some systems have scaled back their legislation. On the civil side, the Brussels Regulation governs jurisdiction among EU Member States and links it to the location where a wrong was carried out or where it


\(^{88}\) See infra Section V.

\(^{89}\) See infra Section V.

\(^{90}\) See infra Section V.
occurred. Domestic tort cases that have tested the limits of the two definitions have exposed the absence of explicit provisions for extraterritorial jurisdiction.

**Criminal Liability**

¶28 As a result of recent amendments, most Member States of the EU now provide for corporate criminal liability. Luxembourg, for example, instituted criminal liability for companies in 2010. Spain also amended its criminal code in 2010 to extend the offenses to companies. The Czech Republic introduced corporate criminal liability in 2012, overturning a presidential veto of legislation that had first been passed in 2011. Liability for extraterritorial activities, however, has grown increasingly limited.

¶29 Corporate liability in the EU Member States typically depends on the crime having taken place within the territory of the national jurisdiction. The French Criminal Code has applied to companies since 1992 but in general does not allow for liability based on actions outside of France. Similarly, the Dutch Criminal Code applies only to corporate crimes carried out within the Netherlands. In the U.K., criminal jurisdiction is presumed territorial. While the U.K. has instituted legislation to hold companies accountable for the deaths they cause, the provisions do not reach extraterritorial offenses. Rather, claims must be based on acts or omissions that occurred within the U.K.

¶30 Exceptions to such territorial requirements hold little relevance for claims related to human rights abuses. The French Criminal Code allows for jurisdiction over companies alleged to have violated rules that themselves apply extraterritorially or that involve the counterfeiting of money or state seals. Under Article 5 of the Dutch Code, companies can be held liable for human trafficking and the sexual abuse of minors outside of the Netherlands. To protect Dutch national interests, Article 4 of the code also establishes extraterritorial jurisdiction over terrorist acts, crimes against state security, and corruption. In the U.K., while supplementary criminal statutes such as the International Criminal Court Act 2001 impose criminal liability on both domestic and non-domestic companies that act outside of British territory, the alleged perpetrator still must be present within the country at the time that the proceedings commence.

¶31 France has acted particularly proactively to eliminate obstacles to criminal accountability, but the measures have had limited application to extraterritorial corporate wrongdoing. No mens rea applies for companies, rendering it unnecessary to prove a

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92 See infra notes 125–145.
93 Code Penal art. 34 (Lux.).
95 Act on Corporate Criminal Liability, zákon č. 418/2011 Sb. (Czech).
96 CODE PÉNAL [C. PÉN] art. 121–22 (Fr.).
97 CODE PÉNAL [C.PÉN.] art. 51 (Belg.).
98 See, e.g., Corporate Manslaughter and Corporate Homicide Act, 2007 c. 19 (U.K.) (creating new offenses for corporations).
99 Id.
100 CODE PÉNAL [C.PÉN] arts. 113-6–113-12, 113-1C (Fr.).
101 CODE PÉNAL [C.PÉN.] art. 5 (Belg.).
102 Id. art. 4.
proscribed mental state, but in order to be liable, companies must have caused harm within France.104 Companies may be held responsible for complicity in crimes taking place abroad, but liability depends on a finding of guilt in the foreign tribunal where the offense was committed.105 In the 2002 Rougier case, the requirement resulted in the dismissal of a complaint by Cameroonian farmers that the French timber company Rougier had been complicit in illicit trade undertaken by its Cameroonian subsidiary.106 Because the subsidiary had not been found guilty in a Cameroonian court, the claim concerning the complicity of the French parent company could not proceed in French court.107

The Total and Trafïgura cases illustrate further obstacles posed by the discretion of French public prosecutors and narrow interpretations of the French criminal laws. In the Total case, Burmese citizens sought to hold the French oil company Total Fina Elf responsible for alleged actions the Burmese military had undertaken on its behalf. According to the complaint, the military used kidnapping and involuntary servitude in order to supply laborers to construct an oil pipeline.108 The Burmese plaintiffs charged the company with complicity in abduction and illegal restraint.109 The public prosecutor, however, requested dismissal of the case.110 His motion did not succeed, and the parties concluded an out-of-court settlement.111 Nevertheless, the court determined in an ordonnance de non-lieu, a judicial dismissal for lack of evidence, that the forced labor did not amount to an illegal restraint.112 In the Trafïgura case, French citizens brought charges against the Dutch petroleum trading company Trafïgura for illnesses arising from improper disposal of toxic waste in the Ivory Coast.113 The public prosecutor, however, did not pursue the case.114

104 JAMES FEATHERBY, GLOBAL BUSINESS AND HUMAN RIGHTS: JURISDICTIONAL COMPARISONS 162 (2011).
105 CODE PÉNAL [C. PÉN] art. 113-5 (Fr.).
106 GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER 103, 131–32 (Andrew P. Morriss & Samuel Estreicher eds., 2010).
108 Kirshner, supra note 1, at 285 n.171.
109 Id. The plaintiffs claimed violation of article 224-1. See CODE PÉNAL [C. PÉN] art. 224-1 (Fr.).
Belgian law used to go farther beginning in 1994, but the Belgian legislature repealed provisions for extraterritorial corporate liability in 2003. Prior to 2003, Belgium offered jurisdiction over all humanitarian claims regardless of the crime’s connection to the country, the nationality of the plaintiffs or defendants, or the absence of defendants from the proceedings. A Belgian court therefore accepted review of a case against Total Fina Elf based on the same facts underlying the claims brought in the French court, as discussed above. In the aftermath of other controversial claims against high-ranking foreign officials, however, the U.S. threatened to move the NATO headquarters out of Brussels unless Belgium revoked the rules. Without the extraterritorial jurisdiction that they had offered, the Belgian court could no longer...

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114 Id.; see Case Profile: Trafigura Lawsuits (re Côte d’Ivoire), BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, available at http://www.business-humanrights.org/Categories/Lawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsCedivoire.


116 The case was brought under a complicated transitory provision (Article 29.3) of the Act on Grave Breaches of International Humanitarian Law of August 5, 2003. A number of intervening procedural judgments were made, after which the court finally dismissed the case on March 28, 2007. Cour de Cassation [Cass.] [Court of Cassation], Mar. 28, 2007, AR P.07.0031.F (Belg.). Efforts were undertaken to reopen the case, yet the Chambre des Mises en Accusation of the Brussels Court of Appeals, which announced its decision on March 5, 2008, refused to do so, on the grounds that the Court of Cassation judgment effectively closed the case (“autorité de la chose jugée”). See Joan Condijts, *Les Birmans Déboutés: Total l’Emporte [Burmese Rejected: Total Wins]*, LE SOIR EN LIGNE, Mar. 5, 2008, available at http://archives.lesoir.be/les-birmans-deboutes-total-l-8217-emporte_t-20080305-00FT4XH.html. A cassation appeal may possibly be filed, but the chance of success is minimal, given the previous decisions of the Court of Cassation in the case.


adjudicate the case against Total.\(^{120}\) It could not pursue allegations brought by Burmese citizens against a French company for abuses in Burma.\(^{121}\)

Similarly, while Spanish courts previously offered a forum for extraterritorial claims, the Spanish Parliament acted to limit the jurisdiction over human rights cases in 2009.\(^{122}\) Under the earlier provisions in Spain, in force since 1985, allegations of the most serious crimes in violation of international law triggered jurisdiction, no matter where the actions had taken place.\(^{123}\) Controversial cases against individuals followed, including against Augusto Pinochet, raising diplomatic concerns.\(^{124}\) The new rules now require claims to allege either Spanish victims or perpetrators that are present in Spain before jurisdiction can arise.\(^{125}\)

### Civil Liability

Just as the corporate criminal laws of the EU Member States generally lack extraterritorial reach, the creative use of domestic civil tort claims has underscored the absence of civil mechanisms for holding companies accountable explicitly for extraterritorial abuses.\(^{126}\) The Brussels Regulation provides for extraterritorial jurisdiction only within the EU.\(^{127}\) The isolated cases in which companies have been found responsible for harms beyond Europe have tested the limits of the Brussels Regulation by framing domestic actions and omissions of national parent companies as the proximate cause of the abuses directly carried out by their foreign subsidiaries.\(^{128}\)

The Brussels Regulation establishes intra-EU extraterritorial jurisdiction, but the jurisdiction does not extend to claims against non-EU entities.\(^{129}\) Under the Regulation, “[p]ersons domiciled in a[n EU] Member State shall, whatever their nationality, be sued


\(^{122}\) Organic Law (L.O.P.J. 1985, art. 23.4) (Spain); see also I. de la Rasilla del Moral, The Swan Song of Universal Jurisdiction in Spain, 9 INT'L CRIM. L. REV. 777 (2009).


\(^{126}\) See infra notes 126–145.


\(^{128}\) Id.

\(^{129}\) Id.; see also DANIEL AUGENSTEIN & ALAN BOYLE, STUDY OF THE LEGAL FRAMEWORK ON HUMAN RIGHTS AND THE ENVIRONMENT APPLICABLE TO EUROPEAN ENTERPRISES OPERATING OUTSIDE THE EUROPEAN UNION (Oct. 30, 2010).
in the courts of that [EU] Member State.” A company or other legal person “is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.”

Jurisdiction over extraterritorial harms caused by foreign subsidiaries of companies domiciled in the EU has not followed easily. Pursuant to the Regulation, the national laws of the European Member State courts in which cases against foreign subsidiaries have been brought determine residual jurisdiction over the non-EU entities.

The laws of most Member States of the EU permit jurisdiction only when proof exists that the companies have abused their corporate status, in order to “pierce the corporate veil” and to connect the wrongful acts of the foreign subsidiaries to their Member State-domiciled parent companies. The rules of most Member States of the EU otherwise do not allow for direct jurisdiction over foreign subsidiaries, or for jurisdiction over foreign subsidiaries of foreign parent companies.

Perhaps for this reason, British and Dutch courts have characterized harm caused by foreign subsidiaries as resulting from actions or omissions of domestic parent companies as a means for assuming jurisdiction over extraterritorial human rights abuses. The claims have ostensibly addressed the role of the parent companies in allowing their foreign subsidiaries to cause harm, but the judgments have ramifications for the conduct of the subsidiaries.

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131 Id. art. 60(1).
133 Augenstien & Boyle, supra note 129, at 62–63, 69. Piercing the corporate veil generally requires mixing of assets (Germany, Italy, Romania, Slovenia, France), or the abuse of the separate legal personality of the subsidiary or parent to defeat the rights of stakeholders or to commit other illegalities (France, Slovenia, Italy).
134 The European Commission has raised the possibility of extending the Regulation to claims against foreign subsidiaries of European parent corporations in a Green paper, but this has not happened. See European Commission Green Paper on the Review of Council Regulation (EC) No. 44/2001, COM (2009) 175 final (Apr. 21, 2009); Council Regulation 44/2001, supra note 91 at art. 4(1); see also Hess, supra note 132.
136 See Case C-412/98, Group Josi Reinsurance Co. v. Universal Gen. Ins. Co., 2000 E.C.R. I-5925, ¶ 57, 59 (“It follows that, as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the [Brussels] [C]onvention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a Contracting State . . . . Consequently, the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country.”); see generally Commission of the European Communities: Green Paper “Promoting a European Framework for Corporate Social Responsibility,” COM (2001) 366 final (July 18, 2001); see also Jessica Woodroffe, Regulating Multinational Corporations
company without establishing abuse of the corporate form to “pierce the corporate veil” and without connecting the actions of the subsidiary to the parent. Similarly, courts can avoid exercising extraterritorial jurisdiction, as they are simply adjudicating whether companies within their jurisdiction should be held accountable for failing to oversee their foreign subsidiaries.

The U.K. courts have heard several such lawsuits against domestic parent companies in the tort context related to human rights abuses. In *Sithole v. Thor*, the English Court of Appeals found jurisdiction over mercury poisoning among employees at a mining subsidiary in South Africa by reviewing the failure of the British parent company to prevent it. Similarly, *Connelly v. RTZ* and *Lubbe v. Cape Plc* confirmed that British courts will exercise jurisdiction over domestic parent companies when foreign subsidiaries, which cause harm abroad, have implemented their policies. The English High Court also found jurisdiction in *Guerrero v. Monterrico Metals* over the alleged assault, torture, and detention of protestors at a subsidiary mining site in Peru by Peruvian police. The court focused on the parent company’s responsibility to prevent the harm. In *Motto & Ors v. Traffigura*, the English High Court took jurisdiction over the claims of 30,000 people of the Ivory Coast for illness arising from exposure to toxic waste, because a British arm of the metals and energy company chartered the ship that carried the waste to Africa. Unlike the French Traffigura case, as discussed above, the claims in the English courts resulted in a successful settlement.

The Netherlands has also embraced jurisdiction in similar contexts. In *Oguru c.s. v. Royal Dutch Shell*, the Dutch Hague District Court found jurisdiction over linked claims against the Dutch parent company Royal Dutch Shell and its subsidiary Shell Nigeria. In that case, Nigerian fisherman and farmers alleged that the parent company had been

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142 Id.


145 HA ZA 30 december 2009, 579 m.nt. (Oguru/Royal Dutch Shell) (Neth.)
negligent in its oversight, which enabled its foreign subsidiary in Nigeria to produce oil in a dangerous manner. Because the plaintiffs had targeted Royal Dutch Shell as well as Shell Nigeria for the same damage, the Dutch court found that it would be more efficient to adjudicate both actions together in the Netherlands, and thus exerted jurisdiction over the foreign entity.

B. Human Rights Accountability But Not Corporate

In contrast to the measures that allow for jurisdiction over companies but not for extraterritorial acts, many EU Member States offer human rights legislation that applies extraterritorially; however, most of the laws exclude companies. Germany offers extraterritorial liability for human rights abuses, but the statutes do not apply to corporate crimes. Similarly, Sweden imposes accountability for any violation of an international treaty, but its humanitarian measures are limited to natural persons. While the U.K. has made many human rights provisions expressly extraterritorial, the punishments that the provisions impose preclude corporate liability. In theory, Dutch courts may hold companies liable for human rights abuses, but even where the strict jurisdictional criteria have been met, no companies have been prosecuted.

Germany has introduced sweeping extraterritorial human rights legislation; however, the legislation does not apply to companies. In Germany, companies can only face administrative sanctions, not criminal liability, and individual plaintiffs have no private cause of action through which to seek the imposition of the administrative sanctions against them.

The German Code of Crimes Against International Law, enacted in 2002 in response to the creation of the International Criminal Court, incorporates crimes under the jurisdiction of the court into German law and extends primary jurisdiction to German tribunals. The code criminalizes all violations of international law perpetrated by individuals, even if the criminal acts occurred outside of Germany. The law applies to crimes committed abroad against German citizens if the actions are punishable by the law of the place where the crimes occurred or if no criminal law enforcement existed at the

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150 VÖLKERSTRAFGESETZBUCH [VSGB] [CODE OF CRIMES AGAINST INTERNATIONAL LAW GERMANY (CCAIL)], June 26, 2002, STRAFGESETZBUCH [StGB] § 1 (Ger.).
151 Section 1 of the CCAIL provides: “This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.” Id.
place where the crime was committed.\textsuperscript{152} The law also applies to crimes committed abroad by German citizens, also so long as the actions are illegal in the place where they occurred or if no criminal law enforcement existed there.\textsuperscript{153} Foreigners can be sued in German court if they have been apprehended within German territory and would qualify for extradition, even if they have not been extradited.\textsuperscript{154} German prosecutors, however, can withdraw jurisdiction in any case in which neither the victim nor the defendant is German, or if the defendant is not present in Germany.\textsuperscript{155}

In spite of the limitations, the legislation has formed the basis of several recent prosecutions of individuals for extraterritorial crimes. A trial is currently underway in Stuttgart against the former president and vice president of the Democratic Forces for the Liberation of Rwanda, a Rwandan rebel group, for their involvement in crimes against humanity and war crimes, allegedly carried out by militias under their direction in the Eastern Congo.\textsuperscript{156} Twelve Iraqi citizens have filed a complaint in Germany under the statute for their detention at the Abu Ghraib prison in Iraq against former Secretary of Defense Donald Rumsfeld, former Attorney General Alberto Gonzales, former CIA Director George Tenet, and 11 other former Bush administration officials and military officers.\textsuperscript{157} A Saudi citizen has also contested his detention at Guantanamo Bay using the provisions.\textsuperscript{158}

In Sweden, the legal system imposes comprehensive illegality for extraterritorial crimes that violate international law, but it does not provide for corporate liability. Chapter 2, Section 3(6) of the Swedish Penal Code states that “crimes committed outside the Realm shall be adjudged according to Swedish Law and by a Swedish court: . . . if the crime is . . . a crime against international law.”\textsuperscript{159} Like Germany, however, general

\begin{itemize}
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Steffen Wirth, \textit{Germany’s New International Crimes Code: Bringing a Case to Court}, 1 J. INT’L CRIM. JUST. 151, 159 (2003).
\item \textsuperscript{158} Katherine Gallagher, \textit{Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture}, 7 J. INT’L CRIM. JUST. 1087, 1106 (2009); Scott Lyons, \textit{German Criminal Complaint Against Donald Rumsfeld and Others}, 10 AM. SOC’Y INT’L L. INSIGHTS 1, 2 (2006).
\item \textsuperscript{159} BROTOBSBALKEN [BRB] [CRIMINAL CODE] 16:8 (Swed.).
\end{itemize}
Swedish law provides only for administrative sanctions against companies, not criminal liability.\(^{160}\)

In the U.K., the punishments linked to relevant criminal provisions, even though they allow jurisdiction over extraterritorial wrongs, limit their application to companies. Abuses such as torture, inhuman and degrading treatment, genocide, war crimes, and crimes against humanity carry express extraterritorial jurisdiction.\(^{161}\) The offense of inhuman and degrading treatment, however, is limited to public officials.\(^{162}\) Genocide, war crimes, and crimes against humanity are punishable solely by imprisonment.\(^{163}\) Because companies cannot be imprisoned, corporate criminal liability cannot arise.\(^{164}\) While breach of the Geneva Conventions is a statutory offense,\(^{165}\) corporate liability for such actions is also not possible because the punishment is imprisonment.\(^{166}\)

In the Netherlands, the International Crimes Act (2003) incorporates the crimes recognized under the Rome Statute of the International Criminal Court into domestic law,\(^{167}\) but no companies have ever been prosecuted there for extraterritorial violations of human rights law.\(^{168}\) In theory, liability may be imposed on companies for genocide, crimes against humanity, war crimes, and torture, where the perpetrator or victim of the crime is Dutch or if the alleged perpetrator is present in the Netherlands.\(^{169}\) Even where a company could meet the jurisdictional thresholds, however, the Van Anraat case shows the obstacles to gathering the evidence necessary for establishing corporate liability.\(^{170}\)

In the Van Anraat case, an individual person, rather than the company he directed, was prosecuted for the crimes of genocide and complicity in war crimes.\(^{171}\) Frans Van Anraat, a Dutch businessman in charge of the FCA Contractor company had provided a gas called TDG to the regime of Saddam Hussein in Iraq that the regime used to make


\(^{162}\) Criminal Justice Act, 1988, c. 33, § 134 (U.K.); see also European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 79, art. 3.


\(^{165}\) Geneva Conventions Act, 6 Eliz. 2, c. 52, § 1 (1957) (U.K); see also International Criminal Courts Act, 2001, c. 17, § 70 (U.K.).

\(^{166}\) Geneva Conventions Act, 6 Eliz. 2, c. 52, § 1A (1957) (U.K).

\(^{167}\) Wet Internationale Misdrijven [International Crimes Act], June 19, 2003, Stb. 2003, p. 270 (Neth.).

\(^{168}\) Jagers & van der Heijden, supra note 148, at 865.

\(^{169}\) Wet Internationale Misdrijven [International Crimes Act], June 19, 2003, § 2(2), Stb. 2003, p. 270 (Neth.).

\(^{170}\) Guus Kouwenhoven, another businessman, has also been sued individually in the Netherlands. He was convicted of breaching U.N. weapons smuggling prohibitions but was acquitted on appeal. See Hof’s-Gravenhage [Court of Appeals], 10 maart 2008, LJN BC6068 (Neth.); Rechtsbank’s-Gravenhage [District Court of The Hague] 7 juni 2006, LJN AX7098 (Neth.).

mustard gas.\textsuperscript{172} The mustard gas was deployed as a chemical weapon against the Kurdish minority and in the Iran–Iraq war.\textsuperscript{173} The district court in the Hague found Van Anraat guilty of complicity in war crimes, although it exonerated him on the charge of genocide based on the finding that he had not been aware of the genocidal intentions of his customers.\textsuperscript{174} The decision to prosecute Van Anraat individually, rather than through his company, has been viewed as the result of evidentiary difficulties stemming from complex corporate legal structures.\textsuperscript{175}

VI. HOW TO FACILITATE JURISDICTION AMONG THE EU MEMBER STATES

\textsection{50} The retraction of extraterritorial jurisdiction over corporate human rights claims in the U.S. has offered the courts of the EU Member States a new opportunity to change course. Article 6 of the Convention on Human Rights could provide a pathway for the courts to begin to impose extraterritorial corporate accountability. Their leadership in this area would contribute to a European identity grounded in the advancement of fundamental rights. Moral leadership seems likely to attract greater popular support for an integrated Europe than economic achievements have engendered.\textsuperscript{176}

\textsection{51} Article 6 guarantees the right to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal, and the right to a fair trial includes the right of access to court.\textsuperscript{177} Specifically, Subsection 1 of Article 6 states, “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . . .”\textsuperscript{178}

\textsection{52} Although the Convention of Human Rights was drafted by the Council of Europe and has more signatories than the EU Member States, it nevertheless expresses the aspirations of a unified Europe. After direct experience of abuses during World War II, many European citizens gathered at the Hague Congress in 1948 to call for the development of a regional system of human rights and the creation of a European


\textsuperscript{174} Rechtbank ’s-Gravenhage 23 december 2005, LJN 2005, AV6353, 09/751003-04 (Van Anraat). The decision was affirmed on appeal, with some changes to the sentence. See Rechtbank ‘s-Gravenhage 9 mei 2007, LJN 2007, BA4676, 22-005090-06 (Van Anraat); HR 30 juni 2009, 07/10742 (Van Anraat).


\textsuperscript{176} See supra notes 45–50.

\textsuperscript{177} European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 79, art. 6.

\textsuperscript{178} Id. at art. 6(1).
Assembly, in order to avoid a repetition of the serious human rights violations that had taken place, and to protect against communism. 179 Winston Churchill presided over a discussion of how to develop European political cooperation. 180 In 1949, the European countries founded the Council of Europe, and the European Coal and Steel Community was envisaged in 1950. 181 The Convention on Human Rights was drafted in Strasbourg in 1949, under the auspices of the Council of Europe. 182 Today, the Council of Europe includes every Member State of the EU. 183 All of them, as well as the EU itself, are party to the Convention. 184

The Court of Human Rights enforces the Convention. 185 Although the Court of Justice of the European Union (“ECJ”) is a separate institution, under the Treaty of Lisbon, it is bound by the decisional law of the Court of Human Rights. 186 Because the EU and all of the EU Member States are signatories to the Convention on Human Rights, the ECJ also refers cases to the Court of Human Rights and views the Convention as


182 See, e.g., Gary Born, A New Generation of International Adjudication, 61 DUKE L.J. 775, 818 n.165 (2012) (“The ECHR is not an EU institution; it was created by the European Convention on Human Rights under the auspices of the Council of Europe, and it includes a number of non-EU members, such as Turkey and Russia. . . . Nonetheless, the ECHR has played a significant role in Europe’s integration . . . .”); see also ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 17–38, 49 (2010); European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 79.


185 European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 79, art. 33 (“Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.”); id. art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”); Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 19, Nov. 1, 1998, E.T.S. 155 (opened for signature May 11, 1994).

186 Fifty Years Of European Union Law: A Panel Of Present And Former Judges, 31 FORDHAM INT’L L.J. 1741, 1749 (2008); see also Intergovernmental Conference which adopted the Treaty of Lisbon, Declaration on Article 6(2) of the Treaty on European Union, U.N. Doc. OJ C 83/337 (March 2010) (“[T]he Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to the Convention.”).
integral to EU law.\textsuperscript{187} Both the EU and its Member States are subject to the Convention and to external monitoring of their human rights activities.\textsuperscript{188} EU institutions are also required to conform to the Convention by Article 6 of the Treaty of Nice.\textsuperscript{189}

The Court of Human Rights has already interpreted Article 6 of the Convention broadly, and some EU Member States have suggested that Article 6 supports extraterritorial jurisdiction. In \textit{Delcourt v. Belgium}, the Court stated that “[i]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art 6-1) would not correspond to the aim and the purpose of that provision.”\textsuperscript{190} It has frequently stated that rights under the Convention must be “practical and effective” and not “theoretical or illusory.”\textsuperscript{191}

In later cases, the Court has held that the Convention on Human Rights encompasses a right of access to court, even though the text of the document does not expressly include one. In \textit{Golder v. U.K.}, it found that Article 6 “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”\textsuperscript{192} It would therefore, the Court went on to state, be impossible for Article 6 to “describe in detail the procedural guarantees afforded to parties in a pending lawsuit and . . . not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.”\textsuperscript{193}

In \textit{Lubbe v. Cape}, a foreign direct liability case concerning the claims of more than 3,000 South Africans that the actions of a subsidiary of the Cape mining company exposed them to asbestos, the U.K. indicated that Article 6 might oblige signatories to the Convention on Human Rights to ensure access to their courts by foreign claimants.\textsuperscript{194} The case turned on whether Article 6 enabled jurisdiction in a British court. The plaintiffs contended that a ruling that the case could only be brought in a South African court


\textsuperscript{188} See generally Douglas-Scott, \textit{supra} note 54; Case C-400/10 PPU, J.McB. v. L.E., 2010 E.C.R. 000.

\textsuperscript{189} Article 6(3) of the Treaty on the European Union (TEU), as amended by the Treaty of Lisbon, states: “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” See, generally, European Convention for the Protection of Human Rights and Fundamental Freedoms, \textit{supra} note 79.


\textsuperscript{193} Golder, 18 Eur. Ct. H.R. at I. 35.

amounted to a violation of their right to a fair trial. Because of the lack of funding and legal representation in South Africa,” they stated in court submissions, denying the British forum would be to “den[y] [them of] . . . a fair trial on terms of litigious equality with the defendant.” Ultimately, the British House of Lords found jurisdiction on other grounds.

Since Lubbe v. Cape, the Court of Human Rights has itself suggested that Article 6 might apply in foreign direct liability cases. In Markovic v. Italy, a case reviewing the refusal of Italian courts to assume jurisdiction over the claims of victims of NATO bombings in Yugoslavia that Italy owed them damages, the Court stated that if the law of the place where the harm occurred offers a right to bring a claim, then Article 6 applies, and a case may be brought in the court of one of the Member States. In most cases, a claim against a foreign corporation would appear to meet the threshold requirements set out in Markovic. The claimants could simply show that the legal system where the harm took place hampers their access to justice, for example through complicated procedural requirements, high costs, or the unavailability of representation.

If the Court of Human Rights were to hand down an explicit ruling, or if the courts of the EU Member States proceeded independently on the interpretation, then the courts of the EU Member States would have a basis for hearing extraterritorial human rights claims against most foreign subsidiaries. Access to justice in foreign direct liability cases, as discussed above, often can be obtained only by providing foreign victims with alternative forums.

Cases decided in national courts in the EU demonstrate that several EU Member States support drawing on Article 6 to assume extraterritorial jurisdiction. Many Member States subscribe to the doctrine of forum necessitatis, a ground for reviewing claims that cannot be initiated anywhere else, in order to prevent the denial of justice. Belgium and the Netherlands have provided for jurisdiction over non-European defendants on the basis of the doctrine, stating explicitly that they have done so to comply with the requirements of Article 6. French courts, too, have cited Article 6 as the rationale for exceptional jurisdiction, where no other court could offer a forum, in a dispute between an Iranian

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195 Id.
196 Id. at §§ 26, 32.
197 See id.
201 See generally Nuyts et al., supra note 132, at 64. The study was prepared at the request of the European Commission. See Augustin & Boyle, supra note 129, at 69; Castermans & van der Weide, supra note 147. The Dutch civil code provides for jurisdiction on the ground of forum necessitatis in Article 9 of the Code of Civil Procedure. Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure] art. 9(b)-(c) (Neth.).
company and the state of Israel, as well as in an employment claim against an international organization.\textsuperscript{202}

\textsuperscript{¶60} Although the Court of Human Rights has allowed sovereign immunity to restrict the remit of Article 6, the U.K. has nevertheless cabined the holdings and provided a forum for claims against individual officials. In \textit{Al-Adsani v. Kuwait}, the Court of Human Rights found that sovereign immunity can limit the right of access to court.\textsuperscript{203} Al-Adsani, a Kuwaiti citizen, fled to the U.K. and brought an action there alleging torture against the Kuwaiti government.\textsuperscript{204} The British courts originally dismissed the claim on the grounds of sovereign immunity, and Al-Adsani appealed to the Court of Human Rights.\textsuperscript{205} In a close vote, the justices decided that dismissal of the case had not violated Article 6 of the Convention on Human Rights.\textsuperscript{206} In \textit{Jones v. Saudi Arabia}, however, the English Court of Appeal subsequently allowed jurisdiction over allegations of torture against individual officials in Saudi Arabia, as distinct from claims against the Saudi Arabian state itself.\textsuperscript{207} The English court applied the \textit{Al-Adsani} judgment so as to minimize the possible narrowing of Article 6.\textsuperscript{208}

\section*{VII. Conclusion}

Extraterritorial human rights claims against companies could find a home in the courts of the EU Member States. The groundwork has been laid for Article 6 to counterbalance the retraction of extraterritorial jurisdiction taking place in the U.S. Although multinational corporations expose the limits of territorially-based legal systems, the EU could offer a mechanism for extraterritorial accountability on the basis of Article 6. In the current economic climate, leadership in human rights could provide a renewed purpose for European integration. It is time for the EU to offer avenues for the legal redress of corporate human rights abuses.

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\bibitem{note7} Id.
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