

# CROSSING THE ATLANTIC? THE POLITICAL AND LEGAL FEASIBILITY OF EUROPEAN FOREIGN DIRECT LIABILITY CASES

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## I. INTRODUCTION

Over the past decade, the much-debated U.S. phenomenon called the Alien Tort Claims Act (ATCA)<sup>1</sup> has provided the basis for numerous attempts in U.S. federal courts to hold multinational corporations<sup>2</sup> liable for public-international-law violations they commit in the course of their transnational activities.<sup>3</sup> These so-called foreign direct liability cases, in which plaintiffs file civil-liabil-

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1. 28 U.S.C. § 1350 (2006). ATCA 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.” *Id.* For an excellent overview of all legal matters pertaining to ATCA and related cases, see generally SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004).

2. The terms “transnational,” “transnational corporation,” “multinational,” “multinational corporation,” and “multinational enterprise” generally are regarded as interchangeable. For a more elaborate discussion of the various definitions, see JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 49-54 (2006) and P.T. MUCHLINSKI, MULTINATIONAL ENTERPRISES & THE LAW 5-8 (2007).

3. One of the most well-known corporate ATCA cases is *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), which settled in April 2005. For more information on this case, see Earthrights International - *Doe v. Unocal*, <http://www.earthrights.org/legal/unocal> (last visited May 18, 2009). See also Earthrights International - *Bowoto v. ChevronTexaco*, <http://www.earthrights.org/legal/chevron> (last visited May 18, 2009) (discussing the ongoing *Bowoto v. ChevronTexaco* case); *Wiwa et al v. Royal Dutch Petroleum et al* — Center for Constitutional Rights, <http://ccrjustice.org/ourcases/current-cases/wiwa-v-royal-dutch-petroleum> (last visited Nov. 19, 2009) (discussing the *Wiwa v. Royal Dutch Petroleum* case, which settled in July 2009); *Business & Human Rights: Rio Tinto lawsuit (re Papua New Guinea)*, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea> (last visited May 18, 2009) (discussing the ongoing *Sarei v. Rio Tinto* case); *Business & Human Rights: Apartheid Reparations Lawsuits*, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica> (last visited May 18, 2009) (discussing the ongoing Apartheid reparations lawsuits).

ity claims against parent companies of multinational corporations in the courts of developed countries for damage caused by subsidiaries in developing countries, have emerged more slowly across the Atlantic, however. To date, only a handful of such cases have appeared before courts in Europe.<sup>4</sup> Two recent claims, one before the London High Court against shipping corporation Trafigura for personal injuries caused in the Ivory Coast and one before a Dutch court against oil giant Shell for environmental damages caused in Nigeria, may indicate a growing interest in the potential of foreign direct liability cases before the national courts of E.U. Member States.<sup>5</sup> At the same time, political developments are taking place at the E.U. level, sparked by the publication in April 2008 of the influential Ruggie Report, which may turn out to have a significant effect on the political and legal climate for future cases within the European Union.<sup>6</sup>

Even though no equivalent to ATCA exists in Europe or anywhere else,<sup>7</sup> plaintiffs may achieve similar results using ordinary tort law.<sup>8</sup> Whereas ordinary tort claims can never substitute for

4. See *Connolly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854 (H.L.) (appeal taken from Eng.); *Lubbe v. Cape Plc.* [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.); *Ngcobo v. Thor Chem. Holdings*, [1995] T.L.R. 579 (Eng. C.A.); *Sithole v. Thor Chem. Holdings*, [1999] T.L.R. 110 (Eng. C.A.). Attempts before Belgian courts to bring a case against the French corporation Total for its activities in Burma failed. See *Business & Human Rights: Total lawsuit in Belgium (re Burma)*, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma> (last visited May 18, 2009).

5. The former claim recently settled, see *Trafigura, Probo Koala Updates*, [http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx](http://www.trafigura.com/our_news/probo_koala_updates.aspx) (last visited Nov. 19, 2009) (providing recent developments in the *Trafigura* case); the latter claim is still pending, see *Milieudefensie, The People of Nigeria versus Shell*, <http://www.milieudefensie.nl/english/shell/the-people-of-nigeria-versus-shell> (last visited Nov. 19, 2009) (providing recent developments in the *Shell* case).

6. U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (prepared by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [hereinafter *Ruggie Report*].

7. See JOSEPH, *supra* note 1, at 19 (the “UK, Australia, and Canada . . . lack the extraordinary bases of claims, such as ATCA . . . that exist in the US.”); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT’L L. 1, 32 (2002) (“No other legal system has a comparable statute.”); ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, EXECUTIVE SUMMARY 24 (2006), available at <http://www.fafon.org/pub/rapp/536/536.pdf> (“The U.S. statute . . . is unique and there is no analog in other countries’ legislation.”).

8. See, e.g., ZERK, *supra* note 2, at 200-07; JOSEPH, *supra* note 1, at 134-38. In fact, plaintiffs have based those foreign direct liability claims instigated before non-U.S. courts, as well as various cases brought in U.S. state courts, on domestic (or state) tort rules.

ATCA claims, they may provide an important alternative when ATCA is unavailable due to the nature of the claim<sup>9</sup> or the fact that it is brought before a court outside of the United States. The U.S. litigation culture, however, is uniquely favorable to foreign direct liability cases,<sup>10</sup> so in countries other than the United States, such cases may face serious legal translation problems.<sup>11</sup> Differences in legal culture, substantive law, and procedural and practical matters may act as barriers to the successful pursuit of foreign direct liability cases in countries other than the United States. Still, as evidenced by past and current foreign direct liability cases before non-U.S. courts, these barriers do not render such cases impossible.

Cases like the English case against *Trafigura* and the Dutch case against *Shell* raise the prospect of translating foreign direct liability cases into the European context. Even though domestic regulations generally have retained their primacy in the civil law domain, due to the European Union's growing political and legal influence on its Member States, E.U. policies and regulations increasingly determine the European climate for foreign direct liability cases.<sup>12</sup> At the same time, interconnected legal histories and shared legal cultures have led to many common European legal features. The question this Article answers is the following: what is the feasibility of foreign direct liability cases before courts in Europe, given the current European political and legal climate?

The underlying issue in foreign direct liability cases is access to justice for individuals and communities who are from developing host countries and who have suffered damage at the hands of mul-

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9. See JOSEPH, *supra* note 1, at 66 (observing that in the United States “[o]rdinary transnational tort jurisdiction . . . acts as an important supplement to ATCA jurisdiction.”).

10. See Stephens, *supra* note 7, at 6-17 (discussing the unique “series of procedures and practices” of U.S. federal courts that are favorable to claims for “civil damages for human rights abuses”).

11. See *id.* at 17-34.

12. Article 65 of the Treaty Establishing the European Community empowers the European Union to take “[m]easures in the field of judicial cooperation in civil matters having cross-border implications,” which include

(a) improving and simplifying the system for cross-border service of judicial and extrajudicial documents, cooperation in the taking of evidence, the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Treaty Establishing the European Community art. 65, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

tinational corporations that operate out of developed home countries.<sup>13</sup> In cases such as these, the host-country government often will be involved itself in the multinational corporation's activities there, either as a business partner or as a beneficiary. These governments are likely, therefore, to condone the corporation's activities even if they cause damage to third parties in the host country, which often considerably diminishes the victim's chances of receiving a fair trial in the host country.

Even if the victims do have access to justice in the host country and receive a verdict there entitling them to compensation for their damages, local subsidiaries involved in the harmful activities will often be financially incapable of meeting a substantial damages claim. At the same time, however, successful enforcement of a host-country verdict against the parent company in the home country may be very problematic, and host-country victims may end up empty-handed nonetheless. Another problem commonly underlying these cases is a discrepancy in regulatory standards between the developing host country and the developed home country, in the sense that behavioral requirements to be met by multinational corporations will often be much stricter in the home country than in the host country.<sup>14</sup>

Foreign direct liability cases, in Europe and elsewhere, may occupy a crucial role in helping individuals or groups from developing countries obtain compensation for damages that multinational corporations inflict on them. At the same time, foreign direct liability cases provide a way to hold multinational corporations accountable for harmful behavior abroad, even if that behavior is not considered to be substandard according to the less stringent host-country standards. The future success of these cases, however, depends to an important extent on the willingness and ability of the developed countries involved to open up their forums to these cases and remove some existing barriers to their successful pursuit, or at least refrain from putting up new ones.<sup>15</sup> In the European context, those barriers may be European rather than

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13. For the purposes of this article, the term "home country" will be used to mean the country in which the parent company of the multinational corporation is located; the term "host country" will refer to the country in which a subsidiary of that parent company is located.

14. See JOSEPH, *supra* note 1, at 4-6, 11-12 (discussing these and other barriers to justice for the victims in the host country).

15. In his report, UN Special Representative John Ruggie wrote that:

[s]tates should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to

domestic phenomena, and thus may require a communal approach rather than one in which the individual Member States deal with them separately.

This Article will provide an overview of current communal political, legal, and practical circumstances in Europe that affect the feasibility of foreign direct liability cases before courts in the European Member States. Part II will discuss the political climate in Europe in regard to foreign direct liability cases by providing a general survey of E.U. policy and rhetoric on corporate social responsibility (CSR) in general, and foreign direct liability cases specifically.<sup>16</sup> Part III will discuss the present legal climate by attempting to translate legal and practical experiences gained in ATCA-based foreign direct liability cases into the European context. Part IV will discuss some of the findings briefly, and Part V will offer conclusions on the political and legal feasibility of European foreign direct liability cases.

## II. THE POLITICAL CLIMATE: E.U. POLICY AND RHETORIC

### A. *E.U. Policy and Rhetoric on Corporate Social Responsibility*

In 2001, the European Commission published a Green Paper on corporate social responsibility (CSR)<sup>17</sup> aimed at launching “a wide debate and seek[ing] views on corporate social responsibility at national, European and international level[s].”<sup>18</sup> The paper defines CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”<sup>19</sup> Notwithstanding the emphasis on voluntarism, the Commission envisaged an overall European framework in which public authorities would play an active role in promoting CSR, to complement and add value to corporations’ voluntary practices.<sup>20</sup>

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justice, including for foreign plaintiffs—especially where alleged abuses reach the level of widespread and systematic human rights violations.

See *Ruggie Report*, *supra* note 6, para. 91.

16. For more elaborate accounts of the E.U.’s CSR policies, see generally Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT’L L.J. 541 (2005), Olivier De Schutter, *Corporate Social Responsibility European Style*, 14 EUR. L.J. 203 (2008), and Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U. J. INT’L HUM. RTS. 262 (2008).

17. *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001).

18. *Id.* para. 19, at 6.

19. *Id.* para. 20, at 6.

20. See *id.* para. 18, at 6.

The public debate that followed the publication of the Commission's Green Paper brought to light a sharp divide among stakeholders over the role of public authorities in providing a regulatory framework for CSR.<sup>21</sup> Business and employers' organizations supported a purely voluntary approach, while nongovernmental organizations (NGOs) and trade unions supported a regulatory framework.<sup>22</sup> Although the Commission initially stuck with its ideas about the desirability of a European CSR framework,<sup>23</sup> a 2006 Commission Communication<sup>24</sup> revealed a drastic change of course in favor of the purely voluntary approach.<sup>25</sup>

The European Parliament, which had shown a clear preference for a mixed voluntary/regulatory approach to CSR prior to the publication of the Commission's Green Paper,<sup>26</sup> responded to the Green Paper approvingly and put forward a number of constructive suggestions for the possible framework outline.<sup>27</sup> Predictably, its reaction to the 2006 Commission Communication, which completely played down the need for a regulatory framework, was less than favorable, and it made a number of critical observations, once again putting forward suggestions for various regulations that it thought the Commission should implement to frame and advance the European Union's CSR policies.<sup>28</sup> When a response by the

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21. See Wouters & Chanet, *supra* note 16, at 274-75.

22. *Id.*

23. See *Commission Communication, Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 5-9, COM (2002) 347 final (July 2, 2002) (discussing "[a] European action framework for CSR").

24. *Commission Communication, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final (Mar. 22, 2006). The Commission wrote that "[b]ecause CSR is fundamentally about voluntary business behavior, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation." *Id.* at 1.

25. See *generally id.* Presumably, this change of course was due to a combination of pressure from the business community—especially within the E.U. Multi-Stakeholder Forum on CSR that was launched by the Commission in 2002—and general changes in policy, as reflected in the 2005 review of the Lisbon Strategy. See De Schutter, *supra* note 16, at 235-36; Wouters & Chanet, *supra* note 16, at 277-80.

26. See *generally* European Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104) 180 [hereinafter EP Resolution on a European Code of Conduct].

27. See European Parliament Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, 2003 O.J. (C 187 E) 180 [hereinafter EP Resolution on CSR 2002]; European Parliament Resolution on the Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, 2004 O.J. (C 67 E) 73.

28. See *generally* European Parliament Resolution on Corporate Social Responsibility: A New Partnership, 2007 O.J. (C 301 E) 45 [hereinafter EP Resolution on CSR 2007].

Commission to this Parliamentary resolution on CSR remained forthcoming, it seemed that the European Union's movement toward development of enforceable CSR policies had come to a standstill.

However, the promulgation in April 2008 of a policy framework on business and human rights by Professor John Ruggie, special representative of the U.N. secretary-general on the issue of human rights and transnational corporations and other business enterprises, has given new impetus to debates on CSR around the world.<sup>29</sup> The policy framework set out in the report rests on three pillars: the state duty to protect human rights, the corporate duty to respect human rights, and the access of victims to remedies.<sup>30</sup> It has been unanimously welcomed by the U.N. Human Rights Council and has received public acclaim across the board, as it seems to provide the different sides to the CSR debate with some common ground, at least with respect to the debate's human-rights dimension.<sup>31</sup> The Ruggie Report has been endorsed by national policy makers in several of the E.U. Member States, and has led to various domestic policy initiatives.<sup>32</sup>

In the course of 2009, it has become clear that the Ruggie Report is also likely to exert a significant impact on future E.U. policy and rhetoric on CSR. John Ruggie himself put in his two cents' worth in a recent address to the European Parliament, where he provided an update on his mandate, as well as some critical remarks on the mandatory versus voluntary debate. Furthermore, Sweden, under its E.U. presidency in the second half of 2009 and in cooperation with the European Commission, recently organized an E.U. conference on CSR based on the Ruggie

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29. See *Ruggie Report*, *supra* note 6.

30. See U.N. Human Rights Council, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 2, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (prepared by John Ruggie), available at [http://www2.ohchr.org/english/bodies/hr\\_council/docs/11session/A.HRC.11.13.pdf](http://www2.ohchr.org/english/bodies/hr_council/docs/11session/A.HRC.11.13.pdf).

31. See *id.* ¶¶ 1-5.

32. See, e.g., HOUSE OF LORDS & HOUSE OF COMMONS, JOINT COMM. ON HUMAN RIGHTS, CALL FOR EVIDENCE: BUSINESS AND HUMAN RIGHTS, (2008-2009), available at [http://www.parliament.uk/documents/upload/Business\\_and\\_HR\\_CallforEvidence.pdf](http://www.parliament.uk/documents/upload/Business_and_HR_CallforEvidence.pdf). Another example is a forthcoming study, commissioned by the Dutch Ministry of Economic Affairs, of the liability of Dutch multinational corporations for violations of human-rights norms, labor norms, and environmental norms abroad. See Kamerstukken II, 2008/2009, 26 485, nr. 66, 26, available at <http://parlis.nl/pdf/kamerstukken/KST129444.pdf> (report of a general consultation on March 4, 2009, between the Dutch Ministry of Economic Affairs and Members of Parliament on the issue of corporate social responsibility) (in Dutch).

Report.<sup>33</sup> These developments indicate that the E.U. debate on CSR has now effectively been reopened and that it is moving in new directions.

### B. *E.U. Policy and Rhetoric on Foreign Direct Liability Cases*

So far, the European Union has never had any specific policy on foreign direct liability cases. In the United States, proliferation of ATCA claims, particularly those against multinational corporations, has given rise to fierce debate about the desirability of these cases and ATCA itself.<sup>34</sup> In the relative absence of similar cases before courts in the E.U. Member States, however, a similar debate in Europe has long failed to materialize.

The European Commission commented on ATCA in 2004 in an amicus brief in the pivotal case of *Sosa v. Alvarez-Machain*,<sup>35</sup> in which the U.S. Supreme Court for the first time took the opportunity to express its opinion on ATCA.<sup>36</sup> In its brief, the Commission remained neutral, choosing to declare itself neither in favor of nor opposed to ATCA. It did comment, however, on ATCA's limits, stressing that "[t]he substantive standards imposed by [ATCA] should be defined by reference to international law"<sup>37</sup> and that "[t]he subject matter of [ATCA] should also be defined by reference to the United States's jurisdiction to prescribe under international law."<sup>38</sup> Apart from this amicus brief, however, the Commission has remained silent on the potential of foreign direct liability cases to hold multinational corporations accountable for their activities in host countries.

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33. For more information on this conference, see [http://www.se2009.eu/en/meetings\\_news/2009/11/10/protect\\_respect\\_remedy\\_a\\_conference\\_on\\_corporate\\_social\\_responsibility\\_csr](http://www.se2009.eu/en/meetings_news/2009/11/10/protect_respect_remedy_a_conference_on_corporate_social_responsibility_csr) (last visited Nov. 19, 2009).

34. See Kevin R. Carter, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability?*, 38 CASE W. RES. J. INT'L L. 629, 639-45 (2007); Hannah R. Bornstein, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L.J. 1077 (2007); JOSEPH, *supra* note 1, at 55-61. The amicus curiae briefs that are often filed in ATCA cases by both proponents of the plaintiffs and defendants are also very informative in this regard. See Business & Human Rights: Lawsuits: Selected Cases, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases> (last visited May 18, 2009) (with links to amicus briefs from recent ATCA cases).

35. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa*, incidentally, did not involve a corporate defendant. *Id.*

36. Brief for European Commission as Amicus Curiae Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at [http://sdshh.com/Alvarez/ECBriefforSosavAlvarez\\_Machain\\_v1\\_%5B1%5D.pdf](http://sdshh.com/Alvarez/ECBriefforSosavAlvarez_Machain_v1_%5B1%5D.pdf) [hereinafter EC Brief for *Sosa v. Alvarez-Machain*].

37. *Id.* at 3.

38. *Id.* at 4.

The matter of foreign direct liability has occasionally arisen in the course of the general debate on CSR within the European Union. Most of the European Parliament's resolutions on the matter have referenced the Brussels Convention<sup>39</sup> or its successor the Brussels I Regulation,<sup>40</sup> stating that they provide the necessary jurisdictional basis for foreign direct liability cases before the courts of the E.U. Member States.<sup>41</sup> In its 2007 Resolution, Parliament called on the Commission to "implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States,"<sup>42</sup> as well as to "organise and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention."<sup>43</sup> Parliament further encouraged the Commission to "develop, in particular, mechanisms that ensure that communities affected by European companies are entitled to a fair and accessible process of justice."<sup>44</sup>

Here it seems, however, that the Ruggie Report has provided the inspiration necessary to definitively put the topic of foreign direct liability on the European agenda. The report itself explicitly addresses home-country remedies for human-rights violations by multinational corporations in host countries, and calls on states to "strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory" and "address obstacles to access to justice, including for foreign plaintiffs."<sup>45</sup>

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39. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 1998 O.J. (C 27) 1 (consolidated version).

40. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels I Regulation].

41. EP Resolution on a European Code of Conduct, *supra* note 26, merely contained a reference to the Brussels Convention in its preamble, but its draft text contained an entire paragraph on the matter. See Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS 263 (Philip Alston ed., 2005). In addition, Paragraph 50 of the EP Resolution on CSR 2002, *supra* note 27, reads:

[The European Parliament] draws attention to the fact that the 1968 Brussels Convention enables jurisdiction within the courts of Member States for cases against companies registered or domiciled in the EU in respect of damage sustained in third countries; calls on the Commission to compile a study of the application of this extraterritoriality principle by courts in the Member States; calls on the Member States to incorporate this extraterritoriality principle in legislation.

42. EP Resolution on CSR 2007, *supra* note 28, para. 32, at 52.

43. *Id.* para. 37, at 52.

44. *Id.* para. 42, at 53.

45. See *Ruggie Report*, *supra* note 6, ¶¶ 13, 26, 77-78, 82-83, 88-91.

Sure enough, in February 2009, participants to the European Multistakeholder Forum on Corporate Social Responsibility raised the issue of liability of European companies for human rights abuses committed outside the European Union. In his speech for the occasion, European commissioner Günther Verheugen encouraged his fellow commissioners involved “to further deepen our knowledge about the nature and scope of the existing EU legal framework applicable to European companies operating in third countries.”<sup>46</sup>

In July 2009, a call for tenders was issued by the Enterprise and Industry Directorate-General of the European Commission for a “[s]tudy of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU.”<sup>47</sup> The study is meant to build on the existing Ruggie framework and to provide a basis for possible measures by the European Union and its Member States to further operationalize that framework.<sup>48</sup> However, it also extends the Ruggie framework’s context by not merely focusing on human-rights issues, but also including environmental issues and labor rights.<sup>49</sup>

It will be interesting to see to what extent the results of this study, expected to be finalized mid-2010, will bring about changes in existing E.U. policy and rhetoric on CSR in general and on foreign direct liability specifically. It does seem inevitable, however, that some features of the existing legal framework, at the E.U. level as well as at the level of individual Member States, are about to change in the near future. How this will impact the feasibility of future European foreign direct liability cases remains to be seen.

At this point, the feasibility of foreign direct liability cases before E.U. Member State courts, such as the *Shell* case and the *Trafigura* case, is primarily determined by the opportunities offered by indi-

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46. Günther Verheugen, Vice-President of the European Commission Responsible for Enterprise and Industry, Speech at the CSR Forum in Brussels: Corporate Social Responsibility Essential for Public Trust in Business (Feb.10, 2009), *available at* [http://ec.europa.eu/enterprise/csr/documents/stakeholder\\_forum/csrforumspeech\\_onlineversion.pdf](http://ec.europa.eu/enterprise/csr/documents/stakeholder_forum/csrforumspeech_onlineversion.pdf).

47. *See* European Comm’n, Enter. & Indus. Directorate-Gen., Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, Invitation to Tender—Call for tenders No ENTR/09/45, Open Procedure, OJEU S131 of 11/07/2009, [http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc\\_id=3472&userservice\\_id=1](http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=3472&userservice_id=1).

48. *See* European Comm’n, Enter. & Indus. Directorate-Gen., Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, Specifications—Call for tenders No ENTR/09/45, Open Procedure, OJEU S131 of 11/07/2009, at 4-5, *available at* [http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc\\_id=3471&userservice\\_id=1](http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=3471&userservice_id=1).

49. *Id.* at 23-24.

vidual Member States' legal systems and any initiatives undertaken within Member States to advance this type of litigation or to remove potential barriers that might prevent access to justice for host-country victims. Member States, however, have found themselves increasingly restricted by a growing number of mandatory and directly applicable Community instruments.<sup>50</sup> These E.U. rules and regulations, though not specifically designed to deal with foreign direct liability cases, do have a profound effect on their feasibility before E.U. Member State courts. Consequently, at present the legal climate for European foreign direct liability cases is in practice determined to a large extent by the legal framework that has been established by the European Union.

### III. THE LEGAL CLIMATE: TRANSLATING FOREIGN DIRECT LIABILITY CASES TO THE EUROPEAN CONTEXT

#### A. *A brief characterization of ATCA*

Essentially, ATCA provides civil remedies for international human-rights violations.<sup>51</sup> Congress enacted the statute in 1789, but attorneys largely neglected it for almost 200 years, after which it took its place in the limelight with the landmark case of *Filártiga v. Peña-Irala*.<sup>52</sup> Many cases, against individual as well as corporate defendants, have followed *Filártiga*.<sup>53</sup> To date, no corporation has been held liable under ATCA,<sup>54</sup> but human-rights advocates within and outside the United States have hailed the statute as the best contemporary option for holding corporations accountable for their transgressions in host countries.<sup>55</sup> In the *Sosa* case in 2004, the U.S. Supreme Court took the opportunity to resolve some of the controversy surrounding ATCA, in particular the controversy over whether the statute provides a cause of action in addition to

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50. See generally Susan M. Nott, *For Better or Worse? The Europeanisation of the Conflict of Laws*, 24 LIVERPOOL L. REV. 3 (2002). See also PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 112-17 (2003) (providing an overview of the different Community instruments and their legal effects).

51. See *supra* note 1 and accompanying text.

52. 630 F.2d 876 (2d Cir. 1980).

53. The first ATCA case against a corporate defendant that was allowed to proceed was *Doe I v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002). Since *Unocal*, "human rights challenges under ATCA have been brought against numerous corporations including Shell, Rio Tinto, Freeport McMoran, Exxon-Mobil, Pfizer, and Coca Cola for the alleged perpetration of human rights abuses abroad." JOSEPH, *supra* note 1, at 22.

54. Bornstein, *supra* note 34, at 1078.

55. See, e.g., JOSEPH, *supra* note 1, at 61 (ATCA is "an important and perhaps the most effective tool in the armory of human rights litigation").

granting jurisdiction.<sup>56</sup> In a highly controversial decision, (the majority of) the Court decided that ATCA does provide a cause of action for a narrow set of violations of the law of nations (i.e., customary international law).<sup>57</sup>

The result of the Court's decision in *Sosa* is twofold. On one hand, ATCA grants U.S. federal courts subject matter jurisdiction over civil claims by non-U.S. citizens<sup>58</sup> for violations of international law, irrespective of whether the violations took place within or outside of the United States. Combined with the fairly liberal rules on personal jurisdiction that apply within the United States—the constitutional threshold is “minimum contacts” of the defendant with the forum<sup>59</sup>—ATCA provides the courts with jurisdiction over a potentially very broad range of corporate and noncorporate defendants, whether domestic or foreign.<sup>60</sup> The mere fact that a corporation is “doing business” and maintains regular and systematic activity within a state is generally sufficient to provide a federal district court in that state with personal jurisdiction over it.<sup>61</sup>

On the other hand, ATCA creates a specific cause of action for tort claims on the basis of certain well-defined norms of international law. Absent a specific, statutory cause of action, a claim is generally not actionable within the common-law tort system; hence the significance of the Supreme Court's ruling in *Sosa*. An important assumption underlying *Sosa* is that customary international law

56. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

57. Different interpretations exist, however. See JOSEPH, *supra* note 1, at 22-33 (providing an elaborate discussion of the interpretation of “the law of nations” in various ATCA cases).

58. ATCA only pertains to claims made by aliens. See 28 U.S.C. § 1350 (2006).

59. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

60. The degree of extraterritoriality inherent in the exercise of jurisdiction in ATCA cases that have minimal contacts with the United States (for instance involving a foreign claimant, a foreign defendant and a violation of international law that has taken place abroad) is the main cause of international controversy surrounding ATCA. See EC Brief for *Sosa v. Alvarez-Machain*, *supra* note 36, at 12-26 (arguing that U.S. federal courts not exceed the limits set forth by international law when determining the existence of adjudicatory and/or prescriptive jurisdiction under ATCA).

61. See, for example, the ATCA case *Wiva v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000), in which a U.S. federal court held that it had personal jurisdiction over Royal Dutch Petroleum Company and Shell Transport and Trading Company, incorporated in the Netherlands and the UK, respectively, on the basis of the physical presence within its jurisdiction of an investor relations office and its manager. For a more elaborate discussion of personal jurisdiction in the United States in the context of foreign direct liability cases, see JOSEPH, *supra* note 1, at 83-87.

is a form of federal common law and as such can be applied directly by U.S. federal courts in ATCA cases, without need for congressional authorization.<sup>62</sup> The questions of which international law norms are capable of forming the basis of an ATCA claim<sup>63</sup> and how these norms should be applied in a particular case<sup>64</sup> remain matters of debate which will eventually have to be decided in current and future ATCA cases.

### B. *Jurisdiction: The Brussels I Regulation*

One of the main features of civil lawsuits on the basis of ATCA is that federal courts have broad jurisdictional powers over domestic and foreign defendants. Within the European Union, the Brussels I Regulation lays down rules on the issue of jurisdiction in civil (and commercial) matters.<sup>65</sup> The Regulation, which is based on the principle of legal certainty,<sup>66</sup> is binding and directly applicable within the E.U. Member States.<sup>67</sup> Its main provision determines that “[p]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”<sup>68</sup> A corporation or other legal person “is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business.”<sup>69</sup> If, according to these criteria, the defendant is not domiciled in a Member State, “the jurisdiction of the courts of each Member State shall . . . be determined by the law of

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62. On the debate surrounding this issue, see Bornstein, *supra* note 34, at 1088-90. See also Luisa Antonioli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651 (2005) (briefly discussing ATCA and the relationship between international law and U.S. domestic law).

63. For a comment on the consequences of the *Sosa* ruling for the feasibility of ATCA claims involving personal welfare rights, see Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT’L & COMP. L. REV. 393 (2006).

64. An example of a widely debated issue is whether corporations can be held liable for merely aiding and abetting human rights violations. The main controversy here is over what system of law—international law or domestic home country or host country law—should be applied to determine the issue. See generally Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304 (2008), available at <http://www.law.northwestern.edu/journals/JIHR/v6/n2/4>.

65. See generally Brussels I Regulation, *supra* note 40.

66. See Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, ¶ 41.

67. See Brussels I Regulation, *supra* note 40, recital 6, at 1. The only Member State not bound by the Regulation is Denmark. *Id.* recital 21, at 2-3.

68. *Id.* art. 2, ¶ 1, at 3.

69. *Id.* art. 60, ¶ 1, at 13. That Article also provides that “[f]or the purposes of the United Kingdom and Ireland ‘statutory seat’ means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.” *Id.* art. 60, ¶ 2, at 13.

that Member State.”<sup>70</sup> The rules in the Regulation apply regardless of the nationality of the plaintiff.<sup>71</sup>

In a limited number of cases, a person domiciled in a Member State may be sued in the courts of another Member State.<sup>72</sup> The Regulation provides for some complementary grounds for jurisdiction which may be relevant in the context of foreign direct liability cases.<sup>73</sup> According to these provisions, a person domiciled in a Member State may also be sued, “in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur,”<sup>74</sup> “as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings,”<sup>75</sup> and “as regards a dispute arising out of the operation of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”<sup>76</sup>

From this brief overview of the Brussels I regime’s most important provisions in the context of foreign direct liability cases, one can discern that the regime in itself does not provide a jurisdictional framework which is as broad as the U.S. framework. Whereas American federal courts may exercise jurisdiction over corporations that are engaged in “continuous and systematic activities” within the United States, the Brussels I regime only provides for jurisdiction over corporations that are incorporated or headquartered in one of the E.U. Member States. In a case such as *Wiwva v. Royal Dutch Petroleum*, in which a U.S. federal court found that it could exercise personal jurisdiction over two Anglo/Dutch corporations on the basis of the physical presence of an investor relations office and its manager within its jurisdiction,<sup>77</sup> a European court would not have had jurisdiction, at least not under the Brussels I regime.

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70. *Id.* art. 4, ¶ 1, at 4.

71. *See* Case C-412/98, *Group Josi Reinsurance Co. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925, para. 7.

72. *See* Brussels I Regulation, *supra* note 40, art. 3, at 4.

73. *See id.*

74. *Id.* art. 5, ¶ 3, at 4.

75. *Id.* art. 5, ¶ 4, at 4.

76. *Id.* art. 5, ¶ 5, at 4. *See also* De Schutter, *supra* note 41, at 264-66 (discussing article 5 and its potential usefulness).

77. 226 F.3d 88, 89 (2d Cir. 2000).

As mentioned above, the jurisdictional rules of the Member State determine whether the Member State's court has jurisdiction in cases that fall outside the scope of the Brussels I regime. These jurisdictional rules may have a broader scope than the Brussels I Regulation. English law, for instance, allows courts to exercise jurisdiction over foreign corporations that carry on business in England and Wales to a certain extent.<sup>78</sup> Occasionally, the Member State rules on jurisdiction may have an even broader scope than their U.S. counterparts.<sup>79</sup> For example, the Dutch *forum necessitatis* rule<sup>80</sup> allows Dutch courts to exercise jurisdiction over cases that have no contacts with the Dutch legal order in the exceptional case that no other forum is available,<sup>81</sup> or where there are sufficient contacts with the Dutch legal order and it would be unacceptable to expect the plaintiff to bring his case before a foreign forum.<sup>82</sup>

One of the major advantages<sup>83</sup> for plaintiffs in foreign direct liability cases before E.U. Member State courts is that the mandatory nature of the Brussels I regime precludes any decline of jurisdiction by an E.U. Member State court in favor of a more convenient

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78. For a very brief overview of English rules of jurisdiction in the context of foreign direct liability cases and further references, see JOSEPH, *supra* note 1, at 113-22.

79. U.S. lawyers would probably consider some of these rules exorbitant, because although they are exercised validly under the jurisdictional rules of the Member State concerned, they can appear unreasonable to non-nationals because of the grounds used to justify jurisdiction. See, e.g., Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgements: The Brussels System as an Impetus for the United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 58-62 (1993). See also Stephens, *supra* note 7, at 23-24.

80. Wetboek van Burgerlijke Rechtsvordering [Rv] art. 9(b)-(c) (Neth.).

81. The access to justice requirement of article 6 of the European Convention on Human Rights (ECHR), *infra* note 91, partly inspired this provision. See Tweede Kamer, Kamerstuk 1999-2000, 26855, nr. 3, Doc. KST41282, at 41-43 (Dutch legislative history of Rv art. 9) (in Dutch), available at <http://parlis.nl/pdf/kamerstukken/KST41282.pdf>.

82. See Tweede Kamer, Kamerstuk 1999-2000, 26855, nr. 3, Doc. KST41282, at 41-43. One example is when the plaintiff does not have access to a neutral judicial process in the foreign country because of discriminatory practices there. *Id.* The absence of an adequate or neutral forum in the host country, which is usually a developing country, is an argument often advanced in foreign direct liability cases in an attempt to fend off motions for dismissal on grounds of *forum non conveniens*. See, e.g., Presbyterian Church of Sudan v. Talisman Indus., 244 F. Supp. 2d 289, 335-36 (S.D.N.Y. 2003).

83. Another advantage is that the Brussels I regime, as opposed to ATCA, does not impose any restrictions on the nationality of the claimant. Whereas ATCA provides only aliens an opportunity to bring their foreign direct liability cases before U.S. federal judges, the Brussels I regime applies irrespective of the claimant's nationality. See Brussels I Regulation, *supra* note 40, §§ 1-2 (containing "general provisions" and rules on "special jurisdiction," respectively, that refer only to defendants). In reality this advantage does not seem overly significant in the context of foreign direct liability cases, however, as the claimants will usually be victims from developing countries outside the European Union. See De Schutter, *supra* note 41, at 266-67.

forum,<sup>84</sup> as may occur in common law courts on the basis of the doctrine of *forum non conveniens*.<sup>85</sup> Considering the fact that this doctrine has been a major impediment in virtually all ATCA cases,<sup>86</sup> and even more so in the ATCA-like civil claims on the basis of ordinary tort law brought in various common-law jurisdictions,<sup>87</sup> this is an important advantage. The same does not follow for foreign direct liability cases against defendants not domiciled within the European Union, however, as they fall outside the scope of the Brussels I regime. Still, the *forum non conveniens* doctrine, at least in civil and commercial cases, is generally associated with common-law jurisdictions,<sup>88</sup> so the United Kingdom and the Republic of Ireland are some of the only Member States in which this doctrine may still hamper foreign direct liability cases against non-E.U. defendants.<sup>89</sup>

One can conclude that the jurisdiction E.U. Member State courts can exercise in European foreign direct liability cases on the basis of the Brussels I regime is not as broad as the jurisdiction that U.S. federal courts can exercise in ATCA cases. The fact that the Brussels I Regulation does not allow for a defense by the European defendant corporation on the basis of the *forum non conveniens* doctrine, however, compensates for the narrower grant of jurisdiction to a certain extent. The jurisdictional rules of the Member States themselves decide, in the end, whether and to what extent the Member State courts can exercise jurisdiction over foreign direct liability cases against foreign defendants (i.e., those not domiciled within the European Union). These rules vary from Member State to Member State, and may provide, depending on the circum-

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84. C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, ¶¶ 37-46.

85. See FAFO, A COMPARATIVE SURVEY OF PRIVATE SECTOR LIABILITY FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW IN NATIONAL JURISDICTIONS: UNITED KINGDOM 32 (2004), available at <http://www.fafo.no/liabilities/UK%20Survey%20standardized%20Nov%202004.pdf> ("The doctrine of *forum no conveniens* [sic] was developed in the English (and related) courts partly in response to the wide scope of exorbitant jurisdiction, which led to conflicts of jurisdictions with courts in different countries trying the same or substantially similar issues in parallel. The test essentially applied by the English court is to decide which of competing jurisdiction [sic] is 'more appropriate' for the prompt and efficient resolution of the case.").

86. For an elaborate discussion of this doctrine and its role in the context of foreign direct liability cases, and for further references, see JOSEPH, *supra* note 1, at 87-99, 115-19.

87. See *id.* at 66, 115-19, 123-24, 126-27.

88. See F. Ibili, *At Last: The EC Court of Justice on Forum Non Conveniens*, 53 NETH. INT'L L. REV. 127, 127 (2006).

89. Some European Member States like Cyprus and Malta might also apply the *forum non conveniens* doctrine, despite not having a common law system, strictly speaking. See *infra* note 108.

stances of the specific case, jurisdiction that is narrower than, similar to, or even broader than that exercised by U.S. federal courts.

### C. Access to Justice: Article 6 of the ECHR

In *Lubbe v. Cape Plc.*,<sup>90</sup> a foreign direct liability case in the United Kingdom between 1997 and 2000, the plaintiffs relied on, *inter alia*, Article 6 of the European Convention on Human Rights (ECHR)<sup>91</sup> to fend off a motion to stay the procedure on grounds of *forum non conveniens*.<sup>92</sup> They contended that a stay of the proceedings in favor of South African courts would violate their rights guaranteed by Article 6 of the ECHR, “since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant.”<sup>93</sup> Even though the court dealt only cursorily with this appeal to Article 6,<sup>94</sup> its use shows that this provision may play a role in foreign direct liability cases before courts in Europe.

Courts have long interpreted the right to a fair trial protected by Article 6 of the ECHR<sup>95</sup> to include a right of access to a court.<sup>96</sup> Thus, Article 6 does not just pertain to legal procedures that are before or pending in courts in Europe, but also to those in which access to such a court is sought. Article 6 places an obligation on the ECHR Member States to ensure (civil) litigants a right of access to their courts that is both effective and practical, but it leaves the

90. *Lubbe v. Cape Plc.* [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.).

91. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

92. *Lubbe*, [2000] 1 W.L.R. at 1561.

93. *Id.*

94. *See id.*

95. Article 6, paragraph 1 of the ECHR, *supra* note 91, reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

96. In *Golder v. United Kingdom*, the European Court of Human Rights concluded that:

Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 § 1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.

18 Eur. Ct. H.R. (ser. A) para. 36, at 18 (1975).

Member States a margin of appreciation as to how they achieve this result. Not all limitations on the right are automatically incompatible with the Convention.<sup>97</sup> According to the European Court of Human Rights, an effective and practical right of access to court may require the forum state to take positive action in certain circumstances, for example, by providing free legal assistance to litigants in civil cases.<sup>98</sup>

As discussed above, access to justice in foreign direct liability cases often can be obtained only by providing the host-country victims with access to courts in the developed home countries of multinational corporations, so the guarantees in Article 6 of the ECHR may be of critical importance in this context. The Convention has a limited territorial reach, however, which raises the question of whether claimants can invoke ECHR Article 6 in foreign direct liability cases.<sup>99</sup> In *Markovic v. Italy*,<sup>100</sup> the European Court of Human Rights stated that “[i]f civil proceedings are brought in the domestic courts, the State is required by Art. 1 of the Convention to secure in those proceedings respect for the rights protected by Art. 6.”<sup>101</sup> According to the Court, if the domestic law of the forum country recognizes a right to bring an action and the claim falls within the broad ambit of Article 6, the mere fact that a civil case is brought before a court in an ECHR Member State establishes a jurisdictional link which gives rise to the applicability of Article 6.<sup>102</sup>

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97. See *id.* para. 38, at 18-19 (recognizing that “there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication”).

98. See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 15 (1979) (“Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”).

99. Can claimants be said to fall within the jurisdiction of the European home country in which they wish to instigate their claim and thus within the ambit of the ECHR? See ECHR, *supra* note 91, art. 1 (providing that the Convention has a limited territorial reach, insofar as it obliges its Member States to secure the rights and freedoms as contained in the Convention to “everyone within their jurisdiction”—i.e., to those who are located on their territory).

100. App. No. 1398/03, 44 Eur. H.R. Rep. 1045 (2007) (Eur. Ct. H.R.).

101. *Id.* at 1066.

102. *Id.* According to the Court:

[e]verything depends on the rights which may be claimed under the law of the State concerned. If the domestic law recognises a right to bring an action and if the right claimed is one which *prima facie* possesses the characteristics required by Art. 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level.

In most cases where a claimant brings a foreign direct liability case against the parent company of a multinational corporation before the courts of the corporation's home country on the basis of ordinary tort law, the case will meet these threshold requirements.<sup>103</sup> This means that in such cases, the host country applicants can rely on ECHR Article 6 if certain features of the home country's legal system, such as an excessively complicated civil procedure, exceedingly high litigation costs, or unavailability of affordable legal assistance or legal aid,<sup>104</sup> seriously hamper their access to justice.

ECHR Article 6 might, in some respects, provide European foreign direct liability cases with certain advantages over their U.S. counterparts, or may at least compensate for the absence in Europe of a litigation culture as favorable as that of the United States.<sup>105</sup> For now, however, the extent of the role ECHR Article 6 may play in these cases remains speculative, and will have to be clarified in future foreign direct liability cases before courts in Europe.

#### D. *Cause of Action: The Common Law / Civil Law and International Law / Domestic Tort Law Dichotomies*

Apart from attempts by several groups of European-private-law scholars to distinguish a European common core of tort law and draw up a common frame of reference,<sup>106</sup> the field of material tort

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*Id.* For a more elaborate discussion of these matters, including the interesting question of whether ECHR article 6 could require European courts to provide a forum even when the case falls outside the scope of the Brussels I regime, see generally Aukje A.H. van Hoek, *Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers*, in *SOCIAL RESPONSIBILITY IN LABOUR RELATIONS: EUROPEAN AND COMPARATIVE PERSPECTIVES* (Y. Konijn et al. eds., 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1113843](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113843).

103. In less clear-cut cases, however, this may not always be true—for example, where a claim against a (non-E.U.) host country subsidiary is brought before the courts of a European home country, or where the claim is based on a cause of action that is foreign to the law of the forum.

104. For an elaborate discussion (in Dutch) of the guarantees provided by ECHR article 6 and its implied right of access to a court, see PETER SMITS, *ARTIKEL 6 EVRM EN DE CIVIELE PROCEDURE [ARTICLE 6 ECHR AND CIVIL PROCEDURE]* 31-93 (2008).

105. Although the text of article 14 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm>, is similar to that of ECHR article 6, it does not involve a similar right of access to a court in civil cases. See SMITS, *supra* note 104, at 34.

106. Several international groups of academics have attempted to expose a European common core of (contractual and non-contractual) liability law. See European Group on Tort Law, <http://www.egtl.org> (last visited May 18, 2009) ("The group meets regularly to

law generally remains, at least for now, outside the scope of the European Union's mandate and, therefore, its regulatory efforts.<sup>107</sup> This means that the specific basis in tort upon which claimants may bring a foreign direct liability case differs by Member State. A general distinction, however, can be drawn here between European common-law systems on one hand,<sup>108</sup> and European civil-law systems on the other. As mentioned above, a claim is generally not actionable within the common-law tort system if there is no specific cause of action that the claim can be based upon. This system is very different from the continental European systems of tort (delict), which are based on Grotius's natural law concept that *every* act that is contrary to that which people in general, or considering their special qualities, ought to do or ought not to do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage. The ensuing generic provisions on tort (delict) contrast sharply with the piecemeal approach of specific torts that characterizes the common-law tort system.<sup>109</sup>

Due to this distinction, the U.S. debate on cause of action is less relevant for the continental European civil-law systems than it is for the U.S. and U.K. common-law systems. The same holds true for the distinction between civil lawsuits on the basis of ATCA and civil lawsuits on the basis of "ordinary" tort law. As a result of the more generic tort provisions that civil-law tort systems feature, a claim on the basis of an alleged violation of international law by the parent company of a multinational corporation will most likely have a similar basis in law and the same legal consequences as a claim on the basis of negligence against the parent company. The question of

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discuss fundamental issues of tort law liability as well as recent developments and the future directions of the law of tort."); Study Group on a European Civil Code, <http://www.sgecc.net/pages/en/introduction/index.introduction.htm> (last visited May 18, 2009) ("Our aim is to produce a codified set of Principles of European Law for the law of obligations and core aspects of the law of property.").

107. Still, European law has a growing influence on the domestic systems of private law in the Member States. *See generally* DE INVLOED VAN HET EUROPESE RECHT OP HET NEDERLANDSE PRIVAATRECHT [The Influence of European Law on Dutch Private Law] (Arthur S. Hartkamp et al. eds., 2007) (in Dutch). One example of European legislation that has directly affected Member States' tort law systems is Council Directive 85/374/EEC, 1985 O.J. (L 210) 29 (on the "Approximation of Laws, Regulations and Administrative Provisions of the member States concerning Liability for Defective Products").

108. These include "England and Wales, Northern Ireland, [the Republic of Ireland], Cyprus, and (in some but not all respects) Malta" (although the latter two are not, strictly speaking, common law jurisdictions). Lord Mance, *The Common Law and Europe: Differences of Style or Substance and Do They Matter?*, Presidential Address at the Holdsworth Club 2 (Nov. 24, 1996), *available at* <http://www.law.bham.ac.uk/documents/holdsworth-address2007.pdf>.

109. *See* WILLEM J. ZWALVE, COMMON LAW & CIVIL LAW 411-27 (2008) (in Dutch).

whether and in what way a tort claim can be based on international law does remain important in civil-law countries, but the possibility of directly or indirectly applying international law in a civil suit is dependent not on the existence of specific causes of action, but on the way in which international law affects the domestic legal order of the country.<sup>110</sup>

The rules of customary international law that potentially are suitable for application in horizontal relations between citizens—or, in this context, between parent companies of multinational corporations and individuals or communities in host countries—is limited.<sup>111</sup> The fact that the last twenty years of ATCA cases have resulted in only a handful of rules of customary international law recognized by U.S. judges as capable of having effect between private parties readily demonstrates this limitation.<sup>112</sup> For example, U.S. federal courts have time and again found that rules of customary international environmental law are unfit to apply directly to individuals (including corporations).<sup>113</sup>

For this reason, foreign direct liability claims based on ordinary tort law are likely to involve complaints of negligent behavior by the multinational corporation's parent company, alleging that it owed individuals or communities in the host country a duty of care which it did not observe, resulting in personal, material, or environmental damage in that country.<sup>114</sup> Claimants have brought all of the foreign direct liability cases instigated before courts in

110. A more elaborate discussion of this matter goes beyond the scope of this article. By way of example, in the Netherlands a breach of certain rules of international law could, either directly (by constituting an act or omission violating a statutory duty) or indirectly (by constituting an act or omission violating a rule of unwritten law pertaining to proper social conduct), give rise to a claim in tort. See André Nollkaemper, *Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 265-81 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). See also LIESBETH ENNEKING, CORPORATE SOCIAL RESPONSIBILITY: TOT AAN DE GRENS EN NIET VERDER? 44-58 [CORPORATE SOCIAL RESPONSIBILITY: DOMESTIC OR TRANSBOUNDARY CONCEPT?] (2007) (in Dutch).

111. Generally, a norm of international law has to be specific, universal, and obligatory to qualify for application in this context. See De Schutter, *supra* note 41, at 274; JOSEPH, *supra* note 1, at 22-33.

112. See JOSEPH, *supra* note 1, at 26-28 (listing norms that have been accepted or rejected by U.S. courts).

113. See *id.* at 28-30. See also Roque Romero, *Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of a Right to a Healthy Environment*, 16 CTR. FOR ENERGY, PETROLEUM & MIN. LAW & POL'Y ONLINE J. 15 (2005), [http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16\\_7.pdf](http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16_7.pdf).

114. For a discussion of the role of negligence (and some other relevant tort principles) in U.S. tort cases that were not based on ATCA, see JOSEPH, *supra* note 1, at 65-74.

Europe to date on such grounds. In the *Cape Plc.* case, the main question of law was formulated as follows:

Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?<sup>115</sup>

The tenor of foreign direct liability cases based on ordinary tort law and those based upon ATCA is basically the same: a parent company of a multinational corporation can, under certain circumstances, on the basis of its knowledge of and influence on the operations of its subsidiaries or business partners in host countries, have direct responsibilities toward third parties in those host countries. The fact that the multinational corporation's activities in the host country, usually a developing country, are condoned by the often low regulatory standards in that country, does not relieve the parent company of these responsibilities, which may be based upon the higher standards of care applicable in the home country, usually a developed country,<sup>116</sup> or on standards derived from customary international law.

One of the major drawbacks of customary international law as a basis for foreign direct liability claims, apart from the scarcity of norms suitable for application in them, is that norms of international law, due to its traditional state-centered approach, usually require some form of state action, which is often difficult to prove.<sup>117</sup> The major advantage is the universal nature of the norm that allegedly has been breached. The universality of the norm results in an enhanced moral condemnation of the multinational corporation's actions,<sup>118</sup> and at the same time may attenuate any

115. *Lubbe v. Cape Plc.* [2000] 1 W.L.R. 1545, 1551 (H.L.) (appeal taken from Eng.) (internal quotations omitted).

116. See, e.g., Liesbeth Enneking, *The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation*, 16 EUR. REV. PRIVATE L. 283, 284-85 (2008) (referring to a recent incident where a London-based shipping company offloaded of 580 tons of petrochemical waste in the Ivory Coast and was sued in English courts).

117. See JOSEPH, *supra* note 1, at 33-47, 50-53.

118. As one judge in an ATCA case noted:

looking to domestic tort law to provide the cause of action mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the kind of wrongs meant to be addressed under the Alien Tort Claims Act: those perpetrated by *hosti humani generis* ('enemies of all human kind') in

infringement of the host country's sovereignty resulting from the possible extraterritorial nature of the claim.<sup>119</sup> Furthermore, it helps to overcome some of the disadvantages that arise as a result of the transboundary nature of a foreign direct liability claim, notably those arising from the differing domestic (legal) standards in the home and host country and choice of law issues.<sup>120</sup>

The feasibility of a European foreign direct liability case on the basis of customary international law depends on the way in which international law is incorporated into the domestic legal order of the Member State concerned. Feasibility of these cases in Europe, as in the United States, is limited by the small number of international norms that may be applied between private parties. Even if an international-law-based foreign direct liability claim is not feasible, however, plaintiffs may base their claim on ordinary domestic tort-law principles, such as negligence. From the few foreign direct liability cases plaintiffs have brought before courts in Europe to date, it seems that this approach is the more popular one. Whether a claim on the basis of negligence is in fact a viable option in a given foreign direct liability case depends on the circumstances of the case and the contents of the Member State's material rules of tort law.<sup>121</sup> The rules of tort/delict featured in continental European civil-law systems are somewhat more advantageous for foreign direct liability cases than their common-law counterparts,

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contravention of *jus cogens* (peremptory norms of human rights law). In this light, municipal tort law is an inadequate placeholder for such values.

Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995).

119. Various foreign direct liability cases have given rise to complaints by host countries of extraterritorial interference in their internal affairs as a result of the home country courts' willingness to try a case that may have more jurisdictional links to the host country than the home country. For example, the former South African government under President Mbeki protested the Apartheid litigation that is ongoing in the United States. See Letter from Penuell Madunda, Minister of Justice and Constitutional Development, Republic of South Africa, to Judge John Sprizzo (July 11, 2003), available at <http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf>; Letter from Nkosazana Dlamini Zuma, Minister of Foreign Affairs, Republic of South Africa to Colin L. Powell, Secretary of State, United States of America (May 4, 2002), available at <http://www.nftc.org/default/ussabc/DAE8515.pdf>. The present government under President Zuma, however, has recently indicated it supports the claims. See Christelle Terreblanche, *State Supports Apartheid-Era Victims*, CAPE TIMES (S. Afr.), Sept. 3, 2009, at 1, available at [http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=6&art\\_id=vn20090903035454378C708545](http://www.int.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20090903035454378C708545).

120. Cf. Stephens, *supra* note 7, at 32-33 (recognizing that in England, failure to prove at right to sue under customary international law results in a claim's much more unfavorable treatment as a "garden-variety municipal tort").

121. A discussion of these rules goes beyond the scope of this article. For an assessment of Dutch tort law in this respect, see ENNEKING, *supra* note 110, at 58-78.

due to their more generic nature, which allows more flexibility in stating a claim.

Both the rules of incorporation of international law into the domestic legal order and the rules of material tort law largely remain, for now, outside the scope of the Europe Union's regulatory reach, and may therefore vary between Member States. Despite some scholarly efforts, European harmonization or unification in these fields seems unlikely in the near future. However, the July 2007 adoption of the Rome II Regulation on the law applicable to noncontractual obligations,<sup>122</sup> which unifies the European choice of law rules in civil and commercial matters, recently brought the preliminary question of which law would be applicable to a foreign direct liability case before an E.U. Member State within the ambit of the European Union's regulatory activities.

### E. *Choice of law: the Rome II Regulation*

Whereas the choice of law question previously played a role of limited importance in ATCA case law,<sup>123</sup> major controversies currently exist over which law should be used to interpret certain legal terms, such as "aiding and abetting."<sup>124</sup> Scholars have suggested various approaches, including the application of international law, federal common law, or the law of the host country.<sup>125</sup> According to Joseph, however:

The most important thing to note, regarding choice of law under the ATCA, is that courts have not applied foreign laws so as to frustrate the purpose of ATCA, by for example applying a foreign law that grants immunity to the perpetrator of a gross human rights abuse, or that imposes a punishment that plainly fails to reflect the gravity of the offence.<sup>126</sup>

In foreign direct liability cases before U.S. state courts on the basis of ordinary tort law, choice of law matters traditionally have played a more pivotal role.<sup>127</sup> Courts determine the applicable law according to the choice of law rules that have been adopted by the state in which the case is brought. Although the approaches

122. Council Regulation 864/2007, 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II Regulation].

123. See De Schutter, *supra* note 41, at 272-74. See also JOSEPH, *supra* note 1, at 55 (observing that courts applying ATCA "have not applied foreign laws so as to frustrate the purpose of ATCA").

124. See generally Cassel, *supra* note 64.

125. See B. STEPHENS & M. RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION 119 (1996); JOSEPH, *supra* note 1, at 54-55.

126. JOSEPH, *supra* note 1, at 55.

127. *Id.* at 74-76.

adopted by different states vary widely, most states in the United States today favor a flexible, policy-oriented approach over a more rigid, rule-based one.<sup>128</sup>

The same is not true of the Rome II Regulation, which, pursuant to its primary aim of predictability in the outcome of litigation and certainty as to the applicable law,<sup>129</sup> does not leave the courts of the E.U. Member States much leeway in determining the law that is applicable to a transboundary tort case. The Regulation is binding and directly applicable to transnational civil and commercial cases involving noncontractual obligations that are brought before courts of E.U. Member States.<sup>130</sup> It entered into force on August 19, 2007, and has applied in the courts of E.U. Member States since January 2009 to cases involving events giving rise to damages that occurred after its entry into force.<sup>131</sup>

The Regulation's general rule provides:

Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.<sup>132</sup>

The scope of the law applicable to a case includes, *inter alia*, determination of the basis and extent of liability, possible grounds for exemption from liability, and the existence, nature, and assessment of the damage claimed.<sup>133</sup> There are only a few well-defined exceptions to this general rule.<sup>134</sup> The most important ones in the context of foreign direct liability cases are the special rule on environmental damage<sup>135</sup> and the exceptions pertaining to overriding

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128. This is of course a generalization. For an elaborate and nuanced discussion of this widely debated matter, see generally S.C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: PAST, PRESENT AND FUTURE* (2006).

129. Rome II Regulation, *supra* note 122, recital 6, at 40.

130. *Id.* art. 1, at 43.

131. See Jochen Glöckner, *Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung*, 29 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 121 (2009) (in German), and Alexander Bücken, *Intertemporaler Anwendungsbereich der Rom II-VO*, 29 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 125 (2009) (in German), for discussions about the lack of clarity concerning the Regulation's entry into force, date of application and application in time.

132. Rome II Regulation, *supra* note 122, art. 4. ¶ 1, at 44.

133. *Id.* art. 15, at 46.

134. For an elaborate and very informative discussion of the Rome II Regulation and its pros and cons, see generally Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173 (2008).

135. See Rome II Regulation, *supra* note 122, art. 7, at 45.

mandatory provisions,<sup>136</sup> rules of safety and conduct,<sup>137</sup> and the public policy of the forum.<sup>138</sup>

According to the Rome II Regulation's general rule, the tort law of the developing host country will apply to future European foreign direct liability claims, as that is where the damage typically arises in such cases. When the host-country victims have sustained damage in the form of, or as a result of, environmental damage, however, they may choose to base their foreign direct liability claim on the law of the country in which the event giving rise to the damage occurred.<sup>139</sup> As mentioned above, foreign direct liability cases on the basis of negligence often claim that the tortious act by the multinational corporation's parent company took place in the home country, because the parent company's boardroom is where the decisions that eventually led to damage were made, or where the parent company failed to take actions to prevent such damage from occurring.<sup>140</sup> Due to the Rome II Regulation's special rule on environmental damage, these claims may be brought under the tort law of the developed home country when the resulting damage is environmental. In all other cases, however, the law governing the foreign direct liability case will be the law of the host country.

The governing law may be a crucial issue in foreign direct liability cases, as there may be major differences in the outcome when they are governed by the developed home country's tort law as opposed to the developing host country's tort law. Important factors like the standards of care, regulatory standards, and damage awards usually will be much higher in the home country than in the host country.<sup>141</sup> Or, as a counselor in the recent *Trafigura* case stated:

Although the events took place thousands of miles away it is right that this British company is made to account for its actions by the British courts and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way as they would act in Abergavenny.<sup>142</sup>

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136. See *id.* art. 16, at 46.

137. See *id.* art. 17, at 46.

138. See *id.* art. 26, at 47.

139. See *id.* art. 7; *id.* recital 24 (defining environmental damage as "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms").

140. See JOSEPH, *supra* note 1, at 134-38.

141. Enneking, *supra* note 116, at 292.

142. See Robert Verkaik, *British firm faces £100m claim for 'dumping toxic waste,'* INDEP. (London), Nov. 10, 2006, available at <http://www.independent.co.uk/news/uk/crime/>

Apart from lower liability standards, in many cases the liability regime as a whole in the developing host country will be unfit to deal effectively with cases as complicated as foreign direct liability claims.<sup>143</sup> For example in the *Bhopal* case,<sup>144</sup> which arose from the horrific Bhopal disaster in India and was one of the earliest U.S. foreign direct liability cases on the basis of ordinary tort law, plaintiffs and amicus curiae argued that “the substantive tort law of India is not sufficiently developed to accommodate the Bhopal claims.”<sup>145</sup>

The European Commission’s explanatory memorandum to its original Rome II proposal<sup>146</sup> shows that potential inequities caused by diverging legal standards in different countries was one of the reasons behind the insertion of the special rule on environmental damage.<sup>147</sup> Such considerations, however, apparently were not considered as urgent outside the environmental context.<sup>148</sup> The choice for a general rule of applicability of the law of the *Erfolgsort* (place where the damage occurs) is justified by the concern for certainty in the law, as well as the assertion that “the modern concept of the law of civil liability . . . is no longer . . . oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates.”<sup>149</sup>

On the basis of this assertion, the Commission has chosen for a general rule that seems to effectively thwart any aspirations toward regulating tortfeasor behavior (deterrence) that tort law may have in transboundary tort cases.<sup>150</sup> This means that any aim that for-

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british-firm-faces-163100m-claim-for-dumping-toxic-waste-423730.html. For more information on this case, see *supra* note 5 and Enneking, *supra* note 116, at 284-285.

143. See Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 409 (2002); ENNEKING, *supra* note 110, at 4-5.

144. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842 (S.D.N.Y. 1986).

145. *Id.* at 849. See also Jamie Cassels, *The Uncertain Promise of Lessons from Bhopal*, 29 OSGOODE HALL L.J. 1 (1991).

146. Because the “European Regulations taking effect under the Amsterdam Treaty do not come with an explanatory memorandum,” it is difficult to fill in the gaps between the explanatory memorandum attached to the original Commission proposal (which in the case of Rome II was presented in 2003) and the end product (the Regulation was only adopted in 2007). See Enneking, *supra* note 116, at 299.

147. See *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”)*, at 19-20, COM (2003) 427 final (July 22, 2003) [hereinafter *Explanatory Memorandum for Rome II Regulation*].

148. See *id.* at 11-12 (a general rule giving victims the option of choosing the law most favorable “would go beyond the victim’s legitimate expectations”).

149. *Id.* at 12.

150. See also Symeonides, *supra* note 134, at 15-20 (criticizing the notion that the compensation function now dominates as well as the Regulation as a whole).

eign direct liability cases may have of increasing corporate accountability of multinational corporations by holding them liable for their harmful conduct in host countries, can only really be achieved in those cases where that conduct happens to result in environmental harm.<sup>151</sup>

As mentioned above, there are various exceptions to the Rome II Regulation's general rule, other than the special rule on environmental damage, that are also relevant to foreign direct liability cases. These exceptions compel a court to apply overriding mandatory provisions of the forum, to take into account rules of conduct and safety of the place where the tortious act took place, or to refuse application of a provision of the applicable law if its application would run counter to the public policy of the forum. Between them, these exceptions may make the general rule more flexible for foreign direct liability cases in which the application of the law of the host country would unduly prejudice the host-country victims. In keeping with the Rome II Regulation's primary aims of legal certainty and predictability, however, these exceptions probably will remain just that: exceptions.<sup>152</sup>

Compared to the U.S. ATCA cases, where choice of law issues do not frustrate the feasibility of foreign direct liability cases, the Rome II Regulation's choice of law regime seems less favorable. It is only with respect to cases that involve environmental damage that the Rome II Regulation takes into account the possibility of differing legal standards between countries and the victim's best interests. In all other cases, the Regulation leads almost automatically to the application of the often less favorable host-country tort law.

Choice of law issues will always play a pivotal role in European foreign direct liability cases, because in the absence of a special statute like ATCA, they necessarily are based on ordinary domestic tort rules. For now, foreign direct liability cases that arise out of tortious actions that took place before the Regulation's entry into force remain governed by the different domestic choice of law rules of the individual Member States.<sup>153</sup> Whether the Rome II Regulation will turn out to be an improvement compared to the

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151. See Enneking, *supra* note 116, at 307 (criticizing the Regulation's impact on the feasibility of foreign direct liability cases before E.U. Member State courts).

152. For a more elaborate discussion of the potential role of these exceptions in the context of foreign direct liability cases, see generally van Hoek, *supra* note 102. See also Enneking, *supra* note 116, at 303-07.

153. The approaches of the Member States' domestic laws diverge when it comes to the question of choice of law in cross-border tort cases. See Enneking, *supra* note 116, at 296.

domestic choice of law regimes when it comes to the feasibility of European foreign direct liability cases remains to be seen.

F. *Procedural and Practical Matters: Litigation Culture, Contingency Fees, Legal Aid, Prescription Periods, etc.*

As mentioned above, the U.S. litigation culture and some of its procedural rules are uniquely favorable for foreign direct liability cases.<sup>154</sup> They do not translate easily to the European context, particularly because most of these matters lie outside the European Union's regulatory ambit and vary from Member State to Member State. One can make some general observations, however.

The United States has a unique litigation culture of public interest and impact litigation. Civil litigation is used as a way to promote social reform and influence future policies, as well as to redress past civil wrongs and prevent future ones from occurring. A framework of financial incentives and public-interest lawyers has developed to sustain this litigation culture.<sup>155</sup>

Europe, on the contrary, has not seen a similar development. The European Commission recently stated that, in its view, the law of civil liability in Europe is no longer oriented toward influencing socially undesirable behavior, but rather toward compensation.<sup>156</sup> According to some, this assertion is in keeping with the civil-law tradition of the continental European systems, which traditionally view the protection of the public interest as a task for criminal law, and perceive civil law as an unfit tool for prevention or punishment of offenses.<sup>157</sup> At the same time, however, the European legal society is increasingly influenced by modern ideas on the functions of tort law as promulgated for instance by law and economics scholars.<sup>158</sup>

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154. See Stephens, *supra* note 7, at 6-17.

155. *Id.* at 13.

156. See *supra* notes 147-149 and accompanying text.

157. See Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 24 DEF. COUNS. J. 320, 322 (2007) ("It is not in the nature of Civil Law to prevent or punish offenses, unlike Criminal Law which ensures the protection of the public interest.").

158. There are many publications on this topic. See, e.g., John Murphy & Frank Stephen, *Partial Blindness and Alternative Insights in the Ascription of Negligence Liability*, in *ESSAYS IN THE LAW AND ECONOMICS OF REGULATION: IN HONOUR OF ANTHONY OGDEN* 239 (Michael Faure & Frank Stephen, eds., 2008); Willem H. van Boom, *Compensating and Preventing Damage: Is There Any Future Left for Tort Law?*, in *1 FESTSKRIFT TILL BILL W. DUFWA: ESSAYS ON TORT, INSURANCE LAW AND SOCIETY IN HONOR OF BILL W. DUFWA* 287 (Hugo Tiberg & Bill W. Dufwa eds., 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=942710](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942710).

Still, European civil society seems to prefer the political arena over the legal arena when it comes to public debates such as the one on corporate social responsibility,<sup>159</sup> and there are only a few European law firms that specialize in public-interest cases.<sup>160</sup> Circumstances like these likely have contributed to the relatively slow emergence of the trend of foreign direct liability cases in Europe.

Circumstances that have had a conducive effect on foreign direct liability cases in the United States include the fact that unsuccessful litigants are not required to pay the legal fees of their victorious opponents, the potential for plaintiffs to hire a lawyer on a contingency-fee basis, the potential to claim punitive damages, the fact that a U.S. court can render a default judgment over an absent defendant, and plaintiff-friendly rules of discovery.<sup>161</sup> Other factors that may have an effect on the viability of foreign direct liability cases are statutes of limitations, the possibility to bring class actions, and the availability of legal aid.<sup>162</sup>

Despite the European Union's efforts to harmonize its Member States' laws of civil procedure,<sup>163</sup> of which both the Brussels I and the Rome II Regulations are a result, most of these more procedural and practical issues remain outside the scope of the European Union's sphere of influence and are regulated by the domestic

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159. European NGOs, as compared to their American counterparts, tend more to address CSR issues through dialogue with businesses and governments than through litigation. European NGOs tend to employ a more collaborative approach, whereas American NGOs employ a more adversarial one. See Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47, 68 (2006). One of the first European NGOs to actually be involved in a foreign direct liability claim is Friends of the Earth Netherlands (Milieudefensie), which has, together with a number of Nigerian farmers and fishermen, brought a claim against Shell before Dutch courts. Milieudefensie has announced that it is planning to bring two more claims against Shell in the near future. For more information on these claims, see Milieudefensie, Factsheet: Shell Nigeria to appear before the Dutch Court, <http://www.milieudefensie.nl/english/publications/Factsheet%20Shell%20Nigeria%20before%20Dutch%20Court.pdf> (last visited Nov. 19, 2009), and *supra* note 5 and accompanying text.

160. One example of a European law firm that specializes in foreign direct liability cases is the English firm Leigh, Day & Co, which has been involved in most of the European foreign direct liability cases. See International Claims – Leigh Day & Co, <http://www.leighday.co.uk/our-expertise/international-claims> (last visited May 18, 2009). Note, however, that references to the recent *Trafigura* case, in which the firm was also involved, have been removed from the site following settlement of that case in September 2009.

161. See Stephens, *supra* note 7, at 14-16. See also JOSEPH, *supra* note 1, at 16-17.

162. See Enneking, *supra* note 116, at 291-92.

163. See generally Mirjam Freudenthal, *The Future of European Civil Procedure*, 7.5 ELECTRONIC J. COMP. L. (2003), available at <http://www.ejcl.org/75/art75-6.html>.

rules and practices in the various Member States.<sup>164</sup> In many cases they vary from Member State to Member State, as is true for the rules and practices on attorneys' fees<sup>165</sup> and legal aid.<sup>166</sup> Sometimes, the Member States' practices are more uniform, as is the case with the availability (or, rather, the unavailability) of punitive damages.<sup>167</sup>

Foreign direct liability cases generally are characterized by inequality of arms in the sense that plaintiffs are often marginalized individuals or communities from developing host countries, while defendants are rich and powerful corporate conglomerates operating out of developed home countries. These circumstances may prove decisive for the host-country victims' prospects of bringing their case before a home-country court. The feasibility of their foreign direct liability claim thus depends not just on European rules and regulations, but also to a large extent on the individual Member State's rules and regulations that may affect the case.

The applicability of ECHR Article 6, as discussed above, may play a harmonizing role here because judgments of the European Court of Human Rights on Article 6 may compel all European states alike to do away with certain procedural barriers to court access. The same holds true for the Ruggie Report, with its recommendations on access to remedies for host-country victims of corporate human-rights abuses. Although it is not as legally compelling as a judgment of the European Court of Human Rights, its potential moral sway cannot be underestimated, and it is

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164. Note, however, that the Rome II Regulation refers to punitive damages. See Rome II Regulation, *supra* note 122, recital 32, at 42 ("In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.").

165. For a report (in Dutch, but with an English summary) on European practices regarding attorneys' fees, see MICHAEL G. FAURE, TON HARTLIEF, NIELS PHILIPSEN, RESULTAATGERELATEERDE BELONINGSSYSTEMEN VOOR ADVOCATEN: EEN VERGELIJKENDE BESCHRIJVING VAN BELONINGSSYSTEMEN VOOR ADVOCATEN IN EEN AANTAL LANDEN VAN DE EUROPESE UNIE EN HONG KONG [RESULT-RELATED REMUNERATION SYSTEMS FOR LAWYERS: A COMPARATIVE LAW DESCRIPTION OF REMUNERATION SYSTEMS FOR LAWYERS IN A NUMBER OF E.U. MEMBER STATES AND IN HONG KONG] (2006), available at <http://www.wodc.nl/onderzoeksdatabase/internationale-vergelijking-beloningsystemen-advocatuur.aspx>.

166. See European Commission – European Judicial Network – Legal Aid – General Information, [http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm) (last visited May 18, 2009) (providing an overview of legal aid practices by Member State).

167. For a discussion of European practices that deviate from the general principle of *restitutio in integrum* (or full compensation of damages), see generally Rouhette, *supra* note 157.

bound to meet with response at the E.U. level, at the level of the European Member States individually, or both. How this response will take shape and whether it will significantly change the European legal climate for foreign direct liability cases is bound to become clear in the near future when the results of the European study are published and meet with response from European policymakers.<sup>168</sup>

#### IV. DISCUSSION

ATCA has formed the basis of a significant trend in the United States toward civil lawsuits against parent companies of multinational corporations brought by individuals and communities from developing host countries that have suffered damage as a result of the multinational corporations' activities there. Are similar so-called foreign direct liability cases feasible outside of the United States? Obviously, any attempt to translate literally the practice of foreign direct liability cases on the basis of ATCA to other legal systems would be in vain. But what are the chances of success for similar claims on the basis of ordinary tort law?

This Article aims to determine the feasibility of foreign direct liability cases before European Member State courts, and considers the current European political and legal climate. In the political arena, the debate about the desirability of foreign direct liability cases has in the past attracted far less attention in Europe than it has in the United States. Although there was some awareness among European politicians of the potential for foreign direct liability cases to promote socially responsible practices by multinational corporations, this awareness did not lead to any conscious policy choices at the E.U. level. At the same time, however, despite a perceived tendency toward collaborative approaches within the European corporate-social-responsibility field, the foreign direct liability cases brought before courts in Europe did not attract strong resistance or condemnation in any form. This lack of debate on foreign direct liability cases within Europe can probably be attributed to the relatively small number of European foreign direct liability cases so far, and the fact that none of these cases have come to a judgment on the merits.

Much has changed, however, since the publication of John Ruggie's "Protect, Respect and Remedy" framework in 2008. The significance of this report lies in the fact that it provides a clear, well-

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168. See *supra* notes 47-49 and accompanying text.

structured, substantive treatment of issues in the field of business and human rights, in a politically sensitive manner, by a well-known and respected authority on the subject. The report has managed to build a bridge between the various sides to the discussion and as such has also had the effect of lifting the E.U. debate on CSR to a higher level.

At the same time, the report's emphasis on access to remedies to host-country victims of corporate human-rights abuses has put the issue of the feasibility of European foreign direct liability cases high on the European agenda. By commissioning a study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union, the European Commission has clearly shown its intent to further operationalize Ruggie's policy framework for business and human rights through the European legal framework.

On the basis of the current European legal framework, bringing a foreign direct liability case before a court in Europe is unproblematic as long as the claimant brings it against an arm of the multinational corporation—usually the parent company—domiciled in one of the E.U. Member States. In those cases, the *forum non conveniens* defense will not be available to the defendant company. When claimants bring a European foreign direct liability case against a company not domiciled in the European Union, its feasibility depends on the jurisdictional rules of the Member State where the case is brought. Those rules are generally more restrictive than those applicable in ATCA cases but in exceptional cases may prove more lenient. In both instances, Article 6 of the ECHR might provide claimants additional guarantees when their real and effective right of access to a court is in question.

Although none of the European states have a statute like ATCA that specifically caters to foreign direct liability cases, ordinary tort law provides a suitable basis for these cases in principle. The generic provisions on tort/delict of the continental European legal systems benefit claimants in foreign direct liability cases because they do not require claimants to base their claims on specific causes of action. Any act, contrary to that which the parent company of the multinational corporation, considering its special qualities, ought to have done or ought not to have done and that results in damage, potentially gives rise to an obligation to compensate that damage.

One drawback of the use of ordinary tort law as the basis for a foreign direct liability claim, however, is that it does not generate

the level of moral condemnation that a similar case on the basis of international law perhaps would. Another drawback is the fact that it raises choice of law questions that would not arise in a foreign direct liability claim based on ATCA. Unless the claim involves environmental damage, the law of the developing host country, not that of the developed home country, is likely to apply. This is often not beneficial to host-country victims, as behavioral standards in the host country are usually lower than those in the home country. At the same time, the likelihood that the law of the developing host country applies hampers the potential use by policymakers in the European Member States of tort law as a mechanism to regulate the conduct of multinational corporations abroad.

For this reason, future European foreign direct liability cases will be more likely to come in the shape of claims for environmental damage in the host country as a result of actions or inactions by the home-country parent company. This will distinguish them from ATCA cases, which claimants typically bring based on a narrow range of international human-rights violations and which have thus far not been successful in claims for environmental damage. In environmental cases, European foreign direct liability cases may provide an interesting alternative to ATCA cases. The same may be true for cases in which the doctrine of *forum non conveniens* proves to be an obstacle in U.S. courts, and those in which the multinational corporation does not have any ties to the United States (although this will be rare).

Practical circumstances and procedural rules, such as impossibility of class actions, unavailability of legal aid, or a ban on contingency-fee arrangements, may create barriers to successful pursuit of foreign direct liability cases before courts in the European Member States. Most of these practical circumstances and procedural rules still are determined at the domestic level, so the feasibility of current and future European foreign direct liability cases still depends on the Member State in which a case is brought and its willingness to remove such barriers. Where the barriers amount to a denial of the claimants' right of access to a court, however, ECHR Article 6 may provide a way around them. In the end, whether and to what extent existing barriers seriously impair the successful pursuit of a foreign direct liability case will depend on the specific circumstances of each case.

It will be up to the protagonists of foreign direct liability cases to persuade policy makers at the E.U. and Member State level to remove existing barriers to access to justice for developing host-

country victims, and to refrain from imposing new ones. They will have to focus not only on the ongoing debate about corporate social responsibility, but also on developments in the fields of civil law, private international law, and procedural law, as these may turn out to have a crucial effect on the feasibility of foreign direct liability cases. E.U. influence here may not be underestimated. Wherever the European Union promulgates new rules and regulations, Member States' discretionary powers are irretrievably narrowed, and derogation from those instruments by individual states is no longer an option once they are implemented. Vigilant door keeping may be necessary from those in favor of European foreign direct liability cases.

It seems, however, that policy makers at the E.U. level themselves have now also become aware of the concept of foreign direct liability, and of the way it interacts with E.U. policies and the European legal framework. The study commissioned by the European Commission will map the existing legal framework for human rights and environmental issues—both at the E.U. level and at the level of (some of) the individual Member States that applies to European companies operating outside the European Union. Best practices will be identified. The relevance of the ECHR in this context will come up for discussion, as well as murky legal concepts such as extraterritoriality and the corporate veil. Opportunities for cross-learning between the human-rights field and the environmental field—in which the European Union has traditionally been more active—will be considered.

All in all, the outcomes of this study are likely to shed ample light on all aspects of the feasibility of European foreign direct liability cases, as well as on related matters falling outside the scope of foreign direct liability, such as the responsibility of buyers for abuses taking place in the course of the production processes of their foreign suppliers. This in itself will be a valuable development, as it will enhance legal certainty for European companies operating in non-E.U. host countries, as well as for individuals from those host countries who are negatively affected by such operations.

Whether and to what extent the analysis of the existing legal framework will lead to actual changes in the framework applicable to European foreign direct liability cases remains to be seen. The strength of this and any subsequent initiatives at the E.U. level affecting the feasibility of European foreign direct liability cases lies in their broad-based approach, as they arise out of a process in

which all sides to the debate participate. At the same time, this may also turn out to be a weakness, as it bears the risk of unsatisfactory compromises. Questions are bound to arise with regard to the extent of the European Union's competences in the field of business and human rights, and with regard to the remaining leeway for individual Member States that may want to diverge from any line E.U. policy makers may set in this regard.

## V. CONCLUSION

Foreign direct liability cases are crossing the Atlantic and finding their way into courts in the European Member States, which may provide developing-host-country victims with increased access to justice in developed-home-country courts. Even though the laws and litigation culture of Europe are not as uniquely favorable to foreign direct liability cases as those of the United States, bringing such cases in European Member State courts is nonetheless currently feasible. European foreign direct liability cases will provide a useful and sometimes necessary alternative to their U.S. counterparts and may open the door to a cross-pollination that takes foreign direct liability cases on both continents a step further, benefiting those who bring them.

Whether the emerging European trend toward foreign direct liability cases eventually will develop into an instrument through which multinational corporations may be held accountable for their overseas transgressions depends on the willingness of European policy makers to endorse them. Whatever their outcome, the current developments at the E.U. level in this regard seem likely to be a start of the debate on the feasibility and desirability of European foreign direct liability cases, rather than its end. Even more fundamentally, though, the future role of European foreign direct liability cases depends on those willing to take up these cases and set a precedent. These may prove to be interesting times for foreign direct liability, on both sides of the Atlantic.