LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES IN THE EUROPEAN UNION: THE CHALLENGE OF JURISDICTION

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I. INTRODUCTION ........................................ 939

II. HOME-STATE REGULATION AT THE E.U. LEVEL: ARTICLE 2 OF THE BRUSSELS REGULATION ............. 944

III. HOME STATE REGULATION IN THE UNITED KINGDOM: NEGLIGENCE CLAIMS .......................... 949

IV. EXPLAINING THE FOCUS ON NEGLIGENCE CLAIMS: THE PRINCIPLE OF NONINTERVENTION .............. 951

V. THE ROLE OF INTERNATIONAL HUMAN-RIGHTS LAW IN LITIGATION AGAINST TRANSNATIONAL CORPORATIONS .......................... 955

VI. FORUM NON CONVENIENS .................................. 959

VII. FROM FORUM NON CONVENIENS TO FORUM CONVENIENS: EXPANDING THE JURISDICTIONAL BASIS ... 962

VIII. TORT CLAIMS IN TRANSNATIONAL CRIMINAL PROCEEDINGS IN EUROPE .......................... 966

IX. EUROPEAN CRIMINAL PROSECUTIONS FOR TRANSNATIONAL HUMAN-RIGHTS VIOLATIONS ........ 968

X. FROM TORT AND CRIMINAL LITIGATION TO INFORMAL CONCILIATION THROUGH THE OECD NATIONAL CONTACT POINTS: AN ATTEMPT AT A TRANSATLANTIC COMPARISON .......................................... 972

I. INTRODUCTION

It is well-known that a number of states, typically developing states, hardly regulate the activities of transnational corporations (TNCs). In some instances, they do so on purpose in order to attract foreign direct investment. In other instances, a regulatory

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vacuum arises because of a nonfunctioning or corrupt government. Either way, vulnerable populations may fall victim to the practices of TNCs. Because the host state fails to assume its regulatory responsibilities, and because no international court has jurisdiction over corporate abuses, it has been argued that the home state of the TNC, typically (but not always) a Western state, should fill the regulatory vacuum (“home State regulation”). Because Western states have failed to adopt specific legislation regulating the overseas activities of their TNCs, victims’ hopes have converged around corporate litigation in Western courts on the basis of general principles of tort law. Specifically in the United States since the 1990s, victims and their representatives have filed a considerable number of tort claims against U.S. TNCs under the Alien Tort Claims Act (ATCA), pursuant to which “[t]he district courts shall have original jurisdiction of any civil action by an alien for a

1. The International Criminal Court, pursuant to Article 25 of the Rome Statute, only has jurisdiction over natural persons. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The establishment of an International Civil Court has been advocated, but no steps toward that goal have been taken so far. See generally Mark P. Gibney, On the Need for an International Civil Court, 26 Fletcher F. World Aff. 47 (2002) (urging the need for an international civil court).


3. A number of bills to that effect have been introduced in the Parliament of Australia, but no bill has yet materialized. See Corporate Code of Conduct Bill, 2000, c. 4 (Austl.) (stating that the proposed act applies to any company outside Australia that employs or engages the services of 100 or more persons, and which “is (a) a trading or financial corporation formed within the limits of the Commonwealth; or (b) a holding company of such a corporation; or (c) a subsidiary of such a corporation; or (d) a subsidiary of a holding company of such a corporation.”). The applicable standards (environmental, health and safety, human rights, etc.) are set out in Part 2 of the bill. The bill is available at http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/for elodgment attachments/745E60AA89A5DB1FCA256F720024ACC8. See also Corporate Responsibility Bill, 2003, § 6 (Eng.), available at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cm bills/145/2002145.pdf (providing for parent company liability for injury to persons or harm to the environment, irrespective whether that injury or harm occurred within the United Kingdom). In the United States, several transnational-corporate-social-responsibility bills have been introduced with the same title: Corporate Code of Conduct Act. See H.R. 5377, 109th Cong. (2006); H.R. 2782, 107th Cong. (2001); H.R. 4596, 106th Cong. (2000).

4. See Michael R. Anderson, Transnational Corporations and Environmental Damage: Is Tort Law the Answer?, 41 Washburn L.J. 399, 409 (2002) (submitting that “there is likely to be a state regulatory failure at both the home state and host state locations,” and suggesting that, accordingly, tort litigation would be the only remaining avenue).
tort only, committed in violation of the law of nations or a treaty of
the United States."  

This Article examines whether tort litigation for corporate
abuses, human-rights abuses in particular, that have occurred
abroad or are at least producing effects abroad, has a future in the
European Union. It is striking that although national courts in the
European Union appear to have jurisdiction over any defendant
corporation that is "domiciled" in the European Union, irrespec-
tive of where the harm occurred or the nationality of the plain-
tiffs, very few tort cases have so far been brought. It is submitted
that this is attributable to the fact that European domestic legal
systems—and, for that matter, most domestic legal systems that do
not statutorily authorize their courts to exercise tort jurisdiction
over overseas violations—have a territorial focus, whereas TNCs
inevitably have a transnational reach. In a transnational situation,
therefore, European courts will typically look for a territorial nexus
with the forum.

It will be argued that this territorial focus is not necessarily fatal
to national courts in the European Union that assume tort jurisdic-
tion over corporate abuses that produce adverse effects abroad. If
the origin of these abuses can be situated in the forum, plaintiffs
may duly have a cause of action. This will notably be the case when
negligence of the TNC’s parent corporation can be established. As
the parent corporation typically organizes the transnational corpo-
rate group’s activities from headquarters in the Western home
state, a parent corporation’s failure to live up to its duty of care has
a territorial nexus. The identification of this nexus may ease con-

drawn-out case is probably the one against the California oil giant Unocal. See Doe I v.
Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Nat’l Coal. Gov’t of the Union of Burma
Cal. 1998), aff’d, 248 F.3d 915 (2001); Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D.
Cal. 2000); Doe I v. Unocal Corp. 395 F.3d 932 (9th Cir. 2002). Other high-profile cases
against TNCs include Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000), and
2002).

Regulation].

7. See Peter T. Muchlinski, Corporations in International Litigation: Problems of Jurisdic-
tion and the United Kingdom Asbestos Case, 50 Int’l. & Comp. L.Q. 1, 1 (2001) ("[T]he ques-
tion of whether a forum has jurisdiction over disputes arising out of the operations of non-
resident entities of the MNE brings into contrast the mismatch between the territorial
reach of the legal system and the transnational reach of the enterprise.").

8. See infra Parts I-II.

9. For the purpose of this Article we consider the concepts “negligence” and “breach
of a duty of care,” along the lines of English tort law, as interchangeable. See Donoghue v.
cerns over the extraterritorial application of the home state’s law and over the attendant intervention in the internal affairs of the host state.\(^{10}\) Even if the standard of duty of care were to be employed, however, it remains no less true that the harm itself has occurred in the host state. In order to weaken defenses based on unwarranted intervention of the home state in the host state, it will therefore be proposed to construe the duty of care in light of universally accepted principles of international human-rights law.\(^{11}\) The same argument holds for forum-non-conveniens defenses, although, in Europe, these defenses have lost their strength anyway after a 2005 judgment of the European Court of Justice.\(^{12}\)

The current European tort system remains less hospitable than the U.S. one for challenging overseas corporate human-rights abuses. In the United States, the ATCA explicitly creates a cause of action for international-law violations committed abroad, where as in the European Union, jurisdictional requirements based on nationality and territoriality may discourage victims of overseas corporate human-rights abuses from filing complaints in domestic courts.\(^{13}\) Especially where an effective remedy in the host state proves impossible, a case can be made for jurisdiction of the home

Stevenson [1932] A.C. 532, 580 (H.L.) (“The liability for negligence . . . is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. . . . The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”); see also RICHARD KIDNER, CASEBOOK ON TORTS 10-57 (10th ed. 2007) (chapter entitled “Negligence: the Basic Principles of a Duty of Care”). In this Article, the concept of “duty of care” is not used in a corporate-law context (fiduciary duty of care of a director vis-à-vis the company), but in a tort-law context, in relation to the duty of care that a parent company has vis-à-vis the workers employed by its overseas subsidiary or any other persons in the vicinity of the subsidiary’s premises, and in particular its duty to ensure that those persons do not suffer personal injuries. Cf. Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545, 1551 (H.L.) (identifying the salient question as “[w]hether 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”).

10. See infra Part III.

11. See infra Part IV.

12. Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383, ¶ 46 (holding that “the Brussels convention precludes a court of a contracting state from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-contracting state would be a more appropriate forum”). See also infra Part V.

state’s court in the European Union. This requires a conceptual shift from the idea that domestic courts in the European Union are inconvenient fora for hearing tort complaints relating to foreign human-rights abuses to the idea that these courts may well be the most convenient fora for dealing with such abuses.\textsuperscript{14} If, however, a tort system for foreign corporate abuses is to work at all in the European Union, a number of procedural features facilitating civil litigation may have to be imported from the United States. It is wildly optimistic to expect that such procedural reforms, for the sole benefit of foreign victims of corporate human-rights abuses, will easily be pushed through.

If the tort avenue proves unsuccessful for victims of corporate human-rights abuses abroad, these victims could still turn to the criminal-justice system in a number of E.U. jurisdictions, either as a simple complainant or as a civil party with enhanced procedural rights.\textsuperscript{15} Criminal law has a number of advantages over tort law as a vehicle to dispense justice for human-rights violations. In particular, criminal law may be fairer in that it levels the playing field for victims from developing countries who often lack sufficient resources: state, as opposed to private, resources are used in the investigation and prosecution. In addition, a criminal conviction may send a stronger accountability signal than a mere monetary punishment, in which tort proceedings ordinarily result. Domestic criminal-justice systems in the European Union, however, remain largely untested for corporate human-rights abuses. So far, only two procedures have been initiated, both against the French corporation Total, in France and Belgium, and both were aborted in an early stage on technical grounds.\textsuperscript{16} Challenges for domestic criminal law as a global justice vehicle are abound: not all human-rights abuses may be characterized as domestic criminal offences, concerns over extraterritorial jurisdiction may be raised, and doctrines of corporate criminal liability as applied in a transnational context are still in their birth throes.\textsuperscript{17}

If tort and criminal remedies for overseas corporate abuses prove unsuccessful in the European Union, more informal mechanisms could be resorted to. As discussed below, figures show that probably the most important informal mechanism of solving conflicts over abuses allegedly committed by TNCs, the National Con-

\textsuperscript{14} See infra Part VI.
\textsuperscript{15} See infra Part VII.
\textsuperscript{16} See infra notes 102, 110 and accompanying text.
\textsuperscript{17} See infra Part VIII.
tact Points of the Organization for Economic Cooperation and Development (OECD), is used to a larger extent in Europe than in the United States. The relative success of these Contact Points may point to a preference for conciliation rather than litigation for overseas corporate abuses. It remains difficult to tell, however, whether the apparent emphasis on dialogue is the result of a conscious decision to shun litigation or whether it is the result of the unavailability of adequate litigation avenues in the European Union. Yet, quite clearly, more clarification of the opportunities for litigation in the European Union appears apt, if only because it could strengthen the negotiating position of victims and their representatives.

II. HOME-STATE REGULATION AT THE E.U. LEVEL: ARTICLE 2 OF THE BRUSSELS REGULATION

No E.U. member state has the equivalent of the ATCA on its statute books. Accordingly, no domestic court in the European Union has per se civil jurisdiction over violations of international law committed abroad by corporations. Nonetheless, in the European Union, rules of adjudicatory jurisdiction are fairly broad, although not as broad as in the United States, where minimal contacts of the defendant corporation with the United States suffice for a finding of personal jurisdiction. In the European Union, by virtue of Article 2 of EC Council Regulation on Jurisdiction in Civil and Commercial Matters (the Brussels Regulation), which is directly applicable in E.U. member states, any defendant corporation that is “domiciled” in an E.U. member state, could be sued in that member state. This opens up wide opportunities for suing

18. See infra Part IX.
20. Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that “due 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’”).
22. Brussels Regulation, supra note 6, art. 2 (“P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”). Pursuant to Article 60(1) of the Brussels Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b)
E.U.-based TNCs in their home states for violations of human rights committed abroad. The plaintiff indeed need not have the nationality of an E.U. member state nor does the alleged violation prima facie need to have occurred on the territory of an E.U. member state. Article 2 of the Brussels Regulation thus enables any person, whatever his or her nationality (whether of an E.U. member state or not), to sue a TNC having its headquarters in the European Union for violations committed abroad. This is also the interpretation of the European Parliament, which, in 2002, drew “attention to the fact that the 1968 Brussels Convention [as consolidated in the Brussels Regulation] enables jurisdiction within the courts of Member States for cases against companies registered or domiciled in the E.U. in respect of damage sustained in third countries.”

The European Parliament did not adduce any relevant case law, however. And indeed, there is as yet no case law of European-based TNCs being held to account for injuries suffered abroad. It will be argued that this is attributable to Article 2 of the Brussels Regulation being only the first, and rather easy, hurdle to clear in order for claims for foreign torts to become actionable. The liability hurdle may constitute the more challenging one. This Article submits that the choice of a liability doctrine is not jurisdictionally neutral. If the public-international-law rules of jurisdiction are understood as delimiting states’ respective spheres of action and as protecting states’ sovereignty, liability doctrines that focus on the foreign locus of the violation (or, put differently, that locate the harmful event in the host state) may be perceived as encroaching on the host state’s sovereignty to a greater extent than doctrines.

23. See Case C-412/98, Group Josi Reinsurance Co. v. Universal Gen. Ins. Co., 2000 E.C.R.I-5925, ¶¶ 57, 59 (“It follows that, as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the [Brussels] Convention, since that application is, in principle, dependent solely on the criterion of the defendant’s domicile being in a Contracting State. . . . Consequently, the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country.”).


that focus on the domestic locus of the violation (put differently, that locate the harmful event in the home state).

It could be argued, admittedly, that issues of liability are issues of substantive law as opposed to issues of procedural or jurisdictional law; liability rules are geared to identify whether a particular person or entity is to be held responsible for a violation—irrespective of the transnational character of the violation—rather than whether a court has jurisdiction over the defendant or the violation. It is nevertheless conspicuous that precisely these liability doctrines that attempt to link liability to corporate action or negligence within the home state seem to have the upper hand in the European Union. It has indeed been indicated in various European quarters that doctrines that focus on the duty of care or the negligence of headquarters are the most appropriate liability doctrines in light of the importance of the locus-delicti rule, pursuant to which the adjudicatory forum is determined on the basis of the place of the harmful event. Or as Preet Sahni observed in her wide-ranging study of transnational corporate liability for human injury, in regard to the determination of jurisdiction in transnational tort litigation:

The first procedural requirement in a transnational tort claim is consideration of the appropriate jurisdiction to hear the action. The forum will be the place where the tort occurs. Thus, a court will have to determine whether the tort is located in the State in which the defendant acts (state ‘A’) or the State in which the plaintiff endures the harm (state ‘B’). This process requires the court to characterise the tort by identifying the actual act of negligence.

Tort claims against European TNCs relating to overseas harm brought in the TNCs’ home state will indeed tend not to be considered as actionable in the absence of some territorial nexus with the

26. Cf. Muchlinski, supra note 7, at 11-12 (submitting that “the requirements for establishing the domicile of the parent are factually distinct from those that will establish its substantive liability for the acts of its overseas affiliate,” and that “the adoption of the domicile principle will simplify the jurisdiction issue, and allow the parties to move more quickly to the substantive question of liability”).


home state. As will be illustrated by the analysis of practice in the United Kingdom in the next section—the United Kingdom being, to our knowledge, the only E.U. member state where such tort claims have been brought—claims may only be deemed actionable in the home state if the locus of the act or omission that eventually led to harm (e.g., human-rights abuses) abroad can be situated in the home state. A European locus may notably be found if a parent corporation has neglected its statutory or unwritten duty of care vis-à-vis the operations of its overseas subsidiaries, branches, or plants. In such a case, while the harm itself may have occurred abroad, the wrongful behavior occurred within the territory.

The prominent role of the parent corporation’s duty of care for the acts of its overseas subsidiaries in transnational liability cases may not only be informed by considerations of territoriality. In particular, the role may be informed by a desire to uphold the separate legal personality of the various entities of the TNC (parent and subsidiaries). By focusing on the parent’s duty of care, the court hearing a transnational liability case circumvents the thorny issue of “piercing the corporate veil”; the parent is held liable for its own violations rather than for the violations of its subsidiaries as different legal entities. Thus, from a corporate-law perspective, a focus on the parent’s duty of care is a promising avenue because it does not defy existing categorization (the principle of separate legal personality of the TNC’s various legal entities). In this Article, however, the authors espouse an international-law rather than a corporate-law perspective without denying the validity of the latter

29. The United Kingdom has been the main European forum for personal injury-related negligence claims against TNCs. The duty of care of a parent corporation for overseas violations has, however, also been put forward in the case-law and the literature of other E.U. member states, although typically outside the human rights field. See, e.g., Liesbeth Enneking, Corporate Social Responsibility: Tot aan de grens en niet verder? [Corporate Social Responsibility: Not Beyond the Border?] 58-78 (2007) (with literature and case-law references regarding the Netherlands). Actual human-rights-related claims have so far not been brought. It should be borne in mind, though, that technically speaking, the U.K. cases discussed in Part IV do not allege human-rights violations either: both Cape and Connelly revolved around violations of health and safety standards. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Prot. of Human Rights, Working Group on the Working Methods and Activities of Transnational Corporations, Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, § 7, U.N. Doc. E/CN.4/Sub.2/2003/XX. E/CN.4/Sub.2/2003/WG.2/ WP.1 (Aug. 2003) (“Transnational corporations and other business enterprises shall provide a safe and healthy working environment as provided by the relevant international instruments and national legislation as well as international human rights law.”).

30. See supra note 29 and accompanying text.

for that matter. The international-law perspective is informed by such long-cherished notions as territoriality and sovereignty, which serve the purpose of delimiting states’ spheres of competence and jurisdiction, in casu the spheres of the home state and the host state. Pursuant to these notions, international legal order only ensues provided that states restrict their jurisdictional assertions to situations arising in their territory.32

It can be concluded from this section that Article 2 of the Brussels Regulation holds some promise for victims of European TNCs’ overseas abusive practices because it allows the defendant European corporation to be sued in its home state irrespective of where the harm occurred or who the plaintiffs (victims) are.33 It has also been indicated, however, that the locus-delicti rule—while codified as an alternative basis of adjudicatory jurisdiction in Article 5.3 of the Brussels Regulation (at least in an intra-E.U. context)34—looks set to maintain its enduring influence in Europe. Returning with a vengeance, that rule, pursuant to which “the place where the harmful event occurred or may occur,” determines the jurisdiction of the courts in tort matters.35 It also narrows the prima facie broad scope of Article 2 if the overall actionability of a tort claim relating to overseas harm is taken into account. As will be more thoroughly argued in Part IV, identifying a harmful event’s nexus with the home state eases sovereignty concerns and may keep jurisdictional assertions within the bounds set by public international law. But first, so as to illustrate the role of the territoriality principle at the level of liability in transnational tort litigation in an E.U. member state, home-state regulation of TNCs in the United Kingdom will be subjected to closer scrutiny. The United Kingdom is the only E.U. member state where (limited) case law for human-rights-related transnational torts is available.

32. While in the Lotus case, of course, the Permanent Court for International Justice held that “[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules,” S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7), territoriality has always been the cornerstone of the international jurisdictional order, with exceptions having been authorized only in very specific instances (mainly in the field of criminal law). See generally CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 21-84 (2008) (noting the pervasive role of territoriality in the law of jurisdiction).

33. See supra note 22 (quoting Brussels Regulation, supra note 6, art. 2).

34. The locus-delicti rule is an alternative basis of jurisdiction because it does not supplant the rule of Article 2 of the Brussels Regulation, which always allows a defendant to be sued in its home state.

35. Brussels Regulation, supra note 6, art. 5(3).
III. HOME STATE REGULATION IN THE UNITED KINGDOM: NEGLIGENCE CLAIMS

The enduring role of the territorial principle in transnational tort proceedings in the European Union can be exemplified by the case of the United Kingdom, where, like in the United States, rules of personal jurisdiction are extremely liberal. In the United Kingdom, jurisdiction premised on the temporary presence of the defendant, even a foreign one, in the territory of the forum (tag or transient jurisdiction) is well established, and with the permission of a court, proceedings may sometimes even be served outside the United Kingdom.\textsuperscript{36} If, however, adjudicatory jurisdiction is to be found by a U.K. court, the court will, under normal circumstances, only hear the case if some tortious conduct in the United Kingdom can be identified.\textsuperscript{37} The transnational tort cases that have so far been brought in U.K. courts indeed appear to revolve around territorial violations of a duty of care by a corporation having overseas activities. Put differently, territorial negligent conduct by that corporation featured prominently. Without a nexus to the United Kingdom in the form of negligent conduct in the United Kingdom, claims for an extraterritorial tort may not be actionable.

The most prominent U.K. duty of care case is \textit{Lubbe v. Cape PLC}.\textsuperscript{38} The \textit{Cape} case concerned claims for damages of over 3,000 miners who claimed to have suffered as a result of exposure to asbestos and its related products in the English defendant corporation Cape’s South African mines. In their complaint against the English corporation, the (mainly South African) plaintiffs were careful not to rely on a liability doctrine that located the defendant’s violations in South Africa (e.g., liability as occupier of the South African factory or as the source of contamination in South Africa). Instead, they relied on the defendant’s violations of his duty of care.\textsuperscript{39} This is a duty that may be traced back to corporate headquarters in the United Kingdom; indeed, programs of “care”

\textsuperscript{36} U.K. R. CIV. P. 6.20.

\textsuperscript{37} See FAFO UK REPORT, supra note 27, at 28.

\textsuperscript{38} Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545 (H.L.). See generally Muchlinski, supra note 7 (discussing Lubbe at length).

\textsuperscript{39} Lubbe, [2000] 1 W.L.R. at 1550 (Lord Bingham of Cornhill) (“[T]he central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care.”)
(due diligence) are devised there, where control of the corporate group is exercised, and are subsequently applied to the worldwide activities of the TNC. The territorial link with England of a standard of negligent conduct by U.K. corporate headquarters, even if the negligence caused overseas harm, is thus apparent. As will be elaborated in the next Part, it is precisely this link that may be instrumental in easing extraterritoriality concerns. The U.K. courts did not, however, have the opportunity to test whether the English parent company indeed had a duty of care, and, if so, whether it had observed proper standards: after the House of Lords removed the stay of proceedings on forum-non-conveniens grounds in 2000, the case was eventually settled in 2003.

Violations of the English corporation’s duty of care will also play a prominent role in the currently pending litigation brought by 12,500 Ivorians against Trafigura, a corporation registered in the United Kingdom and allegedly responsible for dumping toxic waste in Ivory Coast, resulting in 10 people dead and 100,000 more which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss).

40. A focus on duty of care may ease Lord Hoffmann’s concerns in the House of Lords case of Connelly v. RTZ Corp., that “[i]f the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world.” [1997] 4 All ER 335, 349c (H.L.) (Lord Hoffmann). It may be noted, in passing, that England has a long tradition of opposition to assertions of jurisdiction over acts committed abroad, especially in the field of criminal law. See, e.g., Cox v. Army Council, [1963] A.C. 48, 67 (H.L.) (“[A]part from those exceptional cases in which specific provision is made in respect of acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.”).

41. An earlier, slightly similar case is Connelly v. RTZ Corp. [1997] 4 All ER at 338. That case concerned a claim by Connelly, domiciled in Scotland, against the English company RTZ for damages suffered as a result of his having developed cancer of the larynx, which was allegedly attributable to his inhaling silica uranium and its radioactive decay products at a mine in Namibia exploited by RUL, a subsidiary of RTZ. In their complaint, the plaintiffs did not solely rely on RTZ’s violation of its duty of care. The Court held:

[i]t was alleged that RTZ had devised RUL’s policy on health, safety and the environment, or alternatively had advised RUL as to the contents of the policy. It was further alleged that an employee or employees of RTZ, referred to as RTZ supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine.

Id. The liability doctrines invoked by the plaintiff are wider and have fewer territorial connections than the liability doctrine based on a parent corporation’s violations of its duty of care. The English courts did not, however, address the liability issue. Although the House of Lords rejected the application of forum non conveniens and the case was thus allowed to go forward, the case was discontinued when the High Court dismissed the claim in 1998 on the grounds that the complaint had not met the applicable statute of limitations. Id. at 347.
2009] Overseas Corporate Human-Rights Abuses in the European Union 951

injured. The complaint maintains that Trafigura knew, or should have known, that the waste was potentially harmful. The plaintiffs’ strategy therefore appears to consist of an attempt to establish that decisions or failures by Trafigura headquarters in the United Kingdom caused the damage in Ivory Coast. Arguably, the plaintiffs may tend to shun other liability doctrines, such as vicarious liability of the parent corporation for the acts of its agents abroad, given the territorial distance from the forum that other liability doctrines may create.

The above illustrates how the United Kingdom is traditionally the E.U. member state where most of the tort cases against (parent) corporations have been launched by foreign victims for damages sustained abroad. One can only assume that now that the important procedural hurdle of forum non conveniens has been lifted by the European Court of Justice, more suits against corporations will be launched. A recent article in the Financial Times suggests that this is exactly what is happening.

IV. EXPLAINING THE FOCUS ON NEGLIGENCE CLAIMS: THE PRINCIPLE OF NONINTERVENTION

E.U. member states may appear to be more at ease with establishing corporate liability on the basis of neglecting a duty of care in the corporation’s home state than, for instance, with establishing liability for violations committed by the corporation outside the home state (e.g., vicarious liability for violations committed by a corporation’s employee outside the home state). This is arguably so because in the former situation the violation (of the duty of care) occurred in Europe, while in the latter case it occurred abroad.

42. On February 7, 2007, the Senior Master of the Queen’s Bench Division of the High Court ordered “that all of those allegedly injured by the toxic waste dumped in . . . the Ivory Coast . . . should be permitted to bring their case as a single group [class-action/group litigation] rather than being forced to present their cases individually.” Leigh Day & Co, Ivory Coast - Alleged Toxic Waste Claims, http://www.leighday.co.uk/news/news-archive/ivory-coast-alleged-toxic-waste-claims (last visited Oct. 1, 2008). The Trafigura trial is expected to take place in 2008. Id.


44. See infra Part VI.


It is submitted that this preference for liability based on territorial negligence rather than on overseas acts done by a parent corporation might derive from an implicit application of the public-international-law principle of nonintervention in the domestic legal order. Exercising jurisdiction over corporate violations committed abroad, or extraterritorial violations, rather than over territorial corporate violations, risks encroaching on the sovereignty of the territorial state and could indeed amount to a violation of the principle of nonintervention. For instance, it did not come as a surprise that in the field of competition law—to which tort law has also been applied, although primarily in the United States—the European Court of Justice was, in the momentous 1988 Wood Pulp case, so much at pains to identify the territorial implementation of the harmful restrictive business practice in Europe; in the Court’s view, only when the practice was implemented in the European Union could a finding of jurisdiction be in accordance with public international law.

This is, however, not to say that Europeans would characterize a finding of jurisdiction based on home-state registration to be necessarily in violation of international law. After all, if this were the case, the Brussels Regulation would not have featured as broad a provision as Article 2. Moreover, in their amicus briefs in the Sosa ATCA litigation before the U.S. Supreme Court in 2004, European states were careful not to criticize the nationality principle. While the brief submitted by the United Kingdom and Switzerland, amongst other countries, portrays an intense hostility toward the creation of a civil cause of action involving disputes between aliens,

47. See also Olivier De Schutter, Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations 28, 45 (2006), available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRG-re-extraterritorial-jurisdiction-Dec-2006.pdf; Tetsuya Morimoto, Growing Industrialization of our Damaged Planet. The Extraterritorial Application of Developed Countries’ Domestic Environmental Laws to Transnational Corporations Abroad, 1 Utrech L. Rev. 134, 150 (2005) (arguing that an indirect exercise of extraterritorial jurisdiction through a focus on the parent company’s activities rather than on the activities of foreign affiliates “would be less controversial in terms of loss of sovereignty . . . because substantial parts of the illegal conduct, such as authorizing or condoning environmental wrongdoings in foreign countries would occur within the territory of a [transnational corporation’s] home country”) (emphasis added).

48. Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, Osakeyhtio v. Comm’n, 1988 E.C.R. 5193, 5243 (holding that, since the implementation of the anticompetitive agreement entered in to abroad was territorial, the anticompetitive conduct “is covered by the territoriality principle as universally recognized in public international law”).

2009] Overseas Corporate Human-Rights Abuses in the European Union 953

wherever domiciled, based on foreign activities that have no effect within the forum state (i.e., universal jurisdiction), it emphasized that states “may extend the application of their laws to their citizens, wherever located,” or, as far as corporations are concerned, wherever they conduct their operations. Yet quite clearly, public-international-law concerns may play an important role in circumscribing home state jurisdiction over transnational tort claims. It should be kept in mind that the private international law rules of adjudicatory jurisdiction are part of municipal law, or of regional (European) law for that matter, but that they do not reflect public international law. In combination with certain liability doctrines, they may well be in excess of what the jurisdictional rules of public international law provide, or at least of the interpretation of these rules. European courts may give these rules, in view of their importance, direct effect in the European legal order, and they may set aside incompatible, “excessive” private-international-law rules—or at least interpret these rules, such as Article 2 of the Brussels Regulation, in light of applicable public international law.

In order to decide whether the principle of nonintervention is violated in a given case, protests by the state where the violation or the harm occurred (the host state) should be taken into account. It is certainly not excluded that host states may take issue with tort-law-based home state regulation. Host states may well have serious concerns over the imposition of high regulatory standards by home states in the field of labor laws, health and safety regulations, and environmental law, on the grounds that these standards deter inward investment and slow economic growth. These concerns

50. Id. at 7.

51. Id. at 4.

52. See De Schutter, supra note 2, at 91 (submitting that the invocation of the active personality principle, for example home-state regulation, in order to justify the exercise of extraterritorial jurisdiction over the activities of transnational corporations is “delicate”).

53. See Pieter-Jan Kuypers, From Dyes to Kosovo Wine: From Avoidance to Acceptance by the European Community Courts of Customary International Law as Limit to Community Action, in ON THE FOUNDATIONS AND SOURCES OF INTERNATIONAL LAW 149, 169 (I.F. Dekker & H.G. Post eds., 2003) (“The rules relating to jurisdiction of states are so basic to the very existence of the state system itself, that the courts should not in any way encourage an excess of jurisdiction.”).


may piggyback on broader concerns over Western regulatory and cultural imperialism and Western intervention in developing states’ affairs.\textsuperscript{56} In order to solve conflicts arising from home-state regulation, balancing the different interests involved is called for. Courts should weigh, on the one hand, the duty of home states to see to it that their TNCs behave correctly in host states\textsuperscript{57} and, on the other hand, home states’ duty not to interfere in the economic

\textsuperscript{56} One such illustration is South African president Thabo Mbeki’s criticism of ATCA lawsuits in the United States against South African corporations. See Meron Tesfa Michael, \textit{Moment of Truth: South Africa’s Truth and Reconciliation Commission Closes its Doors}, \textsc{World Press.org}, Mar. 2, 2003, http://www.worldpress.org/Africa/1077.cfm (“We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts.”); see also Morimoto, supra note 47, at 149 (discussing sovereignty concerns over the extraterritorial application of developed home states’ environmental regulations).

\textsuperscript{57} It has been argued that states have a (hard) transnational duty to protect under international human-rights law, and thus to regulate the overseas activities of their TNCs. It could indeed be argued that individuals whose rights have been violated as a result of overseas activities of TNCs incorporated in a state party to a human-rights treaty fall “within the jurisdiction” of that state, as jurisdiction clauses in human-rights treaties are typically not territorially limited. If the said individuals fall “within the home State’s jurisdiction,” the home state is obliged to secure their rights as enshrined in the relevant treaty. See, e.g., International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. \textsc{Treaty Doc.} 95-20, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”). The International Covenant on Economic, Social and Cultural Rights does not contain a jurisdiction clause. This may in fact expand the scope of the Covenant. See Magdalena Sepúlveda, \textit{Obligations of ‘International Assistance and Cooperation’ in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights}, 24 \textsc{Neth. Q. Hum. Rts.} 271, 282 (2006) (submitting that states parties to the International Covenant on Economic, Social and Cultural Rights are responsible for the conduct of nonstate actors, such as corporations, who act extraterritorially or whose conduct has extraterritorial effect); \textit{The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights} 9 (1997), \textit{available at} http://www.hrlil.nl/unpublish/content/2641.pdf (“The obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.”). \textit{But cf.} Sigrun I. Skogly & Mark Gibney, \textit{Transnational Human Rights Obliga-
tions}, 24 \textsc{Hum. Rts. Q.} 781, 788 (2002) (arguing that norms of economic, social, and cultural rights “carry mainly negative obligations,” and that there is no “duty to protect” such rights transnationally under customary international law). It exceeds the scope of this Article, however, to more thoroughly flesh out the claim of a home state’s responsibility under international law for overseas human-rights violations by its corporations.
policies of host states.\(^{58}\) It should be observed, nevertheless, that, quite often, host states will not take issue with home-state regulation, but rather the contrary. In the *Trafigura* scandal, for instance, Ivory Coast jailed three *Trafigura* executives it considered responsible for dumping toxic waste in Abidjan,\(^{59}\) and there is no evidence whatsoever that it considered the court action on behalf of the 12,500 Ivory Coast citizens in England to raise sovereignty concerns. In scandals over the dumping of toxic waste, developing countries such as Ivory Coast clearly have no interest in protecting the Western corporation in the dock.

V. THE ROLE OF INTERNATIONAL HUMAN-RIGHTS LAW IN LITIGATION AGAINST TRANSNATIONAL CORPORATIONS

As argued in the previous sections, jurisdictional concerns over home-state-tort-based liability for a TNC’s overseas activities may be eased if the tortious act or negligence can be situated in the home state, notably if it can be established that the parent corporation failed to satisfy its duty of care with respect to the operations of entities of the corporate group abroad. As the harm eventually occurred abroad, however, duty-of-care-based jurisdiction, while having a strong *territorial* connection, remains *indirectly extraterritorial*.\(^{60}\) This indirect extraterritorial jurisdiction may still raise sovereignty concerns. In order to remedy these lingering concerns, it is proposed to link violations of the parent corporation’s duties of care or due diligence to violations of international human-rights law. As human rights are universally recognized, the enforcement of these rights, e.g., by a transnational corporation’s home state, should not be considered to amount to a violation of another state’s sovereignty. Indeed, as De Schutter argued, (extraterritorial) home state regulation could be seen as a method to *facilitate* the (territorial) host state’s respect for the obligations that are imposed on it

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\(^{59}\) The executives were released after the Government of Ivory Coast and *Trafigura* reached an out-of-court settlement. *Trafigura* accepted to pay around £100 million “for damages sustained and the repayment of pollution cleaning costs.” *See* *Ivory Coast Toxic Dumping Case Settled for US$198 Million*, *Env’t News Serv.*, Feb. 16, 2007, *available at* http://www.ens-newswire.com/ens/feb2007/2007-02-16-03.asp.

\(^{60}\) See De Schutter, *supra* note 2, at 96 (submitting that, while a focus on the parent corporation’s duty of care, instead of on the parent corporation’s liability for the acts of the entire corporate group, may be a satisfactory avenue, it remains a controversial one since the home state in fact regulates situations that are located outside its territory).
by international human-rights law. Home-state regulation then becomes cooperative rather than antagonistic. Because home-state regulation geared to transnationally protecting human rights does not serve the interests of the home state, but the interest of the international community in condemning human-rights violations wherever they may have occurred, home-state regulation, while having extraterritorial overtones, may, as De Schutter points out, “benefit from a presumption of lawfulness under international law.”

By linking transnational tort claims for violations of a duty of care to violations of international human rights, the force of extraterritoriality concerns, or any other procedural obstacles for that matter, could be further eased. While it may be objected that corporations are no duty-bearers under international human-rights

61. Id.

62. Id. at 96-97. This presumption, however, should only apply to the extent that both the home state and the host state are parties to the relevant human-rights convention, or are bound by a relevant norm of customary international law or *jus cogens*. See *Cedric Ryngaert, Anders Globaliseren: Mensenrechten, Milieu en Internationale Handel* [A Fair Globalization: Human Rights, the Environment, and International Trade] 66-68 (2007). As between European states, bound as they are by a multilevel network of human-rights obligations stretching from domestic constitutional bills of rights to regional instruments, and to global conventions, there may indeed be a wide gap between a home state’s human-rights obligations and those of a host state. Possibly, the standard set out by the U.S. Supreme Court in the ATCA-based case of *Sosa v. Alvarez-Machain* may serve as a guideline of lawfulness:

[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [these are ‘those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy’] we have recognized.

542 U.S. 692, 724-25 (2004). See also *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 120 (2d Cir. 2008) (applying the *Sosa* standard and holding that “[t]here is lack of a consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants”); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247-48 (2d Cir. 2003) (identifying the “law of nations” in ATCA with “customary international law,” for example a body of law that states “universally abide by, or accede to, out of a sense of legal obligation and mutual concern,” and going on to state that the violations of an alleged norm of customary international environmental law were not cognizable under the ATCA in view of the lack of universal acceptance of the norm).

63. See, e.g., Anderson, *supra* note 4, at 424-25 (arguing that the idea of a human-rights solution is attractive because, among others, “it provides a superior norm that can “trump” the obstacles presented by procedural technicalities,” while nevertheless adding that “in the long run the language of rights will provide no more of a panacea than the language of tort.”).
It is no less true that, as the U.N. special representative pointed out in his report to the Human Rights Council in 2007, corporations, together with states and civil society, “have drawn on some of these instruments in establishing soft law standards and initiatives.”

When transnational corporations adopt codes of conduct, they typically cite the latter’s consistency with such human-rights instruments as the Universal Declaration on Human Rights, the ILO Declaration on the Fundamental Principles and Rights at Work (1998), the OECD Guidelines for Multinational Enterprises (revised in 2000), and the U.N. Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003). If a TNC’s parent corporation has committed itself to upholding the principles enunciated in these instruments, even in a legally nonbinding manner, it could be argued that a failure to comply with them may be evidence of its failure to live up to its duty of care, even in regard to the operations of the TNC’s overseas subsidiaries.

As argued, the link with international human-rights law weakens concerns over jurisdictional overreach in view of the universal acceptance of human rights.

Such concerns would evidently be weakened even further if the relevant human-rights instruments set out some basic rules of jurisdiction, in particular rules that confer jurisdiction over transnational corporate human-rights violations on the transnational corporation’s home state. Such rules may incentivize European
states to provide a statutory cause of action for violations of international (human-rights) law—along the lines of the ATCA, which, as is well known, refers to violations of the "law of nations." As we write, no human-rights instrument contains such rules, however.

The absence of express authorization (let alone compulsion)\(^{70}\) in international human-rights treaties to exercise jurisdiction over violations of international human-rights law may, at least partly, explain the absence of express statutory authorization of domestic courts in the European Union to exercise such jurisdiction. In this section, however, it has been argued that \emph{substantive} norms of international human-rights law could inform the duty of care standard as a standard of corporate liability, thereby weakening concerns over jurisdictional impropriety. Undeniably, the extraterritorial application of a home state’s law appears more legitimate, and arguments of unwarranted intervention in the internal affairs of the host state less compelling, if the alleged violations are violations of universally recognized international legal norms rather than violations of idiosyncratic home-state law,\(^{71}\) such as domestic health and safety standards. Admittedly, even if violations of international human-rights law are alleged, the host state’s concerns should continue to be taken seriously. Indeed, as the International

note 67, at 455. The reasoning could \emph{mutatis mutandis} be applied to other procedural/jurisdictional obstacles, such as public-international-jurisdictional restraints derived from the principle of nonintervention. Forum non conveniens will be further discussed in Part VI.

70. It is indeed quite probably a bridge too far to state that there is a duty under international law to provide for private remedies (i.e., tort litigation) under human-rights treaties. \textit{See} Anderson, \textit{supra} note 4, at 414.

71. \textit{See also} Amy Sinden, \textit{Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs}, in \textit{The New Corporate Accountability: Corporate Social Responsibility and the Law}, \textit{supra} note 67, 501, 525 ("[I]n order for . . . an outside tribunal to act with credibility, it needs some universally accepted source of substantive law, like human rights."). This explains, for instance, why Section 404 of the Restatement (Third) of U.S. Foreign Relations Law premises the lawfulness of the exercise of universal jurisdiction solely on the nature of the offense, and does not subject the exercise of such jurisdiction to an additional reasonableness analysis under Section 403, an analysis that factors in protest by other states. \textit{Restatement (Third) of U.S. Foreign Relations Law} §§ 403-404 (1987). Section 403 only subjects the exercise of jurisdiction on the basis of the classical principles of jurisdiction (territoriality principle, personality principle, protective principle) under Section 402 to a rule of reason. \textit{Id.} § 403 ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."). Section 404, provides, in relevant part, that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern," while Reporters’ Note 1 clarifies that "[a]n international crime is presumably subject to universal jurisdiction." \textit{Id.} § 404 & reporters’ n.1.
Court of Justice held in the Corfu Channel case, it is not for other states, especially not for powerful (home) states, to enforce international law single-handedly on the ground that a strong international supervisory mechanism is lacking. But because the home state itself has a duty to ensure that its TNCs are behaving correctly abroad, and human-rights attach to individuals rather than to states, a host state may face an uphill battle to have the scales tipped in its favor by a home-state court. With good reason, it may probably be submitted that, as far as home-state litigation for foreign corporate human-rights abuses is concerned, protests of the host state should only be allowed to carry weight if the host state can prove that it is genuinely able and willing to investigate the abuses and provide an adequate remedy to the victims if abuses have, indeed, occurred.

VI. FORUM NON CONVENIENS

As noted, concerns over judicial excesses through home state regulation of transnational corporate acts may be addressed through application of the international-law principle of nonintervention. In common-law countries, such as the United States and the United Kingdom, concerns over judicial excess may also be met through the doctrine of forum non conveniens. Pursuant to this doctrine, transnational tort claims may be dismissed even if they could technically be actionable. When dismissing on forum non conveniens grounds, the court determines that a more adequate foreign forum exists and that the interests involved in the case weigh in favor of a foreign forum.

72. Corfu Channel, 1949 I.C.J. 4, 35 (Apr. 9) (“The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of justice itself.”).

73. See supra note 57 and accompanying text.

74. Cf. Rome Statute, supra note 1, art. 17(1)(a) (“[T]he Court shall determine that a case is inadmissible where . . . [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”).

75. See infra note 77 and accompanying text.

76. See infra note 77 and accompanying text.

In U.S. alien tort claims, a defense of forum non conveniens is often made successfully. This has even led one commentator to observe that “[t]he balance of convenience factors [is] heavily weighted against foreign plaintiffs, undermining the federal statutory scheme which encourages aliens to seek civil redress in U.S. courts for wrongs occurring on foreign soil.” In contrast, in Europe, except for the United Kingdom, the doctrine of forum non conveniens is almost unknown. Because there is no European ATCA equivalent in the first place, and because adjudicatory jurisdiction is generally not as liberally established as in the United States, no urgent need is felt for the application of a forum-non-conveniens doctrine as a doctrine of judicial restraint. In addition, European courts feel more at ease with jurisdictional bright-line rules than with the process of balancing interests that inevitably accompanies a forum-non-conveniens analysis.

In the United Kingdom, however, forum non conveniens plays an important role in transnational corporate litigation. Strikingly, the doctrine may be applied to corporate actions and failures in a manner very similar to the application of the principle of non-intervention enunciated in Part IV. It has indeed been observed that, on the basis of the doctrine of forum non conveniens, U.K. courts will ordinarily more readily dismiss cases concerning corporate actions or negligence outside the forum than cases concerning a failure to comply with a duty of care within the forum; the former

78. Aric K. Short, Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation, 33 N.Y.U. J. Int’l L. & Pol. 1001, 1053 (2001) (concluding, therefore, that “the doctrine of forum non conveniens provides a useful check on the possible overextension of federal court subject matter jurisdiction in cases with few meaningful ties to the United States”); see, e.g., Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), aff’d, 303 F.3d 470 (2d Cir. 2002) (“[E]ven if one assumes for the sake of argument the hypothesis that Texaco participated in a violation of international law that would support the claim here brought under the ATCA, neither that assumption nor any of the other considerations special to these cases materially alters the balance of private and public interest factors that, as previously discussed, ‘tilt[s] strongly in favor of trial in the foreign forum.’”).

79. Kathryn L. Boyd, The Inconvenience of Victims: Abolishing Forum non Conveniens in U.S. Human Rights Litigation, 39 Va. J. Int’l L. 41, 48 (1998). The author also observes that the doctrine of forum non conveniens “appears to be not a convenience doctrine at all, but rather an outcome determination which could mask more nefarious motives such as xenophobia, a desire to protect multinational corporations for injuries in foreign countries, or fears of dealing with difficult issues of foreign law.” Id. at 71.


have indeed a more tenuous link with the forum than the latter.\footnote{See Zerck, supra note 46, at 124-26.} In the latter case, given the territorial locus of the failure to comply, the interests involved in the case weigh more heavily in favor of the domestic forum. As noted in the previous section, a similar argument could be developed to undercut sovereignty-related concerns over the extraterritorial reach of home-state law. Application of both the forum-non-conveniens doctrine and the principle of nonintervention may thus yield to the identification of the corporate duty-of-care-based liability standard as the most appropriate liability standard, in light of the focus of this standard on the negligence of the home-state headquarters, i.e., territorial negligence.

The doctrine of forum non conveniens has recently received a cold shower in the European Union, however. In the 2005 \textit{Owusu} case regarding the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the predecessor to the Brussels Regulation), the European Court of Justice held the following:

\begin{quote}
[T]he Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.\footnote{Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383, ¶ 46.}
\end{quote}

This means that the application of Article 2 is mandatory. Accordingly, an E.U. member state’s court cannot stay proceedings against a defendant corporation registered in that state on the ground that another forum, either in another E.U. member state or in a non-member state, is more appropriate.

The repudiation of the defense of forum non conveniens may greatly benefit victims of violations of human rights, environmental law, or health and safety standards committed by an entity of a Europe-based TNC. As courts in continental European countries never apply forum non conveniens in the first place, it is to be expected that the \textit{Owusu} judgment will mainly have practical consequences in the United Kingdom.\footnote{For more on the application of forum non conveniens in cases involving transnational corporations in English courts, see Zerck, supra note 46 at 124-126; Binda Preet Sahni, \textit{Limitations of Access at the National Level: Forum non Conveniens}, 9 \textit{Gonz. J. Int’l L.} 119, 129-34 (2006) (describing forum non conveniens in the United Kingdom).} Although forum non conveniens was, as far as transnational corporate torts were concerned,
on the decline anyway in the United Kingdom,85 the death blow that it suffered in Owusu will surely open a window of opportunity for transnational tort litigation because forum non conveniens served as the most formidable procedural impediment to such litigation.86 The plaintiffs in the current Trafigura case will be the first to draw benefit from it in a procedure for overseas harm as a result of corporate malfeasance.

VII. FROM FORUM NON CONVENIENS TO FORUM CONVENIENS: EXPANDING THE JURISDICTIONAL BASIS

The doctrine of forum non conveniens is designed to dismiss claims in order to limit the possibly excessive caseload of courts that liberal rules of adjudicatory jurisdiction may cause.87 This explains the important role played by forum non conveniens in U.S. ATCA litigation; as ATCA creates a cause of action for violations of international law, wherever and by whomever committed, and personal jurisdiction may be established as soon as the defendant has minimum contacts with the United States, there is a risk of U.S. federal courts being flooded by civil suits for overseas (corporate) human-rights violations.

In Europe, however, jurisdictional rules are by and large less liberal. As argued in Parts 2 through 4, while Europe-based TNCs can be sued in their home states’ courts, these home states’ courts will be inclined to hear claims for foreign harm only if some territorial wrongdoing in the home states can be established. Moreover, tort suits against TNCs registered outside the European Union are off-

85. See generally, Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545 (H.L.) (rejecting the defense of forum non conveniens); Connolly, [1997] 4 All ER (same).

86. Forum non conveniens considerations may continue to play a role in tort matters falling outside the scope of the Brussels Regulation, supra note 6, for example in the context of tort claims for overseas harm brought against non-European corporations (universal jurisdiction instead of home-state regulation). Under Article 4(1) of the Brussels Regulation, indeed, “[i]f 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 that Member State.” In tort matters, a member state’s courts will ordinarily, in keeping with the classical locus delicti rule of judicial jurisdiction, only establish jurisdiction over defendants who are domiciled outside the European Union if they committed a wrongful act in the member state. Compare the intra-E.U. locus-delicti rule in Article 5(3) of the Brussels Regulation, pursuant to which a person domiciled in a member state may, in another member state, 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. In line with the argument developed in Part V, it may also be argued here that, if the complaint alleges violations of international human rights, the universal acceptance of those rights may inform the forum-non-conveniens analysis and tilt the balance in favor of the plaintiffs.

limits in the European Union. Such corporations can ordinarily only be sued in an E.U. member state if it is established that the harmful event at issue occurred in that state (locus-delicti rule)—which will ordinarily not be the case. Accordingly, unlike in the United States under the ATCA, there may be no cause of action in the European Union for human-rights violations committed abroad by foreign corporations against foreign victims.88

In other words, there is no universal tort jurisdiction over violations of international (human-rights) law in Europe.89 Admittedly, it may be questioned whether, in practical terms, U.S. federal courts actually exercise universal jurisdiction when hearing claims arising under the ATCA. Indeed, as one U.S. commentator has observed, reviewing a variety of restraining doctrines employed in ATCA litigation, such as the forum-non-conveniens doctrine, the political-question doctrine, and the act-of-state doctrine, “the current structure of human rights litigation in the United States makes it virtually impossible that exercising universal jurisdiction . . . will have any detrimental ‘collateral consequences’ to foreign relations, to foreign policy, or to the sacrosanct separation of powers.”90 This does not, however, change the fact that the scope of the ATCA itself is extremely broad—a scope that inevitably is to be limited by doctrines of restraint in order to prevent jurisdictional overreach. In the European Union, by contrast, any broad jurisdictional grant is absent in the first place. Doctrines such as forum non conveniens that further limit the already restrictive scope of rules of adjudicatory jurisdiction are therefore not sorely needed. But is the European Union in need of more expansive jurisdictional grounds under statutory law, along the lines of the ATCA?

Interestingly, from a jurisdictional expansion perspective, realizing in particular the fact that its rules of adjudicatory jurisdiction may preclude victims from having an effective remedy for certain violations, one E.U. member state, Belgium, has inserted a conspicuous forum-conveniens clause in its new Code of Private International Law in 2004.91 Article 11 of this Code provides that

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88. In England, application of the forum-non-conveniens doctrine may play an important role in weeding out any such foreign-to-foreign cases. See supra note 84 and accompanying text.
91. See C. de droit international privé art. 11 (Belg.).
“[i]rrespective of the other provisions of the present Code, Belgian judges have jurisdiction when the case has narrow links with Belgium and when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are initiated abroad.”

Whereas forum non conveniens narrows down, on a discretionary basis, the scope of rules of adjudicatory jurisdiction, forum conveniens expands their scope; it creates a cause of action that does not exist under normal rules of jurisdiction. A forum conveniens clause like the Belgian one, although it requires “narrow links with Belgium” and thus does not set forth universal tort jurisdiction, may raise some hopes for foreign victims of human-rights violations committed abroad by foreign corporations. While there is no definition of “narrow links,” a foreign subsidiary or a foreign supplier of a Belgian corporation may possibly have such links with Belgium. If victims of the subsidiary's or the supplier's practices do not have access to justice abroad, they may, with some chance of success, turn to the Belgian courts in hope of a tort remedy. No case law on the basis of this article against transnational corporations is, however, yet available.

One may wonder whether, for litigation against TNCs, a broader jurisdictional basis than home-state regulation is in fact called for. After all, will any remaining accountability gaps not be plugged if all home states were to assume their responsibilities and provide a forum for hearing overseas TNC abuses? Home-state-based tort litigation may indeed seem to be the egg of Columbus, as TNCs, in spite of their activities in different states, will be held accountable in at least one state: the state where they are incorporated. This is, however, to gloss over the fact that TNCs typically consist of enti-

92. Id.

93. If the violations are committed by a Belgian corporation, Article 2 of the Brussels Regulation, supra note 6, applies: persons domiciled in an E.U. member state could always be sued in that state. If the violations are committed by a corporation domiciled in another E.U. member state, Article 1 of the Belgian Code of Private International Conduct does not apply as persons domiciled in a member state may be sued in the courts of another member state only by virtue of the rules set out in the Brussels Regulation. The Brussels Regulation does not contain a forum-non-conveniens clause. As a result, Article 1 of the Belgian Code in tort matters is, practically speaking, only relevant in relation to corporations domiciled in a non–member state.

94. The very fact that a Belgian corporation owns or controls, or has entered into contractual arrangements with, a foreign corporation does not necessarily make for “a case” which has “narrow links” with Belgium. Note, however, that the Draft Norms of the U.N. Sub-commission on Human Rights provide that “[w]ithin their respective sphere of activity and influence,” TNCs “have the obligation” to respect human-rights law. ECOSOC, supra note 29, § 1.

95. See Brussels Regulation, supra note 6, arts. 2, 60.
ties incorporated in different states. While one entity may exercise influence over the other, the former is not necessarily liable for the harm caused by the latter. As argued in Parts 2 through 4, only to the extent that the parent corporation neglected its duty of care to supervise the operations of the corporate group may it possibly be held liable in its home state for foreign harm. If negligence cannot be established, and if the TNC’s entity, e.g., a subsidiary or even a supplier, that caused the harm is incorporated in a weak state, on whose territory the harm presumably occurred and which does not live up to its regulatory responsibilities, an accountability gap looms large. For such cases, either an expanded concept of home-state regulation along the lines of the Belgian Code or full-fledged universal jurisdiction (which may make any claim actionable, irrespective of the locus delicti or the nationality of the defendants or plaintiffs) appears desirable.

Obviously, the legislature ought to take the lead if a wider tort cause of action for corporate overseas harm, possibly along the lines of the ATCA, with its emphasis on violations of international law, is to be created in Europe. In the final analysis, this is a political choice involving at least five main considerations. First, what are the legal instruments (e.g., doctrines of piercing the corporate veil, elements of group law) available in E.U. member states to relativize the separate legal personality of corporate subsidiaries or to make parent corporations accountable for the latter’s behavior? Second, how to establish whether certain human-rights norms are applicable territorially to overseas foreign subsidiaries? Third, is tort litigation an adequate mechanism to deal with violations of human-rights law, or should censure of such violations occur through criminal or administrative law on the grounds that such censure gives a stronger accountability signal? Fourth, should a statutory tort cause of action for overseas violations be introduced when corporate negligence suits already consume scarce judicial resources and potentially cause foreign sovereignty concerns? Fifth, if it were indeed decided to provide for a specific tort cause of action for foreign violations, to what extent should facilitating procedural instruments and traditions be added or broadened (discovery, class-action suits, “no cure no pay,” pro bono litigation).

96. See OECD, supra note 58, at 17-18 (Multinational enterprises (TNCs) “usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary from one multinational enterprise to another. Ownership may be private, state or mixed.”).
tion—all of which exist in the United States and, to a certain extent, in other common-law countries such as the United Kingdom)?

European policymakers should consider these issues carefully, and they should only expand opportunities to include overseas tort claims when the European Union and national legal systems are able to cope with them. In the meantime, victims of overseas violations could put their confidence in the European criminal-justice system in the hope that a prosecutor is willing to take up their complaint (in a few states, investigating judges may even be required to investigate a victim’s complaint). In some jurisdictions, victims may also file a tort claim as an adjunct to a criminal prosecution so that the criminal process may also yield a compensation outcome. The availability of tort litigation within the European criminal-justice system, and the problems this might raise in a transnational context, are addressed in the next section.

VIII. TORT CLAIMS IN TRANSNATIONAL CRIMINAL PROCEEDINGS IN EUROPE

It is a familiar feature of some continental-European criminal proceedings that victims can join their civil action for damages to the criminal action.97 The same criminal judge, then, may pronounce on both criminal and civil remedies.98 Because the judge applies tort law to the civil proceedings and criminal law to the criminal proceedings, it may be expected that, if the case is a transnational one, the rules of adjudicatory jurisdiction in tort matters will govern the action for damages, and the rules of jurisdiction in criminal matters the criminal action. These two sets of jurisdictional rules often do not coincide; the scope ratione loci of criminal law in the European Union is generally broader than the scope of the law of tort—rules of adjudicatory jurisdiction in private-law matters being based mainly on the locus delicti and on the defendant’s domicile. Most European states nowadays provide for universal criminal jurisdiction over violations of (some) international humanitarian law and human-rights norms.99 It is, therefore, possi-

97. This fact was, among others, noted in the context of universal jurisdiction over international crimes by Justice Breyer in the ATCA case of Sosa v. Alvarez-Machain. 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring).

98. See, e.g., Sv art. 51a (Neth.); C. pr. pen. art. 85 (Fr.); C. d’instruction criminelle arts. 63-67 (Belg.).

99. See e.g., C. d’instruction criminelle art. 12bis (Belg.); Netherlands Bill on International Crimes, International Crimes Act (June 19, 2003), available at http://www.iccnow.org/documents/NL.IntCrAct.pdf (containing rules concerning serious violations of inter-
ble—at least theoretically—that a criminal judge establishes jurisdiction over the criminal proceeding yet dismisses jurisdiction over the tort claim joined to the criminal action. It may be noted, however, that in criminal proceedings under the universality principle that have so far been brought in Europe, no tort claims have been entertained, but this may be a result of the victims’ not having filed a tort claim in the first place.

The drafters of the Brussels Regulation were aware of the disadvantages of divergent jurisdictional rules in tort and penal matters in situations where the civil claim is joined to the criminal action. Therefore, they have provided in Article 5.4 of the Regulation that a person domiciled in an E.U. member state may be sued in another member state, “as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.” This means that, in an intra-E.U. context at least, the restrictive rules of jurisdiction in private-law matters may yield to the wide rules of criminal jurisdiction.

In practice, as regards suits against corporations for violations committed outside the European Union, Article 5.4 of the Brussels Regulation is only useful if the violations are attributable to a corporation domiciled in an E.U. member state. In that case, the civil suit against that corporation could be joined to the criminal action against the corporation in another member state—provided, of course, that the courts of the latter state may entertain criminal jurisdiction over the alleged violations, that the state allows the civil action to be joined to the criminal action, and that legal persons can be criminally prosecuted in that state. To give a fictitious example, pursuant to Article 5.4 of the Brussels Regulation, Congolese victims of acts of torture committed in the Democratic Republic of Congo could claim damages in criminal proceedings in France against the German corporation considered to be complicit in the torture acts. A real-life case to which Article 5.4 of the Brussels Regulation could have been applied is the criminal

case brought in Belgium by Burmese refugees who were allegedly victims of violations of international humanitarian law aided and abetted by the French corporation Total. If Belgian criminal courts had upheld criminal jurisdiction over the case, they could, applying Article 5.4, also have heard the claims for damages brought by the Burmese plaintiffs.

In cases not involving European defendant corporations, one still has to read tea leaves to determine whether criminal courts would be willing to apply the broader rules of criminal jurisdiction in hearing the tort claims joined to the criminal action. It is, however, not unlikely that the courts, in the interest of jurisdictional uniformity and possibly because of the heinous nature of certain crimes that give rise to extraterritorial criminal jurisdiction, may, as a matter of course, be willing to hear the tort claims if they establish jurisdiction over the criminal action. This would mean that, in Europe at least, European courts could hear tort claims for overseas violations by corporations through the use of the jurisdictionally more hospitable criminal law.

IX. EUROPEAN CRIMINAL PROSECUTIONS FOR TRANSNATIONAL HUMAN-RIGHTS VIOLATIONS

Thoroughly examining the potential of criminal law in Europe to address transnational human-rights violations exceeds the scope of this Article. It should be noted, however, that at least from a theoretical and academic perspective, more attention has recently been devoted to the role of national criminal laws of developed states, typically the home states of TNCs, in enhancing accountability for violations of individual rights occurred abroad.

102. The case was brought under a complicated transitory provision (Article 27.3) of the Act on Grave Breaches of International Humanitarian Law of August 5, 2003. A number of intervening procedural judgments were rendered, after which the Court of Cassation finally dismissed the case on March 28, 2007 (judgment nr. A.R. P0.7.0031.F). Efforts were undertaken to reopen the case, yet the Chambre des Mises en Accusation of the Brussels Court of Appeals, which rendered its decision on March 5, 2008, refused to do so, on the grounds that the Court of Cassation judgment effectively closed the case ("l’autorité de la chose jugée"). See Joan Condijts, Les Birman D’ébouts: Total L’emporte, LE SOIR EN LIGNE, Mar. 5, 2008, available at http://www.lesoir.be/actualite/monde/la-justic-met-fin-aux-2008-03-05-582191.shtml. Possibly, a cassation appeal will be filed, of which the chance of success is minimal, given the previous decisions of the Court of Cassation in the case.

Many states nowadays allow legal persons, such as corporations, to be criminally prosecuted. In addition, many states have expanded the extraterritorial reach of their laws, particularly in regard to international crimes committed abroad. Also, complicity in committing crimes is a crime in most states. As a result, corporations could, in theory at least, be held responsible for violations of international criminal law—such as genocide, crimes against humanity, war crimes, or torture, committed abroad, particularly in conflict zones where collusion with local authorities has occurred. Like tort suits for human-rights violations committed abroad, however, prosecutions for international crimes in domestic courts are extremely rare.

In Europe, only two cases are recorded, both of them against the French corporation Total for international crimes (forced labor) allegedly committed or aided and abetted in Burma/Myanmar. As noted in the previous section, a case was brought in Belgium, through the mechanism of civil party petition, against Total. But after Belgium’s broad International Crimes Act, which conferred universal jurisdiction on Belgian courts, was withdrawn in 2003, the case was dropped on procedural grounds. In France, a...
similar case was opened against Total after a complaint by two Burmese refugees in 2002. This case was dropped in 2006 on the grounds that "forced labor" was not a crime under French law, and that, in any event, more evidence needed to be adduced by the plaintiffs. As the plaintiffs had settled with Total in 2005, they failed to adduce any additional evidence.

There is no case law available relating to human-rights abuses that do not rise to the level of international crimes, such as violations of certain labor rights. These violations are precisely those that are typically committed by corporate actors. The absence of accountability for such abuses is attributable to a number of factors. First, not all human-rights abuses are domestic criminal offenses (e.g., the French Total complaint). Second, even if the abuses qualify as crimes, extraterritorial jurisdiction is only available on a smaller scale: a stronger nexus in terms of territoriality or nationality is typically required, and prosecutions of domiciled persons and corporations are often subject to a requirement of double criminality (which means that the violation must also be a crime in


110. Cour d’appel [CA] [regional court of appeal] Versailles, Jan. 11, 2005, Chambre de l’instruction, 10ème Chambre, § A.

the host state). The third, establishing criminal liability for corporate violations may be as complicated as, or even more complicated than, establishing tort liability.

In spite of the conceptual challenges that criminal prosecution of overseas human-rights violations has to come to grips with, criminal prosecution of such violations has nonetheless some clear advantages over tort litigation. This applies especially to E.U. member states, which largely lack the sort of facilitating features of tort litigation—pretrial discovery, “no cure no pay,” and class-action suits—that have made such litigation a relative success in the United States. A system that tasks a criminal prosecutor or an investigating judge with gathering evidence of abuses may in fact be more victim-friendly than a tort system because the costs of a criminal investigation are borne by the state, which in the West may have plenty of resources, and not by the often cash-strapped victims from developing countries, as may be the case in tort-based systems. Relatedly, problems of selectivity may be reduced in a criminal-law-based system in which victims are not dependent on rich Western NGOs to take their case to court. Furthermore, victims may not be adversely affected by the application of unfavorable substantive law (it may well be that the law of the locus delicti is applied in transnational tort proceedings on the basis of applicable private-international-law rules), as criminal courts will not apply the criminal—public—law of another state. Most importantly, criminal prosecutions may send a stronger accountability signal and contribute more to deterrence than civil suits, which, in the final analysis, are often only geared toward obtaining damages.

112. See, e.g., C. d’INSTRUCTION CRIMINELLE art. 7 (Belg.) (conditioning criminal prosecutions for more serious offenses on the basis of the Belgian nationality or residence of the perpetrator on double criminality).

113. See Robinson, supra note 103, at 4-6 (providing an overview of approaches to corporate criminal liability and discerning (1) vicarious liability, on the basis of which employees’ or agents’ offenses are imputed to the corporation; (2) the identification model, which imputes the offenses of individual senior officers and employees to the corporation; and (3) organizational liability, that is, liability of the corporation in its own right on the basis of deficient corporate culture).

114. See Anderson, supra note 4, at 422 (noting that foreign litigants are less likely to sue in U.S. courts because of problems with access to courts).


116. Sometimes injunctive relief is also sought by the plaintiffs. See, e.g., In re “Agent Orange” Prod. Liab. Litig., 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (plaintiffs, in connection with their injuries, sought money damages as well as injunctive relief in the form of environmental abatement, clean-up, and disgorgement of profits).
Stiff penalties, in particular in the form of imprisonment of officers of TNCs, may drive home—more than damages could—that certain despicable behavior will not be tolerated.117

**X. FROM TORT AND CRIMINAL LITIGATION TO INFORMAL CONCILIATION THROUGH THE OECD NATIONAL CONTACT POINTS: AN ATTEMPT AT A TRANSATLANTIC COMPARISON**

As already noted, criminal prosecution for transnational corporate abuses has its evident drawbacks. Corporations may not be criminally liable, the alleged abuses may not amount to criminal offences, jurisdiction may be lacking, and establishing corporate criminal liability may be fraught with problems. To these drawbacks could be added the discretionary power of the prosecutor to refuse to take up a complaint or to discontinue the proceedings (judges hearing tort claims, in contrast, do not have this discretion), and the more limited role of individual victims in a state-steered criminal process.

It is impossible to say which system—tort or criminal-law based—should be preferred as a justice system for overseas corporate abuses. At most, one could say that some legal systems lend themselves better to tort avenues and others to criminal avenues. The tort avenue may be preferable in common-law systems, especially in the United States, given the advantageous procedural tools that are available to plaintiffs there. The criminal-law avenue may be preferable in continental-European countries, in particular given the generally wider geographic ambit of criminal law in the European Union and European resistance against using tort litigation as a vehicle to mete out global justice.118 In the United States, foreign plaintiffs have indeed filed numerous tort claims against TNCs (under the ATCA), although no judgments on the merits are yet available.119 In the European Union, in contrast, hardly any criminal investigations into corporate abuses abroad have been launched. This begs the question whether, in spite of a certain

117. See Ryngaert, supra note 89, at 8-10; Voiculescu, supra note 103, at 406 (arguing that “criminal law becomes a recurrent [corporate social responsibility] theme, with its fully-fledged concept of blame and accountability”).


119. This has not prevented commentators from stoking fears that the ATCA may seriously threaten U.S. corporations. See, e.g., Gary C. Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 (2003).
conceptual openness to corporate criminal litigation in the European Union, particularly in respect of international crimes, Europe may just be a less litigious society than the United States.

In this context, reference may be made to the active role played by the OECD National Contact Points in Europe, which is a conciliatory role rather than a dispute-settling one. Through these Points, which are in fact government offices responsible for encouraging observance of the OECD Guidelines for Multinational Enterprises and which assist in solving disputes related to the Guidelines, the different stakeholders involved in corporate wrongdoings abroad may seek an informal solution.\(^{120}\) The procedures before the OECD National Contact Points have been used in a significant number of European states, such as Belgium (11 instances considered, 10 of them relating to alleged abuses committed in developing countries or countries in transition), France (9 considered, 5 in developing or transition countries), the Netherlands (21 considered, 11 in developing countries), and the United Kingdom (13 considered, 10 in developing countries).\(^ {121}\) Admittedly, the National Contact Points have also been resorted to in the United States.\(^ {122}\) Interestingly, however, the U.S. instances considered relate disproportionately to alleged abuses within the United States (20 instances considered, only 6 of them relating to abuses committed abroad).\(^ {123}\)

The following inference may be tentatively drawn from this picture. Given the fact that many more TNCs are incorporated in the United States than in Europe, relatively few instances of alleged corporate abuses are considered by the U.S. OECD National Contact Point. Of those instances, only a minority relates to harm abroad. In stark contrast, the Dutch National Contact Point, for instance, has considered more instances than its U.S. counterpart, and more than half these instances that the Dutch National Contact Point considered related to harm abroad.\(^ {124}\) Arguably, business stakeholders in European states may be culturally predisposed

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120. OECD, National Contact Points for the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html (last visited Oct. 1, 2008).


122. Id. at 17-18.

123. Id.

124. Id. at 10-13.
toward more informal mechanisms of resolving conflicts over corporate wrongdoing abroad rather than toward formal litigation through the courts.\textsuperscript{125} In the United States, victims or their representatives may tend to bypass the OECD National Contact Points, possibly because they do not know them (but this applies to Europe as well), yet probably more so because the OECD procedures are to a large extent confidential, do not catch the news headlines in the same way as a formal court complaint does, and do not lead to a strong moral condemnation of the corporation allegedly responsible for the abuse.\textsuperscript{126}

Is European culture more predisposed toward broad-based consultations and dialogue so as to solve problems regarding alleged corporate abuses than toward court action? However this may be, European states seem to take overseas abuses by their own corporations seriously, yet they may not consider court action to be the most effective mechanism to address corporate wrongdoings abroad. Possibly, only if the uncertainty of any possible legal response to foreign corporate abuses (e.g., problems relating to jurisdiction and to the adequacy of liability doctrines) were to be dispelled, the application of some legal norms to transnational corporate torts or crimes (e.g., the complicity standard)\textsuperscript{127} clarified, and the effectiveness of litigation proven, may (continental-) Euro-

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\item The discrepancy may also be partly attributable to the inward focus of trade unions in the United States. Trade unions, together with NGOs, are the actors who typically bring complaints for corporate abuses, whether domestic or foreign. It may be noted, nevertheless, that there are no formal rules of standing before OECD National Contact Points. The Belgian National Contact Point, for instance, proclaims that “anyone may submit a structured dossier to the NCP with respect to the nonapplication of the OECD Guidelines.” SPF Economie, P.M.E., Classes moyennes et Energie [Federal Ministry of the Economy, Small- and Medium-Sized Enterprises, Middle Classes, and Energy], Foire Aux Questions (FAQ) [Frequently Asked Questions (FAQ)], http://economie.fgov.be/fr/binaries/Nationale_contactpunt_faq_fr_tcm326-67745.pdf (last visited Nov. 1, 2009).
\item Raising headlines via a court complaint against a well-known brand is often the main aim of a complaint under the ATCA, irrespective of whether the complaint is eventually successful on the merits. In fact, the very filing of the complaint may already condemn the corporation in the eyes of the public. See Lorna McGregor, The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction, Am. Soc’Y Int’l L. Proc. 125, 126 (2005). \textit{See generally NAOMI KLEIN, NO LOGO} (2000) (on targeting brands evidently).
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Overseas Corporate Human-Rights Abuses in the European Union

European states—which, after all, prefer black-letter law to vague, interest- or policy-based legal analysis—see additional value in litigation, whether criminal or tort. Doubtless, the ongoing work of the U.N. Secretary General’s Special Representative for Business and Human Rights may play an important role in this respect.\textsuperscript{128}
