



The European  
Coalition for  
Corporate Justice  
(ECCJ)

Discussion Paper

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# Towards Corporate Accountability for Human and Environmental Rights Abuses

A Discussion paper by Olivier de Schutter for the ECCJ

## → INTRODUCTION

**The European Coalition for Corporate Justice (ECCJ) believes that regulatory measures are necessary to ensure all corporations abide by national and internationally agreed standards for human rights, labour rights and environmental rights. An initiative is required at the EU or international level in order to ensure that transnational corporations may be held to account for violations of human and environmental rights that they commit or in which they are complicit wherever they operate. This paper is intended as an invitation to a debate on the steps that could be taken in this regard.**

This paper addresses a number of options that the ECCJ intends to explore, both at the international level and at EU level, which would improve the legal accountability of Multinational Enterprises (MNEs) for human rights and environmental rights abuses. In light of globalisation and the internationalisation of business, the current situation is unsatisfactory. Where the host States competing to attract foreign direct investment

from companies are unable or unwilling to protect their populations, including the communities affected by the activities of transnational corporations, the home States of these corporations are mostly reluctant to provide remedies to victims or to impose obligations on parent companies to control the compliance with human rights norms of the operations of the transnational group. This is a field where States are not likely to act unless significant mobilization by civil society organisations is achieved. Businesses call on States not to impose further burdens, including regulatory requirements, on companies. Home States also may fear that exercising control over transnational corporations by adopting extraterritorial legislation will be seen as inimical to the host State, or as creating an incentive for companies incorporated under their jurisdiction to reincorporate elsewhere. This concern may be especially important in the EU, where the rules of freedom of establishment of corporations facilitate such reincorporations, even when they are for the sole purposes of seeking refuge under a more hospitable regulatory environment.<sup>1</sup>

As a result of this situation, collective action is needed. The European Union should lead by example in this regard since it has at its disposal tools that, if used wisely, might prove more effective than action by each

Member State alone. It could promote the replication of these solutions at the universal level, building on the momentum created by the appointment of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other enterprises.

This paper discusses a limited – but essential – part of the broad debate on corporate accountability and Corporate Social Responsibility (CSR), namely the type of regulation that should be set in place for holding corporations to account for human and environmental rights violations. In the EU, much of the discussion on the social responsibility of corporations hitherto has focused on incentive measures, such as mandatory reporting; the inclusion of social, environmental or human rights clauses in public procurement policies; or other incentives to promote social and environmentally sound production and trade, such as tax breaks for fairtrade products or import restrictions imposed on companies that import products made without respect for core labour, human and environmental rights. This discussion is important, and the ECCJ will continue to take part in the debates on these issues in order to contribute to creating a regulatory environment that will reward the best practices of companies and penalize the worst forms of corporate behaviour by market mechanisms. This paper implies that legal rights should be established; that remedies should be provided to victims of human rights abuses or environmental damage; and that those responsible for any violations may be held to account for any actions or omissions, including failure to monitor the supply chain, that directly cause, encourage, or even simply tolerate such abuses.

## → THE CURRENT SITUATION : A DIAGNOSIS

The accountability of transnational corporations for human rights violations should begin, of course, within the State on whose territory they operate. It is in principle the duty of States, under the international commitments they have entered into in the field of human rights, to control these actors, thus fulfilling their obligation to protect the rights of all individuals under their jurisdiction. However, we identify a number of difficulties associated with this approach. First, since the commitments of States under international human rights law are variable – such commitments depend on the treaties which any particular State has ratified

–, this raises the question of whether it is acceptable that transnational corporations are subjected only to the human rights obligations corresponding to those of the State in which they invest and conduct their activities. Both the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration refer, in defining the content of the human rights obligations of companies, not to the *local rules or practices* in the host State, but either (in the case of the OECD Guidelines) to the *international commitments* of the host State – even though the local rules or practices may not be entirely faithful to those international commitments – or (in the case of the Tripartite Declaration) to the relevant international standards, depending on the precise set of international instruments ratified by that State.<sup>2</sup> Indeed, it is precisely because the commitments of States under international human rights law are variable that there is a need to define a global set of standards applicable to the business community, both in order to ensure that companies will not invoke the bad human rights record of the host government in order to escape their liability for complicity in certain abuses, and in order to prevent any temptation by a government to seek out potential foreign investors at the expense of human rights, or of social and environmental standards, under their jurisdiction. Imposing global *minimum* standards does not imply uniformization of working conditions, environmental standards or other rules throughout the world. Indeed, differences in wages, corresponding to differences in productivity, or in the precise formulation of a number of standards, for example in the area of occupational health and safety, are legitimate and will persist. But the establishment of a global set of principles should provide an international level playing field based on the minimum requirements of international human rights law. Globalization will only benefit the poorest and most vulnerable if it leads to gradually improving standards around the globe. This implies, at the very least, that the actors of globalization, in particular transnational corporations, should not be allowed to commit, be complicit in, or benefit from human rights or environmental abuses.

Second, there is a possibility that the territorial (host) State will not comply with its obligation to protect human rights and social and environmental rights under its jurisdiction by imposing certain forms of behavior on the transnational corporations operating on its territory. It may be unwilling to ensure such protection of human rights; in the vast majority of cases where allegations were made about the involvement of corporations in human rights abuses, the primary violators of human rights were the organs of the State, but with the complicity of the corporation. The host State may also

be reluctant to act against transnational corporations for a variety of reasons. In many cases, transnational corporations, as foreign investors, will be protected under bilateral or multilateral investment treaties (or free trade agreements including similar protections of foreign investment), whose references to 'fair and equitable treatment' and 'full protection and security' have sometimes been interpreted to protect the foreign investor from the loss of profit resulting from certain decisions adopted by the authorities of the host State, and whose guarantees against expropriation extend to both *de jure* and *de facto* (regulatory) expropriation, implying that these clauses might be invoked to seek compensation where the adoption of standards by the host country – for example social or environmental standards – entails an economic loss for the companies affected.

Even more importantly, States compete for foreign direct investment, which can be a source of economic growth for the host economy, freeing local capital for other purposes, thus creating employment, and which may imply transfer of technology and know-how to local entrepreneurs.<sup>3</sup> In such a context, it is unlikely that States will be eager to impose far-reaching obligations on transnational corporations operating in their territory, or, where any obligations are violated, to sue them in court. In the absence of State action, the victims of human rights violations could themselves take legal action, but political pressure on the Judiciary often compromises its ability and willingness to protect victims if the government is not in favour of this.

In situations where the human rights, labour rights and environmental rights threatened by the activity of transnational corporations are not adequately protected by the host State, there is a duty for home States to act. Perhaps the most noticeable illustration of the contribution the home State of transnational corporations can make to combating impunity for violations of international law by these actors is the revival since 1980 of the Alien Tort Claims Act in the United States, which has allowed foreign victims of serious human rights abuses committed by corporations having sufficiently close links to the U.S. to seek damages. The Alien Tort Claims Act, a part of the First Judiciary Act 1789, provides that '[t]he 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.'<sup>4</sup> The United States federal courts have agreed to read this provision as implying that they have jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States,

where foreigners, victims of violations of international law<sup>5</sup> wherever such violations have taken place, seek damages from enterprises that have committed those violations or are complicit in violations been committed by State agents.<sup>6</sup> Moreover, in order to comply with the requirements of international humanitarian law<sup>7</sup> or with those of the Convention against Torture,<sup>8</sup> or – more recently – in the acts they have adopted in order to implement the Rome Statute of the International Criminal Court,<sup>9</sup> a number of States have included in their criminal legislation provisions allowing for the investigation and prosecution of international crimes, even when such crimes are committed outside their national territory, and whether or not the perpetrators or the victims are nationals of the State concerned. To a significant degree, these provisions may be applied to legal persons under certain conditions, either because the national criminal law as a matter of principle considers that legal persons may commit the offences it defines,<sup>10</sup> or because legal persons have been included, alongside natural persons, under the specific acts relating to international crimes.<sup>11</sup>

However, the U.S. Alien Tort Claims Act or the developments of extraterritorial jurisdiction within international criminal law remain both exceptions, and they are limited in their material scope of application to the most serious forms of human rights abuses. It is highly unlikely that, in the future, home States of transnational corporations will assert their jurisdiction over human rights violations committed abroad by these corporations, or in which they are complicit. In the context of the Alien Tort Claims Act itself, the United States government is actively challenging the current interpretation given to this statute by the federal courts, insofar as this interpretation allows suits to be filed against U.S.-based companies for violations of international norms outside U.S. territory. In other countries, where attempts were made to extend the jurisdiction of national courts to human rights violations abroad, this has been strongly opposed by business organizations, resulting in a failure of these attempts. This was the case, for instance, after a 'Corporate Code of Conduct Bill' was introduced in September 2000 in the Australian Senate by Senator Bourne.<sup>12</sup> In Belgium, a bill was presented in December 1999 in the House of Representatives by Mr Van der Maelen, MP, with the objective of allowing the Belgian courts to exercise jurisdiction over certain crimes as defined in Belgian law that correspond to the 1998 ILO Declaration on Fundamental Principles and Rights at Work (thus covering freedom of association and the right to collective bargaining ; the elimination of forced and compulsory labour; the abolition of child labour; and

the elimination of discrimination in the workplace).<sup>13</sup> Again, this attempt failed, due in particular to the resistance of corporations. These experiences confirm the general impression that, if the home States of transnational corporations are not incentivized to move in the direction of exercising extraterritorial jurisdiction on the companies of their nationality operating outside the national territory, they will not do so spontaneously. In isolation, each State may fear that the adoption of an extraterritorial statute will lead transnational corporations to reincorporate elsewhere. Collective action is required.

## → THE OPTIONS UNDER INTERNATIONAL LAW

### 1. Mapping the Current Debate

After a wide consultation of all relevant stakeholders, including the business community, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 of August 14th, 2003, the set of 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises'.<sup>14</sup> The draft Norms essentially present themselves as a restatement of the human rights obligations imposed on companies under international law. They are based on the idea that 'even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and therefore 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments'.<sup>15</sup>

Following the presentation of the draft Norms, the UN Commission on Human Rights reacted in two stages. First, in April 2004, the Commission on Human Rights recommended that the Economic and Social Council request a further report from the Office of the High Commissioner for Human Rights. The report was completed in February 2005.<sup>16</sup> Then, in April 2005, the UN Commission on Human Rights requested in resolution 2005/69 that the UN Secretary General appoints a Special Representative to identify ways

through which the accountability of transnational corporations for human rights violations may be improved.<sup>17</sup> On 28 July 2005, professor John Ruggie was appointed Special Representative of the UN Secretary General. The final report of the Special Representative is expected to be presented in March 2007. The mandate of the Special Representative, as defined in resolution 2005/69, includes identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights and elaborating on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation. It is therefore hoped that the report will contribute to the debate on how the human rights accountability of transnational corporations may be improved for the future.

At least three options may be explored. A first option would consist in clarifying the existing obligation to protect human rights already imposed on the State on whose territory transnational corporations operate. This option is unpromising, however, since it would simply consist in reaffirming the present state of international law; it therefore does not meet the challenge of remedying failures in which the host country is either unwilling or unable to act in order to compel foreign investors acting within its borders to comply with the human rights which the host State is internationally bound to comply with. The second and third options are worth being explored further based on their respective merits. The second option is to set up a mechanism imposing on corporations direct obligations under international law. The third option is to establish an obligation on States to control transnational corporations, beyond the current interpretation given to the scope of this obligation, which remains essentially territory-based.

### 2. A special procedure (Special Rapporteur or Working Group) under the UN Human Rights Council

Under the second option, which was, in fact, anticipated by the UN draft Norms,<sup>18</sup> a Special Rapporteur or a Working Group established under the authority of the UN Human Rights Council could be authorized to receive specific complaints from individuals, trade unions or non-governmental organizations and to submit its views on whether or not a set of agreed upon standards have been complied with by the transnational corporation

concerned. These views would result from an impartial and objective inquiry into the allegations made to the Special Rapporteur or the Working Group involving field visits and the hearing of witnesses, and they would be brought to the attention of the Human Rights Council, as is the case for other existing special procedures. Such a mechanism would, in fact, resemble what is already provided for under the OECD Guidelines for Multinational Enterprises.<sup>19</sup>

Such standards could be based on the existing international law of human rights. The fact that certain questions of interpretation would inevitably result from translating obligations imposed on states by existing international instruments into obligations imposed on corporations should not constitute an insuperable obstacle. Just like the National Contact Points (NCPs) established under these Guidelines and the OECD Investment Committee have clarified the requirements of these Guidelines, whose formulations are sometimes extraordinarily vague, this mechanism could progressively develop the content of the human rights obligations of transnational corporations, approaching notions such as the 'sphere of influence' of corporations, their 'complicity' with certain violations committed by their business partners or the States in which they operate, or the due diligence obligations of the parent company through an inductive process rather than on the basis of a predefined set of criteria, which would be very difficult to arrive at through the classical modes of intergovernmental negotiation.

At the same time, this new mechanism would not simply duplicate the system established under the OECD Guidelines. Instead, it would represent a significant progress beyond these Guidelines and what they have hitherto been able to achieve<sup>20</sup>:

- First, whereas the NCPs are established within the governmental apparatus of each State adhering to the OECD Guidelines, which creates the suspicion that they might be tempted to protect the national corporation against accusations of misbehaviour from parties located in other countries, the international character of a mechanism established under the authority of the UN Human Rights Council could better ensure that no such doubts will be raised as to its objectivity and impartiality, whatever the nationality of the corporation concerned or of its main shareholders.
- Second, while the NCPs are not required to be either independent or impartial in the treatment of the complaints they receive, the special procedures

established under the authority of the UN Human Rights Council are guided by the principles of neutrality, non-selectivity and objectivity.<sup>21</sup>

- Third, while the NCPs established under the OECD Guidelines for Multinational Enterprises primarily seek to arrive at a form of amicable settlement between the parties by offering their mediation,<sup>22</sup> which explains their insistence on the confidentiality of the discussions between parties until the last stage, a special procedure established under the UN Human Rights Council would be aimed at establishing the existence of violations – or the absence of such violations –, and it would be guided by the principle of transparency, ensuring that its findings would be public.<sup>23</sup> This publicity in turn would provide a strong incentive for companies to cooperate.
- Fourth, while the OECD Guidelines are adhered to only by the 30 OECD Member States and eight additional countries, a mechanism established as part of the United Nations human rights machinery would be universal. It could therefore also receive complaints and make findings about corporations based in developing countries, including countries such as China or South Africa, the importance of which is growing rapidly in this area. This would contribute to levelling the playing field globally since it would ensure some monitoring of all activities of transnational corporations, whether or not their home State or the State in which they conduct their activities have explicitly consented to such monitoring. It would also avoid creating the impression, as the OECD Guidelines sometimes do, that norms imposing responsibilities on transnational corporations are a product of industrialized countries seeking to impose their model on developing countries, and which may be seen as a threat to the self-determination of these countries or, in certain cases, as denying them the benefit of certain comparative advantages they might possess in the global competition to attract investment.
- Fifth, a UN special procedure established to monitor the compliance of transnational corporations with human rights obligations would not only consider the responsibilities of corporations – as the NCPs do under the OECD Guidelines –, but they would also consider the responsibilities of States and whether both the host State and the home State comply with their obligation to protect human rights. Thus, no rigid predetermination of the respective

responsibilities of corporations and States in situations where human rights are violated would be required ; the demarcation of this border could be the product of an incremental process, highly context-specific, rather than based on aprioristic understandings of the division of tasks, which are almost doomed not to be able to take into account the wide variety of circumstances in which the question of such a demarcation may be raised. Moreover, the UN Human Rights Council could condemn the States concerned for their failure to protect human rights under their jurisdiction, which the NCPs are not in a position to do.

→ Sixth, finally, the outcome of both procedures would be quite different. NCPs receiving 'specific instances' alleging violations of the OECD Guidelines may make public the results of the procedure and, if the procedure is closed, the parties are free to communicate about them, although they must respect the confidentiality of any information and views provided by the other party during the proceeding. The adverse publicity following a finding by an NCP that the OECD Guidelines have been violated or that any particular company has refused to cooperate will in most cases be a strong incentive for that company to participate in the proceedings in a constructive fashion. However, there are no further sanctions or blaming even where the conclusion is one of non-compliance. In contrast, findings made by a Special Rapporteur or a Working Group under the authority of the UN Human Rights Council may lead to the Council taking up the matter and addressing itself either to the corporation concerned or the States involved, or both. This is a form of pressure of considerably more significant weight on the actors involved, not only because of the much wider publicity that will be given to the failure to comply, but also because the allegations will be discussed in a universal forum, rather than only between the parties directly interested.

For all these reasons, while the precedent of the OECD Guidelines on Multinational Enterprises illustrates the feasibility of a monitoring mechanism based on communications filed by non-governmental organizations, unions or other actors about the failure of transnational corporations to comply with their human rights obligations, the comparison between both tools also shows that the establishment of such a monitoring mechanism would represent a significant step forward. Partly for this reason, and partly because of a (largely misinformed) impression many governments and business organizations might argue that the mechanism

is entirely novel and would represent a significant break from classical understandings of international law as addressed to States, we may expect that proposals towards the establishment of such a mechanism will meet with significant resistance.

### **3. A new International Convention on Combating Human Rights Violations by Transnational Corporations**

Mr El Hadji Guissé, a Special Rapporteur of the UN Commission on Human Rights, has expressed with particular clarity that

→ The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective.<sup>24</sup>

In this spirit, the third option would consist in drafting a new international instrument aimed at clarifying, and where necessary at extending, the obligations of States to protect human rights against any violations of these rights by transnational corporations. By agreeing to consider a company as its 'national' (nationality being defined either by the place of incorporation or by the principal place of business depending on the approach to this question adopted by each State), a State should accept the responsibilities this entails. International law could clearly define the obligations of States in this regard; just as the 1982 Montego Bay Convention on the Law of the Sea defines the duties of the flag State to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag' and goes on to detail the implications of this responsibility,<sup>25</sup> a new International Convention on Combating Human Rights Violations by Transnational Corporations could require State parties to adopt legislation, applicable to all the activities of any corporation considered to have its nationality, wherever the corporation operates, and define the core components of such legislation. Such core components could include that (a) the company respect the human rights recognized in the main international instruments, including, in particular, the eight core UN human rights treaties and the seven core conventions of the

International Labour Organization; that (b) it effectively control its subsidiaries, affiliates or franchisees, whatever their nationality, in order to ensure that they respect those basic human and labour rights; and that (c) it insert a provision concerning respect for the rights listed in all its contracts with suppliers or sub-contractors. In addition, the Convention on Combating Human Rights Violations by Transnational Corporations should contain a chapter on sanctions and remedies, ensuring that any violation by a company to whom such legislation is addressed, will lead to effective, proportionate and dissuasive sanctions,<sup>26</sup> and that the victims will have a right of access to courts in the home State in order to seek compensation, perhaps under the proviso that such right of access should not have to be granted where the victims have access to effective local remedies in the jurisdiction in which the abuses were committed. Furthermore, such right of access could be strengthened by allowing non-governmental organizations not only the possibility to assist the victims in filing their claims, but also the possibility to file a claim in their own right (associational standing), under certain conditions of representativity.

While this would build on current developments in the international law of human rights – from which the above suggestions are borrowed –, it would also go beyond them in obliging the home State to exercise a form of extraterritorial jurisdiction over the corporations that have its nationality for their operations overseas.

In principle, this obligation could take the form either of *parent-based extraterritorial regulation*, in which the home State has an obligation to effectively control the parent corporation and to impose on the parent an obligation to enforce compliance with certain norms among the entities it controls; it could also result in a form of *foreign direct liability*, if the home State is required to impose certain prescriptions directly on the foreign subsidiaries of companies incorporated under its jurisdiction on the grounds that these subsidiaries, along with the parent company, form one single transnational group. However, because the exercise of extraterritorial jurisdiction will be easier to justify if the behavior abroad is regulated via the imposition by the home State of certain obligations on the parent company (which possesses its ‘nationality’) – since this can rely on the principle of active personality –, the former route is probably to be preferred.

The advantage of an approach based on the adoption of parent-based extraterritorial regulation is also that it would facilitate overcoming the problem of the ‘corporate veil’.<sup>27</sup> This problem has its origin in the fact

that, within the multinational corporation as a group of companies, the parent (controlling) corporation on the one hand, and its (controlled) subsidiary, on the other, form two distinct legal entities, each with their own juridical personalities. Since, according to the doctrine of limited liability, the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment, this division of legal personalities results in a situation where, in principle, the parent company cannot be held liable for abuses committed by the subsidiary, unless it can be shown that the parent has been controlling the subsidiary to such a degree that the subsidiary was acting as a mere agent in the hands of the parent company, of which it was the ‘alter ego’ in the circumstances.<sup>28</sup> Under the proposed instrument, however, the State parties would have to ensure that the parent companies of transnational corporations with their nationality respect internationally recognized human rights, over and above the locally applicable legislation, in all their activities, and that they monitor the behavior of their subsidiaries, affiliates and business partners by including provisions imposing a similar obligation to respect internationally recognized human rights in their contractual agreements with these partners.<sup>29</sup> This would facilitate overcoming the ‘corporate veil’ problem by imposing due diligence obligations on the parent company, whose liability could potentially be engaged if it appears that the subsidiary, affiliate or business partner has committed human rights abuses or has been complicit in such abuses.<sup>30</sup>

The main value of such an instrument would consist in establishing a clear division of responsibilities between the host State and the home State in the regulation of transnational corporations. The primary responsibility of the host State, on whose territory the transnational corporation conducts its activities, should be reaffirmed. But a subsidiary responsibility should be imposed on the home State of the transnational to exercise control of the transnational corporation over which it may have jurisdiction on the basis of the principle of active nationality. A clarification of the division of tasks would thereby be achieved. This would not only ensure that the transnational corporations committing human rights abuses will not be left unpunished, but it would also meet the concern of the business community that the development of extraterritorial jurisdiction on an unilateral basis – exercised by the home State in the absence of any bilateral or multilateral framework – might be a source of legal uncertainty.<sup>31</sup>

## → OPTIONS UNDER EUROPEAN UNION LAW

The European Union may also contribute to improving the accountability of transnational corporations domiciled in the EU Member States, although the fact that it may only act within the limits of the powers conferred upon it by the Member States limits the possibilities of doing so. Indeed, it can be argued that some form of accountability already exists under the current state of the law since the national courts of the EU Member States must accept jurisdiction over civil liability claims filed against any defendant, including corporations, domiciled on their territory, wherever the damage took place and whatever the nationality of the claimants (1.). Under the current state of affairs, however, the right of victims of human rights or environmental rights abuses to seek reparation on that basis remains largely theoretical since the practical hurdles to exercising this right have never been systematically identified nor, therefore, addressed by the EU Member States. Alternatively, another possibility would be to build on the existing *acquis* of the European Union in the field of criminal law (2.). In fields such as terrorism, trafficking in human beings, or child pornography, a number of instruments have been adopted in the past few years that encourage (or, in some cases, oblige) EU Member States to adopt criminal legislation with extraterritorial effect and to impose effective sanctions on legal persons for the benefit of whom certain offences have been committed. Not only do these examples show the reach of the competences of the EU in the criminal field, they also have laid down solutions to a number of difficult issues, including, in particular, the bases on which extraterritorial jurisdiction can be exercised, the nature of sanctions that can be imposed on legal persons, and the relationship between the liability of the legal person and the liability of the natural persons who have directly committed the offence, from which inspiration could be sought for the adoption of an instrument criminalizing serious human rights or environmental abuses.

### 1. The civil liability of European transnational corporations for human rights abuses committed abroad

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels I” Regulation)<sup>32</sup> provides that ‘persons domiciled in a Member State shall, whatever

their nationality, be sued in the courts of that Member State’. Thus, under this Regulation the national jurisdictions of the Member States of the European Union are in principle competent to receive civil proceedings against persons, including corporations, domiciled in the EU<sup>33</sup> that are civilly liable for certain acts, wherever these take place, and even if the damage occurs or is caused outside the territory of the Member States. The use of the rule in the context of human rights litigation for violations committed abroad, especially in developing countries where European multinationals operate, has been explicitly envisaged within the European Parliament.<sup>34</sup> Indeed, the rules on jurisdiction and enforcement contained in the ‘Brussels I’ Regulation will apply where the defendant is domiciled in an EU Member State, even though the claimant may be a national of a third (non-EU) country, the damage has been inflicted abroad, and there exists no connecting factor to any other EU Member State.<sup>35</sup> Moreover, once it is established under the ‘Brussels I’ Regulation, the jurisdiction of the national court of the EU Member State is mandatory; according to the European Court of Justice, this precludes this national court from declining its jurisdiction ‘on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State’.<sup>36</sup>

The case of *Lubbe v. Cape plc* may serve to illustrate the potential of the ‘Brussels I’ for suits filed against multinational corporations based in the EU for acts they have committed abroad, whether directly or through subsidiaries.<sup>37</sup> In February 1997, claims to compensation were lodged by five employees of an asbestos mine in the Northern Province of South Africa, which was managed by a subsidiary wholly owned by Cape plc, a company domiciled in England. The plaintiffs suffered from asbestosis and an asbestos-related form of cancer. The alleged liability of Cape plc was based on the negligent control by the parent company over the operations of its subsidiary, which it should have obliged to limit the exposure to asbestos to a safe level. Although the defendant company argued that the English courts should relinquish jurisdiction to the South African courts, the House of Lords took the view that the plaintiffs should be able to pursue the proceedings before the English courts. It reasoned that returning them to the South African courts could lead to a denial of justice, both because of the difficulties the plaintiffs would be facing in obtaining legal representation and because of the lack of experience of those courts in the handling of group actions.<sup>38</sup>

However, like its predecessor, the 1968 Brussels Convention, Regulation No 44/2001 is purely jurisdictional in nature; it does not directly affect the question of the law that will apply to any claims filed on the basis of the jurisdictional provisions they contain. This question will be decided by the national jurisdiction on the basis of the private international law of the forum State. In most European States, the law applicable to tort claims will be the *lex loci delicti*; the judge will decide the claim on the basis of the rules applicable in the country where the tort was committed.<sup>39</sup> The national rules normally applicable, however, will not be applied where this would be in violation of the public policy of the forum<sup>40</sup>; this, it is submitted, should in principle exclude the application, by a national jurisdiction of an EU Member State, of tort laws of a foreign country that would deny the victim of human rights violations any right to compensation, or only allow the victim compensation of a purely symbolic nature. This is not to say that there exists, under international law, a general obligation imposed on States to establish a form of 'universal civil jurisdiction', allowing victims of human rights violations to seek a remedy before their courts, in the absence of an accessible alternative forum.<sup>41</sup> Rather, the argument is that, once a State has agreed to establish its jurisdiction over a particular situation, by entrusting its courts with the power to adopt an authoritative decision on such situation, it may not, without violating its international commitments in the field of human rights, apply a foreign law which would be in clear violation of the standards of international human rights.<sup>42</sup>

The implication of the 'Brussels I' Regulation is that, in the present state of the law, any victim of human rights abuses or environmental damage caused by the activities of a corporation domiciled in the EU may seek reparation before the national courts of the EU Member State where this corporation is domiciled. The fact that the damage occurred outside the EU or that the victims are foreign nationals are not an obstacle to this possibility. In principle, the civil liability rules of the place where the damage took place will be applied to the claim unless such rules would afford insufficient protection to the victim and thus be contrary to the international public policy of the forum State before the courts of which the suit is filed. At the same time, serious obstacles to effective protection from the 'Brussels I' Regulation remain. In practice, the access of victims in third countries to the courts of the EU Member State concerned will meet a number of obstacles, including potential victims' lack of information about the possibility to seek reparation, the need to find legal representation, the costs of proceedings, and

geographical distance. In addition, it will typically be difficult to prove the liability of the company domiciled in an EU Member State if the damage has been caused directly by another company, even if this company is a subsidiary of the EU-based parent or is controlled by the company domiciled in the EU. At this juncture, a first step towards improving the effectiveness of the protection of victims of violations of human rights or environmental rights through civil liability before the EU courts would consist in listing these obstacles, identifying how they can be overcome, and encouraging the EU Member States to adopt legislation ensuring that the right to reparation their courts should provide to the victims of activities of their corporations abroad is effective. In this process, inspiration could be sought from a comparison of the EU Member States' rules on civil liability, as well as the standards of the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.<sup>43</sup>

It will be noted, finally, that the civil liability of the corporation does not imply any civil liability of the directors of the company (either one or more members of the management board, or the managing director). In many cases it will be difficult to identify within the corporate structure which individual is personally liable for a decision (for instance, methods of production, recruitment policies, or choice of sub-contractors) that is alleged to have caused damage. Where, however, any individual natural person may be identified as having committed a fault giving rise to a civil liability claim, the 'Brussels I' Regulation could also apply. In practice, the same hurdles as those identified may render ineffective the right of victims to seek reparation.

## **2. The criminal liability of European transnational corporations for human rights abuses committed abroad**

A second option, in the longer term, would be to consider the potential of the approximation of the criminal legislation of the Member States. It may be argued that the European Union has the competence to approximate the national legislations of the EU Member States as regards the imposition of a criminal liability on transnational corporations for human rights abuses. The need for an initiative in this field might be seen to follow from the difficulties created by the current situation, in which the Member States have diverging approaches on this matter, which creates an obstacle to judicial cooperation in criminal matters and may threaten the effectiveness of existing criminal legislations in the

Member States, especially as regards the recognition of criminal judicial decisions adopted against legal persons for the purposes of enforcement. It would be in violation of the principle of legality to allow for the execution, in any State, of a criminal sanction imposed following a conviction in another State in the absence of a specific text providing for such a possibility. But apart from the recent Framework Decision on the application of the principle of mutual recognition to financial penalties,<sup>44</sup> such texts do not exist concerning the execution of criminal sanctions imposed on legal persons.<sup>45</sup> And since, per definition, the classical means of extradition (or surrender) is not available as regards legal persons, the criminal sanctions adopted in one State may well not be enforceable where the assets of the legal person present in that State do not suffice to ensure this enforcement.<sup>46</sup>

The fact that not all the EU Member States have explicitly allowed, at least on a routine basis, for the criminal liability of legal persons,<sup>47</sup> does not constitute an insuperable obstacle. In areas such as terrorism,<sup>48</sup> trafficking in human beings,<sup>49</sup> or sexual exploitation of children and child pornography,<sup>50</sup> agreement was found on a number of issues, all fundamental to the effective sanctioning of the behavior of legal persons committing certain acts considered offences in the material sense or participating in such acts. Steps should now be taken towards building a consensus on the need to impose effective sanctions (whether or not they are considered criminal sanctions by the State concerned) on corporations found to violate a core set of human rights or environmental rights.<sup>51</sup> The instruments that have been referred to could furnish a model from which to seek inspiration. First, these instruments encourage the EU Member States to exercise a form of extraterritorial jurisdiction on the basis of the active personality principle. Under Article 9 of the Framework Decision on combating terrorism, each Member State must establish its jurisdiction on terrorist offences, *inter alia*, when the offender is one of its nationals or residents, or the terrorist act has been committed for the benefit of a legal person established in its territory. In the other instruments mentioned, such extraterritorial jurisdiction is optional rather than compulsory, but the principle at least of its applicability has not been contested. Second, these instruments provide that legal persons held liable should be punishable by effective, proportionate and dissuasive penalties, although such penalties may be labelled criminal or non-criminal. Such penalties include (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order; and

(e) temporary or permanent closure of establishments that have been used for committing the offence. Third, the liability of legal persons may be engaged either through acts committed for their benefit by any person who has a leading position within the legal person, or where the lack of supervision or control by any person with a leading role has made possible the commission of an offence for the benefit of that legal person by a person under its authority. Fourth, the liability of legal persons does not exclude criminal proceedings against natural persons who have taken part in the commission of the offence. Any attempt to approximate the national legislation of the EU Member States as regards the liability of corporations for serious human rights abuses should take these principles as a natural departure point.

## → CONCLUSION

While it is in principle the duty of States, under international human rights instruments, to protect the human rights of all persons under their jurisdiction, in particular by controlling private actors such as corporations whose activities may threaten those rights, States receiving foreign direct investment may be unwilling or unable to ensure such a protection. Where such situations arise and lead to abuses committed by private persons being left unpunished and leave victims without remedies, other States have a moral, and sometimes a legal, responsibility to react. This paper has listed a number of options, identifying, for each option, the associated risks and opportunities. At the universal level – in particular under the authority of the UN Human Rights Council and as a follow-up to the mandate of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises – two options should be explored. One option consists in the establishment of a mechanism imposing on corporations direct obligations under international law in the form of a special procedure, whether a Special Rapporteur or a Working Group mandated to receive information and complaints relating to abuses committed by transnational corporations or in which they are complicit, and reporting back to the Human Rights Council on the results of the inquiries into such allegations. Another option would be to promote the preparation of a new international instrument imposing an obligation on States to control transnational corporations by adopting legislation, applicable to all the activities of any corporation considered to have its nationality, wherever the corporation operates, and

including in particular a requirement that the company respect a core set of internationally recognized human and environmental rights. Under both options, the scope of the obligation of companies as regards both their subsidiaries, affiliates, or franchisees, and their supply chain, could either be codified in the mandate of the special procedure or in the international instrument to be negotiated, or it could be progressively clarified, either in the national laws implementing the abovesaid convention or through the application of initially broadly phrased notions such as 'sphere of influence' or 'complicity'. The experience of the OECD Guidelines for Multinational Enterprises shows that such vaguely defined notions may be relied upon, provided there exists a mechanism to gradually clarify their meaning on an authoritative basis and in the light of the experience acquired in applying them.

The European Union should lead by example in this field. If it is to promote any of the two options highlighted above at a universal level, it will be credible only if it adopts the measures required to ensure that transnational corporations domiciled in the EU are accountable for any human rights or environmental abuses they commit, wherever those abuses take place. Already in the present state of EU law – specifically, under the 'Brussels I' Regulation n° 44/2001 of 22 December 2000 – the national courts of the EU Member States must accept jurisdiction over civil liability claims filed against any defendant, including corporations, domiciled on their territory, wherever the damage took place and whatever the nationality of the claimants. The right of victims of human rights or environmental abuses to seek reparation on that basis remains largely theoretical, however, because of the considerable practical hurdles that may have to be overcome by the victims wishing to file a claim for reparation of the damage caused to them by the actions or omissions of EU-based companies. A strategy of test litigation based on the 'Brussels I' Regulation could serve both to make this avenue better known to potential plaintiffs and to highlight the many practical obstacles that might impede access to the national courts in EU Member States despite these courts being formally competent ; without the active involvement of non-governmental organisations on the side of the victims, however, such test cases will not be filed, and the potential of the 'Brussels I' Regulation most probably will not be realized.

Alternatively, the EU could adopt an instrument criminalizing serious human rights or environmental abuses, and, following the examples set in fields such as terrorism, trafficking in human beings, or child

pornography, oblige the EU Member States to adopt criminal legislation with extraterritorial effect and to impose effective sanctions on legal persons for the benefit of whom such abuses have been committed. While this objective may be unrealistic in the short term, if the aim is to achieve the approximation of the national laws of the EU Member States for all human rights and environmental rights abuses that could be committed by private or legal persons who are nationals of these States, a first step could be the adoption of an instrument focused on international crimes as defined in the Statute of the International Criminal Court (genocide, war crimes, crimes against humanity), international crimes can be committed by private persons (and, in principle, corporations and natural persons alike), and, in their national laws, a number of EU Member States already provide for the possibility of finding legal persons criminally liable for international crimes.

## → ENDNOTES

- <sup>1</sup> See, in particular, Case C-212/97, *Centros Ltd v. Ervers-og Selskabsstyrelsen*, (1999) ECR I-1459 ; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH* (2002) ECR I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, (2003) ECR I-10155.
- <sup>2</sup> By referring to the obligation of MNEs to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments', the OECD Guidelines suggest that the foreign investor should comply with any international instruments ratified by the host country, even if local regulations or local practice are not themselves in conformity with those instruments ; the ILO Tripartite Declaration states that, even where certain core ILO instruments have not been ratified by the host State, they nevertheless should be 'referred to' by these investors 'for guidance in their social policy'. Principle 10 of the draft Norms on the human rights responsibilities of transnational corporations and other business enterprises states : 'Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.'
- <sup>3</sup> The fact that States compete in order to attract foreign direct investment is well illustrated by figures indicating that the regulatory changes adopted by countries overwhelmingly are favourable to FDI, rather than less favourable of imposing restrictions. According to the 2004 World Investment Report of the UNCTAD for instance, the data were over the period 1990-2003 (UNCTAD, *World Investment Report 2004 : The Shift toward Services*, at p. 8). \* see table below
- <sup>4</sup> 28 U.S.C. §1350.
- <sup>5</sup> The United States Supreme Court considers that, when confronted with such suits, the U.S. federal courts should 'require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights of ambassadors, and piracy]' which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, No. 03-339, slip op. at 30-31 [US Sup Ct 2004]).
- <sup>6</sup> See in particular *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9<sup>th</sup> Cir., 2002) (complicity of Unocal with human rights abuses committed by the Burmese military); and *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, \*2 (S.D.N.Y., 2002) (complicity of Shell Nigeria and its parent companies Shell UK and Royal Dutch in the human rights abuses committed by the Nigerian police).
- <sup>7</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.
- <sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (U.N. GAOR, 39th Sess., Suppl. No. 51, U.N. Doc. A/39/51 (1985), entered into force on 26 June 1987).
- <sup>9</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, reprinted in 37 I.L.M. 999 (1998), entered into force on 1 July 2002.
- <sup>10</sup> This is the case, for instance, in Belgium. See Jan Wouters and Leen De Smet, 'De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het light van de Belgische genocidewet', in Eva Brems and Pieter Vanden Heede (dir.), *Bedrijven en mensenrechten. Verantwoordelijkheid en aansprakelijkheid*, Maklu, Antwerpen-Apeldoorn, 2003, pp. 309-338.
- <sup>11</sup> For example, a recent study coordinated for the Fafo by Mark B. Taylor, Anita Ramasastry and Robert C. Thompson, covering 16 countries from different regions of the world (Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, the Ukraine, the United Kingdom and the United States), arrived at the conclusion that 11 of those countries applied criminal liability to legal persons, and that two more countries do so for certain important offences. It is thus particularly remarkable that, although the International Criminal Court itself does not have jurisdiction to try legal persons – as Article 25(1) of the Rome Statute limits its jurisdiction to natural persons –, most countries surveyed have implemented the Rome Statute without making such a distinction between legal persons and natural persons, and have thus provided for the criminal liability of legal persons for the crimes of genocide, crimes against humanity, and war crimes, as defined in the Rome Statute. See *Commerce, Crime and Conflict. Legal Remedies for Private Sector*

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
<b>Regulatory changes favourable to FDI</b>	80	79	101	108	106	98	135	136	131	147	194	236	220
<b>Regulatory changes less favourable to FDI</b>	2	-	1	2	6	16	16	9	9	3	14	12	24

*Liability for Grave Breaches of International Law. A Survey of Sixteen Countries*, Fafo-report 536, Oslo, 2006.

- <sup>12</sup> See Surya Deva, 'Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations', *Newcastle Law Review*, vol. 8 (2004), pp. 87-116 ; Jennifer Zerk, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Univ. Press, 2006, at pp. 165-167.
- <sup>13</sup> See O. De Schutter, 'L'incrimination universelle de la violation des droits sociaux fondamentaux', *Annales de Droit de Louvain*, vol. 64, 2004, n°1-2, pp. 209-245.
- <sup>14</sup> UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, which the Preamble of the draft Norms states is 'a useful interpretation and elaboration of the standards contained in the Norms', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt & Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt & Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, 2005, pp. 315-350.
- <sup>15</sup> Preamble, 3d and 4th Recital.
- <sup>16</sup> See *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, UN doc. E/CN.4/2005/91.
- <sup>17</sup> UN Commission on Human Rights Res. 2005/69, 'Human rights and transnational corporations and other business enterprises', adopted on 20 April 2005 by a recorded vote of 49 votes to 3, with 1 abstention (chap. XVII, E/CN.4/2005/L.10/Add.17).
- <sup>18</sup> See Principle 16 of the draft Norms and the Commentary (noting in particular that 'The Commission on Human Rights should consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms').
- <sup>19</sup> These Guidelines provide for the establishment, within each OECD member State and other adhering State, of a national contact point authorized to receive 'specific instances' and to seek to solve such instances by mediation or, failing this, by stating its views about the question whether or not the Guidelines have been complied with.
- <sup>20</sup> In addition to the six differences outlined hereunder, the two mechanisms could diverge on further issues, depending on how precisely the mandate of any Special Rapporteur or Working Group established by the UN Human Rights Council would be drafted. In particular, whereas the OECD Guidelines impose on multinational enterprises an obligation to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments', the new mandate which could be established might refer to the Universal Declaration of Human Rights or to customary international law, or to these two sources in addition to any treaty ratified by the host State.

- <sup>21</sup> See the report of the fourth meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme which took place in Geneva from 20 to 23 May 1997 (E/CN.4/1998/45), at para. 71; and see Appendix 5 to the report which contains a set of terms of reference for fact-finding missions by special rapporteurs/representatives of the Commission on Human Rights.
- <sup>22</sup> As again emphasized following the last annual meeting of the OECD national contact points, 'The OECD Council Decision of June 2000 instructs the NCPs to contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP is expected to offer a forum for discussion and to assist the business community, employee organisations and other parties concerned in dealing with the issues raised' (*Report by the Chair, 2006 Annual Meeting of OECD National Contact Points*, 20-21 June 2006, at p. 11).
- <sup>23</sup> See the report of the fourth meeting of special procedures, cited above, at para. 71, f) : 'The special rapporteurs are agents not of confidential but of public procedures. Their reports are public. Hence their relations with the press are governed by the basic principle of transparency'.
- <sup>24</sup> *The Realization of Economic, Social and Cultural Rights, Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, U.N. Doc. E/CN.4/Sub.2/1997/8, 27 June 1997, para. 131.
- <sup>25</sup> See Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay on 10 December 1982.
- <sup>26</sup> Although the convention could provide that the sanctions have to be effective, proportionate and dissuasive, the liabilities of the parent company could be criminal, civil, or administrative, in order to respect the different approaches States have to the question of the criminal liability of legal persons. See, for example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997 in force since 15 February 1999 (according to Article 2 of the Convention, 'Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official' ; this does not impose an obligation to establish the *criminal* liability of legal persons, since such liability may be civil or administrative : see para. 20 of the Commentaries to the OECD Anti-Bribery Convention, adopted by the Negotiating Conference on 21 November 1997); or the International Convention for the Suppression of the Financing of Terrorism, adopted by UN General Assembly resolution 54/109 of 25 February 2000 (providing in Article 5 that each State Party, 'in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence' as defined by the Convention by reference to the existing international treaties on combating terrorism ; such liability may be criminal, civil or administrative).

- <sup>27</sup> See, e.g., Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', 24 *Hastings International and Comparative Law Rev.* 297 (2000-2001).
- <sup>28</sup> *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ('Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception' [citations omitted]); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ('A corporation and its stockholders are generally to be treated as separate entities').
- <sup>29</sup> In favor of such an approach under the ATCA, see Scott Coxe-Huhn, 'No More Hiding behind Forms, Factors and Flying Hats: A Proposal for a per se Piercing of the Corporate Veil for Corporations that Violate the Law of Nations under the Alien Tort Claims Statute', 72 *U. Cin. L. Rev.* 743 (2003).
- <sup>30</sup> For a well-known example, see *Lubbe and 4 Others v. Cape plc*, [2000] 1 W.L.R. 1545 (H.L.). In this case, over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries. As noted by the House of Lords in the leading opinion of Lord Bingham of Cornhill: '... the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)'.
- <sup>31</sup> See *Extraterritoriality and business*, prepared by the Task Force on Extraterritoriality of the International Chamber of Commerce, 13 July 2006 (doc. 103-33/5 final), para. 7 of the recommendations.
- <sup>32</sup> OJ L 12 of 16.01.2001, p. 1. That regulation applies in all the Member States, except Denmark, for actions brought on or after 1 March 2002.
- <sup>33</sup> For the purposes of the Regulation, 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business': see Art. 60(1).
- <sup>34</sup> 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 June 2002).
- <sup>35</sup> See Case C-281/02, *Owusu* [2005] (judgment of 1 March 2005).
- <sup>36</sup> *Owusu*, para. 46.
- <sup>37</sup> See Richard 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*, cited above, at 251, at 258-261; P. Muchlinski, 'Corporations in international litigation: problems of jurisdiction and the United Kingdom asbestos cases', *I.C.L.Q.* (2001), at 1.
- <sup>38</sup> *Lubbe v. Cape plc*, [2000] 1 W.L.R. 1545 (H.L.). The doctrine of *forum non conveniens* which courts follow in common law countries allows the competent court, in the presence of an element of extraneity in the case over which it has jurisdiction, to exercise a relatively broad discretion on whether to continue proceedings or to suspend them, where an alternative forum was identified and appears more closely linked to the dispute. At the time of the Cape plc litigation, the question whether the *forum non conveniens* doctrine could lead courts in the United Kingdom or in Ireland (the two common law jurisdictions in the EU) to dismiss an action filed on the basis of the 1968 Brussels Convention (or, now, on the basis of the 'Brussels I' Regulation of 22 December 2000) still was debated. The recent case-law of the European Court of Justice, referred to above, now clearly leads to the conclusion that jurisdiction under the 'Brussels' Regulation is mandatory, and cannot be set aside through the application of the *forum non conveniens* doctrine.
- <sup>39</sup> A proposal currently pending for a Regulation on the law applicable to non-contractual obligations ('Rome II') (COM(2006) 83 final of 21.2.2006) confirms this solution, providing that, in principle, 'the law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, [...]'.  
<sup>40</sup> In the Amended proposal for a Regulation on the law applicable to non-contractual obligations ('Rome II'), Articles 13 and 23 provide that the law otherwise applicable to the non-contractual obligation may be overridden either by the mandatory rules of the forum State or where applying that law would violate the public policy of the forum.
- <sup>41</sup> See Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom*, Appl. No. 35763/97 (judgment of 21 November 2001), at para. 40: 'it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities'.
- <sup>42</sup> See Eur. Ct. HR (2<sup>nd</sup> sect.), *Pellegrini v. Italy*, Appl. No. 30882/96 (judgment of 20 July 2001).
- <sup>43</sup> CETS n° 150, signed in Lugano on 21 June 1993.
- <sup>44</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76 of 22.3.2005, p. 16.
- <sup>45</sup> As regards criminal convictions of natural persons, see the Council of Europe Convention on the Transfer of Sentenced Persons, opened for signature and ratification in Strasbourg on 21 March 1983 (CETS n°112); and the Council of Europe European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, opened for signature and ratification in Strasbourg on 30 November 1964 (CETS n°51).
- <sup>46</sup> S. Adam, 'Le droit européen et la responsabilité pénale des personnes morales', *Journal des tribunaux-Droit européen*, 2006, pp. 200-204, at p. 204.
- <sup>47</sup> Commission of the European Communities, *Green paper on the*

*approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM(2004)334 final of 30.4.2004, at p. 31.

- <sup>48</sup> Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002, p. 3.
- <sup>49</sup> Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 20 of 1/8/2002, p. 1.
- <sup>50</sup> Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13, 20.1.2004, p. 44.
- <sup>51</sup> As regards damages to the environment, the Council of Europe Convention on the Protection of the Environment through Criminal Law (CETS n° 172, signed in Strasbourg on 4 November 1998) could offer a departure point. This convention imposes on each State party to 'adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence [listed in the Convention] has been committed by their organs or by members thereof or by another representative' (Article 9(1)). Only Estonia has ratified this instrument however, which has therefore not entered into force.

The European Coalition for Corporate Justice (ECCJ) represents a diverse range of civil society organisations from across Europe. The ECCJ has a vision of a sustainable world in which corporations' drive for profit is balanced by the interest of society at large and respects, social, human and environmental rights.



European Coalition for Corporate Justice

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