



SECTION II

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JUDICIAL
MECHANISMS



➤ Bhopal: an environmental industrial catastrophe. A toxic cloud escaping from a chemical plant operated by a subsidiary of Union Carbide Company (USA) led to the death of more than 25 000 people.
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SECTION II

JUDICIAL MECHANISMS

PART I

The Extraterritorial Civil Liability of Multinational Corporations for Human Rights Violations

Presently, it is most common and legally most tenable to seek to hold multinational corporations liable for civil damages through actions pursued at the national level, either in the corporation's country of origin or in its host country.

In countries where the parent companies of multinational corporations are based, a variety of systems have been used over time to prosecute multinationals for their abuses, despite the complexities of their structures and operations. This is an important development because the individuals affected by a multinational's activities often have a low probability of obtaining redress in their own country, the host country of an investment. A lack of political will and insufficient legal capacity among local authorities (i.e., inadequate legislation, poor infrastructure, corruption, lack of legal aid, the politicisation of the judiciary), at times due to pressures intended to attract foreign investment, are common in this area. It is not uncommon for a multinational's implementing local intermediaries (subsidiaries, subcontractors or business partners) to be insolvent or uninsured. Because the parent company often perpetrates the alleged crime, or at least makes decisions that lead to the violation, evidence is often located in the multinational's country of origin or domicile. Numerous obstacles continue to prevent victims from accessing justice, including issues associated with access to information, the costs of legal proceedings, and both substantive and procedural norms.

In this study, we limit ourselves to the examination of three separate legal systems: those of the United States, Canada and the European Union.¹ Beyond the practical

¹ See also Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse - A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008, www.law.ox.ac.uk/opbp. The report examines the legal systems of the following countries: Australia, The Democratic Republic of the Congo, The European Union, France, Germany, India, Malaysia, China, Russia, South Africa, The United Kingdom and The United States. For illustrative purposes, this chapter discusses several decisions by Canadian courts, without analysing specific legislation.

considerations related to the impossibility of conducting an exhaustive study, this limitation is based on three primary factors:

- 1 – The parent companies of multinational corporations are often located in the U.S., Canada and the EU;
- 2 – Over the past decade, the volume of legal proceedings brought by victims anxious to see the recognition of and compensation for their injuries has increased in countries where multinationals are domiciled, and
- 3 – More than those of other countries, these three legal systems have developed specific procedures to hold legal persons liable for acts committed abroad. References to specific cases brought before foreign courts, however, are inserted occasionally in the text.

► NOTE

Courts in other geographic areas have accepted cases against corporations in recent years, and it is anticipated that more cases will be filed against multinationals for human rights abuses in an increasing number of countries. For example, in June 2014, the Thai Supreme Administrative Court accepted a lawsuit filed by 37 Thai villagers against state-owned Electricity Generating Authority of Thailand (EGAT) and four other state bodies for signing of an agreement to purchase power from the Xayaburi Dam in neighbouring Laos, which poses a threat to the environment and food security.² Villagers from Thai provinces near the Mekong had petitioned the Administrative Court in August 2012, alleging that the power purchase agreement is illegal both under the Thai Constitution and the 1995 Mekong Agreement, approved without an assessment of the project’s environmental and health impacts and without adequate consultations in Thailand.³ In February 2013, the Administrative Court denied jurisdiction to hear the case. Overruling the lower court decision, the Thai Supreme Administrative Court said it had jurisdiction to hear the lawsuit and ordered the five government bodies, against which the lawsuit was brought, to “undertake their duty under the Constitution, laws and resolutions of the [Thai] Government, through the notification and dissemination of appropriate information, adequate hearing and consultation and further environmental, health and social impact assessment for the Xayaburi Dam.”⁴ This is said to be the first case in Thailand to recognize the transboundary impacts of a project being built in a neighboring country, and the first to require a Thai state-owned company building a project overseas to comply with Thai laws.⁵ EGAT is supposed to buy 95 percent of the power from the Xayaburi dam under the agreement, and if the court finds the purchase agreement was approved illegally, it could cancel the agreement altogether.

2 Radio Free Asia, *Thai Court Agrees to Hear Lawsuit over Controversial Xayaburi Dam in Laos*, June 24, 2014, www.rfa.org.

3 Reuters, *Thai court takes villagers' case against power firm, Laos dam*, June 24, 2014, www.thanhnien-news.com.

4 Pianporn Deetes, International Rivers, “Justice for the Mekong – Thai Villagers Back at Court” (June 20, 2014), www.internationalrivers.org/blogs/259-0

5 *Idem*

What are the current methods of seeking compensation through **suing a multinational corporation in a U.S., Canadian, or EU Member State's civil court** when the multinational violates the rights of its employees or the surrounding local community as part of its operations abroad?

Our inquiry looks to private international law as it relates to personal relationships with foreign components. Our situation is therefore subject to the internal regulations of each state. The application of private international law can be examined from two angles:

Jurisdictional conflict

- **International jurisdiction:** In which courts will the matter be considered? Which state will have jurisdiction?
- **Recognition and enforcement of foreign judgements:** This point concerns the recognition and enforcement of foreign judgements issued by the forum court. It involves determining the binding effect and enforceability of a foreign authority's legal decision. Because this guide focuses on ways to file suit against a multinational corporation for human rights violations, the recognition and enforcement of foreign judgements will not be discussed herein.

Conflict of laws:

What law will apply to the case at hand?

The EU has issued several community regulations which standardize the rules governing conflicts of jurisdiction and law within the EU's 28 different legal systems. These EU standards are compulsory and applicable in all Member States immediately upon publication. This study is devoted primarily to these community standards and their application in EU Member States.⁶

⁶ Note that there is one exception. The Rome II regulation does not apply to Denmark.

CHAPTER I

Establishing the Jurisdiction of a US Court and Determining the Law Applicable to the Case

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Under what conditions will a US court recognize jurisdiction?

The primary instrument U.S. courts use to establish their jurisdiction for cases that fall within our inquiry is the **Alien Tort Statute (ATS) of 1789**.⁷

➔ An overview of the Alien Tort Statute

Enacted in 1789 and revived in 1980 for human rights cases and in the landmark case *Filártiga v. Peña-Irala*,⁸ the ATS has become the **central basis** for asserting jurisdiction in most **tort cases** brought in the U.S. against multinational corporations for human rights violations committed abroad.

U.S. federal courts may hear civil cases:

- Introduced by a **foreigner**,
- Introduced by a victim of a **serious violation of the “law of nations”, or customary international law**,⁹
- Which **“touch and concern the territory of the United States” “with sufficient force”** to displace the presumption against extraterritoriality,¹⁰
- In which **the defendant is on U.S. soil when the suit is brought**.

In addition to the *Alien Tort Statute*, the **Torture Victim Protection Act (TVPA)** is another tool which allows U.S. courts to hear cases involving violations of international law committed against private persons.

⁷ The Alien Tort Statute is also known as the “Alien Tort Claims Act” or ATCA. We recommend reading the chapter on the United States in: Pro Bono Publico Oxford, op. cit., p. 303 and following.

⁸ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)

⁹ First Judiciary Act 1789 (ch. 20, §9(b)), as codified in 28 USC. § 1350: “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.”

¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)

➔ An overview of the Torture Victim Protection Act

Adopted in 1991, the TPVA allows U.S. and foreign nationals to sue in federal court for redress from perpetrators of torture or extrajudicial executions,¹¹ including those carried out outside the U.S. The TPVA does not replace the ATS, but complements it. On the one hand, the TPVA's scope is more limited than that of the ATS because only acts of torture and extrajudicial executions can be litigated under the TPVA. On the other hand, the TPVA extends the scope of the ATS, in that it accords the right to sue not only to foreigners, but to U.S. citizens as well.¹² However, as the U.S. Supreme Court recently clarified, only natural persons are subject to liability under the TPVA.¹³ It can therefore only be used to sue corporate officers, but not corporations.

1. Applying the ATS to private individuals and multinational corporations

The application of the ATS for violations of international human rights law is the culmination of a long process of evolution. In the initial years since its rebirth as a vehicle for bringing human rights cases, the ATS was invoked and applied in situations involving human rights violations committed by persons **acting under color of law** as public officials (see *Filártiga v. Peña-Irala*).¹⁴ The ATS's scope was subsequently extended to cover violations committed by individuals **acting outside any official capacity** (see *Kadić v. Karadžić*).¹⁵ The application of the ATS to tort actions brought in the U.S. **against multinational corporations for violations of human rights committed abroad** is more recent and will be discussed below in detail. (see, e.g., *Wiwa*¹⁶ and *Unocal*¹⁷)

11 Unlike the ATS, which leaves to international law the task of defining the norms, the TPVA defines torture and summary execution.

12 B. Stephens; J. Chomsky; J. Green; P. Hoffman; M. Ratner, *International Human Rights Litigation in U.S. Courts*, 2nd Revised Edition (2008). B. Stephens, "Corporate Accountability: International Human Rights Litigation Against Corporations in U.S. Courts," in M. T. Kamminga and S. Zia-Zarif (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 210; *Wiwa v. Royal Dutch Petroleum Co*, F.Supp.2d, 2002 WL 319887 (S.D.N.Y., 2002).

13 *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

14 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See K. Gallagher, "Civil Litigation and Transnational Business: An Alien Tort Statute Primer," 8 *Journal of International Criminal Justice* 745 (2010).

15 *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

16 *Wiwa v. Royal Dutch Petroleum Co*, F.Supp.2d, 2002 WL 319887 (S.D.N.Y., 2002).

17 *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

➔ **Sosa v. Alvarez-Machain**¹⁸

At the request of the U.S. Drug Enforcement Agency, a group of Mexican nationals took Mexican physician Alvarez-Machain by force on U.S. soil to face trial in U.S. courts. After being found not guilty, Alvarez-Machain brought an ATS lawsuit for arbitrary arrest and detention against Jose Francisco Sosa, one of the alleged Mexican perpetrators of the disputed events. This was **the first time the U.S. Supreme Court heard not only an ATS case, but also a transnational human rights case.**

The Court found that the ATS provides an opportunity for individuals with cause of action for a limited number of international law violations, a right that was previously unrecognized.

The Court subsequently provided a **more precise definition of the law of nations** contained in the ATS, ruling that all actions based upon “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of 18th century paradigms” may be introduced.¹⁹ At that time, torts included infringement of rights of diplomats and consular officials, safe conduct, and piracy. While being clear that the ATS should be understood to apply to violations in the modern era, the Court remains vague, however, about the content and the specificities of these norms.

The Court clarified that individuals may bring human rights cases under the ATS provided that the violation concerns **universal, obligatory, specific and definable international norm** such as the prohibitions of torture and genocide. In the case at hand, the Court held that arbitrary detention as pled in this case does not violate well-established customary international law and therefore denied cause of action.²⁰

The Court also recognized that individuals could bring ATS action against private actors for violations of international norms. The Court held that it must “consider **whether international law extends the scope of liability** for a violation of a given norm to the **perpetrator being sued**, if the **defendant is a private actor such as a corporation or individual.**”²¹

a) Displacing the presumption against extraterritoriality

In April 2013, the Supreme Court released its decision in *Kiobel v. Royal Dutch Petroleum*, ruling that ATS claims must displace the presumption against extraterritoriality. The presumption is linked to concerns for international comity, that adjudicating a claim could cause “diplomatic strife,” or “international discord.”²²

¹⁸ 542 US 692 (2004)

¹⁹ 542 US at 725

²⁰ 542 US at 732

²¹ 542 U.S. at 732, n.20

²² *Kiobel*, 133 S. Ct. at 1664, 1669

The Court held that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”²³ The facts of *Kiobel*, in which Nigerian plaintiffs sued U.K. and Dutch parent companies for allegedly abetting the Nigerian government in committing abuses in Nigeria, were insufficient to displace the presumption against extraterritoriality.

How can a claim displace the presumption against extraterritoriality?

In *Kiobel*, the Supreme Court noted that “it would reach too far to say that mere corporate presence” – via a public relations office in New York and listings on the New York Stock Exchange – suffices.²⁴ The Supreme Court did not specify what specific factors would be sufficient to displace the presumption, but suggested that ATS claims should be evaluated on a claim-by-claim basis,²⁵ and that displacing the presumption turns on whether the “claim,” rather than the alleged tortious conduct, sufficiently touches and concerns U.S. territory. This means that courts can and must consider all the facts that give rise to ATS claims, including the parties’ identities, their relationship to the causes of action, and the relationship of the claims to the United States’ territory and interests. In citing *Morrison v. National Australia Bank Ltd.*,²⁶ the Supreme Court explained that courts must inquire about the “focus” or purpose of the statute in determining how to apply the presumption. Accordingly, the historical purpose of the ATS was to provide foreigners with access to a U.S. forum for violations of international law that could be attributed to the U.S., such as violations committed by a U.S. citizen, violations committed on U.S. territory or situations where the U.S. provided “safe harbour” for an international law violation, as well as for violations that occur outside the U.S. such as piracy, must be considered when assessing claims brought under the ATS. Justice Kennedy noted in his concurring opinion that “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute” and left open the possibility of application of the ATS to “human rights abuses committed abroad.”²⁷

²³ *Kiobel* 133 S. Ct. at 1669

²⁴ *Idem*

²⁵ See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014)

²⁶ 130 S. Ct. 2869 (2010)

²⁷ *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

Situations where the presumption against extraterritoriality might be displaced include cases in which:

- **the alleged tort occurs on American soil;**²⁸
- **the defendant is an American national;**²⁹
- **significant conduct that contributed to the commission of the violation occurred on U.S. soil;**
- **the defendant’s conduct substantially and adversely affects an important American national interest.**³⁰

The Post-Kiobel Landscape

→ **Al Shimari v. CACI Int’l and CACI Premier Technology, Inc.**

In June 2008, the Center for Constitutional Rights (CCR) filed a civil lawsuit on behalf of four Iraqi former detainees who, had been tortured at Abu Ghraib, against CACI International, Inc. and CACI Premier Technology (CACI), a private contractor that provided interrogators to the U.S. government. In 2004, U.S. military investigators had determined that employees of the company, headquartered in Arlington, Virginia, had participated in torture and other

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- 28 All Justices seem to agree that an ATS claim in which the tortious conduct occurred in the U.S. would be able to proceed. Justice Alito, joined by Justice Thomas, filed a separate concurring opinion arguing that this should be the only circumstance in which ATS claims should proceed, but this view was not accepted by the majority.
- 29 We do not know whether the Supreme Court would allow an ATS claim to proceed on the sole basis of the defendant’s U.S. citizenship alone. Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan indicated that they, at least, would accept a claim on this basis, but we do not know whether additional justices would join them in such a case. The majority opinion distinguished a 1795 opinion by Attorney General William Bradford stating that U.S. courts may have jurisdiction over civil suits arising outside of the U.S. because the case “deal[t] with U.S. citizens.” *Kiobel*, 133 S. Ct. at 1668. In determining whether the presumption against extraterritoriality is displaced for other statutes, courts have considered the “focus” of the statute. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010). A core historical underpinning of the ATS is to remediate international law violations committed by U.S. subjects. See Brief of Amicus Curiae Professors of Legal History, *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08–CV–00827 (GBL/JFA) 2014 WL 2922840 (Nov. 5, 2013). Furthermore, the presumption aims to avoid international discord, but adjudicating claims against a U.S. corporation would not present a risk of international discord, on the contrary, it would promote international relations. See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 322–24 (D.Mass. 2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because “[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself”). See also Restatement (Third) of Foreign Relations Law of the United States, §402(2) and cmt. e (1987) (recognizing jurisdiction over a state’s nationals for activities inside and outside its territory).
- 30 For example, preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring). The U.S. Government has noted that it has an important foreign affairs interest in not harboring torturers or other “enemies of mankind.” The U.S. may be faulted for not providing a remedy under U.S. law for torts committed by individuals present in the U.S.. See U.S. Supplemental Brief as Amicus Curiae in *Kiobel*, 2012 WL 2161290 at *19–20. CACI.; Mwani v. Laden “a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests” 947 F.Supp.2d 1 (DDC May 29, 2013).

“sadistic, blatant, and wanton criminal abuses” of detainees at Abu Ghraib. The plaintiffs brought claims of war crimes, torture and cruel, inhuman and degrading treatment, as well as state law claims including assault and battery. The complaint alleged that the plaintiffs were deprived of food and water, sexually assaulted, beaten, forced to witness the rape of another prisoner, and imprisoned under conditions of sensory deprivation. However, in June 2013, a district judge ruled that the Supreme Court decision in *Kiobel* foreclosed claims arising outside the United States, and therefore dismissed the case because he found the violations all occurred in Iraq.³¹ The plaintiffs filed an appeal with the Fourth Circuit Court of Appeals in October 2013.³² In June 2014, the Fourth Circuit Court of Appeals reversed and vacated the district court’s decision and remanded the plaintiffs’ claims for further proceedings.

The Fourth Circuit Court of Appeals found that the Supreme Court in *Kiobel* had broadly stated that the “claims,” rather than the alleged tortious conduct, must “touch and concern” the United States, “suggesting that courts must consider all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.”³³ Because plaintiffs aimed to enforce the customary law of nations “recognized by other nations as being actionable,” and because “defendants are United States citizens,” the Court concluded that there was no risk of “international discord,” which the presumption of extraterritoriality is meant to avoid.³⁴

The Court of Appeals concluded that the plaintiffs’ ATS claims “touch and concern” the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on a combination of factors: (1) CACI’s status as a United States corporation, (2) the United States citizenship of CACI’s employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI’s contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI’s employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI’s managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to “cover up” the misconduct, and “implicitly, if not expressly, encouraged” it; and (5) the expressed intent of Congress, through enactment of the TVPA and the torture statute (18 U.S.C. § 2340A), to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.

31 *Al Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857 (E.D. Va. 2013).

32 See Gwynne Skinner, Robert McCorquodale, and Olivier de Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2013. Report commissioned by CORE, ECCJ, of which FIDH is a steering group member, and ICAR.

33 *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014).

34 *Al Shimari*, 758 F.3d at 528-30

After this overturn of the lower court's decision to dismiss, the case was sent back to the lower court for judgment on the merits. However, on June 18, 2015, the lower court granted CACI's motion to dismiss the case on the basis that the case presents a « political question » due to the fact that the actions of the company were controlled by the US military, the evaluation of the existence of the alleged violations committed at Abu Ghraib would require assessing sensible elements of the actions of the military. Plaintiffs have appealed the decision, and several amicus brief were submitted by UN Special Rapporteur on Torture Juan Méndez, retired military officers, human rights organizations, former Navy General Counsel Alberto Mora, and survivors of gross human rights violations.³⁵

➔ **Sexual Minorities Uganda v. Lively.**

On March 14, 2012, CCR, representing Sexual Minorities Uganda (SMUG), a coalition of Ugandan LGBTI organisations, filed suit under the ATS against Abiding Truth Ministries President Scott Lively, for his role in the persecution of the LGBTI community in Uganda. The complaint alleges that the defendant, an American citizen, acting in concert with others through actions taken in both the United States and Uganda, violated the law of nations and conspired to persecute the LGBTI community in Uganda. The defendant worked for over a decade from Massachusetts to support the oppression of gays and lesbians in Uganda, including through legislation imposing the death penalty for homosexuality. In August 2013, a federal judge ruled that persecution on the basis of sexual orientation and gender identity is a crime against humanity and that the case could proceed to discovery. The Court distinguished the case from *Kiobel* because 1) the Defendant was a U.S. citizen, and 2) the conduct partially occurred in the United States, with only infrequent visits to Uganda.³⁶ Since then, parties have been arguing over discovery.³⁷

A number of corporate cases involving U.S. corporations have addressed *Kiobel's* “touch and concern” requirement. These include *Cardona v. Chiquita*, a case filed in June 2007 on behalf of multiple plaintiffs by NGO EarthRights International with the Colombian Institute of International Law, Cohen Milstein Sellers & Toll PLLC, Paul Hoffman, Judith Brown Chomsky, and other counsel arising out of Chiquita's alleged financing of paramilitary death squads in Colombia. Chiquita is a U.S. company, and there is evidence that Chiquita's board of directors in the United States approved payments to paramilitaries.³⁸ In July 2014, the Eleventh Circuit concluded that the alleged acts of torture perpetrated by a private actor

³⁵ See CCR, *Al Shimari v. CACI et al.*, <http://ccrjustice.org>

³⁶ *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013). Center for Constitutional Rights, *Court Allows Groundbreaking Case Against Anti-Gay Religious Leader to Proceed*, Aug. 14, 2013. <http://ccrjustice.org/newsroom/press-releases/court-allows-groundbreaking-case-against-anti-gay-religious-leader-proceed>; see also: <http://ccrjustice.org/LGBTUganda/>

³⁷ For more information on the procedure See : www.gpo.gov

³⁸ Marco Simmons, *What does the Kiobel decision mean for ERI's cases?*, EarthRights International Blog, (Apr. 19, 2013) www.earthrights.org/blog/what-does-kiobel-decision-mean-eris-cases

(rather than by a state) did not satisfy the requirement in *Sosa* of being sufficiently clearly prohibited by customary international law.³⁹ Additionally, while the dissent maintained that relevant conduct – the decisions to fund the paramilitaries and funding of them – occurred within the United States, the Eleventh Circuit rejected that reasoning, holding that “all relevant conduct” took place outside the United States. As the Eleventh Circuit believed neither the specificity nor “touch and concern” requirements were met, it concluded the case should be dismissed. In April 2015, the Supreme Court declined to review the Eleventh Circuit’s decision.⁴⁰

In *Doe v. Nestle*, Malian children forced to work on cocoa fields in Cote d’Ivoire brought a class action against Nestle, Archer Midlands and Cargill. In September 2014, the Ninth Circuit Court of Appeals held that corporations can be held liable under the ATS and granted the plaintiffs leave to amend their complaint in light of the *Kiobel* decision, in order to present allegations that their claims “touch and concern” the territory of the United States with sufficient force to displace the presumption against extraterritoriality.⁴¹ The Court did not resolve the question of the appropriate standard of mens rea for aiding and abetting (see discussion below), but found that in any case, both purpose and knowledge were satisfied by the facts; in finding that “purpose” was established, the court reasoned that because the violation benefited the defendants the inference could be made that they acted with the purpose to facilitate it.⁴²

Doe v. Drummond involves allegations that Drummond, a U.S.-based coal mining company, provided funding to paramilitaries to drive guerrillas out of the areas of Drummond’s operations in Colombia. The complaint further alleges that Drummond’s collaboration with the paramilitaries brought a surge of paramilitary combatants, and that hundreds were killed as the paramilitaries conducted cleansing operations in these areas. In March 2015, the Eleventh Circuit Court of Appeals concluded the case was properly dismissed, on the grounds that it did not displace the presumption against extraterritoriality.⁴³ The Court found that only more general decisions about funding were made in the United States, and that planning, execution of the crimes, and collaboration with the principals, occurred outside the United States. The Court found that “mere consent” to the violations in the United States did not sufficiently touch and concern the United States, and dismissed the case.

Baloco v. Drummond involves largely the same allegations as those in *Doe v. Drummond*. In September 2014, the Eleventh Circuit Court of Appeals found that the case did not displace the presumption against extraterritoriality. It found that although the Director of U.S. Security for Drummond, a U.S. national, allegedly

³⁹ *Cardona v Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014)

⁴⁰ *Cardona v Chiquita Brands Int’l, Inc.*, 135 S. Ct. 1842 (U.S., 2015)

⁴¹ *Doe I v. Nestle USA, et al*, 766 F.3d 1013 (9th Cir. 2014). *rhr’g en banc denied Doe v. Nestle USA*, 2015 U.S. App. LEXIS 8543 (9th Cir. May 6, 2015).

⁴² *Doe I v. Nestle*, 766 F.3d at 1024.

⁴³ *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015).

participated in meetings in Colombia where the murders of union leaders were discussed, that conduct did not “touch and concern the territory of the United States.”⁴⁴ The Court thus dismissed the ATS claim. The plaintiffs’ petition for review by the Supreme Court was denied in November 2015.

Doe v. Cisco Systems, Inc. is a case in the Northern District of California against Cisco Systems, Inc., a U.S. network technology corporation. The plaintiffs, represented by the Human Rights Law Foundation, are a group of Falun Gong practitioners who allege they were subjected to serious human rights abuses in China through the use of China’s “Golden Shield” project, a network security system used for the widespread censorship and surveillance of Chinese dissidents. Cisco is alleged to have played a central role in the design and implementation of the Golden Shield, despite widespread knowledge that its central purpose is to facilitate the violent persecution of dissident groups. The plaintiffs were detained and severely mistreated for visiting Falun Gong websites, discussing the practice of Falun Gong online, and sharing information about the widespread human rights abuses suffered by Falun Gong practitioners in China. One of the plaintiffs was beaten to death while in custody and another has disappeared. Cisco continues to work with Chinese security officials.⁴⁵ In September 2014, a District Court for the Northern District of California dismissed the plaintiffs’ claims, finding that the claims did not “touch and concern” the United States, as the human rights abuses were not planned, directed, or executed in the United States.⁴⁶ It also held that the fact that the customization and implementation of the Golden Shield system did not support an inference that Cisco systems knew that the human rights abuses would be committed, and thus the requisite mens rea had not been pled. Plaintiffs have appealed to the Ninth Circuit Court of Appeals. *Amicus* briefs were submitted on January 2016 by The Center for Constitutional Rights (FIDH member organisation), the Electronic Frontier Foundation and former U.S. Ambassador-at-Large for War Crimes Issues David Scheffer.⁴⁷

Mastafa v. Chevron Corp., a case against Chevron Corporation and Banque Nationale de Paris Paribas, was dismissed by the Second Circuit Court of Appeals in October 2014. The defendants allegedly provided money to Saddam Hussein’s regime, in violation of customary international law and sanctions, and which financed the torture of their families.⁴⁸ The Second Circuit found that the proper focus of the touch and concern test was whether the relevant conduct – which it defines as the conduct which actually violated the law of nations – occurred within the United States. The Court found this satisfied by the fact that defendants provided money to Hussein’s regime through domestic purchases and financing

⁴⁴ *Baloco v. Drummond Co.*, 767 F.3d 1229, 1235 (11th Cir. 2014).

⁴⁵ See Human Rights Law Foundation, *Doe v. Cisco Systems, Inc.* <http://www.hrlf.net/cisco-case.html>

⁴⁶ *Doe v Cisco Sys.*, 66 F. Supp. 3d 1239 (N.D. Cal. 2014) *reconsideration denied* 2015 U.S. LEXIS 115681 (N.D. Cal. Aug. 31, 2015)

⁴⁷ See : CCR, *Doe v. Cisco Systems, Inc.* (Amicus), 13 January 2016: <https://ccrjustice.org>

⁴⁸ *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014).

in the United States, and payments conducted through an account there. However, the Court found that international law only recognized the *mens rea* of purpose for aiding and abetting liability, and thus the conduct alleged did not constitute a violation of the law of nations.

In *Doe v. Exxon Mobil Corp.*, Exxon Mobil Corporation is alleged to have funded security forces who killed and tortured civilians living nearby Exxon’s facilities in the Aceh Province of Indonesia.⁴⁹ In July 2015, the District Court of the District of Columbia found that in an aiding and abetting case, the decision to provide assistance to the principals touched and concerned the United States, notwithstanding the fact that the actual provisions of assistance occurred outside the United States. The Court also noted that an accepted standard of *mens rea* for aiding and abetting under customary international law and the ATS was knowing that one’s acts assist the crime, rather than having the purpose that they do so. The Court thus found Exxon’s awareness of the security forces’ record of human rights abuses satisfied the knowledge requirement, and the Court found the *Kiobel* test satisfied and refused to dismiss the case. The Court also noted that, apart from the location of the conduct, “important national interests” might “warrant an expansive application of the touch and concern test,” though it found no such interests in the case.⁵⁰

b) Conditions for the application of the ATS to private persons

The decision in *Kadić v. Karadžić* clarified the law governing the ATS’s application to private persons. The outcome of the case is that for some of the most serious human rights violations, private individuals not acting under color of law may be held directly responsible. In other cases, the court must establish a private actor’s *de jure* or *de facto* complicity with a government. Two findings must be established:

- **Direct liability:** The private actor’s complicity with the state need **not** be demonstrated if the acts in question can be considered to be **piracy, slavery, genocide, war crimes, crimes against humanity or forced labour**.⁵¹ Private persons may be sued directly using the ATS.
- **Indirect liability or the state action requirement:** For other violations of international law, private persons must have acted as a state agent or “under color of law”.⁵² Examples include torture, extrajudicial execution, prolonged arbitrary detention, and racial discrimination.

⁴⁹ *Doe v Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 (D.D.C. July 6, 2015).

⁵⁰ *Doe v Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 at 38.

⁵¹ *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. Cal. 2002). This list is not necessarily exhaustive.

⁵² *See, e.g., Kadić v. Karadžić*, 70 F.3d at 239; *Romero v Drummond*, 552 F.3d 1303, 1316–18 (11th Cir. 2008); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). On the difficulties related to the state action doctrine, see O. De Schutter, *Fonction de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques américain et européens*, Bruylant, Bruxelles, 1999.

In this case, the activities of private persons may violate international law when, in accordance with international law, the person in question has acted **with the complicity of a state** and can be considered a **public agent**. Otherwise, one of the following **alternative criteria** must be met in accordance with national law (case references to these criteria are not uniform):⁵³

- **Public function:** A private person's activities are traditionally state functions,
- **State compulsion:** A private person's activities are imposed by the state,
- **Nexus:** An individual's conduct is strongly interwoven with that of the state such that it renders the individual responsible for the action as if the action had been carried out by the state (the state's involvement in the international law violation must be important),⁵⁴
- **Joint action:** The violation resulted from a significant degree of collaboration between a private person and a public authority,⁵⁵ or
- **Proximate cause:** The private person exercises control over government decisions linked to the commission of violations.⁵⁶

Under the **TPVA**, action may be brought only **against individuals** who have committed acts of torture or extrajudicial executions "under actual or apparent authority, or color of law, of any foreign nation."⁵⁷ This state action must have been committed by a foreign state or by an official agent of the U.S. government acting under the direction of or in partnership with a foreign government.⁵⁸

⁵³ *Doe v. Unocal*, op. cit., 2002 (International law principals, military tribunal precedents at Nuremberg and Tokyo and the jurisprudence of international criminal tribunals. Dissenting opinion of Judge Reinhart: referencing the criteria for classic responsibility under common law). For more, see R.A. Tyz, "Searching for a corporate liability standard under the Alien Tort Claims Act in *Doe v. Unocal*", *Oregon Law Review*, 82, summer 2003, p. 572.

⁵⁴ Oxford Pro Bono Publico, op. cit., p. 310.

⁵⁵ See *Wiwa v. Royal Dutch Petroleum Co*, op. cit., 2002; *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal., 1997), p. This theory is based on criteria developed under 42 U.S.C § 1983 which governs liability in suits seeking reparation for constitutional rights breaches (*Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186, 66 L. Ed., 2d 185 (1980)).

⁵⁶ *Doe v. Unocal*, op. cit., 2000. R.L. Herz, "Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment", *Virginia J. Int'l L.*, 2000, 40, p. 559. A.K. Sacharoff, "Multinationals in host countries: can they be held liable under the Alien Tort Claims Act for human rights violations?", *Brooklyn Journal of International Law*, Vol. 23, p. 943.

⁵⁷ TVPA, 28 U.S.C. § 1350 note § 2(a).

⁵⁸ EarthRights International, *Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts – A resource for Non-Lawyers*, Rev. Sec. Ed., 2006, p. 26.

c) Applying the ATS for violations committed by multinational corporations

The Second Circuit’s decision in *Kadić v. Karadžić*⁵⁹ opened the door for filing suit for international law violations by non-state actors, including those committed by multinational corporations.

Following *Kadić*, and encouraged by *Sosa v. Alvarez-Machain*, numerous foreign victims addressed U.S. courts to obtain redress for human rights violations committed by multinationals through their operations abroad, in which the multinational was either a **perpetrator** or an **accomplice** to the investment’s host government. Among these are companies with headquarters in the United States, including Chevron Texaco, Wal-Mart, ExxonMobil, Shell Oil, Coca-Cola, Southern Peru Copper, Pfizer, Ford, Del Monte, Chiquita, Firestone, Unocal, Union Carbide, Gap, Nike, Citigroup, IBM and General Motors, and other corporations in the United Kingdom, Australia and Canada, including Rio Tinto, Barclays Bank and Talisman Energy.

A minority of federal judges recently questioned the applicability of the ATS to corporations. In 2010, a panel of the Second Circuit Court of Appeals held that the ATS does not confer jurisdiction over claims against corporations in the *Kiobel v. Royal Dutch Petroleum Co* case.⁶⁰ Although the Supreme Court granted *certiorari* on the question of whether corporations could be held liable under the ATS, its decision in the case did not directly address the issue, but implied that corporations may be held liable under the ATS if the presumption against extraterritoriality is displaced, noting that “mere corporate presence” alone was not enough to do so. Since the Second Circuit’s decision in *Kiobel*, the Seventh, Ninth and District of Columbia Courts of Appeal joined the Fifth and Eleventh Circuits in finding that corporations can be sued under the ATS, and since the Supreme Court’s ruling, a district court in New York has done likewise.⁶¹

Both the U.S. federal government and industrial groups have been active in corporate cases via *amicus curiae*,⁶² including in the recent *Kiobel* case before the Supreme Court.⁶³ Faced with the multiplicity of cases against multinational corporations and due to concerns about the cases’ potential interference with the fight against

59 *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

60 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010)

61 See *Doe v. Nestle*, 738 F.3d 1048 (9th Cir. 2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated*, 527 Fed.Appx. 7, 7 (D.C. Cir. 2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *In re S. African Apartheid Litig.*, 02 MDL 1499 SAS, 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014).

62 Oxford Pro Bono Publico, *op. cit.*, p 303.

63 Amicus briefs in support of both plaintiffs and defendants, on the questions of corporate liability and extraterritoriality, can be found at: www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

terrorism, U.S. foreign policy and overall trade and investment, the State Department under the Bush administration exercised *amicus curiae* in the following case to express its view that the ATS does not grant victims cause of action.

➔ **Corrie v Caterpillar**

Corrie v. Caterpillar was a federal lawsuit filed against Illinois-based Caterpillar, Inc. on behalf of the parents of Rachel Corrie and four Palestinian families whose relatives were killed or injured when Caterpillar bulldozers demolished their homes. Corrie, a 23-year old American human rights defender, was crushed to death by a Caterpillar D9 bulldozer in 2003 as she attempted to defend a Palestinian family's home from being demolished by the Israeli military while the family was inside.

Since 1967, Caterpillar, Inc. has supplied the Israel Defense Forces (IDF) with D9 bulldozers which have been used to demolish Palestinian homes in the Occupied Palestinian Territory, leaving thousands of families homeless. Caterpillar, Inc. has known about the human rights abuses committed with its bulldozers since at least 1989, when human rights groups began publicly condemning the violations. Since 2001, human rights groups have sent over 50,000 letters to Caterpillar, Inc. executives decrying the use of its bulldozers to carry out human rights abuses.

The case alleges that Caterpillar, Inc. aided and abetted war crimes and other serious human rights violations on the grounds that the company provided bulldozers to the Israeli military knowing they would be used unlawfully to demolish homes and endanger civilians in Palestine. In addition to ATS claims, Plaintiffs allege Caterpillar violated the Racketeer Influenced and Corrupt Organisations (RICO) Act, and brought claims of wrongful death, public nuisance, and negligence.

In September 2007, the Ninth Circuit Court of Appeals affirmed the district court's dismissal of the lawsuit under the political question doctrine, ruling that the court did not have jurisdiction to decide the case because Caterpillar's bulldozers were ultimately paid for by the United States Government. Because of the U.S. government's decision to grant military assistance to Israel, any decision regarding whether Caterpillar aided and abetted war crimes would impermissibly intrude upon the executive branch's foreign policy decisions. The Court's reasoning for dismissal is in accord with the position put forward by the United States in its *amicus* brief urging dismissal.⁶⁴ In January 2009 Plaintiffs' petition for panel rehearing and rehearing en banc was denied, rendering the case's dismissal final.

⁶⁴ The U.S. *amicus* brief is available at: https://ccrjustice.org/sites/default/files/assets/us_amicus_brief-AS-FILED.pdf. The United States also argued against aiding and abetting liability for ATS claims.

The Obama Administration has not pursued a policy of active opposition to corporate cases under the ATS, with more of a mixed record.

► NOTE

Determining the **liability of multinational corporations** in the U.S. is a subject of some controversy. The question is whether liability should be guided by the norms of international law or those of U.S. federal law.⁶⁵ One area where this debate has had particular consequences is in relation to **aiding and abetting**. Some courts and judges favoured looking to federal common law for the requisite *mens rea* for aiding and abetting, and concluded that the standard was knowledge.⁶⁶ In recent years, however, courts have looked to internal law to provide the standard. Circuits' standards for the requisite *mens rea* for aiding and abetting liability differ: some hold the accomplice must **know** their actions will further the principal's commission of the violation, and other Circuits require that the accomplice must further have the **purpose** that the principal commit the crime.

Courts that hold the appropriate standard is **purpose** focus on, *inter alia*, the fact that the Rome Statute permits a finding of aiding and abetting liability if the accomplice provides assistance “[f]or the purpose of facilitating the commission” of the crime. Art. 25(3)(c). In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit found that this and one of the Nuremberg trials indicate that customary international law only recognizes claims of aiding abetting liability in which the accomplice not only knew that his actions would assist the perpetrator's commission of the crime, but he specifically intended they would do so.⁶⁷ Subsequent cases in the Second Circuit have applied this requirement; for example in July 2015, the court in *Balintulo v. Ford Motor Co.* held the ATS claim should be dismissed because the requisite *mens rea* was not present.⁶⁸ It found that, in designing vehicles and software for the implementation of apartheid in South Africa, defendants might have known their efforts would further the crimes of the principal, but the defendants did not have the purpose that the principal commit those acts. Other Circuits have adopted the Second Circuit's reasoning.⁶⁹

Other Circuits have focused on extensive jurisprudence of other international tribunals, such as the ICTY and ICTR, which have found that the proper *mens rea* is **knowledge** that the accomplice's actions will further the violations of the

65 Oxford Pro Bono Publico, *op. cit.*, p. 311.

66 *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 2007 U.S. App. LEXIS 24370 (2d Cir. N.Y. 2007) (Judge Hall concurrence)

67 *Presbyterian Church Of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)

68 *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169 (2d Cir. 2015)

69 *See, e.g., Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–400 (4th Cir.2011) (holding that the Fourth Circuit is persuaded by *Talisman*, and adopts a *mens rea* of purpose for aiding and abetting liability).

perpetrator.⁷⁰ In *Doe v. Exxon*, the District of Columbia Circuit Court of Appeals held that significant jurisprudence from international tribunals supports a *mens rea* of knowledge for aiding and abetting liability.⁷¹ The Court also added that the Rome Statute itself, properly construed permits such liability: in addition to Article 25(3)(c), Article 25(3)(d)(ii) considers the *mens rea* also established when an accomplice provides assistance “in the knowledge of the intention of the group to commit the crime.” Other Circuits also apply a *mens rea* of knowledge for aiding and abetting liability.⁷²

Courts’ approach to the *actus reus* of aiding and abetting liability is more consistent, finding that the standard is providing practical assistance to the principal which has a substantial effect on the perpetration of the crime.⁷³ In *Prosecutor v. Perišić*, the ICTY suggested an additional element of the *actus reus*, that is that the accomplice’s assistance be “specifically directed” towards the commission of the crime.⁷⁴ The Court defined this to mean the establishment of “a culpable link between assistance provided by an accused individual, and the crimes of principal perpetrators.”⁷⁵ It can be anticipated that defendants will argue for a heightened standard for the *actus reus*, and that additional clarifications from Courts of Appeal will be forthcoming.

⁷⁰ The ICTY recently reemphasized that this is the established *mens rea* in the *Prosecutor v. Perišić*, Appeals Chamber Judgment, Case No. IT-04-81-T, 28 Feb., 2013, ¶ 48 (“[T]he Appeals Chamber recalls again that the *mens rea* required to support a conviction for aiding and abetting is knowledge that assistance aids the commission of criminal acts...”). See also, e.g., *Prosecutor v. Sanovic et al.*, Appeals Judgment, Case No. IT-05-087-A, 23 Jan. 2014, ¶ 1649; *Prosecutor v. Popovic*, Appeal Judgment Case No. IT-05-88-A, 30 Jan., 2015, ¶ 1732; *Prosecutor v. Furundzija*, Trial Chamber Judgment, Case No. IT-95-17/1, 10 Dec., 1998, ¶¶ 236, 245; *Prosecutor v. Krstic*, Appeals Judgment, Case No. IT-98-33-A, 19 Apr. 2004, ¶¶ 139-41; *Prosecutor v. Delalic*, Case No. IT-96-21-I, Trial Chamber Judgement, 16 Nov., 1998, ¶¶ 325-29; *Tadic*, Trial Chamber Judgement, Case No. IT-94-1-T, 7 May 1997, ¶¶ 674, 692. ICTR cases hold the same. See, e.g., *Karera v. Prosecutor*, Appeal Judgment, Case No. ICTR-01-74-A, 2 Feb. 2009, ¶ 321; *Prosecutor v. Ntakirutimana*, Appeals Judgment, Case No. ICTR-96-13-I, 13 Dec. 2004, ¶ 501; *Prosecutor v. Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-I, 27 Jan. 2000, ¶¶ 180-82

⁷¹ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 37 (D.C. Cir. 2011) vacated, 527 F. App’x 7 (D.C. Cir. 2013). This decision was vacated, and remanded to the District Court to decide the *mens rea* in light of *Prosecutor v. Perišić*, Appeals Chamber Judgment, Case No. IT-04-81-T, 28 Feb., 2013. The D.C. Circuit has not altered its position, and the District Court found the proper *mens rea* standard for aiding and abetting liability was knowledge, and Persic had not altered the determination of liability. *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 (D.D.C. July 6, 2015).

⁷² See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005). Still other Circuits have not fully resolved the issue. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014)

⁷³ See, generally *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014); *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015)

⁷⁴ Appeals Judgement, Case No. IT-04-81-T, 28 Feb., 2013,

⁷⁵ *Idem.*, ¶ 37.

It has been rare for cases against multinationals to proceed to trial.⁷⁶ In some cases, the parties have entered into financial settlement.⁷⁷ The development of the ATS's usage in U.S. courts and the numerous exceptions that may arise during proceedings effectively render the **application of the ATS difficult and unpredictable**.

2. Conditions for bringing action under the ATS

a) *An alien tort victim*

The first material condition for bringing action under the ATS is that the victim of the alleged tort is not a U.S. national. **The ATS may be invoked only by foreigners.**

The practical impact of this restriction, however, is limited because in our scenario the tort is committed by a multinational during its operations abroad, where victims tend to be foreign nationals.

Moreover, **it is not necessary for the victim to exhaust domestic remedies** available in his or her country of residence prior to bringing action under the ATS.⁷⁸ The TPVA, by contrast, does require the exhaustion of domestic remedies.

➔ **Class action lawsuits in the U.S.**

In civil procedure, U.S. courts recognise class action lawsuits. Class action suits can take two forms:

Opt-in: To be part of the class action, each individual must declare his or her intention to participate. This is the case in the U.K. and Québec, for example.

Opt-out: Everyone sharing the defendant's situation is automatically part of the class action, but may opt out with a formal statement. This system is in place in the United States.

In the United States, an individual or group of individuals (both private and legal persons) whose rights have been violated may sue on behalf of an unlimited number of victims in similar circumstances. The court's decision will be binding upon all victims in the same circumstances, whether they are party to the proceedings or not. The aim of the class action process is to address large numbers of related complaints through a single legal action, and to facilitate access to justice for all who suffered similarly. This type of collective action is in the victims' financial interest because it reduces the costs of litigation.

⁷⁶ See *Bowoto v. Chevron* www.earthrights.org; *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D.Fla. 2008) (plaintiffs awarded \$80 million on forced labor claims).

⁷⁷ See *Wiwa v Royal Dutch Petroleum* (<https://ccrjustice.org>); *Doe v. Unocal* (www.earthrights.org); *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (<https://ccrjustice.org>); *Al-Quraishi v Nakhla and L-3 Services* (<https://ccrjustice.org>)

⁷⁸ The Court's response to this question, however, was ambiguous in *Sosa*. *Sosa v Alvarez-Machain, op. cit.*, 2004, cited in Oxford Pro Bono Publico, *op. cit.*, pp. 315-316.

In addition to permitting class action lawsuits, the U.S. legal system provides numerous other advantages, including the discovery procedure and the system of contingency fees. These aspects are discussed briefly in the annex at the end of chapter III.

b) A violation of international law

For the ATS to be applicable, **the harm must have been caused by a violation of international law**, in our case, a violation of international human rights law. Violations of international law which provide a U.S. court with jurisdiction may take two forms:

– A violation of a treaty by which the U.S. is bound

In most cases, the U.S. has refused to recognize the direct applicability of human rights treaties it has signed. Accordingly, few cases cite this basis for jurisdiction.⁷⁹

– A violation of customary international law (the law of nations)

For an international human rights law norm to be characterized as customary international law, it must be **universal, definable and obligatory**.⁸⁰ These norms need not necessarily fall under *jus cogens*. The concept refers to customary practices and principles clearly defined by the international community.⁸¹ The norm is flexible and should be interpreted dynamically.⁸²

A violation of a *jus cogens* norm, however, clearly provides U.S. courts with jurisdiction to hear allegations of the following.⁸³

- Genocide, war crimes, and crimes against humanity,
- Slavery and forced labour,
- Summary execution, torture, and disappearance,
- Cruel, inhuman, and degrading treatment,
- Prolonged arbitrary detention,
- Serious violations of the right to life and personal security, and
- Serious violations of the right to peaceful demonstration.

⁷⁹ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 60.

⁸⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see also R.L. Herz, *op. cit.*, 2000, p. 556-557; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 52; B. Stephens, *op. cit.*, 2000, p. 405.

⁸¹ *Filartiga v. Peña-Irala*, *op. cit.*, 1980; *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003); *Kadić v. Karadžić*, 70 F.3d at 238.

⁸² *Filartiga v. Peña-Irala*, *op. cit.*, 1980, p. 878; *Kadic v. Karadzic*, *op. cit.*, 1995, p. 238; *Beanal v. Freeport-McMoran Inc*, *op. cit.*, 1999; *Doe v. Unocal*, *op. cit.*, 2000, p. 1304; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2002; *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*. See also R.L. Herz, *op. cit.*, p. 558; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 53.

⁸³ *Doe v. Unocal*, *op. cit.*, 2002; *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*, note 18. See W.S. Dodge, “Which Torts in Violation of the Law of Nations?” *Hasting Int’l & Comp. L. Rev.*, 2000-2001, 24, p. 351; R.L. Herz, *op. cit.*, p. 554.

Environmental abuses **have not been found to constitute violations** of international law under the ATS;⁸⁴ in light of the growing international movement related to climate change and environmental issues, and resulting changes to regulatory frameworks, human rights advocates might consider asking courts to reconsider this finding. For the time being, however, to bolster the admissibility of a complaint, it is more useful to bring action for the human rights violations so often tied to environmental abuses

A case against a U.S. corporation deemed the human rights to freedom of association and collective bargaining defensible under the ATS.⁸⁵ The fate of social rights, however, remains uncertain in the event of suits against non-U.S. firms. Freedom of association and collective bargaining rights still fail to be regarded as part of customary international law, a *sine qua non* for the ATS to be applied.⁸⁶

► NOTE

The Supreme Court's ruling in *Sosa v. Alvarez-Machain* confirms earlier jurisprudence defining international law norms under the ATS as being universal, definable and obligatory. At the same time, the ruling requires federal judges to exercise **great judicial caution in ensuring that violations meet these criteria**.⁸⁷ Prior to accepting jurisdiction, U.S. courts must consider how the practical consequences of hearing a case will impact foreign relations.⁸⁸ In addition, if bringing action under the ATS does not first require the exhaustion of domestic and international remedies, U.S. courts may, according to the Supreme Court, take that fact into consideration before accepting jurisdiction. This is a **prudential** rather than a jurisdictional requirement.

* * *

Meeting the above-mentioned conditions, particularly with regard to violations of customary international law, is not easy. In addition to *Sosa*'s requirements, and those stemming from *Kiobel* (infra), domestic law provides several procedures requiring a link between the case and the forum court.

⁸⁴ *Beanal v. Freeport-McMoran Inc*, *op. cit.*, 1999, p. 166; *Flores v. Southern Peru Copper Corp.*, 1587224 (S.D.N.Y. 2002).

⁸⁵ *Estate of Rodriguez v. Drummond Co.*, *op. cit.*, 2003.

⁸⁶ For a closer look at this topic, see W.V. Carrington, "Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act", www.law.uiowa.edu/journals

⁸⁷ See also E.J. Brav, "Recent Developments – Opening the Courtroom to Non-Citizens : Cautiously Affirming Filartiga for the Alien Tort Statute", *Harvard Int'l L.J.*, 2005, vol. 46, pp. 276 and following.

⁸⁸ *Sosa v. Alvarez-Machain et al.*, *op. cit.*, 2004, p. 2766 and note 21.

c) A procedural requirement: personal jurisdiction

Whether a multinational defendant is headquartered in the U.S. or elsewhere, plaintiffs must establish personal jurisdiction in a U.S. court prior to bringing action under the ATS. This requirement is complex. To fulfil it, plaintiffs must demonstrate that the corporation maintains affiliations “so constant and pervasive as to render it essentially at home in the forum state.”⁸⁹ In January 2014, in *Daimler AG v. Bauman*, the Supreme Court found that sizable sales were not enough to establish jurisdiction over a corporation, when the tortious conduct occurred abroad.

Generally speaking, however, regardless of where the facts of the case took place, U.S. states recognize a court's jurisdiction in the following situations:⁹⁰

- The corporation's headquarters are located **in the state** of the forum court, or
- The company (U.S. or foreign) has its head office in another state but is **conducting ongoing and systematic business** in the forum state.⁹¹

The following fictitious example, taken from a guide published by EarthRights International, illustrates the difficulty of the question:⁹²

Big Oil Inc is a multinational company with headquarters in the United Kingdom. It has two subsidiaries, Big Oil U.S.A and Big Oil Sudan, which operate in the United States and Sudan, respectively. Big Oil Sudan has committed serious violations of international human rights law and the victims seek to bring action in U.S. courts. They have three options:

- 1) **Pursue Big Oil Sudan directly** if the corporation has ties with the U.S. This situation is improbable, however, because Big Oil Inc, the parent company, has likely ensured that its subsidiary in Sudan has no connection to or activity in other jurisdictions.

⁸⁹ *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

⁹⁰ Most states also grant specific jurisdiction where the case relates to a corporation's activities in the forum state, provided the activities are substantial (B. Stephens and M. Ratner, *op. cit.*, 1996, p. 100; *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001).

⁹¹ For individuals, a court's jurisdiction is based on the individual's domicile or residence in the forum state, or on the individual's physical presence, temporary or otherwise, therein. See *Kadic v. Karadzic*, *op. cit.*, 1995, p. 247; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 100; B. Stephens, *op. cit.*, in M.T. Kamminga and S. Zia-Zarif (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 220; S.M. Hall, S.M. Hall, “Multinational Corporations' Post-Unocal Liabilities for Violations of International Law”, *The Geo. Wash. Int'l L. Rev.*, 2002, 34, p. 408. The above requirement implies that “such contacts are not accidental but rather based upon purposeful availment of the benefits and protection of the forum's law”. U. Mattei and J. Lena, “U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications”, *Hastings Int'l & Comp. L. Rev.*, 2000-2001, 24, p. 389. *Wiwa v. Royal Dutch Petroleum Co*, 226 F.3d 88, 92-93 (2d Cir. 2000), p. 95; See also *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*

⁹² EarthRights International, *op. cit.*, 2006, p. 28.

2) **Pursue Big Oil U.S.A.** The U.S. subsidiary is subject to the personal jurisdiction of U.S. courts, but was not involved in the human rights violation. Unless there is a link between Big Oil U.S.A and Big Oil Sudan, in which case the connection must be demonstrated, Big Oil U.S.A cannot be pursued for human rights violations perpetrated by Big Oil Sudan.

3) **Pursue the U.K.-domiciled parent company in U.S. court.** To establish a U.S. court's personal jurisdiction, plaintiffs must prove that Big Oil Inc has sufficient connections with the U.S. This may be the case if the company is listed on a U.S. market and maintains offices in the U.S., or if the parent company is sufficiently involved in the activities of its U.S. subsidiary such that the two entities cannot be considered legally separate. In order to establish the parent company's liability, victims must prove a) that the parent company, Big Oil Inc, controlled its subsidiary, Big Oil Sudan, b) that the subsidiary was acting on behalf of the parent company, or c) that Big Oil Inc itself was involved in activities that contributed to the human rights violations. Such conditions are difficult to meet.

Examining a subsidiary's activities

Is it possible to tie the activities of a U.S. subsidiary to those of a foreign parent company in order to establish a U.S. federal court's personal jurisdiction over the parent company? If yes, what are the criteria for doing so? The questions are numerous:

- Does the mere location of a foreign multinational corporation's subsidiary on U.S. soil satisfy the criteria for being "at home" in a forum state to establish a U.S. forum court's personal jurisdiction under the ATS?
- Failing this, is it possible to examine the U.S. subsidiary's activities in the U.S. in order to identify whether the foreign parent company has sufficient connections to the U.S., thus establishing a U.S. court's personal jurisdiction over the parent company?

Beyond their symbolic nature, they raise a number of legal questions regarding the ATS's applicability to the activities of multinational corporations abroad.

➔ **Doe v. Unocal⁹³ (Doe I)**

This case is the second suit filed in October 1996 in the dispute pitting the consortium of oil corporations comprised of Unocal, Total, the MOGE and the SLORC against Burmese victims whose rights were violated during the construction of the Yadana pipeline in Burma (for a detailed description of the facts, see Roe I above). The suit also targets two Unocal executives. The allegations are based on the ATS. Seeking redress for harm to the population, eighteen Burmese villagers brought the class action suit in U.S. federal court on behalf of all the inhabitants affected by the project.

According to the plaintiffs, SLORC soldiers in charge of securing the pipeline route violated the rights of the local populations. The plaintiffs said they were victims of a variety of abuses, including forced displacement, the confiscation and destruction of homes, fields, food stocks and other assets, the use of forced labour, threats and beatings, the torture of those who refused to cooperate, and in some cases, rape and sexual abuse. The plaintiffs said that Unocal and Total knew or should have known that the SLORC was accustomed to such practices. The oil companies thus benefited directly from these abuses, particularly the forced labour and displacement. Despite information the corporations had or should have had in their possession, they paid the SLORC for its security services. In 1995, prior to being legally pursued, the corporations compensated 463 villagers who were victims of forced labour, demonstrating that the corporations had been aware of the abuses since 1995. The plaintiffs considered the corporations liable for the atrocities the Burmese military committed during the Yadana project.

In 1997 a U.S. federal court in Los Angeles ruled that the suit against Unocal and Total was admissible.

The U.S. court's personal jurisdiction over Total⁹⁴

In 1998, the U.S. court had to determine its personal jurisdiction over Total, a French company with several subsidiaries on U.S. soil. To do so, the court had to rule on contacts between the subsidiaries and the parent company. It was held that the mere existence of a relationship between the various legal entities was insufficient to establish the presence of one via the presence of the other and thus recognize jurisdiction over the multinational.⁹⁵ On their own, the identity of the entities' leaders or the parent company's normal direct involvement as an investor are unlikely to call into question the general principles of separation under entity

⁹³ Information on this case is pulled in part from papers published by *EarthRights International*. Also on this subject, see the documentary *Total Denial* (2006) by Milena Kaneva, Oxford Pro Bono Publico, *op. cit.*, p 303; *Doe v. Unocal Corp.*, *op. cit.*, 1997; *National Coalition Government of the Union of Burma v. Unocal, Inc.*, *op. cit.*, 1997; *Doe v. Unocal*, 27 F. Supp. 2D 1174, 1184 (C.D. Cal. 1998), *Doe v. Unocal*, *op. cit.*, 2001; *Doe I v. Unocal Corp.*, *op. cit.*, 2000; *Doe v. Unocal*, *op. cit.*, 2002; *Doe v. Unocal*, Brief of the United States of America as amicus curiae, *op. cit.*, 2003. See also L. Bowersett, "Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments", *The Transnational Lawyer*, 1998, 11, p. 361; S.M. Hall, *op. cit.*, 2002, p. 402; R.A. Tyz, *op. cit.*, 2003, p. 559.

⁹⁴ *Doe I v. Unocal corp.*, *op. cit.*, 1998.

⁹⁵ *Doe v. Unocal*, *op. cit.*, 2001, p. 926.

law.⁹⁶ However, the existence of an alter ego relationship (establishing that the entities are not legally separate) or agency relationship (determining that one entity acted on behalf of the other, under the supervision of one, with the mutual consent of both) was entered into evidence, helping to establish the court's jurisdiction over the foreign corporation due to the activities of its U.S. subsidiaries. This issue will be discussed in chapter III.B.

Establishing Unocal's liability

The evidence at trial led to the conclusion that Unocal was aware of and benefitted from forced labour. Testimony demonstrated that the plaintiffs were victims of violence. The trial court dismissed the case, however, due to insufficient evidence of Unocal's active participation in the use of forced labour. It was not established that the company itself desired the military's violations of international human rights norms, and as a result, Unocal could not be held liable. The district court's decision was similar in *Roe I* and on appeal, the two cases were combined. A California Court of Appeals reversed the trial court's decision on 18 September 2002, setting a precedent by agreeing to hear cases in which corporations are charged for human rights violations committed abroad. The court acknowledged that Unocal exercised a degree of control over the Burmese army tasked with securing the pipeline and evidence indicated that Unocal was aware of both the risk and the actual use of forced labour by the Burmese military before and during the project. The court held that sufficient physical evidence existed to determine whether Unocal was complicit in the human rights violations committed by the Burmese army.

A hearing on the limited charges of murder, rape and forced labour was set for June 2005. In March 2005, however, the parties reached a settlement whereby Unocal formally denied any complicity and the corporation compensated the plaintiffs, established funds to improve living conditions, care, education, and to protect the rights of the populations living near the project, in return for the relinquishment of legal proceedings. The terms of the agreement remain confidential.

➔ *Wiwa et al v. Royal Dutch Petroleum et al*⁹⁷

The Center for Constitutional Rights (CCR) and co-counsel from EarthRights International brought three suits – *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson* and *Wiwa v. Shell Petroleum Development Company* – on behalf of the relatives of activists killed while demonstrating for the protection of human rights and the environment in Nigeria. The suits targeted Netherlands-domiciled Royal Dutch Petroleum Company and Shell Transport and Trading Company, merged in 2005 under the name Royal Dutch/Shell plc, the head of the corporation's operations in Nigeria, Brian Anderson, and the corporation's subsidiary in Nigeria, Shell Petroleum Development Company (SPDC).

⁹⁶ P.I. Blumberg, "Asserting Human Rights Against Multinational Corporation Under United States Law: Conceptual and Procedural Problems", *American J. Comp. L.*, 2002, 50, pp. 496 and following.

⁹⁷ The facts of these cases are very similar to those in *Kiobel*, and a court today would probably not find that the presumption against extraterritoriality is displaced. However, they are still useful to look at.

The defendants were accused under the ATS and the TVPA of complicity in human rights violations against Nigeria's Ogoni people. The specific violations included summary execution, crimes against humanity, torture, inhumane treatment, arbitrary detention, murder, aggravated assault and subjection to emotional distress. The suit against Royal Dutch/Shell was also based on the Racketeer Influenced and Corrupt Organisations (RICO) Act, a federal law that aims to combat organised crime.

Royal Dutch/Shell has worked since 1958 to extract oil from Nigerian soil in a region where the Ogoni people lived. The pollution resulting from the work has contaminated the agricultural land and water supplies upon which the regional economy depends. The plaintiffs alleged that for decades, Royal Dutch/Shell worked with the Nigerian military regime to stifle all opposition to the company's activities. The oil company and its Nigerian subsidiary provided financial and logistical support to the Nigerian police and bribed witnesses to produce false evidence.

In 1995, the parent company and its subsidiary worked together with the Nigerian government to arrest and execute the Ogoni Nine. This group included three leaders of the Movement for the Survival of Ogoni People (MOSOP) and the Commissioner of the Ministry of Trade and Tourism, a member of the Rivers State Executive Board. On the basis of false accusations, a special military tribunal tried the Ogoni Nine and they were hanged on 10 November 1995. Human rights defenders and political leaders alike have condemned both the killings and the failure to respect the victims' right to a fair trial.

On behalf of the victims and relatives of the deceased, CCR filed suit on 8 November 1996 against Royal Dutch Shell and Shell Transport and Trading Company in the Southern District of New York. In 2000, the Court of Appeals acknowledged that the United States was an appropriate forum to decide the case. The court established personal jurisdiction with respect to Royal Dutch Shell/Shell Transport and Trade by virtue of their maintenance of offices in New York. District Court Judge Kimba Wood acknowledged the plaintiffs' ability to bring legal action under the ATS, the TPVA and RICO.

In September 2006, Judge Wood admitted the charges of crimes against humanity, torture, prolonged arbitrary detention and abetting these crimes. He declared inadmissible the charges of summary execution, forced exile, and infringements of the rights to life, freedom of assembly, and freedom of association. The trial for *Wiwa v. RPDC* and *Wiwa v. Anderson* began on 26 May 2009. In June 2009, following 13 years of proceedings in *Wiwa v. Shell*, the parties came to a settlement that covered all three cases. The terms of the settlement were released: U.S.D 15.5 million in damages, the creation of a trust benefitting the Ogoni people, and the reimbursement of certain costs of litigation. The settlement is currently being implemented.

d) Time limits: the statute of limitations

Present in both the U.S. and European legal systems, the statute of limitations, as it is known in U.S. law, is a procedural element that applies to both civil and criminal cases. The statute of limitations requires the plaintiff to bring action within a defined period of time after the starting point of the event, either the commission of a harmful act, or the discovery of the harm. Failure to do so will deprive the plaintiff of his or her cause of action.

Grounds for tolling the statute

The statute of limitations is a defence often invoked by defendants. In the U.S., however, few transnational disputes have been declared inadmissible on this basis. Indeed, a plaintiff can prove that the reason for the limitation was suspended. This argument, if granted by a court, has the effect of delaying (tolling) the period during which legal action may be brought. For example, it has been found that the statute of limitations may be tolled if:

- The plaintiff has been detained,
- The plaintiff was not on U.S. soil,
- The plaintiff had access to ineffective remedies,⁹⁸
- It was difficult to gather evidence during a civil war, or
- The defendant attempted to conceal evidence.⁹⁹

The limitations period continues again from the time the cause of the suspension ceases to remain in effect.

If the defendant has always been subject to the jurisdiction of U.S. courts (by virtue of being a U.S. resident or a corporation headquartered in the U.S.) and if the plaintiff's life was not in danger, the statute of limitations cannot be tolled.

⁹⁸ A 1991 U.S. Senate report states the grounds for tolling the statute of limitations under the TVPA: The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender." S. Rep. No. 102-249, at 11 (1991). See also H.R. Rep. No. 102-367(I), at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88.

⁹⁹ *Romagoza Arce et al. v. Garcia and Vides Casanova*, 434 F.3d 1254 (11th Cir. 2006). The suit was brought under the TVPA and the ATS.

Duration

The statute of limitations is generally defined by law. Under the TVPA, the statute of limitations is 10 years from the time the misconduct occurred. The ATS, however, prescribes no specific time period and U.S. courts determine the statute of limitations by drawing parallels with similar federal laws. Given the ATS and TVPA's common purpose (protecting human rights), the type of proceedings (civil suits to protect human rights), and the place they share in U.S. legislation, several jurisdictions have borrowed the TVPA's 10-year statute of limitations for cases brought under the ATS. Similarly, some courts have adopted the grounds for tolling denoted under the TPVA (listed by the 1991 U.S. Senate report) for use with litigation invoking the ATS.¹⁰⁰

What are the obstacles to a U.S. court recognizing jurisdiction?

1. The doctrine of *forum non conveniens*

The doctrine of *forum non conveniens* aims to allow cases to be heard in the **most appropriate venue**, generally the jurisdiction in which the tort occurred. In the U.S., the doctrine calls upon the court hearing a case under the ATS to consider whether U.S. courts are best placed to hear the case, or whether a foreign court seems more appropriate, given the circumstances of the case. If a U.S. court is best placed to hear the case, the court is to grant the relief requested.¹⁰¹

Applying this theory to our situation, however, often raises difficulties related to the fact that the legislative and judicial systems of countries with human rights violations – typically developing countries – are defective or incomplete and do not provide optimal conditions for the legal pursuit of multinational corporations that commit violations. Multinational defendants¹⁰² frequently invoke *forum non conveniens*.¹⁰³

100 S. Rep. No. 102-249, at 11 (1991), *op. cit.*

101 On this issue, see EarthRights International, *op. cit.*, 2006, p. 32.

102 Unlike in the U.K., U.S. federal courts may raise the *forum non conveniens* exception on their own. See A. Nuyts, L'exception de *forum non conveniens* – Étude de droit international privé comparé, Bruylant, Bruxelles, LGDJ, 2004, p. 294, No. 202.

103 O. De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law", in Ph. Alston (ed.), *Labour rights as human rights*, Oxford University Press, 2005.

a) Grounds for refusing jurisdiction

For *forum non conveniens* to apply and for a U.S. court to decline jurisdiction:

- The court must be convinced not only that another court exists to which the plaintiff could turn to seek redress for the harm he or she claims to have suffered;
- The court must also be convinced that an assessment of all the interests involved (including the public interest¹⁰⁴) leads to a conclusion that the alternative forum is the most appropriate.

In principle, the burden of proof for each of these issues lies with the defendant.¹⁰⁵

b) Adequate alternative forum

When considering the plaintiff’s arguments, the proposed alternative forum (usually that of the place the damage occurred or where the defendant(s) is/are domiciled) can be considered adequate **if it provides an effective solution**, that is to say, **if it authorizes the legal action in question on proper grounds and provides an acceptable remedy**.

A judiciary of questionable independence or in which similar cases have never been heard or never been successful does not meet these criteria.¹⁰⁶

By contrast, it has been held, for example, that the lack of such a contingency fees system, under which an attorney is paid only for positive results, does not necessarily preclude the application of *forum non conveniens*.¹⁰⁷ The court may consider this factor, although it is not determinative on its own.

➔ Sequihua v. Texaco, Inc

Ecuadorian citizens who felt that Texaco’s operations were causing air, water and soil pollution filed suit in U.S. courts under the ATS. A New York federal court dismissed the suit on appeal, on the basis of *forum non conveniens*. The court ruled that crucial factors indicated Ecuador’s courts would be more appropriate to handle the case, including: access

¹⁰⁴ The interests taken into account are both private (those of the parties) and public (those of the jurisdiction). Private interests which the court may assess include the accessibility of evidence, witness availability and all other elements that render a trial easy, rapid and less costly. Assessing the public interest involved takes into account the court’s caseload, the interests of the forum in trying the case and the judge’s familiarity with the applicable law. B. Stephens and M. Ratner, *op.cit.*, 1996, p. 151, note 60; P.I. Blumberg, *op. cit.*, pp. 506-509; R.L. Herz, *op.cit.*, p. 568, note 152.

¹⁰⁵ B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 151 and following; P.I. Blumberg, *op.cit.*, pp. 501 and following.

¹⁰⁶ B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 151 and following; R.L. Herz, *op. cit.*, p. 567; P.I. Blumberg, *op. cit.*, p. 504.

¹⁰⁷ P.I. Blumberg, *op. cit.*, p. 507.

to evidence and witnesses, the opportunity to visit the disputed areas, the cost of travel between Ecuador and the U.S. and uncertainty regarding the ability to enforce in Ecuador a court ruling made in the U.S.¹⁰⁸

Whether a plaintiff be national or foreigner, **his or her residence in a territory generally has a favourable effect upon the selection of that territory as the forum for the case.**¹⁰⁹ For non-resident plaintiffs, the doctrine of *forum non conveniens* still applies.¹¹⁰

Because the facts of ATS cases (and therefore the parties, evidence, witnesses, etc.) are generally located abroad, *forum non conveniens* is an **obstacle** to suits brought under the ATS.¹¹¹ In addition, exercising *forum non conveniens* can result in the **de facto rejection of civil liability**¹¹² and few cases lead to legal proceedings in the foreign forum.

In the U.S., exercising *forum non conveniens* involves the definitive rejection of the suit from U.S. courts. Plaintiffs may bring new legal action if and only if the defendant (in our situation, the corporation) fails to meet the conditions set forth by the court that handled the case at the time it was referred to an adequate alternative forum.¹¹³

In *Aldana v. Del Monte Fresh Produce*, Guatemalan union leaders residing in the United States sued Del Monte under the ATS and TVPA, for taking them hostage and threatening them.¹¹⁴ Plaintiffs argued that *forum non conveniens* should not apply: firstly because Guatemala was not safe for them, and secondly because Guatemalan courts were corrupt, ill-equipped to address a case implicating politics and officials, and judges often turned a blind eye to violence against unionists. The Court found the forum was adequate because the plaintiffs would not necessarily have to return to Guatemala, and the Guatemalan courts were adequate. The Court then considered the interests of the litigants and the public. The Court found that the plaintiffs' selection of courts where they resided, the United States, strongly pointed towards the U.S. being an appropriate forum. However, other interests of the litigants outweighed this: the evidence and witnesses were in Guatemala and the U.S. had no power to compel necessary witnesses to attend. Finally, the Court found that public interest concerns are given minimal weight; but they pointed to having the case in Guatemala: that it was an important issue for

108 847 F Supp 61 (1994) 63–65, cited in Oxford Pro Bono Publico, *op.cit.*, p. 324.

109 *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000.

110 P.I. Blumberg, *op.cit.*, p. 501.

111 B. Stephens and M. Ratner, *op.cit.*, p. 151; P.I. Blumberg, *op. cit.*, p. 503; S.M. Hall, *op.cit.*, p. 408.

112 A. Nuyts, *op.cit.*, p. 457.

113 P.I. Blumberg, *op.cit.*, p. 509; B. Stephens, *op. cit.*, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 228.

114 578 F.3d 1283 (11th Cir. 2009).

Guatemalan people to be resolved in their courts, the need to protect comity, and more. In light of all of these, the Court rejected the case on *forum non-conveniens* grounds.

In *Mastafa v. Australian Wheat*, Iraqi plaintiffs sued Australia’s Wheat Board and others under the ATS and TVPA for providing funds to the Saddam Hussein regime, which purportedly funded the torture, killing, and illegal imprisonment of the plaintiffs’ husbands.¹¹⁵ Plaintiffs alleged Australia was not an adequate forum, since the causes of action it recognized (such as negligence, battery, and wrongful death) did not “recognize the gravity” of the international law claims of crimes against humanity, war crimes, genocide, torture etc. The Court rejected this argument, finding the difference largely semantic. The Court then found the litigants’ interests weighed in favor of Australia rather than the U.S. taking the case: the plaintiffs had no particular connection to the U.S., as they were in Iraq, the activities in question (planning for the funding of Hussein) took place in Australia and evidence was there, and the useful witnesses were AWB’s staff in Australia. The Court found public considerations weighed in favor of Australia too: it made more sense to burden Australian citizenry with being on a jury, since Australian jurors would be more affected by the litigation than American ones. In light of these factors, the Court rejected the case on *forum non-conveniens* grounds.

In *Sarei v. Rio Tinto PLC*, Papua New Guinean plaintiffs sued a mining group under the ATS for war crimes, murder and other crimes.¹¹⁶ The District Court found that there were procedural differences to Papua New Guinea’s law of class actions, hiring of lawyers on a contingency basis, and discovery law; but it found these did not render Papua New Guinean courts inadequate. The Court then assessed the interests of the litigants, finding the preceding issues, and fact that the plaintiffs faced harm in Papua New Guinea pointed against it exercising jurisdiction. It also found that the local interest in the controversy and appropriateness of putting the obligation of judging on their citizenry, pointed towards Papua New Guinea; however this was outweighed by the fact that Courts there are extremely congested. Taking all the considerations into account then, the Court found that *forum non conveniens* was not appropriate here, and permitted the case to go forward.

➔ **Filártiga v. Peña-Irala**

In 1979, two Paraguayan citizens filed an ATS lawsuit in U.S. federal court after a Paraguayan police officer carried out acts of torture on U.S. soil that resulted in the death of a family member of the two Paraguayans. This was the first case dealing with acts of torture under the ATS. In 1984, the plaintiffs received U.S.D 10,375,000 in damages. *Forum*

¹¹⁵ *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 CIV. 7955 (GEL), 2008 WL 4378443, at 7 (S.D.N.Y. Sept. 25, 2008)

¹¹⁶ *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1130 (C.D. Cal. 2002).

non conveniens was briefly discussed in the case, but because it was impossible for the victims to expect reasonable chances of success before Paraguayan courts,¹¹⁷ the U.S. court accepted jurisdiction.

➔ **Wiwa v. Royal Dutch Petroleum Co. and Shell Transport**

In this case (cited earlier in Chapter I.A.2), the doctrine of *forum non conveniens* has played an important role. Action was brought under both the ATS and the TVPA. Although several of the plaintiffs resided in the U.S., Royal Dutch/Shell is domiciled in the U.K., and the U.S. trial judge that heard the case ruled that English courts were best placed to hear the Ogoni people's representatives' call for redress from Royal Dutch/Shell's Nigerian subsidiary.¹¹⁸ The appeals court, however, reversed that decision, identifying several criteria that preclude the application of *forum non conveniens*:¹¹⁹

1. In particular, the court noted that several of the alleged victims, the plaintiffs, resided in the United States, a particularly favourable fact for the admissibility of their claim. Under the ATS, foreigners residing in the U.S. receive preference over foreigners living abroad. In addition, **requiring persons residing in the U.S. to bring claim in the courts of another state would be particularly expensive**, and could lead to impunity for the perpetrators charged.¹²⁰
2. In rejecting the admissibility of the claim on the basis of *forum non conveniens*, **the trial judge did not give adequate weight to the federal legislature's expressed intention** and to the idea that it is in the interest of the United States to provide a forum for victims of international law breaches committed by persons on U.S. soil.

The court stated the need to consider international human rights law in assessing the interest of the United States in hearing the case and, thus, the pre-eminence of public interest over private interests.¹²¹ According to the court, torture contradicts both international law and U.S. domestic law. This resulted in the 1991 adoption of the TVPA which establishes the ability of U.S. courts to rule on torture and extrajudicial executions committed by public officials or under color of law.¹²² According to the court, it would be paradoxical to deny U.S. courts jurisdiction under the ATS for acts of torture in the name of *forum non conveniens* when

117 *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 865 (1984). "The United States policy against forum shopping does not warrant a denial. Plaintiffs could get no redress in Paraguay and sued Peña where they found him".

118 *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).

119 *Wiwa v. Royal Dutch Petroleum Co.*, *op. cit.*, 2000.

120 *Ibid.*, p. 101 and 102: "the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction".

121 *Wiwa v. Royal Dutch Petroleum Co.*, *op.cit.*, 2000. "[...] the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."

122 *Ibid.*, "The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is 'our business'".

the legislature has clearly expressed its willingness to aggressively pursue perpetrators of torture under the TVPA. In some ways, Congress’s adoption of the TVPA tipped the scales in favour of U.S. courts recognizing jurisdiction over acts of torture under the ATS, provided the criteria for the case’s referral to another forum are not fully met.¹²³

It is important to analyze **the impact of these important, yet isolated decisions** on subsequent jurisprudence involving *forum non conveniens*, particularly the extent to which *forum non conveniens* is applicable to claims under the ATS. Some, however, believe that a judge’s unfettered discretion in the matter¹²⁴ and the multiplicity of factors at work prevent any consistency or predictability.¹²⁵

It is also worth noting that if one pursues state tort claims (see section I.D, *infra*), states have their own doctrines of *forum non conveniens* which may differ significantly from the federal doctrine outlined above, and from each other.¹²⁶ The doctrine of *forum non conveniens* cannot be discussed without mentioning the *Bhopal case*.

➔ The Bhopal case

One of the largest industrial disasters recorded to date occurred on the night of 2-3 December 1984 in India. A toxic cloud escaped from a chemical plant operated by Union Carbide India Limited (UCIL), an Indian subsidiary of the U.S. multinational Union Carbide Corporation (UCC). Large quantities of toxic substances from the accident spread through the atmosphere, with disastrous human and environmental consequences. According to Amnesty International, between 7,000 and 10,000 people died shortly after the disaster, and 15,000 others in the twenty years that followed. More than 100,000 people were affected.¹²⁷

The Indian government’s legal framework was not equipped to handle this type of harm, and was inundated with requests for action. In response, the government adopted the Bhopal Act on 29 March 1985, a law authorizing the Indian government to represent the interests of victims before the courts. India filed a claim in the Southern District Court of New York, relying precisely on the inability of India’s legal system and judiciary to deal with such disputes¹²⁸ on the one hand, and the direct involvement of the multinational UCC on the other. Holding the parent company liable was all the more necessary because the subsidiary did not have sufficient financial resources to meet the victims’ needs.

¹²³ P.I. Blumberg, *op.cit.*, p. 521.

¹²⁴ P.I. Blumberg, *op.cit.*, p. 506; S.M. Hall, *op. cit.*, p. 408; R.L. Herz, *op. cit.*, pp. 567-568.

¹²⁵ P.I. Blumberg, *op.cit.*, p. 505.

¹²⁶ See, e.g., Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World*, 46 Colum. Hum. Rts. L. Rev. 158, 207-08 (2014).

¹²⁷ Amnesty International, *Clouds of Injustice: Bhopal disaster 20 years on*, 2004.

¹²⁸ *In Re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F Supp 842 (SDNY 1986), 846–48.

The case was dismissed under the doctrine of *forum non conveniens*, notably because witnesses and evidence were located on Indian soil. The Court of Appeals for the Second Circuit upheld the lower court's decision but did not retain one of three conditions established by the trial judge: the requirement that UCC provide all files requested by the opposing party in accordance with the discovery procedure applicable in the United States (the discovery procedure requires parties to disclose all exhibits in their possession, whether favourable or not).¹²⁹ The court maintained conditions barring the invocation of statute of limitations to avoid the jurisdiction of Indian courts, and the obligation to carry out the foreign judgement to be adopted by the alternative forum.

In India, the trial was held on 5 September 1986. The Indian Union demanded “fair and full” compensation as well as punitive damages to deter UCC and other multinational corporations from repeating such acts with wilful, free and malicious disregard for the rights and safety of Indian citizens. After a long legal battle, the parties reached an agreement whereby UCC would pay the sum of U.S.D 470 million in return for a guarantee of no future civil or criminal claims from any individuals.

Several cases have called the constitutionality of the Bhopal Act into question on the grounds that it infringed upon the right of Indian citizens to individually pursue UCC. The plaintiffs also cite the Indian government's lack of consultation with victims prior to the agreement. Although the Supreme Court of India upheld the validity of the Bhopal Act it has also permitted criminal prosecutions.

The Bhopal case led the Indian government to strengthen its legal system in terms of liability for environmental damage and tort liability following a major accident. It should be noted, however, that the slowness and complexity of trials has prevented victims from accessing justice. The relief granted to victims was also inadequate and litigation concerning the redress continues. More than 30 years after the disaster, victims are still fighting to obtain justice and the site has still not been decontaminated.¹³⁰

2. Immunities and acts of state

a) Sovereign immunity

The U.S. government

The U.S. government, including its federal agencies, enjoys sovereign immunity from all civil and criminal claims, unless it waives immunity or agrees to be pursued in a particular case. Under the ATS, plaintiffs may not seek redress from the U.S. government in U.S. federal courts. In certain specific cases, however, the government has waived immunity.

¹²⁹ *Union Carbide*, 809 F.2d 195 - 2nd Cir 1987.

¹³⁰ Amnesty International, *Thirty years from Bhopal disaster: Still Fighting for Justice*, www.amnesty.org.

The situation regarding government officials is more complex, and depends on whether the person acted as an official within the scope of his or her authority,¹³¹ which is often difficult to determine.

The Federal Tort Claim Act (FTCA) allows foreign U.S. residents and non-residents to bring civil claims in U.S. courts for harm caused by a federal employee. The FTCA contains many exceptions which could hypothetically result in the lifting of immunity. In addition, the dispute will be subject not to international law, but to the tort laws of the United States, specifically the law of the place where the act of negligence or omission occurred.¹³² Some sections of international law, however, are incorporated into the laws of individual states, and thus certain provisions of international law are considered to be an integral part of domestic law and may be heard under the FTCA.

Foreign states

By virtue of the Foreign Sovereign Immunities Act (FSIA), a **Foreign state**, understood to be “a political subdivision of a foreign state or an agency or instrumentality of a foreign state,”¹³³ benefits from absolute immunity in civil actions heard by U.S. courts.¹³⁴ “Agency” and “instrumentality” are defined as “any entity— (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”¹³⁵

There are several exceptions to the granting of such immunity. One is a commercial exception. Immunity is absolute when an act is carried out on public authority, in other words, when a foreign state acts in its sovereign capacity. However, foreign states do not enjoy immunity from acts that have caused damage when the acts are governed by private law in the context of commercial transactions, in other words, when the state conducts an act of management as opposed to an act of sovereignty. The commercial exception covers loan agreements, investment offers, purchase and sales contracts and employment contracts. A link to the U.S. must be established: this is most often done when the commercial activity is conducted directly by the foreign state on U.S. soil (e.g. when a company whose majority shareholder is a foreign

¹³¹ EarthRights International, *op. cit.*, 2006, p. 29.

¹³² *Richards v. United States*, 369 U.S. 1 (1962). “An FTCA claim is decided under the law of the place in which the negligent act or omission occurred and not the place in which the act or omission had its operative effect”.

¹³³ Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-11 (1988). “a political subdivision of a foreign state or an agency or instrumentality of a foreign state”. See also B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 39 and 125 and following; L. Bowersett, *op.cit.*, pp. 366 and following.

¹³⁴ 28 U.S.C. § 1330(a). “The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state [...]”.

¹³⁵ 28 U.S.C. § 1603(b).

state is located in the U.S.), or where an act linked to the foreign state's business was carried out on U.S. soil (e.g., the signing of a commodities contract in the U.S.)¹³⁶.

→ Doe v. Unocal

Both the trial and appellate courts recognized the immunity of SLORC and MOGE, ruling that the security of the Yadana pipeline, for which they were responsible under the framework of their joint venture with Unocal, was not a commercial activity¹³⁷ within the meaning of the definition of exceptions lifting immunity. The SLORC and MOGE were therefore able to rely on the immunity granted by the Foreign Sovereign Immunities Act.

Questions regarding immunity for agents of a foreign government are a point of contention in U.S. federal courts. In June 2010, the Supreme Court ruled in *Samantar v. Yousuf* that the FSIA statute itself provides no recognition of sovereign immunity for individuals representing a foreign state. However, the Court left open the possibility that such individuals might still enjoy immunity outside the FSIA, under common law.

Immunity under the common law is complex and unresolved, but certain aspects are important for human rights litigation. Firstly, high ranking officials, such as heads of state, may enjoy immunity for all of their acts while they hold their offices. Secondly, officials may enjoy immunity for acts within their duties, even after they have left office.¹³⁸ However, some courts have ruled such immunity does not extend to violations of *jus cogens*.¹³⁹ Others have found this immunity does extend to *jus cogens* violations; thus the issue is an open one.¹⁴⁰ Finally, the Court may apply or withhold immunity according to the State Department's recommendation.¹⁴¹

¹³⁶ 28 U.S.C. § 1605 (a) (2): “[...] commercial activity carried on in the United States or an act performed in the United States in connection with a commercial activity elsewhere, or an act in connection with a commercial activity of a foreign state elsewhere that causes a direct effect in the United States;”

¹³⁷ *Doe v. Unocal*, *op. cit.*, 1997, p. 897; *Doe v. Unocal*, *op. cit.*, 2002; L. Bowersett, *op. cit.*, p. 370.

¹³⁸ For a discussion on both types of immunity, respectively known as “status” immunity, and “conduct” immunity, see, e.g., Curtis A. Bradley, Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213 (2010).

¹³⁹ See *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (conduct immunity does not extend to violations of *jus cogens*).

¹⁴⁰ See, e.g., *Rosenberg v. Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014) (common law conduct immunity extends to violations of *jus cogens*); *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250 (D.D.C. 2011) *aff'd*, 493 F. App'x 106 (D.C. Cir. 2012) (same).

¹⁴¹ The effect of the State Department's recommendation to apply or withhold conduct immunity is significant, but whether it completely binds courts is unresolved. Compare *Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014) (suggesting Executive's recommendation is binding on courts), with *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (Executive's recommendation is entitled to substantial weight).

b) Act of state immunity

U.S. courts may also invoke the **act of state doctrine** to refuse to hear a lawsuit, particularly when a foreign state does not enjoy immunity under the FSIA. This doctrine further restricts the scope of a foreign state’s liability, when the case would require the court to pass on certain of the foreign states acts. The doctrine is grounded in the idea that the courts of one state shall not judge the acts of a foreign government carried out in that government’s state.¹⁴² Like the political question doctrine (see below), act of state immunity in U.S. courts is also partially grounded in the court’s unwillingness to interfere with or contradict U.S. foreign policy largely entrusted to other branches.¹⁴³ The more likely a case is to require the court to make a determination that would frustrate or contradict U.S. foreign policy, the more likely the Court is to invoke the act of state doctrine.

Acts of state could include, for example, another state’s adoption of a law or decree, or a police action or military activities carried out on a state’s own soil. As the name suggests, acts such as these are governmental in nature. They are also of an official nature, carried out by government officials acting in the name and on behalf of a foreign state. The abovementioned list is not exhaustive. The court has the discretion to determine whether an act is an act of state by assessing the case’s implications for U.S. foreign policy through three criteria:

- **The behaviour in question.** In evaluating the dispute, the court must consider the **degree of international consensus** regarding the behaviour. The more international consensus there is prohibiting the behaviour, the less necessary courts will consider the act of state doctrine. Some consider that universally condemned serious human rights violations (particularly *jus cogens* norms) cannot constitute acts of state.¹⁴⁴ The application of the act of state doctrine in the field of human rights remains ambiguous, however, although most U.S. courts have ignored the doctrine when faced with human rights violations committed by state agents.
- **The significance for U.S. foreign policy.** The less important the issue is for U.S. foreign policy, the less likely a Court is to invoke the act of state doctrine. **The continued existence of the state committing the act.**¹⁴⁵ If the state that committed the act on which the court must pass is no longer in existence, the act

¹⁴² *Underhill v. Hernandez*, 168 U.S. 250, 252, 42 L. Ed. 456, 18 S. CT 83 (1897). “Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the act of government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves”. See also *Doe v. Unocal*, *op. cit.*, 1997; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2002; *Doe v. Unocal*, *op. cit.*, 2002.

¹⁴³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

¹⁴⁴ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 139. *Doe v. Unocal*, *op. cit.*, 1997, p. 894.

¹⁴⁵ *Doe v. Unocal*, *op. cit.*, 2002. The court adds a fourth criteria, that of public interest.

of state doctrine is less likely to apply, since any pronouncement is less likely to offend the current country or aggravate U.S. foreign relations.

The act of state doctrine has rarely been used in ATS cases. In *Sarei v. Rio Tinto*, a claim based on environmental damage, the court invoked the act of state doctrine and justified it based on a lack of international consensus on the specific nature of the violation.¹⁴⁶ *Du Daobin v. Cisco Systems, Inc.*, concerned Cisco's aiding and abetting in the torture of Chinese dissidents. The court invoked the act of state doctrine, because of the second of the factors above: it found that a U.S. pronouncement on China's application of Chinese law against Chinese citizens, which the case would involve, would significantly impact and damage U.S. foreign relations.¹⁴⁷ *Mezerhane v. Republica Bolivariana de Venezuela* concerned a foreign sovereign taking property in violation of human rights law. The Court appeared to adopt a similar analysis, but went as far as to suggest that acts committed by a foreign sovereign outside the U.S., and to a foreign plaintiff were always acts of state.¹⁴⁸

c) Political question doctrine and international comity doctrine

Defendants may also rely on **political question doctrine** and **international comity doctrine** to block lawsuits targeting them.

The political question doctrine is often invoked in transnational disputes relating to human rights, and more generally in terms of foreign policy. It allows U.S. courts to decline jurisdiction when the case at hand raises a "political" question relating to the executive and legislative branches of government. The doctrine prevents the judiciary from interfering in politically sensitive affairs and poses an obstacle to the application of international law. Most importantly for international human rights litigation, an issue is likely to be political when as with the act of state doctrine, the court's ruling on it could frustrate or contradict U.S. foreign policy. An issue may also be political when it entails a court's judgment about the propriety of the Executive's exercise of a power committed to it, such as the power to conduct foreign affairs and the military.

Corrie v. Caterpillar, for example, concerned a suit against a manufacturer for providing bulldozers it knew would be used for the demolition of homes in violation of international law.¹⁴⁹ The Court dismissed the case on political question grounds. Firstly, because a court's ruling would implicate the legality of U.S. foreign policy of other branches – its aid to Israel, since the U.S. had helped purchase the bulldozers. Secondly, a ruling could make U.S. foreign policy manoeuvring on the

¹⁴⁶ *Sarei v. Rio Tinto plc.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), p. 1183. See also L. J. Dhooge, "The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism", *Geo J. Int'l L.*, 2003, No. 35, p. 90.

¹⁴⁷ *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 725-26 (D. Md. 2014).

¹⁴⁸ 785 F.3d 545, 552 (11th Cir. 2015).

¹⁴⁹ *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)

Israeli-Palestinian conflict very difficult, since it would require the court’s finding that Israel’s demolitions were illegal under international law.

Hwang Geum Joo v. Japan concerned a suit against Japan, by Phillipina, Chinese, Taiwanese and South Korean “comfort women” forced into sexual slavery during World War II by the Japanese army.¹⁵⁰ The Court was presented with whether the “commercial exception” to the FSIA discussed above applied to Japan. However, it rejected the case on political question grounds. Japan had signed a peace treaty with the United States waiving suits by U.S. nationals for acts committed during the war, and subsequent peace treaties with China, Taiwan and South Korea that did not explicitly extinguish liability. China, Taiwan, and South Korea maintained that neither agreement extinguished their nationals’ claims against Japan, though Japan disagreed. The Court found that the suit would involve a declaration about which states’ interpretations were correct, which the Executive noted could damage delicate regional relations and undo stability in the region. The Court found that since the case would be of considerable significance for the Executive’s foreign relation policy, the case was a political question it would not adjudicate.

In *Saldana v. Occidental Petroleum Corp*, family members of union leaders sued Occidental Petroleum for funding a brigade committing the murder of civilians and other human rights abuses, with full knowledge of the brigade’s acts.¹⁵¹ The United States had also provided substantially more funding to the same brigade, and the court thus found that the case would also involve ruling on the propriety of how the Executive exercised its foreign relations power. Consequently, it found the case raised a political question, and rejected it.

Courts have also, however, refused to invoke the political question doctrine. In *re South African Apartheid Litigation*, for example, concerned a suit against multinational corporations for aiding and abetting the South African government in implementing apartheid.¹⁵² The Court found that since the act in question was a violation of *jus cogens*, judging the propriety of the Executive’s actions cannot be politically fraught, and the political question could not apply for this reason. It also found that a judicial determination would not contradict U.S. policy: a determination about businesses’ aiding and abetting apartheid would not affect business in South Africa more generally. In *Doe v. Exxon Mobil Corporation*, Indonesian plaintiffs sued Exxon Mobil for its knowing employment of Indonesian soldiers engaged in torture and extrajudicial killings in Indonesia.¹⁵³ Indonesia had informed the State Department that adjudicating the claim and deciding on the legality of the soldiers’ actions would upset U.S. foreign policy commitments to peace in Indonesia and the Helsinki Accord. The court rejected Exxon’s claim; holding that since the State

¹⁵⁰ *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 5005)

¹⁵¹ 774 F.3d 544, 554 (9th Cir. 2014).

¹⁵² 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹⁵³ *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014).

Department had not released a recent or definite statement on the matter, the Court would not assume the issue would have significant foreign policy implications for the U.S., and so invocation of the political question doctrine was inappropriate.¹⁵⁴

International comity doctrine is more an act of courtesy than an obligation binding the judiciary. U.S. courts may decline jurisdiction under international comity doctrine where there is a conflict of law between the legal systems of the U.S. and a foreign state.

➔ **Aguinda v. Texaco – Jota v. Texaco**¹⁵⁵

This dispute opposed some 30,000 indigenous Ecuadorian farmers and the U.S. corporation Chevron-Texaco, which extracted oil in Ecuador's Oriente region from 1972-1992. The company reportedly used operating techniques that were outdated or banned in other countries due to their adverse environmental and health consequences. Texaco, the Government of Ecuador, and Petroecuador, Ecuador's national oil company, have consistently denied liability for the environmental damage and health problems that resulted from such practices. Since 1972, Texaco has been accused of discharging toxic waste and more than 70 billion gallons of polluted water into rivers and streams. Soil has also been contaminated and the pollution has affected the indigenous peoples and farmers, whose ways of life depended on these natural resources (securing water, irrigating agriculture and fishing). Particularly high rates of cancer, leukaemia, digestive and respiratory problems, birth defects, miscarriages and other ailments have also been noted.

The affected communities filed their first claim in a New York federal Court in 1993. The Ecuadorian government intervened in the trial, claiming in particular that it alone had the authority to adjudicate disputes concerning public land in Ecuador and that individuals could not sue to defend their rights with regards to public lands. The Ecuadorian government's reluctance for the trial to take place in the United States was a key factor in the U.S. federal court's decision to decline jurisdiction under international comity **doctrine**. U.S. federal courts finally agreed to hear the case under the ATS, but only after a new government in Ecuador expressed a desire for the trial to proceed.

Meanwhile, in 1999, the Ecuadorian parliament adopted the Environmental Management Act (EMA) which allows individuals to bring action seeking redress for environmental damage affecting public lands. Throughout the trial, Chevron argued that according to *forum non conveniens*, Ecuadorian courts alone are an appropriate forum. In 2002, a New York court of appeals affirmed Chevron's argument and referred the matter to Ecuadorian courts, with the stipulation that Chevron must submit to the jurisdiction of Ecuadorian courts and their rulings.

¹⁵⁴ *Exxon Mobil Corp.*, 69 F. Supp. at 92.

¹⁵⁵ *Aguinda v. Texaco, Inc*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996); *Jota v. Texaco, Inc*, 157 F.3d 153, 158-61 (2d Cir. 1998); *Aguinda v. Texaco, Inc*, 303 F.3d 470, 480 (2d Cir. 2002)

In 2003, the same victims filed a class action suit against Chevron in the Superior Court of Nueva Loja, Ecuador, under the EMA. On 12 November 2013, Ecuador Supreme Court upheld the August 2012 ruling against Texaco/Chevron for environmental damage but halved damages to \$9.51 billion. Since then, Chevron has multiplied legal actions.

Lawsuits are taking place in the U.S., in Ecuador, in Canada (see below in this section), before an investment tribunal and now before the International Criminal Court. In March 2015, the arbitration tribunal held that the settlement between Chevron and Ecuador did not preclude residents from suing over the future effects of pollution. However, in January 2016, the tribunal ruled in favour of Chevron on the basis of US-Ecuador investment agreement.¹⁵⁶ A lawsuit in the U.S. was also initiated by Chevron following the Supreme Court's decision in Ecuador: Chevron filed a racketeering lawsuit against the plaintiffs' lawyers and representatives in US federal court on 1 February 2011. In October 2012 the US Supreme Court refused to hear Chevron's appeal on the basis that Judge Kaplan lacked authority to block the enforcement of the Ecuadorian judgment.¹⁵⁷ In October 2014, Ecuadorian rainforest communities filed a communication at the International Criminal Court in respect of Chevron chief executive's acts to prevent the ordered clean-up of toxic waste in the Amazon.¹⁵⁸

➔ Apartheid in U.S. courts¹⁵⁹

In 2002, a group of South African nationals brought action under the ATS against 20 banks and companies accused of aiding and abetting human rights violations committed by the South African government during apartheid. The plaintiffs were victims of extrajudicial killings, torture and rape. The South African government publicly opposed the trial before both the district and appellate courts in the United States. In October 2007, the court of appeals overturned the trial court's dismissal of the case. The defendants appealed the overturn, but the U.S. Supreme Court upheld the appellate court's decision in May 2008. On 8 April 2009, a district court judge dropped several of the charges, while allowing a continuation of the suit against Daimler, Ford, General Motors, IBM and Rheinmetall Group. The judge refused to accept the defendants' arguments invoking the doctrines of political question and international comity. The judge also rejected arguments that the statute of limitations had expired. In a September 2009 letter to the judge describing the district court as the "appropriate forum", the South African government announced its support for the trial to proceed.

The defendants then filed an interlocutory appeal (an appeal filed in civil proceedings prior to the court's ruling) with the Second Circuit Court of Appeals. Before accepting jurisdiction, the court of appeals asked the parties to submit their arguments on the question of whether companies can be held accountable for violations of customary international law.

¹⁵⁶ See: Business and Human Rights Resource Centre, *Texaco/Chevron lawsuits (re Ecuador)*, <http://business-humanrights.org>

¹⁵⁷ *Ibid.*

¹⁵⁸ Business and Human Rights Resource Centre, *Texaco/Chevron (re Ecuador)*, <http://business-humanrights.org>

¹⁵⁹ *In re Africa Apartheid Litig.*, 346F Supp.2d 538 (S.D.N.Y 2004); *In re Africa Apartheid Litig.*, 617F Supp.2d 228 (S.D.N.Y 2009); *In re Africa Apartheid Litig.*, 624 Supp.2d 336 (S.D.N.Y 2009).

In particular, the victims needed to prove that companies can be held civilly and criminally liable under customary international law. In April 2014, federal judge Shira A. Scheindlin concluded that companies may be held civilly liable under customary international law and the ATS.¹⁶⁰ However, Judge Scheindlin dismissed the case, finding that it did not touch and concern the United States. In July 2015, the Second Circuit found that the *mens rea* required for liability under the ATS for aiding and abetting required that the defendant acted with the purpose of facilitating the commission of the crime, rather than knowledge that it would be committed.¹⁶¹ The Court found that such purpose was not present in the case, and while the defendants could have known their efforts would further the violations, it was not their specific purpose to do so. The Court therefore affirmed Judge Scheindlin's dismissal, and on September 2015, the Second Circuit refused to rehear the case.

What law will the U.S. forum court apply?

The very wording of the ATS – “a tort only, committed in violation of the law of nations” – suggests that not only a court’s jurisdiction, but also the norms applicable to a civil liability suit must be considered in the light of international law. This point is controversial in U.S. jurisprudence and doctrine. In determining the applicable law, **U.S. courts have three options available to them:**

- International law,
- The law of the forum court (*lex fori*), including federal common law,¹⁶² and
- The law of the place where the damage occurs.¹⁶³

1. International law: jurisprudence selection

Most ATS cases refer to international law to decide which law is applicable to the case.

In *Doe v. Unocal*, the court ruled¹⁶⁴ that it was preferable to apply international law rather than the law of a particular country¹⁶⁵ in determining Unocal’s liability for violations committed by Burmese forces, due to the nature of the alleged violations

¹⁶⁰ *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014).

¹⁶¹ *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169 (2d Cir. 2015)

¹⁶² Common law countries, such as the U.S. and U.K., as opposed to civil law, have legal systems characterized by the pre-eminence of jurisprudence. Courts create a “precedent” which serves more as a basis for subsequent rulings than the law or statute itself. Legal systems in civil law countries are characterized by lawmaking and an emphasis on the law itself. Federal common law refers to the law in force in each state in the U.S., based primarily on precedent.

¹⁶³ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 120; R. A. Tyz, *op. cit.*, 2003, p. 572. See also *Doe v. Unocal*, *op. cit.*, 2002, p. 14214; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2000, note 12.

¹⁶⁴ The court expressly stated that its reasoning was justified by the facts of the case, and that in the presence of other facts, the application of forum law or *lex loci delicti commissi* may have been appropriate.

¹⁶⁵ The defendants were in favour of *lex loci delicti commissi*, i.e. Burmese law.

(of *jus cogens* norms).¹⁶⁶ The court’s decision was based on jurisprudence from international criminal tribunals for Rwanda and the former Yugoslavia.¹⁶⁷

References to international law may

- Be **direct**, or
- Be **based in federal common law**.¹⁶⁸

Opinions are divided on choosing between these two options. In the *Unocal* case, the court did not address its selection of international law because the applicable norms of international law were similar to those of forum law.¹⁶⁹

2. *Lex fori* (federal common law): doctrine selection

Unlike international or foreign law, federal common law offers **maximum flexibility in determining the applicable standards of liability and compensation**. The application of federal common law does not preclude consideration of international law objectives, provided they are part of the case, and it has the additional advantage of being well-known by the court. In the eyes of federal common law, the application of international law is disadvantaged by its incomplete nature and, more particularly, by its lack of criteria for determining adequate compensation.¹⁷⁰

3. Law of the place where the damage occurs: an inadequate solution

With several exceptions,¹⁷¹ jurisprudence indicates that **turning to the law of the place where the damage occurs (*lex loci damni*) is inadequate**.¹⁷²

The application of foreign law can be problematic, for example, when:

- It is not sufficiently protective of victims,
- It tolerates or even requires the non-observance of international human rights law,
- It provides certain amnesties,
- It does not provide for the awarding of damages, or
- It provides a short statute of limitations.

¹⁶⁶ *Doe v. Unocal*, *op. cit.*, 2002, p. 14214. In his dissenting opinion, Judge Reinhardt rejected international law as the applicable law and expressed a preference for “*general federal common law tort principles*”.

¹⁶⁷ *Doe v. Unocal*, *op. cit.*, 2002, pp. 14216 and following.

¹⁶⁸ See *Doe v. Unocal*, *op. cit.*, 2002, pp. 14214 and following.

¹⁶⁹ *Ibid.*, 2002, p. 14214, note 23; R. A. Tyz, *op. cit.*, pp. 573-574.

¹⁷⁰ B. Stephens and M. Ratner, *op. cit.*, 1996, pp. 121-122; R. A. Tyz, *op. cit.*, pp. 574-575.

¹⁷¹ See *Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981), 726 F.2d 774 (Feb. 3 1984), p. 781; *In Re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992).

¹⁷² See *Xuncax v. Gramajo*, 886 F. Supp. 162 (*D. Mass.* 1995), pp. 182-183.

Another option: Transitory Tort Litigation in State Courts

State courts can hear “transitory torts,” claims arising outside their territory, if the court has personal jurisdiction over the defendant, by virtue of the defendant’s transitory presence in the United States at the time of the suit.¹⁷³ The Supreme Court briefly mentioned the transitory tort doctrine in *Kiobel* without questioning it.¹⁷⁴

Litigating in state court implies a choice of law analysis. Different states have different choice of law rules. When a human rights case involves conduct outside the forum state’s territory, there are at least three potential sources of applicable law: the domestic law of the place where the conduct occurred (*lex loci*), the domestic law of the forum state (*lex fori*), and international law.¹⁷⁵ Many international human rights claims have parallels in state tort law, for example, wrongful death, assault, and battery. However, transitory tort cases involving foreign litigants and foreign events will generally apply the law of the place of injury.¹⁷⁶ Under almost every choice-of-law approach, concerns for international comity and foreign sovereign interests must be built into the analysis.

Possible advantages

- May avoid heightened federal pleading standards;
- Avoids the high threshold of definiteness and universality required by *Sosa*;
- *Forum non conveniens* does not have the same importance as in federal courts;
- Theories of corporate liability are likely to be more expansive and less contested than in ATS litigation.¹⁷⁷

Possible disadvantages

- Procedural rules are different in each state, whereas federal rules are the same all over the U.S.;
- Each state has its own standards for personal jurisdiction;
- Each state has different pleading requirements;
- Statutes of limitations will likely be shorter than in federal court;
- State court judges are elected and therefore may be more vulnerable to pressure from corporations.

¹⁷³ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 11 (2013).

¹⁷⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665-66 (2013).

¹⁷⁵ Chimène I. Keitner, “State Courts and Transitory Torts in Transnational Human Rights Cases” 3 UC Irvine L. Rev. 81 (2013).

¹⁷⁶ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 69-70 (D.C. Cir. 2011) (holding that Indonesian law applied to claims arising in Indonesia).

¹⁷⁷ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 19 (2013).

Examples

Cases against *Union Carbide (Bhopal)* and *Occidental Petroleum*, which involve environmental contamination in foreign countries, are proceeding under ordinary claims for “toxic torts” (negligence, trespass, nuisance, for example) under the “transitory tort” doctrine.¹⁷⁸

In *Doe v. Unocal Corp.* (see above), the plaintiffs refiled their pendent state claims in the state trial court after the ATS claims were dismissed in the federal trial court. While an appeal of the dismissal of the ATS claims was pending, plaintiffs completed discovery in state court and prepared for trial. The case settled several months before the state court trial was scheduled to begin and shortly before an oral argument before the Ninth Circuit. The *Unocal* plaintiffs were able to assert all of their ATS claims as state common law tort claims in the state court case.¹⁷⁹



➤ ECUADOR, Quito: A march of Ecuadorean indigenous people arrives in Quito on July 1, 2014 protesting for the Water Law that withdraws the right of the natives to administrate the water sources in their territories.
© AFP PHOTO/JUAN CEVALLOS.

¹⁷⁸ These cases have been filed by EarthRights International. See Marco Simmons, “What does the Kiobel decision mean for ERI’s cases?” EarthRights International Blog, (Apr. 19, 2013) www.earthrights.org.

¹⁷⁹ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 16 (2013).

CONCLUSION

Although *Kiobel* limited the scope of the ATS and a number of lower federal courts have dismissed ATS cases since *Kiobel*, it remains an important tool for corporate accountability, particularly in the case of U.S. corporations. Current procedures are favourable to situations such as ours, given the existence of class action lawsuits, the discovery procedure and the contingency system for remunerating attorneys. The ATS has also accepted international law as the law applicable to the case and developed a liberal approach in terms of piercing the corporate veil.

In practice, however, **ATS trials are characterized by numerous difficulties and uncertainties which render the process unpredictable.** Some go as far as saying the ATS process is compromised from the outset. It is difficult to meet the substantive conditions for civil action in our situation, particularly with regard to international law violations. The quasi-universal jurisdiction granted by the ATS is limited by various procedural hurdles which require a territorial connection between the U.S. and the dispute, either through personal jurisdiction or *forum non conveniens*, or which aim to avoid any interference with U.S. foreign policy. ATS trials are lengthy and costly for victims.

In addition, despite an increasing body of favourable case law affirming the right of victims of international law violations to a remedy in the U.S., **many doctrinal and jurisprudential controversies remain with regard to the application and appropriateness of legislation such as the ATS.**

Despite the low number of actual settlements or trials, some have stressed the value of the cases introduced under the ATS, noting that the ATS provides a forum where victims can publicly denounce the abuses they suffered, force companies to answer for their actions before an independent court and disclose relevant documents via the disclosure procedure. In addition, calling the reputation of corporations into question plays a preventive role.¹⁸⁰

Despite these obstacles, it remains pertinent to **draw lessons** from the ATS, particularly in terms of the content and principles it ascribes. It is also important to learn from the practices it generates for **building an appropriate model of civil liability and responding to the challenges of globalisation.**

Thus, waiting for the law to develop a truly effective legal system, it is important to **coordinate efforts between NGOs and attorneys, to further advocate** and to

¹⁸⁰ See H. Ward, "Governing Multinationals: the role of foreign direct liability", Briefing Paper, Energy and Environment Programme, New Series, No. 18, February 2001; D. Kirkowski, "Economic Sanctions vs. Litigation under ATCA: U.S. Strategies to Effect Human Rights Norms; Perspectives from Burma", Working Paper, 2003.

increase litigation relating to human rights violations committed by multinational companies.

ADDITIONAL RESOURCES

- International Commission of Jurists, *Corporate complicity & legal accountability*, vol. 3: civil remedies, Genève, 2008.
 - Oxford Pro-bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse – A Comparative Submission Prepared for Prof. John Ruggie*, UN SG Special Representative on Business and Human Rights, 3 November 2008, www.law.ox.ac.uk/opbp.
L. Boy, JB Racine, F. Siirainen, *Droits économiques et droits de l’homme*, Larcier, Belgique, 2009.
 - EarthRights International, *Out of Bounds: Accountability for Corporate Human Rights Abuse After Kiobel*, Sept. 2013. www.earthrights.org/es/publication/out-bounds.
 - Business and Human Rights, *Corporate Legal Accountability Portal*: www.business-humanrights.org/LegalPortal/Home.
 - Center for Constitutional Rights, <http://ccrjustice.org/>.
 - EarthRights International, www.earthrights.org.
 - Professor Gwynne Skinner, Professor Robert McCorquodale, Professor Olivier De Schutter, and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, report released by the International Corporate Accountability Roundtable (ICAR), CORE, and the European Coalition for Corporate Justice (ECCJ), of which FIDH is a steering group member (2013).
 - Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Mar. 7, 2014), available at: www.amnesty.org/en/library/info/POL30/001/2014/en.
 - Canadian Network on Corporate Accountability: <http://cnca-rcrce.ca/>
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Litigation examples in Canada

To date, the few business human rights cases litigated in Canada have not achieved positive results for human rights plaintiffs.¹⁸¹ However, recent decisions have opened up possibilities for successful corporate human rights litigation¹⁸².

A Way to Establish Jurisdiction: The “Forum of Necessity” Doctrine

In 2010, the Ontario Court of Appeal recognized that Canadian courts may assert jurisdiction in “exceptional cases”, “despite the absence of a real and substantial connection” under the Forum of Necessity doctrine.¹⁸³ “Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.”¹⁸⁴ On appeal, the Supreme Court of Canada left open the “possible application of the forum of necessity doctrine” but did not address it directly.¹⁸⁵

In March 2014, the Ontario Court of Appeal reviewed this “relatively new Canadian doctrine”, first incorporated in art. 3136 of the *Civil Code of Québec* (C.C.Q.), which was enacted in 1991 and came into force in 1994, and then included in s. 6 of the Uniform Law Conference of Canada’s (“ULCC”) model *Court Jurisdiction and Proceedings Transfer Act*, 1994.¹⁸⁶ The Court noted that “[a]ll jurisdictions in Canada that have recognized the forum of necessity have incorporated a ‘reasonableness’ test.”¹⁸⁷ In Ontario, a plaintiff must establish that “there is no other forum in which the plaintiff can reasonably seek relief”.¹⁸⁸

The “reasonableness” requirement has been stringently construed.¹⁸⁹ To date, only one Ontario court has assumed jurisdiction based solely on the forum of necessity doctrine. In *Bouzari v. Bahremani*, the only Ontario case to successfully invoke forum of necessity, the motion judge found in a default judgment that the plaintiff, an Iranian citizen – although he was a Canadian citizen at the time of the suit – was tortured in Iran by the defendant (another Iranian citizen) or at his instigation. The

181 Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 UC Irvine L. Rev. 127, 135. See, e.g., *Piedra v. Copper Mesa Mining Corp.*, 2010 ONSC 2421, 2010 CarswellOnt 3623 (Can. Ont. Sup. Ct.) (WL); *Recherches Internationales Québec v. Cambior Inc.*, 1998 CarswellQue 1430 (Can. Que. Sup. Ct.) (WL); *Bil’in (Village Council) v. Green Park Int’l Ltd.*, 009 QCCS 4151 [2009] R.J.Q. 2579; *Anvil Mining Ltd. v. Ass’n Canadienne Contre l’Impunité*, 2012 QCCA 117, 2012 CarswellQue 255 (Can. Que. C.A.) (WL) application for leave to appeal denied.

182 For a useful overview of lawsuits in Canada against extractive companies, see Above Ground, *Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005*, www.aboveground.ngo.

183 *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84.

184 *Ibid.*

185 *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17[2012] 1 S.C.R. 572, at para. 100.

186 *West Van Inc. v. Daisley*, 2014 ONCA 232, para. 18.

187 *Ibid.*, para 20.

188 *Ibid.*

189 *Ibid.*, para 21.

motion judge further found that there was “no reasonable basis upon which [the plaintiffs could be] required to commence the action in a foreign jurisdiction, particularly, the state where the torture took place, Iran”.¹⁹⁰ The defendant later had the default judgment set aside, and challenged jurisdiction, claiming that England was a more appropriate forum: both the plaintiff and defendant agreed that the action could not be heard in Iran. The court denied the defendant’s request. Ontario had assumed jurisdiction based on the forum of necessity – which the defendant did not initially challenge – and the defendant had not met his burden of establishing that England was clearly a more appropriate forum.¹⁹¹

Examples of situations in which the doctrine has relevance include, but are not limited to:

1. the breakdown of diplomatic or commercial relations with a foreign State;
2. the need to protect a political refugee; or
3. the existence of a serious physical threat if the debate were to be undertaken before the foreign court.¹⁹²

In the case of *ACCI vs. Anvil Mining Limited*, the plaintiffs tried to argue forum of necessity, but the Court of Appeal rejected the argument. However, the motion judge actually found in the plaintiff’s favour: the judge found that Quebec had jurisdiction simpliciter (i.e. that jurisdiction could be asserted against an out-of-province defendant) and then rejected the defendant’s claim of *forum non conveniens*. On 24 January 2012 the Quebec Court of Appeals reversed and dismissed the case.¹⁹³ This case is addressed in part II of this section looking at extraterritorial criminal liability and the role of victims and the prosecution in initiating proceedings (see below).

➔ **Bil’in v. Greenpark International, Inc et al.**

Bil’in is an agricultural village located in the eastern portion of the Occupied Palestinian Territory. In order to build a settlement, in 1991, the Israeli military confiscated a portion of the land belonging to the village, which depended on farming the land for its livelihood.

In 2001, two Canadian companies, Green Park International, Inc. and Green Mount International, Inc. began to construct the settlements. In 2005, the village of Bil’in filed a civil claim with the Israeli Supreme Court against the two Canadian companies, other Israeli companies involved in the project and the Israeli military and government agencies concerned. It was alleged that both the land acquisition, building plans and permits were illegal. The motion did not mention the illegality under international humanitarian law of regula-

¹⁹⁰ *Bouzari v. Bahremani*, [2011] O.J. No. 5009, para 5.

¹⁹¹ *Bouzari v. Bahremani*, 2013 ONSC 6337, para 27.

¹⁹² *West Van Inc. v. Daisley*, 2014 ONCA 232, para 40.

¹⁹³ Documents related to this case are available at: Canadian Centre for International Justice (CCIJ), www.ccij.ca. For other non-human rights related cases on some non-human rights case that have dealt with forum of necessity see notably *Josephson v Balfour Recreation Commission*, 2010 BCSC 603; *Olney v Rainville*, 2008 BCSC 753.

tions allowing the establishment of settlements in occupied territories. The Israeli Supreme Court had already ruled that the judiciary could not decide the legality of the settlements and that the executive branch alone had jurisdiction in that matter. The village of Bil'in also filed civil suit against the two Canadian companies on 7 July 2008 in the Québec Superior Court in Montreal.

The plaintiffs cited international humanitarian law, specifically the Fourth Geneva Convention of 1949. According to the plaintiffs, the defendant firms were acting as de facto agents of the State of Israel, illegally building homes and other facilities, promoting and managing the sale of these buildings on occupied territory. The target audience for the campaign was only the civilian population of the occupying power creating the new neighbouring settlement on Bil'in's land.

By participating in this illegal project, the companies acted as accomplices to the State of Israel. The plaintiff argued that Canadian courts had jurisdiction to hear the case because of obligations to which Canada had agreed under national and international law, namely by ratifying the Rome Statute of the International Criminal Court and the Fourth Geneva Convention.

The plaintiffs submitted three requests to the court:

1. Recognize violations of the above-mentioned national and international law instruments by the corporations,
2. Order the corporations to halt all construction, sales, advertising and other activities related to the creation of a settlement on Bil'in's lands, remove all on-site supporting materials and equipment, and return the lands to their original state, and
3. Order the company to pay punitive damages in the order of CAD 2,000,000 and order the directors of the companies to pay CAD 25,000. Citing several preliminary objections, such as the fact that the case had already been tried in Israeli courts, or that *forum non conveniens* was an obstacle to Canadian courts accepting jurisdiction, the Québec Superior Court ruled that it did not have jurisdiction and that Israeli courts should be the appropriate forum.

Notwithstanding the above-mentioned decisions, some Bil'in villagers have recently regained some of their land thanks to deviations of the separation barrier Israel built on the Occupied Palestinian Territory. Although this case does not involve any companies, and is in no way linked to the previous case, it deserves to be mentioned as Bil'in was affected by the barrier's route.

In response to deadly attacks targeting Israelis, Israel began in 2002 the construction of a separation barrier on the Occupied Palestinian Territory. On 4 September 2007, the Israeli Supreme Court ordered a revision to the separation barrier's route which effectively prevented some Bil'in villagers from accessing their farmland. On 11 February 2010, two and a half years after the ruling, Israeli authorities began rerouting the portion of barrier running near Bil'in, thus some villagers will regain access to their land. Bil'in villagers filed an appeal which was dismissed in March 2011 by the Québec Superior Court.

➔ **Recherches Internationales Québec v. Cambior Inc.**¹⁹⁴

In this case, the August 1995 bursting of a tailing dam holding back waste from the ore-leaching process, poisoned a river on which the life and culture of nearly 23,000 people in Guyana depended. The Omai mine which caused the damage is wholly owned by Omai Gold Mines Limited (OGML), whose main shareholder (65%) at the time was Canadian company Cambior Inc. In 2002, Cambior Inc. held a 95% stake in OGML. The 23,000 victims, assisted by Recherches Internationales Québec (RIQ), brought a class action lawsuit against Cambior Inc in Québec seeking CAD 69 million for harm suffered.

Having initially accepted the joint jurisdiction of Canadian and Guyanese courts to handle the matter, the Canadian court ultimately ruled that Guyanese courts were the most appropriate forum. Citing *forum non conveniens*, the Canadian court rejected jurisdiction in August 1998. The court held that the fact that the corporation was domiciled in Québec did not constitute a special link in assessing the appropriateness of the jurisdiction. The court also rejected RIQ's argument that Guyana's judicial system failed to guarantee the right to a fair trial. In 2002 the Guyanese court hearing the case dismissed the claim. In 2003, a new claim was brought against Cambior Inc seeking redress for the damages resulting from the bursting of the dam.

In October 2006, the Guyanese court dismissed the claim and ordered the victims to pay for the expenses Cambior Inc. incurred during the trial.

Direct negligence liability and piercing the corporate veil: Choc v. Hudbay Minerals

Mayan Q'eqchi' from Guatemala brought three related actions against a Canadian mining company, Hudbay Minerals, and its subsidiaries, HMI Nickel (formerly Skye Resources, Inc.) and CGN, in Ontario Superior Court of Justice. They allege that security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, committed human rights abuses, including a shooting, a killing, and gang-rapes committed in the vicinity of the former Fenix mining project, a proposed mining operation located in eastern Guatemala. Hudbay Minerals is a Canadian mining company headquartered in Toronto. During the relevant period, Hudbay Minerals owned the Fenix mining project through CGN. Since then, HMI Nickel Inc./ Skye Resources amalgamated with Hudbay, who is now legally responsible for all its legal liabilities. CGN owned and operated the Fenix mining project in Guatemala, and was wholly-controlled and 98.2% owned subsidiary of Hudbay Minerals. The defendants' motion to strike the three actions was denied by Justice Carole J. Brown on July 22, 2013.¹⁹⁵ The two main issues

¹⁹⁴ Recherches Internationales Québec v. Cambior, [1998], Q.J., No. 2554

¹⁹⁵ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414. Carole J. Brown, J. See also chocversushudbay.com.

were whether Hudbay could be found liable in negligence for actions or omissions in another country and whether the plaintiffs had pleaded facts able to lift the corporate veil and hold Hudbay liable.

An individual complaint against Canada has been filed in February 2013 before the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.¹⁹⁶

Torts committed in another country

The main issue in *Choc v. Hudbay Minerals* was whether the plaintiffs had pleaded all material facts required to establish the constituent elements of their claim of direct negligence and whether Hudbay “owed a duty of care to the plaintiffs.”¹⁹⁷ Because the plaintiffs did not argue that there is an established duty of care, it was necessary to apply the test for establishing a novel duty of care. **The following must be proven:**

- **the harm complained of is a reasonably foreseeable consequence of the alleged breach;**
- **there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and,**
- **no policy reasons exist to negatively or otherwise restrict that duty.**¹⁹⁸

In *Choc v. Hudbay Minerals*, the judge concluded that the plaintiffs had pleaded all materials facts required to establish their claim of negligence.

Piercing the corporate veil

In her decision in *Choc v. Hudbay Minerals*, the judge explained that “Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: **a) where the corporation is ‘completely dominated and controlled and being used as a shield for fraudulent or improper conduct’**¹⁹⁹; **(b) where the corporation has acted a the authorized agent of its controllers, corporate or human**²⁰⁰; and **(c) where a statute or contract requires it**²⁰¹. The judge noted that “the Plaintiffs have pleaded second exception to the rule of separate legal personality” by pleading that CGN is an agent of Hudbay, and concluded that “[i]f plaintiffs can prove at trial that CGN

196 See: The Global Initiative for Economic, Social and Cultural Rights, *Palestinian village’s complaint against Canada registered with the UN Human Rights Committee*, <http://globalinitiative-escr.org> see also : FIDH, *Re: Submission concerning human rights violations linked to transnational corporations operating in the Occupied Palestinian Territory*, September 19, 2013, www.fidh.org

197 *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para 55.

198 *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para. 57 (citing the Supreme Court of Canada in *Odhavi Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R 263).

199 Citing 642947 *Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 69.

200 Citing *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, [2009] O.J. No. 1195 at para. 51.

201 Citing *Parkland Plumbing*, at para. 51.

was Hudbay’s agent at the relevant time, they may be able to lift the corporate veil and hold Hudbay liable.”²⁰²

1) Foreseeability

Because the pleadings state that Hudbay/Skye knew that violence was frequently used by personnel during forced evictions; that violence had been used at previous forced evictions it had requested; that the security personnel was in possession of illegal firearms; and that there was a general risk that violence and rape would occur, the Judge concluded that the pleadings make it reasonably foreseeable that requesting the forced eviction of a community could lead to violence and rape.²⁰³

2) Proximity

The judge noted that “proximity is determined by examining various factors, rather than a single unifying characteristic or test.” These include the parties’ expectations, representations, reliance, the property or other interests involved,²⁰⁴ a close causal connection, and any assumed or imposed obligations.²⁰⁵ The Judge concluded that “[b]ased on the plaintiffs’ pleadings, there were numerous expectations and representations on the part of Hudbay/Skye”, in particular, “Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs. There were also a number of interests engaged, such as Hudbay/Skye’s interest in developing the Fenix project, which required a ‘relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala’, according to Hudbay’s President and CEO.” The judge found that a *prima facie* duty of care may be found to exist.²⁰⁶

3) Policy considerations

The judge found that “it is not plain and obvious that policy reasons would negative or otherwise restrict a *prima facie* duty of care” because there “are clearly competing policy considerations in recognizing a duty of care in the circumstances of the case.”²⁰⁷

The plaintiffs must now prove the facts alleged in their complaint at trial, but the ruling is significant in that it recognizes the possibility of holding corporations liable for their negligence in foreign countries.

²⁰² *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para 49.

²⁰³ *Id.* at para 63.

²⁰⁴ Citing *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 34

²⁰⁵ Citing *Odhavi Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 55

²⁰⁶ *Choc v. Hudbay Minerals Inc.*, at paras. 69-70.

²⁰⁷ *Choc v. Hudbay Minerals Inc.*, at para. 74.

In June 2015, the Court ordered HudBay to disclose extensive documentation concerning its corporate structure and control over its subsidiaries²⁰⁸.

In sum and as highlighted by Above Ground, “the court’s ruling sets a precedent with respect to parent company liability. For the first time in Canada, cases involving foreign plaintiffs who allege to have suffered harm caused by Canadian company’s overseas operations will proceed to trial.”²⁰⁹

➔ **García, García Monroy, Castillo Pérez, Castillo Herrera, Pérez Martínez, Aguilar Castillo and Martínez Sasvín v. Tahoe Resources Inc.**

On June 18, 2014, seven Guatemalan men filed a civil lawsuit in a Vancouver court against Canadian mining company Tahoe Resources Inc. for injuries they suffered when Tahoe’s security personnel opened fire on them at close range. The men, residents of San Rafael Las Flores, where the company’s Escobal mine is located, allege that Tahoe is legally responsible for the violence inflicted on them as they peacefully protested against the mine²¹⁰.

The plaintiffs are suing Tahoe, a company incorporated in British Columbia, for battery and negligence. The lawsuit claims that Tahoe’s manager of security ordered the shooting. It further alleges that Tahoe expressly or implicitly authorized the manager’s conduct or was negligent in its management of security personnel. The plaintiffs argue that Tahoe was aware of widespread community opposition to the mine and the manager’s conflictive relationship with the community. In addition to the civil case in Canada, criminal charges have been filed in Guatemala against Tahoe’s former security manager.²¹¹ On November 9, 2015, the Supreme Court of British Columbia rendered a decision staying the procedure on the basis of *forum non conveniens*, considering that “Guatemala is clearly the more appropriate forum for the determining the matters in dispute”.²¹²

➔ **Chevron Corp. v. Yaiguaje**

On 4 September 2015, the Supreme Court of Canada considered that Canadian courts have jurisdiction to decide if Ecuadorian villagers allegedly harmed by Texaco’s (now merged with Chevron) operations in their region can have the Ecuadorian judgment (U.S.\$ 9.51 billion in environmental and punitive damages) recognized and enforced in Canada (against Chevron Canada).²¹³

208 See CNCA, *Important Canadian court ruling in the HudBay Minerals (Guatemala) lawsuit*, 30 June 2015, <http://cnca-rcrce.ca>

209 See Above Ground, *Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005*, www.aboveground.ngo.

210 Extract from CCIJ, *Tahoe case*, www.cci.ca/cases/tahoe/.

211 Extract from Above Ground, *Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005*, www.aboveground.ngo.

212 *García v. Tahoe Resources Inc.*, 2015 BCSC 2045

213 Extract from Canadian Corporate Accountability Network (CNCA), *Important decision today: Canadian courts have jurisdiction to decide if Ecuadorian villagers allegedly harmed by Texaco’s (now merged with Chevron) operations in their region can have the Ecuadorian judgement (US\$ 9.51 billion in environmental and punitive damages) recognized and enforced in Canada (against Chevron Canada)*, <http://cnca-rcrce.ca/>.

“Since the initial judgment, Chevron has fought the plaintiffs in the U.S. courts and has refused to acknowledge or pay the debt. As Chevron does not hold any Ecuadorian assets, the plaintiffs commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice. It served Chevron at its head office in California, and served Chevron Canada, a seventh-level indirect subsidiary of Chevron, first at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario. *Inter alia*, the plaintiffs sought the Canadian equivalent of the award resulting from the judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos. Chevron and Chevron Canada each sought orders setting aside service *ex juris* of the amended statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action.”

The court found that “To recognize and enforce such a (foreign) judgment, the only prerequisite is that the foreign court had a **real and substantial connection** with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied... To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court’s statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.”²¹⁴

This case gave rise to legal proceedings in the U.S., in Ecuador as well as in investment arbitration.²¹⁵

ADDITIONAL RESOURCES

- **Above Ground:**
www.aboveground.ngo
 - **CNCA (Canadian Network on Corporate Accountability):**
<http://cnca-rcrce.ca>
 - **CCIJ (Canadian Centre for International Justice):**
www.ccij.ca
-

²¹⁴ Full decision accessible here: <http://scc-csc.lexum.com>

²¹⁵ See Business and Human Rights Resource Centre, “Texaco/Chevron Lawsuit (re Ecuador)”, <http://business-humanrights.org>

CHAPTER II

Establishing Jurisdiction in an EU Member State Court and Determining the Law Applicable to the Case

* * *

Under what conditions will an EU Member State court recognize jurisdiction?

The primary instrument currently used in the European Union to establish the civil liability of multinational corporations for human rights violations committed outside the EU is **Regulation 44/2001 of 22 December 2000 (Brussels I)** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²¹⁶

Regulation 44/2001 sets out, inter alia, the rules of international jurisdiction in civil and commercial matters which are common to the various EU Member States.²¹⁷ It entered into force on 1 March 2002 and replaces the Brussels Convention of 27 September 1968.²¹⁸

²¹⁶ European Community Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ, L12, 13 January 2001, p. 1. We highly recommend reading the chapter on the European Union in Oxford Pro Bono Publico, *op.cit.*, p. 65 and following.

²¹⁷ Note also the Hague Conference on Private International Law's 30 June 2005 adoption of the "Convention on Choice of Court Agreements", which has allowed the creation of a global legal alternative for the resolution of disputes between corporations when the parties have reached an agreement on the choice of forum. It entered into force on the 1st October 2015, after the approval by the E.U.: see www.hcch.net. See also an analysis of the impact of the Hague Convention on Choice of Court Agreements' ratification by the European Community: Commission Staff Working Document of 5 September 2008 (SEC (2008) 2390)). On this subject, see: B. Van Schaak, "In Defense of civil redress: the domestic enforcement of human rights norms in the context of the proposed Hague judgments convention", *Harvard Int'l L.J.*, 2001, p. 141; B. Stephens, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", *Yale J. Int'l L.*, 2002, 27, p. 54.

²¹⁸ The Brussels Convention, however, continues to apply on the one hand to actions begun before 1 March 2002 (Regulation (EC) No 44/2001, *op.cit.*, art. 66.1) and on the other hand to the relations between Denmark and other EU Member States as Denmark is not considered a Member State under the terms of Article 1.3 of the Regulation (Regulation (EC) No 44/2001, *op.cit.*, arts. 21 and 22. On that Member State, see: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ, 16 November 2005, L299/62).

In cross-border disputes, the regulation permits courts in a Member State to determine the state’s international jurisdiction, provided the necessary conditions for the regulation’s application are met.²¹⁹

1. General condition for the application of Regulation 44/2001

For Regulation 44/2001 to be applied, **the corporation must be domiciled in a Member State.**

Otherwise, under Article 4§1 of the regulation, each Member State determines jurisdiction under its own law.²²⁰ Each Member State has in effect appropriate conflict of jurisdiction rules. In France, for example, Articles 14 and 15 of the French Civil Code allow courts to hear a case if the plaintiff or defendant is French. Furthermore, several countries allow cases to be brought against individuals with personal effects in an EU Member State. This mechanism is known internationally as “the Swedish umbrella rule”, which has its roots in a Swedish rule allowing national courts to prosecute an individual in all types of cases if the individual left his or her umbrella on the soil over which the court has jurisdiction.²²¹

Regulation 44/2001 applies regardless of whether a victim bringing action is a resident or national of a third,²²² non-EU Member State.

2. Three options available to victims

People affected by the foreign operations of a multinational corporation domiciled in a Member State have three primary grounds for jurisdiction to bring action in an EU Member State court:

a) The court with jurisdiction is that of the defendant’s domicile

In general, Article 2§1 of Regulation 44/2001 provides that, regardless of their nationality, persons domiciled in an EU Member State (in our situation, the multinational) shall be sued in the courts of that state.

²¹⁹ On this subject, see: European Parliament resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366-C5-0161/2002 - 2002/2069 (COS), 30 May 2002, §50.

²²⁰ Subject to articles 22 and 23 relating to exclusive jurisdiction and the extension of jurisdiction, respectively, issues not considered in this study.

²²¹ H. Smit, “Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies”, *Hastings Int’l & Comp. L. Rev.*, 1972, p. 335., in B. STEPHENS, “Corporate Liability: Enforcing Human Rights Through Domestic Litigation”, *Hastings Int’l & Comp. L. Rev.*, 2000-2001, p. 410; Y. Kryvoi, “Enforcing Labor Rights Against Multinational Corporate Groups in Europe”, *Industrial Relations: A Journal of Economy and Society*, Vol. 46, No. 2, p. 366-386, April 2007.

²²² CJEC, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, 13 July 2000, C-412/98, Rec., p. I- 5940, §§ 57 and 59 (The plaintiff was domiciled in Canada).

The concept of “domicile” for legal persons

A company or legal person’s domicile is considered to be **its registered office, central administration or principal place of business** (Art. 60 of the regulation²²³). The Court of Justice of the European Union independently interprets these concepts.²²⁴

Thus, under Article 2§1 of Regulation 44/2001, a foreign person, for example a worker whose rights have been violated by a multinational corporation, may bring action in the court of a Member State if the principal place of business, registered office or central administration of the parent company in question is located in that court’s territorial jurisdiction.

On this legal basis,²²⁵ between 1997 and 1999, South African workers and citizens filed several claims with English courts against Cape plc, a British company which worked with asbestos in South Africa.²²⁶

b) The court with jurisdiction is that of the place where the harmful event occurred or may occur

Article 5§3 of Regulation 44/2001 allows for a person domiciled in one Member State to be sued in another Member State for tort, delict or quasi-delict²²⁷ in the courts of the place where the harmful event occurred or may occur.²²⁸

The concept of “place where the harmful event occurred”

The Court of Justice of the European Union has ruled that the place where the harmful event occurred can be understood in two ways.

- **The place where the damage itself occurred**, or
- **The place of the event giving rise to damage**.²²⁹ For example, if a board of directors makes a decision in a state other than that in which the corporation is

223 Article 53 of the Brussels Convention considers the domicile of a company or legal person to be its headquarters, as defined by the rules of private international law in the forum court.

224 EC Regulation 44/2001, *op.cit.*

225 In reality, Regulation 44/2001 replaced Article 2 of the Brussels Convention.

226 *Lubbe et al. v. Cape plc* (CA 30 July 1998) (1998) C.L.C. 1559; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd’s Rep. 139; *Rachel Lubbe et al. v. Cape plc* (CA 29 Nov. 1999) (2000) Lloyd’s Rep. 139.

227 CJEC, *Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst et Cie, et autres*, 27 September 1988, 189/87, Rec., 1988, p. 5579, §17; CJEC, *Réunion européenne SA e.a. v. Spliethoff’s Bevrachtungskantoor BV et Capitaine commandant le navire “Alblasgracht V002”*, 27 October 1998, C-51/97, Rec., 1998, p. I-6511, §22: The Court of Justice of the European Communities has ruled that the terms “delict and quasi-delict” should be defined independently and that they comprise “all actions seeking to establish the liability of a defendant not contractually bound according to Article 5§1”.

228 Regulation 44/2001 somewhat modifies the terms of Article 5§3 by replacing the word “defendant” with “any person” and by adding to the place where the harmful event occurred “or may occur”.

229 See CJEC, *Sté Bier et Fond. Rheinwater v. Mines de Potasse d’Alsace*, Rec., 30 November 1976, 76.1735; CJEC, *Dumez France v. Helaba*, 1990, C-220/88; CJEC, *Réunion européenne, op.cit.*, 1998.

domiciled, and that decision causes the harm for which the plaintiff seeks redress, the claim may be brought in the state where the decision was made.²³⁰

The concept of “place where the harmful event may occur”

To allow preventive legal action, Article 5§3 of Regulation 44/2001 grants jurisdiction to the place where a harmful event may occur. The admissibility of such action depends, however, on the law of the forum court. The potential risk must also have some degree of materiality (the threat of the harmful event must be serious or immediate).²³¹

c) The court with jurisdiction is that of the place where a branch, agency or other establishment is located²³²

The special jurisdiction rules laid forth in Article 5§5 of Regulation 44/2001 allow **a defendant domiciled in a Member State to be sued in the courts of another Member State, provided a branch, agency or any other establishment is located in the other Member State.** Two conditions must be met: 1) the claim must concern operations (see below), 2) the parent company must be located in an EU Member State.

The concepts of “branch, agency or other establishment”

The Court of Justice has held that the terms “branch, agency or other establishment” do not refer to specific legal situations, but imply:

- **The secondary establishment’s dependence** on the parent company, and
- **The secondary establishment’s involvement** in the conclusion of business transacted.²³³

²³⁰ O. De Schutter, *The Role of EU Law in Combating International Crimes*, report prepared as part of the International Commission of Jurist’s project: “Corporate Complicity in International Crimes”, p. 34.

²³¹ G. Tritton, *Intellectual property in Europe*, 2 ed., Sweet & Maxwell, London, 2002, p. 971-975; CJEC, *Fiona Shevill, Ixora Trading Inc, Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, 7 March 1995, C-68/93, Rec. C.J.C.E., 1993, p. 415 and following, § 24.

²³² Deriving from Article 2§1, these special rules of jurisdiction allow a plaintiff to withdraw action from the state of the defendant’s domicile and bring it before the court of another Contracting State (See CJEC, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, *op.cit.*, §34), provided there is a substantial link between the dispute and the court called upon to hear the case (*CJEC SAR Schotte GmbH v. Parfums Rothschild SARL*, 9 December 1987, 218/86, Rec., p. 4905). The special rules are applicable to companies domiciled in Denmark according to the relevant provisions of the Brussels Convention and also to companies domiciled in Switzerland, Norway and Iceland (the rules are applicable to companies domiciled in Finland and Sweden only for actions brought before 1 March 2002) according to the Lugano Convention (convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano 16 September 1988, OJ, L319, p. 9).

²³³ CJEC, *A. De Bloos SPRL v. Société en commandite par actions Bouyer*, 6 October 1976, 14/76, Rec., 1976, p. 1509, §21; CJEC, *Somafer SA v. Saar-Ferngas AG*, 22 November 1978, 33/78, Rec., 1978, p. 2193, §12; CJEC, *Blanckaert et Willems PVBA v. Luise Trost*, 18 March 1981, 139/80, Rec., 1981, p. 819, §13 (Excluding independent commercial agents, who, while representing the company abroad, “merely transmits orders to the parent undertaking, without being involved in either, their terms or their execution”).

According to the Court’s rulings, the place of business may enjoy legal personhood provided it has the appearance of permanency and acts publicly as an **extension** of the parent body domiciled in another Member State. Third parties do not have to deal directly with the parent company headquartered in another Member State, but can transact business at the place of business constituting the extension (branch, agency or other establishment). A legal connection is if necessary established between the parent company and the third party.

The concept of “disputes arising out of operations”

Disputes may involve rights, contractual or non-contractual obligations **entered into by the place of business (branch or agency) on behalf of the parent company. The execution of these obligations may take place in the Member State where the secondary establishment is registered, or in another Member State.**²³⁴ The dispute can also relate to rights, contractual or non-contractual obligations resulting from **activities the place of business itself has assumed²³⁵ in relation to its own management.** This applies, for example, to a dispute arising out of employment contracts made by the place of business.²³⁶

To illustrate, consider a parent company domiciled in an EU Member State with a subsidiary in another EU Member State operating a refinery on behalf of the parent company. The subsidiary contaminates water due to faulty operation at the plant. Under Article 5§5, victims can bring action against the parent company in the subsidiary’s jurisdiction.

Situations in which a branch’s activities cause a tort to occur outside of the European Union are not covered under Article 5§5, but under Article 5§3, discussed above.

3. Two additional grounds for jurisdiction

Regulation 44/2001 provides two additional grounds for jurisdiction:

Nexus between claims

If a lawsuit involves several companies domiciled in different Member States, Article 6§1 of Regulation 44/2001 allows the parties to be **sued in a single jurisdiction, provided that one of the companies is domiciled there, and provided there is a nexus between the claims.**²³⁷ It is thus possible to bring joint action

²³⁴ CJEC, *Lloyd’s Register of Shipping v. Société Campenon Bernard*, 6 April 1995, 439/93, Rec., 1995, p. I-981, §22; H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano. Compétence internationale, reconnaissance et exécution des jugements en Europe*, 2^e éd., L.G.D.J., Paris, 1996, No. 211, p. 158-159.

²³⁵ CJEC, *Somafer, op.cit.*, 33/78, §13.

²³⁶ *Ibid.*

²³⁷ This condition resulting from Court rulings (CJEC, *Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst et Cie, et autres, op.cit.*, p. 5584, §13; H. Gaudemet-Tallon, *op.cit.*, 1996, No. 222 to 224, p. 165-166), was incorporated as Article 6§1 of Regulation 44/2001.

against a parent company and its subsidiary for harm caused by their activities abroad, provided they are both domiciled in the EU. It is also possible to bring joint action against two separate European multinationals operating a joint venture in a third country.

Interim measures

Article 24, in turn, **allows plaintiffs to request Member State courts to grant interim measures**,²³⁸ even when another contracting state has jurisdiction to hear the case, provided there exists “a real link between the relief sought and the territorial jurisdiction of the Contracting State’s forum court”.²³⁹

“COLLECTIVE INTEREST” LAWSUITS IN EUROPE

In Europe, generally, only alleged victims or their assigns may bring civil action. With the exception of certain countries, including the UK, the “class action” suits found in the American system are generally not accepted (See Chapter I.A.2).

In Europe, “collective interest” lawsuits are admissible only in cases clearly enumerated in law.

- In Belgium, “collective interest” lawsuits are permitted for acts of racism, discrimination or damage to the environment.
- In France, associations whose registered purpose is to combat crimes against humanity or war crimes may bring civil action through “collective interest” lawsuits, provided the association has been registered at least five years. Victims may then join the suit as a civil party.²⁴⁰
- In the Netherlands, the Civil Code permits NGOs to bring action as soon as a human rights violation undermines the public interest, as promoted under the civil code’s statutes.²⁴¹

In 2013 the European Commission Issued a recommendation on common principles of injunctive and compensatory collective redress mechanisms in the Member States for cases of violations or rights protected under EU law²⁴². The recommendation establishes specific standards for collective

²³⁸ CJEC, *M. Reichert, H.H. Reichert and I. Kockler v. Dresdner Bank AG*, 26 March 1992, C-261/90, *Rec.*, 1992, p. I-2149, §34: “Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.”

²³⁹ CJEC, *Van Ude Maritime BV v. Kommanditgesellschaft in Firma Deco Line ea*, 17 November 1998, 391/95, *Rec.*, 1998, p. I-7135; CJEC, *Hans-Hermann Mietz v. Intership Yachting Sneek BV*, 27 April 1999, C-99/96, *Rec.*, 1999, p. I-2314, §43.

²⁴⁰ French code of criminal procedure, Art. 2-4.

²⁴¹ Nederlandse Burgerlijke Wetboek (BW), art. 3:305a(1). N. Jägers and M-J. Van Der Heijden, “Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands”, *Brook. J. Int’l L.L.*, 2008, vol. 33, p. 849.

²⁴² European Commission, *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, 2013/396/EU, 11 June 2013.

redress mechanisms Member States should respect, including elements for cross-border cases.²⁴³ Although it is not binding, it should be reviewed by the Commission by 2017.²⁴⁴ There are some interesting examples of collective redress regarding standing of environmental NGOs, such as in France.²⁴⁵

What are the obstacles to an EU Member State court recognizing jurisdiction?

1. The doctrine of *forum non conveniens*

The applicability of *forum non conveniens* in the context of Regulation 44/2001 (or the Brussels Convention of 1968) and its implied harmonisation of legal jurisdiction is a controversial issue widely discussed in UK and Irish courts.

a) Non-E.U.-domiciled corporations

When a company domiciled outside the EU faces legal action, a situation not expressly addressed under European law, Article 4§1 of Regulation 44/2001 **refers to the national law of the Member State forum court, including with regards to *forum non conveniens*, if applicable.**²⁴⁶

b) E.U.-domiciled corporations

Forum non conveniens is more problematic when a case before an EU Member State court meets all conditions for the application of Regulation 44/2001, but involves ties outside the E.U., **in the sense that the appropriate alternative forum is located in a third country outside the E.U.'s jurisdiction.**

→ Re Harrods (Buenos Aires) Ltd.²⁴⁷

This case concerns a UK-domiciled company whose activities took place entirely in Argentina. Although liable under Article 2 of the Brussels Convention (the defendant's domi-

²⁴³ *Ibid.*, §17-18

²⁴⁴ For detailed info on the collective redress mechanisms see: British Institute for International and Comparative Law, *Report II on collective redress*, November 2014, available at: www.collectiveredress.org

²⁴⁵ British Institute of International Law and Comparative Law's mapping of collective redress in Europe in collaboration with several firms: www.collectiveredress.org/collective-redress/

²⁴⁶ A. Nuyts, *op.cit.*, p. 246 and following; I.D.I., "The principles for determining when the use of the doctrine of *forum non conveniens* and anti-suit injunctions is appropriate - Preliminary Exposition and Questionnaire (November 2000)", *Ann.*, vol. 70, t.I, 2002-2003, p. 30.

²⁴⁷ *Re Harrods (Buenos Aires) Ltd* (1991) 4 All ER 334, (1992) Ch. 72 (C.A.).

cile), the Court of Appeal in London held that such a basis for jurisdiction did not preclude the use of *forum non conveniens* to refer the case to Argentina,²⁴⁸ a country outside the E.U. Although the court also required **the absence of ties to any other Member State**, subsequent case law has omitted this condition, applying the *Harrods* precedent to disputes involving contact with several European states, including situations in which “the court of any such state has jurisdiction under the Brussels Convention to hear the case.”²⁴⁹

Disagreement over the compatibility of the *Harrods* precedent with the Brussels Convention and Regulation 44/2001 is all the more difficult because many multinational corporations are domiciled in the United Kingdom. *Lubbe v. Cape plc* illustrates the issue.

➔ **Lubbe et al. v. Cape plc**

Filed in February 1997, the suit sought damages from the UK-domiciled company Cape plc in relation to its work with asbestos, carried out in part in South Africa.

The plaintiffs, South African nationals, alleged serious health problems resulting from their occupations or the location of their homes near the factory in question. They argued that the parent company had failed to act with general care and to exercise due diligence in monitoring the factory’s activities, and was thus responsible for the problems. English courts established jurisdiction in both procedures under Article 2§1 of the Brussels Convention.

Discussion between the parties focused on the application of *forum non conveniens*. The company argued that South African courts were a more appropriate forum, because the damage and the event giving rise to damage took place in South Africa.

After lengthy proceedings,²⁵⁰ the House of Lords rejected the application of *forum non conveniens*, and refused to stay British proceedings in favour of South African jurisdictions. Although the injury, victims and evidence were located in South Africa, the victims could not receive legal aid there.

²⁴⁸ Unlike in the US, the application of *forum non conveniens* does not terminate proceedings, but allows the court to stay the case. If necessary (e.g. if justice is denied abroad), the victim may request a lifting of the stay, see A. Nuyts, *op.cit.*, p.462.

²⁴⁹ A. Nuyts, *op.cit.*, p. 257-258; S. Beernaert and A. Coibion, “La doctrine du forum (non) conveniens - Réconciliation avec le texte de la Convention de Bruxelles”, *Journal des Tribunaux*, 2000, p. 416; I.D.I., *op.cit.*, p. 31.

²⁵⁰ See *Lubbe et al. v. Cape plc*, *op.cit.*, 1998; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd’s Rep. 139; *Rachel Lubbe et al. v. Cape plc*, *op.cit.*, 2000. See also R. Meeran, “Liability of Multinational Corporations : A Critical Stage in the UK”, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague / London / Boston, 2000, p. 258.

In *Ngcobo v. Thor* and *Sithole v. Thor*, British courts applied *forum non conveniens* to hear another case involving the activities of a British company's subsidiary abroad.

➔ **Ngcobo v. Thor and Sithole v. Thor**²⁵¹

In 1994 and 1998, two employees of a South African subsidiary filed separate suits in the High Court of Justice against Thor Chemicals (UK) Ltd, Thor Chemical Holdings Ltd, and John Desmond Cowley, CEO of Thor Chemicals Ltd. In the course of their work for the South African subsidiary, which specialized in the production and handling of mercury, the two employees were exposed to excessive levels of mercury and suffered a variety of neurological problems. The plaintiffs argued that the British parent company had been negligent in implementing and monitoring its dangerous operations in South Africa, and that it had not adopted the measures necessary to prevent such harm.

In each of the two cases, British courts rejected the companies' calls for the application of *forum non conveniens*. During the trial of *Ngcobo v. Thor*, the courts ruled that a link existed between the negligence of the parent company in England and the harm caused in South Africa. The courts also cited the risk of a miscarriage of justice. Under South African law, the Workmen's Compensation Act 1941 (SA), granted compensation to victims of work related accidents (who were rendered unable to perform their jobs) and subsequently barred them from suing their employer in court. If victims were able to obtain financial compensation, barring them from pursuing further justice, the amount was ridiculous. Both cases settled with compensation going to the victims.

In *Lubbe v. Cape plc*, the House of Lords did not expressly rule on the question of compatibility between *forum non conveniens* and the Brussels Convention. It was not until the European Court of Justice's (ECJ) 1 March 2005 decision in *Andrew Owusu v. N.B. Jackson* that ***forum non conveniens* theory was declared incompatible with the Brussels Convention of 1968**.²⁵² The case pitted a British national residing in the UK against the company N.B. Jackson, also domiciled in the UK, for harm caused in Jamaica. The decision is in line with previous ECJ rulings.²⁵³ In theory, EU Member States could no longer invoke *forum non conveniens* to dismiss a case from their jurisdiction when the company involved is domiciled in the E.U., without facing the risk of being sentenced by the ECJ.

²⁵¹ *Ngcobo v. Thor Chemicals Holdings* [1995] TLR 579; *Sithole v. Thor Chemicals Holdings* [1999] TLR 100.

²⁵² CJEC, *Andrew Owusu v. N.B. Jackson, agissant sous le nom commercial "Villa Holidays Bal-Inn Villas"* e.a., 1 March 2005, C-281/02, 2005, C-106/2 "The Convention of 27 September 1968 (...) precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting state is in issue or the proceedings have no connecting factors to any other Contracting State."

²⁵³ See, for example ECJ, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, *op.cit.*

2. Immunity

Because Regulation 44/2001 does not address immunities, they are governed by the national laws of individual states and are thus likely to affect civil suits against multinational companies.

For example, in the UK, immunity applies not only to states, but also to their employees and agents, even when acting outside their official duties.²⁵⁴ A state enterprise acting as an agent of the state could therefore be granted immunity when faced with a civil suit.

The question of a foreign state's immunity from jurisdiction has been raised in French courts in a case against Veolia Transport, Alstom and Alstom Transport. The courts were able to circumvent this obstacle by arguing that the state (in this case Israel) did not exercise sovereignty over the territories in which the events in question took place.

➔ The Jerusalem tramway case

On 17th July 2005, the Israeli government signed a contract with several companies, including the French companies Veolia and Alstom, for the construction and operation of a tramline. The tram is to connect West Jerusalem (Israeli) to two Jewish settlements in the West Bank via East Jerusalem (Palestinian). The companies obtained a thirty-year operational contract.

The Association France Palestine Solidarité (AFPS) lodged two complaints with the High Court of Nanterre, one against the Veolia Transport and Alstom, and the other against Alstom Transport. The Palestinian Liberation Organisation (PLO) joined AFPS in the suit. Initially, the first two companies were ordered to hand over copies of the entire concession contract and its annexes to the plaintiffs. Releasing those documents revealed Alstom Transport's involvement in the project in question, leading to the second complaint.

AFPS and the PLO argue that the contract is illegal, and seek its annulment and a halt to the companies' ongoing activities under the agreement. The plaintiffs argue that the contract was entered into in violation of national and international law and that it violates the Fourth Geneva Convention of 1949 as mentioned in UNSCR 465 of 1 March 1980. Paragraph 5 of that resolution states that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem [...] have no legal validity". The Security Council further calls upon all states to deny Israel all assistance in settling the occupied

²⁵⁴ State Immunity Act 1978, sect. 14, cited in M. Byers, "English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment", in M.T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 245.

territories. Plaintiffs also argue that the contract is contrary to French public policy and therefore null and void under Articles 6, 1131 and 1133 of the French Civil Code.

The defence has argued that French courts do not have jurisdiction and the complaints are thus inadmissible, **particularly on the basis of the State of Israel's immunity from jurisdiction**. The high court issued its decision on 15th April 2009, ruling that only the AFPS was admissible considering that the PLO had no cause of action. The court also accepted material and territorial jurisdiction over the case.

- On the one hand, the companies facing suit could not claim the State of Israel's immunity from jurisdiction. The courts ruled that **not only was the State of Israel not party to the proceedings, but that Israel did not qualify as a sovereign state**. The courts ruled that Israel is an “**occupying power** of the section of the West Bank where the disputed tramway was built and operated, a section recognized by the international community and the International Court of Justice as Palestinian territory” (free translation).
- On the other hand, **the companies were domiciled in France**. The French courts based their decision on Article 6§1 of the European Convention on Human Rights which recognizes the **right to an independent and impartial tribunal**. They expressed their desire to ensure the plaintiffs' free access to justice. The risk of a miscarriage of justice, inherent in disputes of this nature, bolstered the French courts' claim to jurisdiction. To quote the court, “It is well-established in jurisprudence that **the risk of a miscarriage of justice is a criterion for French courts accepting jurisdiction when the dispute has ties with France**” (free translation). Such is the case here, where the companies facing suit are domiciled in France, and specially since 46 of Jerusalem tramway's railcars are produced in french soil by five Alstom Transport's plants.

Alstom and Alstom Transport appealed the decision regarding jurisdiction but on 17th December 2009, the Versailles Court of Appeal upheld the trial court's ruling. On 30th May 2011, the High Court of Nanterre dismissed a petition by the France-Palestine Solidarity Association to nullify under French law contracts signed by French transports Veolia and Alstom. The Nanterre court found that under French law these particular international law provisions have no direct effect on private individuals and companies who are not a party to the conflict. Under French law, only states which signed the Geneva Conventions of 1949 can be regarded as being bound by the specific treaty provisions listed in AFPS's legal arguments.

What law will an EU Member State forum court apply?

On 11 July 2007, the European Parliament and the Council adopted Regulation 864/2007 (Rome II).²⁵⁵ This Regulation aims to:

- standardize rules on **conflicts of law** applicable to **non-contractual obligations**,
- Ensure that the courts of all Member States apply the same law in cross-border civil liability disputes, and
- thus facilitate the mutual recognition of legal rulings in the European Union.

Rome II is **applicable and binding**, since the 11th January 2009, **across all EU Member States except Denmark**.²⁵⁶ It is prudent therefore to describe the system in place before Rome II entered into force and the changes brought by Regulation 864/2007.

1. The law applicable to events giving rise to damage occurring prior to 11 January 2009

a) The law of the place where the event giving rise to damage was committed (*Lex loci delicti commissi*): The generally accepted solution

The rule

Regulation 44/2001 does not determine the law applicable to the merits of the case. Each State's rules of private international law determine the applicable law. There is no clear legal test. Therefore it is up to the courts to interpret the connecting criterion,²⁵⁷ namely the law of the place where the event giving rise to damage occurs (*lex loci delicti commissi*). Within Member States, the notion of *Lex loci delicti* is subject to two interpretations:

- The **law of the place where the damage occurred**, in this case, the foreign law will apply, or
- The **law of the place where the causal behaviour occurred**, in this case, the law of an EU Member State will apply.

Our situation involves a multinational company domiciled in the European Union, which either a) makes direct decisions about its business conducted abroad, causing harm to an employee or member of the local community, or b) without planning the action causing harm, and knowingly or wilfully ignoring it, fails to take preventative measures to avoid harm. According to the criterion the court selects, either the law

²⁵⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II), *OJ*, 11 July 2007, p. L 199/40.

²⁵⁶ *Ibid.*, art. 32.

²⁵⁷ F. Rigaux and M. Fallon, *Droit international privé*, Larcier, Bruxelles, 2005, No. 1531, p.700 (the authors suggest applying the law of the place where the perpetrator acted). See also G. Betlem, “*Transnational litigation against multinationals before Dutch courts*”, in M.T. Kamminga and S. Zia-Zarif (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 290.

of the place where the damage occurred or the law of the place where the causal behaviour occurred will be applied.

Thus, applying *lex loci delicti commissi* involves several uncertainties regarding:

- The implementation of the connecting criterion (*lex loci delicti*) due to **the variety of possible interpretations**,
- The **status of the plaintiff’s alleged facts** under foreign legislation, and
- The **applicable law**, for example, if the components of the causal action are geographically disparate, occurring in several different countries (complex torts). This is the case for multinational companies whose policies are decided by the parent company in several EU Member States, and implemented in a third country.

The international public policy exception

The court may cite the international public policy exception to reject the application of a designated foreign law when, for example, the law denies victims the right to a remedy, the right to compensation or when it constitutes a flagrant violation of international human rights law.²⁵⁸

In addition to jurisdiction, EU Member States may also find that the application of a foreign law that would cause a serious human rights violation constitutes a **violation of the Member State’s obligations** under the European Convention on Human Rights.²⁵⁹ Where a foreign law runs contrary to international public order, **a court may choose to apply its own law to the case**. In addition to the abovementioned situation, the forum court of an EU Member State may apply its law in the following situations:

- When the injurious activities were **planned and initiated** by a company on the territory of the forum court,
- When the causal event of the violation is the company’s **lack of supervision** vis-à-vis its foreign operations and their consequences, or
- When **the parties to the dispute opt** for the application of the law of the EU.

b) The freedom of choice of contracting parties

By common agreement, the **parties may also directly designate** the law applicable to the dispute unless the law selected runs contrary to the international public policy exception.

²⁵⁸ See *Oppenheimer v. Cattermole* (1976) AC 249.

²⁵⁹ O. De Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law”, *op.cit.*, p. 40.

2. The law applicable to events giving rise to damage occurring after 11 January 2009

Adopted on 11 July 2007²⁶⁰ to address the abovementioned legal uncertainty, Rome II applies to suits brought for torts occurring after the regulation’s entry into force on 11 January 2009.²⁶¹ Non-contractual obligations arising from violations of privacy and rights relating to personality (Article I), however, do not fall within the scope of the regulation and continue to be governed by the conflict rules of the different EU Member States.

a) General rule

Under the general rule laid forth in **Article 4 of Rome II**, the law applicable to non-contractual obligation shall be:

- (1) In principle, the **law of the State where the direct damage occurs** (*lex loci damni*), regardless of the place where the event giving rise to damage occurs and regardless of where the indirect consequences of the event occur, **even when the applicable law is not that of a Member State**,
- (2) However, when both the injured party and the person liable are **habitual residents of the same country** at the time when the damage occurs, **the law of that country shall apply**,
- (3) Otherwise, if the sum of the circumstances indicates that the tort/delict is **manifestly more closely connected with a country** other than those referred to in paragraphs 1 or 2, **the law of that country shall apply**. A manifestly closer connection with another country could consist of a pre-existing relationship between the parties, such as a contract, which presents a close connection with the tort in question.

First it can be difficult and sometimes impossible to determine with accuracy the place where the direct damage occurred (*lex loci damni*). Furthermore, the victim may be more familiar with the law of his country of residence or that of the location of the event giving rise to damage (see the specific environmental situation below) than with the law of the place where the damage occurs, i.e. the law of the place where the effects of the violation were felt. Finally, determining the direct and indirect consequences of the harmful event, as mentioned in Article 4(1) of the regulation, presents a certain difficulty of interpretation because direct damage may occur in several states at once.²⁶²

²⁶⁰ Regulation (EC) 864/2007, *op.cit.* This regulation completes the Rome Convention of 1980 on the law applicable to contractual obligations.

²⁶¹ For the purposes of the regulation, the term “Member State” refers to all Member States except Denmark (Article I(4)).

²⁶² Oxford Pro Bono Publico, *op.cit.*, p. 120 and following.

A specific situation: environmental damage

In a non-contractual obligation arising out of **environmental damage or subsequent harm** to persons or property, the applicable law is that designated in Article 4(1), **the law of the place where the damage occurred**, unless the plaintiff seeking compensation selects **the law of the place where the event giving rise to damage occurred**. This specific situation is defined in Article 7 of Regulation 864/2007. It is important to routinely verify that there is no specific agreement on the damages in question, such as the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

A specific situation: Product liability

When harm is caused by a product (Article 5 of Regulation 864/2007), in principle, the applicable law is that of the injured person's habitual residence, the law of the place where the product was purchased, or the law of the place where the damage occurred, if the product was marketed in that country.

➔ *Trafigura Beheer BV & Trafigura Limited in Côte d'Ivoire*²⁶³

These cases began on the night of 19 to 20 August 2006 when the Probo Koala, chartered by Trafigura Ltd., the UK subsidiary of the Dutch company Trafigura, discharged 500 tons of toxic waste into several landfills in Abidjan, Côte d'Ivoire. Puma Energy, an Ivorian subsidiary of Trafigura, had contracted with Société Tommy, an alleged Ivorian shell company registered one month before the Probo Koala's arrival in Abidjan, to handle the waste. The Probo Koala had docked earlier at the port of Amsterdam, where Trafigura refused to pay the additional costs Dutch authorities charged to dispose of the toxic waste. After being exposed to fumes from the waste in Abidjan, more than 100,000 people sought medical care, creating a major health crisis in Côte d'Ivoire. For the most part, patients suffered from nausea, headaches, skin sores and nosebleeds. Official Ivorian sources say that 16 people died after inhaling or otherwise coming into contact with the toxic products.

According to CIAPOL (Center for Anti-Pollution Control in the Ivory Coast) the waste contained at least three substances: hydrogen sulphide, H₂S and mercaptans. The test identified by-product a large amount of sulphur resulting from H₂S refinery in the waste which was potentially dangerous. A Rotterdam laboratory which conducted tests on several samples of waste dumped in Abidjan identified no toxic substances. Doubts remain about the authenticity of the results, however, because the samples were neither sealed nor marked.

On 12th February 2007, Trafigura settled with the Ivorian government. While denying liability for the disaster and insisting that it did not deserve to pay damages, Trafigura agreed to build a waste treatment plant, contribute to health care for the victims and pay U.S.D 198 million to create a victim compensation fund in exchange for a promise from the Ivorian government not to sue the company. Following the settlement, the Ivorian government

²⁶³ This case summary has been largely extracted from the site *Business & Human Rights*, "Case profile: Trafigura Lawsuits (re Côte d'Ivoire)", www.business-humanrights.org

released Trafigura and Puma Energy representatives who had been arrested and imprisoned after arriving in Côte d’Ivoire to ascertain the incident.²⁶⁴

In November 2006, the High Court of Justice in London agreed to hear a suit against Trafigura brought by some 30,000 victims, represented by the law office of Leigh Day & Co.

The plaintiffs qualified the chemicals defendants as hazardous waste under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The European Union has indeed banned the export of hazardous waste from its Member States to developing countries. According to the plaintiffs, Trafigura brought the untreated waste to Côte d’Ivoire knowing the lack of facilities to treat the waste on site.

Trafigura has denied the toxicity of the chemicals and rejected all liability, arguing that the waste resulted from the normal operation of a ship. The company emphasized that it had entrusted the disputed event to Société Tommy and that there was no reason to doubt that company’s abilities. According to Trafigura’s findings, only 69 individuals actually suffered physical problems. On 23 March 2009, after Trafigura attempted to persuade victims to alter their statements, the court ordered the company to end contact with them.

In September 2009, the parties to the UK civil proceedings reached a settlement whereby Trafigura agreed to pay each of the 30,000 applicants the sum of U.S.D 1,500. In return, the victims acknowledged that no link had been established between exposure to the discharged chemicals and the various acute and chronic illnesses they have documented. The settlement also included a final waiver of all claims against Trafigura. Trafigura held that its compensation to the victims is illustrative of its social and economic commitment in the region, and is in no way a recognition of guilt. In a press release, the company insisted that, in the worst-case scenario, the *Probo Koala* could “only have caused a range of short term, ‘flu like’ symptoms and anxiety”.²⁶⁵

In December 2009, BBC London was ordered to pay Trafigura the sum of GBP 28,000 in damages after Trafigura filed a libel suit. BBC London had accused Trafigura of causing the health problems which occurred following the discharge of toxic waste in Abidjan. The BBC retracted its allegations and had to apologize on the air.

²⁶⁴ FIDH, “Affaire des déchets toxiques: une transaction au détriment de la justice et de la réparation pour les victimes”, press release from 16 February 2007, www.fidh.org. FIDH and its member organisations in Côte d’Ivoire, LIDHO and MIDH, denounce this “transaction to the detriment of justice [...] which can in no way be accepted as fair compensation for the injuries the victims suffered. This calls for the establishment of liability, a true assessment of the wrongs suffered, redress for the victims and an understanding of the future consequences for humans and the environment”.

²⁶⁵ FIDH and its member organisations in Côte d’Ivoire, LIDHO MIDH, “L’accord intervenu à Londres entre Trafigura et près de 31 000 victimes ivoiriennes ne doit pas occulter la responsabilité de Trafigura!”, Press release from 25 September 2009, www.fidh.org

Recurrent complications with material compensation

At the request of Claude Gohourou, the head of a group of local associations called The National Coordination of Victims of Toxic Waste (CNVDT), in late October 2009, Ivorian courts froze the bank accounts into which the victims' compensation had been transferred. On 4th November 2009, the High Court of Justice in London expressed "profound concern" that the money was not being redistributed. On 22nd January 2010, the Court of Appeal in Abidjan unfroze the victims' funds, but ordered the money transferred to the account of Claude Gohourou's group. On 14th February 2010, the victims' law firm, Leigh Day & Co, signed an agreement with Claude Gohourou granting Leigh Day & Co control of the funds to ensure that all the victims effectively obtain redress. Claude Gohourou insisted that the terms of the agreement remain confidential. Although the money should have been transferred to the victims, by in mid-March 2010, the process is laborious because complications continue to crop up.

Criminal Procedures

This case has been and continues to be the subject of criminal proceedings. In June 2007, FIDH's Legal Action Group filed a suit in France against two Trafigura group executives. The complaint was dismissed. In Côte d'Ivoire, Trafigura and its Ivorian subsidiary, Puma Energy, have not been fully prosecuted as proceedings against them were stayed at trial. The complaint filed in Côte d'Ivoire, however, did result in the September and October 2008 criminal trial of Société Tommy representatives involved in the disaster.²⁶⁶ Criminal proceedings against Trafigura are pending in Dutch courts, as discussed in the corporate criminal liability section of this guide.

b) Exceptions

The "Rome II" regulation also provides certain exceptions:

Waiver decided by the parties

The parties may select the applicable law:

- By an agreement following the event giving rise to damage, or
- In situations where all parties are pursuing commercial activities, by an agreement freely negotiated *prior* to the event giving rise to damage.

The national and international public policy exception

The legal provision designated by Rome II may be rejected by national courts if its application is manifestly incompatible with the public policy of the forum (Article 26 of the regulation). Depending on the circumstances of the case and the statute in question, this exception may serve plaintiffs and/or defendants to a

²⁶⁶ FIDH and its member organisations in Côte d'Ivoire, LIDHO and MIDH, and in France, LDH, Greenpeace and Sherpa, "La Cour d'assises d'Abidjan rend son verdict, en l'absence des principaux responsables", Press release from 28 October 2008, www.fidh.org

suit.²⁶⁷ The European Court of Justice may also be asked to rule on interpretations of this exception.²⁶⁸

Because of the many exceptions and exemptions available, it is difficult to predict which law is applicable to a dispute. It appears, however, that the law of the place where the damage occurs, while constituting the general rule, applies in practice only when it is not manifestly inconsistent with the public policy of the state which should have jurisdiction (Article 26 of Rome II).²⁶⁹

c) Scope of the applicable law

Article 15 of Rome II states that the law applicable to non-contractual obligations under the regulation shall address:

- Conditions and extent of liability, including determining who may be held liable,²⁷⁰
- Grounds for exemptions, limitations and the division of liability,
- The existence, nature and assessment of damages or relief sought,
- Within the limits of the powers granted to the court, the actions a court may take to ensure the prevention, cessation or to provide compensation,
- The transferability of the right to reparation, including through inheritance,
- Persons entitled to compensation for harm suffered personally,
- Vicarious liability, and
- The rules for the prescription and extinction of legal actions.

Applying Community regulations: France and the UK

➔ The case of France

According to the French Code of Civil Procedure, in litigations relating to non-contractual obligations, plaintiffs may seize jurisdiction:

- Where the defendant lives (the place where the company is established or domiciled),²⁷¹
- Where the event giving rise to damage occurred, or
- Where the damage was suffered.²⁷²

²⁶⁷ Oxford Pro Bono Publico, *op.cit.*, p. 124 “Rules permitting the awarding of non-compensatory punitive damages that are excessive in relation to the circumstances of the case and to the law of the forum may be held to be manifestly in breach of the public policy of the forum”.

²⁶⁸ For more on the public policy exception in the E.U., see Oxford Pro Bono Publico, *op.cit.*, p. 116 and following.

²⁶⁹ Oxford Pro Bono Publico, *op.cit.*, p. 124.

²⁷⁰ To evaluate the conduct of a person accused of being liable, Article 17 of the regulation states that the “rules of safety and conduct in force at the place and time of the event giving rise to liability” are to be considered. This provision should be clarified by national courts and the Court of Justice. For more, see Pro Bono Publico Oxford, *op.cit.*, p. 122.

²⁷¹ French Code of Civil Procedure Article 42 §1, for the domicile of companies see article 43 of the same code.

²⁷² French Code of Civil Procedure, Article 46§1 & 3.

Any foreign victim of a human rights violation committed by a French company abroad may address the French courts provided the company is domiciled in France. The victim enjoys the same jurisdictional grounds as those designated in Regulation 44/2001. In addition, the doctrines of *forum non conveniens*, act of state and political question found in the US legal system do not apply in France.

Under Rome II, the law applicable to transnational tort litigation (for events giving rise to damage occurring on or after 11 January 2009) is the law of the place in which the direct damage occurred. A foreign victim who brings action against a French company for harm suffered abroad may not benefit from French law. In effect, the French forum court will apply the law of the place the damage occurred, i.e. the foreign law. Most often, however, when victims bring action outside the jurisdiction of their country, they seek the benefit of a more flexible foreign law which will protect the victims' right to compensation. French courts cannot guarantee this unless exceptions to the principle of *lex loci damni* bring the case under French law.

France's Highest Court of Justice, the Court of Cassation has, however, ruled that foreign laws not conforming to the "principles of universal justice considered in French public opinion as being of absolute international value"²⁷³ must be rejected. This condition is unclear and it remains to be seen whether future French courts will opt to apply French law when an otherwise applicable foreign law does not offer essential guarantees of the right to compensation.

➔ The case of the United Kingdom

Regulation 44/2001 has applied to all Member States since 2007. The British legal system, however, presents several peculiarities. In determining jurisdiction in cases where one party is domiciled outside of the E.U., British courts consider the doctrine of *forum non conveniens*, despite the ECJ's interpretation (see Chapter II.B). British courts have ruled that the regulation does not apply unless the dispute involves a link with an EU Member State. A court may also accept the act of state and political question doctrines.

Since 11 January 2009, Rome II has been directly applicable to all Member States, including the UK. However, on 18th November 2008, the British Parliament adopted a law, entered into force on 11th January 2009, which brought UK law into compliance with the provisions of European law, and harmonized (in some cases expanded), the conflict rules between England, Wales, Scotland, Northern Ireland and Gibraltar. With regard to events giving rise to damage occurring on or after 11th January 2009, UK courts must now refer to the provisions of Rome II. 'Similar remarks to those of France can be made here. For events giving rise to

²⁷³ Cass. fr., ch. Civ., *Lautour*, 25 May 1948.

damage occurring prior to 11 January 2009, case law²⁷⁴ indicates that British courts may reject the application of foreign law (law of the place where the damage occurs, *lex loci damni*) in favour of English Law in cases where a sufficiently close connection exists between the UK-domiciled company and the tort.



➤ A worker boils leftover scraps of chemically soaked leather trimmings. The contaminated leather is then left to dry on the ground and is eventually used to feed livestock.

© Daniel Lanteigne

²⁷⁴ *Ngcobo v. Thor, op.cit*; *Sithole v. Thor, op. cit*; *Connelly v. RTZ co. Plc*, [1998] AC 854, [1999] CLC 533. For more, see K. Sontag, “La justiciabilité des droits de l’homme à l’égard des sociétés transnationales” in *Droits économiques et droits de l’homme*, under the direction of L. Boy, J.B. Racine, F. Siirainen, Larcier, Belgium, 2009, p. 604.

CHAPTER III

The Accountability of Parent Companies for Acts Committed Abroad: “Piercing the Corporate Veil”

* * *

Clarifications

A problem often encountered when attempting to establish a multinational corporation’s liability in a country other than that in which it operates is the way these entities operate abroad. From a legal standpoint, the establishment of an international presence can occur in three ways:

- (1) The company may be **directly present in the host country**, establishing a branch or office in that country.

In this case, there is no specific problem with impunity. Whether in its country of origin (typically at its registered office or principal place of business) or in a host country, a multinational corporation’s actions or omissions are considered its own. Applying the law of the country of origin for such acts is not problematic.

- (2) The company may **create a separate legal entity, subject to the laws of the host country, but which it controls** as a majority shareholder or by selecting the subsidiary’s directors. This establishes a parent-subsidiary relationship which can take many forms and may allow the parent company to maintain strict control.
- (3) The company may develop **contractual relationships with local partners**.²⁷⁵

The accountability of a parent company for violations committed by a foreign subsidiary or other entity active in its supply chain is certainly one of the most complex legal issues in civil litigation targeting multinational companies.²⁷⁶ The parent company’s participation in the event giving rise to damage may be either direct or indirect.

²⁷⁵ O. De Schutter, “Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations”, *op.cit.*, p. 35-37.

²⁷⁶ The issues are similar in criminal procedure.

1. A parent company's direct participation in the event giving rise to damage

The parent company of the multinational corporation may **cause injury or participate directly therein**:

- By commission (the parent company takes part in the decision leading to the harm), or
- By omission (when aware of the decision, the parent company fails to act despite being able to prevent the harm).

In these cases, the parent company falls under the classical legal concept of direct liability,²⁷⁷ or joint and several liability if it acted together with another legal person, subsidiary, subcontractor or other provider. Legally, this situation poses no problem. Nevertheless, on a factual level it is difficult to prove that a parent company caused the tort or directly participated in the facts of the case.

This is true even when the entity responsible for the violation is a branch, office or agency. Because branches, offices and agencies do not have their own legal personhood, the company on which they legally depend will be held liable for the violations they commit, even if the parent company's business activities are conducted abroad. **With the exception of banks, in practice it is rare for companies to carry out direct operations abroad.** Generally, multinational corporations operate abroad through companies with separate legal personhood.

2. A parent company's indirect participation: "piercing the corporate veil"

By contrast, when the link between the parent company and the event giving rise to damage is only indirect, **the principle of legal personhood inherent in commercial law makes it difficult to hold the parent company liable** for the acts of a subsidiary or other entity in its supply chain.

While tied to the multinational corporation by an intra-company relationship (i.e. a branch) or contract (an entity within the supply chain), these entities enjoy **their own legal personhood** and are thus legally liable for their actions. **The parent company** of the multinational corporation is a separate legal person and, **with certain exceptions, cannot be charged for violations** committed by these different legal entities.

These exceptions, while rare, confusing and evolving, permit what is called **"piercing the corporate veil"**. Broadly speaking, **whether the veil can be pierced depends on the nature of the relationship between the direct perpetrator of**

²⁷⁷ On the direct liability of a multinational corporation's parent company, see P. Muchlinski, *Multinational Enterprises and the Law*, Blackwell Publishers, 1995, p. 323 and following; S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, 2004, p. 134 to 138.

the harm and the parent company of the multinational corporation. In the framework of an existing relationship between a parent company of a multinational company and its subsidiary, **“piercing the corporate veil” depends on the degree of *de jure* or *de facto* control the former exercises over the latter.**

By creating separate legal entities, the parent company establishes its relations with different entities of the group such that it escapes its legal liability. The parent company is legally separated from the policy centre and local operators. This is known as the doctrine of limited liability.²⁷⁸ Multinational corporations, however, frequently ignore the legal personhood of other companies, and often delegate activities to other entities with full knowledge of, or at least without ignoring, the conditions under which they are carried out. The legal fiction that constitutes corporate personhood enables businesses to **achieve in third countries what they could not do within the EU or the US**, in order to maximize profits and avoid liability. In determining a company’s liability for harmful acts, it is important to consider **not only the group’s economic organisation, but also the reality of its economic and professional relationships and the nature of the act.** Identifying the parent company is all the more crucial when a subsidiary’s assets are insufficient to compensate the victims. The court’s role in this regard is fundamental.

Thus, given the difficulties arising from the application of *forum non conveniens* theory and the financial imbalance between plaintiffs and defendant companies, **piercing the corporate veil is an additional obstacle** to legal action by victims of human rights violations.

US courts

In proceedings brought under the ATCA, US courts have only cursorily addressed the issue of a parent company’s liability for acts carried out by a subsidiary or other contractually-linked entity. The following analysis is based on general US case law on “piercing the corporate veil” and on existing case law under the ATCA, although to date, no trial has been brought or decided on its merits.²⁷⁹

This jurisprudence is difficult to systematise, and is based on two theories: the theory of piercing the corporate veil and the theory of agency (discussed below – see Chapter III.B.2). Neither theory provides a satisfactory treatment of the issue at hand.

²⁷⁸ R. Meeran, *op.cit.*, 2000, p. 252.

²⁷⁹ Legal reasoning on this issue differs according to the context in which it arises: personal jurisdiction (See above - personal jurisdiction) or the merits of the case (S. Joseph, *op.cit.*, p. 87, P.I. Blumberg, *op.cit.*, p. 500).

1. Piercing the corporate veil

In American jurisprudence,²⁸⁰ the theory of piercing the corporate veil derives from instrumentality doctrine (when the parent company completely dominates the other entity)²⁸¹ and alter ego doctrine (where the ownership and interests of the two entities overlap).²⁸² In practice, these theories are easily interchangeable.²⁸³

Alter ego doctrine aims to **assess the legal separation of two legal entities**. Because the conditions for alter ego doctrine are uncertain and difficult to assemble, it applies only in exceptional cases. To establish that a parent company and its subsidiary are alter egos, and therefore not actually legally separate entities, **the plaintiff in the action must demonstrate**:

- Evidence that the subsidiary does not have its own legal personhood;
- The subsidiary is used to perform fraudulent, unfair or unjust acts for the benefit of the parent company or majority shareholders, and
- A causal connection between the conduct and the injury suffered by the plaintiff.

Case studies reveal several trends:²⁸⁴

- US courts are more inclined to pierce the corporate veil with regards to individual shareholders than with corporate shareholders, and
- US courts make greater use of piercing the corporate veil in contract law cases than in tort proceedings.

Assessments of these conditions are heavily focused on facts. Basing a claim on any generalisation of the criteria used to “pierce” the corporate veil, including determination of an excessive control, provides uncertain results. As of today, the parent company’s control over its subsidiary’s daily operations seems to be the only way to pierce the corporate veil.²⁸⁵

²⁸⁰ This description is based on P.I. Blumberg, *op.cit.*, p. 304 and following. See also S. Joseph, *op.cit.*, p. 129 and following; P. Muchlinski, *op.cit.*, p. 325 to 327.

²⁸¹ P.I. Blumberg, *op.cit.*, p. 297, note 17. Instrumentality doctrine requires excessive control (i.e. complete domination, not only over finances, but also over policy and business practices regarding the transaction in question, such that at the time of the transaction, the concerned entity no longer has its own personhood, will or existence), improper or unfair conduct and a causal relationship between the conduct in question and the harm caused to the plaintiff in the suit.

²⁸² *Ibid.* Alter ego doctrine is applicable when the sum of ownership and interest between the two companies is such that they are no longer legally separate and the subsidiary is relegated to the status of the parent company’s alter ego. Moreover, recognizing the two companies as separate entities should be a warning of fraud or potentially unjust activity.

²⁸³ *Ibid.*

²⁸⁴ S. Joseph, *op.cit.*, p. 130; R.B. Thompson, “Piercing the Corporate Veil : An Empirical Study”, *Cornell L. Rev.*, 1991, vol. 76, p. 1036; R.B. Thompson, “Piercing the Veil Within Corporate Groups : Corporate Shareholders as Mere Investors”, *Conn.J.Int’l L.*, 1998-1999, vol. 13, p. 379 and following.

²⁸⁵ P.I. Blumberg, *op.cit.*, p. 498. See also S. Joseph, *op.cit.*, p. 84.

a) Absence of a subsidiary's own legal personhood

The condition is met **when the parent company (or majority shareholder) exercises excessive control over the subsidiary's management, operations and decision-making**, eliminating the independence of the subsidiary's managers and directors.

The absence of a subsidiary's own legal personhood can be demonstrated by showing, for example, an absence of legal formalities (such as those relating to general meetings of the board of directors, separate accounting, etc.), a lack of premises, assets, employees unique to the subsidiary, inadequate capitalisation or lack of business relations with anyone other than the parent company.

Jurisprudence does not provide a clear indicator of the level of control required to disregard a subsidiary's legal personhood and attribute its actions to the parent company on which it depends. The only certainty is that **the control must be excessive and go beyond that which is generally considered acceptable in practice**. It goes without saying that the question is highly fact-specific and the outcome is subject to the judge's interpretation and discretion.²⁸⁶

b) A parent company's use of the subsidiary for fraud or other wrongful acts

With regards to the second condition, jurisprudence is also incomplete as to what constitutes fraudulent, unfair or unjust acts for the benefit of the parent company or majority shareholder. Again, the judge's determination is fact-specific.

One thing is certain, however. The commission of a tort, on its own, is insufficient and mere negligence or carelessness cannot constitute a fraudulent act. Wilful misconduct is required and plaintiffs must prove that the perpetrator intended to commit the fraud or tort.

c) Causal relationship between the act and the harm

With regards to the third condition, proof of the causal relationship between the act and the harm is seldom verified in practice.

* * *

²⁸⁶ V. Simonart, *La personnalité morale en droit privé comparé*, Bruylant, Bruxelles, 1995, p. 474.

The conditions are such that any company benefiting from professional advice can easily claim to be a mere investor, thus avoiding a piercing of the corporate veil.²⁸⁷ Despite severe limitations to its application, the theory of piercing the corporate veil has in several cases proved useful in establishing the liability of a multinational corporation's parent company.

Wiwa v. Royal Dutch Petroleum/Shell and *Doe v. Unocal* cases demonstrate that the theory of piercing the corporate veil has resonated in several jurisdictions where plaintiffs sought to establish the liability of parent companies for the actions of their subsidiaries.

➔ **Doe v. Unocal et al (Doe I)**

This suit targeted both Total and Unocal in California courts. In 2001, the court applied alter ego doctrine.²⁸⁸

With regards to Total, the court failed to establish personal jurisdiction because it could not prove the existence of an agency or alter ego relationship. It should be noted that at that juncture, the agency or alter ego test was useful only for establishing the existence of sufficient ties between the foreign parent company and the forum. Establishing the above permits US courts to accept personal jurisdiction (the court's motives regarding the agency relationship are outlined below). The court refused to consider Total's California subsidiaries as its alter egos, on the grounds that the parent company's direct and active involvement in its subsidiaries' decision-making processes, while important, was insufficient to establish the total overlap of interest and ownership between them. Total had complied with the formalities necessary to maintain legal separation.²⁸⁹ The court did not examine the other conditions.

By contrast, the State of California Court of Appeal established in its 18th September 2002 ruling that the facts in its possession were sufficient to hold **Unocal** liable for the acts of its subsidiaries in Burma, which became accomplices to the Burmese military's use of forced labour. The two companies involved, Unocal Pipeline Corp and Unocal Offshore Co, were Unocal's alter egos and by consequence, Unocal was liable for their actions. To establish this, the court cited the under-capitalisation of the two subsidiaries and Unocal's direct involvement in managing them.²⁹⁰

²⁸⁷ R.B. Thompson, "Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors", *op.cit.*, p. 391.

²⁸⁸ *Doe v. Unocal*, *op.cit.*, 2001, p. 926.

²⁸⁹ *Doe v. Unocal*, *op.cit.*, 2001, p. 927.

²⁹⁰ *Doe v. Unocal*, *op.cit.*, 2002, p. 14222-14223, note 30. This issue is addressed in a footnote of the ruling, after establishing that the facts of the case showed that the necessary conditions had been met for liability under the ATCA (*actus reus and mens rea*) for complicity with forced labour.

2. Agency theory

The classical theory of agency requires a general agency agreement between the alleged principal and the agent, such that the agent acts in the name and on behalf of the principle.²⁹¹

A subsidiary is an agent of its parent company if it is shown that the functions it performs as a representative of the parent company are significant such that **in the subsidiary's absence, the parent company would be required to provide similar services**. The subsidiary's presence thus substitutes that of the parent company.²⁹²

To assess the presence of an agency relationship and of an agent's continuous presence within their jurisdiction, courts of the State of New York look for several traditional criteria. These are facts such as the possession of an office, bank account, other property or a telephone line and the maintenance of public relations, or the continuous presence of individuals in the State of New York.²⁹³

The existence of an agency relationship is established when:

- The parent company (principal) has expressed a wish that the subsidiary (agent) act in its name and on its behalf,
- The subsidiary (agent) has accepted the commitment, and
- Each of the two parties agree that operational control is vested in the parent company (principal).

Common law requires proof not only of the **parent company's significant control** over the subsidiary, but also of a **consensual transaction** or **mutual consent** between the two entities. If the first condition is generally met through the relationships within a group of companies, it must still be demonstrated by the facts. Although the parent company knowingly uses many subsidiaries to escape liability, the second condition is rarely encountered because it requires the parties to expressly agree that the subsidiary (agent) would act on behalf of the parent company (principal).²⁹⁴

In the *Unocal* and *Wiwa* cases, however, the courts independently²⁹⁵ assess the application of this theory.

291 P.I. Blumberg, *op.cit.*, p. 497, note 13. See also S. Joseph, *op.cit.*, p. 85.

292 *Doe v. Unocal*, *op.cit.*, 2001; *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000, p. 95.

293 *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000.

294 Restatement of Agency (Third) § 1.01 (Tentative Draft No. 2, Mar. 14, 2001).

295 P.I. Blumberg, *op.cit.*, p. 499. See also S. Joseph, *op.cit.*, p. 85.

➔ Bowoto v. Chevron

This decision recognises the applicability of agency theory and ratification theory (an alternative theory of liability which holds the principal liable for acts committed by the agent outside of its duties, provided the principal expresses agreement) to a suit brought under the ATCA to determine a parent company's liability for its subsidiary's activities.

In May 1998, members of the Ilaje community attended a peaceful demonstration to draw attention to the disastrous environmental and economic harm local communities experienced due to the oil extraction activities of Chevron's Nigerian subsidiary. The event was organised on an oil platform off the Nigerian coast and ended with Nigerian security forces committing a number of abuses, including murder, torture and cruel, inhuman or degrading treatment.

The plaintiffs invoked several theories of liability, including agency. They alleged that the Nigerian government's security forces had acted as an agent of Chevron's Nigerian subsidiary, which in turn acted as an agent of the parent company, Chevron Corporation, and two Chevron companies domiciled in United States, Chevron Investments Inc. and Chevron USA, Inc.²⁹⁶ The plaintiffs argued that the parent company, Chevron, and its subsidiaries should be held liable for having provided material and financial support, having controlled the Nigerian security forces and having participated directly in the attacks.

The US court recognised jurisdiction under the ATCA and accepted the plaintiffs' proposed agency theory. The court ruled that an agency relationship could be inferred from the conduct of the parties and that the existence of the relationship is largely determined by the specific circumstances of the case.²⁹⁷ The Court recognised that sufficient evidence existed to establish that Chevron and its subsidiaries exercised "right of control" over the security forces they hired.

Although holding the principal legally responsible requires that the damage caused by the agent occurs in the course of the duties assigned to it by the principal,²⁹⁸ a contract breach by the agent does **not necessarily exonerate** the principal from liability. The Nigerian government could be considered as acting within the limits of the duties assigned to it, even if Chevron did not authorize the conduct in question in the following situations:

- A link could be reasonably made between the conduct and the duties Chevron had assigned to the government, or
- Chevron could reasonably expect such behaviour to occur given the violent past of the security forces.

²⁹⁶ *Bowoto v Chevron Texaco*, 2007 WL 2349336 (N.D. Cal. 2007), p. 15-16.

²⁹⁷ *Bowoto 2004*, 312 F.Supp.2d at 1239.

²⁹⁸ *Ibid.*, 1239-1240.

If the conduct goes beyond the scope of duties assigned to the agent, **agreement between the parties could be found in a prior authorisation or subsequent ratification**. If the parent company (principal) knew or should have known the facts and accepted the conduct of the subsidiary (agent) in question, it is to be held liable for the act committed by its agent. There are **two required elements**: knowledge and acceptance. The acceptance of previously unauthorized conduct can be established when:

- The parent company (principal) adopts the conduct of the subsidiary (agent) as an “official act” of the company,
- The parent company (principal) provides assistance to the subsidiary (agent) to conceal the fraudulent conduct (Chevron Corporation published false reports of the facts in question and concealed the financial ties linking the subsidiary with the military),
- The parent company (principal) continues to use the services of the subsidiary (agent) following the conduct in question, or
- The parent company (principal) fails to take the necessary steps to investigate or halt the conduct in question.²⁹⁹

A parent company (principal) can thus be held liable for the activities of a subsidiary (agent) acting outside the scope of the duties authorized by the parent company at the time of the disputed facts.

In November 2008, after examining the merits of the case, the jury did not recognize the liability of Chevron and its subsidiaries. The decision was appealed to the Ninth Circuit Court of Appeals and then to the Supreme Court in June 2011.

Even in the absence of an express agreement, an agency relationship may be created if the principal has expressly or implicitly endorsed or covered up its subsidiary’s acts after the fact.³⁰⁰

➔ **Doe I v. Unocal et al (Doe I)**

Californian courts establish personal jurisprudence from the moment a non-resident defendant has minimum contacts with the jurisdiction or the defendant operates in a “substantial, continuous and systematic” manner within the jurisdiction, including situations where the contact within the forum is unrelated to the dispute.

The plaintiffs argue that Total’s US subsidiaries were its agents and that Total maintained contact with the jurisdiction (the State of California) through its subsidiary entities in the US. To establish the existence of an agency relationship, the plaintiffs pointed to Total’s references to its subsidiaries’ activities in its Annual Report, indirect shareholding, the exercise of indirect control and supervision of its subsidiaries’ and holding companies’

²⁹⁹ *Bowoto v. Chevron Texaco*, Instructions to Jury, Case 3:99-civ-0506-SI, Doc. 2252, 28 November 2008, p. 29-33, 37-39. See also Restatement (Third) of the law of Agency, sec 4.06 (Ratification), comment d.

³⁰⁰ S. Joseph, *op.cit.*, p. 132.

activities.³⁰¹ **Refusing to recognize the subsidiaries** (both Californian and non-Californian entities which maintained contact with California) **as Total's agents** because they had **no representative activities** in the jurisdiction,³⁰² the court declined jurisdiction.

➔ **Wiwa v. Royal Dutch Petroleum/Shell** **Determining personal jurisdiction in a US court**

In 2000, the District Court of the State of New York accepted jurisdiction to hear the case involving Royal Dutch Petroleum Company, (Netherlands) and Shell Transport and Trading Company (United Kingdom) on the grounds that two of their agents were based in New York. Those were conducting business on behalf of their parent companies. Systematic and continuous activities in the forum, which fulfil the *doing business* criterion, need not necessarily be conducted by the foreign company itself. State of New York case law recognises personal jurisdiction where an agency relationship is established between the foreign company and an entity present in the State of New York. In this case, the New York-based Investor Relations Office and its manager James Grapsas devoted all of their time to Shell's commercial activities. Shell paid the full costs of running the Investor Relations Office, including salaries, rent, electricity and communications. Grapsas waited for approval from the defendants prior to making major decisions. The Investor Relations Office and James Grapsas were thus considered agents of Royal Dutch Petroleum Company and Shell Transport and Trading Company in New York.

Determining the liability of parent companies

In its 28th February 2002 ruling, the court found that Royal Dutch Petroleum Company and Shell Transport and Trading Company (the parent companies) controlled Shell Nigeria (the subsidiary) and that the parent companies could be held liable for Shell Nigeria's activities, insofar as the parent companies were not only **shareholders of the subsidiary**, but were also **directly involved in its activities**. The court ruled that, with respect to the activities in question, Shell Nigeria was the parent companies' agent.³⁰³

➔ **Presbyterian Church of Sudan v. Talisman Energy**³⁰⁴

In 2001, The Presbyterian Church of Sudan and several Sudanese individuals filed an ATCA complaint in US federal court against the Canadian company, Talisman Energy. The victims accuse the company of complicity with the government of Sudan, which has committed serious abuses (genocide, crimes against humanity and war crimes) against non-Muslim Sudanese residents. The plaintiffs defendants argue that these actions against the local population facilitated Talisman Energy's exploitation of a local oil concession.

³⁰¹ *Doe v. Unocal, op.cit.*, 2001.

³⁰² *Doe v. Unocal, op.cit.*, 1998, p. 1186 and following.

³⁰³ *Wiwa v. Royal Dutch/Shell, op.cit.*, 2002, note 14.

³⁰⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan, op.cit.*, p. 331.

The judge found that the US subsidiaries of Talisman, a foreign company, should be considered agents, because of the numerous links between them, including:

- The importance of the activities carried out by Fortuna, a subsidiary in New York, on behalf of the parent company. Fortuna was 100% owned by the parent company,
- The identity of their leaders,
- Fortuna’s lack of financial independence, and
- Their location at the same address.

The court also based its decision on the parent company’s listing on the New York Stock Exchange, ruling that the listing supported the recognition of personal jurisdiction, provided that other contacts with the jurisdiction were established.³⁰⁵

On 12th September 2006, the court declared the complaint inadmissible due to a lack of evidence and on 2nd October 2009, the Second Circuit Court of Appeal upheld the decision. The Court of Appeal ruled that the plaintiffs had failed to establish that Talisman Energy had acted in order to support the violations of international law committed by the Sudanese government. The victims failed to prove Talisman’s payments were clearly intended to supply arms to the Sudanese government. In this case as in others, the evidence was insufficient and **proof of intent poses a major obstacle to victims.**

By considering the company in question’s listing on the New York Stock Exchange in the *Wiwa* and *Presbyterian Church* cases, this ruling on agency brings hope, because many foreign multinational corporations meet this condition. This condition, however, must still be corroborated by other facts.

Criteria necessary to establish personal jurisdiction depend on the facts of the case, legislation and case law of the forum court. Thus, **the uncertainty surrounding the question of whether a court will seize jurisdiction over a foreign multinational corporation is considerable**³⁰⁶ and the risk that the ATCA’s applicability may be confined only to domestic companies is real.

EU Member State courts

In cases under Regulation 44/2001, a parent company’s liability for the actions of its subsidiary is determined **strictly according to the applicable national law.**

There are two traditional mechanisms: 1) piercing the corporate veil and 2) a parent company’s direct liability for failure to exercise due diligence with respect to its subsidiary.

³⁰⁵ *Ibid.*, p. 330.

³⁰⁶ S.M. Hall, *op.cit.*, p. 408.

1. Piercing the corporate veil

The examples below derive from commercial law and competition law. Analyzing them provides an idea of the principles which could eventually govern a parent company's liability for human rights violations committed by its subsidiaries.

Commercial law

In the Netherlands, a parent company may be held liable for debts incurred by a subsidiary if:

- The parent company is the subsidiary's majority shareholder,
- The parent company knew or should have known that the creditors' rights would be violated,
- The violation is the result of an action by the parent company or the parent company's heavy involvement in its subsidiary's actions, or
- The parent company failed to take the creditors' interests into due consideration.³⁰⁷

In other words, piercing the corporate veil requires the parent company to be both deeply financially involved in the subsidiary and aware of rights violations committed by the subsidiary.

Belgian courts have rarely pierced the corporate veil, and never in the area of international human rights law.

In considering the economic reality of a multinational group, the Charleroi Commercial Court took the view that the parent company's influence over its subsidiary's management was sufficient to lift the corporate veil and face charges.³⁰⁸

Most Belgian doctrine provides a legal basis for charging a parent company for its subsidiary's actions in the event that the parent company lacks knowledge of its subsidiary's interests. To do so, the court interprets both parties' will, applies extra-contractual liability rules or the principle of good faith. This occurred in the case of a dispute between a subsidiary and its parent company in which the subsidiary wished for the parent company to be held liable for allegations against the subsidiary, on the grounds that it was clear to both the parent company and the subsidiary that the former controlled all of the latter's activities. Another invocable legal basis is appearance theory. When the third party is misled about the legal personhood of the other party, and the party could justifiably believe that it had contracted with the parent company, but in fact contracted with the subsidiary, the parent company can be held liable for the resulting harm. These same legal grounds

³⁰⁷ For the situation in the Netherlands, see N. Jägers and M.J. Van Der Heijden, *op.cit.*, p. 840 and following.

³⁰⁸ Charleroi Commercial Court, 5 February 1998, *R.P.S.*, 1998, p. 443. See also P. Van Ommeslaghe and X. Dieux, "Examen de jurisprudence (1979 à 1990). Les sociétés commerciales", *R.C.J.B.*, 1992, p. 629 and following.

allow companies to be declared sham entities and the corporate veil to be pierced in situations where the company has no autonomy from its parent company or where there is confusion regarding the companies' domicile.³⁰⁹

Competition law

From inception, **European courts** have held the parent company liable for offenses committed by its subsidiary within the EU when the latter despite having distinct legal personhood, “does not determine its market behaviour autonomously, but in essentials follows directives of the parent company” (paragraph No. 15).³¹⁰ The Court of Justice previously held that “the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company” (paragraph No. 15).³¹¹

Some authors have noted that in order for that decision to be compatible with commercial law and to not deny the subsidiary's legal personhood, plaintiffs must “establish the parent company's direct participation in the actions and conduct in question and demonstrate that the subsidiary acted on specific and binding instructions from the parent company, thus depriving the subsidiary of its independence” (free translation).³¹²

In a later case, the Court found it necessary to consider the economic entity formed by the parent company (in this case CSC, a US company,) and its subsidiary (ICI, an Italian company), which was characterized by an “obviously united action” in the context of its relationship with the company Zoja. The Commission considered CSC and ICI to be jointly responsible for abusing their dominant position over Zoja.³¹³

More recently, on 10 September 2009, the Court of Justice held in *Akzo Nobel*³¹⁴ that a **parent company** which owns 100% of a subsidiary's capital is **presumed liable** for the subsidiary's actions **without any involvement, be it direct or indi-**

³⁰⁹ T. Tilquin and V. Simonart, *Traité des sociétés*, t. 1, 1996, Kluwer, Belgique, p. 575 and following.

³¹⁰ See ECJ, *Continental Can*, 21 February 1973, Rec. 1973, p.215. This case involved Europemballage's purchase of shares issued by a company incorporated in the Netherlands, whereas Europemballage's capital was wholly owned by the parent company American Continental Can. The European Commission held that the parent company was abusing its power and was the perpetrator of the infraction, given that the parent company was “the sole shareholder of Europemballage, which holds an 85% stake in SLW.” The court noted that Continental Can controlled two companies and could thus be charged for its subsidiaries' conduct.

³¹¹ *Ibid.* See also ECJ, *Affaire des fabricants de colorants*, Commission, 24 July 1969, OJ, No. L195, 7 August 1969 - ECJ, 14 July 1972, Rec., 1972, 619. Article 85 of the Rome Treaty applies to parent companies.

³¹² B. Oppetit, “Groupes de société et droit du travail”, *Rev. Soc.*, 1973, p. 69.

³¹³ M. Delmas-Marty, “La responsabilité pénale des groupements”, *Rev. Intern. dr. Pén.*, 1980, p. 52; ECJ, *Zoja*, Commission, 14 December 1972, OJ, No. L 299, 31 December 1972; ECJ, *Instituto Chimioterápico Italiano Spa*, 6 March 1974, Rec.1974, 223; ECJ, *Moët et Chandon*, 27 November 1981, OJ, No. L94, p.259.

³¹⁴ ECJ, *Akzo Nobel*, 10 September 2009, Aff. No. C 97/08P.

rect. In this case, the parent company was presumed to have “a decisive influence on the conduct of its subsidiary” and it is thus the parent company’s responsibility to prove the autonomy of its subsidiary in carrying out its operations. Although this decision applies only in the context of anti-trust law, future decisions by the European Court of Justice may evolve and apply this solution to other situations, including human rights violations.

Several difficulties exist:

- It is difficult to predict whether these commercial and anti-trust teachings can be easily exported to issues of extraterritorial human rights violations,
- In the case at hand, the burden of proof for piercing the corporate veil is borne by the plaintiffs,
- Decisions on whether the corporate veil can be pierced are decided on the facts of the case.

This could encourage parent companies to forgo control over their subsidiaries to avoid the corporate veil being pierced. The less a company is involved in the policy and operations of its subsidiary, the less likely it is to be held liable for the subsidiary’s actions.³¹⁵

2. Direct liability – due diligence³¹⁶

The concept of due diligence is both a soft law mechanism and a legal tool. It is the process by which companies act not only to ensure compliance with national laws, but also to prevent the risk of human rights infringements.

A soft law mechanism

Recurring human rights breaches by multinationals have led former UN Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (see Section I), to promote the concept of due diligence. In the absence of international corporate legal liability mechanisms, Ruggie encourages multinational corporations to adopt the necessary measures to assess the impact of their activities on human rights, prevent breaches and remedy adverse impacts. Companies are encouraged to integrate this approach into their managerial policy.

³¹⁵ N. Jägers and M.J. Van Der Hejden, *op.cit.*, 2008, p. 842.

³¹⁶ It may be also be interesting to develop the *precautionary principle* in the context of corporate liability for environmental and human rights violations. The *precautionary principle* addresses probable risks which, while not yet scientifically confirmed, can be identified as likely using empirical and scientific knowledge. The principle is most heavily called upon in environmental matters, where its application would subject business operations to risk management. It is unclear how it would be applied by both public policy makers and private actors, particularly given that interpretations vary from state to state.

A legal concept

Due diligence is a legal concept in civil cases under U.S., or more broadly, Anglo-Saxon law. English Law has developed the similar concept of duty of care through case law. Both concepts sanction physical and legal persons for neglecting their due diligence obligations. The concept of due diligence is more of a procedural requirement whereas the concept of **duty of care** is a substantive requirement with a higher level of obligation.

In the broad sense, the concept involves **taking all necessary and reasonable precautions to prevent harm from occurring**. Otherwise, there is a lack of due diligence or duty of care. In our situation, recklessness, negligence or a parent company's omissions with regards to its subsidiaries constitute a violation of civil liability standards. To fulfil its due diligence obligations, a multinational corporation must assess the risk of human rights breaches and inform itself about its trading partners and the context in which it operates abroad.

Under US law, the concept presents a presumption in the company's favour because the burden of proof shifts to the opposing party. Due diligence usually serves as a defence for companies seeking to escape condemnation. This may be an obstacle to the favourable outcome of suits brought under the ATCA.

The following examples illustrate the due diligence obligations multinational corporations face when operating abroad.

→ **Lubbe v. Cape plc**³¹⁷

A group of South African workers complained that the British parent company which controlled their subsidiary had taken no action to reduce the risks associated with mining. The case constituted a breach of **duty of care** which required the employer to provide a safe and healthy workplace for its employees.

The Court of Appeal accepted the plaintiffs' argument that the fact that the operations in question were not illegal under South African law does not mean that the defendant was not negligent. The parent company should have considered the available scientific knowledge in order to reduce the risks it incurred. In addition, even if the event giving rise to damage occurred in South Africa and there were serious reasons to believe the dispute could have been heard in local courts, the British courts held the parent company's staff director liable for the decisions that led to the deterioration of the workers' health. Because the company's

³¹⁷ *Lubbe et al. v. Cape plc, op.cit.*, 1998; *Rachel Lubbe et al. v. Cape plc, op.cit.*, 2000.

violations of its care of duty obligations occurred mainly in the United Kingdom, the court ruled that victims could bring action against Cape plc in the British High Court.³¹⁸ In 2001, the case was settled with the company offering compensation to the workers.

➔ The OCENSA Pipeline

A group of 70 Colombian farmers brought this case in British courts against BP's Colombian oil subsidiary, BP Exploration Company (Colombia) Ltd (BPXC). BPXC's construction of the OCENSA pipeline in the late 1990s severely damaged the farmers' land by contaminating soil and water resources, rendering the land unsuitable for farming. The case is pending. To render the trial most efficient and swift, the most representative cases will be selected in the near future. Some plaintiffs had entered into contract with the subsidiary and are acting in breach of the contract. Others allege that the company was negligent in its conduct by failing to take adequate steps to prevent the harm from occurring.

It will be interesting to follow the concept of negligence as the case develops. Another group of 53 Colombian farmers, however, brought action against BPXC in an earlier case alleging environmental damage resulting from the pipeline's construction. The case concluded following a confidential settlement agreement between the two parties and BPXC has not admitted its responsibility.

➔ Dutch and British courts in Action: The Shell Nigeria case³¹⁹

Two Nigerian farmers, Oguru and Efanga, residents of Oruma village in the Niger Delta state of Bayelsa, brought action with Milieudefensie (Friends of the Earth Netherlands) against Shell in Dutch courts. A leaking oil pipeline operated by Shell Nigeria contaminated farmland and drinking water near Oruma. Shell Nigeria also caused other harm, including causing fish farms to be unusable, forests to be destroyed and health problems among people in and around Oruma.

The leak was not the first major oil leak Shell dealt with in its Nigeria operations. Shell noted between 200 and 340 leaks per year between 1997 and 2008.³²⁰ Between 1998 and 2007 Shell Nigeria was responsible for 38% of Shell's oil spills in the world.³²¹

On 8 May 2008, the victims notified Shell of their intention to hold the company liable in Dutch courts. On 7 November 2008, Shell was served a subpoena which detailed the disputed facts. Before the court examined the merits of the case, Shell requested a ruling on whether Dutch courts had jurisdiction to hear the case. On 30 December 2009, the Civil Court

³¹⁸ N. Jägers, *Corporate Human Rights Obligations in Search of Accountability*, Intersentia, Antwerpen/ Oxford/ New York, 2002, p. 207; R. Meeran, *op.cit.* 2000 p. 258-261.

³¹⁹ This information is largely pulled from Milieudefensie, "Documents on the Shell legal case", www.milieudefensie.nl

³²⁰ Milieudefensie, "Factsheet oil spills in the Niger Delta", www.milieudefensie.nl

³²¹ Royal Dutch Shell plc, "Financial and Operational Information 2003-2007: Delivery and Growth", www.faoi.shell.com

of The Hague seized jurisdiction. The trial was set for 10 February 2010, but was postponed because the plaintiffs sought more time to prepare. Proceedings resumed on 24 March 2010, at which time the defendants/plaintiffs filed a motion for disclosure,³²² requesting that Shell provides them with a number of key documents. These documents would provide additional evidence to establish Shell's liability for the actions of its Nigerian subsidiary. The motion also called for the disclosure of specific documents related to oil leaks, information Shell denied to disclose in June 2010.

The relationship between Shell and Shell Nigeria

Royal Dutch Shell plc. (Shell), a multinational, operates as a single entity. Decisions are made at headquarters and all subsidiaries and partners must comply. Shell's environmental policy, as evidenced by a guide and the adoption of a "Health, Safety & Environment Policy" and "Global Environmental Standards", is managed and verified for compliance from the company's headquarters. Thus, all decisions relating to the multinational's policies have the ability to influence Shell Nigeria's operational conduct.

As the sole shareholder, Shell exercises direct influence and absolute authority over the nomination of Shell Nigeria's CEOs. It was Shell's responsibility to appoint leaders with the experience and ability to repair or at least limit the harm resulting from oil production. This was the basis upon which Oguru, Efanga and Milieudefensie brought legal action against Royal Dutch Shell plc and Shell Nigeria.

The jurisdiction of Dutch courts

Shell Nigeria objected to appearing alongside Shell before a Dutch court and the court held that the two entities were not sufficiently connected for the court to be able to recognize jurisdiction over the subsidiary. Oguru, Efanga and Milieudefensie cited *Freeport v. Arnoldsson* case in which the European Court of Justice held that a lack of offices or business premises in a particular state does not preclude the company from being brought before the courts of that state. Article 6, paragraph 1 of Regulation No 44/2001, provides that in cases with multiple defendants, a defendant may be sued in the jurisdiction where one of the defendants is domiciled, on condition that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". According to the ECJ, the fact that claims may be brought against several defendants on different legal grounds does not preclude the application of this provision.

Together with Mileudefensie, two Nigerians, Chief Barizaa Dooh and Friday Alfred Akpan, filed two additional complaints on 6 May 2009. The *Goi* and *Ikot Ada Udo* cases accuse Shell of similar offenses in Dutch courts.

On the *Ikot Ada Udo* case Shell was ordered to pay compensation to the plaintiff, for failing to adequately protect its pipelines from vandalism. However, in the *Goi* case, the

³²² Milieudefensie, "Nigerian oil victims demand transparency from Shell via court", press release from 24 March 2010.

court ruled that Shell could not be held liable for the failures of its subsidiary. An appeal was filed by the plaintiff, resulting in a ruling on the December 18th, 2015, through which the Court of Appeals of the Hague overturned the lower court's decision considering that Royal Dutch Shell could be held liable for oil spills attributable to its subsidiary. The ruling introduced two important evolutions for corporate responsibility law : (1) Procedurally, the Court ordered for the first time the disclosure of internal documents of the company ; (2) On jurisdiction, the court allowed the plaintiffs to jointly sue Shell in the Netherlands for oil spills that took place in Nigeria.³²³

Shell Nigeria before UK courts

On 2 March 2016, a UK judge ruled that Royal Dutch Shell can be sued before British courts for its involvement in oil leaks in Nigeria. The case was brought by lawyers from Leigh Day, representing the victims from the two Nigerian towns of Ogalé and Bille. The plaintiffs allege that Shell has for decades neglected to clean-up oil spills causing contamination to farmlands and water in their region.

→ Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA³²⁴

Monterrico, a UK-domiciled company, has several subsidiaries. One of them, Rio Blanco Copper SA, specializes in copper extraction in Piura, north-western Peru. Although copper extraction is underdeveloped in the region, Monterrico's project would be one of the 20 largest copper mines in the world. The plaintiffs, mostly farmers in Peru, voiced opposition to the project at a demonstration which lasted from late-July to early-August 2005. During the event, 28 demonstrators were forcibly taken to the site of the mine where they were detained and tortured for three days. Several women were sexually abused and one man died of his injuries. The companies do not dispute the excesses of police brutality during the demonstration nor the detention of the demonstrators.

The plaintiffs, represented by Leigh Day and EDLC, argued that Monterrico's on-site officers should have intervened to prevent such abuses and/or were liable for the bodily harm. The plaintiffs demanded redress from Monterrico in UK courts, citing:

- The direct involvement of Monterrico's two co-directors in the disputed events;
- The fact that Monterrico agreed to manage the risks inherent in the operation and management of its subsidiary;
- Monterrico's effective control over its Peruvian subsidiary, to the extent that they constituted a single entity;
- Monterrico affirmed its method of risk management and direct control over the subsidiary in its annual reports.

On 2nd June 2009, the UK court issued an injunction to freeze the parent company's bank accounts (Monterrico was delisting from the London stock exchange and transferring its assets and operations to China). The plaintiffs then asked the High Court of Justice to prolong

³²³ For more information on the case see: <https://milieudefensie.nl/>

³²⁴ *Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA* [2009] EWHC 2475 (QB).

the injunction. On 16th October 2009, the court acknowledged the existence of sufficient evidence and accordingly stated that the plaintiffs had cause of action. GBP 7.4 million (the amount of damages that could be awarded) was frozen in the company's bank accounts. The court noted in its opinion that Monterrico did not challenge the jurisdiction of UK courts under Article 2 of Regulation 44/2001 and the court itself cited *Owusu v. Jackson case*, emphasizing that Monterrico was domiciled in England at the time the suit was brought. The court thus rejected the doctrine of *forum non conveniens* on its own accord. The trial was scheduled to begin in October 2011 in London, but the parties reached a confidential settlement in July 2011 under which the victims would receive compensation payment.

The economic imbalance between multinationals and individual victims

In terms of financial resources, the inherent imbalance in a dispute between a multinational corporation and an individual victim is a central question which must be taken into consideration. In the context of a multinational corporation's liability for human rights breaches, a recurrent problem is the length of the proceedings and the resulting cost. Litigation can sometimes last more than 15 years and there is an imbalance between the resources available to a company to avoid court rulings which could adversely affect its reputation and those available to individual victims seeking redress. This inequality can affect the outcome of legal proceedings in favour of the company. The European Court of Human Rights' 15 February 2005 ruling in *Steel and Morris v. United Kingdom* illustrates this phenomenon.

➔ Steel and Morris v. United Kingdom³²⁵

Two unemployed British nationals, Helen Steel and David Morris, had ties to London Greenpeace, a small group unrelated to Greenpeace International, which campaigns principally on environmental and social issues. In 1986 London Greenpeace produced and distributed a six-page leaflet entitled "What's wrong with McDonald's" which claimed that the multinational sells unhealthy food, hurts the environment, imposes undignified working conditions and abusively targets children with its advertising.

London Greenpeace was not a legal person and it was thus impossible to sue the organisation in court. After investigating and infiltrating the group to identify those responsible for the campaign, McDonald's Corporation (McDonald's U.S.) and McDonald's Restaurants Limited (McDonald's UK) sued Helen Steel and David Morris for libel and demanded compensation before the High Court of Justice in London. Steel and Morris were **refused legal aid** and conducted their own defence throughout the trial and appellate proceedings, benefiting only from the assistance of volunteer lawyers. They claim they were **severely hampered by their lack of resources**, not only in terms of legal advice and representation, but also with administrative matters, research, preparation and the costs of experts and

³²⁵ ECHR, *Steel and Morris v. United Kingdom*, 15 February 2005, No. 68416/01.

witnesses. Throughout the trial, McDonald’s Corporation was represented by lead and junior counsel with experience in libel law, and sometimes two solicitors and other assistants. The trial took place before a single judge and lasted from 28th June 1994 to 13th December 1996, 313 court days (the longest trial in English legal history). On appeal, the Court of Appeal rejected most of Steel and Morris’s arguments including the lack of fairness but reduced the damages awarded by the trial judge from a total of GBP 60,000 to GBP 40,000. Steel and Morris were not allowed to appeal to the House of Lords and McDonald’s has not sought to collect the damages.

Steel and Morris have filed suit against the United Kingdom before the European Court of Human Rights under Article 6§1 of the European Convention on Human Rights (right to a fair trial). Case law from the court indicates that whether a fair trial requires the provision of legal aid depends on the facts and circumstances of each case, upon the importance of what is at stake for the applicant in the proceedings, on the complexity of the applicable laws and procedures, as well as on the plaintiff’s ability to effectively defend his or her cause. The Court concluded that Article 6§1 had been violated, noting that the “the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable **inequality of arms with McDonald’s**.”³²⁶

A look at the US trial procedure

With the exception of the UK,³²⁷ trials in EU Member State courts differ greatly from those in the US because they remain subject to the legislation of individual Member States. It is therefore difficult to present an overview of European trial procedures. For this reason the appendix concentrates on describing various aspects of US trial procedure. One thing can, however, be said concerning European Member States: the discovery procedure found in the US is generally absent.

It is important to note that **in US civil procedure, the victim’s role is accusatory** and the role of the opposing parties is predominant over that of the judge.³²⁸ The parties manage the trial, decide how it unfolds and provide evidence of the facts they allege. The judge’s role is merely that of a gatekeeper, ensuring that the parties comply with the trial procedure. Juries issue final decisions.

In our situation, victims of human rights violations by multinational corporations generally have significantly fewer material and financial resources than their opponents to investigate and substantiate the facts and harm they allege. To counter this imbalance, Article 26 of the Federal Rules of Civil Procedure authorizes the **discovery procedure**, which permits either party to require the other to furnish

³²⁶ *Ibid.*, § 72.

³²⁷ For a comparison with UK trial procedure, see M. Byers, *op.cit.*, 2000, p. 244.

³²⁸ On US trial procedure, see EarthRights International, *op.cit.*, 2006, p. 51 and following.

it with all relevant information. This mechanism allows the plaintiff to use court orders to obtain necessary evidence from both the defendant and third parties. Victims may also require companies to turn over certain documents, even if they directly incriminate the company.³²⁹ Failure to comply with the discovery procedure is grounds for the judge to hold a party in contempt of court, which may result in severe penalties.

Burden of proof in EU Member States

Outside of the UK, victims are most often responsible for demonstrating a multinational company's liability for a tort, even though the body of documents and other material evidence is in the hands of the parent company, its subsidiary or its subcontractors abroad. The same applies to potential witnesses. There is no equivalent to the discovery procedure. The inequality between plaintiff and defendant is all the more striking given that defendants generally have unlimited financial and logistical means. Most Member States, however, offer a (partially) free system of legal aid. While some rules of US trial procedure are potential obstacles to suits brought under the ATCA, others, such as the discovery procedure, present **advantages vis-à-vis the rules in place in Europe**:

► ADVANTAGES

- The ability to bring **class action** on behalf of a group of individuals, or to bring action while protecting the plaintiff's identity,
- The ability to **modify or supplement a suit** based on information gathered through discovery,
- A trial may be held even in the defendant's absence, provided that personal jurisdiction is established (**default judgement**),
- Civil proceedings are independent from possible criminal proceedings (the adage *le pénal tient le civil en l'état* does not apply),³³⁰
- The **contingency fees** of counsel are calculated in proportion to the amount of any rulings or settlements,
- The existence and *pro-bono* involvement of **public interest lawyers** who work with law schools and private firms,
- The sizeable damages awarded by **juries**,
- The unsuccessful party does not have to bear the costs of the case (**no penalty for losing**),
- The ability to obtain both compensatory and punitive damages, as well as court orders requiring changes in practices. Punitive damages are intended both to punish the defendant and discourage others from such conduct, and

³²⁹ A. Blumrosen Bernard-Hertz-Bejot, "Conférence de consensus sur l'expertise judiciaire civile, Groupe d'analyse des textes - L'expertise judiciaire et civile en droit américain", 2007, p. 3.

³³⁰ This adage refers to two rules: the suspension of a civil trial and the civil authority of *res judicata* in criminal cases.

- No compensation for **frivolous and vexatious**³³¹ lawsuits. If a suit is declared frivolous and vexatious, the defendant may claim damages. A frivolous and vexatious suit may be one that is brought without reflection, carelessly or recklessly, or without legal basis.

► **DISADVANTAGES / OBSTACLES**³³²

- The difficulty in US courts of establishing personal jurisdiction over a company for the actions of its subsidiaries and secondary entities (and vice versa), particularly when the companies are parts of multinational corporations,
- The doctrine of *forum non conveniens*,
- The **act of state** and **political question** doctrines,
- The difficulty of enforcing rulings by US courts in foreign jurisdictions. Foreign governments have difficulty accepting the extraterritorial jurisdiction of US courts and the compensatory and punitive damages awarded in US courts are sometimes considered excessive. **US courts are reluctant to recognize and enforce foreign rulings.** These obstacles are all the more severe because there are few enforcement agreements between the US and other countries.³³³ These restrictions require plaintiffs to consider the foreign jurisdiction where they wish to enforce the US decision, in order to best formulate their complaint to ensure its enforcement in that country.
- The United States does not offer a constitutional or legal basis for legal aid in civil matters. There is no organised system of **legal aid**. The support that exists is provided *pro-bono* by certain attorneys and NGOs, but not by the federal government,
- With certain exceptions, there is no rule which allows successful plaintiffs to be **reimbursed for their legal costs**, and
- Lastly, the court cannot appoint certified interpreters unless the government is the plaintiff.

* * *

³³¹ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 45, 179 and following, 208 and following, 391 and following; B. Stephens, *op.cit.*, 2002, p. 14 and following.

³³² Oxford Pro Bono Publico, *op.cit.*, p. 304 and 310.

³³³ *Ibid.*, p. 325 and following.

Regulation 44/2001 allows a multinational corporation to be held liable in the court of an EU Member State based on the alternative grounds of jurisdiction discussed herein.

For the rest, Regulation 44/2001 determines neither the law applicable to civil liability, nor the rules of procedure. These questions must be referred to the Rome II regulation and/or the national law of the forum court. While covering all applicable tort actions, **Regulation 44/2001 does not take into account the specific nature of our situation**. It represents, however, a clear opportunity for legal action within Europe and should not be overlooked.

With this in mind, it is clear that ***a priori* the ATCA presents many advantages over EU law**. It specifically grants jurisdiction to US federal courts to hear any civil action brought by a foreign victim of an international law violation. Case law has largely interpreted the different conditions for action, and has specifically asserted that US courts have jurisdiction to hear civil liability suits against multinational corporations for international human rights law violations committed in the context of their operations abroad. The ATCA has also accepted international law as the law applicable to the case and developed a liberal approach in terms of piercing the corporate veil. Current procedures are particularly favourable to situations such as ours, given the ability to sue a non-U.S.-domiciled multinational corporation, the existence of class action lawsuits, the discovery procedure and the contingency system for remunerating attorneys.

In practice, however, **ATCA trials are characterized by numerous difficulties and uncertainties which render the process unpredictable**. Some go as far as saying the ATCA process is compromised from the outset. It is difficult to meet the substantive conditions for civil action in our situation, particularly with regard to international law violations. The quasi-universal jurisdiction granted by the ATCA is limited by various procedural hurdle sunwillingness which require a territorial connection between the US and the dispute, either through personal jurisdiction or *forum non conveniens*, or which aim to avoid any interference with US foreign policy. ATCA trials are lengthy and costly for victims.

In addition, despite an increasing body of favourable case law affirming the right of victims of international law violations to a remedy in the U.S., **many doctrinal and jurisprudential controversies remain with regard to the application and appropriateness of legislation such as the ATCA**. With the support of industry lobbyists, the Bush Administration tried to limit the scope of the ATCA by challenging its foundations and/or limiting its application to the legislature's original intent. On 25th June 2009, President Obama appointed Harold Hongju Koh as the new Legal Advisor of the Department of State. Koh has consistently supported a broad application of the ATCA since the 1990s particularly when the Bush administration expressed opposition. Koh's strategic position in the Obama administration does suggest a move toward applying the ATCA.

Although many cases and issues are pending, to date, **no ATCA trial has come to completion**. The most emblematic case, *Doe v. Unocal*, concluded with a financial out-of-court settlement between the parties before the merits of the case came under judicial scrutiny. Despite a lack of actual sentences, some have stressed the value of the cases introduced under the ATCA, noting that the ATCA provides a forum where victims can publicly denounce the abuses they suffered, force companies to answer for their actions before an independent court and disclose relevant documents via the disclosure procedure. In addition, calling the reputation of corporations into question plays a preventive role.³³⁴

Despite these obstacles, it remains pertinent to **draw lessons** from the ATCA, particularly in terms of the content and principles it ascribes. It is also important to learn from the practices it generates for **building an appropriate model of civil liability and responding to the challenges of globalisation**. **European law offers opportunities for real success** in litigation based on European rules of jurisdiction and enforcement. Rulings by the High Court of Nanterre and the Versailles Court of Appeal in the case of the Jerusalem tramway are significant, as is the Dutch court's ruling in the case of Shell in Nigeria. The implications of these cases will become more clear as the rulings are put into practice.

Thus, waiting for the law to develop a truly effective legal system, it is important to **coordinate efforts between NGOs and attorneys, to further advocate** and to **increase litigation** relating to human rights violations committed by multinational companies.

Post-Scriptum

Although these sections focus on the legal framework and cases in Europe, the United States and Canada, other jurisdictions have also shown to have a progressive approach to the question of responsibility of businesses for extraterritorial violations of human rights, such as in Brazil.

→ **Brazilian courts in action**

Odebrecht – Biocom Angola³³⁵

In March 2014, the Brazilian multinational “Odebrecht” was notified by the Brazilian Government of allegations of slave labour conditions in Angola at the site of construction of a plant for Biocom, an Angolan company partly owned by Odebrecht. Subsequently, the Brazilian Prosecutor General filed a lawsuit before the labour court of Araraquara, Brazil,

³³⁴ See H. Ward, “Governing Multinationals: the role of foreign direct liability”, Briefing Paper, Energy and Environment Programme, New Series, No. 18, February 2001; D. Kirkowski, “Economic Sanctions vs. Litigation under ATCA: US Strategies to Effect Human Rights Norms; Perspectives from Burma”, Working Paper, 2003.

³³⁵ 2nd Labour Court Araraquara, Process N° 10230-31.2014.5.15.0079, September 2015.

in June 2015 accusing Odebrecht of human trafficking and of maintaining Brazilian workers in slave-like labour conditions.³³⁶

The case resulted in the conviction of the Odebrecht Group on the basis of article 3 of the Brazilian law regulating the situation of Brazilian workers or workers transferred by their employers abroad. According to this legal provision, the person responsible for the labour contract shall ensure the respect of the worker's rights protected under Brazilian law, regardless of the legal standards applicable in the state where the worker is located. The court considered that in the case of employees transferred to work abroad, all the companies involved in the transaction are bound to ensure conditions of dignity and comfort at work as per Brazilian labour law. Having investigated Biocom's plant construction site in Angola, the court concluded that the lack of adequate hygiene, health and safety conditions amounted to degrading working conditions, which violated workers' dignity and subjected them to suffering, especially considering they were not in their home country.

The court ordered the company to pay 50 million reais (US 13 million) in damages to 500 workers.

Zara Brazil

Zara, one of the brands owned by Inditex, the world's largest clothing retailer in terms of number of stores, sources its products from a large network of suppliers throughout the world. In 2011 the Brazilian labour inspection authorities found violations of human rights in Zara's supply chain, whereby "orders from Zara ended up at illegal workshops, where undocumented immigrants from Bolivia and Peru were working and living under inhumane conditions."³³⁷ The Brazilian authorities reached an agreement with Zara who committed to carry out stronger monitoring and inspections on its suppliers. However, more recent reports from the labour inspection authorities identified continuing violations of workers' rights committed by Zara's suppliers, such as excessive overtime and occupational health and safety violations.³³⁸ As a consequence, Zara risks being included in the so-called 'dirty list' of Brazil's labour and employment ministry, which indicates the companies where slave-like conditions have been found. In response, Zara initiated a constitutional action contesting the constitutionality of this list.³³⁹

³³⁶ Bussiness and Human Rights Ressource Centre, "Odebrecht Lawsuit (re Forced Labour in Angola)", available at: <http://business-humanrights.org>

³³⁷ SOMO, 'Fashion Brand Zara once again associated with Brazilian labour rights abuses', 9 May 2015, www.somo.nl

³³⁸ Reporter Brazil, *Zara corta oficinas de imigrantes e será multada por discriminação*, 9 May 2015, available at: <http://reporterbrasil.org.br>

³³⁹ SOMO, 'Fashion Brand Zara once again associated with Brazilian labour rights abuses', 9 May 2015, www.somo.nl

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- International Commission of Jurists, *Corporate complicity & legal accountability, vol. 3: civil remedies*, Genève, 2008
 - International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations*, Poland, Geneva 2010
 - International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: South Africa*, Geneva 2010
 - Oxford Pro-bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse – A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008
www.law.ox.ac.uk/opbp
 - EarthRights International, *Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts – A resource for Non-Lawyers*, Rev. Sec. Ed., 2006
 - Business and Human Rights, *Corporate Legal Accountability Portal*
www.business-humanrights.org/
 - Center for Constitutional Rights
<http://ccrjustice.org>
 - EarthRights International
www.earthrights.org
 - Environmental Defender Law Center, *Corporate Accountability*
www.edlc.org/cases/corporate-accountability
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PART II

The Extraterritorial Criminal Liability of Multinational Corporations for Human Rights Violations

It is well established that certain corporations have a propensity to engage in serious criminal activity. At various times in history they have been used by dictators, rebel armies and even terrorists to carry out their crimes.³⁴⁰ Frequently denounced violations by companies include the development and use of toxic chemicals in recent armed conflicts (former Yugoslavia)³⁴¹ and “pacts of connivance” – corrupt practices – between foreign companies and local governments.³⁴²

In South Africa, following hearings which began in November 1997 on the involvement of economic actors in the system of apartheid,³⁴³ the Truth and Reconciliation Commission (TRC) ruled unequivocally that companies had provided material support to the institutionalised crime. The TRC held that the companies played a central role in supporting the economy which kept the South African State running under apartheid and that companies derived substantial profit from the system of racial privileges. The TRC went so far as to say that some companies, particularly in the mining sector, contributed to the development and implementation of the apartheid system.³⁴⁴ A full ten years earlier, the United Nations General Assembly had already condemned apartheid’s widespread and systematic use of racial discrimination as a crime against humanity. The UN Convention of 1973 on the Elimination

³⁴⁰ For instance, Ford and Mercedes Benz were accused of complicity during the Argentinian dictatorship in the mid 70s, accused of letting their workers in the hands of the repressors and to have allowed in their factories military detachment. D. Vandermeersch, “La dimension internationale de la loi”, in M. Nihoul (Ed.), *La responsabilité pénale des personnes morales en Belgique*, Brussels, La Chartre, 2005, p. 243.

³⁴¹ D. Baigun, “Reponsabilidad penal de las transnacionales”, Geneva, 4-5 May 2001, CETIM/AAJ, p. 3-4.

³⁴² See Global Witness, “Now it’s time for transparency”, Press Release of 24 March 2003, www.globalwitness.org

³⁴³ The Truth and Reconciliation Commission “had no power to condemn the perpetrators of criminal violations of human rights, but could, however, declare an amnesty.” Business Hearings” examined the role of economic, government and union actors. Several sectors of the economy were interviewed. For more on this process, see B. Lyons, “Getting to accountability: business, apartheid and human rights”, *N.Q.H.R.*, 1999, p.135 ff.

³⁴⁴ See the Truth and Reconciliation Commission, Final Report, Vol.4, Chapter 2, § 161.

and Repression of the Crime of Apartheid established that “organisations, institutions and individuals committing crimes of apartheid are criminal.”³⁴⁵

The ability of companies to violate international humanitarian law has thus far not resulted in their criminal liability before international courts. In the aftermath of the Second World War,³⁴⁶ however, national laws have increasingly recognised the principle of corporate criminal liability and numerous international conventions and regional instruments have called upon States to legislate in this direction. The 20th century has been marked by an increase in the number and size of corporations, such that social and political life now appears to be heavily influenced by their behaviour. Their increased involvement in social relations corresponds proportionally with an increased involvement in criminal activity.

Many people believe that establishing a regime under which corporations, and not only the individuals who work for or manage them, are held criminally liable, will render prosecutions and enforcement efforts more fair and efficient.³⁴⁷

The difficulty or impossibility of identifying the physical person(s) personally and criminally liable, despite serious analysis of a company’s management structure, internal organisation, memos, contracts delegating powers and written mandates, has often lead to a double impasse: the corporation’s impunity, or, the sentencing of supervisors – due to their position – although no fault of their own could be demonstrated.³⁴⁸ In a purely functional manner, the court has on many occasions found a company’s manager to be criminally responsible, even in situations where it was unanimously agreed that key factors in the company’s organisation, particularly with regard to multinational groupings of companies, make it impossible

³⁴⁵ See art. I (2) of the *United Nations Convention on the Suppression and Punishment of the Crime of Apartheid* adopted 30 November 1973, effective 18 July 1976. The direct criminal responsibility of persons can be engaged internationally on this basis. Several Protocol proposals, which were never achieved, were filed to create an international tribunal with jurisdiction over corporations with multinational companies to be targeted in particular. See A. Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons”, in *Liability of Multinational Corporations under International Law* / ed. M. T. Kamminga and S. Zia-Zarifi, Kluwer Law International, The Hague/London/Boston, p. 173.

³⁴⁶ G. Stessens, “Corporate criminal liability a comparative perspective”, I.C.L.Q. 1994, (493), 493; R. Roth, “La responsabilité pénale des personnes morales”, in *La responsabilité. Aspects nouveaux* (Travaux de l’association Henri Capitant des Amis de la Culture juridique française), Tome L., L.G.D.J., 1999, pp. 683 ff.

³⁴⁷ Rontchevsky, “Rapport français” in *La responsabilité. Aspects nouveaux* (Travaux de l’association Henri Capitant des Amis de la Culture juridique française), Tome L., 1999, L.G.D.J., p.741.

³⁴⁸ M. Delmas-Marty, “La responsabilité pénale des groupements”, *Rev. Intern. dr. Pén.*, 1980, p.39-41; A. De Nauw, “La délinquance des personnes morales et l’attribution de l’infraction à une personne physique par le juge”, See under Cass., *R.C.J.B.*, 1992, p. 570.

to monitor all of the company's activities.³⁴⁹ Thus it seems necessary to establish **corporate criminal liability**, without eclipsing **individual criminal liability** when guilt is demonstrated.

In some respects, corporate criminal liability would be more “promising” than the civil liability:

- Criminal procedure offers the **benefit of theoretically relieving victims of the burden of proof**;
- Criminal procedure **has a greater deterrent** effect against future violations, particularly if the sanction imposed on the company is not limited to fines but also includes asset forfeiture or **the closure of** company branches involved in the offence; and
- Some statutes of limitations are longer in criminal matters, particularly in cases involving serious violations of international humanitarian law.

On the other hand, it should not be overlooked that the required evidentiary standards are higher and it is thus more difficult to demonstrate proof in criminal cases than in civil cases. In criminal cases, defendants may be acquitted due to doubt. In addition, the slowness of some criminal procedures sometimes prevents the case from reaching completion.

³⁴⁹ This tendency is most notable in Belgium. See Roger-France, “La délégation de pouvoir en droit pénal, ou comment prévenir le risque pénal dans l’entreprise?”, *J.T.*, 2000, p. 258.

CHAPTER I

Criminal Prosecution of Multinationals before the International Courts

A. Ad hoc International Criminal Tribunals

B. International Criminal Court

* * *

The international criminal courts are of two types: the International Criminal Tribunals (ICT), which are temporary tribunals, and the International Criminal Court (ICC), which is a permanent court.

A. The ad hoc International Criminal Tribunals

The ICTs are non-permanent courts created by the Security Council on the basis of Chapter VII of the UN Charter, regarding action with respect to threats to the peace, a breach of the peace or an act of aggression.

Several ICTs were created by the Security Council:

- The International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993
- The International Criminal Tribunal for Rwanda (ICTR) in 1994

More recently, the UN, with the States concerned, created hybrid criminal tribunals (the creation, composition and operation of which is assured by both the United Nations and the State in question):

- The Special Court for Sierra Leone (SCSL), in 2002
- The Extraordinary Chambers in the Courts of Cambodia (ECCC), in 2004
- The Special Tribunal for Lebanon (STL) in 2007

The first *ad hoc* tribunals were created after the Second World War to prosecute international criminals, mainly German and Japanese:

- The Nuremberg International Military Tribunal, established in 1945 by an agreement between the United States, the United Kingdom, the USSR and France
- The International Military Tribunal for the Far East, established in 1946

The statutes of the international tribunals (currently operational), responsible for the repression of serious violations of international humanitarian law, do not provide for the criminal prosecution of state or privately held legal entities. Their jurisdiction is limited to individuals (state officials or private individuals), co-authors, accom-

plices or instigators, and representing the legal entity.³⁵⁰ Prosecution is limited to the business leaders (and not the companies as moral entities).

Several trials that followed the end of the Second World War led to the conviction of industrialists for serious crimes or complicity in the commission of such crimes:
– 1947-1948: *The United States of America v. Alfried Krupp, and al.* This trial led to the conviction of several members of the Krupp family (weapons industry) for crimes against peace and crimes against humanity.
– 1947-1948: *The United States of America v. Carl Krauch, and al.* This trial resulted in the conviction of several German industrialists of the chemical group IG Farben, the producer of Zyklon B gas, for war crimes and crimes against humanity.

➔ The private economic parties before the ICTR

The ICTR Appeals Court confirmed on 16 November 2001, the sentence of life imprisonment – rendered in first instance on January 27, 2000 – against the former director of the Tea Factory Gisovu (Kibuye, western Rwanda), Alfred Musema, for the crime of genocide and extermination understood as a crime against humanity (Case ICTR-96-13-1). Alfred Musema, the largest employer in the area, lent vehicles, drivers and employees of his factory to transport the killers to the massacre sites in Rwanda.³⁵¹

In the Decision of the Court of First Instance ruling on the motion filed by the Prosecutor to obtain a formal request for a deferral to the International Criminal Tribunal for Rwanda (pursuant to Articles 9 and 10 of the Rules of Procedure and Evidence), rendered March 12, 1996 (ICTR-96-5-D), it was stated the following: “since his investigations target mainly people in positions of power, the Prosecutor considers that the criminal responsibility of Alfred Musema could be paramount. Indeed, Alfred Musema was director of the tea factory Gisovu (Kibuye prefecture). He used this position of director to aid and abet the execution of serious violations of international humanitarian law. More specifically, he is presumed to have been seen several times on the massacre sites [...]. In addition, vehicles of his factory are alleged to have been used to transport the killers to the massacre sites. His employees and drivers were also regularly present”.³⁵²

³⁵⁰ See Articles 6 and 7 of the *Statute of the International Tribunal for the Former Yugoslavia* (Statute adopted on May 25, 1993 by Resolution 827 of the Security Council), Articles 5 and 6 of the *Statute of the International Tribunal for Rwanda* (Statute adopted on November 8, 1994 by Resolution 955 of the Security Council). See also *United Nations Convention on the Suppression and Punishment of the Crime of Apartheid* of 30 November 1973 (entered into force July 18, 1976), *Ibid.*

³⁵¹ ICTR, *Musema v. Prosecutor*, case n°ICTR-96-13-A, November 6, 2001. Regarding the charges against him, see R. Boed, “Current developments in the Jurisprudence of the International Criminal Tribunal for Rwanda”, *I.C.L.R.*, Volume 2, Number 3, 2002, p. 283-295(13). In first instance, see ICTR, *The Prosecutor v. Musema*, case n°ICTR-96-13-T, January 27, 2000.

³⁵² Centre de droit international ULB, *Tribunal Pénal International pour le Rwanda – recueil des ordonnances, décisions et arrêts 1995-1997*, Bruylant, Bruxelles, 2000, p. 389. (free translation).

In relation to the moral authority of a company over its environment by its mere presence, the analysis of André Guichaoua, a French sociologist and professor at the University of Lille, speaking on May 6, 1999 in Arusha in his capacity as an expert witness was recalled. Professor André Guichaoua indicated that Alfred Musema had a definite influence on the population: “In my opinion, a director of a tea factory, with all that this position represents in the overall distribution of resources, had considerable influence on the local population and municipal authorities”. It is interesting to compare this analysis with the decision rendered by the ICTR in the *Prosecutor v. Jean-Paul Akayesu* case, of October 2, 1998 (Case No. ICTR-96-4): a passive witness who is viewed by the other perpetrators in such high esteem that his presence amounts to encouragement, can be convicted of complicity in crimes against humanity.³⁵³

This decision is not an isolated one. In the case of *The Prosecutor v. Ruzindana*, the Prosecutor stated on October 28, 1998 before the ICTR, that Obed Ruzindana, was a well-known and respected businessman in Kibuye of good social standing and in a position to deter potential perpetrators of massacres from committing such acts.³⁵⁴

The gradual recognition of the “sphere of influence”³⁵⁵ and moral authority of the industrialists and their companies, and thus their power over the course of events through their mere presence is the basis for the criminal liability which may be imputed to them when, present at the scene of the crime, they fail to act to try to prevent its commission.

The Prosecutor v. Nahimana, Barayagwiza and Ngeze case, commonly called the “media case” concerns the media campaign conducted by three people in Rwanda in 1994, intended to desensitize the Hutu population and encourage it to kill Tutsis.

Ferdinand Nahimana and Jean Bosco Barayagwiza were both prominent members of the initiative committee behind the creation of the *Radio Television Libre des Mille Collines* (RTLM) which broadcast from July 1993 – July 1994 virulent messages condemning the Tutsi as “enemies” and moderate Hutus as “collaborators”. Nahimana, a former university professor and director of the Rwandan Information Office (ORINFOR) was accused of being behind the creation of RTLM and was considered the company president. Barayagwiza, former Director of Political Affairs in the Ministry of Foreign Affairs, was considered the number two of RTLM.

Hassan Ngeze was the founder, owner and chief editor of the newspaper Kangura, which was published from 1990 to 1991 and was widely read throughout Rwanda. As with the broadcasts of RTLM, Kangura published hate messages, denouncing the Tutsis as enemies seeking to overthrow the democratic system and take power.

³⁵³ See also See ICTY, *Furundzija case*, § 209: “presence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility.”

³⁵⁴ ICTR, *Prosecutor v. Obed Ruzindana*, ICTR-96-10-T et ICTR-96-1-T, June 1, 2001.

³⁵⁵ The term was also used in the Musema case in the appeal judgement. See ICTR, *Prosecutor c. Ruzindana*, June 1, 2001 (ICTR-96-10-T and ICTR-96-1-T).

On November 28, 2007, the Appeals Chamber declared Nahimana and Ngeze guilty of direct and public incitement to commit genocide, and Barayagwiza of genocide, incitement to genocide, extermination and persecution constituting crimes against humanity.³⁵⁶

In each of the cases discussed above, the leaders of the companies involved were considered either as a perpetrator or a direct accomplice of the crime. There are other cases in which the company is indirectly complicit in the crime, when it draws profits therefrom.

B. The International Criminal Court

The ICC, head-quartered in The Hague, is the first permanent international criminal court. It was created by the Treaty of Rome, signed on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries of the United Nations and defining the Statute of the ICC.³⁵⁷

🕒 What crimes are sanctioned?

The crimes within the jurisdiction of the ICC are defined in Articles 5 and following of the Rome Statute: genocide, crimes against humanity, war crimes and the crime of aggression. This list also includes certain crimes against the administration of justice (art. 70 and 71).

The jurisdiction of the ICC is limited to four types of crimes that affect the entire international community, considered the most serious. These are:

- The **crime of genocide**, defined in Article 6 of the Statute;
- **Crimes against humanity** (Article 7 of the Statute);
- **War-crimes** (Article 8 of the Statute);
- The **crime of aggression**.

Article 6 stipulates that the **crime of genocide** means any of the following acts committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

³⁵⁶ Sophia Kagan, “L’affaire des “médias de la haine” devant le tribunal pour le Rwanda: L’arrêt Nahimana et al.”, The Hague Justice Portal, www.haguejusticeportal.net

³⁵⁷ FIDH, *Victims’ Rights before the International Criminal Court: a Guide for Victims, their Legal Representatives and NGOs*, April 2007, www.fidh.org

Crimes against humanity consist in acts committed as part of a **widespread or systematic** attack directed against any civilian population, with knowledge of the attack such as murder, extermination, enslavement, torture. The list of Article 7 is not exhaustive.

The ICC also has jurisdiction to try persons suspected of **war crimes**, in particular when those crimes are part of a plan or policy or as part of a series of similar crimes committed on a large scale (art. 8). The Statute defines a war crime in Article 8. It lists 50 offences including rape, deportation and sexual slavery.

The **crime of aggression** also falls within the jurisdiction of the Court. During the Review Conference in June 2010 in Kampala, Uganda, a resolution was voted to amend the Rome Statute in order to include a definition of the crime of aggression based on the UNGA Resolution 3314 (XXIX) of 14 December 1974, which defines aggression as a “crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.”³⁵⁸ The amendment will only enter into force after having been ratified by 30 states and only if the Assembly of States Parties so decides after 1st January 2017. Until now 26 States have ratified the amendment.³⁵⁹ Such limit imposed on the jurisdiction of the Court has been subject to criticism by NGOs.³⁶⁰

► NOTE

The crimes over which the Court has jurisdiction are not subject to any statute of limitations (Article 29). This means that there is no maximum time after the commission of the crime to initiate legal proceedings (upon condition that the crime occurred after 2002 and/or the date of ratification of the ICC Statute by the State. See *infra*).

🕒 Over whom does the ICC have jurisdiction?

- The statute provides that the Court has jurisdiction only over **individuals**. **Legal entities, such as businesses, are therefore currently excluded from the jurisdiction of the ICC.** This choice was justified by the fact that the criminal liability of legal entities is not universally recognized.³⁶¹ However, it remains possible to individually prosecute the directors of a company.
- The ICC has jurisdiction over the authors, co-authors, principals, instigators, accomplices

³⁵⁸ ICC, “Review Conference of the Rome State concludes in Kampala”, Press Release, 12 June 2010, www.icc-cpi.int

³⁵⁹ See: <https://treaties.un.org>

³⁶⁰ FIDH, “Conclusion of Landmark ICC Review Conference: Difficult Compromise and Commitments to be Confirmed”, 14 June 2010, www.fidh.org

³⁶¹ K. Ambos, “Les fondements juridiques de la Cour pénale internationale”, Rev. trim. D.H., 1999, p. 749.

“The different types of liability recognized are individual liability (author), co-liability (‘jointly with another person’), and indirect liability (‘through another person’)” (art.25. 3.a).³⁶²

Because international crimes typically involve several persons, Article 25 of the Statute stipulates that the ICC has jurisdiction not only in respect of any individual who actually committed a crime provided for under the Statute (direct perpetrator), but also against all those who have intentionally ordered such crimes, solicited or induced others to commit them or provided the means therefore.³⁶³

The Rome Statute opts for a **broad definition of complicity**. Indeed, an individual will be criminally liable if he/she:

- Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted (Art. 25, 3, B), or
- For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (Art. 25, 3, C).

Article 25.3.D also specifies that a person who contributes in any way to the commission or attempted commission of a crime by a group of persons acting in concert will be convicted. This contribution must be intentional and either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or be made in the knowledge of the intention of the group to commit the crime.³⁶⁴

- The defendants must be **at least 18 years old at the time of the alleged commission of a crime** (s. 26)
- **There are several grounds for excluding criminal responsibility (art. 31).**

An individual shall not be held criminally liable where:

- the person suffers from a mental disease or defect that destroys that person’s capacity to appreciate his conduct, or
- the person acts reasonably to defend himself or herself or another person, or
- the person was acting under duress or a threat.

The official capacity of the suspect is not a ground for exoneration (art. 27): the immunity which may benefit certain persons (such as agents of state entities) is inadmissible before the Court.

³⁶² K. Ambos, *op. cit.*, p.749. (free translation).

³⁶³ See FIDH, *Victims’ Rights before the ICC, op.cit.*

³⁶⁴ M. Bassiouni, “Note explicative sur le Statut de la Cour pénale internationale”, *Rev. Internat. dr. pén.*, 2000, p.17.

➔ What about the complicity of individuals implicated in the commission of international crimes committed by or with the complicity of a company?

Article 25.3.c) of the Statute of the ICC could, *inter alia*, apply to these persons (see above).

In a press release dated September 26, 2003, the Prosecutor of the ICC drew attention to a certain number of connections between crimes committed in Ituri (Democratic Republic of Congo) and several companies in Europe, Asia and North America, the illegal exploitation of resources in eastern DRC allowing for the financing of the conflicts in this region. The Prosecutor, Mr. Ocampo stated that his own investigations on violations of human rights in the DRC were based on the successive reports of the group of UN experts regarding the illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo,³⁶⁵ reports that sought to identify the role of business in the perpetuation of conflicts. In his statement, Mr. Ocampo explained that “The investigation of the financial aspects of war crimes and crimes against humanity is not a new idea. In the aftermath of the Second World War, German industrialists were prosecuted by the Nuremberg Military Tribunals for their contribution to the Nazi war effort. One of these Tribunals held that it was a settled principle of law that persons knowingly contributing – with their influence and money – to the support of criminal enterprises can be held responsible for the commission of such crimes.”³⁶⁶

Nevertheless, the investigations of the Office of the Prosecutor of the ICC in the DRC and the first cases involving crimes committed in the north and east of the country do not yet show any real consideration for the complicity of the economic actors in the commission of the alleged crimes.

🕒 Who can trigger the jurisdiction of the ICC?

The Prosecutor may initiate investigations and prosecutions in three possible ways (art.13):

- States Parties to the Statute can refer situations to the Prosecutor;
- The Security Council of the United Nations may ask the Prosecutor to open an investigation into a situation;
- The Prosecutor may initiate investigations *proprio motu* on the basis of information received from reliable sources;
- Non-party States to the Statute may also refer to the Prosecutor.

³⁶⁵ *United Nations Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC*. S/2001/357, april 12, 2001; S/2001/1072, November 13, 2001; S/2002/1146, October 16, 2002; S/2003/1027, October 23, 2003.

³⁶⁶ See L. M. Ocampo, “The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri”, *Press Release*, The Hague, September 26, 2003.

“Situation” means “the context of developments in which it is suspected that” a crime within the jurisdiction of the Court “has been committed.”³⁶⁷

The referral of a situation to the Court by a State Party (Art. 14)

A State Party may ask the Prosecutor to open an investigation into a particular situation. This possibility is granted only to States that have ratified the Rome Statute. Non-party states may, however, inform the prosecutor of certain crimes that have been committed, so that he can act *proprio motu*.³⁶⁸ The state that has referred a situation to the Prosecutor must attach to the referral certain information that can serve as evidence.

The referral of a situation to the Court by the Security Council (Art. 13.b)

The Security Council must act with intent to prevent a threat to peace and security (Chapter VII of the UN Charter). In this case, the ICC has jurisdiction even though the crimes were committed on the territory of a non party State (that has not ratified the Rome Statute) or by a national of any such State. The only requirement is that the situation involves a “threat to peace and security”.³⁶⁹

Following these two types of referrals, the Prosecutor shall decide to initiate an investigation if he considers there is a reasonable basis to proceed under the Rome Statute.

The opening of an investigation by the Prosecutor acting on his own initiative (Art. 15)

The Prosecutor of the ICC has the authority to refer a situation on his own initiative. The successful opening of such an investigation however, is conditioned upon the approval of a Pre-Trial Chamber (composed of three judges). In the event the Chamber considers that the evidence is insufficient and therefore does not provide its authorization, the Prosecutor may submit a new application later on the basis of facts or new evidence.³⁷⁰ However, if the authorization of the Pre-Trial Chamber is granted, the Prosecutor shall notify the opening of his investigation to all States Parties and the states concerned. They then have a period of one month (from receipt of the service) to notify the Prosecutor if proceedings have already been introduced at national level.

To determine whether to initiate an investigation, the Prosecutor will seek relevant information from **credible sources** such as states, intergovernmental organisa-

³⁶⁷ M. Bassiouni, *op. cit.*, p.18. (free translation).

³⁶⁸ D. Becharoui, *op. cit.*, p.353. (free translation).

³⁶⁹ M. Bassiouni, *op. cit.*, p. 18. (free translation).

³⁷⁰ K. Ambos, *op. cit.*, p.745.

tions. At this stage of the proceedings, victims, intergovernmental organisations, UN bodies may provide the Prosecutor with information that will help determine whether there are grounds to initiate an investigation.

In November 2009, the Prosecutor sought the authorization of the judges of the Pre-Trial Chamber to initiate an investigation into the situation in Kenya.

On March 31, 2010, the judges of Pre-Trial Chamber II authorized the Prosecutor of the ICC to investigate crimes against humanity allegedly committed in Kenya as part of post-election violence in 2007-2008. This is the first time that the ICC Prosecutor calls for the opening of an investigation on his own initiative *proprio motu*. The Prosecutor announced his intentions to act quickly and his hopes to finalize the investigation before the end of 2010.³⁷¹

Victims and NGOs may also, on this basis or in reference to article 54.3.e section, **send information to the Office of the Prosecutor to facilitate the opening of investigations *proprio motu***, or contribute to the ongoing investigations and prosecutions. In this context, the FIDH provided significant information to the Office of the Prosecutor, in particular in relation to the situations in the Democratic Republic of Congo, Central African Republic and Colombia.

The referral of a situation to the Court by a non party state (art.12.3)

Non party States may refer a situation to the Prosecutor by means of an *ad hoc* declaration accepting the jurisdiction of the Court, as was the case for the Ivory Coast when the government made a statement accepting the jurisdiction of the Court in 2003 for crimes committed since September 19, 2002.

② Under what conditions?

The location of the commission of the crime and the nationality of the accused

If the crime was committed on the territory of a non party state or by a national of a non party state, the Court shall in principle not have jurisdiction over this crime. However, the non party state may recognize the jurisdiction of the Court on an *ad hoc* basis (12.3). It will therefore also have jurisdiction where a non-party state to the Rome Statute has consented to the exercise of its jurisdiction over a crime committed on its territory or by a national thereof.³⁷²

³⁷¹ Coalition for the International Criminal Court, www.iccnw.org

³⁷² D. Becheraoui, “L’exercice de la compétence de la Cour Pénale Internationale”, *Rev. internat.*, 2005, liv.3-4, p. 347.

A situation may also be referred by the Security Council of the United Nations, under Chapter VII of the UN Charter.

The jurisdiction of the Court can be exercised only if:

- The accused is a national of a State Party or a state that otherwise has accepted the jurisdiction of the Court
- The crime was committed on the territory of a State Party or a state that otherwise has accepted the jurisdiction of the Court
- The UN Security Council referred the situation to the Prosecutor, regardless of the nationality of the suspect or where the crime was committed.

The principle of complementarity (Art. 17)

The ICC is not intended as a substitute for national courts. The **obligation to prosecute** genocide, crimes against humanity and war crimes rests **primarily with national courts**, the ICC intervenes only in cases of failure on their part or their state. The ICC is therefore complementary to national criminal jurisdictions (which distinguishes it strongly from *ad hoc* international tribunals). Therefore, it can prosecute and try persons, only where no national court has initiated proceedings or where a national court has affirmed its intention to do so but in reality **lacks the will or ability to conduct such prosecutions**. Lack of will is established where a state is trying to shield the person concerned from criminal responsibility for crimes within the Court's jurisdiction, or is conducting a mock trial in order to protect the person suspected of crimes, either by delaying the procedure or by conducting a biased procedure.³⁷³ Inability will be established when the state's judiciary has collapsed, disintegrated during an internal conflict, preventing the gathering of sufficient evidence.

The jurisdiction of the Court intervenes as a last resort.³⁷⁴ This principle allows national courts to be the first to investigate or initiate prosecutions.

The date of the facts

The ICC has jurisdiction only over crimes committed after the entry into force of the Rome Statute, i.e. after 1 July 2002.

For states which became parties to the Statute after this date, the ICC's jurisdiction will apply only to crimes committed after their ratification thereof. Section 124 of the Statute also allows a state that becomes a party to the Statute to defer the implementation of the Court's jurisdiction over war crimes for seven years. The deletion of this article is also on the agenda of the Review Conference in June 2010.

³⁷³ K. Ambos, *op. cit.*, p.746.

³⁷⁴ *Victims' Rights, op.cit.*

② Role of the victim in the proceedings

Unlike the international tribunals, the **victims before the ICC play an important role**. The Rome Statute provides an autonomous place for victims in the judicial process. This revolution is tied to the transition from justice based on the sentencing of the accused (retributive justice)³⁷⁵ to justice that places the victim at the heart of the lawsuit (restorative justice). The place of the victims in the proceedings of a trial before the ICC further demonstrates the efforts made to ensure that the perpetrators of serious crimes be held accountable for their actions.

The concept of the victim

Article 85 of the Rules of Procedure and Evidence defines the term “victim” rather broadly. This definition defines the physical victim extensively to include also **indirect victims**³⁷⁶:

- Any individual who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court;
- Any organisation or institution, the property which is dedicated to religion, education, arts, science or charitable purposes, a historic monument, hospital and other premises used for humanitarian purposes that has suffered direct harm.

Unlike the definition of private individual victims, the definition of legal entity victims is restrictive. An association that does not meet the criteria of Article 85 shall not be able to assist victims on the basis only of its activities.

Regarding the damages, it is the role of the judge to determine, in a case-by-case basis, those to be taken into account, it being understood that these include damage to the **integrity of the person**, both **physical** and **psychological**, and **material damages**.

*The participation of the victim during the preliminary phase of the trial*³⁷⁷

Victims may send information to the Prosecutor of the ICC, regarding crimes within the jurisdiction of the Court, so that he may decide whether there are sufficient grounds on which to prosecute and the possibility of opening an investigation.³⁷⁸ They can thus **intervene by submitting their views as of the first referral to the Court**. The Prosecutor shall take into account their interests, particularly where he

³⁷⁵ See *Ibid* and J. Fernandez, “Variations sur la victime et la justice pénale internationale”, *Revue de la Civilisation Contemporaine de l’Université de Bretagne Occidentale*, 2006, p.2, www.univ-brest.fr/amnis

³⁷⁶ J. Fernandez, *op. cit.*, p.7.

³⁷⁷ We will discuss here only the preliminary phase.

³⁷⁸ See the decision of the Preliminary Chamber, on January 17, 2006, taken at the request of six people affected by the crimes committed in DRC

decides to prosecute.³⁷⁹ They also have the **right to participate in the proceedings** (Article 68 of the Statute, which defines the conditions for the participation of victims in the proceedings, provides that “Where the personal interests of victims are concerned, the Court shall permit their views and concerns to be presented and considered at stages of the procedure it considers appropriate...”) and claim for reparation.³⁸⁰

Victims may also submit observations to the Court in an action challenging the jurisdiction of the ICC or the admissibility of prosecution.³⁸¹

FIDH supports the participation of victims of the DRC (and of other cases), and more generally the access of victims to the ICC. In domestic law, the rulings of the ICC “have the authority of *res judicata*”: the victims are entitled to plead before a domestic court for redress.

* * *

Any possibilities for the ICC to have jurisdiction over companies as moral persons?

During the preparatory work of the Rome Statute, certain debates have indeed focused on the criminal liability of moral persons (legal entities). The draft statute for the creation of an international criminal court prepared by M.C. Bassiouni³⁸² stated in Article XII that the court would have jurisdiction to try the “individuals”. In this proposal, the term “individuals” was used in its broadest sense and applied equally to natural and moral persons. As for the draft statute submitted by the International Law Commission, the term “persons” referred to in the text suggested a reference to natural persons only.³⁸³

The report of the **Preparatory Committee for the creation of an international criminal court** in 1996, contains proposals relating to the inclusion of companies, the principal of which was a recommendation for the international court to have jurisdiction on the: “**criminal liability [...] of legal entities**, with the exception

³⁷⁹ J. Fernandez, *op. cit.*, p.7.

³⁸⁰ See FIDH, *Victims' Rights before the ICC*, *op.cit.*

³⁸¹ Statute, Art. 19. 3 ; L. Walleyn, “Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole”, *R.J.C.R.*, mars 2002, vol. 84, p.57.

³⁸² M.C. Bassiouni, *Draft Statute: International Criminal Tribunal*, 1998.

³⁸³ Cristina Chiomenti, “Corporations before the International Criminal Court”, Global Law Working Paper 01/05, *Symposium: Transnational Corporations and Human Rights*, NYU Law, 2005.

of states, when the crimes were committed in the name of the legal entity or its agencies and representatives”.³⁸⁴

Certain delegations expressed reservations about these proposals, arguing that it would be more useful to limit the jurisdiction of the Court to individuals, especially as the companies are controlled by natural persons.

At the Diplomatic Conference of Plenipotentiaries of the United Nations on the Establishment of an International Criminal Court held in Rome from June 15 to July 17, 1998³⁸⁵, **France proposed to include the notion of criminal organisations and companies as legal entities in the Statute.**³⁸⁶

The participating states were largely opposed thereto, citing the primary objective of the proposed ICC, which is to try natural persons responsible for international crimes, and practical reasons such as: the definition of legal entities varies from state to state, the principles of complementarity and subsidiarity would meet with opposition from certain national legal systems that have limited legislation on the criminal liability of legal persons and the fact that the Court would face significant difficulties in gathering evidence.

Some delegations seeking to find a middle ground, proposed that the court should have jurisdiction over the civil or administrative liability of legal persons. This proposal was hardly discussed.

Despite the position and hope of certain civil society representatives, the inadmissibility of actions brought against corporations was not put on the agenda during the Review Conference of the Rome Statute held in Kampala in May / June 2010.

In addition, several Protocol proposals, never achieved, were filed in order to create an international tribunal with jurisdiction over legal persons in particular over corporations.³⁸⁷ Many civil society groups continue to lobby for the creation of such a tribunal.

³⁸⁴ See Report of the Preparatory Committee on the establishment of an International Criminal Court, Proposal 2, Part 3bis, Article B, § a. “Personal jurisdiction”, <http://daccess-dds-ny.un.org>

³⁸⁵ *Final act of the united nations diplomatic conference of plenipotentiaries on the establishment of an international criminal court*, A/CONF.183/10, July 17, 1998.

³⁸⁶ “[...] The court should have jurisdiction to prosecute legal persons [...]” and then follow several conditions: when the crime has been committed by a person exercising control within the legal person when the crime has been committed in the name of the corporation, with his explicit consent, and as part of its activities when the individual has been convicted of the crime.” The French proposal only concerned companies, and excludes states, legal persons under public law, public international organisations, or non-profit organisations.

³⁸⁷ See A. Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons”, in *Liability of Multinational Corporations under International Law* edited by Menno T. Kamminga Saman Zia-Zarifi, Kluwer Law International, The Hague/London/Boston, p.173.

Therefore, in the case of crimes involving corporations, the victims must then prove the **existence of a relationship of complicity between the individual convicted by the ICC, and the corporation from which they are seeking compensation for damage suffered.**³⁸⁸

ADDITIONAL RESOURCES

- ICC
www.icc-cpi.int
- Coalition for an International Criminal Court
www.iccnw.org
- FIDH, *Victims' Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, April 2007
www.fidh.org/Victims-Rights-Before-the-International-Criminal
- FIDH, *FIDH paper on the International Criminal Court's first years*
www.fidh.org/FIDH-paper-on-the-International-Criminal-Court-s



➤ Prey Lang, primary forest in central Cambodia, 2013

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³⁸⁸ E. David, “La participation des victimes au procès devant la Cour pénale internationale”, *Guest Lecture Series of the Office of the Prosecutor*, aout 2005, p.7.

CHAPTER II

The Extraterritorial Criminal Liability of European-based Multinational Corporations for Human Rights Violations

* * *

For practical and legal considerations similar to those evoked in the section relating to corporate civil liability (section II, part I), we limit ourselves to providing an overview of existing legislation in some of the EU Member States, the US and Canada in relation to extraterritorial criminal liability.³⁸⁹

This chapter will not describe the laws of the 28 EU Member States but will highlight the major differences between them to identify those States which currently offer the “most successful” corporate criminal liability regimes and thus should be favoured by victims with a choice of forum.

The main scenario considered in this part is that of a multinational company whose parent company is headquartered in an EU Member State. Through its investments, the company has committed human rights violations abroad.

Corporate Criminal Liability in EU Member States

In criminal cases, there is no equivalent to EC Regulation 44/2001 governing civil matters (see Section II, Part I on extraterritorial corporate civil liability). Notwithstanding some exceptions, each EU Member State organises its own legal approach to this issue and maintains extraterritorial criminal laws which allow the State to hold a parent company liable for acts committed by its overseas subsidiaries. The principle of corporate criminal liability has continued to gain head wave in the EU, although the Member States disagree on the precise rules to apply.

³⁸⁹ There have been numerous interesting studies made on the subject. See the recent publications of the International Commission of Jurists on corporate liability in South Africa, Poland and Colombia (referenced at the end of section II, part I). See also Dr. Jennifer A. Zerk, “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas: A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG’s Special Representative on Business and Human Rights”, Working Paper No.59, June 2010. See also Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse - A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008, www.law.ox.ac.uk/opbp.

➔ Complaints filed in Belgium and France against Total

Suits filed four months apart in Belgium and France against the French company Total form a “leading case” in this area. On April 25, 2002, four Burmese refugees filed a civil suit in Brussels naming the France-based parent company of Total (formerly Total Fina Elf) and its Burmese subsidiary METR (Total Myanmar Exploration and Production). In application of the *universal jurisdiction principle* (see below), Total was accused of complicity in crimes against humanity committed in the course of the multinational’s operations on the Yadana gas pipeline in Burma. On 26 August 2002, two Burmese refugees who had been victims of kidnapping and forced labour filed a similar suit in Paris in application of the *active personality jurisdiction principle* (the alleged perpetrator was a French national). For technical reasons, only company executives, not the firm itself, were targeted in this case. The Belgian and French courts carried out their legal examinations in parallel and without consultation until each suit was stayed.

Recent regional and international conventions on financial, economic and transnational crime invite, but do not require, signatories to introduce the criminal liability of legal persons into domestic law.³⁹⁰ Article 10, paragraph 4 of the United Nations Convention against Transnational Organized Crime calls for legal persons to be subject to effective, proportionate and dissuasive **civil, administrative or criminal sanctions**. Council of Europe recommendations³⁹¹ and several common positions and framework decisions adopted within the EU are couched in similar terms.

Most EU Member States, including both common law and civil law countries, have already adopted this principle. This guide does not attempt an exhaustive comparison of the corporate criminal regimes in place within the various EU Member States, but identifies discernable trends among them.

The principle of corporate criminal liability is notably recognised in **Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Norway, the Netherlands, Poland, Portugal, Romania, the United Kingdom, Luxembourg and Spain**.³⁹²

³⁹⁰ See in particular Article 10 of the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000, and opened for signature by the Conference in Palermo on 12-15 December 2000, the UN Convention of 1988 “Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, Article 2 of the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997. The Treaty on the fight against criminal corruption signed in Strasbourg on 27 January 1999 follows that convention with an obligation for States to adopt laws establishing the liability of legal persons for corruption (art. 18).

³⁹¹ Recommendations No. R (81) 12 of 25 June 1981 on white collar crime and No. R (88) 18 of 20 October 1988 on the liability of legal persons for infractions committed in the course of their operations.

³⁹² For an overview of the pertinent national legislation see “Additional resources” at the end of the part.

Greece and Italy consider the principle to be unconstitutional.³⁹³ **Germany** has adopted hybrid measures.³⁹⁴

Before addressing the principle of corporate criminal liability regimes in EU Member States, there is a central question, in both civil and criminal matters, of how a parent company can be held liable for human rights violations committed by a subsidiary “for the benefit” of the multinational. The multinational *per se* does not have legal personhood. Its different entities, i.e. the parent company and its subsidiaries, are **separate legal persons** by virtue of the principle of limited liability. When a multinational group’s legal and illegal activities are closely intertwined, particularly with regard to economic and financial crime, it is difficult to identify the respective roles of different legal entities within the multinational.

1. Applying the principle of corporate criminal liability

National laws generally avoid the question of how to deal with offences committed by a corporation which is part of a group of companies.³⁹⁵ Although subsidiary companies own themselves, exercise operational autonomy and are able to finance themselves, they are by definition financially dominated by the parent company which owns most or nearly all of their capital.³⁹⁶ As a result, they are often *de facto* deprived of all decision-making power. The parent company, however, can legitimately deny responsibility for crimes committed by its subsidiary under the pretext that it cannot be held “vicariously criminally liable”.³⁹⁷

Faced with the frequent disconnect between law (the development of independent legal entities) and reality (the lack of independence- i.e. autonomous management power- among legal persons created by a parent company) it is important to **pierce the corporate veil** surrounding a subsidiary’s legal personhood and hold the parent

³⁹³ Italy accepts a “quasi-criminal” liability. Through legislation from 8 June 2001, it “has created a curious liability for administrative persons that commit a crime.” See C. Ducouloux-Favard, “Où se cachent les réticences à admettre la pleine responsabilité pénale des personnes morales?”, in *Liber Amicorum* / Ed. G. Hormans, Bruylant, Bruxelles, p. 433.

³⁹⁴ German law allows for measures of a punitive character to be applied to delinquent companies, according to German administrative-criminal law. (§ 30 OWiG).

³⁹⁵ For a comparative study on corporate criminal liability see R. Roth, “La responsabilité pénale des personnes morales”, *op. cit.*, p. 692. E. Montealegre Lynett is the only reporter to mention specifically that in Colombia parent companies are liable for the acts of their subsidiaries. See E. Montealegre Lynett, “Rapport colombien” in *La responsabilité. Aspects nouveaux, op. cit.*, p.737.

³⁹⁶ According to Article L. 233-1 of the French Commercial Code, a company is a subsidiary of another when the latter owns more than 50% of the former. Under Article 6 of Belgium’s Companies Code (the new code for companies created by the Law of 7 May 1999 which entered into force on 6 August 1999), A parent company is that which controls another company and a subsidiary is that which is controlled by another company. On the notion of control, see Art. 7 to 9 of the Code.

³⁹⁷ The principal of personality in prosecution and penalties notably derives from Article 6 of the European Convention of Fundamental Freedoms and Human Rights. Only individuals causing a breach may be prosecuted.

company (ies) liable for the actions of its/their subsidiaries, to the extent that the subordination of the latter to the former is significant.³⁹⁸

In situations where several legal entities, for example a parent company, its subsidiaries and their subcontractors, acted together, each making a gain from the offence, one should consider the overlapping criminal liability of the several legal persons under the concept of **complicity**.³⁹⁹ A parent company can be charged with complicity for acts committed abroad by a subsidiary in situations where “the parent company provides indispensable or accessory assistance to commit the offence and the assistance is provided to accomplish its goals or defend its interests or if the acts are carried out on the parent company’s behalf [...]”.⁴⁰⁰ In this case, the subsidiary is not necessarily relieved of all liability because, “as a rule, an illegal order from a superior is not a justification or excuse, unless the subsidiary can establish its non-liability by proving that it was under moral constraint.”⁴⁰¹ If on the other hand the interference of the multinational’s parent company in the management of its subsidiaries is minimal, the distinction between the various legal persons will limit the charges of co-liability against the parent company. In each case, the facts must be evaluated.

To establish a parent company’s criminal liability for crimes committed by its subsidiaries and subcontractors abroad, **an adequate causal link must be established between the mode of participation and the commission of the predicate offence.**

2. The national laws of EU Member States

National corporate criminal liability law are not harmonised. The statutes put forth do not in any way ensure that the same offence charged in two different EU Member States will be similarly enforced.⁴⁰² In its Green Paper on the approximation,

³⁹⁸ Here, the expression is understood in a broad sense, without reference to the various theories laid out in the section of civil liability. Under Danish law, G. Tøftegaard Nielsen says subsidiaries will be automatically found guilty if they break a criminal law. Parent companies are mainly “shareholders” and are liable for the actions of their subsidiaries in circumstances which are not specified. See G. Tøftegaard Nielsen, “Criminal liability of companies in Denmark – Eighty years of experience”, in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Basecqz and M. Nihoul, La Chartre, Bruxelles, 2008, p. 126.

³⁹⁹ EU Member States generally provide a dual model for individual criminal liability (primary perpetrator and accomplice). Some States, however, adopt a tripartite model (primary perpetrator, accomplice and instigator). The notion of complicity is not identical in the various criminal codes.

⁴⁰⁰ D. Vandermeersch, *op. cit.*, p.248.

⁴⁰¹ D. Vandermeersch, *op. cit.*, No. 10, p.249. With regards to crimes under international humanitarian law, rule of law and the power of authority are not valid justifications. They may, however, impact the severity of the penalty.

⁴⁰² See for example the convention established on the basis of Article K.3 of the Treaty on the European Union concerning the protection of EU financial interests, OJ C 316 of 27 November 1995, p. 49 -57. Article 3, concerning the criminal liability of business leaders, stipulates that “each Member State shall take necessary measures to allow heads of businesses or other persons with decision making powers and control within an enterprise to be declared criminally liable under the principles defined by each state’s domestic law in the case of fraudulent acts [...] by a person under their authority on behalf of the company.”

mutual recognition and enforcement of criminal sanctions in the European Union, the European Commission notes: “There are considerable differences between the Member States as regards sanctions for legal persons.”⁴⁰³ In order to ensure **fair competition** between companies domiciled in the EU Member States, it would be better if they harmonised their rules governing corporate criminal liability in order to guarantee fair competition between EU-based companies.⁴⁰⁴

Where appropriate, national laws have opted for a system of either: (a) generality or specificity, (b) strict liability or vicarious liability, (c) a disposition toward holding either individuals or corporations liable or (d) a disposition towards holding both parties liable to either a full or limited extent. In terms of penalties, each State enjoys complete freedom in selecting specific penalties for legal persons found guilty. Procedural issues raise several delicate questions. Before addressing these issues, the first question is whether the company in question is a legal person which may be held criminally liable.

Ⓞ Is the company in question a legal person?

Under the rules of private international law, in terms of their organisation and legal personhood, subsidiaries and parent companies alike are subject to the laws of the State of which they hold nationality.⁴⁰⁵ Generally speaking, this refers to the laws of the country in which they are incorporated.

 In **Belgium**, as in other States, the law establishing corporate criminal liability, creates a sort of “custom criminal legal personhood” for companies not yet covered under civil legislation (e.g. commercial companies in the process of incorporating).⁴⁰⁶ The Belgian criminal code applies to private entities which exist in reality and are carrying out specific operations.⁴⁰⁷ The law applies primarily to economic entities which function despite a lack of legal personhood in the strict sense.⁴⁰⁸

⁴⁰³ European Commission, “Green book on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union”, 30 April 2004, COM/2004/0334 final, point 3.1.6. See also the European Commission report of 25 October 2004, on the Member States’ implementation of the Convention concerning the protection of EU financial interests COM (2004) 709.

⁴⁰⁴ See B. Boulouc, under Cass. crim., 9 December 1997, D., 1998, p. 296 and ff.

⁴⁰⁵ Nationality in this sense is defined as the “legal state from which the company receives its legal personhood and under the influence of which it is organized and operates.” This reasoning is thus circular. P. Van Ommeslaghe and X. Dieux, “Examen de jurisprudence (1979-1990). Les sociétés commerciales”, *R.C.J.B.*, 1992, p. 673. For more on the concept of nationality, see the section on “active personality” below.

⁴⁰⁶ M. Nihoul, “Le champ d’application”, in *La responsabilité pénale des personnes morales en Belgique* / Ed. M. Nihoul, La Chartre, Bruxelles, 2005, p. 25.

⁴⁰⁷ D. Vandermeersch, *op. cit.*, p. 246-247. This applies to all companies listed under Article 2 of the Companies Code, whether they are subject to commercial or civil law and regardless of European economic and business interests. See A. Misonne, “La responsabilité pénale des personnes morales en Belgique – UN régime complexe, une mise en œuvre peu aisée”, in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Basieczq and M. Nihoul, La Chartre, Bruxelles, 2008, p. 67.

⁴⁰⁸ Rapport de la Commission de la Justice, *Doc. parl.*, Sénat, sess. ord. 1998-99, No. 1-1217/6, p. 7.

 In **France** it is possible for criminal courts to recognise the legal personhood of a group for the sole purpose of imposing a criminal penalty.⁴⁰⁹

 The **United Kingdom** also does not require abstract entities to hold legal personhood in the strict sense for them to be considered criminally liable.⁴¹⁰

 **Portugal:** The principle was introduced in the Criminal Code of 1982 by the Law 59/2007 which modified and extended the scope of article 11 of the code.

 **Luxembourg:** The law of march 3rd, 2010, which introduced several articles on the penal code and the code of criminal procedure, attaches the responsibility of legal entities to the existence of a legal personality.⁴¹¹

 **Spain:** The reform to the Criminal Code, approved by the Senate on 9 June 2010, introduced corporate criminal liability for the first time through article 31bis of the Code. This article was recently modified by the Organic Law 1/2015 of March 30, 2015.

The Spanish Supreme Court in its ruling 154/2016, dated 29 February, assessed for the first time corporate criminal liability on the basis of article 31bis of the criminal code. The ruling specified the conditions that must be met for this article to be applicable : (1) the crime must have been committed by an individual that forms part of the company concerned, and (2) the enterprise must have failed to establish measures to monitor and supervise its personnel in order to prevent such crimes from being committed, thereby making possible or facilitating the commission of the crime.⁴¹²

⁴⁰⁹ “A specially authorised doctrine holds that Article 121-2 of the French Criminal Code postulates the existence of a corporation that has been endorsed by the Court of Cassation in its famous decision of 28 January 1954.” (D., 1954, p. 217). See N. Rontchevsky, “Rapport français”, *op. cit.*, p.746.

⁴¹⁰ Thus, English law recognizes the criminal liability of abstract entities, the granting of legal personality according to the criteria that distinguish between “corporate entities” (associations with legal autonomy)” and unincorporated entities”(groups without autonomy). However, it appears that if the latter are devoid of legal personality, they can nevertheless be prosecuted for certain offences. See M. Delmas-Marty, “Personnes morales étrangères et françaises (Questions de droit pénal international)”, *Rev. soc.*, p. 255 ff. The question might therefore arise as to whether to rely strictly on the existence of legal personality in forum court’s State, or whether to incorporate the fact that even with non-legal persons, some groups subject to criminal penalties in their country of origin could be held criminally liable in the prosecuting State. In such a case, reference would have to be made to the criminal law of the foreign State.

⁴¹¹ See : Law of 3 mars 2010 &. Introducing criminal responsibility for legal entities on the penal Code and the Code of Criminal Procedure, 2. Modifying the Penal Code and the Code of Criminal Procedure and other laws, Journal Officiel du Grand-Duché de Luxembourg, A -n°36, article 2(1), available at: www.legilux.public.lu

⁴¹² Global Compliance News, The Spanish Supreme Court Confirms Corporate Criminal Liability, 7 March 2016, <http://globalcompliancencnews.com>

A company's dissolution through merger or acquisition, however, guards the acquired company from liability for acts carried out prior to the merger, while the acquiring company also escapes liability due to the prohibition on vicarious liability under criminal law.⁴¹³ The resulting impunity is the same if several companies form a new company by transferring their assets to the latter.⁴¹⁴

② The principles of generality and specificity

Some States (including Belgium, France and the Netherlands) have opted for the **generality principle** under which corporations and individuals are subject to all national criminal codes and additional laws and decrees.⁴¹⁵ Others prefer the **principle of specificity** (including Portugal, Estonia, Finland and Denmark⁴¹⁶) **which allow legal persons to be charged only for those offences expressly enumerated in the national criminal code** (and/or additional laws or decrees).

 In 2004, ten years after the principle of corporate criminal liability entered into force, **France** replaced its generality regime with one grounded in the principle of specificity, in an effort to adapt its legal system to developments in the criminal world and to enhance the effectiveness of its prosecution efforts.⁴¹⁷ The implementation of a regime based on the principle of specificity appears inadequate, however, as cases frequently include a range of diverse and related offences.

② The material element (actus reus) of corporate liability

To establish a corporation's material liability for an offence (in other words, to hold legal persons liable for committing an act which is defined and punishable under law), it must be established that the violation was committed **in the course of the company's operations and on its behalf**. This principle is present in both

413 J.C. Saint-Pau, "L'insécurité juridique de la détermination du responsable en droit pénal de l'entreprise", *Gazette du Palais*, 9-10 February 2005, p. 136.

414 See S. Braum, "Le principe de culpabilité et la responsabilité pénale des personnes morales – remarques relatives au projet de loi luxembourgeois", in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Basecqz et M. Nihoul, La Charte, Bruxelles, 2008, p. 236.

415 Belgium's Law of 4 May 1999 involved a legal fiction in that, to the greatest extent possible, it equated corporations with individuals (*Doc. Parl.*, Sénat, "Exposé des motifs", 1-1217/1, session 1998-1999, p.1). See A. Masset, "La loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales: une extension du filet pénal modernisé", *J.T.*, 1999, p.655. **France** has adopted the principle of generality since the Law of 9 March 2004 (loi Perben II), No. 2004-204, OJ 10 March 2004, entered into force on 31 December 2005) amending Article 121-2 of the French Criminal Code. See H. Matsopoulou, "La généralisation de la responsabilité pénale des personnes morales", *Rev. Sociétés*, 2004, p. 283 ff. In the Netherlands, continental Europe's pioneer in this field, corporate criminal liability was introduced in 1950, for economic crimes only, and was then extended to all crimes in 1976.

416 In 1996, Denmark had more than 200 specific laws. H. de Doelder and K. Tiedemann, *La criminalisation du comportement collectif*, Kluwer, 1996, p.19.

417 Law No. 2004-204 of 9 March 2004, entered into force on 31 December 2005.

international and regional instruments and in national legislation.⁴¹⁸ It aims to avoid holding companies strictly liable for crimes committed by individuals who abuse the company's legal or material framework in order to commit offences to their own personal benefit. Companies can be held liable in one way or another for acts committed to secure an advantage or to avoid an inconvenience.⁴¹⁹ The question must be asked whether this condition may be satisfied not only by defending one's **economic interests**, but also by pursuing a **moral interest**.⁴²⁰

A company's profit or savings deriving from an offence is a key criterion of liability. Similarly, offences committed in a company's financial or economic interest or in order to ensure its operations create liability even if no profit is earned. As the plaintiffs in Belgium argued, regardless of the financial benefits, Total and its subsidiary TMEP reaped by operating the Yadana gas pipeline in Myanmar, the companies benefited from their complicity in gross human rights violations perpetrated by partners the company contracted to provide security for the pipeline.

 In **Belgium**, material liability (the material link between the facts and the legal person) depends not on the nature of the person who commits an offence (parent company or subsidiary, legal person or individual), but exclusively on the characteristics of the act. Belgian law is closer to section 51 of the **Dutch** Penal Code, which states in clear terms that punishable offences can be committed by individuals or legal persons. In this sense, the company may be held liable for the actions not only of **managers**, but of subordinate employees (or the sum of the acts of several individuals) as well.

Some States, however, have provided an exhaustive list of persons who can render a company materially liable.

418 In Belgium, for legal person or person(s) to be held liable for unlawful acts there must be proof that the commission of the offence is intrinsically linked to the achievement of the corporation's purposes either in defending its interests, or on its behalf. See A. De Nauw and F. Deruyck, "De strafrechtelijke verantwoordelijkheid van rechtspersonen", R.W., 1999-2000, p. 902 and 903; A. Misonne, "Le concours de responsabilité", in *La responsabilité pénale des personnes morales en Belgique* / Ed. M. Nihoul, La Chartre, Bruxelles, 2005, p.92 à 96. In France, Article 121-1 of the Criminal Code also contains the phrase "on behalf of ...", which includes any type of benefit to the firm. Companies are held materially liable for offences carried out in their interest (what the interest is taken into account as the interests of shareholders do not necessarily correspond with those of employees or creditors), but also those committed in the course of operations necessary to ensure the organisation or its operations. N. Rontchevsky, *op. cit.*, p.741.

419 For Belgium see M. Gollier and F. Lagasse, "La responsabilité pénale des personnes morales: le point sur la question après l'entrée en vigueur de la loi du 4 mai 1999", *Chron. dr. soc.*, 1999, p.523.

420 A "moral interest" could be that of an employer who practices racial discrimination in recruiting staff, in accordance with his racist opinions, but not conforming to any economic reality.

 In France, for example, Article 121-2 of the Penal Code specifies that only offences committed by individuals categorised as **organs**⁴²¹ or **representatives**⁴²² of a company on behalf of a company can render a company materially liable.

Most States, however, have opted for a blend of these two models.

② The moral element (*mens rea*) of corporate liability

Strict liability and vicarious liability

The general legal principle that criminal liability is established only when the material and moral elements intersect applies naturally to legal persons. In criminal law, there can be no liability without intent. A corporation is therefore a social reality which can exercise true and autonomous will, distinct from the sum of the individual intentions of its directors, representatives and agents.

In practice, however, courts evaluate a company's intentions through the attitudes of individuals working within the company.

Contrary to French law (vicarious liability⁴²³) and English law,⁴²⁴ the law in Belgium and the Netherlands does not identify which individuals can render a company criminally liable through “omission or commission” and the question is left to the court's discretion. One may deduce that with each fault by an employee the company's *mens rea* (intention) and criminal liability increase. The explanatory memorandum to the Belgian law notes that in order to establish the intent of a legal person, the court must rely on the conduct of individuals in **leadership positions**.⁴²⁵ Belgium's Senate Justice Commission further noted, but does not require, that the most common and revealing (though not exclusive) criteria establishing intent are found in the decisions and attitudes of the directors.⁴²⁶

421 The board is charged by law with managing and administering the company. It acts in the company's name, both individually and collectively.

422 In France corporate criminal liability requires “the intervention of one or several individuals qualified to legally act on behalf of the company”. N. Rontchevsky, *op. cit.*, p. 749. The UK and Germany (section 30 of the *Ordnungswidrigkeiten*) also limit the number of individuals who can render a legal person liable. The same is true in Canada.

423 In France, it must be proved that the board or one of its members committed both the material and moral elements of the offence.

424 “English law, for example, only imputes an agent's criminal intent to the corporation if the agent is the “alter ego” of the corporation, and courts usually define “alter ego” to mean an agent high up in the corporate hierarchy.” V. S. Khanna, “Corporate criminal Liability: What purpose does it Serve?” 109, *Harv. L. Rev.*, 1477, 1996, p. 1491.

425 Exposé des motifs, *Doc. parl.*, Sénat, sess. ord., 1998-1999, 1-1217/1, p.6. There has been a return to vicarious liability for legal persons. Managers can order, direct or simply accept offences.

426 Rapport de la Commission de la Justice du Sénat, *Doc. Parl.*, Sénat, sess. ord., 1998-1999, 1-1217/1, p.26.

While the **act** and **intent** components of any offence are by nature closely related in cases involving the criminal liability of individuals, the two components may stem from different individuals in cases involving corporate criminal liability. It is quite common for a company's "knowledge" and "will" to be compartmentalised in different business entities. With regards to a particular translation, the sum of the "knowledge" and "will" components within a company result in what is called *collective knowledge doctrine*.⁴²⁷

Among the different options available, the preferable solution may be the possibility for the *actus reus* (the material act) to emanate from a director or agent, whereas the *mens rea* (intent to commit a crime) could be established in one or more individuals who share the role of "director".⁴²⁸ For the purposes of this chapter, "director" shall be defined as any person who has *de facto* power to make decisions which result in the company taking action, provided the individual has made the decisions in the course of his or her duties and within the limits of his or her powers.⁴²⁹ This refers to "*de facto* directors", those who were the "company incarnate" at the time of the offence.⁴³⁰ Decision-making is generally an organic process, and decisions are often taken with the support of colleagues and with a diffusion of will so divided that it is difficult to attribute a decision to particular individuals. Qualitatively speaking, an expressed desire belongs more to the company than to the group of individuals. In other words, the expressed desire of the company is fundamentally distinct from that of each of its members.

The principle of joint liability

Establishing a company's criminal liability does not mean that individuals (physical persons) who allegedly commit an offence on behalf of a company will receive impunity. The Council of Europe Recommendation No. R (88) 18 promotes the principle of **joint liability** of individuals and legal persons. The new section 12.1 of the Corpus Juris 2000 also provides that "If one of the offences described herein (Articles 1 to 8) is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he **knowingly** allowed the offence to be committed [...]"⁴³¹ One of the most interesting lessons in comparing the laws of EU Member States is that **the number of rules** in common targeting intentional

⁴²⁷ See *Doc. parl.*, Sénat, 1-1217/1, sess. ord., 1998-1999, p.5. See also A. De Nauw, "Le vouloir propre de la personne morale et l'action civile résultant d'une infraction", *RCJB*, 1995, p.247.

⁴²⁸ See M. Lizée, "De la capacité organique et des responsabilités délictuelles et pénales des personnes morales", *Revue de droit McGill*, 1995, vol. 41, p. 165.

⁴²⁹ M. Lizée, *op. cit.*, p.147.

⁴³⁰ J. Messinne, "Propos provisoires sur un texte curieux: la loi du 4 mai 1999 instituant la responsabilité pénale des personnes morales", *Rev. dr. pén.*, 2000, p. 689.

⁴³¹ M. Delmas-Marty and J.A.E. Vervaele, *The implementation of the Corpus juris in the Member States*, Intersentia, 2000.

offences **is significantly greater than those targeting unintentional offences.**⁴³² This guide is primarily concerned with unintentional offences given that the moral element is often difficult to ascertain or even absent in cases of corporate violations.

Yet, it remains a recommendation only and does not mean that the concept of joint liability is harmonised within the national legislation of the EU Member States.

 In the **United Kingdom**, individuals are criminally prosecuted. The company's joint liability is not mandatory.

 In **France**, under Article 121-2 Section 3 of the Criminal Code, the criminal liability of corporations does not preclude that of individual perpetrators or of accomplices to offences. In the case of unintentional violations, the separation of liability is not mandatory.⁴³³

 In the **Netherlands**, joint liability is expected, but not mandatory.⁴³⁴

🔗 Penalties

 In **Belgium**, as enumerated in Article 7bis of the Criminal Code, penalties may include a fine, special confiscation, dissolution of the corporation (only when the corporation was created to provide a vehicle to commit certain offences), a temporary or permanent ban on certain activities or a temporary or permanent closure of one or several of the corporation's offices, branches or other establishments.

 In **France**, fines are applicable in all cases in which offences are committed. Other penalties, noted in Article 131-39 of the French Criminal Code, such as the company's disbarment from public procurement, apply only in cases expressly provided for by law.⁴³⁵ The dissolution of a company may be imposed for the most serious offences, including crimes and offences against persons, crimes against humanity or if working or housing conditions do not meet basic standards of human dignity. A conviction for crimes against humanity will result in the confiscation of all assets.

The common feature among penalties is an **affront to the group's business operations, or even its assets**. One should not ignore the direct effect penalties may have on employment following a temporary closure or a financial penalty so significant it would require the company to restructure itself. This consideration creates a *de facto* **undesirable collective liability**.

⁴³² R. Roth, *op. cit.*, p.686.

⁴³³ On joint liability in French Criminal law, see J.-C. Saint-Pau, *op. cit.*, p. 138.

⁴³⁴ See Article 51 of "Nederlandse wetboek van strafrecht".

⁴³⁵ See H. Matsopoulou, *op. cit.*, p. 289. A similar penalty exists under Romanian law. See F. Streteanu, "La responsabilité pénale des personnes morales en droit roumain – Une réforme attendue", in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Bascezc and M. Nihoul, La Charte, Bruxelles, 2008, p. 277.

States may not always find it practical to enforce penalties against foreign companies. How should one enforce a sentence issued by Belgian courts against the French company Total for complicity in crimes committed in Burma? Fines may be executed by drawing from the company's assets in Belgium. Specific penalties such as dissolution and closure could be enforced on Belgian soil by targeting operational headquarters or company activities in Belgium (but being careful not to enforce the penalty against a distinct legal person). Because the foreign company, by nature, cannot be extradited, the effect of the penalties is limited to the company's assets on Belgian soil.⁴³⁶ To do otherwise would undermine the sovereignty of the State in which the parent company is incorporated.

If, however, the enforcement of a penalty against a foreign company in one State appears to be unlikely or impossible due to a lack of assets on the soil of the forum court's State, it is still possible to report the facts to the State where the company is headquartered.⁴³⁷ That State could act under active personality jurisdiction (see below) given the nationality of the perpetrator.

In sum, the challenges for victims are daunting. In order to identify the most appropriate jurisdiction (that which is least open to challenge under international law) **victims must first determine whether a corporation or individual director at the parent company may be held criminally liable in a particular forum court. Victims must also establish the nationality of the alleged perpetrators** in order to argue the principle of active personality. At the same time, the forum court's legislation in concert with various extraterritorial principles will determine whether the accused legal person may be held criminally liable.

⁴³⁶ During the preparatory work for the Belgian law, a commissioner stressed the importance of the international context: **closing a subsidiary in Belgium is meaningless if the parent company can easily shift its activities abroad**. See Rapport de la Commission de la Justice, *Doc. Parl.*, Sénat, sess. ord., 1998-1999, n°1-1217/6, p. 14-15.

⁴³⁷ "At the request of another State, the termination of or transfer of proceedings to a foreign authority are procedures by which a State can undertake or resume a prosecution which would normally be conducted in the other state." See D. Vandermeersch, *op. cit.*, p. 263; C. Van den Wijngaert, *Strafrecht, Strafprocesrecht en Internationaal Strafrecht*, Anvers, Maklu, 2003, p. 1159.

Determining a court’s extraterritorial jurisdiction

Territoriality remains the guiding principle of criminal jurisdiction.⁴³⁸ Jurisdiction is **primarily granted to the courts of the place where the offence occurred**, regardless of the severity of the offence and the nationality of the protagonists involved.⁴³⁹

The courts of places where unlawful acts occur (mostly developing countries) generally fail to prosecute “European” companies suspected of human rights violations. The principle of territoriality, however, may still be useful in the context of the problem at hand.

 Particularly in **France** and **Belgium**, territoriality is closely associated with the **ubiquity principle** which is relevant for offences committed in part in a third country. In accepting the ubiquity principle, France makes no distinction between the place where the offence is initiated and the place where the damage occurs.⁴⁴⁰ Belgian law and doctrine hold that the Belgian courts have jurisdiction to try offences which are only partially carried out in Belgium.⁴⁴¹ “It is sufficient for one of the material elements (not purely intentional) to be carried out on the Belgian territory. There is no requirement that the offence be committed entirely in Belgium, or in the case of an offence which could have led to harm, that the harm occur.”⁴⁴²

⁴³⁸ See for example, Article 3 of the Belgian Criminal Code. On this principle, see H.-D. Bosly et D. Vandermeersch, *Droit de la procédure pénale*, 2001, 2^e Ed., La Chartre, p. 56-57, 62-70.

⁴³⁹ The Permanent Court of International Justice’s *Lotus* ruling of 7 September 1927 in a dispute between France and Turkey, however, marks a turning point in this matter by declaring that the principle of territoriality in criminal law is not an absolute principle in international law. (CPJI, *Lotus - France c. Turquie*, 7 September 1927, Series A, No. 10).

⁴⁴⁰ M. Delmas-Marty, “Personnes morales étrangères et françaises (Questions de droit pénal international)”, *op. cit.*, p.256. The French Supreme Court has also stated that French courts have jurisdiction over crimes committed abroad by a foreigner if they are inseparably linked to crimes committed in France by the same perpetrator. See Cass. Crim., Fr., R, 27 October 2004, n°04-85.187, *Revue mensuelle LexisNexis JurisClasseur*, March 2005, p. 13-14.

⁴⁴¹ D. Vandermeersch, *op. cit.*, p.250. Cass., 23 January. 1979, *Pas.*, 1979, I, p. 582; Cass., 4 February. 1986, *Pas.*, I, 1986, p. 664; F. Tulkens and M. van de Kerkhove, *Introduction au droit pénal*, 6^e éd., Bruxelles, Kluwer, 2002, p. 232; C. Hennau et J. Verhaegen, *Droit pénal général*, Bruylant, Bruxelles, 2003, p. 75.

⁴⁴² D. Vandermeersch, *op. cit.*, p.250. See also H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, La Chartre, Bruges, 2003, p. 67-73. Moreover, some Belgian laws independently criminalise preparatory acts to a crime if these behaviours are committed on Belgian soil. Belgian courts are thus competent even if the offence takes place abroad. See, for example, Articles 136 *sexies* and *septies* of the Belgian Criminal Code on the creation, possession or transportation of instruments, devices and objects intended to commit a crime under international humanitarian law. The Belgian Criminal Code also criminalizes orders and proposals to commit a crime under international humanitarian law or incitement to commit such a crime, even if these acts are not carried out.

In addition to that of territoriality, six “derogatory” principles of jurisdiction can be identified in the various national laws:⁴⁴³

- the principle of **active personality** (the State has jurisdiction to judge crimes committed by its nationals);
- the principle of **passive personality** (the State has jurisdiction to judge crimes committed against its nationals);
- the principle of **universality**, applicable only to the most serious crimes, (perpetrators may be tried by any State in which they eventually set foot,⁴⁴⁴ regardless of the location of the crime and the nationality of the perpetrator or the victim);⁴⁴⁵
- the **principle of the flag** (the State has jurisdiction to apply criminal law to aircraft and ships flying the national flag);
- the **protective principle** (the State has jurisdiction to judge crimes deemed to constitute a threat to fundamental national interests); and
- the principle of representation.⁴⁴⁶

The following discussion focuses solely on the principles of active and passive personality and the principle of universality, the most commonly invoked sources of extraterritorial jurisdiction in the EU Member States.

There is no doubt that companies and/or their directors can be tried on these various bases of jurisdiction for criminal acts committed abroad. A criminal court hearing a case will **apply the criminal law of its State**, while still taking into account that prosecuting the case requires the alleged acts to be criminalised in the State in which they were committed (the principle of double criminality, see below).

1. The principle of active personality (relating to the alleged perpetrator’s nationality)

Certain international instruments, including the Convention Against Torture of 1984 (Art. 5.1 (b)), and the Convention for the Suppression of the Financing of Terrorism of 1999 (article 7) **require States to include the principle of active personality in their national laws to prosecute human rights violations**. Through certain Framework Decisions, the EU has also spread the principle of active per-

443 L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, Oxford, Oxford University Press, 2003, p. 21-22.

444 The laws of various States provide several situations in which the perpetrator’s presence on the soil of the prosecuting State is not necessary to invoke universal jurisdiction. See below.

445 L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 5.

446 On the principle of representation, L. Reydams states that “according to the European Committee on Crime Problems the term refers to cases in which a State may exercise extraterritorial jurisdiction where it is deemed to be acting for another State which is more directly involved, provided certain conditions are met. In general, the conditions are a request from another State to take over criminal proceedings, or either the refusal of an extradition request from another State that it will not request extradition”. L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 22.

sonality among its Member States for specific crimes such as terrorism and human trafficking.

Even outside of these instruments, however, the principle of active personality is widespread in the EU Member States. Many States view jurisdiction based on active personality as a **corollary to the rule of non-extradition of nationals**. In this sense, the application of active personality should have a different scope with regard to individuals and legal persons. Because legal persons are by nature not extraditable, the principle of active personality should apply fully to them. This section first explores the various forms this principle has taken in the criminal laws of several EU Member States. It then examines the cross-cutting issues that need to be addressed if active personality is to serve within the EU as a strong basis for prosecuting businesses that violate human rights in third countries.

Active personality in the EU Member States



In **Belgium**, the use of active personality depends on whether the facts in question are considered “ordinary offences” or serious violations of international humanitarian law.⁴⁴⁷

– All Belgian individuals and legal persons are subject to Belgian law and the jurisdiction of Belgian courts for “ordinary” misdemeanours committed abroad, provided the suspect is **present** on Belgian soil and the **double criminality requirement is met**.⁴⁴⁸ In the likely situation of a foreign victim, the role of the Belgian State will be secondary. Apart from the requirement that the alleged perpetrator remain on Belgian soil and not be extradited, Belgian courts may act only following a **complaint from the victim or his or her heirs**, or following the **receipt of an official notice from the foreign government of the place the offence occurred**.⁴⁴⁹

Consider a multinational company whose parent company is headquartered in Belgium and whose majority-owned subsidiaries commit human rights violations outside of Belgium. Provided that the act is criminalised both in Belgium and the

⁴⁴⁷ Article 6 and 7 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure, which was recently modified by the law 19-10-2015

⁴⁴⁸ The active personality regime is laid out in Articles 6, 7 and 9 of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure. The assumption under Article 7 alone holds relevance to the problem at hand in this guide. Double criminality is not required when the preparatory elements of the offence - committed for the most outside Belgian territory – occurred on Belgian soil. See Cass. belge, 18 November 1957, Pas., 1958, I, p. 285.

⁴⁴⁹ In the latter case, the prosecution can be moved only at the request of the Belgian Public Prosecutor, in accordance with Article 7 § 2 of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure. Note also that if the Belgian who has committed a crime abroad had a foreign co-perpetrator or accomplice, Article 11 of the same law provides that the latter may be prosecuted in Belgium jointly with the Belgian defendant, even after the conviction of the Belgian, provided he or she is captured on Belgian soil.

place the offence occurred, the parent company may be prosecuted in Belgium in order to provide redress when prosecution is unlikely or physically impossible in the country where the unlawful act took place. Of course, the success of such a lawsuit ultimately depends on whether or not the corporate veil can be pierced.

– In cases of serious violations of international humanitarian law, the active personality principle applies when the accused holds **Belgian nationality** or maintains his or her **principal residence** in Belgium. These criteria apply at either the time the offence is committed or the time prosecution begins.⁴⁵⁰ In the case at hand **the defendant is not required to be in Belgium**⁴⁵¹ (it will become clear, however, that this “reduced condition” is interesting only when the defendant is an individual), nor is **double criminality** required. There is no clear definition of what is meant by a corporation’s “principal residence in Belgium”.

 In **France**, courts have jurisdiction if it is established that an individual or legal person held or holds French nationality at the time a crime is committed abroad, or at the time prosecution begins in France. These two bases for jurisdiction maintain the court’s ability to prosecute defendants who acquire another nationality in order to escape criminal proceedings. Although **double criminality** is examined in all cases of crimes committed abroad by French nationals, it is required only in cases in which the French national is an accomplice rather than the primary perpetrator of the act.⁴⁵² Where the French national is an accomplice, the public prosecutor alone may open a prosecution,⁴⁵³ and only **following a complaint from a victim or his or her heirs, or following an official complaint from a government authority in the country where the act occurred**. French prosecutions on the basis of active personality are subject to prosecutions conducted by the State where the offence occurred, and with the exception of amnesties granted by the foreign State,⁴⁵⁴ will not be carried out if the foreign State issues a final decision regarding the same offence. A defendant’s presence on French soil is not required for a prosecution to proceed, and trials *in absentia* (in the absence of the suspected perpetrator of the infraction) are possible.

450 Art. 6, No. 1bis of the Preliminary Title of the Code Criminal Procedure as modified by the Law of 5 August 2003 on serious violations of international humanitarian law. *M.B.*, 7 August 2003.

451 B. Swart, “La place des critères traditionnels de compétence dans la poursuite des crimes internationaux”, in *Juridictions nationales et crimes internationaux* / Ed. A. Cassese and M. Delmas-Marty, PUF, Paris, 2002, p.567 ff.

452 Art. 113-6 and 113-5 of the French Criminal Code. See Cass. Crim. (fr.), 10 February 1999, *Bull. crim.*, No. 15, D. 1999, jurisprudence p. 491, note. A. Fourmie.

453 Article 113-8 of the French Criminal Code holds that “in the cases enumerated in Articles 113-6 and 113-7, prosecutions may be carried out only by request of the Prosecutor.

454 Article 113-9 of the French Criminal Code.

➔ Complaint in France against the parent company and a subsidiary of the French-headquartered Group Rougier, suspected of committing multiple offences in Cameroon

On 22 March 2002, seven villagers from the Djoum region of Cameroon filed a criminal complaint and civil suit with the Dean of the Examining Magistrates of Paris. The suits allege destruction of property, forgery, fraud, possession of stolen goods and bribery of officials by the leadership of Société forestière de Doumé (SFID), a Cameroon subsidiary of Group Rougier (a global leader in the timber industry), and the group's France-headquartered parent company Rougier SA. The suits allege that the defendants illegally plundered forest resources to the detriment of the local population. After illegally harvesting various types of wood without license and after destroying fields to lay access roads, SFID refused to pay the looted villagers the financial compensation they claimed. The villagers faced considerable resistance from the local government, which they considered to be biased after apparently receiving benefits either directly or indirectly from SFID. A complaint lodged with Cameroon's Attorney General resulted in a *nolle prosequi* and was dismissed.

Because local corruption (an alliance between the subsidiary and the authorities) had apparently deprived the Cameroonian villagers of an effective remedy from an independent and impartial court, they seized jurisdiction in France by filing a complaint on the principles of both **territoriality** and **active personality**. Rougier SA, the primary target of the complaint is incorporated in France and thus a French national. The victims argued that Rougier SA could be held strictly liable for possession of stolen goods on the grounds that the company had deposited dividends from SFID although the parent company knew or should have known that the money was the fruit of illegal activities, and that timber stolen from Cameroon had been imported into France.⁴⁵⁵ In light of previous accusations levelled against SFID,⁴⁵⁶ Rougier SA could not have been unaware of its subsidiary's illegal activities.

The victims also argued that Rougier SA should be tried for its involvement in other crimes attributable to SFID, not only those for which the parent company was the primary beneficiary, but also taking into account the interdependence between the two companies. Rougier SA holds a majority stake in SFID and the accounts of the subsidiary are fiscally integrated into those of the parent company. In addition, at the time of the events (beginning in 1999), one person held the position of CEO for both SFID and the parent company, and both companies were managed by the same administrators.⁴⁵⁷ The plaintiffs argued that this significant “financial and managerial overlap” between legally separate companies meant that Rougier SA clearly dictated SFID's actions. The plaintiffs argued as a result, that because Rougier had

⁴⁵⁵ The principle of “territoriality-ubiquity” applies here. Article 113-2 of the French Criminal Code provides that any offence may be deemed to have been committed on French territory provided that a material element took place on French soil. According to French Supreme Court jurisprudence, crimes which begin abroad but are carried out in France fall under French jurisdiction.

⁴⁵⁶ In 2001, SFID was convicted on three charges of illegally exporting a protected tree species (assamela), falsification of documentation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (The Washington Convention) and exceeding timber quotas.

⁴⁵⁷ Most of SFID's representatives and managers held French nationality.

reduced its subsidiary to taking orders, Rougier should be prosecuted under personal liability (not vicarious liability) for the acts of SFID. The subsidiary was simply an instrument through which the offence was committed. The alleged act itself was ordered by Group Rougier, for its interests and with its resources.

On 13 February 2004, the Examining Chamber of the Paris Court of Appeals dismissed the suit citing two procedural hurdles. Firstly, prosecutions of crimes (the facts of the case were described as such) committed by French nationals abroad may be initiated only at the request of the public prosecutor (Article 113-8 of the French Criminal Code). The public prosecutor had refused the terms of requests filed on 27 September 2002. Although one could not reasonably deny the harmful economic impact the events in question had on the local population, the public prosecutor held that the alleged events were not sufficiently serious to justify referral to an examining judge. Secondly, the Court of Appeals cited Article 113-5 of the French Criminal Code under which alleged **accomplices** (Rougier SA) **cannot be prosecuted in France unless the foreign jurisdiction issues a final ruling condemning the principal author of the crime or offence committed abroad**. Yet, it is precisely because of their inability to obtain a fair trial in Cameroon that the plaintiffs chose to “seize” the French courts. The Court found insufficient evidence of corruption in Cameroon, however, and rejected the plaintiffs’ argument. An appeal was filed but it was dismissed. Sherpa brought action before the European Court of Human Rights, but that appeal was declared inadmissible.⁴⁵⁸

Prospects

In order to increase the probability of prosecutions based on the principle of active personality, this condition French courts impose on extraterritorial investigations (i.e. the fact that a foreign jurisdiction has to condemn the principal author of the crime or offence first for it to be deemed admissible in France) should be revised. Conditioning the prosecution of a parent company in France on the prosecution of the principal author/accomplice abroad is problematic for several reasons. Firstly, there is a risk that such an approach will not adequately consider issues present in the judicial system of the country where the subsidiary is incorporated. Insufficient resources and corruption generally make it difficult to prosecute subsidiaries. Secondly, parent companies and subsidiaries are at times both complicit in serious human rights violations and at times the primary perpetrators are official representatives of the State in which the subsidiary is incorporated. Immunity from criminal prosecution in the courts of the third country again precludes any possibility of prosecuting companies guilty of involvement in violations. The approach adopted by the International Criminal Tribunal for Rwanda, which held that a person may be convicted of complicity even if the perpetrator cannot be identified, is preferable.⁴⁵⁹

⁴⁵⁸ See Sherpa, “Rapport d’activités 2006, actualisé au 2 mai 2007”, p. 2.

⁴⁵⁹ See TPIR, *Le Procureur c. Jean-Paul Akayesu*, 2 October 1998, Case No. ICTR-96-4, §§ 530-531. The Belgian Court of Cassation held that “Anyone who participates in a crime or offence shall be punished as a perpetrator or accomplice provided that all the conditions of criminal participation are met, even when the primary perpetrator escapes prosecution.” (See Cass.b., 5 November 1945, *Pas.*, 1945, I, p. 364). Although the perpetrator remains unknown, the accomplice is still subject to prosecution and conviction. (See Cass.b., 31 May 1897, *Pas.*, 1927, I, p.108). See also A. Clapham and S. Jerbi, “Categories of Corporate Complicity in Human Rights Abuses”, *New York*, 21-22 mars 2001, p.2.

Finally, it would be interesting to examine the discretion exercised by the public prosecutor. Should he not be required to allow victims to appeal his decision, particularly when there is no other country in which the complaint can be effectively heard? In such cases, it is feared that the State is sometimes judge and jury. The prosecuting authority is also a host State to, and sometimes majority shareholder in, a powerful company that creates wealth. Given the heavy financial penalties to which a prosecution could lead, it could be painful to prosecute the parent company of a multinational corporation based on the prosecuting authority's territory.

➔ DLH's logging activity and the perpetuation of conflict in Liberia

This case pits Global Witness, Sherpa, Greenpeace France, Friends of the Earth and a Liberian activist against the multinational DLH (Dalhoff, Larsen & Horneman), a timber company with worldwide operations. The plaintiffs filed a complaint before the Public Prosecutor at the Court of Nantes, France in late 2009.

The plaintiffs accuse the French arm of DLH (DHL France) of having contributed to the civil war in Liberia between 2000 and 2003 by sourcing Liberian companies which in turn provided support to the regime of Charles Taylor which was subject to international sanctions. DLH France was accused of buying wood from illegal logging concessions and thus possession of stolen goods, which is punishable under Article 321-1 of the French Penal Code. According to a Global Witness, "the complaint is based on solid evidence of the involvement of DLH's suppliers in illicit activities such as bribery, tax evasion, environmental degradation, arms sales in violation of the UN embargo and human rights violations."⁴⁶⁰ The case was dismissed by the prosecutor, on February 15, 2013, and required "no further action". The other cases, one against DLH Nordisk A/S (as perpetrator) and one against DHL A/S (as accomplice) were filed in Denmark.

The general principle of active personality is embodied in the criminal codes of **Germany, Austria, Denmark, Spain, Finland, Greece, the Netherlands, Portugal and Sweden.**

Two characteristics are common in the criminal provisions of the abovementioned countries. Apart from specific exceptions, **all crimes and misdemeanours** (misdemeanours must be of a certain degree of severity) **may be prosecuted on the basis of active personality, provided they are also punishable in the country in which they were carried out** (double criminality).

⁴⁶⁰ Global Witness, "International timber company DLH accused of funding Liberian War", 18 November 2009, www.globalwitness.org

 In **Denmark**, active personality jurisdiction extends to foreign residents and citizens in Denmark as well as in Finland, Iceland, Norway and Sweden, provided they are present in Denmark at the time proceedings are initiated, not at the time of the commission of the crime. Finland and Sweden⁴⁶¹ have similar regimes.

 **Greece** does not condition the exercise of active personality on double criminality if the offence is committed in an ungoverned territory. Portugal provides for a similar suspension of the double criminality rule when offences are carried out in a place where no punitive power is exercised.

 Broadly speaking, the **UK** rejects the principle of active personality and agrees to extradite its nationals.⁴⁶² Departures from this rule may be found, however in cases under the *Offences against the Person Act of 1861*⁴⁶³ and the *International Criminal Court Act 2001*.⁴⁶⁴

2. Cross-cutting issues

Several points should be clarified with regard to the principle of active personality:

- the meaning of nationality and how it is acquired;
- extending the principle of active personality to residents;
- double criminality; and
- requirements that the suspect be present on the territory of the forum court.

When applied to corporations, these issues are particularly complex.

a) The meaning of nationality and how it is acquired

The use of “nationality” as a connecting factor may be problematic in corporate

⁴⁶¹ Section 6 Chapter 1 of the Finnish Criminal Code. See also Section 11 Chapter 1 of the Finnish Criminal Code which lays out the principles of double criminality and *lex mitior*. On Finnish extraterritorial jurisdiction, see M. Joutsen, R. Lahti and P. Pölonen, *Criminal Justice Systems in Europe and North America: FINLAND, Helsinki, Finland*, 2001, p. 8-9: www.legal.coe.int - On Sweden, see Section 2 Chapter 2 of the Swedish Criminal Code.

⁴⁶² B. Swart, “La place des critères traditionnels de compétence dans la poursuite des crimes internationaux”, *op. cit.*, p. 567 ff. L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p.202.

⁴⁶³ The “Offences Against the Person Act 1861” establishes jurisdiction over murder and manslaughter (Section 9) and bigamy (section 57) committed by Britons regardless of location. The prosecution of a British national in this case, however, may occur only if he returns voluntarily to the UK following the commission of the offence and prosecution is impossible in the State where the offence was committed.

⁴⁶⁴ The “International Criminal Court Act 2001” incorporates the core of the Rome Statute into national law. Sections 51 and 68 outline the scope of *ratione loci* and *personae*. Under this law, extraterritorial jurisdiction is limited to the prosecution of residents in the United Kingdom at the time of the crime, or those who have become residents after the crime and who continue to be residents at the onset of legal proceedings.

criminal liability cases because the nationality of legal persons is conferred differently than that of individuals.

The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company's attachment to a state".⁴⁶⁵

Determining a company's nationality involves identifying the "legal State from which the company receives its legal personhood and under the influence of which it is organised and operates."⁴⁶⁶ According to the International Court of Justice ruling of 5 February 1970 in *Barcelona Traction, Light and Power Company*, "international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."⁴⁶⁷ In reality, public international law appears to have expressed no preference for any criteria at all. As in adopting rules governing the nationality of individuals, **it is up to each State to decide under what conditions a company with its "nationality"** must respect the rules that apply to all its nationals, regardless of where they work.⁴⁶⁸

Under the general rules of private international law, corporations hold the nationality of either the **place of registration** or the State in which they are **headquartered**. There are a variety of opinions on the deciding factor. The **control test**, which is based on the nationality of the majority shareholders or on the nationality of the persons who actually run the company, could also be used to establish the company's nationality.⁴⁶⁹ The same goes for the **place of the company's core activity**.⁴⁷⁰

⁴⁶⁵ Watts & Jennings, *Oppenheim's International Law*, vol. 1, 9th ed., 1996, p. 861. See L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p.23.

⁴⁶⁶ See P. Van Ommeslaghe and X. Dieux, "Examen de jurisprudence (1979-1990). Les sociétés commerciales", *R.C.J.B.*, 1992, p. 673.

⁴⁶⁷ ICJ, *Barcelona Traction Light and Power Company (Belgique v. Espagne)*, 5 February 1970, *Rec.* 1970, p. 43.

⁴⁶⁸ The criterion of effectiveness which the International Court of Justice raised in the *Nottebohm* case about individuals, was dismissed with regard to legal persons. The 5 February 1970 ruling of the International Court of Justice in the *Barcelona Traction* case is explicit in this regard: "With particular regard to the diplomatic protection of corporate entities, no absolute test of minimal ties has been generally accepted" (*Rec.*, 1970, p. 43).

⁴⁶⁹ Nguyen Quoc Dinh, *Droit international public*, Paris, L.G.D.J., 6^e éd. (P. Daillier et A. Pellet), 1999, p. 492. See for example the Federal Council Decision of 30 October 1996, in L. Calfisch, "La pratique suisse en matière de droit international public, 1996", *Rev. suisse de droit international et de droit européen*, vol. 7, 1997, p. 673, cited by A. Clapham in "The Question of Jurisdiction under International Criminal Law over Legal Persons", *op. cit.*, p. 188.

⁴⁷⁰ M. Henzelin, *Le principe de l'universalité en droit pénal international – Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité*, Bruylant, Bruxelles, 2000, p.26.

The application of the nationality criteria, even when clearly established by law, can be controversial.⁴⁷¹

 Under **Belgian law**, (Art. 58 of the Companies Code), the company's **actual headquarters** determines the applicable law. All companies with their actual headquarters in Belgium “are regarded as Belgian even if they were validly incorporated in a foreign country and they have always operated under the laws of that country.”⁴⁷² In contrast, a company incorporated in Belgium, but which has its actual headquarters in a foreign country is supposed to be a “citizen” of that State, even in cases where the law of the foreign State imposes a different rule (e.g. the headquarters rule).⁴⁷³ The actual headquarters can be defined as the place where the company's legal; finance and management departments are located.⁴⁷⁴

 **French law** similarly argues that a corporation with its actual headquarters in France is French, even if it is controlled by foreigners.⁴⁷⁵

Because the rules governing the nationality of companies vary widely from country to country, applying the principle of active personality to corporations could **create numerous conflicts of jurisdiction**.⁴⁷⁶ Several States have also extended the principle of active personality to persons who acquire nationality after the commission of an offence. In 1990, the Council of Europe responded by stating that “when establishing jurisdiction over legal persons on the basis of the principle of active personality, the legislature should clearly identify the standards by which it considers those persons to be its citizens”.⁴⁷⁷ The Council added that in the absence of such clarifications, “for the sake of predictability, the location of a legal person's headquarters appears to be the only acceptable criterion.”⁴⁷⁸

b) Extending the principle of active personality to residents

The current trend is to extend active personality jurisdiction beyond the question of nationality to links resulting from the suspect's **habitual residence** or **principal residence** in the State attempting to exercise extraterritorial jurisdiction.⁴⁷⁹

471 See *infra* the *Trafigura* case in Côte d'Ivoire where the judge invoked the absence of national ties with France when the accused individuals (i.e. the chairman of the company) had French nationality.

472 D. Vandermeersch, *op. cit.*, p. 246.

473 R. Prioux, “Les sociétés belges et les sociétés étrangères”, in *Dernières évolutions en droit des sociétés*, C.U.B., Bruxelles, Ed. du jeune Barreau de Bruxelles, 2003, p. 311 and 312.

474 G.-A. Dal and A.-P. André-Dumont, “Personnalité juridique des sociétés”, in Centre d'Etudes Jean Renauld, *Le nouveau Code des sociétés*, Bruylant, Bruxelles, 1999, p.205.

475 A. Huet and R. Koering-Joulin, *Droit pénal international*, Paris, PUF, 2^e éd., 2001, p.208; M. Delmas-Marty, “Personnes morales étrangères et françaises (Questions de droit pénal international)”, *op. cit.*, p. 258.

476 M. Henzelin, *Le principe de l'universalité en droit pénal international ...*, *op. cit.*, p. 26.

477 Council of Europe, “Compétence extraterritoriale en matière pénale”, 1990, p. 29-30.

478 *Ibid.*

479 A. Cassese, *International Criminal Law*, Oxford, 2003, p. 282.

 The **Scandinavian countries** generally apply the active personality residence principle.

 The **Swiss** Criminal Code allows the residence principle to be applied in certain cases where the extradition of the perpetrator is not justified.⁴⁸⁰

 The **United Kingdom** and **Belgium** apply the residence principle to alleged perpetrators provided they are suspected of violating international humanitarian law.⁴⁸¹

 Finally, in a genocide case, the **German Federal Supreme Court** held that German courts have jurisdiction when the defendant has lived in Germany for several months, has established a base in Germany for his or her activities and has been arrested in Germany.⁴⁸²

This extension is logical when the State where the crime was committed experiences difficulty in obtaining extradition.

➔ Identifying the primary residence of a multinational: Total in Burma

In a 5 May 2004 decision in the “Total in Burma” case, the Belgian Court of Cassation ruled that “Total, the multinational, may not, as is argued, be deemed to have “its primary residence in Belgium due to the incorporation of its co-ordination centre in Brussels,” when it is established pursuant to Royal Decree No. 187 of 30 December 1982, that the co-ordination centre is registered as a limited liability company under Belgian law and that it carries its own legal personhood and therefore cannot be regarded as the head office or place of business of the separate company TotalFinaElf.”⁴⁸³ The court added that, under Articles 24 and 62bis of the Belgian Code of Criminal Procedure, it is the location of the **headquarters** or **place of business** which determines the rules of jurisdiction and admissibility for prosecuting crimes and misdemeanours committed outside of Belgium. The court ruled that the conditions required to implement the principle of active personality, as enumerated in the Belgian law of 5 August 2003 relating to serious violations of international humanitarian law, had not been met and thus that Total SA’s headquarters was not in Belgium, but in France.

⁴⁸⁰ M. Henzelin, *Le principe de l’universalité en droit pénal international* ..., *op. cit.*, p. 25.

⁴⁸¹ The “War Crimes Act 1991” introduced the ability to prosecute any British citizen or UK resident for certain crimes committed between 1935 and 1945 in Germany or in German-occupied territory (Judges Higgins, Kooijmans and Buergenthal mention this example in their separate opinions appended to the Judgement of 14 February 2002 by the International Court of Justice in the case concerning the arrest warrant of 11 April 2002). See “International Criminal Court Act 2001” above. For Belgium, see Article 6, 1bis of the Preliminary Title of Code of Criminal Procedure.

⁴⁸² Bundesgerichtshof, 13 February 1994, 1 BGs 100.94, *Neue Zeitschrift für Strafrecht* 1994, p. 232. Cited by President Guillaume in an individual opinion appended to the ICJ’s 14 February 2002 ruling in the case concerning the arrest warrant of 11 April 2000.

⁴⁸³ Cass. b., 5 May 2004, réf. P.04.0482.F/3 (TotalFinaElf).

The work done in preparation of the law of 5 August 2003 offers no clarity on the scope of a legal person's primary residence, and by analogy, to a multinational group. Although it is difficult to draw parallels with companies, the guidelines put forth to determine the primary residence of individuals are "fact-based".⁴⁸⁴

Because the notion of "principal residence" is a factual concept, the plaintiffs used actual evidence to argue that Total Group's principal residence was that of its co-ordination centre in Brussels. By virtue of their name, co-ordination centres co-ordinate and serve as a hub for the administrative and financial activities of multinationals. In terms of finance, Total Group's co-ordination centre in Brussels houses the group's centralised payments operations, banking administration, cash management operations and finance and investment operations for the group's companies. Focusing on the group's centralised co-ordination centre rather than the headquarters of several individual companies which make up the group and were involved in the alleged infractions provided the plaintiffs with what they held to be a unifying, legitimate and pertinent connecting factor. While debatable, the Court of Cassation's ruling stemmed from its confirmation **that under no circumstances may a multinational group be targeted as a whole**. Moreover, although both the parent company of Total Group and its subsidiary in Burma were specifically mentioned in the complaint, the parent company's residence could not be established in Belgium because, although it was the headquarters of the group, the Belgian company was a legally separate company.

With regard to the legal certainty of the legal persons involved, it would be more appropriate to employ **the concept of domicile**, rather than that of nationality, as an alternative connecting factor, as defined in Article 60 of EC Regulation No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Domicile is defined as the place of a legal person's **registered office, headquarters or principal place of business** (see Section II-Part I).

Once again, the scope of these terms is not entirely clear and it appears that they partially overlap. It is unclear how they differ and whether they are a preferable approach to that of the "actual headquarters" criteria which some States use to determine the nationality of legal persons. The various approaches employed in different EU Member States complicate legal proceedings and serve to maintain jurisdictional conflicts.

⁴⁸⁴ See the preparatory work for Article 3 of the Law of 19 July 1991 as seen in the motives for the law on serious violations of international humanitarian law. *Doc. parl.*, Ch. Repr., *Sess.extr.*, 51 0103/00, p.4-5, as well as the Goris Report, 28 July 2003, on the project of the law on serious violations of international humanitarian law, *Doc. parl.*, Ch. Repr., *Sess.extr.*, 51 0103/003, p.36-37.

c) Double criminality

In general, prosecutions for offences committed abroad are subject to the principle of double criminality, in application of the “legality of crimes and punishments” rule (a fundamental principle under which a court cannot sentence a person if the offence is not proscribed by law). The concept of double criminality requires to verify “whether the event which the proceedings examine is **punishable both under the law of the State where the offence was committed and under the law of the State in which jurisdiction is seized.**⁴⁸⁵

In criminal proceedings against companies, the question remains whether double criminality concerns only the **illegality of the crime abroad** (double criminality *in abstracto*) or the **ability to hold a particular suspect liable** as well (double criminality *in concreto*⁴⁸⁶). Some argue in favour of the second alternative in which corporations cannot be held liable abroad and that only individuals may be prosecuted for violations.⁴⁸⁷ **The difficulty for victims, again, lies in the fact that not all countries have agreed to hold legal persons criminally liable**, and that among those countries that do, some hold corporate criminal prosecutions to be the exception, rather than the rule.

When the offence is particularly serious, some Member States do not condition the use of active personality on the existence of double criminality.



This is the case in **France** when a French national is the primary perpetrator of a crime in a third country.⁴⁸⁸



Belgium also grants active personality jurisdiction in its courts, without requiring double criminality, in cases of serious violations of international humanitarian law. Because these offences are constitutive of *jus cogens*, it is often believed that

⁴⁸⁵ D. Vandermeersch, *op. cit.*, p.258. In Belgian and French doctrine, the qualifications of the crime do not have to be identical under the two sets of legislation.

⁴⁸⁶ According to this second principle, it is important to verify whether the suspect can be prosecuted and punished under the law of the State where offence was committed, taking particular account of the principles of liability (is corporate criminal liability permitted in the third State?) and reasons to nullify the act, penalty or prosecution. See D. Vandermeersch, “La dimension internationale de la loi”, *op. cit.*, p.259. See also the opinion of A. De Nauw delivered to Parliament on the proposed law modifying the Law of 5 August 1991 on the importation, exportation and transit of arms, munitions and materials and technology of military use, completing the Preliminary Title of the Criminal Code of Procedure. Doc. parl., Ch., sess. ord. 2000-01, No. 0431/009, p. 8; C. Van den Wijngaert, *Strafrecht, Strafprocesrecht en Internationaal Strafrecht*, Anvers, Maklu, 2003, p. 1103 and 1104.

⁴⁸⁷ Referral and the extent of a magistrate’s investigative powers are determined by the facts stated in the act of referral; he is seized *in rem*, not *in personam*. In other words, if corporate criminal liability does not exist in the law governing the act, it is sufficient for the magistrate to rely on the classical principle of the individual responsibility to justify the continuation of an investigation it has initiated. D. Vandermeersch, *op. cit.*, p.260.

⁴⁸⁸ Article 113-6 of the french Penal Code.

their prohibition applies by necessity to all persons – both natural and legal – regardless of the inclusion of specific offences under various national criminal laws.⁴⁸⁹

 **Greece and Portugal** also do not require double criminality when the territory on which the offence was committed lacks a “State organisation” or the “power of law enforcement”.

➔ **Complaint in France against the leaders of Total for kidnapping crimes committed by a subsidiary in Burma**

For a time, US, French and Belgian courts simultaneously investigated human rights violations linked to the Yadana pipeline in Burma operated by joint venture partners Unocal (US), Total (France), MOGE (Burma) and PTT (Thailand). Total, which originally faced civil proceedings in California alongside Unocal,⁴⁹⁰ benefitted from a 1997 amicus curiae brief filed on behalf of France in Los Angeles federal court. The brief argued that “France respectfully objects to the exercise of personal jurisdiction by this court over Total, a corporate citizen of France, on the ground that it would conflict with the sovereignty and laws of France” and therefore the “maintenance of this action against Total in the United States courts will conflict with France’s foreign policy interests.”⁴⁹¹ On 26 August 2002, two Burmese refugees filed a complaint in Paris under the principle of active personality against two leaders of Total, for kidnapping crimes.

The factual and legal basis of the complaint⁴⁹²

From its inception in 1992, the pipeline project has been strongly criticised by several human rights organisations⁴⁹³ who argued that at every stage of its work, Total SA (like Unocal) would have to maintain a close partnership with the dictatorial regime of Myanmar. The militarisation of an area 63km long (starting in 1995) for the purpose of “securing” the pipeline required population displacement, forced labour to construct Burmese Army infrastructure (camps, roads, airstrips) and the requisition of civilians to clear the way for future roads and to demine certain zones by stepping on explosive devices. Testimonies from Burmese civilians and military personnel who fled the country tend to show that **Total had precise knowledge of these killings** and that the company oversaw some of the work for which soldiers were paid through the Burmese company MOGE.

⁴⁸⁹ Article 6 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure.

⁴⁹⁰ For more on this subject, see the section on corporate civil liability.

⁴⁹¹ The amicus curiae is reproduced in an addendum to the work of F. Christophe, *TotalFina: entre marée noire et blanchiment*, Villeurbanne, Editions Golias, 2000.

⁴⁹² For the circumstances of this case, see L. Hennebel, “L’affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis”, 2006, No. 26, 41 p., <http://cridho.cprdr.ucl.ac.be>

⁴⁹³ See *inter alia* FIDH, “La Birmanie, TOTAL et les droits de l’Homme: dissection d’un chantier”, October 1996; “Total en Birmanie. Total pollue la démocratie - stoppons le TOTALitarisme en Birmanie”, transnational group of organisations, including FIDH, 4 July 2005, www.fidh.org. See also Earthrights International, “Total Denial”, 1996; Earthrights International, “Total denial continues”, May 2000; Earthrights International, “Total Denial: More of the Same”, September 2001, www.earthrights.org

It was in this context that the two plaintiffs, refugees in Thailand, say the Burmese army forced them to leave their villages in late 1995 to work on the construction of the Yadana pipeline. They were forced to “work under the constant threat of violence from the battalions that trained them if they did not perform the tasks assigned to them, and claim to have witnessed abuse and violence committed by these battalions against other workers on the same site.”⁴⁹⁴ One witness claims to have seen about 300 workers build a heliport for Total’s dedicated use.⁴⁹⁵ Citing in particular the testimony of deserted soldiers and Unocal executives, the plaintiffs reproached Total for having **recruited and paid the junta’s battalions** (workers nicknamed them “Total battalions”), monitoring facilities⁴⁹⁶ and having **knowingly benefitted from forced labour** on the worksite despite repeated protests from the International Labour Organisation and the United Nations Commission on Human Rights that the crime of forced labour in Burma was systemic and occurring on a massive scale.

In the **absence of a specific offence under French law**, the plaintiffs argued that the forced labour they had suffered for the benefit of Total was tantamount to the crime of kidnapping as defined by the French Penal Code: Forced requisition by the military to perform unpaid work between 1995 and 1998, with the requirement to work and reside on the project site without food or health care (which is an aggravating circumstance under the crime of kidnapping), for a given time and without any possibility of escape (threats of abuse).⁴⁹⁷

The principle of “the exception” which governed corporate criminal liability in France at the time the complaint was filed, however, precluded Total from being prosecuted. The law did not provide that corporations be held liable for kidnapping. Without excluding the individual liability that resulted from the court’s investigation, including that of multiple operational leaders and private contractors employed locally by the company, the plaintiffs identified several individuals as being responsible for the violations. These individuals included Thierry Desmarest, Chairman and CEO of Total SA and the person primarily responsible for the Yadana project as director of the Exploration and Production division from July 1989 to 1995. The plaintiffs also identified Herve Madéo, director of Total’s subsidiary, Myanmar Exploration and Production (METR) from 1992 to 1999, as being responsible.

The investigation began in October 2002 and in October 2003 the examining court heard Madéo as an “assisted witness” (an intermediate between that of a mere witness and an indicted person). On 11 January 2005, the Examining Chamber of the Versailles Court of Appeals⁴⁹⁸

⁴⁹⁴ Extract from CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 8.

⁴⁹⁵ Memoire addressed to the President and Counsellors of the 10th Chamber, Section A of the Examining Chamber of the Versailles Court of Assizes, hearing of 14 December 2004 at 11:00, Case No. 2004/01/600, p. 11 ff.

⁴⁹⁶ The facilities monitoring was provided under an agreement between the Burmese authorities and the French company.

⁴⁹⁷ CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 10.

⁴⁹⁸ The prosecutor held that according to the results of the investigation, the victims were not “detained and confined” – as the complaint cited – but were instead victims of “forced labour”, which is not criminalized under French law.

rejected a motion for dismissal by the Nanterre prosecutor.⁴⁹⁹ During oral argument, the French lawyers of the two Burmese plaintiffs referred to the US proceedings, noting that “Unocal, which is less engaged in this project than Total, chose to settle rather than risk a trial. This means that the evidence brought forth by the plaintiffs created a fear of conviction.”⁵⁰⁰

The court, however, dismissed the case on 10 March 2006, citing a lack of adequate criminality. The ruling states that “the elements which constitute the crime of kidnapping were not present in this case.” Under French law, forced labour, when successfully proven, could only be a “factual element likely to corroborate the crime of kidnapping [...], and not the crime itself”. In fact, **“despite France’s international commitments, forced labour does not constitute any criminal offence under domestic law.”** Furthermore, “because criminal law requires a narrow reading, a line of reasoning which assimilates forced labour into the crime of kidnapping is impossible in the absence of express statutory provisions.” The court added that “despite reports from international organisations, human rights organisations, and the parliamentary committee on oil companies, the legislature clearly did not intend to legislate on this issue.” The court stressed however that “the allegations of the eight plaintiffs who said they were victims of forced labour [...] are consistent with each other and were confirmed by several witnesses,” concluding that **“the facts reported cannot be doubted.”**⁵⁰¹

The transactional process

Before the case was stayed by the Court and as part of an agreement made public on 29 November 2005, Total, like Unocal, agreed to establish a solidarity fund of 5.2 million Euros to be used largely for local humanitarian efforts in Burma, namely housing, health and education.⁵⁰² Although the Group reiterated a categorical denial of the forced labour allegations, the fund provides up to 10,000 Euros⁵⁰³ in compensation to each plaintiff and all other persons who can justify having been in a similar situation in the area near the construction site of the Yadana pipeline. All efforts to move funds were to be carried out under the supervision of international humanitarian organisations unanimously selected by the parties.

Although the agreement implicitly sought to have the charges dropped, the court was in no way bound by the transactional process. The withdrawal of the complaint following the agreement, however, may have compromised its future. On 10 March 2006, the court said in its dismissal, “due to this withdrawal, hearing the plaintiffs, even as witnesses like other people named in the complaint, [...] will be impossible,” because they are still “in hiding on

499 See CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 16.

500 P. Grangereau, “Travail forcé en Birmanie: Unocal préfère transiger”, *Libération*, 14 December 2004. Unocal concluded a settlement in March 2005 under which the Burmese plaintiffs dropped their civil suit in US court in exchange for a 30 million dollar payment to the group. For more information, see the civil liability section of this guide.

501 The order was not published, but large excerpts were quoted in the press. See M. Bastian, “Non-lieu pour Total, même si le travail forcé a existé en Birmanie”, dépêche AFP, 22 June 2006; X., “Travail forcé en Birmanie: non-lieu de la justice française pour Total”, *L’Echo*, 21 June 2006.

502 Total, “Myanmar: Total et l’association Sherpa concluent un accord prévoyant la création d’un fonds de solidarité pour des actions humanitaires”, Total press release, 29 November 2005, www.total.com/fr/

503 Six victims joined the two original plaintiffs.

Thai soil” where they are refugees. Such hearings would have been essential to “corroborate the crime,” given that the eight Burmese plaintiffs are the only ones able to provide “factual elements establishing the kidnapping”.⁵⁰⁴

Because international crimes are involved, the compliance of these settlement agreements with international human rights law could be put into question. FIDH is interested in this particular issue and has asked the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, to examine the issue of settlement agreements from the perspective of victims’ right to reparation.⁵⁰⁵

2. The principle of passive personality (relating to the nationality of victims)

Among other international instruments, the Convention against Torture of 1984 (Article 5, 1, c) and the Convention for the Suppression of the Financing of Terrorism of 1999 (Article 7, 2, a) mention passive personality, but only as an optional form of jurisdiction and only with regards to nationals. This principle’s integration into the criminal laws of EU Member States has been parsimonious.⁵⁰⁶

Passive personality jurisdiction in criminal matters is a type of **protective jurisdiction**, traditionally based on the idea that an attack on a country’s national is equivalent to an attack on the country itself. In the initial hypothesis put forth in this guide, given that victims should hold the nationality of an EU Member State when they suffer an offence, passive personality is considerably less helpful than active personality. In most cases victims hold the nationality of a third country, that of the country where the multinational suspected of violations has chosen to invest. Therefore, after briefly presenting the various forms passive personality can take, this section primarily explores the relevance of extending the principle to habitual residents and refugees (as some States have allowed).⁵⁰⁷

Passive personality in the EU Member States

 In **Belgium**, Title 1 of the Code of Criminal Procedure provides that Belgian courts have jurisdiction over **crimes** committed abroad against Belgian citizens, in particular when the maximum penalty under the law governing the place of the

⁵⁰⁴ See M. Bastian, “Non-lieu pour Total, même si le travail forcé a existé en Birmanie”, *op. cit.*

⁵⁰⁵ See FIDH, “Upholding Human Rights and Ensuring Coherence”, Position Paper, October 2010, www.fidh.org

⁵⁰⁶ CoE, “Compétence extraterritoriale en matière pénale”, 1990, p. 26-31.

⁵⁰⁷ No international convention, however, mentions a passive personality option for victims residing in a State without holding that State’s nationality.

crime exceeds five years imprisonment.⁵⁰⁸ The principle of passive personality requires **double criminality** and the **presence** of the accused on Belgian territory. The victim may also bring civil proceedings on this basis.

However, in the case of a violation of international humanitarian law, Belgian courts have jurisdiction when, **at the time of the crime**, a victim is either a Belgian national or a resident alien who has actually, regularly and legally been in Belgium for at least three years, or else a refugee who habitually resides in Belgium. This is the case even if the accused is in Belgium and even if the violations are not criminalised in the country where they were committed.⁵⁰⁹ In these situations, however, prosecution may be brought only by the federal prosecutor, and not through civil action.⁵¹⁰ Again, because corporations are largely “rooted” in a particular place, and thus easier to find even if they relocate, they cannot operate in true confidentiality and the conviction of a corporation *in absentia* is less delicate than that of an individual.

 In **France**, Article 113-6 of the French Criminal Code introduces the principle of passive personality with conditions similar to those used for active personality. Article 113-7 of the French Criminal Code also states that victims must hold French nationality **at the time of the offence** for passive personality jurisdiction to be applicable.

 **Germany, Austria, Estonia, Greece and Portugal**, *inter alia*, also provide for extraterritorial jurisdiction for all crimes (and misdemeanours) committed against their nationals.⁵¹¹

 **Finland and Sweden** extend the scope of passive personality jurisdiction to foreigners permanently residing in Finland and to foreigners domiciled in Sweden.⁵¹² In Sweden, however, jurisdiction applies only to acts committed in an area lacking a State judiciary.

⁵⁰⁸ The scope of passive personality is defined in Articles 10, 12 and 13 of the Act of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure.

⁵⁰⁹ Article 10, Ibis of the Preliminary Title of the Code of Criminal Procedure.

⁵¹⁰ The federal prosecutor may order a judge not to investigate in four situations: 1) the complaint is manifestly without foundation; 2) the acts referred to in the complaint do qualify as serious breaches of international humanitarian law; 3) the complaint would not be admissible as a public action; 4) an international court or independent and impartial national court with jurisdiction is more competent to handle the complaint. In the first three cases, a decision to dismiss, however, is entrusted to the Chamber of Indictments of the Brussels Court of Appeal which rules at the behest of the federal prosecutor. In the fourth case, the federal prosecutor must notify the Minister of Justice who himself informs the International Criminal Court of crimes committed after 30 June 2002.

⁵¹¹ § 7 of the German Criminal Code; Article 7 of the Greek Criminal Code; Article 5(d) of the Portuguese Criminal Code.

⁵¹² Section 5 of the Finnish Penal Code. The act must be punishable by at least six months' imprisonment; Section 3, Chapter 2 of the Swedish Penal Code.

 **Italy** includes stateless persons residing in Italy in its definition of “Italian citizen”, while limiting the exercise of passive personality jurisdiction to cases in which the accused is located in the country (as in Belgium for ordinary crimes and in Portugal).

 In **Spain**, the principle of passive personality is limited to specific crimes explicitly enumerated by the law⁵¹³.

 In **Denmark**, the principle of passive personality exists only in exceptional cases, and then it is extended to residents.⁵¹⁴

 In the **Netherlands**, the principle of passive personality is recognised only when an international agreement binding the Netherlands contains an obligation to apply it. It has nevertheless been introduced for all serious violations of international humanitarian law.⁵¹⁵

 Finally in the **United Kingdom**, the principle of passive personality for violations of particular intensity, such as treason or assassination is recognised.

Cross-cutting issues

Although not always explicitly stated in criminal law, it appears **that a victim’s nationality, residence or domicile must be acquired or established before the offence is suffered to be able to lodge a complaint** in the State to which the victim appears to be linked. This guide makes great use of this hypothesis in the cases contained within. Therefore, it is important to first consider the concept of “victim”, then assess how the extension of passive personality to refugees and habitual residents is largely ineffective if these attributions must be established at the time of the unlawful event.

a) The concept of victim

 **In France**
In a ruling dated 31 January 2001, the Cour de Cassation (the highest Court in the French judiciary) held that the principle of passive personality required a “**direct victim**” of French nationality and that the French nationality of indirect victims (such as the family of the deceased direct victim) does not permit the establishment of extraterritorial jurisdiction. The case involved the assassination of the President of the Republic of Niger, a crime committed outside France. Although

⁵¹³ Article 23 (4) of the Organic Law 6/1985 of the Judicial Power, with the modifications Introduced by the Organic Law 1/2014.

⁵¹⁴ “[E]xcept when an offence of a certain severity is committed against a Danish or a person resident in the Danish State outside the territory of any State” (Strfl. §§(3)).

⁵¹⁵ Section 2 of the Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act). Territorial presence is required.

the president held Nigerian citizenship, his widow and children were French citizens residing in France and therefore sought compensation before the French courts. Although the “**indirect victims**” compared their plight to that of a direct victim with French nationality, and they cited the discrimination to which they were subject, the Court of Cassation ruled that “the provisions of Articles 6 and 14 of the European Convention on Fundamental Freedoms and Human Rights cannot be interpreted as being likely to challenge a French criminal court’s rules and laws on international jurisdiction.”⁵¹⁶ This decision was upheld by a ruling of the Court of Cassation on 21 January 2009 in a case concerning the 1975 disappearance of the President of the Cambodian National Assembly, Ung Boun Ohr.

Thus, under no circumstances would victims of corporate violations who flee their country to legally reside and obtain citizenship in France be permitted to lodge a complaint on the basis of passive personality, as indirect victims of harm sustained by family members that remain in their country of origin (unless the latter also hold the nationality of the prosecuting State).

b) Extending the principle of passive personality to refugees



Belgium alone specifically grants passive personality jurisdiction for offences committed against refugees who habitually reside in the State.⁵¹⁷

However, the restrictive conditions attached to passive personality jurisdiction inherently prevent all recognised refugees in Belgium from using this basis to lodge complaints in Belgium against aggressors in the country they left. This is not only because individuals logically receive refugee status only after having suffered a violation, not at the time of the violation, but moreover because once individuals are granted refugee status, they are strongly discouraged from returning to their country of origin. In returning to their country of origin, they could lose their refugee status and be **dangerously re-exposed to a great risk of rights violations**.

In drawing parallels between refugees and citizens with regards to passive personality, Belgium intended to confirm the primacy of its existing international obligation under Article 16.2 of the Geneva Convention of 28 July 1951 relating to the status of refugees, which states that “A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts [...]”⁵¹⁸ This novel approach is, however, affected

⁵¹⁶ Cass. fr., 31 January 2001, *Bull. crim.*, 2001, No. 31, p.81.

⁵¹⁷ Article 10 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure.

⁵¹⁸ On the scope of this provision, see A. Grahl-Madsen, *Commentary on The Refugee Convention 1951*, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997, p.66-67; J.-Y. Carlier, *Droits de réfugiés*, Bruxelles, Ed. Story-Scientia, 1989, p.110; J.C. Hathaway, *The Law of Refugee Status*, Vancouver, Butterworths, 1992; F. Flauss, “Les droits de l’homme et la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés” in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, Bruxelles, Bruylant, 2001, p.102; D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile*, PUF, Paris, 2002, p. 554.

by several pragmatic considerations. Where the passive personality regime for nationals is strictly applied to refugees, the requirement to be a refugee at the time of the violation ensures that no refugee candidate will have a “strategic” reason to target Belgium as a host State providing a forum for effective legal redress for the human rights violations the exile sought to escape. Fearing an effect on Belgium’s appeal for asylum applications, the Belgian Parliament clearly stated a desire to prevent “asylum shopping”. One way to curb this potential risk while improving refugees’ access to justice would be to ensure that all EU Member States enact legislation granting passive personality to persons who are refugees at the time prosecution begins.

➔ **The controversial dismissal of the complaint against Total by four Burmese in Belgium**

The issue of extending passive personality to refugees was hotly debated in the context of the complaint four Burmese refugees lodged in Belgium against X, Total SA, T. Desmarest and H. Madéo. The Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law (the law of ‘universal jurisdiction’ which was amended several times), under which the complaint was validly lodged on 25 April 2002, was repealed by the entry into force of the Law of 5 August 2003 which aimed to put an end to the supposedly improper use of the universal jurisdiction law. While providing for the immediate implementation of the new law, the legislature found it useful to adopt an interim measure to preserve, within the limits of international law, the jurisdiction of Belgian courts in certain cases (forty complaints had been lodged under the old law) where the examining court had established a link with Belgium.⁵¹⁹ This referred in particular to the plaintiff’s Belgian nationality ties at the time of the prosecution’s commencement.

In accordance with established procedure, the Court of Cassation was prepared to dismiss the complaint against Total given that, inter alia, none of the plaintiffs held Belgian nationality. The plaintiffs, however, petitioned the Court of Cassation to hold a preliminary hearing in the Constitutional Court to determine the constitutionality of the transitional legal arrangement. The plaintiffs argued that by ratifying the Geneva Convention of 28 July 1951, Belgium committed itself, under Article 16.2 of the Convention, to grant equal access to the courts for nationals and refugees habitually residing on its territory. The plaintiffs held that dismissing the complaint from a recognised refugee with habitual residence in Belgium clearly, effectively and discriminatorily denied them a “right of access to justice” which was nonetheless maintained for citizens. They noted that refugees no longer claim protection from their home country (by taking refuge in Belgium, they sever all ties with the officials of their home country). Taking this argument into account, the Court of Cassation in its 5 May 2004 ruling agreed to pose the plaintiffs’ question to the Constitutional Court.⁵²⁰

⁵¹⁹ Explanatory Memorandum to the Draft Law on Serious Violations of International Humanitarian Law, Ch. Repr., sess. extr., 51^e sess., *Doc. Parl.*, No. 0103/001, p.10; Report on behalf of the Commission of Justice by Mr Stef Goris, Ch. Repr., sess. extr., 51^e sess., *Doc. Parl.*, No. 0103/003, p.10-11.

⁵²⁰ Cass. b., 5 May 2004, RG P.04.0482.F, www.cass.be

On 13 April 2005, the Constitutional Court agreed that the difference in treatment of which the defendants complained was discriminatory in nature.⁵²¹ In its opinion, the Constitutional Court held that the Belgian courts' dismissal of the complaint, when one of the plaintiffs was a recognised refugee in Belgium at the time the prosecution began is inconsistent with Article 16 of the Geneva Convention Relating to the Status of Refugees. The Constitutional Court added that according to recommendations from the United Nations High Commissioner on Human Rights released 2 August 2004, Belgium should "guarantee the rights victims acquire to a meaningful remedy, without any discrimination, to the extent that the mandatory rules relating to general international law on diplomatic immunity of the State do not apply."⁵²² Among its primary considerations, the Committee expressed concern about the effects immediately applying the Act of 5 August 2003 would have on complaints lodged under the Act of 16 June 1993, with regards to compliance with Articles 2, 5, 16 and 26 of the International Covenant on Civil and Political Rights.

In its 29 June 2005 ruling, the Court of Cassation decided nonetheless to dismiss the complaint against X, Total SA, Desmarest and Madéo from Belgian courts.⁵²³ The court ruled that it **could not compensate for the legislature's shortcomings** and as a result, could not transpose to refugees the transitional legal arrangement for complaints lodged by Belgians, even by analogy. The court added that the legality of prosecutions in this case would be questionable if not dismissed by the court. The court concluded that Articles 6 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms do not compensate for a lack of legal basis, given that "these provisions do not prohibit the legislature from using nationality as a criterion of personal jurisdiction with respect to offences committed outside of the territory." Consequently, the Court of Cassation terminated proceedings against Total, Desmarest and Madéo and the legislature adapted the controversial transitional legal arrangement to conform to Belgium's international obligations as confirmed by the Constitutional Court.⁵²⁴

Following a number of procedural hurdles, the Total case was finally put to rest in October 2008, without the merits of the allegations ever being addressed.⁵²⁵

⁵²¹ C.A., 13 April 2005, n° 68/2005, www.arbitrage.be The Court concludes in its ruling that "in that it would require Belgian courts to dismiss the case although the plaintiff was a recognized refugee in Belgium at the time legal proceedings commenced, Article 29, §3, paragraph 2 of the Law of 5 August 2003 relating to serious violations of international humanitarian law violates Articles 10, 11 and 191 of the Constitution." For an overview of this case, see N. Benaïssa, "La loi de compétence universelle. Commentaire des arrêts rendus les 23 mars et 13 avril 2005 par la Cour d'arbitrage", *J.T.*, 2005, p. 389-391.

⁵²² See CCPR, *Observations finales – Belgique*, 12 August 2004, CCPR/CO/81/BEL; CCPR, *Quatrième rapport périodique – Belgique*, 16 May 2003, CCPR/C/BEL/2003/4.

⁵²³ Cass. b., 29 June 2005, www.cass.be

⁵²⁴ Law of 22 May 2006 amending some provisions of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure, and a provision of the Law of 5 August 2003 relating to serious violations of international humanitarian law, M.B., 7 July 2006. Voir aussi Ch. Repr., sess. ord., *Doc. Parl.*, 51 2305/003, p.7-8.

⁵²⁵ See N. Benaïssa, "La loi sur la compétence universelle, acte III", *J.T.*, n°6241 – 35/2006, 4 November 2006, p. 663; A. Kettels, "L'affaire TotalFina: quand le pragmatisme prend le pas sur la réalité intellectuelle", *J.L.M.B.*, 2006/34, p. 1508-1509.

* * *

The traditional criteria for jurisdiction, territoriality and personality, are not fully sufficient for punishing human rights violations by multinationals. States where crimes are committed are often inactive. The principle of active personality provides little or no relief when:

- 1) the State in which jurisdiction is seized does not recognise corporate criminal liability (or if the liability of legal persons is limited) and
- 2) the parent company is not a resident or national of an EU Member State. Beyond the legal hurdles, it is important to understand that a State in which parent companies are based may be reluctant to exercise extraterritorial jurisdiction due to “conflicts of interest” (particularly financial interests).

In its current state, **passive personality only rarely offers new opportunities for victims to prosecute**. It is thus useful to explore the universal jurisdiction laws Member States have adopted and to analyze the extent to which they address the shortcomings outlined above. The Total case is an excellent illustration of the phenomenon. Only the complaint filed in Belgium on the principle of universal jurisdiction allowed the company to be held criminally liable. The principle of the exception in place in France at the time the complaint was lodged, however, created difficulty in prosecuting Total there.

3. The principle of universal jurisdiction

Universal jurisdiction is generally based on the principle of *aut dedere, aut judicare*, under which **States are obliged either to extradite perpetrators arrested on their soil (or transfer them to an international court) or to prosecute and judge them themselves**. Universal jurisdiction allows all the national courts in the world to prosecute and sentence perpetrators of serious international crimes, regardless of the location in which crimes are committed and the nationality of perpetrators or victims of crimes. The source of this jurisdiction lies in the nature of the crime in question, which is important insofar that the international community as a whole is affected.

At first glance, the principle of universality creates an obvious possibility for victims of serious violations of human rights committed by multinational enterprises in a third country to lodge a complaint in any State invested with such jurisdiction. This principle requires neither a territorial link (in most cases the requirement of the suspect’s presence) nor a particular nationality among suspects and/or victims. It should be noted, however, that whereas the definitions of international crimes are characterised by the scope, systematic nature and destructive spirit of serious violations of fundamental rights such as the right to life and the bans on torture and degrading and inhumane treatment, violations attributed to multinational enterprises

are not committed in this context (violations of civil and political rights are carried out at the company level, not at the host country level), or are of a different nature (violations of economic and social rights).

Three international conventions explicitly provide for universal jurisdiction:

- The four Geneva Conventions of 1949, Art. 49, 50, 129 and 146;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984, Art. 5(2); and
- The International Convention for the Protection of All Persons against Enforced Disappearance of 2006, Art. 9(2).

Implementing the principle of universal jurisdiction is either a treaty obligation that a country has accepted, or a country's own initiative. Thus, a variety of universal jurisdiction rules exists among EU Member States.⁵²⁶ This next section provides a summary of these systems to more precisely identify the crimes for which universal jurisdiction is exercised. This will be followed by a review of technical and practical issues which have hindered or could hinder the use of universal jurisdiction to prosecute a company.

War crimes and torture in treaty obligations

War crimes and **torture** merit particular attention because they are serious human rights violations which **create treaty obligations for countries to utilise universal jurisdiction**.⁵²⁷

 Universal jurisdiction deriving from treaty obligations exists in **Germany, Austria, Belgium, Denmark, Finland, France, Portugal and Sweden**.⁵²⁸

 **Greece** and **Italy** respectively refer to the Geneva Conventions of 12 August 1949 on war crimes and the United Nations Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment.

⁵²⁶ For a comparative overview, see FIDH, *A Step by Step Approach to the Use of Universal Jurisdiction in Western European States*, June 2009, www.fidh.org

⁵²⁷ Regarding war crimes committed during international armed conflict, see the Common Article (respectively 49(I), 50(II), 129(III) and 146(IV)) to the four Geneva Conventions of 12 August 1949, and Rule 85§1 of the First Additional Protocol of 1977. In its 1986 Judgement against Nicaragua, the ICJ ruled that §220 Article 1 of the Geneva Conventions is customary law, which means that it must be also be respected by those States not party to the conventions. All states have the right to require other States to observe the conventions when the perpetrator of a serious crime is on their soil. Regarding torture, see Articles 5§ 2 and 7§1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment adopted by the UN General Assembly 10 December 1984 and entered into force 26 June 1987. See also J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture; A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, p. 132.

⁵²⁸ For an overview of the pertinent national legislation, see “Additional resources” at the end of this part.

 The **Netherlands** introduced a clause whereby States are obliged either to extradite perpetrators arrested on their soil (or transfer them to an international court) or to prosecute and judge them themselves (*aut dedere, aut judicare*) once obliged to do so by an international convention. The Netherlands exercises jurisdiction only if an extradition request from a third country has been received and rejected.

 The **United Kingdom** observes a similar approach to that of the **Netherlands**. Universal jurisdiction is authorised by special legislation only when expressly required by treaty to do so.⁵²⁹

 **Ireland** and **Luxembourg** both recognise the universal jurisdiction of their courts for war crimes and torture, *inter alia*.

 In **Spain**, Article 23(4) of the LOPJ which, before 2014 provided for universal jurisdiction was recently modified by the Organic Law 1/2014 which limited and conditioned the scope of universal jurisdiction to the following cases:

- crimes against humanity and genocide if committed against a spanish national, resident or anyone present in spanish territory a foreigner whose extradition has been denied.
- Torture if the crime is committed against a spanish national.
- Enforced dissapereance if the victim is a spanish national.

Consequently, it is clear that the former principle of universal jurisdiction has been now reduced to the principle of passive personality in cases of grave international crimes.

 In **France**, Article 689-2 of the Code of Criminal Procedure grants French courts universal jurisdiction to prosecute persons suspected of **torture** as defined by the 1984 Convention on the basis of universal jurisdiction. In contrast, French courts do not recognise the direct applicability of the Geneva Conventions and due to a failure to codify war crimes in domestic law France cannot prosecute such crimes under universal jurisdiction. In addition, because France has not yet transposed the Rome Statute into domestic law,⁵³⁰ universal jurisdiction cannot be exercised for crimes against humanity or genocide, with the exception of the specific situations of Rwanda and the former Yugoslavia (see below).

⁵²⁹ The United Kingdom continues to adhere strongly to the idea that all crimes are local, resulting in its prominent use of extradition. No prosecution on the basis of universal jurisdiction has been identified. During the drafting of the conventions against torture, genocide and apartheid, the United Kingdom opposed universal jurisdiction. L. Reydams, *op. cit.*. L. Reydams, *op. cit.* See the Geneva Conventions Act (1957) (war crimes), *Geneva Conventions (Amendments) Act* (1995), the *Aviation Security Act* (1982), the *Taking of Hostage Act* (1982), and Section 134 (Torture) of the *Criminal Justice Act* (1988). The condition for initiating prosecution is that the suspect voluntarily returns to the United Kingdom. This is not specifically required, but it is the only interpretation consistent with British legal tradition.

⁵³⁰ SeeFIDH, “Mise au pas du Parlement: le gouvernement défend l’impunité des bourreaux”, 25 May 2010, www.fidh.org

Presence on a country's soil is required for a prosecution to move forward only when the appropriate international treaty demands it, which occurs in a majority of cases. Articles 5, 7 and 8 of the **Convention against Torture** hold that prosecution is mandatory only when the suspect is present on the soil of the forum court. The **Geneva Conventions** and official comments on them, however, are silent on this point, but most international and national jurisprudence **requires prosecution when the suspect is present**.⁵³¹ Although prosecutions are never required when a suspect is not present on the soil of a country, some courts hold that prosecutions *in absentia* are permissible.⁵³² Some, however, stress the importance of a specific extradition request to avoid conducting a trial in the absence of the accused.⁵³³ This situation is particularly interesting when it involves the prosecution of a company. State authorities have a greater incentive to prosecute when companies are fully absent from their soil and there is no risk to the national economic interest. Individuals – especially leaders – would be denied criminal refuge as hiding in a country unlikely to prosecute (because it has not ratified the relevant international conventions) would not pose an obstacle to criminal proceedings in another State. There is disagreement concerning the admissibility of prosecution *in absentia*,⁵³⁴ however, and the risk of multiple prosecutions could negatively affect the system as a whole.

➔ **Complaint in Belgium against the French parent company of the former Elf Group suspected of complicity in serious violations of international humanitarian law committed in Congo-Brazzaville**

On 11 October 2001, three plaintiffs from the Congo lodged a civil complaint in a Brussels examining court against Sassou Nguesso, President of Congo-Brazzaville, for war crimes, crimes against humanity, torture, arbitrary arrest and kidnapping in the Congo, but also against the French parent company of the multinational oil company Total (formerly Elf) for involvement in the abovementioned offences. The plaintiffs sought to establish Total's participation in these crimes by demonstrating the company's financial and logistical support to Sassou Nguesso's repressive military regime.

531 See M. Sassoli, "L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *R.G.D.I.P.*, 2004, p. 804-805. ICJ 14 February 2002, *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgique)*. See Ch. the accusation of CA Bruxelles, 16 April 2002, ruling on the receivability of the complaint against A. Yerodia; Ch. the accusation of CA Bruxelles, 16 June 2002, on the receivability of complaints against A. Sharon and L. Gbagbo. For a series of national examples requiring the suspect's presence, primarily for war crimes, see R. Rabinovitch, "Universal Jurisdiction in absentia", *Fordham Intern. Law Journ.*, 2005, vol. No. 28, p. 507-510; C. Bassiouni, "International Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices", 42 *Va. J. Int'l L.*, 2001, p. 136-137 and 139-149.

532 See R. Rabinovitch, "Universal Jurisdiction *in absentia*", *op. cit.*, p. 499-530; A. Poels, "Universal Jurisdiction *in absentia*", *N.Q.H.R.*, 2005, p. 65-84; C. Reyngaert, "Universal criminal Jurisdiction over Torture: a State of Affairs after 20 years the UN Torture Convention", *N.Q.H.R.*, 2005, p. 590 ff.; *Principes de Bruxelles contre l'impunité et pour la justice internationale*, Principe 13 § 2

533 A. Poels, "Universal Jurisdiction *in absentia*", *op. cit.*, p. 84.

534 M. Sassoli, "L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *op. cit.*, p.806.

The complaint was the first in Belgium to draw links between the Belgian Law of 4 May 1999 establishing the criminal liability of legal persons and the former Law of 16 June 1993 (amended on 10 February 1999) on the repression of serious violations of international humanitarian law.⁵³⁵ The complaint cited absolute universal jurisdiction with no requirement for minimal ties with Belgium, or even the presence of suspects on Belgian soil. This approach created exceptional opportunities for prosecution. Multinational corporations that were either directly or indirectly responsible for serious violations of international humanitarian law abroad could be brought before Belgian courts, regardless of the location of the parent company's headquarters or other entities which depend upon the parent company.

The French company was primarily criticised for having provided helicopters to armed militias. The plaintiffs cited the public testimony of French deputy Noël Mamere submitted at a 28 February 2001 hearing before the 17th Criminal Chamber of the Tribunal de Grande Instance of Paris (in *Denis Sassou Nguesso v. Verschave FX and Laurent Beccaria*). Mamere spoke of ethnic cleansing operations carried out in the southern districts of Brazzaville between December 1998 and late-January 1999. "These facts are proven, there were witnesses. Families were massacred; young Lari men were systematically accused of being part of the ninja militias (in opposition to Sassou Nguesso's Cobras). From January to August 1999, entire regions in the south were virtually erased. I have no figures to give you, because I do not know the exact magnitude of the support Elf (Aquitaine) provided to Sassou Nguesso. I think you will hear more evidence of frightening things, such as massacres carried out from the helicopters upon which it was easy to read the Elf logo[...] Clearly, Elf did not limit itself to supporting Sassou Nguesso, the company also assisted Lissouba. It helps those who can serve its interests. This company acts only according to its interests [...] Evidence [...] clearly demonstrates the role of what might be called the armed wing of France's African policy, the Elf Group."

Having met the criteria set forth in the transitional provisions of the new Law of 5 August 2003, the case appears to still be active.

In the meantime, the Assize Court of Brussels has ruled in a case involving logistical support economic actors provided in the commission of war crimes. Between 9 May 2005 and 29 June 2005, Belgium held its second trial for war crimes committed 11 years prior during the Rwandan genocide. Two notable traders from Kibungo and Kirwa were sentenced to 12 and 9 years imprisonment for having participated in the preparation, planning and carrying out of massacres largely committed by the Interahamwé genocide militias (Hutu extremists). After the killings broke out, claiming some 50,000 lives in the Kibungo region, the two traders made their trucks and supplies available to the militias for their murderous expeditions.

⁵³⁵ *M.B.*, 5 August 1993 (entered into force on 15 August 1993) and *M.B.*, 23 March 1999 (entered into force on 2 April 1999), p.9286. The Law of 5 August 2003 on serious violations of international humanitarian law (*M.B.*, 7 August 2003) amended and replaced the Law of 16 June 1993.

The repeal of the Law of 16 June 1993 and its replacement by the Law of 5 August 2003 had no effect on the proceedings. Given that the accused were on Belgian soil, the prosecution should be carried out in accordance with the 1949 Geneva Conventions on war crimes.

Other serious violations of international humanitarian and human rights law

Some EU Member States allow their courts to prosecute certain crimes, despite the **absence of international treaty obligations**. For the purposes of this guide, these offences are divided into two categories:

- **Serious violations of international humanitarian law** other than war crimes (for which there exists an obligation to prosecute under the Geneva Conventions, see above): **crimes against humanity** and **genocide**, and
- **Serious crimes** usually of an **international dimension**, such as the development and proliferation of weapons of mass destruction, money laundering, sexual abuse, human trafficking, bribery, etc.

 In particular, **Austria, Belgium, Greece, Luxembourg and Portugal**⁵³⁶ have such provisions in their criminal legislation. Their legitimacy lies in the nature of the crimes prosecuted. In most cases, **the accused must be present on the soil of the prosecuting State**.

It should be noted that although crimes against humanity and genocide have no equivalent to the Geneva Conventions on war crimes,⁵³⁷ the use of universal jurisdiction to prosecute these offences is now widespread. Many States have created identical prosecutorial regimes for all serious violations of international humanitarian law. See *infra* on universal jurisdiction.

 **German law** provides for universal jurisdiction in crimes against humanity and genocide (similar to the jurisdiction rules for war crimes). The same is true in the **Netherlands and Spain. Italy, Finland, Luxembourg, Portugal and Sweden** grant universal jurisdiction only for the crime of genocide, and **Greece** only for crimes against humanity.⁵³⁸

⁵³⁶ See “Additional Resources” at the end of this part.

⁵³⁷ Article VI of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide **obliges only the State in whose territory the act was committed to prosecute**. Other states cannot refuse to extradite perpetrators of genocide on the grounds that they constitute political offences (Article VII), which ensures the universal prosecution of genocide through the collaboration of all States with the *loci delicti* State, to enable it to prosecute. ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, 11 July 1996, Rec., 1996, p. 615-616, § 31.

⁵³⁸ *Ibid.*

 In **France**, universal jurisdiction for serious violations of international humanitarian law is grounded in the laws governing the country’s co-operation with the ICTY and ICTR⁵³⁹ as well as the law incorporating the Rome Statute with regard to the crimes of genocide, crimes against humanity and war crimes.

 Finally, in **Belgium**, unlike the Law of 16 June 1993 which it repealed, the Law of 5 August 2003 on serious violations of international humanitarian law no longer grants explicit universal jurisdiction for genocide and crimes against humanity. An expansion of the active and passive personality jurisdiction regime was introduced for the abovementioned crimes, but Belgium ignored its obligations to exercise universal jurisdiction under treaties the country has signed.

4. Three questions common to different types of extraterritorial jurisdiction

- 1) **The suspect’s presence on the soil of the prosecuting State:** in most cases, in order to prosecute for acts carried out in a third State, the suspect must be present on the soil of the prosecuting State. The question remains how this condition should be interpreted with regard to a corporation.
- 2) **The modes of lodging the complaint:** These also deserve special attention because the prosecution is often unprepared to prosecute human rights violations committed abroad.
- 3) The issue of criminal “**forum non conveniens**”.

The concept of a suspect’s presence: individuals and legal persons

For **individuals** – corporate executives or other members of the company – there are two elements unanimously constituting presence. In the first, passing through the territory of the prosecuting State is usually sufficient to meet the condition of presence. In the second, unless presence is required at the time of trial, the condition of presence is not met if it is the result of extradition. In this case, **voluntary presence** is required.

⁵³⁹ These laws grant jurisdiction over all crimes falling under *ratione materiae, loci* and *temporis*, under the jurisdiction of ad hoc courts, once suspects are found to be in France. In the Barbie case, the Supreme Court ruled that the concept of crime against humanity is of an international order in which concepts of borders and rules of extradition have no place. See Cass. (fr.), *Fédération Nationale des Déportés et Internés Résistants et Patriotes et autres c. Barbie*, *Journ. Dr. Intern.*, 6 October 1983, p.779. The concepts of crime against humanity and genocide were not introduced until the French Criminal Code of 1994 (see Article 212-1 (crimes against humanity) and 211-1 (genocide)).

Criteria differ from one State to the next

However, there are **differences among States on the question of when this test should occur**. The same State sometimes uses different criteria depending on the offence in question. States offer several approaches: 1) the time the complaint is lodged, 2) the time the proceedings begin (see the French position, below),⁵⁴⁰ the time of the trial (see the Spanish position, below)⁵⁴¹ or a “less determined” moment.⁵⁴² In actuality, this condition is defined by national principles of procedure, and although additional principles are sometimes drawn from international human rights standards, they are not drawn from international law itself.⁵⁴³

OVERVIEW THE FRENCH POSITION

In France, Article 689-1 of the Code of Criminal Procedure requires that the suspect “be located” on French soil prior to the commencement of any proceedings. It results from a ruling issued by the Court of Cassation on 9 April 2008 in the case of disappearances from Brazzaville Beach and from a ruling issued by the Criminal Chamber of the Court of Cassation on 21 January 2009 which gives trial judges sovereign discretion to determine whether the suspect is on French soil at the time of the prosecution’s commencement.⁵⁴⁴ Once the accused is found to be on French soil and once proceedings have been initiated, they may continue even if the perpetrator leaves the country (see the case of the Mauritanian lieutenant *Ely Ould Dah* sentenced in absentia on 1 July 2005 to 10 years imprisonment by the Nîmes Court of Appeal for acts of torture committed in 1990). On the *Ely Ould Dah* case, in its final conclusions and recommendations addressed to France, the Committee against Torture recommended that “when the State establishes its jurisdiction over torture cases

⁵⁴⁰ See Redress & FIDH, “Legal remedies for victims of ‘international crimes’ – Fostering an EU approach to ‘Extraterritorial Jurisdiction’”, Final Report, April 2004, p.61.; Redress & FIDH, “EU Update on International Crimes”, 1 June 2006, p. 6. In the **Netherlands**, the accused’s presence is a prerequisite for prosecution (and throughout the trial stage) in most cases, particularly when applying the Law on International Crimes (Explanatory Memorandum, p.38). Trial *in absentia* is permitted in some other cases (Art. 278-280 of the Code of Criminal Procedure (*Wetboek van Strafvordering*)).

⁵⁴¹ In **Denmark**, **Greece** and the **United Kingdom**, suspects are generally required to be present only during trial given that trials *in absentia* do not occur (Section 847 of the Law on the Administration of Justice). However, until the trial stage, prosecution could theoretically occur for certain crimes under international treaty law, regardless of the accused’s location. See Redress & FIDH, “Recours juridiques pour les victimes de ‘crimes internationaux’”, *op. cit.*, p. 55, 64 and 75. In **Germany**, for serious violations of international humanitarian law, the Prosecutor decides if the prosecution can continue when the suspect is neither in Germany nor likely to be there. See Section 153f of the Code of Crimes against International Law.

⁵⁴² In Belgium, the condition of territorial presence is generally satisfied if the alleged offender has been seen or found after the crime of which he is suspected and even if he left Belgium before opening of the prosecution: the notion of presence is therefore conceived in the broad sense. Brussels (mis. acc.), 9 November 2000, *Rev. dr. pén. crim.*, 2001, p.761.

⁵⁴³ C. Reyngaert, “Universal criminal Jurisdiction over Torture”, *op. cit.*, p. 591.

⁵⁴⁴ Cass. Ch. crim., 9 April 2008, No. 07-86.412; Cass. Ch. crim., 21 January 2009, No. 07-88.330.

in which the accused is present on any soil under its jurisdiction, it should adopt the measures necessary to ensure that person's detention and presence, in accordance with its obligations under Article 6 of the Convention."⁵⁴⁵

OVERVIEW THE SPANISH POSITION

Spain's *Ley Orgánica del Poder Judicial* does not expressly require the presence of a suspect on Spanish soil to exercise universal jurisdiction. Thus, in the Pinochet case, the *Audiencia Nacional* found Spanish courts competent when Pinochet was in the United Kingdom. Except under exceptional circumstances, however (see arts. 791(4), 789(4) and 793 of the Spanish Code of Criminal Procedure), trials *in absentia* are not permitted. The *Tribunal Supremo's* 25 February 2003 ruling in the *Ríos Montt* case, however, **contextualises the lack of a presence requirement until trial**. In this case, the Spanish high court ruled that in accordance with the principles of State sovereignty and non-interference, Spanish courts cannot exercise jurisdiction over cases allegedly constituting genocide unless there is a connecting factor with Spain. Spanish courts “do not specify the time at which the perpetrator must be located on Spanish soil, but imply that this element would be crucial prior to establishing a Spanish court's jurisdiction. The launch of an investigation in the accused's absence could nonetheless still be possible.”⁵⁴⁶

The time at which presence is required will likely depend on whether presence is a **condition for the establishment of criminal jurisdiction** in order to avoid jurisdictional conflicts. If so, the condition must be met at the time of the prosecution, or upon the lodging of a complaint. If presence is a **procedural requirement**, however, and necessary only to avoid a trial *in absentia*, preliminary investigations may be initiated in the suspect's absence.⁵⁴⁷ While investigations *in absentia* are relatively common and uncontroversial in international law, trials *in absentia* may provoke debate.⁵⁴⁸

To the best of the authors' knowledge, the scope of a **corporation's “presence”** has not yet been fully clarified by criminal jurisprudence. Touching upon this issue, Henzelin notes that in certain cases, a foreign company is considered under the Alien Tort Claims Act as being on US soil “from the moment it carries out some of its activities there.” According to Henzelin, frequent trips by a representative of

⁵⁴⁵ CAT, *Observations finales – France*, 24 November 2005, CAT/C/FRA/CO/13/CPRCRP.51, § 14.

⁵⁴⁶ Redress & FIDH, “Legal Redress for Victims of International Crimes”, *op. cit.*, p. 57.

⁵⁴⁷ Swart, “La place des critères traditionnels de compétence dans la poursuite des crimes internationaux”, p. 567 ff. in A. Cassese and M. Delmas-Marty (dir.), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002.

⁵⁴⁸ R. Rabinovitch, “Universal Jurisdiction *in absentia*”, *op. cit.*, p. 519. See also V. Bouchard, “Procédures par contumace et par défaut au regard de l'Article 6, paragraphe 1, de la Convention européenne des droits de l'homme”, R.S.C., 2002, p. 517-535.

a foreign company to the United States are sufficient to create the minimum ties necessary to establish jurisdiction in US courts.⁵⁴⁹

In terms of criteria for criminal liability, several options exist for establishing the presence of a company in an EU Member State.

- 1) The company has its **headquarters** in the Member State (a situation similar to nationality, see above);
- 2) The company owns a **place of business** in the Member State (a situation similar to residence, see above); or
- 3) The company simply **conducts business** in the Member State.

Requiring that conditions corresponding to residence be met seems inappropriate given the way the concept of presence is applied with respect to individuals. To establish “presence”, individuals do not need to maintain continued residence on the soil of a county, but simply pass through the country occasionally. Thus, the question remains whether Total’s partial ownership of its subsidiary results in the parent company’s *ipso facto* “material presence” in Belgium, regardless of any complicity by the Belgian subsidiary in the offences committed in Burma.

Requiring presence on a State’s soil is logical from the perspective that there is possibility of apprehending alleged perpetrators in order to judge them. In this sense, it is reasonable to argue that a subsidiary, branch or representative office meets the condition of presence within a prosecuting State only if it has provided assistance to the foreign parent company to commit an offence in a third country.⁵⁵⁰

➔ The Total case in Belgian courts

In its 5 May 2004 ruling, the Belgian Supreme Court held, however, that the presence of Total’s co-ordination centre – the central administration providing all functions necessary to represent the industrial and commercial group – was insufficient to establish the multinational’s material presence on Belgian soil. The co-ordination centre’s participation in Total’s operations in Burma, however, cannot be so easily denied. Holding that the co-ordination centre is a separate legal person, however, the court is likely to simply dismiss the idea that the parent company itself is present on Belgian soil. The possibility of lifting the corporate veil, thus, was not considered.

⁵⁴⁹ M. Henzelin, *Le principe de l’universalité en droit pénal international...*, *op. cit.*, p. 185.

⁵⁵⁰ See D. Vandermeersch, *op. cit.*, p. 252-253. The author states that when the accused’s presence on Belgian soil is required, that should mean that prosecutions should be limited to companies with their actual headquarters in Belgium and to foreign companies whose operational headquarters in Belgium participated in the commission of the offence.

🕒 Ways to lodge complaints: the participation of victims

In terms of initiating proceedings, the criminal justice systems of EU Member States differ from one another with regard to the principles of opportunity (i.e. the discretionary power of the Prosecutor to sue, most often in cases of serious crimes) and legality (i.e. the fact that the Prosecutor can systematically be obliged to sue any offence for which he/she is made aware of).

The principle of opportunity is applied in Belgium, France, Denmark, Ireland, United Kingdom, Luxembourg and the Netherlands. Germany, Austria, Spain, Finland, Sweden, Greece, Italy and Portugal apply the principle of legality.⁴³⁴

It is now a common phenomenon for victims to participate in criminal proceedings in order to obtain redress for personal injuries resulting from an offence. Whether victims and organisations are able to initiate criminal proceedings without intermediation has a direct effect on their access to justice. Restrictions on the ability of victims to directly cause an investigation to be opened, combined with the principle of opportunity (prosecutorial discretion) can seriously hamper victims' access to courts. In some States the rules for initiating prosecution on the basis of extraterritorial jurisdiction differ from those applicable to common or "territorial" crimes.⁵⁵²

 **Spain** is exemplary in this field. Criminal prosecution is guided by a "juez central de instruccion" that can be seized by the **prosecutor**, the **victim**⁵⁵³ and also by **any private citizen** or **association** bringing "class action" (a suit brought before criminal court by a private citizen, in the interest of either an individual or society as a whole). Spain is the only EU Member State to introduce class action in criminal matters. Prosecutorial discretion is also non-existent in Spanish prosecutions.⁵⁵⁴

⁵⁵¹ The respective prosecutors of these States obligated to prosecute when an offence is brought to their attention (through the lodging of a complaint), unless the courts do not have jurisdiction over the events or if the allegations are clearly unfounded. See the European Commission *Green Paper on the Approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM/2004/0334 final, 30 April 2004, p. 29, pt. 3.1.1.1.

⁵⁵² Redress & FIDH, *Legal Redress for Victims of International Crimes*, *op. cit.*, 2004, p. 7.

⁵⁵³ It should also be noted that Spanish law criminal complaints by victims lead to ipso facto civil claims unless the plaintiff expressly requests otherwise (Article 112 of the Spanish Law on Criminal Procedure).

⁵⁵⁴ Redress & FIDH, "Legal Redress for Victims of International Crimes", *op. cit.*, 2004, p. 57.

According to the legal tradition of the country concerned, victims generally have an opportunity to bring legal action as a civil party,⁵⁵⁵ or else the prosecutor alone can bring victims on as representatives of the executive branch.⁵⁵⁶



Germany has a hybrid system. Although victims are unable to bring legal action, they may eventually join the proceedings as auxiliaries to the prosecutor.⁵⁵⁷

The **ability to bring legal actions as a civil party**, which allows a direct appeal to a court, is somewhat controversial. Although it often seems necessary to combat the public prosecutor's inertia,⁵⁵⁸ it has also been warned that the lodging of symbolic, ideological or political complaints risks turning the judiciary away from its original purpose.⁵⁵⁹

The ability to bring **legal actions as a civil party** is undoubtedly useful because it bypasses the prosecutor's frequent exercise of discretion (the principle of mandatory prosecution is rare) over whether an extraterritorial crime will be prosecuted. A prosecutor's decision may be influenced by both political and financial considerations. Crimes committed abroad require substantial resources (trial judges, translators, a budget for letters rogatory, etc.). In addition, the prosecutor usually decides the budget and the resources which will be allocated to a potential trial. With regard to the will of the executive to prosecute multinational based in the country, it is possible that the executive would abstain, given that such prosecutions would undermine the country's economic interests.

555 In Belgium, France, Italy and Luxembourg. A. Poels, "Universal Jurisdiction *in absentia*", N.Q.H.R., 2005, p.79.

556 In Austria, Denmark, Finland (Section 12 (2) of the Finnish Criminal Code), Greece, Ireland, the Netherlands, the United Kingdom and Sweden. In Sweden and Denmark, the decision to prosecute an extraterritorial crime is made by an administrative (political) authority. See Section 5 of Chapter 2 of the Swedish Criminal Code, and Section 8 (4-6) of the Danish Criminal Code. In Ireland too, the Law on the Geneva Conventions states that the Minister of Foreign Affairs has the sole authority to determine whether the Act applies to a particular case.

557 On this prosecution, see Redress & FIDH, "Legal Remedies for Victims of International Crimes", *op. cit.*, p. 45; M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Universeit van Tilburg (Nijmegen, Pays-Bas, 2000: Wolf Legal Productions (WLP)), Chapter 9; J. Doak, "Victims' Rights in Criminal Trials: Prospect for participation", *Cardiff University Law School*, 2005, p. 308-310.

558 Most investigations are initiated following a concerted effort by victims. See Redress & FIDH, "Legal remedies for victims of 'international crimes', *op. cit.*

559 L. Reydam, *op. cit.*, p.108; D. Vandermeersch, "La compétence universelle" in *Juridictions nationales et crimes internationaux* / Eds. A. Cassese and M. Delmas-Marty, PUF, Paris, 2002, p. 589 ff.; J. Wouters en L. De Smet, "De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het licht van de Belgische Genocidewet", in *Bedrijven en mensenrechten – verantwoordelijkheid en aansprakelijkheid*, Antwerpen, Maklu, 2003, p. 309-338.

 **Italy** applies the mandatory prosecution principle which, according to the Constitution, implies that the public prosecutor has the obligation to exercise criminal action. This principle, although tempered by the possibility for the Prosecutor to dismiss cases provided that there is an inconsistency between facts, a procedural obstacle or the absence of legal characterization, allows associations – acting on behalf of victims- to alert the Prosecutor on alleged corporate-related human rights violations. The recent Eternit trial is a good example.

 **Germany, Greece and the Netherlands** also expressly allow for prosecutions to be dropped for political reasons.⁵⁶⁰

These elements are significant. Given victims’ fear of being exposed through court proceedings, recognising a right for civil associations to represent victims’ interests, or “class actions” such as that applicable in France for certain crimes,⁵⁶¹ would undoubtedly be a useful measure for countries to adopt.⁵⁶²

 In 2003, **Belgium** limited the scope of civil actions available to plaintiffs for violations of international humanitarian law.⁵⁶³ Civil action is now possible only when the company and/or its leader are of Belgian nationality or reside on Belgian soil (active personality).⁵⁶⁴ In other situations, only the Federal Prosecutor may initiate investigations.

 Similarly, **France** adopted a legislation which incorporates crimes under the Statute of the International Criminal Court into French national law. Such legislation grants a monopoly to the prosecutor therefore denying victims the ability to bring civil action.⁵⁶⁵

The national standards which stipulate that only the prosecutor may decide to prosecute (according to the principle of prosecutorial discretion) also tend to grant recourse to victims whose appeals are denied.⁵⁶⁶ Through these provisions, States comply

⁵⁶⁰ Section 153, German Code of Criminal Procedure; Art. 67, 242 of the Dutch Code of Criminal Procedure.

⁵⁶¹ See art. 2-4 of the French Criminal Code. FIDH used this possibility in the Ely Ould Dah case and in a number of other cases brought in France on the basis of universal jurisdiction. See CA Montpellier, *FIDH et al. c. Ould Dah*, 25 May 2001.

⁵⁶² See the *Brussels Principles against Impunity and for International Justice*, Principle 16 § 3.

⁵⁶³ Suits have been filed against George W. Bush with respect to the second military intervention in Iraq.

⁵⁶⁴ It should be noted that barring serious violations of international humanitarian law, plaintiffs remain civil parties in Belgium. Thus, a violation of human rights committed abroad is grounds to bring civil suit on the basis of both active and passive personality.

⁵⁶⁵ See the legislation passed on 13 July 2010 incorporating crimes of the International Criminal Court statute as well as civil society's concerns: “La CFCPI consternée par le vote de l’Assemblée nationale”, 13 July 2010: <http://www.fidh.org/Justice-internationale-La-CFCPI>

⁵⁶⁶ See L. Reydam, *op. cit.* In the Netherlands, for example, victims may appeal the Public Prosecutor’s decision not to prosecute (Art. 12 and 13a of the Dutch Code of Criminal Procedure). Similarly, see Sections 277, 278 and 287-2b of the Portuguese Code of Criminal Procedure and Articles 408-410 of the Italian Code of Criminal Procedure and Articles 43(1), 47 and 48 of the Greek Code of Criminal Procedure.

with international guidelines which hold that the rights of victims, particularly those who are victims of serious human rights breaches, must receive special attention.⁵⁶⁷

📍 Hierarchy and subsidiarity in the principles of extraterritorial jurisdiction: towards a “forum non conveniens” in criminal matters?

🌐 The first section of the **Belgian Code of Criminal Procedure** provides an explicit mechanism similar to *forum non conveniens*.⁵⁶⁸ The federal prosecutor may dismiss a case if the investigation shows that in the interests of properly administering justice and Belgium’s international obligations, the complaint should be brought before international courts or the courts of the jurisdiction where the acts were committed, the courts of the perpetrator’s nationality or the courts of the place where the perpetrator is located, provided that the courts maintain independence, impartiality and fairness, particularly as the latter may highlight Belgium’s relevant international commitments in the alternative jurisdiction.

🌐 Deriving from Spanish jurisprudence, **German law** embodies a similar principle of subsidiarity with regard to serious violations of international humanitarian law.⁵⁶⁹

🌐 In its rulings in *Rios Montt* and *Fujimori*, the **Spanish Supreme Court** held that territorial jurisdiction takes priority over all other forms of jurisdiction “when several real and effective active jurisdictions exist”.⁵⁷⁰ In the *Fujimori* decision, the Supreme Court held that in order to prosecute in Spain on the basis of universal jurisdiction, there must be “serious and reasonable evidence” showing that the offences “have thus far not been effectively prosecuted in the State with territorial jurisdiction”.⁵⁷¹ The article on the basis of which Spanish courts had in the past exercised universal jurisdiction has today been limited to a specific number of situations. For instance, Article 23.5(a), (b) prevents Spanish courts from exercising jurisdiction in situations where proceedings involving an investigation and the effective prosecution of a criminal offence have been initiated within the jurisdiction of another country or in an international court.⁵⁷²

⁵⁶⁷ See Rule 7 of Recommendation No. R (85) 11 of the Committee of Ministers to Member States the victim’s position under criminal law and criminal procedure adopted 28 June 1985, Article 12 of Resolution No. 2005/35 of the UN Commission on Human Rights E/CN.4/RES/2005/35, the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, UN GA, Res. 40/34. See also Rule 89 § 1 and 92.2 of the International Criminal Court’s Rules of Procedure and Evidence (ICC-ASP/1/3).

⁵⁶⁸ See Articles 10, *1bis*, Paragraph 3, 4 and 12*bis*, Paragraph 3, of the Preliminary Title of the Code of Criminal Procedure.

⁵⁶⁹ § 153 (f) of the Code of Criminal Procedure (StOP); C. Reyngaert, “Universal criminal Jurisdiction over Torture...”, *op.cit.*, p. 603. To see this principle applied, see below.

⁵⁷⁰ See Audiencia Nacional (Spain), *Rigoberta Menchu Tum et al. v. Montt et al.*, 13 December 2000; Redress & FIDH, “Legal Remedies for Victims of International Crimes”, *op. cit.*, p. 58.

⁵⁷¹ Redress & FIDH, “Legal Remedies for Victims of International Crimes”, p. 58. In fact, Spanish courts recently confirmed these principles in a case brought by Palestinians against Israelis. Tribunal Supremo, *Miguel Colmenero Menendez de Luarca*, Auto 550/2010, 4 March 2010.

⁵⁷² Art. 23.5 (a) and (b) of the LOPJ, recently modified by the Ley Organica 7/2015.

 **Belgian, Spanish and German** courts allow the use of the third criterion of “effective jurisdiction” to decline jurisdiction, even if the host State displays an unwillingness to genuinely prosecute the case.⁵⁷³ The existence of a better forum in such a situation is but a theoretical possibility.

➔ **Trafigura Beheer BV & Trafigura Limited in Côte d’Ivoire**

The offloading of 500 tons of toxic waste in Abidjan (Côte d’Ivoire) by the ship *Probo Koala* during the night of 19-20 August 2006, had disastrous human and environmental consequences (for more information on the context of the case and the precise details, see Section II, Part I on extraterritorial corporate civil liability). The following companies were involved: Trafigura Beheer BV (the parent company based in the Netherlands), Trafigura Ltd. (its English subsidiary that chartered the ship), Puma Energy (Trafigura Beheer BV’s Côte d’Ivoire subsidiary), Société Tommy (an Abidjan marine supply firm specialised in emptying tanks, maintenance and bunkering) and Waibs Shipping (engaged by Trafigura to co-ordinate the *Probo Koala*’s reception and waste disposal operations). They all face prosecution in Côte d’Ivoire, the Netherlands and France.

Court proceedings in Côte d’Ivoire

Following an investigation carried out by Côte d’Ivoire judicial authorities, several persons were charged, including Puma Energy’s representative, Waibs’ director, Tommy’s manager, and the co-founder of Trafigura, Claude Dauphin and his manager for Africa, Jean-Pierre Valentini, who were both arrested at Abidjan airport as they were leaving the country following a visit to establish the facts of the incident.

The two Trafigura representatives were held in custody from the time of their arrest on 18 September 2006 to 14 February 2007. On 19 March 2007, despite every indication of Trafigura’s liability, on whose account, and to whose benefit the toxic waste had been dumped, the Indictment Division of the Abidjan Court of appeal dropped the charges against Dauphin and Valentini, citing lack of evidence on the following grounds:

- concerning the charges of complicity in poisoning, “*the investigation failed to reveal any act committed personally by the defendants Dauphin, Claude and Valentini, Jean-Claude.*”
- concerning the violation of the law protecting public health and the environment from the effects of toxic and nuclear industrial waste and harmful substances, the Indictment Division of the Abidjan Court of appeal held that “*the investigation showed that Dauphin, Claude and Valentini, Jean-Claude, had committed no reprehensible act, and that they had found themselves at the centre of these proceedings because they had travelled to Côte d’Ivoire of their own free will in order to help limit the damageable consequences of the acts committed by Ugborugbo Salomon Amejuma (the director of Tommy) and others.*”⁵⁷⁴

⁵⁷³ C. Reyngaert, *op. cit.*, p.602. Redress & FIDH, *op. cit.*, 2004, p. 58.

⁵⁷⁴ Decision by the Indictment Division of the Abidjan Court of appeal, 19 March 2008, p. 25-26.

The charges against Puma Energy's director were also dropped. The Indictment Division of the Abidjan Court of Appeal eventually sent twelve persons before the Assize Court for their involvement in the dumping of toxic waste.⁵⁷⁵

The trial opened on 29 September 2008. On 22 October 2008, the Abidjan Assize Court recognised the toxic nature of the substances discharged and the danger they posed to human beings. The director of Société Tommy (which collected and unloaded the toxic waste) was sentenced to 20 years' imprisonment. The Waibs employee who had referred Société Tommy to Trafigura's Côte d'Ivoire subsidiary (Puma Energy) was sentenced to 5 years' imprisonment. The State of Côte d'Ivoire was found to bear no responsibility for the criminal act. The customs officials, former harbour master and former director of the *Affaires maritimes et portuaires* had all been indicted but were acquitted.⁵⁷⁶

Legal proceedings in France

On 29 June 2007, 20 Ivorian victims, with the support of attorneys from the FIDH Legal Action Group (LAG), lodged a complaint with the Paris Prosecutor's office against the management of Trafigura, Dauphin and Valentini, for dumping harmful substances, manslaughter, bribery and violation of the special provisions concerning cross-border movements of waste.⁵⁷⁷

On 16 April 2008, the Vice-prosecutor of the "Public health – economic and social delinquency" division **dismissed the case** on the grounds that the proceedings were "*entirely of foreign origin*", citing the following reasons:

- an absence of the accused persons' permanent ties with French territory, namely Dauphin and Valentini, who were chairman and board member of the Trafigura group, respectively;
- the subsidiaries and commercial entities belonging to the Trafigura group were established outside of French territory; and
- the existence of other legal proceedings at the same time.

It should be noted that by virtue of the principle under which jurisdiction is based on the defendant's identity, as laid out in Article 113-6 of the French Criminal Code, **the perpetrators' French nationality is sufficient to establish the jurisdiction of French courts.** Whether the persons involved are domiciled in or have permanent links with French territory is of no significance. The other legal proceedings do not address the same acts or person and are thus also of no significance. *See discussion supra on the meaning of nationality.*

On **16 June 2008**, attorneys cited Article 40-3 of the French Criminal Code to appeal the case's dismissal on the grounds that the jurisdiction of French courts is established by the

⁵⁷⁵ See the FIDH-LIDHO-MIDH, "Two years after the disaster, those responsible remain unpunished and the victims destitute", Press Release, 14 August 2008, www.fidh.org

⁵⁷⁶ See the joint FIDH press release, with its member organisations in Côte d'Ivoire and France, and Greenpeace and Sherpa, "The Abidjan Assize Court hands down its verdict, in the absence of the main authors", 28 October 2008, www.fidh.org

⁵⁷⁷ See press release by FIDH and its member organisations in Côte d'Ivoire and in France, "Appeal for the establishment of responsibility and for justice for the victims of the dumping of toxic waste in Côte d'Ivoire", 21 December 2007, www.fidh.org

simple fact that the perpetrators hold French nationality. The appeal noted that any argument based on the existence of other ongoing proceedings or on the difficulty of carrying out investigations from France is void. On July 27, 2008 Mr Gino Necchi, Avocat general, confirmed the filing of the appeal under the number 2008/05998, however, to date, there has been no response to the appeal.

Legal proceedings in the Netherlands

The criminal proceedings initiated in the Netherlands concern events that occurred in Amsterdam, prior to the dumping of toxic waste in Côte d'Ivoire⁵⁷⁸. They involve Trafigura, the captain of the *Probo Koala* and the City and Port of Amsterdam.

The trial was postponed several times. A hearing took place in May 2010 and will resume in September 2010. Trafigura is accused of violating European legislation on waste disposal, and is liable to a maximum fine of 450,000 Euros and/or six years' imprisonment. Trafigura is also accused of falsifying documents relating to the composition of the waste, and of failing to inform APS (a Dutch-Danish waste recycling firm) of the toxic nature of the waste to be treated.

APS is accused of having unloaded and reloaded part of the *Probo Koala's* toxic cargo when it put in at Amsterdam in July 2006. When the waste turned out to be more toxic than announced, the charterer refused to pay for its treatment. Claude Dauphin, Trafigura's CEO, has been charged with illegally exporting toxic waste.

On 19 December 2008, the Amsterdam Court of Appeal dismissed the criminal charges against Trafigura's CEO. However, on 6 July 2010, the Dutch Supreme Court decided that Claude Dauphin could still be prosecuted, asking the Court of Appeal to deliver a new judgment as regards the prosecution of Trafigura's CEO, considering that all the evidence had not been taken into account. On 30 January 2012, the Court of Appeal of Amsterdam decided that the Public Prosecutor may prosecute Trafigura's president Claude Dauphin for leading the illegal export of the waste from the *Probo Koala* to Ivory Coast.

On 5 February 2009, APS was found guilty of breaking the environment protection laws, and fined 450,000 Euros. One of its former executives was sentenced to 240 hours' community service, with a suspension of half of the sentence.

An important development in the proceedings occurred at a 19 May 2010 hearing before the Amsterdam Court of Appeal when Greenpeace produced testimony by the Ivorian truck drivers who had transported the toxic waste from the *Probo Koala*, asserting that Trafigura had paid them to make false statements during the civil proceedings in London (see Section II, Part I on corporate civil liability).⁵⁷⁹ The trial began on June 2nd 2010.

⁵⁷⁸ Greenpeace, which is party to the proceedings, has challenged the limitation of the case to events that occurred in Amsterdam. An appeal is pending.

⁵⁷⁹ See the article published in *Libération* on 18 May 2010, "Probo Koala: the charterer Trafigura called to witness" www.liberation.fr

On the July 23rd 2010, Trafigura was condemned to pay 1 million euro for EU shipments of waste Regulation and for failing to mention the type of transported waste. However, it was acquitted for forging of documents. Besides, the employee of Trafigura who had coordinated the stopover, Naeem Ahmed, was given a six-month suspended prison sentence and condemned to pay a fine of 25.000 euros; the Ukrainian captain of the cargo boat, Seriy Chertov, was given a five-month suspended sentence.

The public prosecutor's department of Amsterdam, Trafigura and Naeem Ahmed appealed against this decision. On 1 July 2011, the Dutch Court of Appeal annulled the verdict against Naeem Ahmed on the basis that the Court of First Instance did not have jurisdiction.⁵⁸⁰ The Public Prosecutor has appealed this decision. The 23 December 2011 the Amsterdam Court of Appeal upheld the €1 million fine against Trafigura. However it confirmed that the municipality of Amsterdam was immune to prosecution. An appeal to the Supreme Court was subsequently filed, and is still pending.

Trafigura and the Public prosecutor's department of Amsterdam both lodged an appeal against the decision of the 23rd of July 2010 as regards the facts that took place in the Netherlands. The Public prosecutor's department of Amsterdam asked the Court to reconsider on the discharge concerned the city of Amsterdam, the port manager, and the APS company, responsible for waste treatment, and required the payment by Trafigura of a €2 million fine. The appeal trial opened on the 14th of November 2011. Concerning the individual responsibility of Claude Dauphin, president of Trafigura, the court decided, on January 30th, 2012, that Claude Dauphin could be prosecuted for the alleged illegal export of waste by Trafigura. However, no decision on the merits was reached, since the Dutch Public Prosecutor's Office and Trafigura reached an out-of-court settlement in November 2012. Trafigura agreed to pay €300,000 compensation and paid a €67,000 fine in return for the withdrawal of the case against Claude Dauphin.

Lawyers representing 110,937 Ivorians have called upon Trafigura in respect to a new lawsuit in The Hague for causing "bodily, moral and economic injuries to the plaintiffs. They ask for the payment of €2,500 in compensation, as well as the cleaning of the waste."⁵⁸¹ However, in November 2015, victims will still be awaiting payments.⁵⁸²

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⁵⁸⁰ Amnesty International, "*The Toxic Truth About a Company Called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*", 2012, The Netherlands,

⁵⁸¹ Business and Human Rights Resource Centre, "Trafigura lawsuits (re Côte d'Ivoire)" <http://business-humanrights.org>

⁵⁸² *Ibid.*

Prosecutions based on universal jurisdiction still face strong resistance from countries unwilling to take on the political and diplomatic costs of such cases. This is especially true when complaints target companies on their territory, resulting in a threat that the companies will relocate. Following two complaints filed in Belgium against multinational companies and their directors for serious human rights violations, the Federation of Enterprises in Belgium denounced the Belgian Law of 16 June 1993 as rendering Belgium an inhospitable climate for companies doing business in different parts of the world. The scope of the law’s application was largely reduced, and the court declined jurisdiction in the complaint against Total in Burma.

The technical difficulties resulting from domestic legal rules on corporate criminal liability and extraterritoriality should not be overlooked.

An appropriate conventional framework is “required in order to provide the legal certainty necessary to dispense justice at the international level”⁵⁸³ and to ensure the feasibility of prosecutions. Although companies that commit serious international crimes should be investigated and prosecuted without waiting for victims to complain, this has never been the case. The role of victims and the NGOs that support them is crucial.

ADDITIONAL RESOURCES (AND REFERENCES)

For a comparison of the criminal liability regimes in place in Europe:

- H. de Doelder and K. Tiedemann, *La criminalisation du comportement collectif*, Kluwer, 1996.
- S. Geeroms, “La responsabilité pénale des personnes morales: une étude comparative”, *Rev. int. dr. comp.*, 1996.
- Association Henri Capitant des Amis de la Culture juridique française, *La responsabilité, aspects nouveaux*, Tome I, L.G.D.J., 1999.
- M. Wagner, “Corporate Criminal Liability – National and International Responses”, *Background paper for the International Society for the Reform of Criminal law – 13th International Conference Commercial and Financial Fraud: A Comparative Perspective*, Malta, 8-12 July 1999
- M. Delmas-Marty and J.A.E. Vervaele (dir.), *La mise en œuvre du Corpus Iuris dans les États Membres*, Vol.1., Antwerp/Groningen/Oxford, Intersentia, 2000.
- S. Adam, N. Colette-Basecqz and M. Nihoul, *La responsabilité pénale des personnes morales en Europe – Corporate Criminal Liability in Europe*, Bruxelles/Bruges, La Charte/Die Keure, 2008.

⁵⁸³ D. Vandermeersch, “La dimension internationale de la loi”, *op. cit.*, p. 273.

On the recognition of corporate criminal liability in EU Member States:

- **Austria:** VbVG *Verbandsverantwortlichkeitsgesetz* (The federal law on the liability of organisations in criminal matters) for violations committed since 1 January 2006. See also M. Hilf, “La responsabilité pénale des personnes morales en Autriche – Le régime de la nouvelle loi autrichienne sur la responsabilité des entreprises” in *La responsabilité pénale des personnes morales en Europe* / S. Adam (dir.), N. Colette-Basecqz and M. Nihoul, La Charte, Bruxelles, 2008.
- **Belgium:** Art. 5 of the Belgian Criminal Code, established by the Law of 4 May 1999 creating corporate criminal liability (*M.B.*, 22 June 1999, p. 2341). This law entered into force on 2 July 1999.
- **Estonia:** Art. 14 and 37 of the new Criminal Code of 2002.
- **Finland:** Section 9 of the Criminal Code (following the reform of 1 September 1995 (1995/743)).
- **France:** Art. 121-2 of the new Criminal Code, which entered into force on 1 March 1994. It was recently modified by the Law of 9 March 2004.
- **The Netherlands:** See art. 51 of the *Nederlandse wetboek van strafrecht* (Dutch Criminal Code), Introduced by the Law of 22 June 1950 on economic crime, and revised by the Law of 23 June 1976. See also J. D’Haenens, “Sanctions pénales et personnes morales”, *Rev. dr. Pén. Crim.*, 1975. J. Vervaele, “La responsabilité pénale de et au sein de la personne morale aux Pays-Bas. Entre pragmatisme et dogmatisme juridique”, *Rev. sc. crim.* (Fr.), 1997, liv. 2, p. 325-346. D. Roeff, T. De Roos, “De strafrechtelijke aansprakelijkheid van de rechtspersoon in Nederland: rechtstheoretische beschouwingen bij enkele praktische knelpunten”, in X., *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders*, Antvers, Intersentia, Série ‘Ius Commune Europeanum’, No 25, 1998, p. 49-121. A. De Nauw and F. Deruyck, “De Strafrechtelijke verantwoordelijkheid van rechtspersonen”, *R.W.*, 2000, p. 897-898.

On the principle of universal jurisdiction

- FIDH, “FIDH Paper on Universal Jurisdiction – A Step by Step Approach to the Use of Universal Jurisdiction in Western European States”, June 2009, www.fidh.org
- FIDH, *Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture*, April 2007, www.fidh.org

In EU Member States:

- **Germany:** Para. 6 of the *Strafgesetzbuch* (Criminal Code). See also Section 1 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch* or VStGB), adopted on 30 June 2002. G. Werle and F. Jessberger, “International Criminal Justice is coming Home: The new German Code of Crimes against International Law”, *CrimL. L. F.*, 2002, 191, p. 214. This Code is a model and could serve as a source of inspiration for other European countries. M. Delmas-Marty, “Le droit pénal comme éthique de la mondialisation”, *R. S. C.*, 2004, p. 8. Prosecution *in absentia* is permitted, but only with the goal of preserving evidence for a possible future trial. (StPO §276, StPO §285 (1)).

- **Austria:** Para. 64 (64.1 to 64.8) and 65 of the Strafgesetzbuch or StGB (Criminal Code). With regard to genocide in particular, universal jurisdiction is granted by jurisprudence. See International Law Association, “Final Report on the exercise of Universal jurisdiction in respect of gross human rights offences”, prepared report by M. Kamminga, 2000, p. 24.
- **Belgium:** Art. 12bis of Chapter II of Title 1 of the Code of Criminal Procedure (replaced by the Law of 18 July 2001 and amended by the Law of 5 August 2003 (entered into force on 7 August 2003) and Article 378 of the Law Programme of 22 December 2003 (entered into force on 31 December 2003)). See also Art. 6, 3-10, al. 1-4 and Art. 10 *quater* of Title 1 of the Code of Criminal Procedure.
- **Denmark:** *Strfl.* § 8(1) (5) and Sections 2, 5(2) and 6 of the Military Criminal Code (Act. No. 216 of April 1973).
- **Spain:** Art. 23.4 of the LOPJ of 1 July 1985.
- **Finlande:** Section 7 – Chapter 1 of the Criminal Code (amended by 650/2003).
- **France:** Art. 689-1 of the Code of Criminal Procedure and Cassation or 26 March 1996, *Bull. crim.*, No. 132.
- **Greece:** Art. 8h and 8k of the Criminal Code.
- **Ireland:** Section 3 of the Irish Law on the Geneva Conventions, 1962, which was amended by the Law on the Geneva Conventions of 1998; Sections 2 and 3 of the Irish Law of 2000 on criminal justice (United Nations Convention against Torture).
- **Italy:** Art. 7(5) of the Criminal Code. With regard to torture, see also Article 3(1)(c) of Law No. 498 of 3 November 1988 (Legge 3 novembre 1988, n°498) and Article 10 of the Criminal Code (Legge 9 ottobre 1967, n°962).
- **Luxembourg:** Art. 10 of the Law of 9 January 1985 on the Repression of Serious Violations of the International Geneva Conventions of 12 August 1949. (*Mém.* A N° 2 of 25 January 1985, p.24); Art. 1 of the Law of 2 August 1947 on the Repression of War Crimes (*Mém.*1947. 755-Pas. 1947. 500); Art. 7-3 of the Code of Criminal Procedure, in combination with Art. 260-1 to 260-4 of the Criminal Code and Art. 7-4 of the Code of Criminal Procedure. See also Articles (4) and 5-1 of the Code of Criminal Procedure and Art. 163, 169, 170, 177, 178, 187-1, 192-1, 192-2, 198, 199, 199bis, and 368 to 382 of the Criminal Code. See also Art. 6 of the Law of 8 August 1985 on the Repression of Genocide.
- **The Netherlands:** Sections 2(1)(a) and (c) and 2(3) of the Law on International Crimes, adopted on 19 June 2003 and entered into force on 1 October 2003.
- **Portugal:** Art. 5 § 2 of the Criminal Code. See also Art. 5 para. 1 (b) and Art. 239 para. 1 of the Criminal Code.
- **Sweden:** Chapter 2, section 3 (6) and chapter 22, section 6 of the Criminal Code. See also chapter 2, section 3(7) of the Criminal Code in combination with Law (1964/169) on the Repression of Genocide.

CHAPTER III

The Extraterritorial Criminal Liability of Multinational Corporations for Human Rights Violations before American and Canadian Courts

A. In the USA

B. In Canada

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A. In the USA

1. Recognising the principle of corporate criminal liability and applicable penalties

To establish a corporation's liability for criminal acts committed by individuals, US courts draw upon three theories:⁵⁸⁴

- **The theory of agency:** This theory allows a company to be held liable for violations committed by its employees (*vicarious liability*). It must be proved that the employee acted within the scope of his or her duties for the benefit of the company (at least in part), and that the intent (*mens rea*) and the physical act (*actus reus*) of the offense committed by the employee are attributable to the company.
- **The theory of identification:** This theory allows a company to be held liable for violations committed by its officers or executives. There is a connection between the corporation and those persons not subordinate within the hierarchy of the company. Knowledge of and willingness to commit an offense, conditions required to invoke the company's criminal liability, must be attributed to an individual regarded as "the directing mind and will" of the company. The conduct of the company's leader is likened to that of the corporation. Unlike the theory of agency, the theory of identification invokes the company's strict liability for the actions of its staff and executives who are personally liable.
- **The theory of accomplice liability:** Under this theory, a company may be held liable when it has been complicit in illegal acts committed by outside individuals. Complicity must feature a **shared criminal intent**.⁵⁸⁵ In the US, **the accomplice**

⁵⁸⁴ E. Engel, "Extraterritorial criminal liability: a remedy for human rights violations?" *Saint John's Journal of Legal Commentary*, spring 2006, p. 2.

⁵⁸⁵ In the United States, this intentional element is called "state of mind": the intention to commit or participate in a crime.

must desire that the crime be committed **and must assist** the primary perpetrator in committing the offense. These provisions have at times been interpreted in such a manner that the primary perpetrator of the offense and his or her accomplice should share the same motivations for the crime.⁵⁸⁶ The theory of “shared intent” makes it difficult, however, to determine the complicity of transnational corporations because companies generally do not encourage human rights violations for the same reasons as the perpetrators of such crimes. Indeed, transnational corporations are often motivated solely by profit, thus one can argue that transnational corporations and perpetrators of crimes simply act in common interest. The International Commission of Jurists, however, considers that this interpretation confuses the *motivation* and *intent* of perpetrators and accomplices.⁵⁸⁷

Given that the United States is a confederated nation, the US criminal justice system is legally grounded not only in the Constitution, its amendments and federal criminal statutes but also in the criminal law of each state. The role of the Attorney General, and that of the applicable penalties, thus varies depending on whether one is charged under federal or state law.⁵⁸⁸

The United States, however, has adopted guidelines that broadly determine which penalties may be imposed on legal persons. The Federal Sentencing Guidelines, issued in 1991, have helped to harmonise the penalties legal persons face in different US states. These guidelines contain a number of penalties that have been issued according to the severity of the crime, the company’s culpability and the financial gain the company obtained following the offense.

In addition to these guidelines, each law is accompanied by its own sanctions and penalties:

- **Fines** are administrative penalties the court calculates in two stages. The court first calculates the base fine by referring to the amount indicated in the table of offenses and adding to it any financial gains and losses generated by the offense. The fine is then increased or decreased according to the threshold of the company’s culpability.⁵⁸⁹
- **Probation** is a criminal sanction which permits the company to be monitored for a maximum period of five years. Monitoring is conducted by the government and may include board supervision. The company may also be required to provide

⁵⁸⁶ A. Ramasastry, R. C. Thompson, “Commerce, Crime and Conflict, legal remedies for private sector breaches of international law, a survey of sixteen countries”, *FAFO*, 2006, p.18-19.

⁵⁸⁷ International Commission of Jurists, *Corporate complicity & legal accountability – Report of the International Commission of Jurists expert legal panel on corporate complicity in international crimes*, vol. 2, 2008.

⁵⁸⁸ J. Jacobs, “L’évolution du droit pénal américain”, *Revue électronique du département d’Etat*, volume 6, No. 1, 1 July 2001, p.6.

⁵⁸⁹ M. Wagner, “Corporate Criminal Liability: National and International responses.” *Commonwealth Law Bulletin*, 1999, p. 8-9.

periodical activity reports to its probation officer or to the court. In addition to probation, certain laws such as RICO (see below) provide for prison sentences of up to 20 years for individuals convicted of organised crime.⁵⁹⁰

- **Forfeiture and disgorgement** are civil penalties proposed under RICO and other laws. These penalties require the company to turn over to the US government all property and financial gain obtained through illegal acts.
- **Damages** can be awarded to victims of the offense and may be considered a civil penalty charged to the companies. Punitive damages also exist. Unlike civil law countries, common law countries provide for sums of money to be paid as **punishment**. This remedy seeks to punish reprehensible conduct and prevent its reoccurrence. This sanction is not to be confused with a fine.⁵⁹¹

2. The jurisdiction of US criminal courts for acts committed abroad

a) Territorial Jurisdiction

For the purposes of territorial jurisdiction, the US follows the “effects” doctrine. Most US extraterritorial legislation applies only if the alleged conduct abroad can have a “**direct, substantial and predictable effect on its national soil**”⁵⁹² (effects test), or if the alleged conduct directly causing damage abroad took **place on US soil** (conduct test). The extraterritorial application of these laws is in this case limited by a requirement of minimal ties to US soil.

b) Personal jurisdiction

The United States applies the principles of **active personality** and **passive personality**.⁵⁹³ Most US criminal laws use **active personality** as a link, which means the laws apply only if the perpetrator is a US citizen. The criterion of **passive personality** applies only under certain specific laws, such as the *US war crimes statute*, in which the offense is committed by a foreigner and the victim is a US citizen.⁵⁹⁴

Extraterritorial corporate criminal liability is a question not fully resolved overseas. Various researchers and US courts do not always agree on the legitimacy of the theory and the criteria for its application. Because the common law system depends

⁵⁹⁰ Title 18 USC, A§ 1964 (a).

⁵⁹¹ M. Wagner, *op. cit.*, p.9.

⁵⁹² O. De Schutter, “Les affaires *TOTAL* et *UNOCAL*: complicité et extraterritorialité dans l’imposition aux entreprises d’obligations en matière de droits de l’homme”, *AFDI*, LII, 2006, p. 35. This doctrine was used for the first time in 1945 by the Second Circuit Court of Appeals in *United States v. Aluminum Co. of America (Alcoa)*. We analyze its particular use under RICO later.

⁵⁹³ *Idem*, p. 36.

⁵⁹⁴ A. Ramasastry, R. C. Thompson, *op. cit.*, p. 16.

primarily on legal doctrine and precedent to create law rather than on written law,⁵⁹⁵ it is difficult to agree on clear and precise criteria for the application of extraterritorial criminal liability. Some defend the proposition that corporations should be held accountable for criminal acts they commit abroad, based on a common law principle known as *ultra vires* (beyond the powers conferred by a company's rules and regulations).

In effect, this means that companies today which receive their powers and privileges (legal personhood, limited liability) from the state, must not only uphold the laws of the state but also the international legal obligations to which the state has committed to respect.

Several US laws such as RICO and the FCPA render multinational corporations criminally liable, but the laws apply only to certain offenses.

c) Universal jurisdiction

The Constitution limits the degree to which states exercise federal jurisdiction.⁵⁹⁶ US states cannot extend their jurisdiction beyond those crimes committed on their soil.⁵⁹⁷

The federal government itself can enact extraterritorial criminal laws,⁵⁹⁸ although they contain only minor extensions of US law and do not truly create universal jurisdiction.

Conventions protecting human rights

These include:

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force on 20 November 1994,
- The Convention against Genocide of 9 December 1948, and
- The Geneva Conventions of 1949 and related protocols.

The United States is party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and has incorporated it into national law. Thus the *Torture Statute*⁵⁹⁹ enjoys quasi-universal jurisdiction provided the alleged perpetrator is a US citizen, or the alleged perpetrator is present on US soil, regardless of the nationality of either the victim or the alleged perpetrator.

⁵⁹⁵ While only a few criminal statutes specifically address the extraterritorial criminal liability of transnational corporations, there is no written rule. These laws will be discussed below.

⁵⁹⁶ A. Cassese and M. Delmas-Marty, *Juridictions nationales et crimes internationaux*, PUF, Paris, 2002, p. 458.

⁵⁹⁷ See 14th Amendment (1868 clause on preserving individual liberties).

⁵⁹⁸ A. Cassese et M. Delmas-Marty, *op. cit.*, p.458.

⁵⁹⁹ See 18 USC 2340A.

The United States is also party to the Convention against Genocide. Federal law has since affirmed that US courts have universal jurisdiction over the crime of genocide. However, federal law does establish jurisdictional requirements,⁶⁰⁰ including the **US citizenship** of the accused or his or her **presence on US soil**.

In fact, no international legal instrument requires states to exercise jurisdiction over cases of genocide and crimes against humanity if the facts present no ties to a country's territory. Because these crimes are considered part of *ius cogens*, however, states have a customary obligation to end it.⁶⁰¹

The United States has also incorporated an element of the Geneva Conventions through the War Crimes Statute.⁶⁰² US courts have jurisdiction to hear war crimes if the perpetrator or victim is a US citizen or a member of the US armed forces. War crimes aside, other provisions of the Geneva Conventions, including laws to tackle crimes against humanity, have not been incorporated into the American legal code.⁶⁰³

It is worth noting that the United States has not ratified the Rome Statute and thus the International Criminal Court has no jurisdiction over international crimes committed by US nationals.

In situations where these international conventions have been incorporated into US domestic law, it should be noted that they generally apply when crimes are committed abroad by US perpetrators or with US victims. **A tie with the US is always required.**⁶⁰⁴

The applicability of these federal statutes against torture, war crimes and genocide to legal persons (e.g. companies) remains an unresolved issue. Despite the lack of clarity, one could legitimately consider a case, particularly under the *Torture Statute*, in which the use of the generic term “person” permits both legal persons and individuals to be held liable. Even if no provision expressly excludes the applicability of these laws to companies, prior to undertaking any legal proceedings it would be prudent to examine the preparatory work that led to a particular law's drafting.

⁶⁰⁰ See 18 USC 1091.

⁶⁰¹ O. De Schutter, “Les affaires *TOTAL* et *UNOCAL*: complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme”, *op. cit.*

⁶⁰² See 18 USC 2441.

⁶⁰³ There is currently a debate in the US as to whether a federal law targeting crimes against humanity will be adopted.

⁶⁰⁴ E. Engel, *op. cit.*, p. 30–31. Indeed, in a recent publication, Dr. Jennifer Zerk confirms that “States appear to regard the nationality principle as the strongest basis for direct extraterritorial criminal jurisdiction [...]” See J. Zerk, *Extraterritorial Jurisdiction: Lessons from the Business and Human Rights Sphere from Six Regulatory Areas: A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights*, Working Paper No.59, June 2010.

The special case of the Foreign Corrupt Practices Act (FCPA) and Racketeering Influenced and Corrupt Organisations (RICO)

Several US criminal laws render companies criminally liable for human rights violations in which they participate abroad. The US has extraterritorial laws against money laundering, in situations where laundering would bring into the US money obtained illegally in a foreign country. There is also a law against the importation of stolen objects and a law against importing illicit drugs.⁶⁰⁵

The most important laws are the anti-bribery law (FCPA) and the law against organised crime (RICO):

Anti-bribery Laws

At the international level, the United States is bound by two conventions: the *Inter-American Convention Against Corruption* of 29 March 1996 and the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* of 18 December 1998. The first falls under the framework of the Organisation of American States (OAS) and the second under the Organisation for Economic Co-operation and Development (OECD).

At the national level, the matter is addressed by two texts: the FCPA and recommendations from the *Securities and Exchange Commission* (SEC). **The FCPA applies to illegal activities carried out abroad by US companies.** Above all, the law criminalises the **bribery** of foreign government officials in order to obtain advantages of any kind. **US companies cannot be prosecuted, however, for practices that are not criminalised in the laws of the host country.** Nor can they be prosecuted when payments are made for the purposes of demonstrating or explaining a product, or when they facilitate the execution of a contract already signed with a foreign government.

Companies guilty of bribing foreign officials are liable for fines up to \$2,000,000. Officers, directors, shareholders, employees and agents face fines of up to \$100,000 and/or five years imprisonment.

⁶⁰⁵ *Ibid*, p. 26.

➔ **Securities and Exchange Commission v. ABB Ltd, 2004**

In 2004, the SEC investigated ABB Ltd, a Swiss engineering group in Sweden.

In its complaint, the SEC determined that between 1998 and 2003, ABB subsidiaries in the US and overseas seeking to enter into business relationships with Nigeria, Angola and Kazakhstan offered illicit payments of more than U.S.D. 1.1 million to officials in those countries.

According to the complaint, all of the payments were made to influence the actions and decisions of foreign officials in order to assist ABB's subsidiaries in establishing and maintaining business relationships in the countries.

The complaint further alleged that the payments were made with the knowledge and approval of certain members of staff responsible for managing ABB subsidiaries, and that payments worth at least \$865,726 were made after ABB registered with the SEC in April 2001 and was from that point on subject to the SEC's reporting obligations.

Finally, the complaint accused ABB of having poorly accounted for the payments in its books and records, and of failing to have implemented significant internal controls to prevent and detect such illicit payments.

The SEC held that in making the payments through its subsidiaries, ABB violated the anti-bribery provisions of the FCPA (Section 30A of the *Securities Exchange Act of 1934*).

The SEC also held that ABB's improper recording of the payments violated the FCPA's relevant books and records provisions (Article 13 (b) (2) (A) of the *Securities Exchange Act of 1934*).

Finally, the **SEC held that in failing to develop or maintain an effective system of internal controls to prevent** and detect the FCPA violations, ABB violated the FCPA's internal accounting controls (Section 13(b)(2) (B) of the *Securities Exchange Act of 1934*).

Determined to accept ABB's settlement offer, the SEC took into account the full co-operation that ABB provided SEC staff during its investigation. The Commission also considered the fact that ABB itself brought the matter to the attention of SEC staff and the US Department of Justice.

In 2004, the SEC ordered ABB Ltd. to pay a fine of \$10.5 million and an additional sum of \$5.9 million.

In addition, ABB paid approximately \$17 million in legal fees.

The FCPA’s extraterritoriality has given rise to discussion, in part because some consider it to be an affront to the host nation’s sovereignty. However, most doctrines and jurisprudence recognise an extraterritorial character within the FCPA.⁶⁰⁶

► NOTE

Only the SEC and Department of Justice can seek justice. Individuals can address the SEC and DOJ and inform them of offenses of which they are aware.

Racketeering Influenced and Corrupt Organisations (RICO)

This law has been incorporated into Title 18 of the US Code and targets organised crime. Title 18 USC A§ 1962 states: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”⁶⁰⁷

RICO employs a very broad definition of what an enterprise might be: according to RICO, an enterprise is a “group of persons associated together for a common purpose of engaging in a course of conduct.”⁶⁰⁸ A parent company and a subsidiary can be treated as a single enterprise if an offense is committed as part of their relationship.⁶⁰⁹

The company must have committed “a pattern of racketeering activity”, which is to say a series of criminal acts related to one another. These crimes must feature a certain **continuity**. The criminal acts prosecutable under RICO are those cited in the Hobbs Act and in Title 18 USC A§ 1962 (c). In addition to the list of crimes contained therein, **a company can be charged under RICO for acts considered criminal in the country in which it operates**. A criminal complaint under RICO may thus be introduced on the basis of a violation of foreign law if the violation corresponds with a violation of US law.⁶¹⁰ RICO applies, however, only if the alleged situation involves a **direct link with the United States** and may have a **direct effect on US commerce**⁶¹¹ (conduct/effects test).

The possibility of applying RICO extraterritorially in the absence of US ties is a subject of current debate in US courts and may evolve in the coming years.

⁶⁰⁶ See *S.E.C. v. Montedison*, S.P.A., Lit. Release No. 15164, 1996 WL 673757 (D.D.C., 1996). In this case, the SEC prosecuted the Montedison company for FCPA violations committed in the course of its activities in Europe. The court held that the company was liable.

⁶⁰⁷ Title 18 USC. A§ 1962 (c).

⁶⁰⁸ Title 18 USC. A§ 1961 (3).

⁶⁰⁹ E. Engel, *op. cit.*, p. 7.

⁶¹⁰ See *Orion Tire Corp. v. Goodyear Tire & Rubber Co.* 268 F. 3d 1133, 1137 (9th Cir. 2001): This decision made it possible to cite foreign laws under RICO.

⁶¹¹ E. Engel, *op. cit.*, p. 7-8.

3. The roles of victims and the prosecution in initiating proceedings

The victim's role in initiating proceedings

In the US criminal justice system, victims cannot initiate criminal proceedings. **The Attorney General alone may initiate proceedings at any time.** Victims of a crime are never party to the proceedings, but may serve as witnesses. Outside the criminal process, however, victims may undertake civil action provided that criminal law does not provide for the action. The Attorney General thus enjoys a type of monopoly in initiating criminal proceedings.

Prosecutorial discretion and the role of the Attorney General

The US criminal justice system is grounded in an accusatory process and it is the prosecution's responsibility to prove the guilt of the accused. To do this, the prosecutor has broad discretion to determine whether it is useful and timely to pursue a particular suspect.⁶¹² This suggests that in many cases, prosecutors may, for political and economic, rather than strictly legal reasons, refuse to bring criminal charges against multinational corporations for human rights violations committed abroad.

An insight into...

Procedural and political hurdles

Strictly procedural hurdles

The Department of Justice faces a number of procedural hurdles, mostly in civil actions brought by victims, such as the *statute of limitations*, the *act of state doctrine* and *international comity doctrine*⁶¹³ (for a detailed description, see Part I, Section III which addresses challenges to corporate liability).

The cost of litigation

Because victims are not party to the proceedings, the Department of Justice must incur the costs of investigation and prosecution. Although defendants may choose between using their own attorneys and seeking legal assistance, it appears certain that a multinational corporation will select the first option. It is very likely that the financial resources at the company's disposal will exceed those of the Department of Justice, creating an imbalance between the parties in criminal proceedings.

⁶¹² J. Jacobs, *op. cit.*, p.2.

⁶¹³ *United States v. Giffen*, 326 F. Supp. 2d 497; 2004 US Dist. LEXIS 12273.

► NOTE

Regarding the recognition of US judgments abroad or of foreign judgments in the US, **state courts do not generally recognise or enforce foreign criminal judgments**. Exceptions to this principle include bilateral agreements on extradition or those facilitating the recognition of certain convictions. However, such exceptions do not exist with regards to corporate convictions.

B. In Canada

1. Recognising the principle of corporate criminal liability and applicable penalties

In Canada, legal persons – included in the category of “organisations” – can be held liable for most criminal offenses under the Criminal Code.

Article 2 of the Criminal Code specifies that the terms “whomever”, “individual”, “person” and “owner” used in the code include “Her Majesty and organisations.” Similarly, the word “person” in the Crimes Against Humanity and War Crimes Act includes legal persons, *inter alia*, given that Article 2 states: “Unless otherwise indicated, the terms of this Act shall be construed under the Criminal Code.” Canada therefore allows legal persons to be prosecuted for genocide, crimes against humanity, war crimes and breach of responsibility by a military commander or other superior.

The Canadian Criminal Code makes a distinction between crimes of negligence (art. 22.1) and offenses for which some knowledge or intent must be established (art. 22.2). Thus, Article 22.1 of the Criminal Code notes that “*In respect of an offence that requires the prosecution to prove negligence, an organisation is a party to the offence if (a) acting within the scope of their authority: (i) one of its representatives is a party to the offence, or (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and (b) the senior officer who is responsible for the aspect of the organisation’s activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.*”

In other words, with regard to the material element, an organisation is liable for the negligent act or negligent omission of one of its agents. However, the offense may also be the result of the collective behaviour of several of the organisation’s agents. Regarding the moral element, the executive officer or senior management, must collectively make a marked departure from the standard of care expected in the circumstances to prevent neglect.

In addition, Article 22.2 of the Criminal Code notes that “*In respect of an offence that requires the prosecution to prove fault — other than negligence — an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers*

- (a) acting within the scope of their authority, is a party to the offence;*
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they carry out the act or make the omission specified in the offence; or*
- (c) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.”*

Article 22.2 of the Criminal Code thus provides three ways in which a corporation may commit an offense requiring knowledge of a fact or a specific intent. In all cases, the emphasis is placed on executives who must have intended to use the organisation in order to commit an offence.

The Canadian Criminal Code provides for fines where organisations are deemed guilty of a breach of business law. The Code sets no ceiling for fines imposed on organisations. This amount is left to the discretion of the court and varies depending on a number of factors.⁶¹⁴

The Criminal Code also provides for probation orders for companies.⁶¹⁵ The conditions the court may impose on an organisation include:

- Providing compensation for victims of the offense to emphasise that their losses are among the sentencing judge’s primary concerns;
- Requiring the organisation to inform the public of the offense, the penalty imposed and the corrective measures it has taken;
- Implementing policies and procedures to reduce the possibility of committing other offenses;
- Communicating those policies and procedures to its employees;
- Designating a senior manager responsible for overseeing the implementation of those policies and procedures;
- Reporting on the implementation of various penalties

⁶¹⁴ These factors are provided in section 718.21 of the Canadian Criminal Code and are essentially the profits the organisation derived due to the commission of the offense, the complexity of the planning related to the offense, the degree to which the organisation co-operated during the investigation, the costs incurred by the administration, and the effect of the penalty on the company’s viability.

⁶¹⁵ Art. 718.21 of the Canadian Criminal Code.

2. The jurisdiction of Canadian criminal courts for acts committed abroad

a) Territorial jurisdiction

The principle of territoriality is privileged under Canadian law. Article 6(2) of the Canadian Criminal Code⁶¹⁶ provides that “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.”

When there is a link between Canada and the alleged offense, provided the activity takes place largely outside of Canada but that much of the offense is committed in Canada, it is possible to establish a “real and substantial connection”⁶¹⁷ with Canada, such that Canada has jurisdiction to prosecute. In establishing such a link, the court must examine the facts which occur in Canada – at corporate headquarters, for example, in the case of a Canadian business operating outside of Canada. In addition, the court must determine whether Canada’s exercise of extraterritorial jurisdiction may be poorly received by the international community.

b) Personal jurisdiction

The principles of **active personality** (under which Canadian courts have jurisdiction over all Canadian nationals who commit an offense, regardless of where the offense occurs) and **passive personality** (under which Canadian courts have jurisdiction in cases where Canadian nationals have been victims of an offence, regardless of where the offense occurs) **are rarely used**. They are used, however, for the most serious international crimes including:

- Terrorist crimes prohibited by international conventions;⁶¹⁸
- War crimes and crimes against humanity⁶¹⁹ and treason.⁶²⁰

c) Universal jurisdiction

Canada uses the principle of universal jurisdiction in a measured manner. According to Article 7(3.71) of the Canadian Criminal Code,⁶²¹ any person who commits an act or omission constituting an international war crime or crime against humanity

⁶¹⁶ Criminal Code Art. 6(2) (L.R.C. 1985, ch. C-46, modified).

⁶¹⁷ See e.g., *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.).

⁶¹⁸ Criminal Code Art. 7(3) (L.R.C. 1985, ch. C-46, modified) and the International Convention for the Suppression of Terrorist Bombings, opened for signature in New York 12 January 1998.

⁶¹⁹ Criminal Code Art. 7(3.73) and (3.75) (L.R.C. 1985, ch. C-46, modified); Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts, *S.C. 2000, c. 24*; the Geneva Convention of 1949 the additional protocols of 8 June 1977, ratified by Canada on 5 May 1965 and 20 November 1990.

⁶²⁰ Criminal Code Art. 46(3) (L.R.C. 1985, ch. C-46, modified).

⁶²¹ Criminal Code Art. 7(3.71) (L.R.C. 1985, ch. C-46, modified).

and a violation of Canadian law at the time of the act or omission will be regarded as having committed the act or omission in Canada if:

- 1) At the time,
 - He or she was a Canadian citizen or Canadian public or military employee;
 - He or she was a citizen or public or military employee of a country participating in armed conflict against Canada; or
 - The victim was a Canadian citizen or a national of a state allied in armed conflict with Canada or
- 2) If at the time of the act or omission, and in accordance with international law, Canada could exercise jurisdiction over the person on the basis of his or her presence on Canadian soil, and if after the time of the act or omission, the person is present on Canadian soil.

In order to meet the conditions for universal jurisdiction the allegations must focus on one of the two abovementioned crimes, there must be a violation of Canadian law and in addition, the party involved must fall under one of the two categories above.

Based on the Rome Statute of the International Criminal Court, Canada has fully incorporated the three crimes of conventional and customary international law – genocide, crimes against humanity and war crimes – in its national legislation by adopting the Law on Crimes Against Humanity and War Crimes.⁶²²

The applicability of that law to corporations is a subject of discussion, particularly due to inadequate definitions of the crimes legal persons can commit under international law.

Under Canadian law, complicity in the commission of genocide, a war crime or crime against humanity is itself a crime. Thus, Articles 4(1.1.) and 6(1.1.) of the Law on Crimes Against Humanity and War Crimes stipulate that “Every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime” and “is an accessory after the fact in relation to, or counsels in relation to, an offence.”

Some believe that the Special Economic Measures Act (SEMA) could potentially be used to penalise companies that commit human rights violations abroad. The SEMA authorises the Cabinet to implement the decisions, resolutions or recommendations of international organisations of which Canada is a member, in order to adopt economic measures against another state if an international organisation requests it.

⁶²² Law on Crimes Against Humanity and War Crimes, S.C., 2000, c. 24, articles 4 and 6.

The Canadian government, however, has interpreted SEMA as authorising the adoption of such measures only on the request of an international body.

Lastly, under Article 11 of the Canadian Charter of Rights and Freedoms:

“Any person charged with an offence has the right [...] not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations.”

The scope of this right’s application has not been delineated in practice, but could allow for the prosecutions of corporations in Canada for violations of international law.

3. The roles of victims and the prosecution in initiating proceedings

Victims may only initiate criminal legal proceedings with the court’s approval. Article 9(3) of the Code of Criminal Procedure states “The following may be prosecutors: (1) the Attorney General; (1.1) the Director of Criminal and Penal Prosecutions; (2) a prosecutor designated under any Act other than this Code, to the extent determined in that Act; (3) a person authorised by a judge to institute proceedings.” Victims may thus initiate criminal proceedings when they receive the court’s permission to bring charges. Victims must request authorisation from an ad hoc court. When the court has reasonable grounds to believe a violation has occurred, it authorises prosecution.

Prosecutions are generally taken over in first instance by the Attorney General or the Director of Criminal and Penal Prosecutions.⁶²³ With regard to international crimes, however, the personal written consent of the Attorney General or his Deputy Attorney General is required to prosecute.⁶²⁴ The Interdepartmental Operations Group (IOG, or Ops Committee) has developed a policy to establish criteria ensuring that cases under investigation are appropriately prioritised for possible prosecution under the Law on Crimes Against Humanity and War Crimes. These criteria are grouped into three categories:

- **The nature of the allegation** (credibility, severity of the crime (genocide, war crimes, crimes against humanity), military or civilian position, strength of evidence).
- **The nature of the investigation** (progress in the investigation, ability to obtain the co-operation of other countries or an international tribunal, the likelihood of

⁶²³ Canadian Code of Penal Procedure, Art. 11.

⁶²⁴ Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts, *S.C. 2000, Art. 9.*

effective co-operation with other countries, the presence of victims or witnesses in Canada or in other countries where access is easy, the likelihood of a parallel investigation in another country or by an international tribunal, the likelihood of being part of a collective investigation in Canada, the ability to conduct a document search in order to assess the credibility of the allegation, the likelihood of prosecuting for the offence or of danger to the public with regards to allegations of crimes against humanity and war crimes).

- **Other factors** (probability of no return, no reasonable prospect of fair and effective prosecution in another country or indictment by an international court, unlikely extradition, factors affecting the national interest).

→ **ACCI v. Anvil Mining Limited in DRC**

On 8 November 2010, a class action against Anvil Mining was filed by the Congolese NGOs ASADHO and ACIDH and their partners RAID, Global Witness and the Canadian Center for International Justice, which are all members of the Canadian Association against Impunity (ACCI), an NGO coalition representing relatives of victims of the 2004 Kilwa massacre in the DRC. Anvil Mining is accused of providing logistical support to the Congolese army who raped, murdered and brutalised the people of Kilwa.

On 28 April 2011, the Superior Court of Quebec ruled that the case can proceed to the next stage. In his decision, Judge Benoît Emery rejected Anvil Mining's position that there were insufficient links to enable the court to have jurisdiction over the case and considered that at this stage in the proceedings, on the basis of article 3135 of the Civil Code of Quebec, if the court were to refuse to accept the class action, there would be no other possibility for the victims' civil claim to be heard.

Anvil lawyers sought leave to appeal this judgement and a hearing was held on 3 June 2011. The main legal issue hinges on the interpretation of the meaning of activities [3148 (2) CcQ]. ACCI argued that traditionally activities had been widely interpreted in Quebec jurisprudence. It therefore argued that it was sufficient to show that the company had an establishment and undertook activities in Quebec to be able to proceed.

On 25 January 2012, the Quebec Court of Appeal reversed the decision of the Superior Court Judge Honorable Benoît Emery and thus refused jurisdiction to hear the class action. The Court of Appeal states that there was insufficient connections to Quebec due to the fact that Anvil Mining's office was not involved in managerial decisions leading to its alleged role in the massacre (which contradicts earlier findings by Judge Emery). The Court also found that it had not been proven that victims could not access justice in another jurisdiction (the DRC or Australia).

The applicants will try for leave to appeal to the Supreme Court of Canada.

An insight into...

Procedural and political hurdles

Foreigners' access to justice

Canadian law does not distinguish between Canadian and foreign citizens in providing access to justice.

Political Question and Act of State Doctrine

The Supreme Court of Canada has stated that any matter is justiciable.⁶²⁵ Parliament has nonetheless granted blanket immunity to foreign states and their governments before Canadian courts. That immunity, however, does not extend to procedures related to the commercial activities of foreign states.

Forum non conveniens

The Supreme Court has emphasised the exceptional nature of exercising *forum non conveniens*, arguing that the existence of a more appropriate jurisdiction should not lead a sufficiently appropriate court to decline jurisdiction.

Legal aid

In criminal matters, legal aid may be granted to Canadian citizens and to refugees and migrants. In Québec, it is provided almost exclusively to Canadian citizens.

Cost of litigation

In general, the unsuccessful party bears the costs incurred by the other party. In Québec for instance, the costs are determined by the *Tariff and Court Costs* whereas in Ontario, costs are generally divided between parties.

⁶²⁵ *Operation Dismantle v. The Queen*; 1985.