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Jodie A. Kirshner

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

Jodie A. Kirshner*

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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* Technical Advisor, Bank for International Settlements, Visitor, Columbia Law School.

[1] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 1 (2013). For a discussion of the general trend in the U.S. as perceived by the author, *see also* Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Companies to Europe: Extraterritoriality, Sovereignty, and the Alien Tort Statute,* 30 BERKELEY J. INT'L L. 259 (2012).

[2] *See Kiobel,* 569 U.S. at parts II and V.

[3] For arguments that a European identity could flow from human rights leadership, *see* Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1308 (2000).

[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

¶3 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;[6] survivors of the Holocaust for losses to Banque Paribas which appropriated their assets during the German occupation of France;[7] and Chinese dissidents who were detained and tortured after Yahoo! revealed that they were disseminating pro-democracy materials.[8]

¶4 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.[9]

¶5 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."[10] Claims under the ATS always faced obstacles, and they occupied an increasingly uncomfortable position within the American legal system.[11] 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.[12] 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.[13] The Supreme Court reviewed the decision of the Second Circuit

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

[6] Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

[7] Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000).

[8] Xiaoning v. Yahoo! (N.D. Cal. 2007) (settled out of court and settlement unpublished); *Xiaoning et al. v. Yahoo! Inc. et al.*, JUSTIA DOCKETS & FILINGS, http://dockets.justia.com/docket/california/candce/4:2007cv02151/191339.

[9] *See, e.g.*, REDRESS, TORTURE SURVIVORS' PERCEPTIONS OF REPARATION: PRELIMINARY SURVEY (2001), *available at* http://www.redress.org/downloads/publications/TSPR.pdf; *see also* Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 3 (2012) ("Beyond monetary redress, ATS litigation provides plaintiffs with symbolic vindication and empowerment while serving as a deterrent against future corporate complicity in international law violations.").

[10] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 1, 14 (2013).

[11] 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).

[12] 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").

[13] 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]

¶6 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.

¶7 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

¶8 Extraterritorial jurisdiction has become essential for imposing accountability on multinational companies. The Alien Tort Statute in the U.S. provided such jurisdiction.[22]

F.3d 1013 (7th Cir. 2011), *and* Sarei v. Rio Tinto PLC, 671 F.3d 736 (9th Cir. 2011); *see also* Aziz v. Alcolac, Inc., 658 F.3d 388, 394 n.6 (4th Cir. 2011) (declining to reach question of corporate liability and dismissing on alternative grounds). To address the developing split, the Supreme Court accepted review of *Kiobel*.

[14] *See, e.g.*, Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What that Can Tell Us About How to Read Kiobel)*, SCOTUSBLOG (April 19, 2013), http://www.scotusblog.com/?p=162650; *see also* Dorothy Shapiro, *Kiobel and Corporate Immunity Under the Alien Tort Statute: The Struggle for Clarity Post-Sosa*, 52 HARV. INT'L L.J. 209 (2011), *available at* http://www.harvardilj.org/2011/03/online_52_shapiro/. A plurality affirmed the Second Circuit's holding that corporations are not under the ATS's jurisdiction. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 1, 14 (2013).

[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.

[19] *See, e.g.*, Samantha Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 326 (2006) (arguing "for a conception of the EU *qua* a post-national institution of global justice").

[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.[23]

¶9 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.[24] "Cross-shareholding," "inter-enterprise contracts," linked directorships, and "concentrated voting rights" have become common.[25]

¶10 These attributes have allowed companies to evade the territorial legal systems designed to govern them.[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.[27] Transnational corporate strategies have conflicted with circumscribed national legal regimes.[28]

¶11 Multinational companies have eluded territorial jurisdiction in several ways.[29] First, they have distributed actions that collectively amount to illegality across separate entities

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[23] *See infra* Section I.

[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.").

[25] *See, e.g.,* J.E. Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 197, 205–06, 205 n.29 (1999) (citing Investment Trust Corp. v. Singapore Traction Co., 1 Ch. 615 (1935) (Eng.) (noting "where only one share was capable of outvoting the remaining 399,999.")); John Albion Young Andrews, The Interlocking Corporate Director (May 1982) (unpublished M.A. dissertation, University of Chicago) (on file with author); Melvin A. Eisenberg, *The Structure of the Corporation: A Legal Analysis*, 89 COLUM. L. REV. 1461 (1976).

[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.").

[27] *See, e.g.,* Viven Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State*, 124 DEADALUS 75 (1995) (stating that the nation-state is becoming less powerful than business); Detlef F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970); Stephens, *supra* note 26, at 58.

[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.

[29] On the principle of territorial jurisdiction, *see* U.N. Charter art. 1, para. 2, art. 2, para. 4; *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); Stephens, *supra* note 26, at 82. On evasion of responsibility in a territorially-based system, *see, e.g.*, Michael K. Addo, *Introduction to* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 3, 11 (Michael K. Addo ed., 1999).

in different countries, so that each has operated within the law.[30] Second, they have carried out harmful conduct in countries other than where its effects are felt.[31] Alternatively, companies have partitioned their assets, shifting money within the corporate group, so that no funds are recoverable in the territorial jurisdiction.[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.[33]

¶12 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.[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.[35] Individual units of corporate groups, however, now generally own

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[30] *Comments In Response To The UN Special Representative Of The Secretary General On Transnational Corporations And Other Business Enterprises' Guiding Principles – Proposed Outline*, AMNESTY INT'L 19 (Oct. 2010), *available at* http://www.amnesty.org/en/library/asset/IOR50/001/2010/en/71401e1e-7e9c-44a4-88a7-de3618b2983b/ior500012010en.pdf; *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 20, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) ("[C]hallenge is the attribution of responsibility among members of a corporate group.").

[31] *See, e.g.*, DE SCHUTTER, *supra* note 5, at 21.

[32] AMNESTY INT'L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION, INTRODUCTION 17 (Aug. 31, 2001), *available at* http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/292e21c5-1dee-401d-8501-6b54748731da/ior530022001en.html; Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 474 (2007).

[33] *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 16, U.N. Doc. A/HRC/4/35/Add.2 (Feb. 15, 2007) ("[T]he State lacks both the ability and inclination to exercise jurisdiction, particularly where it seeks to encourage companies registered on its territory to expand their overseas operations."); F. McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 219–20 (Olivier De Schutter ed., 2006); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1, 32 (2002) ("[T]he local municipal law might not recognize the underlying facts as a tort at all."); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporation,* 20 BERKELEY J. INT'L L. 91, 91–92 (2002).

[34] *See, e.g., 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); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1105, 1198 (2009); John Ruggie, Keynote Presentation at EU Presidency Conference on the "Protect, Respect and Remedy" Framework 6 (Nov. 10–11, 2009), *available at* http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf; Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights and Responsibilities*, 23 AM. U. INT'L L. REV. 451 (2007) (Grotius Lecture, presented at the 101st Annual Meeting of the American Society for International Law (Mar. 28, 2007)).

[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.[36] The law does not distinguish their incentives from those of human investors.[37]

¶13 Multinational companies have exploited this legal separation to shield parent companies from accountability.[38] These companies have strategically insulated dangerous activities within separate entities.[39] Each entity remains legally distinct in spite of its overall economic interdependence, and limited liability protects the parent companies that own them.[40]

¶14 Regulating corporate behaviour therefore demands legal liability beyond national borders and across corporate groups.[41] Without the exercise of judicial authority outside of territorial jurisdictions,[42] no single judicial system has the capacity to impose responsibility on multinational companies.[43] The Member States of the EU can provide extraterritorial jurisdiction, and doing so would benefit European integration.[44]

III. HUMAN RIGHTS LEADERSHIP WOULD BENEFIT THE EU

¶15 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.[45] A new European identity located in the extraterritorial promotion of international rights could attract crucial popular support.[46]

REV. 89 (1985); Henry G. Manne, *Our Two Corporation Systems: Law And Economics,* 53 VA. L. REV. 259 (1967).

[36] *See, e.g.*, LOWENFELD, *supra* note 28.

[37] *See id*.

[38] *See, e.g.*, DE SCHUTTER, *supra* note 5, at 36.

[39] Stiglitz, *supra* note 32, at 474 ("In some cases MNCs take a country's natural resources, paying but a pittance while leaving behind an environmental disaster. When called upon by the government to clean up the mess, the MNC announces that it is bankrupt: all of the revenues have already been paid out to shareholders. In these circumstances, MNCs are taking advantage of limited liability.") (citation omitted).

[40] *See, e.g.*, LOWENFELD, *supra* note 28. For a private international law perspective on gaps in governance, *see* Horatia Muir Watt, *Private International Law as Global Governance: Beyond the Schize, from Closet to Planet*, *available at* http://works.bepress.com/horatia_muir-watt/1.

[41] *See, e.g.*, DE SCHUTTER, *supra* note 5, at 21 ("[T]he interdependencies created by the activities of such transnational actors, and the need to devise an adequate reaction."); Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 5 (Corporate Soc. Responsibility Initiative, John F. Kennedy School of Government, Harvard University, Working Paper No. 59, 2010); Addo, *supra* note 29, at 11 ("Of all the characteristics of the law it is its predominantly domestic focus which impedes its effectiveness in the regulation of transnational corporations of today.").

[42] *See, e.g.*, DE SCHUTTER, *supra* note 5.

[43] *Id*. at 2–7; *Exploring Extraterritoriality In Business And Human Rights: Summary Note Of Expert Meeting*, CENTER FOR BUSINESS & GOVERNMENT, HARVARD KENNEDY SCHOOL 3 (Sept. 14, 2010), *available at* http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf.

[44] *See infra* Section III.

[45] *See infra* Section II.

[46] *See, e.g.*, Besson, *supra* note 19, at 324. ("[E]conomic integration is to a large extent exhausted as a vision for further integration in the European Union" and "[t]he prospects of enlargement have further contributed in the last few years to identifying national, regional and global threats to human rights and

¶16 Human rights leadership has appeared to provide a strong rallying purpose easier for EU citizens to understand and support than the single market.[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.[48] In 2011, 76% of EU citizens polled believed that globalization required "worldwide governance," up from 68% since 2010.[49] "Social equality and solidarity" was frequently selected as a goal that European society should emphasize, [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.

¶17 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.[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.[52] Only 39% of those polled said that the single market had increased their standard of living.[53]

¶18 The focus of the EU on economic unity initially engendered support from disparate political groups and elided cultural differences.[54] The European project began conservatively, with the unification of the coal and steel industries. [55] It gradually

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hence to conscientise the EU's vision of itself as a global entity, whose 'one boundary is democracy and human rights.'").

[47] *See, e.g.*, Von Bogdandy, *supra* note 3, at 1308; *see also* Williams, *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, *supra* note 19, at 324.

[48] European Commission Directorate-General for Communication, *Special Eurobarometer 379: Future of Europe*, at 84, COM (2012), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_379_en.pdf.

[49] *Id.* at 92.

[50] *Id*. at 72.

[51] European Commission Directorate-General for Communication, *Special Eurobarometer 363: Internal Market: Awareness, Perceptions and Impacts*, at 12, COM (2011), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf; European Commission Directorate-General for Communication, *Standard Eurobarometer 77: Public Opinion in the European Union*, at 15, COM (2012), *available at* http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_first_en.pdf.

[52] *Special Eurobarometer 363*, *supra* note 51, at 18.

[53] *Id.*

[54] *See, e.g.*, BEN ROSAMOND, THEORIES OF EUROPEAN INTEGRATION 2, 7, 10, 30 (2000); *see also* Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty Of Lisbon,* 11 HUM. RTS. L. REV. 645, 647–8 (2011) (discussing absence of a concern with human rights at the start of the EU); John Donahue & Mark Pollack, *Centralization and Its Discontents: The Rhythms of Federalism in the United States and the European Union*, THE FEDERAL VISION 73, 95–99 (Kalypso Nicolaidis & Robert Howse eds., 2001) (discussing origins of the EEC); Jodie A. Kirshner, *"An Ever Closer Union" in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the* Societas Europaea, 84 ST. JOHN'S L. REV. 1273, 1280–85 (2010) (discussing growth of corporate regulation).

[55] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 2; *see also* Gerard Quinn, *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.");

expanded to a broader common market, recognizing rights of the free movement of goods, services, and people, and trade flows expanded.[56] Later, it introduced the Euro, which developed into a dominant world currency, used in foreign reserves and international debt securities.[57]

¶19 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.[58] 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.[59] A faction of British conservatives has led a bid to hold a referendum on EU membership.[60] Slovakia refused to participate in bailout packages for Greece.[61] Journalists have debated the prospects for dissolution of the Union.[62]

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).

[56] *See* Consolidated Version of the Treaty on European Union, art. 3, para. 4, May 1, 1992, 2008 O.J. (C 115) 13; European Commission Directorate-General for Economic and Financial Affairs, *Ten Years of Economic and Monetary Union Main Achievements, available at* http://ec.europa.eu/economy_finance/emu10/achievements_en.pdf.

[57] *See generally* HANS VON DER GROEBEN, THE EUROPEAN COMMUNITY: THE FORMATIVE YEARS: THE STRUGGLE TO ESTABLISH THE COMMON MARKET AND THE POLITICAL UNION (1958-66) (1982); STEPHEN OVERTURF, MONEY AND EUROPEAN UNION (1997); Jürgen Stark, *Genesis of a Pact*, *in* THE STABILITY AND GROWTH PACT: THE ARCHITECTURE OF FISCAL POLICY IN EMU (Anne Brunila et al. eds., 2001); Christopher Taylor, *Introduction: The Economics and Politics of the EMU*, *in* EMU EXPLAINED: MARKETS AND MONETARY UNION (Ruth Pitchford & Adam Cox eds., 1997); *Ten Years of Economic and Monetary Union Main Achievements*, *supra* note 56.

[58] 1992 O.J. (C 191) 1; 1992 O.J. (C 224) 1; *see, e.g.*, Grainne de Burca, *If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 FORDHAM INT'L L.J. 1472, 1483–84 (2010); Brendon S. Fleming, Book Review, 15 COLUM. J. EUR. L. 561, 562–63 (2009) (reviewing CHARLES H. KOCH JR., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: INTRODUCTION (2008)).

[59] *See, e.g.*, Richard Bellamy & Uta Staiger, *EU Citizenship and the Market*, THE EUROPEAN INST. (2011), *available at* http://www.ucl.ac.uk/european-institute/analysis-publications/publications/Final.pdf.

[60] Tim Ross, *David Cameron is Told to Call an EU Referendum by 2014*, THE TELEGRAPH (Nov. 19, 2012, 3:10 PM), http://www.telegraph.co.uk/news/uknews/9688281/David-Cameron-is-told-to-call-an-EU-referendum-by-2014.html; Daniel Boffey & Toby Helm, *56% of Britons Would Vote to Quit EU in Referendum, Poll Finds*, THE GUARDIAN (Nov. 17, 2012, 2:56 PM), http://www.theguardian.com/politics/2012/nov/17/eu-referendum-poll/print; Nicholas Watt, *David Cameron Rocked by Record Rebellion as Europe Splits Tories Again: Largest Postwar Rebellion on Europe as 81 Tory MPs Support Call for Referendum on Britain's Membership of the EU*, THE GUARDIAN (Oct. 24, 2011), http://www.theguardian.com/politics/2011/oct/24/david-cameron-tory-rebellion-europe/print.

[61] *No New Aid for Greece Beyond Current Bailout: Slovakia*, EU BUSINESS (Feb. 9, 2012, 2:52 PM), http://www.eubusiness.com/news-eu/finance-public-debt.f2c/; *Slovakian Discord Threatens to Derail Eurozone Bailout Vote*, THE GUARDIAN (Oct. 10, 2011, 3:02 PM), http://www.theguardian.com/business/2011/oct/10/slovakia-vote-eurozone-bailout-package; Nicholas

IV. COMPARATIVE ADVANTAGE OF EU HUMAN RIGHTS LEADERSHIP

¶20 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]

¶21 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.

¶22 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 "obligator[il]y" 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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Kulish & Stephen Castle, *Slovakia Rejects Euro Bailout*, N.Y. TIMES (Oct. 11, 2011), http://www.nytimes.com/2011/10/12/world/europe/slovak-leader-vows-to-resign-if-bailout-vote-fails.html.

[62] *See, e.g.*, Georg Lentze, *EU Referendum: Pundits Mull Future Without Britain*, BBC NEWS (Sept. 30, 2012, 7:37 PM), http://www.bbc.com/news/world-europe-19742182; Gideon Rachman, *Disunion: Why Europe's Best Chance for Survival Is to Break Apart*, THE ATLANTIC (Apr. 27, 2012, 9:05 AM), http://www.theatlantic.com/international/archive/2012/04/disunion-why-europes-best-chance-for-survival-is-to-break-apart/256440/; Simon Jenkins, *It is Not Inevitable that the EU – or Democracy – Will Survive this Mess*, THE GUARDIAN (Nov. 24, 2011, 4:00 PM), http://www.theguardian.com/commentisfree/2011/nov/24/inevitable-eu-democracy-survive-mess; *Is this Really the End?*, THE ECONOMIST (Nov. 26, 2011), *available at* http://www.economist.com/node/21540255.

[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).

[66] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801–05, 808–19 (D.C. Cir. 1984) (Bork, J., concurring).

[67] Sosa v. Alvarez-Machain, 542 U.S. 692, 737–38 (2004).

[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 *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]

¶23 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, *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]

¶24 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

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[69] *Id*. at 737-38.

[70] Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1245, 1247 (11th Cir. 2005).

[71] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001); Paul Magnusson, *A Milestone for Human Rights*, BUSINESS WEEK (Jan. 23, 2005), http://www.businessweek.com/stories/2005-01-23/a-milestone-for-human-rights.

[72] Settlement Agreement and Mutual Release, Royal Dutch Petroleum Co. v. Wiwa, 626 F. Supp. 2d 377 (S.D.N.Y. 2009) (Nos. 96-cv-8386, 01-cv-1909), *available at* http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf.

[73] Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), *available at* http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell.

[74] *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 enterprising 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., *The Alien Tort Statute: Next Bonanza for the Trial Bar*, DLA PIPER LITIGATION RISK ALERT (Feb. 5, 2007), 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), *available at* http://usaengage.org/News/News.asp?id=16&Newsid=840; Bradley, *supra* note 64, 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."); *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] *See, e.g.*, Kirshner, *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.[76] They implement supranational directives and invalidate conflicting national legislation.[77] The Court of Human Rights analyzes the content of the national rules of its Member States for compliance with the Convention on Human Rights.[78]

¶25 Second, human rights cases brought in the EU would not rely on complicated funding arrangements, nor would they generate large damage awards.[79] Comparative studies have shown that damages in the U.S. vastly exceed those typical in the EU.[80] 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.[81] 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.[82] The compensation awarded to victims in the EU has also been generally low and predominantly symbolic.[83] In the Netherlands, for example, it has amounted to roughly $600, on average.[84] Nonetheless, legal aid is available: the Court of Human Rights has

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danger of another war. Nowhere were these feelings expressed more strongly than in Western Europe, where a federation of European states was considered by many 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).

[76] On Brussels and Luxembourg as the locations of the legislature and court, *see, e.g.*, European Commission Directorate-General for Communication, *Europe in 12 Lessons* (2010), *available at* http://europa.eu/abc/12lessons/lesson_4/index_en.htm; Anna F. Triponel, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. UNIV. INT'L L. REV. 855, 907 (2007).

[77] For example, The Human Rights Act 1998 incorporated the European Convention on Human Rights into U.K. law. *See* Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273, 278 (2000).

[78] All member states have accepted. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 48, Nov. 4, 1950, 213 UNTS 246 (as amended by the Eleventh Protocol of May 11, 1994). For example, in the judgment of February 25, 1982, Campbell & Cosans v. U.K., 48 Eur. Ct. H.R. (ser. A) (1982), the European Court reviewed the use of corporal punishment in British public school and found it to be in breach of the European Convention. The European Court required the payment of just compensation. 60 Eur. Ct. H.R. (ser. A) (1983).

[79] 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).

[80] Stephens, *supra* note 33, at 31.

[81] *See, e.g.*, EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Marty & J.R. Spencer eds., 2002); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 143–47 (2001); *see also* Brief of International Law Scholars as Amici Curiae Supporting Plaintiff-Appellees at 19-23, Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2009) (No. 09-2778-cv).

[82] *See generally* Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. L. & SOC. 294 (2005).

[83] *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").

[84] *See* Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention (The Netherlands), U.N. Doc. CAT/C/9/Add.1, at 31 (Mar. 20, 1990).

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

¶26 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

¶27 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

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[85] Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 21 (1979); *see also* Steel v. United Kingdom, 18 Eur. Ct. H.R. 22 (2005) (legal and factual complexity of the case demanded counsel); Bertuzzi v. France, 2003-III Eur. Ct. H.R. 117 (2003) (representation necessary where deemed crucial); Aerts v. Belgium, 29 Eur. Ct. H.R. 50 (1998) (denying legal aid infringes the right to a tribunal); Andronicou v. Cyprus, 3 Eur. Ct. H.R. 389, ¶ 199 (1997) (access to the courts must be guaranteed).

[86] Courts and Legal Services Act, 1990, c. 41, §§ 58, 58A (U.K.); Richard Meeran, *Tort Litigation Against Multinationals ("MNCs") for Violation of Human Rights: An Overview of the Position Outside the US*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE 14 (Mar. 7, 2011), http://business-humanrights.org/en/pdf-tort-litigation-against-multinationals-%E2%80%9Cmncs%E2%80%9D-for-violation-of-human-rights-an-overview-of-the-position-outside-the-us.

[87] U.K. CPR, PD 44, ¶ 9.1, *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs/part-44-general-rules-about-costs2; *but see* MINISTRY OF JUSTICE, REFORMING CIVIL LITIGATION FUNDING IN ENGLAND & WALES – IMPLEMENTATION OF LORD JUSTICE JACKSON'S RECOMMENDATIONS: THE GOVERNMENT RESPONSE, 2011, Parl. 8041 (U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf; Meeran, *supra* note 86, at 14. Unlike the American contingency fee, the uplift fee is not an incentive to pursue a claim for its monetary value. It is simply the amount of the costs and a means of covering the costs of additional non-successful cases.

[88] *See infra* Section V.

[89] *See infra* Section V.

[90] *See infra* Section V.

occurred.[91] Domestic tort cases that have tested the limits of the two definitions have exposed the absence of explicit provisions for extraterritorial jurisdiction.[92]

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.[93] Spain also amended its criminal code in 2010 to extend the offenses to companies.[94] The Czech Republic introduced corporate criminal liability in 2012, overturning a presidential veto of legislation that had first been passed in 2011.[95] 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.[96] Similarly, the Dutch Criminal Code applies only to corporate crimes carried out within the Netherlands.[97] 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.[98] Rather, claims must be based on acts or omissions that occurred within the U.K.[99]

¶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.[100] 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.[101] To protect Dutch national interests, Article 4 of the code also establishes extraterritorial jurisdiction over terrorist acts, crimes against state security, and corruption.[102] 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.[103]

¶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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[91] Council Regulation 44/2001, 2000 O.J. (L012) (EC) (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).
[92] *See infra* notes 125–145.
[93] Code Penal art. 34 (Lux.).
[94] Organic Law (B.O.E. 2010, 5) (amending B.O.E. 1995, 10) (Spain).
[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.
[103] International Criminal Court Act, 2001, c. 17, § 68 (U.K.).

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]

¶32 The *Total* and *Trafigura* 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 *Trafigura* case, French citizens brought charges against the Dutch petroleum trading company Trafigura for illnesses arising from improper disposal of toxic waste in the Ivory Coast.[113] The public prosecutor, however, did not pursue the case.[114]

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[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).

[107] Abigail Hansen, *Case-Study: Crimes in Cameroon and the Role of North-South Cooperation in Seeking Justice from the French Courts*, 11TH INTERNATIONAL ANTI-CORRUPTION CONFERENCE (May 26, 2003), http://iacconference.org/en/archive/document/crimes_in_cameroon_and_the_role_of_north-south_cooperation_in_seeking_justi/.

[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.).

[110] Olivier De Schutter, *Les Affaires Total et Unocal: Complicité et Extraterritorialité dans l'Imposition aux Entreprises d'Obligations en Matière de Droits de l'Homme [The Total and Unocal Cases: Complicity and Extraterritoriality in the Imposition of Human Rights Obligations on Corporations]*, 52 ANNUAIRE FRANÇAIS DE DROIT INT'L [French Yearbook of International Law] 55, 69–71 (2006).

[111] *Id.*; Press Release, Info Birmanie, International Federation for Human Rights and Ligue des Droits de l'Homme, Info Birmanie, the Ligue des Droits de l'Homme (LDH) and the International Federation for Human Rights (FIDH) Denounce the Agreement Reached Between Total and the Sherpa Association (Dec. 1, 2005), *available at* http://www.reports-and-materials.org/FIDH-press-release-Total-settlement-1-Dec-2005.pdf.

[112] OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 140 (Nov. 3, 2008), *available at* http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/OPBP-Comparative-submission-for-the-Special-Representative-on-Business-and-Human-Rights-Nov-2008.pdf.

[113] *Côte D'Ivoire. Une Vérité Toxique. Á Propos de Trafigura, Du Probo Koala et Du Déversement de Déchets Toxiques en Côte D'Ivoire. Résumé*, AMNESTY INTERNATIONAL (Sept. 25, 2012),

¶33 Belgian law used to go farther beginning in 1994, but the Belgian legislature repealed provisions for extraterritorial corporate liability in 2003.[115] 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.[116] 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.[117] In the aftermath of other controversial claims against high-ranking foreign officials,[118] however, the U.S. threatened to move the NATO headquarters out of Brussels unless Belgium revoked the rules.[119] Without the extraterritorial jurisdiction that they had offered, the Belgian court could no longer

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http://www.amnesty.org/fr/library/asset/AFR31/008/2012/fr/7754f65c-abdd-45e6-8bbb-851c907763da/afr310082012en.html.

[114] *Id.*; *see Case Profile: Trafigura Lawsuits (re Côte d'Ivoire)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire.

[115] Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003); Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 984, 986–87 (2003).

[116] Roemer Lemaître, *Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities*, 37 JURA FALCONIS 255 (2000-2001), *available at* https://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm.

[117] 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-20080305-00F4XH.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.

[118] *See, e.g.*, *New War Crimes Suits Filed Against Bush, Blair in Belgium*, DAILY TIMES, June 20, 2003, *available at* http://archives.dailytimes.com.pk/national/20-Jun-2003/war-crimes-suits-filed-in-belgium-against-bush-blair; Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, N.Y. TIMES, Feb. 13, 2003, at A14.

[119] Lorna McGregor, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, 99 AM. SOC'Y OF INT'L LAW 125, 128 (2005); *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH (Aug. 2, 2003), http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed; David Wastell, *America Threatens to Move NATO After Franks Is Charged*, SUNDAY TELEGRAPH, May 18, 2003, *available at* http://www.telegraph.co.uk/news/worldnews/europe/belgium/1430468/America-threatens-to-move-Nato-after-Franks-is-charged.html; Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24; Richard Boucher, U.S. Dep't of State Spokesman, U.S. Dep't of State Daily Press Briefing, at 10–11 (June 13, 2003), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2003/21566.htm (the "Secretary of State has raised these concerns in public and in private with the Belgians. The Secretary of Defense has raised them in public and in private with the Belgians. The goal is to get them to change the law, and so none of these other questions will arise."); Donald Rumsfeld, Secretary of Defense, Transcript (June 12, 2003), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2742.

adjudicate the case against Total.[120] It could not pursue allegations brought by Burmese citizens against a French company for abuses in Burma.[121]

¶34 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

¶35 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]

¶36 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

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[120] Loi relative a la repression des violations graves de droit international humanitaire [Law Relating to the Repression of the Serious Violations of Humanitarian International Law] of Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 10, 1999 (Belg.), *available at* http://www.preventgenocide.org/fr/droit/codes/belgique.htm.

[121] *Universal Jurisdiction in Europe – The State of the Art*, 18 HUMAN RIGHTS WATCH 1, 37–38 (2006), *available at* http://www.hrw.org/sites/default/files/reports/ij0606web.pdf.

[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).

[123] *See generally* Olga Martin-Ortega & Jordi Palou-Loverdos, *Preserving Spain's Universal Jurisdiction Law in the Common Interest*, JURIST, June 26, 2009, *available at* http://jurist.org/forum/2009/06/protecting-spains-universal.php.

[124] *See* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

[125] PRINCETON UNIV., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, 16 (2001), *available at* https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (Universal jurisdiction generally includes "genocide, crimes against humanity, war crimes and torture."); Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 37-40 (2011).

[126] *See infra* notes 126–145.

[127] Council Regulation 44/2001, *supra* note 91.

[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."[130] 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."[131]

¶37 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.[132]

¶38 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.[133] 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.[134]

¶39 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.[135] 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.[136] In these cases, plaintiffs can reach the parent

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[130] Council Regulation 44/2001, *supra* note 91, art. 2(1) (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

[131] *Id.* art. 60(1).

[132] For a discussion on residual rules, *see* Study on Residual Jurisdiction General Report No. JLS/C4/2005/07-30-CE)0040309/00-37 of 23 Sept. 2007, *available at* http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (prepared by Prof. Arnaud Nuyts et al. as part of a service contract with the EC); *see also* Report on the Application of Regulation Brussels I in the Member States Study JLS/C4/2005/03 of Sept. 2007, *available at* http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (prepared by Prof. Burkhard Hess et al.).

[133] Augenstein & 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.

[135] *See, e.g.*, Ramasastry, *supra* note 33, at 92–93; JOHN RUGGIE, OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 284 (2008), *available at* http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf; *infra* notes 147–148.

[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 exterritorial jurisdiction, as they are simply adjudicating whether companies within their jurisdiction should be held accountable for failing to oversee their foreign subsidiaries.[137]

¶40 The U.K. courts have heard several such lawsuits against domestic parent companies in the tort context related to human rights abuses.[138] 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.[139] 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.[140] 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.[141] The court focused on the parent company's responsibility to prevent the harm.[142] In *Motto & Ors v. Trafigura*, 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.[143] Unlike the French *Trafigura* case, as discussed above, the claims in the English courts resulted in a successful settlement.[144]

¶41 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.[145] In that case, Nigerian fisherman and farmers alleged that the parent company had been

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in A World of Nation States, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 131, 138 (Michael K. Addo ed., 1999).

137 Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939, 947 (2009) ("By focusing on the parent's duty of care, the court hearing a transnational liability case circumvents the thorny issue of "'piercing the corporate veil;'" the parent is held liable for its *own* violations rather than for the violations of its subsidiaries as different legal entities.").

138 *See*, *e.g.*, Stephens, *supra* note 33, at 39 (discussing domestic tort suits in country where firm is incorporated); Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1706, 1706–07 (1998).

139 Sithole v. Thor Chemicals Holdings Ltd., [1999] 09 LS Gaz R 32, CA, The Digest 236 (Eng.).

140 Connelly v. RTZ, [1997] UKHL 30 (U.K.); Lubbe v. Cape Plc, [2000] UKHL 41, [2000] 4 All Eng. Rep. 268, 271–72 (U.K.); *see generally* Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT'L & COMP. L.Q. 1 (2001).

141 Guerrero v. Monterrico Metals, [2009] EWHC (QB) 2475 (Eng.).

142 *Id.*

143 Motto v. Trafigura Ltd. [2001] EWCA Civ 1150; *see also Deadly Toxic Waste Dumping in Côte d'Ivoire Clearly a Crime – UN Environmental Agency*, UN NEWS CENTRE, (Sept. 29, 2006), www.un.org/apps/news/story.asp?NewsID=20083&Cr=ivoire&Cr1; Michael Peel, *European Lawyers in a Hunt for Big Game*, FINANCIAL TIMES, (Jan. 31, 2008).

144 *Timeline of Events*, TRAFIGURA, http://www.trafigura.com/media-centre/probo-koala/timeline/2009/september/12676/; David Jolly, *Ivory Coast Toxic-Dump Case Settled, Company Says*, N.Y. TIMES, (Sept. 21, 2009), *available at* http://www.nytimes.com/2009/09/21/business/global/21iht-toxic.html?_r=1&scp=13&sq=trafigura&st=nyt. (affirming that up to 30,000 injured Ivory Coast residents could be compensated).

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.[146] 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.[147]

B. Human Rights Accountability But Not Corporate

¶42 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.[148]

¶43 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.[149]

¶44 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.[150] The code criminalizes all violations of international law perpetrated by individuals, even if the criminal acts occurred outside of Germany.[151] 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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[146] *Id; see The People of Nigeria Versus Shell: The Course of the Lawsuit*, MILIEU DEFENSIE, http://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit/view.

[147] HA ZA 30 december 2009, 2009, 579 m.nt. (Oguru/Royal Dutch Shell) (Neth.); *see* MILIEU DEFENSIE, *supra* note 146*; see* Wetboek van Burgerlijke Rechtsvordering [RV] [Code of Civil Procedure], art. 7(1) (Neth.); *see also* A.G. Castermans & J.A. van der Weide, *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights* 8 (Dec. 15, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626225.

[148] Nicola M.C.P. Jagers & Marie-Jose van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 865 (2008).

[149] Sara S. Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 122-26 (2004); Thomas Weigend, *Societas Delinquere non Potest? A German Perspective*, 6 J. INT'L CRIM. JUST. 927, 936 (2008).

[150] VÖLKERSTRAFGESETZBUCH [VSTGB] [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.[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.[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.[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.[155]

¶45 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.[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.[157] A Saudi citizen has also contested his detention at Guantanamo Bay using the provisions.[158]

¶46 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."[159] Like Germany, however, general

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] Steffen Wirth, *Germany's New International Crimes Code: Bringing a Case to Court*, 1 J. INT'L CRIM. JUST. 151, 159 (2003).
[156] *See Festnahme Mutmaßlicher Führungsfunktionäre der "Forces Démocaratiques de Libérations du Rwanda" (FDLR)*, DER GENERALBUNDESANWALT [GBA] [ATTORNEY GENERAL OF GERMANY] Nov. 17, 2009, http://www.generalbundesanwalt.de/de/showpress.php?themenid=11&newsid=347.
[157] *Criminal Indictment Against Donald Rumsfeld et al*., CENTER FOR CONSTITUTIONAL RIGHTS (Nov. 14, 2006), https://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al; s*ee, e.g.*, Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld Under the German Code of Crimes Against International Law*, 6 GER. L.J. 689, 691–93 (2005); Denis Basak, *Abu Ghreib, das Pentagon und die Deutsche Justiz*, 18 J. INT'L L. OF PEACE AND ARMED CONFLICT 85 (2005); Wolfgang Kaleck, *Strafanzeige gegen Donald Rumsfeld*, REPUBLIKANISCHER ANWäLTINNEN- UND ANWäLTEVEREIN 2005, http://www.rav.de/publikationen/infobriefe/archiv/infobrief-94-2005/strafanzeige-gegen-donald-rumsfeld/; *Keine Deutschen Ermittlungen wegen der Angezeigten Vorfälle von Abu Ghraib/Irak*, DER GENERALBUNDESANWALT [GBA] [ATTORNEY GENERAL OF GERMANY] Feb. 10, 2005, https://www.generalbundesanwalt.de/de/showpress.php?newsid=163.
[158] Katherine Gallagher, *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, *German Criminal Complaint Against Donald Rumsfeld and Others,* 10 AM. SOC'Y INT'L L. INSIGHTS 1, 2 (2006).
[159] BROTTSBALKEN [BRB] [CRIMINAL CODE] 16:8 (Swed.).

Swedish law provides only for administrative sanctions against companies, not criminal liability.[160]

¶47 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]

¶48 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]

¶49 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

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[160] The Swedish Penal Code allows the public prosecutor to seek the imposition of corporate fines. Brottsbalken [BrB] [Criminal Code] Ch. 36 (Swed.); s*ee, e.g.*, ALLENS ARTHUR ROBINSON, 'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS (2008), http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

[161] Criminal Justice Act, 1988, c. 33, § 134 (U.K.); International Criminal Courts Act, 2001, c. 7, §§ 51–52 (U.K.).

[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.

[163] International Criminal Courts Act, 2001, c. 17, § 53 (U.K.).

[164] Corporations, (1973) 11 HALS. STAT. (4th ed.) ¶ 1280.

[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.).

[171] 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.); *see* Wetboek van Strafrecht [SR] [Dutch Criminal Code], art. 48 (Neth.); Uitvoeringswet Genocideverdrag [Law for the Implementation of the Genocide Convention], July 2, 1964, Stb. 1964, p. 243 (Neth.); Wet Oorlogsstrafrecht [Wartime Offenses Act], July 10, 1952, Stb. 1952, p. 408 (Neth.).

mustard gas.[172] The mustard gas was deployed as a chemical weapon against the Kurdish minority and in the Iran–Iraq war.[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.[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.[175]

VI. How to Facilitate Jurisdiction Among the EU Member States

¶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.[176]

¶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.[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 . . . ."[178]

¶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

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[172] Jernej Letnar Černič, Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights 149 (2010); *see Trial Watch: Frans van Anraat*, Trial.org (Apr. 7, 2014), http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/286/action/show/controller/Profile/tab/legal-procedure.html.

[173] Jernej Letnar Černič, Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights 149 (2010); *see Trial Watch: Frans van Anraat*, Trial.org (Apr. 7, 2014), http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/286/action/show/controller/Profile/tab/legal-procedure.html.

[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, 22-000509-06 (Van Anraant); HR 30 juni 2009, 07/10742 (Van Anraat).

[175] *See, e.g.*, Int'l Comm'n of Jurists, Access to Justice: Human Rights Abuses Involving Corporations: the Netherlands 9 (2010), *available at* http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Netherlands-access-justice-publication-2010.pdf; Jagers & van der Heijden, *supra* note 148, at 863.

[176] *See supra* notes 45–50.

[177] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 79, art. 6.

[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 Sate of the EU.[183] All of them, as well as the EU itself, are party to the Convention.[184]

¶53 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

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[179] *See, e.g.*, LEONARD JASON-LLOYD & SUKHWINDER BAJWA, THE LEGAL FRAMEWORK OF THE EUROPEAN UNION 1 (1997) (suggesting European integration would prevent repetition of the atrocities leading up to World War II); *see also*, Clarence C. Walton, *The Hague "Congress of Europe:" A Case Study of Public Opinion*, 12 W. POL. Q. 738 (1959); *see also* JULIE SMITH, EUROPE'S ELECTED PARLIAMENT 27–38 (1999).

[180] *See, generally*, COUNCIL OF EUROPE, MANUAL OF THE COUNCIL OF EUROPE 3–4 (1970).

[181] The countries that founded the Council of Europe included Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the U.K. *See* Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103, E.T.S. 1; Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, as amended, Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 2; *see also A Peaceful Europe – The Beginnings of Cooperation*, EUROPEAN UNION, http://europa.eu/about-eu/eu-history/1945-1959/index_en.htm.

[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.

[183] Constant Brand, *EU Faces 'Tricky' Talks With Council Of Europe*, EUROPEAN VOICE (Feb. 16, 2010), *available at* http://www.europeanvoice.com/article/eu-faces-tricky-talks-with-council-of-europe/.

[184] *See, e.g.*, *Accession of the European Union*, COUNCIL OF EUROPE, http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention.

[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.[187] Both the EU and its Member States are subject to the Convention and to external monitoring of their human rights activities.[188] EU institutions are also required to conform to the Convention by Article 6 of the Treaty of Nice.[189]

¶54 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 *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."[190] It has frequently stated that rights under the Convention must be "practical and effective" and not "theoretical or illusory."[191]

¶55 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 *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."[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."[193]

¶56 In *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.[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

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[187] The Court of Justice has referenced the European Court of Human Rights sufficiently frequently that the European Court now presumes that EU law will conform to the European convention. *See* Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, 2005-VI Eur. Ct. H.R. 107; *see also* Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands, App. No. 13645/05, Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91278; Connolly v. 15 Member States of the European Union, App. No. 73274/01, Eur. Ct. H.R. (2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90864 (in French); La Société Etablissement Biret et CIE S.A. v. 15 Member States of the European Union, App. No. 13762/04, Eur. Ct. H.R. (2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90863 (in French); Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87 (2006).

[188] *See generally* Douglas-Scott, *supra* note 54; Case C-400/10 PPU, J.McB. v L.E., 2010 E.C.R. 000.

[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, *supra* note 79.

[190] Delcourt v. Belgium, 1 Eur. Ct. H.R. 355 (1970).

[191] Airey v. Ireland (no. 32), 32 Eur. Ct. H.R. (ser. A)*; see also* Artico v. Italy, App. No. 6694/74, 3 Eur. H.R. Rep. 1, ¶ 33 (1980); Mehmet Eren v. Turkey, App. No. 32347/02, Eur. Ct. H.R., 50 (2008).

[192] Golder v. U.K.,18 Eur. Ct. H.R. (ser. A) (1975); *see also* Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. (1999).

[193] Golder, 18 Eur. Ct. H.R. at I. 35.

[194] Lubbe v. Cape Plc, [2000] UKHL 41, [2000] 4 All Eng. Rep. 268 (U.K.)

amounted to a violation of their right to a fair trial.[195] "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."[196] Ultimately, the British House of Lords found jurisdiction on other grounds.[197]

¶57 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.[198] 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.[199]

¶58 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.

¶59 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.[200] 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.[201] 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*.

[198] Markovic v. Italy, App. No. 1398/03, 44 Eur. Ct. H.R. Rep. 1045 (2007).

[199] *See, generally id.* at 33–34; *see also* AUKJE VAN HOEK, UNIVERSITY OF AMSTERDAM INSTITUTE FOR PRIVATE LAW, TRANSNATIONAL CORPORATE SOCIAL RESPONSIBILITY: SOME ISSUES WITH REGARD TO THE LIABILITY OF EUROPEAN CORPORATIONS FOR LABOUR LAW INFRINGEMENTS IN THE COUNTRIES OF ESTABLISHMENT OF THEIR SUPPLIERS (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113843.

[200] Council Regulation 4-2009, 2008 O.J.E.U. (L7/1) (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations).

[201] *See generally* Nuyts et al., *supra* note 132, at 64. The study was prepared at the request of the European Commission. *See* Augenstein & 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.[202]

¶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 *Al-Adsani v. Kuwait*, the Court of Human Rights found that sovereign immunity can limit the right of access to court.[203] Al-Adsani, a Kuwaiti citizen, fled to the U.K. and brought an action there alleging torture against the Kuwaiti government.[204] The British courts originally dismissed the claim on the grounds of sovereign immunity, and Al-Adsani appealed to the Court of Human Rights.[205] In a close vote, the justices decided that dismissal of the case had not violated Article 6 of the Convention on Human Rights.[206] In *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.[207] The English court applied the *Al-Adsani* judgment so as to minimize the possible narrowing of Article 6.[208]

VII. CONCLUSION

¶61 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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[202] Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Feb. 1, 2005, Bull. civ. I, No. 53 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (Fr.).

[203] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 103 (2001) (holding that the United Kingdom did not violate the European Convention on Human Rights when it granted immunity to the government of Kuwait in a case alleging torture in Kuwait); *see also* Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415, 429 (2002) (holding that international law does not require that a state enforce against another state a judgment based on human rights violations).

[204] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79 (2001).

[205] *Id.*

[206] *Id.*

[207] Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) [285-86] (appeal taken from Eng.).

[208] *Id.*