Berkeley Journal of International Law

Volume 30 | Issue 2 Article 1

2012

Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute

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ABSTRACT

The United States has policed the multinational effects of multinational corporations more aggressively than any other country, but recent decisions under the Alien Tort Statute indicate that it is now backtracking. Europe, paradoxically, is moving in the other direction. Why do some countries retract extraterritorial jurisdiction while others step forward? The article traces the opposing trends through corporate human rights cases and suggests that the answer may lie in attitudes towards national sovereignty. The developments raise important questions regarding the position of the United States in a globalizing world and its role in upholding international norms.

INTRODUCTION

For several decades, the United States has acted as the global leader in imposing accountability on multinational corporations in the area of human rights. Recently, however, U.S. courts have declined jurisdiction to police their extraterritorial abuses. In September 2010, the Federal Court of Appeals for the Second Circuit held that corporations fall outside the purview of the key legal mechanism used to hold them accountable, the Alien Tort Statute (ATS).[1] The

*The author wishes to thank Professors John Coffee and Katharina Pistor for hosting her as a Scholar in Residence at Columbia Law School during completion of the research. She also would like to thank Professors Curtis Milhaupt, Gillian Metzger, Paul Stephan, David Sloss, Chimene Keitner, and Brian Cheffins for helpful comments.

1. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010). Since the *Kiobel* decision, other circuit courts have considered whether the ATS allows for extraterritorial jurisdiction over corporate defendants. Conflicting authorities have resulted. *Compare* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (2011); Sarei

ruling deprived residents of the Ogoni region of Nigeria of their legal claim against Royal Dutch Petroleum and Shell Transport and Trading Company, though military forces the corporations hired to suppress environmental protesters had shot and killed some civilians, and had beaten and raped others.[2]

The retraction in the willingness of U.S. courts to exercise extraterritorial jurisdiction over multinationals is occurring just as the courts of many European member states are becoming more open to it. The English High Court recently took review of the *Monterrico* case, which involves claims of thirty-two indigenous Peruvians that an English corporation, owned by a Chinese consortium and headquartered in Hong Kong, aided and abetted their torture by the Peruvian Police.[3] The District Court in The Hague, meanwhile, will adjudicate the claims of four Nigerian villagers who allege that oil spills caused by Royal Dutch Shell deprived them of their livelihood, even though a similar proceeding is advancing in Nigeria.[4]

For now, the United States has pursued more cases than any EU member state, but the attitudes reflected in the corporate human rights jurisprudence of the two regions appear to be evolving in opposite directions.[5] The question of

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v. Rio Tinto, PLC, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); *see also* Aziz v. Alcolac Inc., 658 F.3d 388, 394 n.6 (4th Cir. Sept. 19, 2011) (declining to reach question of corporate liability and dismissing on alternative grounds). To address the developing split, the Supreme Court will review *Kiobel,* and it is widely predicted to, at a minimum, narrow corporate jurisdiction under the statute. *See, e.g.,* Daniel Fisher, *Supreme Court to Decide if 1789 Law Applies to Shell in 2012*, FORBES, Dec. 20, 2011, http://www.forbes.com/sites/danielfisher/2011/12/20/supreme-court-to-decide-if-1789-law-applies-to-shell-today/ ("The Roberts Court is also likely to trim the sails of plaintiff lawyers who want to use the 1789 Alien Tort Claims Act to pursue 21st-century class actions."); Stephen M. Nickelsburg & Erin Louise Palmer, *Supreme Court To Decide Corporate Liability Under Alien Tort Claims Act*, THE METROPOLITAN CORPORATE COUNSEL, Dec. 2011, at 6, *available at* http://www.metrocorpcounsel.com/articles/16694/supreme-court-decide-corporate-liability-under-alien-tort-claims-act ("Even if the Supreme Court concludes that corporations can be liable under the ATCA, however, numerous questions regarding the statute's interpretation continue to vex the lower courts and could limit corporate liability."); Lisa Ann T. Ruggiero, Joseph E. Hopkins & Anthony Molloy, *What Were They Thinking? How a Circuit Split Over Mens Rea Could Resolve the Alien Tort Statute Corporate Liability*, 207 N.J. L.J. 503 (2012) (" Indeed, even if *Kiobel* is overturned by the Court, not all will be lost for corporations if the Court subsequently reviews *Doe v. ExxonMobil*.").

2. *Kiobel*, 621 F.3d. at 123.

3. Guererro et al. v. Monterrico Metals PLC, [2009] EWHC (QB) 2475 (Eng.), subsequently settled out of court, *see, e.g.,* Dan Collyns, *UK Firm Agrees to Pay Compensation to Peruvian Farmers*, BBC, July 20, 2011, http://www.bbc.co.uk/news/world-latin-america-14227670;, *Peruvian Torture Claimants Compensated by UK Mining Company*, LEIGH DAY & CO. (July 20, 2011), http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin.

4. Court of the Hague, Docket Number HA ZA 09-579 (Oguru v. Royal Dutch Shell PLC) (Neth.). *See, e.g.*, *The People of Nigeria Versus Shell: The Course of the Lawsuit*, MILIEUDEFENSIE (Dec. 2009), http://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit/view.

5. *See supra* Sections III and IV. *See also Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, OXFORD PRO BONO PUBLICO, 332-33, 338-40 (Dec. 3, 2008), http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf;

DOI: doi:10.15779/Z38CW7K

why, in an increasingly interconnected world, the United States is growing less tolerant of extraterritorial adjudication just as EU member states are entering the field, is what this article seeks to explain.

What happened? Thanks to an innovative application of the Alien Tort Statute, the United States emerged as a staunch protector of foreign plaintiffs.[6] Throughout recent decades, no nation did more to enforce universally recognized international norms against multinational corporations. However, not only have U.S. courts recently called into doubt the applicability of the ATS to corporations,[7] but they also have recently decided that corporations cannot be sued under the Trafficking Victims Protection Act,[8] that the Racketeer Influenced and Corrupt Organization Act does not apply to extraterritorial corporate activities,[9] and that the principal antifraud provision of the federal securities laws does not apply extraterritorially to foreign transactions, even when fraudulent conduct has occurred within the United States.[10]

What is compelling here is not that the United States is acting inconsistently.[11] Rather, what is puzzling is why EU member states are increasingly a driving force behind the enforcement of corporate standards and why the United States is reversing course. The paradox of a leader potentially lagging behind warrants exploration.

The aim of this article is wider than simply describing the trend. Instead, the article is focused on understanding the reasons behind the U.S. evolution in comparative perspective. While many articles have criticized the recent U.S. approach to extraterritoriality, none has considered the moves made by U.S. courts in global context. Part II discusses the attributes of the corporate form that make it susceptible to human rights abuses and establishes why extraterritorial jurisdiction is necessary for regulating the conduct of multinational corporations. Part III examines case law under the ATS leading up to the decision that the statute does not apply to corporations. Part IV investigates the means through which EU member states are beginning to address the foreign conduct of

Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 Geo. Wash. Int'l L. Rev. 903, 903-05 (2009).

6. 28 U.S.C. § 1350 (2006).

7. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 149 (2d Cir. 2010).

8. Mohamad v. Rajoub, 634 F.3d 604 (D.C. Cir. 2011).

9. Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010).

10. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010) (applying a statutory presumption against extraterritoriality and interpreting the scope of section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5).

11. In a few instances, the United States has expanded extraterritorial jurisdiction. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1964 (2010); Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I) 542 U.S. 155 (2004) (interpreting the scope of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (2006)). *See generally* Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 5-10 (John F. Kennedy School of Government, Harvard University, Working Paper No. 59, 2010).

corporations, without an equivalent statute providing extraterritorial jurisdiction over causes of action in customary international law. Part V suggests that different cultural attitudes towards sovereignty, rooted in history, animate the current approach each region takes towards extraterritoriality. The article concludes by proposing that instead of depending on U.S. courts to adjudicate extraterritorial claims, even as they grow increasingly hostile to them, alternative forums could develop human rights norms in international law to achieve accountability.

The developments in the United States raise fundamental questions about its position in a globalized world. Among them: Should the United States seek to project a moral example beyond its borders? What is the correct scope of extraterritorial jurisdiction within the U.S. legal system? To what extent should the United States accept constraints on its sovereignty and join international regulatory initiatives?

I.
POLICING THE MULTINATIONAL EFFECTS OF MULTINATIONAL CORPORATIONS REQUIRES EXTRATERRITORIAL JURISDICTION

As corporations have become increasingly transnational, they have outgrown the national corporate law regimes designed to govern them.[12] The modern multinational corporation, bearing little resemblance to the archetypal sole trader operating alone within his own country or the early corporation selling shares to individual investors, is now difficult to hold accountable in spite of the susceptibility of corporations to human rights abuses.[13] To fill the resulting governance gap, extraterritorial jurisdiction has become necessary.[14]

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12. *See, e.g.*, Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 58 (2002) ("Regulatory schemes are largely domestic, based on national laws, administrative bodies, and with judicial systems, while transnationals operate across borders"); Wayne Ellwood, *Multinationals and the Subversion of Sovereignty*, 246 NEW INTERNATIONALIST 4, 7 (1993) ("companies are less attached today than ever to their country of origin").

13. *See* Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 5 (De Schutter ed., 2006).

14. There are few international bodies with enforcement power over companies. U.N. committees can investigate in conjunction with the Torture Convention, the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention for the Protection of Human Rights and Fundamental Freedoms is enforced by the European Court of Human Rights; the American Convention on Human Rights is overseen by the Inter -American Commission and the African Charter on Human and Peoples' Rights is implemented by the African Commission. The French delegation led efforts to include corporate liability in the Rome Statute of the International Criminal Court, but consensus was impossible. *See* Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Lee ed., 1999).

http://scholarship.law.berkeley.edu/bjil/vol30/iss2/1
DOI: doi:10.15779/Z38CW7K

A. Modern multinational corporations transcend national jurisdiction

Today roughly 80,000 multinational corporations with ten times as many subsidiaries operate on a global scale, far beyond the borders of any single territory, but this was not always the case.[15] Intercorporate stock ownership originally was outlawed in the United States and Europe.[16] The first holding company act, which allowed corporations to buy and hold stock in other corporations, was not adopted until 1888.[17]

Over time, corporations used their rights of intercorporate ownership to cluster separate corporations into global networks of subsidiaries, achieving levels of transnationality and economic power at odds with territorially based laws.[18] Cross-shareholding, inter-enterprise contracts, linked directorships, and concentrated voting rights became common.[19] While the interlocking, international structures of the modern enterprises enabled more efficient delivery of goods and the standardization of products, the scope and financial strength of the networks now threatens to overshadow individual states.[20] Separate legal regimes continue to govern each national unit of multinational corporations, in spite of the broader international strategy that each jointly

15. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further Steps toward Operationalization of the "Protect, Respect, Remedy" Framework*, ¶ 82, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

16. *See, e.g.*, Central R.R. v. Collins, 40 Ga. 582 (1869); Hazelhurst v. Savannah, Griffin & N. Ala. R.R., 43 Ga. 13 (1871); First National Bank v. Nat'l Exch. Bank, 92 U.S. 122, 128 (1875) ("Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power"); Franklin Co. v. Lewiston Inst. for Sav., 68 Me. 43, 46 (1877); Rumänischen Eisenbahn case of 1881, 3 RGZ 123 (Ger.); Petroleum case of 1913, 82 RGZ 308 (Ger.). *See also* René Reich-Graef, *Changing Paradigms: The Liability of Corporate Groups in Germany*, 37 CONN. L. REV. 785 (2005) (discussing fact corporate stock ownership outlawed in Europe and German law unique in changing this in German Stock Corporation Act of 1965).

17. 1888 N.J. Laws 385-86; 1888 N.J. Laws 445-46. *See also* Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 203 (2009) ("In 1988, New Jersey was the first state to grant permission for any corporation chartered in the state to own stock in any other").

18. *See, e.g.*, Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE 40 (Nov. 3-4, 2006), http://www.business-humanrights.org/Links/Repository/775593 (background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels) ("the multinational corporation appears as a coordinator of the activities of its subsidiaries, which function as a network of organizations working along functional lines").

19. *See, e.g.*, José E. Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 197, 205 n.29 (1999) (citing Inv. Trust Corp. v. Sing. Traction Co., [1935] Ch. 615 (Eng.) (one share can outvote 399,999 shares)); MELVIN EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976).

20. *See, e.g.*, Detlev Vagts, *The Multinational Enterprise: A New Challenge for. Transnational Law*, 83 HARV. L. REV. 739 (1970); Vivien A. Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State*, 124 DAEDALUS 75, 75 (1995) (nation-state becoming less powerful than business); Stephens, *supra* note 12, at 56.

pursues.[21]

B. Limited liability and separate legal personality insulate multinational corporations from accountability

The national corporate law systems governing the individual units originated prior to the proliferation of interconnected multinational groups and do not translate well to them.[22] While countries generally want to attract investment from multinationals in order to gain access to foreign capital, international markets, and new technologies and training, the same advantages make them difficult to hold accountable under national corporate laws.[23] Their ability to abuse the corporate form, however, is by now well known. Delegated decision making, asset partitioning, and other corporate attributes make them susceptible to abuse by actors who treat human rights norms lightly. From I.G. Farben during World War II to Union Carbide in Bhopal, they have long caused significant harm.[24] Many multinational corporations operate in conflict-affected regions where "bad things are known to happen," structuring their risky ventures to avoid liability.[25]

The lack of correspondence between the corporate form designed for single corporate enterprises and the integrated economic form of multinational

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21. *See, e.g.*, Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise,* 74 HARV. L. REV. 1489, 1526-30 (1961) (corporations string together corporations created by the laws of different states).

22. *See, e.g.*, Beth Stephens, *supra* note 12 at 54 ("Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms"); ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 81 (1996) ("the law has not kept up with reality . . . law was developed with a view to a single firm operating out of a single state, owned by shareholders who . . . were not other corporations").

23. *See, e.g.*, John Ruggie, *Global Markets and Global Governance: The Prospects for Convergence*, *in* GLOBAL LIBERALISM AND POLITICAL ORDER: TOWARD A NEW GRAND COMPROMISE? 33 (Steven Bernstein and Louis W. Pauly eds., 2007) ("the territorial state is not their cardinal organizing principle"); Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, Ninth Annual Grotius Lecture at the Annual Meeting of the American Society of International Law (ASIL), 101 ASIL PROCEEDINGS 3, 15 (2007); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 454 (2007-2008); McLeay, *supra* note 13, at 5.

24. *See, e.g.*, Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1105, 1198 (2009); In re Union Carbide Corp., 634 F. Supp. 842 (S.D.N.Y. 1986) (Gas Plant Disaster at Bhopal, India in December 1984), *aff'd and modified* 809 F.2d 195 (2d Cir. 1987).

25. John Ruggie, Keynote Presentation, EU Presidency Conference on the "Protect, Respect and Remedy" Framework, Stockholm, November 10-11, 2009 at 6, *available at* http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf (last visited August 4, 2011); *see also* Stiglitz (2007), *supra* note 23, at 49.

DOI: doi:10.15779/Z38CW7K

corporations makes the corporate fiction problematic.[26] The act of incorporation carries with it an artificial separate legal personality, dividing the incorporated enterprises and their shareholder-owners into separate spheres and bestowing limited liability on the owners.[27] The theory of limited liability developed to encourage individuals to invest, so that corporations could pool capital and put it to efficient use.[28] Limited liability, however, continues to apply to corporate owners within multinational corporations, without distinguishing their incentives from those of human investors.[29]

While the doctrines of separate legal personality and limited liability protect individual shareholders against losses that exceed their initial investments, thus encouraging them to invest, the doctrines have different consequences when they apply to corporations.[30] Multinationals can exploit them to shield parent corporations from liability for human rights abuses committed by their foreign subsidiaries.[31] If they strategically insulate dangerous activities within separate entities,[32] the corporate fiction ensures that each one remains legally separate in spite of their economic interdependence, and limited liability protects the parent corporations against responsibility.[33]

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26. *See, e.g.,* Phillip I. Blumberg, *Accountability of MNCs: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297 (2001); Stephens, *supra* note 12, at 88.

27. *See, e.g.*, Burnet v. Clark, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities"); Anderson v. Abbott, 321 U.S. 349, 362 (1949) ("Normally the corporation is an insulator from liability on claims of creditors"); *see also* Aktiengesatz [AktG] [Stock Corporation Act], Sept. 6 1965, BGBL. § 1; art. 5 French loi du 24 juillet 1966; English Companies Act, 1985, §§ 1, 13 (Eng.). For examples of limited liability legislation, *see*, 1830 Mass. Acts 325, 329, Act of Feb. 23, 1830 ch. 53, S 8; Limited Liability Act, 1855, 18 & 19 Vict., c. 133; Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47.

28. WILLIAM A. GROENING, THE MODERN CORPORATE MANAGER: RESPONSIBILITY AND REGULATION 11 (1981); Henry G. Manne, *Our Two Corporation Systems: Law And Economics,* 53 VA. L. REV. 259 (1967); Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Reinier Kraakmann, *The Economic Functions of Corporate Liability*, *in* CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES 178 (Klaus J. Hopt & Gunther Teubner eds., 1985).

29. *See, e.g.*, Andreas Lowenfeld, *supra* note 22 at 83-85.

30. P. BLUMBERG, THE LAW OF CORPORATE GROUPS 7 (1995).

31. *See, e.g.,* De Schutter, *supra note* 18, at 36.

32. Stiglitz (2007-2008), *supra note* 23, at 474; José Engrácia Antunes, *Enterprise Forms and Enterprise Liability – Is There a Paradox in Modern Corporation Law?* in: II REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DO PORTO 187, 217 (2005) (187-225) ("In some cases MNCs take a country's natural resources, paying but a pittance while leaving behind an environmental disaster. When called upon by the government to clean up the mess, the MNC announces that it is bankrupt: All of the revenues have already been paid out to shareholders. In these circumstances, MNCs are taking advantage of limited liability").

33. *See, e.g.*, Lowenfeld, *supra note* 22, at 82. For a private international law perspective on gaps in governance, *see* Horatia Muir-Watt, *Private International Law as Global Governance: Beyond the Schize, from Closet to Planet*, (2011), *available at* http://works.bepress.com/horatia_muir-watt/1.

C. Accountability requires extraterritoriality

In this way, multinational corporations challenge the effectiveness of national corporate law systems, and a recognition has emerged that their regulation demands legal liability beyond national borders and across corporate groups.[34] Extraterritoriality, a legal doctrine that allows judicial systems to exercise authority outside the typical jurisdiction, has become a tool for countering the accountability gap that globalization has caused.[35] Extraterritorial jurisdiction can be used to impose responsibility in situations where no single system has the capacity to find multinationals at fault.[36]

Without extraterritoriality, the host countries of the subsidiaries that committed human rights abuses generally would take jurisdiction over their actions within the national territory.[37] Often, however, multinational corporations can manipulate territorially based jurisdiction to evade liability.[38] To begin with, they can distribute actions that collectively amount to illegalities across many separate entities, so that each individually has operated within the law.[39] If the harmful conduct is carried out in countries other than where its effects are felt, evading the competence of the territorial jurisdiction becomes even easier.[40] Second, even if liability could be imposed on one unit of a multinational, the unit can shift its financial assets within the corporate group, exhausting the funds that would otherwise have been recoverable in the territorial jurisdiction.[41]

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34. *See, e.g.*, Schutter, *supra* note 18, at 21 ("the interdependencies created by the activities of such transnational actors, and the need to devise an adequate reaction"); Zerk, *supra note* 11, at 5; Michael Addo, *Human Rights and Transnational Corporations – an Introduction*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 11 (Michael Addo ed., 1999) ("Of all the characteristics of the law it is its predominantly domestic focus which impedes its effectiveness in the regulation of transnational corporations of today").

35. *See, e.g.*, De Schutter, *supra note* 18.

36. *Id*. at 2-7; *Exploring Extraterritoriality In Business And Human Rights: Summary Note Of Expert Meeting Tuesday*, Sept. 14 2010, Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School, at 3, *available at* http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf (last viewed Aug. 4, 2011).

37. On the principle of territorial jurisdiction, *see* U.N. Charter art. 1, para. 2, art. 2, para. 4; Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); *see also* Stephens, *supra* note 12, at 82.

38. *See, e.g.,* Michael Addo*, supra note* 34, at 11.

39. Amnesty International, *Comments In Response To The Un Special Representative Of The Secretary General On Transnational Corporations And Other Business Enterprises' Guiding Principles – Proposed Outline* 19 (Oct. 2010), available at http://www.amnesty.org/fr/library/info/IOR50/001/2010/en; Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *supra* note 15, at 20 ("challenge is the attribution of responsibility among members of a corporate group").

40. *See, e.g.*, De Schutter, *supra note* 18, at 21.

41. *Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation,*

In addition, in a territorial system, even if a single entity acting within a single national jurisdiction has committed a wrong, and even if the entity has not protected its assets by transferring them outside of the jurisdiction, multinational corporations can still rely on their economic strength to evade liability.[42] In many cases, the countries where the harm occurred will not have made the actions of the corporations illegal so as not to discourage foreign investment.[43] Even if the actions are illegal, the multinationals can still wield their power to avoid punishment: they can pressure local authorities not to prosecute them, offering continued investment. Local authorities, moreover, frequently have been complicit in wrongdoing.[44] When prosecutions do proceed, the host countries often lack functioning legal systems or may not have sufficient resources to bring multinationals to justice.[45]

Extraterritoriality surmounts some of the difficulties by enabling litigation to take place in alternative jurisdictions, either through the direct horizontal application of international laws, as is the case under the ATS in the United States, or through a vertical collapsing of the separation between the parent corporations and the subsidiaries that they own, as has become prevalent in Europe.[46] The former can be justified under a theory of supranational liability, which assumes that multinational corporations are no longer closely connected to any particular country and have outgrown the exclusive jurisdiction of the territory in which the human rights abuses took place.[47] The latter mechanism of accountability reflects an enterprise theory of liability and presumes that multinationals, though aggregates of legally separate corporations, are organized as single economic units, so every act of the subsidiaries may be imputed to

Introduction, AMNESTY INTERNATIONAL, 17 (Aug. 31, 2001), http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/be2d6765-d8f0-11dd-ad8c-f3d4445c118e/ior530022001en.pdf; Stiglitz (2007-2008), *supra note 23*, at 474.

42. On jurisdiction generally, *see* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2008); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011).

43. G.A. RES. 60/251, at 16, U.N. Doc. A/HRC/4/35/Add.2 (Feb. 15, 2007) ("the state lacks both the ability and inclination to exercise jurisdiction, particularly where it seeks to encourage companies registered on its territory to expand their overseas operations"); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1, 32 (2002) ("the local municipal law might not recognize the underlying facts as a tort at all").

44. *See, e.g.*, Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations,* 20 BERKELEY J. INT'L L. 91, 91-92 (2002).

45. *See* McLeay, *supra* note 13, at 5.

46. 28 U.S.C. § 1350 (2006); *infra* Section III.A.

47. *See, e.g.*, Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 505-507 (2008); Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837 (2008); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

their parent corporations.[48] The enterprise theory differs from the usual entity-based approach, in which the separate legal personality of subsidiaries only can be overlooked when they display no will or existence of their own, which is determined through scrutiny of the relationship between the subsidiaries and their parent corporations.[49]

Extraterritoriality, however, remains controversial.[50] Some argue that it is improper to interfere in the domestic affairs of territorial jurisdictions and suggest that each deserves the opportunity to develop local institutions to address local problems.[51] The criticisms assume that multinational corporations can be held accountable within a single jurisdiction, even though the wrongdoing may have taken place across multiple countries, evading any territorially bounded prohibition. Other critics defend the interests of the multinationals themselves, stressing that extraterritoriality forces them to comply with conflicting requirements of multiple jurisdictions, leading to legal uncertainty and additional expense.[52] These arguments, however, overlook the fact that foreign subsidiaries generally form part of integrated corporate groups under common management. The public relates to multinational corporations at the level of the parent corporations that control each separate unit, and so the parents can be expected to run them in compliance with the laws of the parent jurisdictions. Indeed, multinationals targeted in boycotts and divestment campaigns have not denied that they were doing business in foreign territories

48. Adolf Berle advocated using an economic enterprise theory and disregarding the corporate form in favor of economic substance. *See* Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947); *see also* Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195 (2009).

49. Phillip I. Blumberg, *The Increasing Recognition Of Enterprise Principles In Determining Parent And Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 297 (1996) ("This view of the corporation as a separate juridical entity with its own rights and duties distinct from those of its shareholders is entity law."). For veil-piercing standards in various countries, *see, e.g.*, Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L.J. 73 (1998); Thomas J. Heiden, *The New Limits of Limited Liability: Differing Standards and Theories for Measuring a Parent/Shareholder's Responsibility for the Operations of Its Subsidiary*, 823 Practicing L. Inst. 7 (1993) (discussing typical entity-based approach that relies on veil-piercing). *See, e.g., Consol. Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801, 806 (8th Cir. 1964) (parent company exerted complete control over subsidiary, rendering it "mere conduit, instrumentality or adjunct" of its parent); *Steven v. Roscoe Turner Aeronautical Corp*., 324 F.2d 157, 161 (7th Cir. 1960) (although stock control and common officers and directors are factors in applying the instrumentality rule, they represent common business practice and without other misconduct, corporate structure will not be disregarded).

50. *See, e.g.*, Luc Reydams, *Universal Jurisdiction in Context*, 99 AM. SOC'Y INT'L L. PROC. 118, 119 (2005); *Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights, Background Notes*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, 8 (Nov. 8-9, 2007), http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-backgrounder.pdf; Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 87 (2001).

51. De Schutter, *supra* note 18, at 7, 10.

52. *See, e.g.*, Ruggie, *supra* note 25, at 5.

DOI: doi:10.15779/Z38CW7K

by suggesting that only their independent subsidiaries conducted activities there.[53]

II.
THE ATS OVERCAME THE OBSTACLES TO ACCOUNTABILITY, BUT MOUNTING RESISTANCE TO EXTRATERRITORIAL JURISDICTION HAS CULMINATED IN POTENTIAL IMMUNITY FOR CORPORATE DEFENDANTS

In the United States, the ATS offered a cause of action in international law coupled with extraterritorial jurisdiction to overcome many of the obstacles to liability described in the previous section.[54] Although not its original purpose, *Filártigav. Peña-Irala* and *Doe v. Unocal* construed the statute as a tool foreign plaintiffs could use to hold transnational corporations accountable for human rights abuses abroad.[55] The claims always have been difficult to bring, however, and they increasingly appear to occupy an uncomfortable position within the U.S. legal system.[56] In *Sosav.Alvarez-Machain*, the Supreme Court restricted the range of international laws that may enter U.S. courts through the statute, emphasizing separation of powers concerns with extraterritorial jurisdiction.[57] *Kiobel v. Royal Dutch Petroleum*, recently handed down in the Second Circuit, narrowed the statute to exclude corporate defendants, reflecting similar uneasiness with nondomestic laws and extraterritoriality.[58]

A. The ATS brings international laws into U.S. courts for external application against foreign defendants

The ATS allowed U.S. courts to consider external international rules and exercise extraterritorial jurisdiction, and thus enabled the adjudication of claims concerning the multinational effects of multinational corporate wrongdoing. Though this was an unintended use of the statute, U.S. courts initially condoned it, reflecting U.S. leadership in human rights.[59]

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53. *See, e.g.*, Lowenfeld, *supra* note 22, at 99-105.

54. *See, e.g.*, Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 7-8 (2003).

55. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part*, *rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

56. *See, e.g.*, Gonzalez v. Chrysler Corp., 301 F. 3d 377, 381-84 (5th Cir. 2002); Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1529 (D. Minn. 1996); Torres v. S. Peru Copper Corp., 965 F. Supp. 899, 900 (S.D. Tex. 1996); Ernst v. Ernst, 722 F. Supp. 61, 64-68 (S.D.N.Y. 1989). *See also* U.N. G.A., Human Rights Council, *supra* note 43, at 20; Oxford Pro Bono Publico, *supra* note 5, at ii; Part III C.

57. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

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

59. De Schutter, *supra* note 18, at 6.

Enacted in 1789 with little surviving legislative history,[60] the ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[61] Its original purpose appears to have been to assure other governments that foreign diplomats and merchants living in the United States would have access to legal remedies.[62]

First used in actions against foreign officials and repressive regimes, and then applied to corporate defendants, the ATS prior to *Kiobel* offered foreign plaintiffs the ability to hold any defendant accountable in the United States, provided they could make out a cause of action under international law.[63] The statute applied to foreign subsidiaries with separate legal personalities and the harms they caused outside of the United States.[64] The legislation therefore has functioned in both an inward and an outward direction: it has conveyed international causes of actions *into* federal common law, and it has allowed U.S. courts to impose jurisdiction *outward* over foreign claims so that they may be adjudicated in the United States.

After nearly two hundred years of nonuse, in *Filártiga v. Peña-Irala* the ATS enabled a Paraguayan father and his daughter to redress the kidnapping and torture of his son by a Paraguayan police officer.[65] The domestic suit they had brought in Paraguay stalled when the defendant-police officer arrested and threatened their lawyer and another person falsely pleaded guilty.[66] The ATS, however, provided U.S. federal court as an alternative. The Second Circuit found federal question jurisdiction over the claim between Paraguayan citizens because "the law of nations . . . has always been a part of the federal common law."[67] The court found torture to be a violation of the law of nations, citing the Universal Declaration of Human Rights and other UN documents, and therefore

60. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("no one seems to know whence it came").

61. 28 U.S.C. § 1350 (2006).

62. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004). This view, further described in Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002), remains subject to dispute; *but see* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490-93 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 234 (1996).

63. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115-16 (2d Cir. 2010).

64. *See, e.g.*, Bowoto v. Chevron Corp., 621 F.3d 1116, 1124-28 (9th Cir. 2010); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

65. Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). On nonuse, *see Kiobel,* 621 F.3d at 115-16; Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 748 (2010).

66. *Filártiga*, 630 F.2d at 878 (2d. Cir. 1980).

67. *Id.* at 885.

DOI: doi:10.15779/Z38CW7K

actionable under the statute.[68]

Filártiga transformed the ATS into a tool for remedying human rights violations committed abroad.[69] The opinion endorsed the domestic integration of international laws and extraterritorial jurisdiction, stating that the federal common law incorporates new international norms as "part of an evolutionary process" and that "[i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction."[70] The court aspired to make torture "an enemy of all mankind."[71]

A flurry of cases against foreign officials and repressive regimes followed *Filártiga*.[72] The cases offered no real prospect of recovery, but their documentary and symbolic functions elicited approval, at least outside of the D.C. Circuit.[73] Law review articles dissecting the cases also supported the role of the statute in stimulating the development of international law.[74] Overall, the new use of the statute seemed well received, perhaps because the need to allege a violation of the law of nations and to withstand motions asserting *forum non*

68. *Id*. at 879-83.

69. *See, e.g.*, Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 388 (2010) (describing "explosion of ATS litigation centered almost exclusively on human Rights").

70. *Filártiga*, 630 F.2d at 885, 887.

71. *Id*. at 890.

72. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Almog v. Arab Bank, PLC, 471 F.Supp.2d 257(E.D.N.Y. 2007); *See also* Sinan Kalayoglu, *Correcting Mujica: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L. J. 1045, 1045-1046 (2007).

73. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61, 103 (2008) ("ATS judgments against individual defendants provide invaluable symbolic vindication for plaintiffs and can deter human rights abusers from entering or remaining in the United States, but money judgments against these defendants are notoriously difficult, if not impossible, to collect. Defendants might not have significant assets in the United States, and U.S. judgments can be difficult to enforce abroad"); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 516 (2011) ("In ATS litigation, American courts have heard cases brought by aliens on account of human rights violations. This litigation has produced some successes, including both symbolic victories against judgment-proof individuals and monetary settlements with corporations allegedly complicit in human rights abuses committed by governments. Human rights treaties have famously weak enforcement mechanisms—some create toothless committees or commissions, others create nothing at all—and litigation in the United States provides a potential avenue for enforcement that is both procedurally sound and more likely to produce tangible victories. For this reason, Koh supports this litigation"); Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 3 (2012) ("Beyond monetary redress, ATS litigation provides plaintiffs with symbolic vindication and empowerment while serving as a deterrent against future corporate complicity in international law violations").

74. Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 175 (2004) ("Hundreds of law review articles analyzing the *Filártiga* doctrine were overwhelmingly favorable").

conveniens or sovereign immunity limited the number of claims that could proceed to judgment.[75]

The D.C. Circuit alone took a more hostile view of the statute and sought to restrict the scope of international law that could come into domestic courts for extraterritorial application. In *Tel-Oren v. Libyan Arab Republic*, a claim by Israeli citizens against a Palestinian organization for a terrorist attack in Haifa, Judge Bork stated in a split-panel decision that only Congress could create causes of action.[76] It therefore followed, he said, that the ATS could not incorporate new causes of action within the meaning of the law of nations as it evolved.[77] Judge Bork would have limited the incorporation of international laws into U.S. law to the few norms recognized in 1789, when Congress adopted the ATS.[78] All three judges on the *Tel-Oren* panel declined to impose judgment extraterritorially over events that took place in Israel.[79] Doing so, they wrote, would amount to the conduct of foreign relations, which separation of powers principles reserve exclusively for the political branches.[80] Both arguments have reappeared in more recent decisions involving corporations.[81]

B. The ATS extended extraterritorial jurisdiction to multinational corporate defendants

Corporations provide easier targets for ATS claims than individuals or repressive regimes, and litigators seized the opportunity. The 2001 *Doe v. Unocal* case offered to charge them with complicity in human rights abuses.[82] Suits against corporations have reached actions taken by many individuals that only collectively amount to illegalities.[83] Sovereign immunity has not protected

75. 28 U.S.C. § 1404. *See also* In re Union Carbide Corp., 634 F. Supp. 842 (S.D.N.Y. 1986) *aff'd*, 809 F.2d 195 (2d Cir. 1987) (Gas Plant Disaster at Bhopal, India in December, 1984); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (11th Cir. 2009). The doctrine of foreign sovereign immunity developed in the common law prior to the enactment of the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602. *See* Carpenter v. Republic of Chile, 610 F.3d 776 (2d Cir. 2010); Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

76. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring).

77. *Id*. at 808-19.

78. *Id*. Subsequent courts in other circuits, however, initially followed *Filártiga*, not *Tel-Oren*, and continued to assume the power to recognize causes of action. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (referring to *Filártiga* as "the wellspring of modern § 1350 case law"); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 441-42 (D. N.J. 1999); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987).

79. *Tel-Oren*, 726 F.2d at 775-76, 798-99, 823-27.

80. *Id*. at 799, 803-804, 823-827.

81. *See infra* section B.

82. *See* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); 248 F.3d 915 (9th Cir. 2001), *vacated* 403 F.3d 708 (9th Cir. 2005).

83. For cases involving suing a corporation to reach the actions of many individuals, *see, e.g.*,

http://scholarship.law.berkeley.edu/bjil/vol30/iss2/1
DOI: doi:10.15779/Z38CW7K

corporations as it has governments.[84] Most large corporations have maintained permanent presences within the United States, making it possible to establish personal jurisdiction over them.[85] Corporations also have had more substantial recoverable assets and stronger incentives to settle claims to avoid negative publicity than other defendants.[86]

In *Doe v. Unocal*, a federal court reviewed for the first time whether the ATS applied to corporate complicity in human rights abuses, relying on an earlier case, *Kadic v. Karadzic*.[87] While liability under international laws generally necessitates state action, the *jus cogens* crimes of slave trading, genocide, and war crimes do not require it.[88] In *Kadic*, the Second Circuit found that nonstate actors also violate international laws when they commit crimes that further a separate *jus cogens* crime.[89] The court therefore allowed an ATS claim alleging genocide against the leader of the Bosnian-Serb Republic, even though the Bosnian-Serb Republic did not qualify as a state.[90]

In *Doe v. Unocal*, the Ninth Circuit endorsed ATS suits against corporations, largely on the basis that *Kadic* already implicitly allowed claims against private actors.[91] The case concerned allegations that a subsidiary of Unocal was complicit with its security partner, the Myanmar military, in the assault, rape, torture, and murder of villagers in Burma.[92] The full circuit voted for *en banc* review to determine the correct standard for aiding and abetting liability, vacating the judgment of the prior panel.[93] Before the *en banc* opinion issued, however, the parties settled the case.[94]

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 262 (2d Cir. 2007); Bigio v. Coca-Cola, 448 F.3d 176, 179 (2d. Cir. 2006); Doe v. Nestle, S.A., 748 F.Supp.2d 1057, 1063, 10744 (C.D. Cal. 2010).

84. Inés Tófalo, *Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations* 5 (NYU Sch. of Law, Global Law Working Paper No. 01/05, 2005).

85. *See, e.g.*, Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 911-12 (9th Cir. 2011); *but see, e.g.,* Singh v. Crompton Greaves Ltd., No. 10-13224, 2001 WL 2433396, at *3 (E.D. Mich. May 24, 2011).

86. *See, e.g.*, Jenny Strasburg, *Saipan Lawsuit terms OK'd: Garment Workers Get $20 Million*, S.F. Chron., Apr. 25, 2003, at B1.

87. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

88. Theoretically, violations of *jus cogens* do not amount to sovereign acts at all because they reflect the disregard of norms the community of states has established and thus do not receive sovereign immunity. *See, e.g.,* Evan J. Criddle & Evan. Fox-Decent, *A Fiduciary Theory Of Jus Cogens,* 34 YALE J. INT'L L. 331 (2009); Sévrine Knuchel, *State Immunity And The Promise Of Jus Cogens,* 9 NW. U. J. INT'L HUM. RTS. 149 (2011); Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 772 (2003).

89. *Kadic*, 70 F.3d at 240, 242.

90. *Id.* at 251.

91. Doe v. Unocal Corp., 395 F.3d 932, 945-55 (9th Cir. 2002).

92. *Id.,* at 936-37.

93. Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).

94. Press Release, Unocal Corp., Settlement Reached in Human Rights Lawsuit, (Dec. 13,

Since *Unocal*, plaintiffs have sued corporations under the ATS and extracted a few large payouts, although they have rarely won at trial. To date roughly 150 individual lawsuits, a majority of the ATS claims filed, have named corporate defendants.[95] Only four of the cases have proceeded to trial, and only one has ended in a judgment against the corporation.[96] Most have failed on the grounds of subject matter jurisdiction, statute of limitations, or *forum non conveniens*.[97] These impediments, however, have not precluded substantial settlements. Royal Dutch Petroleum/Shell, for example, agreed to pay $15.5 million after years of litigation over the *Wiwa* case.[98] The large recoveries have appeared to provoke opposition.[99]

C. Increasing hostility towards extraterritoriality culminated in Kiobel v. Royal Dutch Shell Petroleum

Assorted opponents of the ATS challenged the recognition of new causes of action that brought increasing amounts of international law into U.S. courts, as well as the foreign policy implications of the judiciary using the law to impose judgments abroad.[100] *Business Week* reported that corporate advocacy groups met in November 2002 to plot a strategy to limit the application of the statute to corporations.[101] Some participants claimed that corporations became susceptible to suit just by investing in a foreign country.[102] Ten separate

2004) (on file with author); *see also* L. Girion, *Unocal to Settle Human Rights Lawsuit*, L.A. TIMES, Dec. 14, 2004, at A1; F. Quigley, Editorial, *Nigerians Get Their Day in Court to Fight Oil Companies*, INDIANAPOLIS STAR, Dec. 15, 2008, at A9.

95. *See*, *e.g.,* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733 (9th Cir. 2008); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007); Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003). *See also* Brief for the National Foreign Trade Council, USA et al. as Amici Curiae Supporting Petitioner at 4, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339), WL 162760.

96. Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375 (E.D.N.Y. 2009) (jury awarding Plaintiff Chowdhury $1.5 million); Jama v. Esmor Corr. Servs., 2009 U.S. App. LEXIS 107950 (3d Cir., Aug. 12, 2009); Bowoto v. Chevron, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

97. *See*, *e.g.*, Estate of Abtan v. Blackwater Lodge and Training Center, 611 F. Supp. 2d 1 (D.D.C. 2009); Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700 (E.D.Va. 2009); Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 269 (2004).

98. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001); Paul Magnusson, *A Milestone for Human Rights*, BUS. WEEK, Jan. 24, 2005.

99. *See infra*, Part IV.

100. Stephens*, supra* note 74, at 179.

101. Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUS. WEEK, Nov. 25, 2002, at 78.

102. *Id*.

DOI: doi:10.15779/Z38CW7K

lawsuits filed in 2002 alleging complicity in human rights abuses against corporations that conducted business with the apartheid government in South Africa further inflamed dissent.[103] A book published in 2003 labeled the statute an "awakening monster" and argued that ATS litigation "could have profound consequences for the world economy."[104] Senator Dianne Feinstein proposed legislation limiting claims against corporations, then withdrew the bill eight days later; she refused to disclose whether she had consulted with interest groups.[105] Growing discomfort with the claims ultimately seemed to reveal itself in briefs of the executive branch and increasingly narrow judicial holdings such as *Sosa v. Alvarez-Machain*.[106]

Amicus briefs and letters to the court evidence the evolution in attitude towards the extraterritorial character of the ATS. The Carter administration supported the view of the Second Circuit in *Filártiga* that the statute permits the judiciary to incorporate new causes of action in "international law as it has evolved over time" and impose the law on foreign defendants.[107] In its amicus brief in *Filártiga*, the Department of Justice discounted concerns over extraterritoriality, stating that "there is little danger that judicial enforcement will impair our foreign policy efforts."[108] In *Trajano v. Marcos*, an amicus brief filed by the Reagan administration agreed that enforcing a judgment against former Prime Minister Ferdinand Marcos "would not embarrass the relations between the United States and the Government of the Philippines."[109] In *Kadic*, a statement of interest filed by the Clinton administration also maintained that "dismissal of these cases at this stage under the 'political question' doctrine is not warranted."[110] The Department of Justice during the first Bush administration, however, began to urge limitations on the scope of international law that could be used to create new causes of action under the statute.[111]

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103. *See* Ntzebesa. v. Citigroup, Inc., 02 Civ 4712 (S.D.N.Y. 2002); *Khulumani v. Barclays National Bank*, Case No. 02-CV5952 (S.D.N.Y. 2002); Digwamaje v. Bank of America, Case No. 02-CV-6218 (S.D.N.Y. 2002); *see also* Stephens, *supra* note 74, at 179.

104. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 vii (2003).

105. S. 1874, 109th Cong. (1995) (introduced Oct. 17, 2005) (limiting ATS suits to those "asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort").

106. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004); *see infra*.

107. Memorandum for the United States as Amicus Curiae, Submitted to the Court of Appeals for the Second Circuit, Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *available at* http://homepage.ntlworld.com/jksonc/docs/filartiga-us-amicus-brief-19800529.html at 3.

108. *Id*. at 23.

109. Memorandum for the United States as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (table disposition), *see* text in 1989 WL 76894.

110. Statement of Interest of the United States, Jane Doe I v. Karadzic (2d Cir. Sept. 13, 1995) (No. 94-9035).

111. Indeed, the first Bush administration initially opposed passage of the TVPA and was concerned it risked provoking retaliatory lawsuits against U.S. officials. *See* Brief for U.S. Reps. as Amici Curiae, Relating to Issues Raised by the United States in Its Motion to Vacate October 21,

Nevertheless, President George H. W. Bush signed into law the Torture Victims Protection Act, which allowed for extraterritorial jurisdiction over claims of torture and extrajudicial killing.[112] In a speech at the time, he supported extraterritorial goals, stating, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere."[113]

The Department of State and Department of Justice in the administration of President George W. Bush, however, pursued a comprehensive attack against the ATS, reprising arguments against admitting international laws into U.S. courts for judicial imposition abroad and raising new challenges to the extraterritorial basis of the statute itself. In *Sarei v. Rio Tinto*, the Department of State submitted a letter that said "continued adjudication of the claims . . . would risk a potentially serious adverse impact . . . on the conduct of our foreign relations."[114] It filed another letter in *Doe v. Exxon Mobil* making the same assertion and attached an affidavit from the Indonesian ambassador.[115] The affidavit stated that Indonesia "cannot accept" a suit against an Indonesian government institution and U.S. courts should not be adjudicating "allegations of abuses of human rights by the Indonesian military."[116] In *Doe v. Unocal*, an amicus brief of the Department of Justice first argued that only law that has "been affirmatively incorporated into the laws of the United States" can come into U.S. courts and that "the ATS . . . raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles . . . [because] open[ing] our courts to right every wrong all over the world . . . has not been assigned to the federal courts."[117] The brief then opposed the entire line of human rights cases developed under the statute: "The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral,

2002, Matters and Statement of Interest or, in the Alternative Suggestion of Immunity at IV, Plaintiffs A, B, et al. v. Zemin et al., (June 9, 2003) (No. 02-7530).

112. H.R. REP. NO. 102-367, at 3 (1992).

113. Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, *reprinted in* 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 16, 1992), *quoted in* Stephens, *supra* note 74, at 189.

114. Letter from William H. Taft IV, Legal Adviser of the Dep't of State, to J. Robert D. McCallum (Oct. 31, 2001), in Sarei v. Rio Tinto, No. 00-11695 (MMM) (AIJx) (C.D. Cal. 2001).

115. Letter from William H. Taft IV, Legal Adviser of the Dep't of State, to J. Louis F. Oberdorfer (July 29, 2002), in Doe v. Exxon Mobil Corp., No. 01-1357 (LFO) (D.D.C. 2002) ("adjudication … would risk a potentially serious adverse impact on significant interests of the United States").

116. Letter from Soemadi Brotodiningrat, Ambassador, Embassy of the Republic of Indon., to Richard L. Armitage, Deputy Sec'y of State, U.S. Dep't of State (July 15, 2002), *available at* http://courtappendix.com/kiobel/protests/.

117. Brief for the United States of America as Amici Curiae, Doe v. Unocal Corp., 473 F.3d 345 (No. 00-56603), at 4, 11, *available at* www.earthrights.org/sites/default/files/legal/Unocal-doj-brief.pdf.

and legal judgment on . . . foreign acts[.]"[118] It further stated, "[A] statute is presumed to apply only within the territory of the United States . . . [and] nothing in the ATS or in its contemporaneous history . . . furnish[es] a foundation for suits based on conduct occurring within other nations."[119] President George W. Bush took additional measures to curb the litigation and issued an executive order that provided immunity to corporations doing business in Iraq.[120]

The Bush administration lobbied for Supreme Court review of *Sosa v. Alvarez-Machain*, and the decision the Court ultimately handed down narrowed the reach of the ATS significantly.[121] Its brief in support of the petition for certiorari maintained that "the ATS cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts."[122] The judgment of the Court did not go as far, but it did confine the statute to claims in international law that contain principles that have been "universally" and "obligator[il]y" defined to include the "specific" conduct alleged.[123] Concerns with extraterritoriality appeared to motivate the decision:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.[124]

The claim of a Mexican physician that he had been abducted at the behest of the U.S. Drug Enforcement Agency and detained for one day therefore did not succeed. The Court found that while detention commanded universal condemnation, insufficient evidence indicated that the general prohibition against it included the specific conduct in dispute, captivity for one day.[125]

Cases following *Sosa*, although often inconsistent, continued to narrow the range of international laws that could sustain a cause of action in a U.S. court

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118. *Id*. at 21-22.

119. *Id*. at 29.

120. Exec. Order No. 13303, 68 Fed. Reg. 31931 (May 22, 2003), *reprinted in* Earth Rights International, *Executive Order 13303: Instituting Immunity* (Aug. 13, 2003), http://www.earthrights.org/publication/earthrights-international-examines-eo-13303; Claire Kelly, *The War on Jurisdiction: Troubling Questions About Executive Order 13303*, 46 ARIZ. L. REV. 483, 484-87 (2004).

121. Brief for the United States in Support of the Petition for a Writ of Certiorari, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

122. *Id*. at 25.

123. *See Sosa*, 542 U.S. at 732 (noting that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory" (citing In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

124. *Id*. at 727-28.

125. *Id*. at 737-38.

and the circumstances under which the court could impose a judgment abroad. The Second Circuit, for example, added a purposefulness requirement for corporate liability.[126] The Eleventh Circuit excluded all nontorture cases involving cruel, inhuman, or degrading treatment.[127] The Ninth Circuit required a claim to be exhausted abroad, thereby constraining the most aggressive extraterritorial application of the ATS.[128] Judge Reinhart wrote in dissent that "neither the Supreme Court nor any circuit has ever imposed an exhaustion requirement."[129]

Kiobel v. Royal Dutch Petroleum marks the latest move in the retrenchment. The Second Circuit based the decision on an application of *Sosa* and found that the limited causes of action in international law that can come into court through the statute do not sustain actions against corporations.[130] A footnote in *Sosa* made the circumstances in which courts could impose judgments on foreign corporations subject to the same test it set out for recognizing a cause of action.[131] The Second Circuit found that corporate liability "has not attained [the] discernible, much less universal acceptance among nations of the world" that *Sosa* required.[132] Royal Dutch Petroleum therefore avoided responsibility for abuses government forces perpetrated against civilians in the wake of environmental protests in Nigeria.[133] The judgment conflicted with earlier decisions of the Eleventh Circuit, as well as two district courts of the Second Circuit.[134]

In a petition for panel rehearing of the case, the chief judge of the Circuit expressed what now seems to be the prevailing attitude towards extraterritorial jurisdiction:

> [F]oreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors, and paying

126. *Compare* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 245, 287-88 (2d Cir. 2007) (stating that a plaintiff may "plead a theory of aiding and abetting liability" under the ATS), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 666-68 (S.D.N.Y. 2006) (stating that aiding and abetting liability requires corporations to have acted with the purpose of facilitating the violation of international law).

127. Aldana v. Del Monte Fresh Produce N.A., Inc., 416 F.3d 1242 at 1245, 1247 (11th Cir. 2005).

128. Sarei v. Rio Tinto, PLC, 550 F.3d 822 at 824 (9th Cir. 2008) (en banc).

129. *Id.* at 841 (Reinhardt, J., dissenting).

130. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 at 120 (2d Cir. 2010);

Sosa v. Alvarez-Machain, et. al. 542 U.S. 692, 732, n20 (2004) (question is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual"). *See also* Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 289-91 (2011).

132. *Kiobel*, 621 F.3d at 145.

133. *Id.*

134. Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008); In re Agent Orange Prod. Liab. Litig. 373 F. Supp. 2d 7, 55, 58-59 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman I), 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

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DOI: doi:10.15779/Z38CW7K

> taxes. . . . American courts and lawyers [do not] have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them, and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.[135]

III.
EUROPE INCREASINGLY POLICES THE EXTRATERRITORIAL ACTIONS OF MULTINATIONAL CORPORATIONS

Meanwhile, in Europe both the individual member states and the European Union are taking steps in the opposite direction to address foreign corporate human rights abuses. While the ATS provided causes of action in international law and extraterritorial jurisdiction, the courts of some member states, and particularly the United Kingdom, are circumventing the need for both by emphasizing contributing infringements of their domestic tort laws by domestic parent corporations.[136] Member states that incorporate international humanitarian principles into national statutes offer new causes of action against multinational corporations. Extraterritorial jurisdiction is also expanding in Europe through EU regulations and national criminal legislation with extraterritorial effect.

A. Contributing torts of domestic parent corporations supply national causes of action and national jurisdiction

In the United Kingdom and other European countries, courts are finding jurisdiction over corporate human rights cases by characterizing actions or omissions of national parent corporations as contributing factors in abuses that took place abroad.[137] The negligence claims address the role of parent corporations in allowing their foreign subsidiaries to cause harm, but the judgments affect the conduct of the subsidiaries.[138] The cases express an enterprise theory of liability in which multinational corporations appear as single entities, headed by parent corporations that control the entire business.[139]

Framing the illegal acts in terms of the failure of the parent corporations to exercise oversight of their subsidiaries avoids the difficulties posed by the doctrine of separate legal personality and opposition to extraterritoriality. The plaintiffs do not have to establish abuse of the corporate form, as they would if

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135. Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 270 (2011).

136. Note that this approach was explicitly rejected by the U.S. Supreme Court in *Sosa*, 542 U.S. at 703-11.

137. *See, e.g.*, Ramasastry *, supra* note 44, at 93; *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse, supra* note 5, at 284.

138. *See, e.g.,* Jessica. Woodroffe, *Regulating Multinational Corporations in a World of Nation States*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 138 (Michael K. Addo ed., 1999).

139. On enterprise liability theory in the U.S. context, *see, e.g.,* Blumberg, *supra* note 49.

the illegalities were articulated as wrongs committed by subsidiaries for which the parents should bear responsibility.[140] Nor do the courts have to exercise extraterritorial jurisdiction, as they can review the actions of national parent corporations under domestic rules.[141] Although holding corporations present within the jurisdiction accountable for failing to oversee their foreign subsidiaries has extraterritorial effects, it provokes less controversy than directly claiming jurisdiction over subsidiaries in other territories.[142]

Lawsuits related to human rights abuses have proceeded in the United Kingdom in tort against several domestic parent corporations.[143] In *Sithole v. Thor*, the English Court of Appeal found jurisdiction over mercury poisoning among employees at a mining subsidiary in South Africa by reviewing the failure of the English parent corporation to prevent it.[144] The case settled for 1.3 million pounds, far exceeding the recovery in a parallel South African claim.[145] Cases against the English parent corporations of the mining corporation Rio Tinto and the energy corporation Cape confirmed that English courts will exercise jurisdiction over domestic parent corporations when foreign subsidiaries that cause harm abroad have implemented their policies.[146] The High Court also found jurisdiction in *Guerrero v. Monterrico Metals* over the assault and detention of protestors by Peruvian police at a subsidiary mining site in Peru by focusing on the responsibility of the parent corporation to prevent the harm.[147] In *Motto & ORS v. Trafigura*, the High Court took jurisdiction over the claims of 30,000 citizens of the Ivory Coast for illness arising from exposure to toxic waste because an English arm of the metals and energy corporation

140. Piercing the corporate veil generally requires mixing of assets (Germany, Italy, Romania, Slovenia, France), or the abuse of the separate legal personality of the subsidiary or parent to defeat the rights of stakeholders or to commit other illegalities (France, Slovenia, Italy).

141. *See, e.g.,* Schutter, *supra* note 18, at 41 (discussing argument in Connelly v. RTZ [1997] UKHL 30, [1998] A.C. 854 (appeal taken from Eng.)).

142. *See, e.g.,* HOUSE OF LORDS & HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, ANY OF OUR BUSINESS? HUMAN RIGHTS AND THE UK PRIVATE SECTOR, REPORT 2009-10, H.L. 5-I, H.C. 64-I, ¶ 205 (U.K.) (finding "parent-based" regulation less intrusive than direct extraterritorial jurisdiction).

143. *See, e.g*., Stephens, *supra* note 43, at 39 (discussing domestic tort suits in country where firm is incorporated); Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1706 (1998).

144. Sithole and Ors v. Thor Chemicals Holdings Ltd and Anon [1999] All ER (D) 102; *see also*, Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 268 (Michael K. Addo ed., 1999).

145. Neil Hodge, *Future Imperfect: Should Companies Exporting Potentially Dangerous Materials to the Developing World Take Responsibility for Their Actions Whatever the Legislation Enforces?,* 64 INT'L BUS. NEWS 49, 51 (2010).

146. Connelly v. RTZ [1997] UKHL 30, [1998] A.C. 854 (appeal taken from Eng.); Lubbe and Ors v. Cape Plc. and Related Appeals, [2000] UKHL 41, [2000] 4 All E.R. 268, [2000] WLR 1545.

147. Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB).

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DOI: doi:10.15779/Z38CW7K

chartered the ship that carried the waste to Africa.[148]

Dutch courts have used a similar approach and exercised jurisdiction over national parent corporations for human rights violations committed abroad. In 2009, the Minister of Foreign Trade commissioned a study to identify the questions a civil court must ask in order to assess the liability of parent corporations for abuses by their subsidiaries.[149] Later that year, the Hague District Court found jurisdiction over three cases Nigerian fisherman and farmers brought against Royal Dutch Shell claiming that the parent corporation had been negligent in failing to ensure that its Nigerian subsidiary carried out oil production carefully.[150]

Additional cases addressing foreign abuses through the contributions of national parent corporations have enabled jurisdiction in other European countries, including Switzerland and Germany. The Geneva Court of First Instance reviewed claims of five orphaned Roma children against IBM, the U.S. computing corporation, because the European corporate headquarters were located there during World War II.[151] The case alleged that IBM had aided and abetted the murders of the parents of the children by providing computer technology to the Nazis.[152] Human rights organizations in Germany brought a domestic false advertising claim against Lidl Corporation, the German discounter, to draw attention to abusive labor practices at its foreign subsidiaries.[153] The corporation described its commitment to labor rights in its

148. Trafigura Beheer v. Golden Stavraetos Maritime Inc. [2003] 4 All ER 746; *Deadly Toxic Waste Dumping in Côte d'Ivoire Clearly a Crime – UN Environmental Agency*, UN News Centre, September 29, 2006, www.un.org/apps/news/story.asp?NewsID=20083&Cr=ivoire&Cr1; Press Release, Trafigura and the Probo Koala (August 16, 2007), *available at* www.trafigura.com/our_news/probo_koala_updates.aspx; David Jolly, *Ivory Coast Toxic-Dump Case Settled, Company Says*, N.Y. Times, Sept. 21, 2009, http://www.nytimes.com/2009/09/21/business/global/21iht-toxic.html?_r=1&scp=13&sq=trafigura&st=nyt (affirming that up to 30,000 injured Ivory Coast residents could be compensated).

149. Alex Geert Castermans & Jeroen Van der Weide, *The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognized rights* (Working Paper, 15 December 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626225

150. Court of the Hague, Docket Number HA ZA 09-579 (Oguru v. Royal Dutch Shell PLC) (Neth.); *The People of Nigeria Versus Shell: The Course of the Lawsuit*, *supra* note 4.

151. Ian Traynor, *Gypsies Win Right to Sue IBM Over Role in Holocaust*, THE GUARDIAN, June 23 2004; Swiss Court: Extrait de l'arrêt de la Ire Cour civile dans la cause Gypsy International Recognition and Compensation Action (GIRCA) contre International Business Machines Corporation (IBM) (recours en réforme) 4C.113/2006, Aug. 14 2006; Anita Ramasastry, *A Swiss Court Decides to Allow Gypsies' Holocaust Lawsuit to Proceed*, FINDLAW'S WRIT, July 8, 2004, *available at* http://writ.news.findlaw.com/ramasastry/20040708.html.

152. Cohen, Milstein, Hausfeld & Toll, *Cohen, Milstein, Hausfeld & Toll, P.L.L.C. Files Class Action Lawsuit Against IBM*, Feb. 11, 2001; *Gypsies Ask IBM for Holocaust Reparation*, BBC NEWS, June 10 2001.

153. *See*, *e.g.*, European Center for Constitutional and Human Rights, *Successful Complaint Against Consumer Deception – Lidl Retracts Advertisements*, *available at* http://www.ecchr.eu/lidl-case/articles/lidl-retracts-advertisements.html.

advertisements, in spite of poor conditions at foreign plants.[154]

B. Causes of action supporting corporate human rights claims grow more prevalent in Europe as routes to liability through customary international laws narrow under the ATS

The domestic tort suits discussed in the previous section bypassed the need for causes of action in international law such as the ATS has provided, and other causes of action suitable for corporate human rights cases are proliferating in Europe. Some member states automatically allow international law claims in their national courts.[155] Many do not require a specific domestic cause of action to review alleged violations of international laws.[156] Others recently have adopted criminal remedies that incorporate international law principles, providing domestic pathways for corporate liability.[157]

While hostility to judicial absorption of new principles of customary international law into the federal common law has intensified in the United States, the availability of an explicit cause of action is now irrelevant in many European member states. All customary international laws form part of the English common law; the Swedish penal code provides blanket illegality for serious humanitarian violations; and tort rules in civil law countries contain general prohibitions that include abuses of international laws.[158] Where

154. *See*, *e.g.*, Jürg Rupp, *Ethics in Garment Production*, RUPP REPORT, Apr. 13, 2010; Labour Behind the Label, *LIDL: Forced to Retract 'Ethical' claims*, Sept. 14, 2010.

155. *E.g.*, England, *see infra*.

156. *E.g.*, Sweden, *see infra*.

157. *See infra*. Note that imposing corporate liability through criminal laws has been widely criticized in American legal scholarship. For law and economics literature prioritizing civil liability for corporations instead, *see*, *e.g.*, Albert W. Altschuler, *Two Ways of Thinking about the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009); Daniel Fischel & Alan Sykes, *Corporate Crime*, 25 J. L. STUD. 319 (1996); John C. Coffee, "*No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 405, 408 (1981); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. L. STUD. 833, 848-49 (1994); C.M.V. Clarkson, *Corporate Culpability* (1998), *available at* http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html; *but see* Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 155 (2006).

158. R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 276 ("Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."); *see also* Human Rights Committee, International Law Association (English Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 EUR. HUM. RTS. L. REV. 129, 158 (2001); 22 ch. § 6 Brottsbalken (Swed.) (Criminal Code); Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903, 922 (2009) ("the continental European systems of tort (delict), which are based on Grotius's natural law concept that every act that is contrary to that which people in general, or considering their special qualities, ought to do or ought not to do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage").

DOI: doi:10.15779/Z38CW7K

considerations of justice support doing so, Austria, Belgium, Estonia, the Netherlands, Portugal, Romania, France, Germany, Luxembourg, and Poland allow jurisdiction over claims that do not fall within any domestic cause of action.[159] Belgium and the Netherlands have viewed the jurisdiction as necessary for compliance with the European Convention on Human Rights, which guarantees the right to a fair trial.[160]

Several European countries have drafted new criminal laws for corporations, creating additional avenues for human rights claims against them.[161] Corporate criminal liability in the United Kingdom predated its introduction to the United States, and the majority of other European member states have recently adopted it.[162] Austria, for example, instituted criminal liability for corporations in 2006.[163] Denmark amended its criminal code in

159. In accordance with the doctrine of *forum necessitatis*, a general principle of law that has developed in EU law to require jurisdiction even if it would otherwise be lacking in order to avoid the denial of justice, *see* http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf at 64-66; *see*, *e.g.*, art. 9(b)-(c) Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) (Neth.), *available at* http://www.st-ab.nl/wetten/0471_Wetboek_van_Burgerlijke_Rechtsvordering_Rv.htm.

160. Art. 11, New Code of Private International Law in 2004.91 ("Irrespective 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."); art. 9(b), (c) Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) (Neth.).

161. *See*, *e.g.*, Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations* (report prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business) (Feb. 2008), *available at* http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf; *but see* discussion of problems in countries where only prosecutors can initiate proceedings, *e.g.*, Hervé Ascensio, *Extraterritoriality as an Instrument*, Contribution to the work of the UN Secretary-General's Special Representative on

human rights and transnational corporations and other businesses, at 5, *available at* http://www.business-humanrights.org/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf (describing dismissal of a complaint filed by seven farmers from Cameroon against a French company for illicit trade and bribery for this reason).

162. Birmingham & Gloucester Railway Co., [1842] 3 Q.B. 223 (finding corporation liable for failure to fulfill statutory duty); Gt North of England Railway Co., [1846] 9 Q.B. 315 (finding vicarious liability); Moore v. Bresler [1944] 2 All E.R. 515 (finding direct corporate liability); R. v. ICR Haulage Ltd. [1944] K.B. 551 (finding direct corporate liability); DPP v. Kent and Sussex Contractors Ltd [1944] All E.R. 119 (finding direct corporate liability; Tesco Supermarkets v. Nattrass [1972] AC 153 (finding that human actions can represent the will of the corporation). Most civil law countries previously followed the principle of *societas delinquere non potest*, a Roman law theory that immunized abstract entities from criminal liability because they had no physical bodies to punish. *See* A. Weissmann and D. Newman, *Rethinking Criminal Corporate Liability*, 82. IND. L. J. 411, 419-20 (2007); New York Central & Hudson R.R. Co. v. U.S., 212 U.S. 481 (1909); *see*, *e.g.*, T. Weigend, *Societas Delinquere Non Potest?: A German Perspective*, 6 J. INT'L CRIM. JUST. 927, 955-74 (2008).

163. The Law on the Responsibility of Associations (Verbandsverantwortlichkeitsgesetz, VbVG) was passed in 2005 and entered into force on January 1, 2006. *See Business Crimes and Compliance Criminal Liability of Companies Survey*, at 6 (Lex Mundi Publication prepared by the Lex Mundi Business Crimes and Compliance Practice Group) (Feb 2008), *available at*

2002 to extend every offense to corporations.[164] Belgium reintroduced corporate criminal liability in 1999, having removed it in 1934, and then expanded it in 2007.[165] Seventeen member states now provide for corporate criminal liability.[166]

The criminal provisions have been used to address the complicity of multinational corporations in several human rights suits in France and in other countries.[167] Three human rights organizations brought charges against DLH France, the Dutch-owned timber corporation, for the French crime of "*recel*," which prohibits handling or profiting from illegally obtained goods.[168] DLH had imported timber from Liberian suppliers who did not have harvesting rights, thereby funding the civil war in Liberia.[169] French citizens brought a criminal complaint against Trafigura, the Dutch metals and energy corporation, alleging corruption, involuntary homicide, and physical harm leading to death based on the pollution that gave rise to the English civil case *Sithole v. Thor*, discussed in section IV.A.[170] Burmese plaintiffs also settled a criminal case in France against

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www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf.

164. DANISH CRIM. CODE § 306 (DJØF Publishing, 2d ed. 2003); DUTCH PENAL CODE ¶ 51; *see* S. Beale & A. Safwat, *What Developments in Europe Tell Us About Western Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 110 (2005).

165. BELGIAN PENAL CODE art. 5; The Act of 4 May 1999 (reintroducing corporate criminal liability into Belgian law); M. Faure, *Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium*, *in* CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES 105 (Eiser, Heine, Huber, eds. 1999).

166. Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain, and the United Kingdom. *See*, *e.g.*, Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 499-520 (1994); *see also* Stephens, *supra* note 12, at 66 (noting that countries without criminal liability frequently penalize the same behavior administratively, such as through the German Gesestz über Ordnungswidrigkeiten).

167. *See*, *e.g.*, Günter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience - or Vice Versa*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 173 (1998).

168. Béatrice Héraud, *DLH accusé d'avoir financé la guerre au Liberia*, NOVETHIC, 19 Nov. 2009, *available at* http://www.novethic.fr/novethic/entreprise/pratiques_commerciales/presence_dans_les_pays_litigieux/dlh_accuse_avoir_finance_guerre_liberia/122353.jsp; *International timber company DLH accused of funding Liberian war*, GLOBAL WITNESS, 18 Nov. 2009, *available at* http://www.globalwitness.org/library/international-timber-company-dlh-accused-funding-liberian-war.

169. *See*, *e.g.*, *Bankrolling Brutality: Why European timber company DLH should be held to account for profiting from Liberian conflict timber*, GLOBAL WITNESS, 18 Nov. 2009, *available at* http://www.globalwitness.org/library/bankrolling-brutality-why-european-timber-company-dlh-should-be-held-account-profiting.

170. *See*, *e.g.*, *Case Profile: Trafigura lawsuits (re Côte d'Ivoire)*, Business and Human Rights Resource Center (Mar. 22, 2012), *available at* http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire; Business and Human Rights European Cases Database, European Center for Constitutional and Human Rights, available *at* http://www.ecchr.de/index.php/eonference_en.html (last visited Nov. 2008).

Unocal, the U.S. oil corporation, for the actions in Burma litigated under the ATS in *Doe v. Unocal*, discussed in Section III.B.[171] Greenpeace filed a criminal complaint against the French oil corporation Total Fina Elf for pollution in Siberia under German criminal provisions outlawing polluting water and causing bodily harm with fatal consequences.[172]

Some European penal codes also include international laws and enable domestic prosecutions of corporations for international crimes, where corporate liability is available.[173] Belgium, Germany, the Netherlands, Spain, and the United Kingdom, for example, criminalize genocide, crimes against humanity, and war crimes within their national laws.[174] A Dutch judgment against Frans Van Anraat, a businessman who supplied chemicals to the former Iraqi regime, confirmed the applicability of the rules to corporations: "[p]eople or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that—if they do not exercise increased vigilance—they can become involved in most serious criminal offences."[175] The statutes have primarily been used against individuals, however, securing convictions of two nuns in Belgium for their participation in the Rwandan genocide, four Bosnian Serbs in Germany for their involvement in ethnic cleansing, and an Afghan terrorist in the United Kingdom for torture and hostage taking overseas, among others.[176] In member states that allow

171. Plaintiffs claimed "séquestration", Art. 224(1) C. PÉN. (Code *pénal*) (Fr.) (covering illegal confinement); *see* http://birmanie.total.com/fr/controverse/p_4_2.htm; Cour d'appel [CA] [regional court of appeal] Versailles, Jan. 11, 2005, Chambre de l'instruction, 10ème Chambre, § A.

172. Polluting waters under §§ 324 I StGB (Penal Code) (Gr.) (covering pollution of waters); §§ 324 III, 13 I StGB (covering pollution of waters by neglect); §§ 223 I, 224 I Nr. 1 StGB (causing bodily harm); §227 I StGB (causing bodily harm with fatal consequences); European Center for Constitutional and Human Rights, *Business and Human Rights European Cases Database*, November 2008.

173. *See, e.g., Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights*, Background Notes, Copenhagen, 8-9 Nov. 2007, at 8, *available at* http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-backgrounder.pdf. Note that criminal prosecutions proceed differently among different countries. In France, a victim can join a criminal prosecution as a *parties civile* and receive compensation and rights of appeal; in Spain, a victim "may appear as a civil claimant or as a private prosecutor in criminal proceedings", *see*, *e.g.*, Luc Reydams, *Universal Jurisdiction in Context*, 99 Proceedings of the Annual Meeting (ASIL) 118, 119 (2005); Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. L. & SOC'Y 294, 310-11 (2005); Judge Anita Ušack, *Building the International Criminal Court*, 23 MCGEORGE GLOBAL BUS. & DEV. L.J. 225, n.66 (2011); Enrique Carnero Rojo, *National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain,* 9 J. INT. CRIM. JUST. 699, 709-10 (2011).

174. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability Volume 2: Criminal Law and International Crimes*, 52 n.191 (2008), *available at* http://icj.org/dwn/database/Volume2-ElecDist.pdf.

175. Appeal Judgment, Case of Frans Van Anraat, Court of Appeal of The Hague, 9 May 2007, Case No. BA6734 at #16, *available at* http://www.haguejusticeportal.net/eCache/DEF/7/548.html.

176. State Department Report*, Country Report on Human Rights Practices*, 4 Mar. 2002, *available at* http://www.state.gov/j/drl/rls/hrrpt/2001/af/8398.htm; Bayerisches Oberstes

corporate liability and have ratified the Rome Statute of the International Criminal Court (ICC) into domestic law, such as Belgium and the Netherlands, plaintiffs can pursue corporations for international ICC crimes, even though the Rome Statute itself does not apply to them.[177]

Others have introduced national causes of action based on additional provisions of international law.[178] Greenpeace, for example, used a Luxembourg statute implementing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to hold Euronav, the Luxembourgian shipping company, accountable for selling a tanker for destruction without first decontaminating it, exposing workers in Bangladesh to hazardous materials.[179] The *Trafigura* case in the United Kingdom, discussed in part IV.A, also relied on domestic incorporation of the Basel Convention.[180]

Landesgericht [BayObLG] [Bavarian Higher Regional Court] May 23, 1997, 1998 Neue Juristische Wochenschrift [NJW] 392 (Djajić); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, 1999 Neue Zeitschrift fur Strafrecht [NSTZ] 396, Int'L L. Domestic Cts. [ILDC] 132 (Eng. trans.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 2001 Juristen-Zeitung [JZ] 975; Jorgić v. Germany, App. No. 74613/01, Eur. Ct. H.R. (2007); BGH, Revision Judgment, Feb. 21, 2001, NJW 2728, ILDC 564 (Sokolović); BGH, Revision Judgment, Feb. 21, 2001, NJW 2732 (Kus□ljić); R v. Zardad [2007] All ER (D) 90, *available at* http://www.redress.org/downloads/news/zardad%207%20apr%202004.pdf, http://www.redress.org/downloads/news/zardad%205%20oct%202004.pdf.

177. Netherlands International Crimes Act ("This Act consolidates into national legislation the international crimes of genocide, crimes against humanity and war crimes falling under the Rome Statute of the ICC. It repeals the Genocide Convention Implementation Act and the Torture Convention Implementation Act, and criminalizes for the first time crimes against humanity under Dutch law. The definitions of crimes are based on definitions provided by the Rome Statute."); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 39 I.L.M. 999 (1998), adopted 17 July 1998. Art 25(1) restricts ICC jurisdiction to natural legal persons. France extended liability to corporations in 2004 pursuant to Article 121-2 of the Criminal Code, and Act 2010-930 of August 2010 added the Rome Statute of the International Criminal Court to the list of conventions justifying the extraterritorial application of French Criminal Law, *see* Law No. 2010-930 of 09.08.2010 (adapting the French criminal law); *see also* Robert C. Thompson, Anita Ramasastry, and Mark B. Taylor, *Translating UNOCAL: The expanding web of liability for business entities implicated in international crimes*, 40 GEO. WASH. INT'L L. REV. 841, 851-852 (2009); Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 402 (2005).

178. The process varies by country. In the Netherlands, an example of the *monist* model of international law, no national order is required to convert international law into national law. In the United Kingdom, an example of the *dualist* model of international law, a treaty must be incorporated into national law to have effect.

179. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, arts. 4(3), 9(5), 1673 U.N.T.S. 57, 132, 137; European Center for Constitutional and Human Rights, *Business and Human Rights European Cases Database*, November 2008, at 26.

180. Trafigura Beheer v. Golden Stavraetos Maritime Inc., [2003] 2 Lloyd's Rep. 201; *see also* www.greenpeace.org/international/news/ivory-coasttoxic-dumping/toxic-waste-in-abidjan-green; www.un.org/apps/news/story.asp?NewsID=20083&Cr=ivoire&Cr1; Official Statement of 16 August 2007, TRAFIGURA: OUR NEWS, *available at* www.trafigura.com/our_news/probo_koala_updates.aspx.

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Although the European Union does not have legislative powers over human rights matters, the European Parliament nevertheless has attempted to enact rules that would address corporate abuses committed abroad, and European courts have enforced judgments against corporations and state actors responsible for them.[181] The European Parliament has called upon the European Commission to develop a mandatory "European multilateral framework governing companies' operations worldwide."[182] It also has sought to "standardize corporate liability and the law of corporate groups[.]"[183] Unsuccessful proposals, had they been enacted, would have regulated the conduct of foreign subsidiaries.[184] The European Court of Justice has ruled that private corporations bear human rights responsibilities, and the European Court of Human Rights has found member states responsible for allowing corporations to cause other harms, offering legal theories that could extend to abuses by subsidiaries of multinational corporations.[185]

181. *See*, Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union,* 17, *Study conducted for the European Commission, Directorate-General for Enterprise and Industry*, University of Edinburgh ("The European Union does not have an explicit general (internal or external) competence to legislate on human rights.") (June 2010), *available at* http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm#h2-1.

182. Resolution of EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104); *see also* Ratner, *supra* note 47, at 446.

183. *Liability of Enterprises for Offenses*, *Recommendation No. R (88), adopted by the Committee of Ministers of the Council of Europe on 20 October of 1988 at the 420th meeting of the Ministers' Deputies* (never passed by the Member States); *see Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, at n.21, COM (2003) 284 final (May 21, 2003) ("A draft 'Ninth Company Law Directive on the Conduct of Groups containing a Public Limited Company as a Subsidiary' was circulated by the Commission in December 1984 for consultation. According to its Explanatory Memorandum, the Directive was intended to provide a framework in which groups can be managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Such a legal framework, adapted to the special circumstances of groups, was considered to be lacking in the legal system of most Member States.").

184. *See* Klaus Bohlhoff & Julius Budde, *Company Groups - The EEC Proposal For A Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, 6 J. COMP. BUS. & CAPITAL MKT. L. 163, 181-92 (1984); Christine Windbichler, *"Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law*, 1 EUR. BUS. ORG. REV. 265 (2000); *Communication from the Commission to the Council*, *supra* note 183, at 18-20. Menno Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, *in* THE EU AND HUMAN RIGHTS 566 (Philip Alston, ed., 1999).

185. Case 36/74, Walrave & Koch v. Assoc. Union Cycliste Int'l, 1974 E.C.R. 1405 (corporations obliged not to discriminate); Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455 (corporations bear human rights responsibilities); Guerra and Others v. Italy, App. No. 14967/89, 7 Eur. Ct. H.R. (1998) (finding Italy liable for failing to inform local population about potential accidents at a chemical factory); Lopez Ostra v. Spain, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (1994) (Spain liable for failing to protect residents from environmental problems at nearby waste treatment facility).

C. Extraterritorial jurisdiction over corporate human rights claims expands in Europe as it narrows under the ATS

The European Union and the member states are deliberately expanding jurisdiction for the causes of action discussed in the previous section, while the ATS has narrowed in the United States, in conjunction with limitations on international claims.[186] The European Union has instituted extraterritorial jurisdiction within Europe, and many member states now allow access to national courts in the interests of justice.[187] New criminal laws that apply to corporations also permit extraterritorial jurisdiction, and other Member State courts seem effectively to offer it through liberal interpretations of jurisdictional rules.[188] The United States, however, restricted extraterritorial corporate human rights cases in Belgium by urging it to revoke broad jurisdictional rules.[189]

The European Union has indicated willingness to enlarge the coverage of the Brussels Regulation, which currently allows for extraterritorial jurisdiction over intra-European claims.[190] In accordance with the Regulation, member states can adjudicate all civil claims against domestic corporations independent of the nationality of the victims or the jurisdiction in which the harm occurred.[191] The European Commission raised the possibility of extending the

186. *See also*, *e.g.*, Menno Kamminga, *Universal Jurisdiction: Is It Legal? Is it Desirable?*, 99 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOC'Y OF INT'L L. 123, 124 (2005) ("The European Commission . . . has specifically stated that it is not opposed to the exercise of universal jurisdiction in tort cases even though the Commission obviously realized that this competence enables U.S. courts to exercise jurisdiction over European companies. In its amicus brief in *Sosa*, the Commission did not argue against extraterritorial jurisdiction, instead it merely urged that jurisdiction in such cases should be exercised with due respect for the limitations imposed by international law.").

187. The European Union has supported broad jurisdiction over international tort claims. In other areas, such as terrorism, human trafficking, sex crimes, and the environment, it also has implemented new extraterritorial measures, *see, e.g.,* Council Framework Decision of 13 June 2002 on combating terrorism, 2002 O.J (L 164) 3; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings; Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. While the European Union no longer emphasizes framework decisions, they nevertheless evidence support for extraterritorial jurisdiction. *See infra*.

188. *See infra*.

189. *See id*.

190. *See* Council Regulation (EC) No. 44/2001 of 22 Dec 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12/1); *see also* Augenstein, *supra* note 181, Executive Summary.

191. *See* Council Regulation (EC) No. 44/2001, art 2, 2001 O.J. (L12/3) ("[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."); Holger Haibach, *Human Rights and Business Report*, Doc. No. 12361, at ¶ 99, Council of Europe, Parliamentary Assembly (Sept. 27, 2010), ("[the Brussels Regulation] allows cases to be brought against companies in all civil proceedings, whereas the Alien Tort Claims Act can only be relied on for an alleged violation of the law of nations"), *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm; Ascensio, *supra* note 161, at 7.

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DOI: doi:10.15779/Z38CW7K

Regulation to claims against foreign subsidiaries of European parent corporations in a Green paper; however, residual member state laws presently govern jurisdiction over non-European entities.[192]

Residual rules frequently suffice for extraterritorial jurisdiction over foreign subsidiaries.[193] Most member states provide for jurisdiction in cases where subsidiaries have secondary establishments or assets in Europe.[194] Many member states also allow for jurisdiction either where damage was caused or where it was sustained.[195] Lawsuits have therefore proceeded against foreign subsidiaries in European courts based on causal events that occurred in Europe.[196]

Connections to other countries that have blocked many potential ATS cases from adjudication in the United States have rarely prevented European courts from finding jurisdiction over international human rights claims.[197] The Brussels Regulation determines jurisdiction without regard to them, and they do not affect residual jurisdictional rules in civil law countries.[198] The member states that provide jurisdiction over foreign claims when justice requires doing so, discussed in section IV.B., review cases wholly connected to other places.[199]

Recent national criminal legislation expressly provides for extraterritorial jurisdiction.[200] The penal codes of Denmark, Finland, France, and Sweden, for example, allow for jurisdiction over actions committed abroad by defendants of any nationality that are "covered by international conventions."[201] Dutch

192. *See Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters*, COM (2009) 175 final (Apr. 21 2009); Brussels I Regulation, art. 4(1).

193. On residual rules, *see*, *e.g.*, A. Nuyts et al, *Study on Residual Jurisdiction*, European Commission Study LS/C4/2005/07-30-CE)0040309/00-37 (3 Sept. 2007); B. Hess et al, *Report on the Application of Regulation Brussels I in the Member States*, European Commission Study JLS/C4/2005/03 (Sept. 2007).

194. *See* Augenstein, *supra* note 181, at 69.

195. *See id*.

196. *See id*.

197. For discussions of the operation of *forum non conveniens* in the United States and Europe *see*, *e.g.*, Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 58-67 (1988) (U.S. federal court); David W. Robertson and Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non-Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 948-53 (1990) (U.S. state court); Wendy Kennett, *Forum Non Conveniens in Europe*, 54 CAMBRIDGE L.J. 552, 552-54 (1995) (Brussels Regulation); *see also*, *infra* Section IV.A.

198. *See*, *e.g.*, Case C-281/02, Andrew Owusu v. N.B. Jackson, 2005 E.C.R. 1-(1.3.2005); Oxford Pro Bono Publico, *supra* note 5, at 107-110; DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 7-10 (J.J. Fawcett ed., Oxford: OUP 1995).

199. *E.g.*, Austria, Belgium, Estonia, the Netherlands, Portugal, Romania, France, Germany, Luxembourg, and Poland.

200. *See, e.g.,* Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights, *supra* note 50, at 8.

201. STRAFFELOVEN [STRFL] [Penal Code] § 8(5) (Den.) ("[A]cts committed outside the

domestic legislation incorporating the Rome Statute offers universal jurisdiction.[202]

The English system has permitted additional routes to jurisdiction over foreign defendants that have resulted in extraterritorial jurisdiction over human rights claims against individuals in the Middle East. In the United Kingdom, jurisdiction depends on the ability of plaintiffs to serve defendants.[203] The Companies Act 2006 allows service of foreign corporations in any English place of business identified with them.[204] The English Rules of Civil Procedure also enable service abroad in specific instances, such as when a claim has a close connection to the United Kingdom.[205] Some courts have interpreted connections broadly: In *Al-Adsani v. Kuwait*, the Court of Appeal permitted a plaintiff to serve the Government of Kuwait with charges of unlawful detention and torture at the instigation of the royal family, finding a connection through mental health problems he experienced afterwards in England.[206] In *Jones v. Saudi Arabia*, the Court allowed jurisdiction over allegations of torture in Saudi Arabia by the Saudi Minister of Interior and other Saudi Arabian officials, based on the same justification.[207]

The United States has, however, pressured Belgium to repeal very broad extraterritorial provisions, underscoring the significance of extraterritorial jurisdiction for holding corporations accountable for human rights violations.[208]

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territory . . . shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator . . . where the act is covered by an international convention . . . ."); Criminal Code 626/1996 c. 1 § 7 (Fin.) ("Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement . . . ."); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689-1 (Fr.) ("In accordance with the international conventions . . . a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts."); BROTTSBALKEN [BRB] [Criminal Code] 2:3(6) (Swed.) ("[C]rimes committed outside the Realm shall be adjudged according to Swedish Law and by a Swedish court: . . . if the crime is . . . a crime against international law . . . .").

202. 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 international humanitarian law).

203. *See, e.g.*, HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASSOCIATION (ENGLISH BRANCH), REPORT ON CIVIL ACTIONS IN THE ENGLISH COURTS FOR SERIOUS HUMAN RIGHTS VIOLATIONS ABROAD, *reprinted in* 2 EUR. HUM. RTS. L. REV. 129, 139 (2001).

204. Companies Act, 1985, c. 6, § 695 (U.K.); *see also* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 141 (2007).

205. Civil Procedure Rules, 1998, S.I. 1998/3132, Rule 6.20(8) (U.K.).

206. Al-Adsani v. Government of Kuwait, 107 I.L.R. 536, 538-39 (C.A. 1996)*; see* Stephens, *supra* note 43, at 17 (calling *Al-Adsani* a "*Filartiga*-style civil lawsuit"); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 150 (2006).

207. Jones v. Saudi Arabia, [2004] EWCA (Civ) 1394 (Eng.).

208. *See, e.g.*, Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888 (2003); Sean Murphy, ed., *U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 AM. J. INT'L L. 984, 986-87 (2003).

DOI: doi:10.15779/Z38CW7K

Prior to 2004, Belgium offered jurisdiction over all humanitarian claims, regardless of whether the crimes had any connection to the country, regardless of the nationality of the plaintiffs or defendants, and regardless of the absence of defendants from the proceedings.[209] A Belgian court therefore accepted review of a case brought by Greenpeace against Total Fina Elf, the French oil corporation, for complicity in crimes against humanity committed by the Burmese military junta during construction and operation of a gas pipeline.[210] In the aftermath of other controversial cases against high-ranking foreign officials, however,[211] the United States threatened to move the NATO headquarters out of Brussels unless Belgium restricted the rules[212] In the aftermath of the revocation, the Belgian court could no longer adjudicate the claims against Total Fina Elf.[213] Without the extraterritorial jurisdiction that they had offered, it could not pursue allegations brought by Burmese citizens against a French company for abuses in Burma[214]

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209. Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions [Grave Breaches of International Humanitarian Law Act], of June 16,1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 1993.

210. The case ultimately was dismissed by the Court of Cassation. *See*, Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939, n. 102. *See also* Joan Condijts, *Les Birmans Déboutés: Total L'emporte, Le Soir en ligne*, Mar. 5, 2008,

available at http://www.lesoir.be/actualite/monde/la-justice-met-fin-aux-2008-03-05-582191.shtml.

211. *See, e.g.*, *New War Crimes Suits Filed Against Bush, Blair in Belgium*, DEUTSCHE PRESSE-AGENTUR, June 20, 2003; Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, N.Y. TIMES, Feb. 13, 2003, at A14.

212. *See, e.g.*, Philip Reeker, Dep't of State Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 6 (May 14, 2003) (quoting chairman of the Joint Chiefs of Staff considering need to relocate NATO headquarters), http://2001-2009.state.gov/r/pa/prs/dpb/2003/20584.htm; David Wastell, *America Threatens to Move NATO After Franks Is 'Charged'*, SUNDAY TELEGRAPH, May 18, 2003, at 31; David Rumsfeld, Secretary of Defense, U.S. Dep't of Defense News Transcript (June 12, 2003), http://www.defense.gov/releases/release.aspx?releaseid=5455; Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24; Richard Boucher, Dep't of State Spokesman, U.S. Dep't of State Daily Press Briefing at 10-11 (June 13, 2003), http://2001-2009.state.gov/r/pa/prs/dpb/2003/21566.htm ("Secretary of State has raised these concerns in public and in private with the Belgians. The Secretary of Defense has raised them in public and in private with the Belgians. The goal is to get them to change the law, and none of these other questions will arise."); Lorna McGregor, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, 99 ASIL 125, 128 (2005); *Belgium Universal Jurisdiction Law Repealed*, Hum. Rts. News (Aug 1, 2003), http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed.

213. Loi modifiant la loi du 16 juin 1993 relative a la repression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire [Law amending the law of June 16, 1993, concerning the prohibition of grave breaches of international humanitarian law and article 144ter of the judicial code] of Apr. 23, 2003, MONITUER BELGE [M.B.][OFFICIAL GAZETTE OF BELGIUM], May 7, 2003.

214. HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE – THE STATE OF THE ART, Volume 18, No. 5(D) 37-38 (June 2006), *available at* http://www.hrw.org/sites/default/files/reports/ij0606web.pdf.

IV.
DIFFERENT VIEWS ON SOVEREIGNTY ACCOUNT FOR DIVERGING U.S. AND EUROPEAN APPROACHES TO EXTRATERRITORIALITY

Contrary attitudes towards national sovereignty may explain why U.S. courts have withdrawn extraterritorial jurisdiction just as the European Union and several member states have begun to extend it.[215] Extraterritorial jurisdiction depends on a flexible approach to sovereignty; it entails reaching into the territory of another country to impose a judgment. The United States initially used the ATS to facilitate jurisdiction over aggressive extraterritorial claims and to enforce human rights norms against multinational corporations. But the United States increasingly has appeared to interpret intrusions on national sovereignty as a threat to democracy. It has prioritized domestic laws that express the popular democratic will. U.S. suspicion of international laws is linked to the narrowing scope of extraterritorial jurisdiction under the statute. The courts must read causes of action in international law into the federal common law before they can impose a judgment abroad. Hostility towards international law has therefore narrowed the range of exterritorial judgments. In contrast, the European member states have appeared to regard conceding national sovereignty as necessary for safeguarding democracy. They have surrendered authority to supranational institutions to enable external protect and enforce baseline standards of behavior. Having done so, the member states have grown increasingly open to international rules. Enforcing them extraterritorially has become an expression of the potential of Europe for human rights leadership.

A. U.S. courts have prioritized laws of elected domestic officials and constraints on international laws have narrowed extraterritorial jurisdiction

Popular sovereignty has long been a touchstone in U.S. jurisprudence. After breaking from England to establish a republic based on direct democracy, the new government restricted the judiciary from making new laws.[216] To protect the fundamental freedoms of the people, it has instead applied rules

215. *See, e.g.*, Fleur E. Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 912 (1994) (describing the perception of "ever more intrusive activities of home-states seeking to regulate" multinational corporations as a "threat to state sovereignty"). *See also*, Guglielmo Verdirame, *The Divided West: American and European International Lawyers*, 18 EUR. J. INT'L L. 553 (2007) (tracing the emergence of different assumptions about sovereignty between "the two sides of the Atlantic").

216. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 515 (2008) (citing U.S. Const. art. I, § 7, art. II, § 2). 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."); 4 Reg. Deb. 349 (1828) (statement of Sen. Rowan); THE FEDERALIST NOS. 78-82 (Alexander Hamilton).

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DOI: doi:10.15779/Z38CW7K

enacted by elected legislators.[217] International laws do not derive from publicly-accountable officials and the laws increasingly have appeared to be regarded as antidemocratic.[218] The judiciary lately has limited the jurisdiction of the courts to consider them, leading to the retraction of extraterritorial jurisdiction over corporate human rights claims.[219]

The United States has enjoyed a history of political stability, which has seemed to engender a sense of self-sufficiency. Powerful and geographically separate, it rarely has needed to accept subversions of its authority.[220] It never faced the threat of foreign invasion, never risked succumbing to fascism or dictatorship.[221]

The secure environment nurtured a robust, plaintiff-friendly legal system, capable of driving progress in the area of human rights. Early decisions, such as *Marbury v. Madison*, established the role of the judiciary in protecting individuals.[222] U.S. courts made redress by victims more favorable by providing devices such as class action lawsuits, pretrial discovery, and default judgments.[223] The courts facilitated access to counsel through contingency fee arrangements and punitive damages.[224] An active plaintiffs' bar and tradition of pro bono developed.[225] Radovan Karadzic, the leader of the Bosnian Serbs, faced genocide and war crimes charges in the United States, not in Europe.[226] Royal Dutch Shell defended its actions towards the Ogoni people of Nigeria in the United States, too, in spite of efforts to transfer the litigation to the United

217. *See, e.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938); *Texas Industries, Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 640 (1981) (federal courts may formulate federal common law only when "Congress has given the courts the power to develop substantive law"); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994); Hamilton, *supra* note 216.

218. *See, e.g.*, JEREMY RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005). *But see, e.g.*, Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (rejecting the claim that the use of international law is antidemocratic and establishing that international law has properly been used to construe the Constitution).

219. *See, e.g.*, Michael Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 191-94 (2001).

220. *See, e.g.*, Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 11-12 (Michael Ignatieff ed., 2005).

221. *Id*. at 17.

222. *See* Marbury v. Madison, 5 U.S. 137 (1803).

223. S*ee* U.N. Human Rights Council, 14th Sess., 3d agenda item at 21, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (discussing the importance of these instruments to legal actions against multinational corporations).

224. SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 16-17 (2004); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245, 252 (2004).

225. *See, e.g.*, Jonathan C. Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, June 2010, at 17.

226. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

Kingdom or the Netherlands.[227]

These and other claims under the ATS reflected the U.S. commitment to upholding fundamental rights, but the United States has increasingly appeared to emphasize its domestic rules. The language of Supreme Court decisions has tracked the general trajectory: In 1988, in *Thompson v Oklahoma*, the Court considered "views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading Members of the West European community."[228] More recent opinions, however, have stated that U.S. courts "should not impose foreign moods, fads, or fashions," and "discussion of . . . foreign views is meaningless [and] dangerous dicta."[229]

The United States lately has refused to ratify international rights conventions, unlike the European member states that have incorporated them into national law. The United States rarely has contravened international standards; it has seemed reluctant to cede its sovereignty to external regimes.[230] It voted against the Kyoto Protocol, withdrew from the Anti-Ballistic Missile Treaty, and unsigned the Rome Statute of the ICC. Its use of military commissions rather than international tribunals to try foreign terror suspects appears to reject established systems of international law.[231]

The theory of "integrity-anxiety" may offer an explanation of why the

227. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99-108 (2d Cir. 2000); *see also* Declaration of Richard Meeran (filed before Magistrate Judge Henry B. Pitman on May 5, 1998); Two Declarations of Peter Duffy (filed before Magistrate Judge Henry B. Pitman on Aug. 26, 1997 and May 5, 1998); Three Declarations of Lawrence Collins (filed before Magistrate Judge Henry B. Pitman on Mar. 26, 1997, May 16, 1997, and Sept. 26, 1997).

228. Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988).

229. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (denying certiorari); *see also* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). *Compare* Trop v. Dulles, 356 U.S. 86, 102-03 (1958), *with* Coker v. Georgia, 433 U.S. 584, 593 n.4 (1977).

230. *See, e.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000) (describing "reduced constitutional autonomy" and "impaired popular sovereignty" as costs of global governance); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273, 278 (2000).

231. *See, e.g.,* Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22 (1998); S. Res. 98, 105th Cong. (1997): A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Chan; Joshua P. O'Donnell, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority to Terminate a Treaty,* 35 VAND. J. TRANSNAT'L L. 1601 (2002) (exploring the legal issues surrounding a president's unilateral withdrawal from a treaty); Emily K. Penney, *Is That Legal?: The United States' Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 Cath. U. L. Rev. 1287 (2002); John Bolton, *U.S. Letter to U.N. Secretary-General Kofi Annan*, CNN (May 6, 2002, 6:32 PM), http://archives.cnn.com/2002/US/05/06/court.letter.text/index.html (Letter from John Bolton, under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, UN Sec'y Gen. announcing decision to unsign the Rome Statute); Edward T. Swaine, *Unsigni*ng, 55 STAN. L. REV. 2061, 2061-62, 2064 (2003); Harold H. Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002).

United States has increasingly excluded international laws.[232] The American identity, the theory postulates, derives from the constitution and national laws.[233] In a pluralistic society, decisions based on constitutional principles and congressional legislation receive more popular legitimacy than those that draw from boundless outside authorities.[234] Domestic courts therefore keep disagreements in check by applying only domestic rules.[235] Foreign, international laws threaten the integrity of the system.[236]

Perhaps for this reason a nationalist school seems to have prevailed, and the increasingly strict interpretations of separation of powers principles have resonated in the recent opinions construing the ATS.[237] It has become "antidemocratic" for the federal government to delegate lawmaking authority to outsiders unaccountable to the U.S. electorate.[238] And it therefore has been "countermajoritarian" for U.S. courts to develop and apply international laws.[239]

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232. *See* FRANK I. MICHELMAN, *Integrity-Anxiety?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241 (Michael Ignatieff ed., 2005).

233. *See, e.g., id.*

234. *Id.; see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 93-144 (2004). *See generally*, JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 1-63 (2004).

235. *See* MICHELMAN, *supra* note 232; *see also*, Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986) (explaining why customary international law lacks popular legitimacy in the United States); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 584 (2002) ("federal courts cannot apply international law at all unless it is affirmatively incorporated into state or federal law by Congress").

236. *See, e.g.,* John O. McGinnis, *Foreign to the Constitution*, 100 NW. U. L. REV. 303, 313-18 (2006); Joan L. Larsen, *Importing Constitutional Norms from a 'Wider Civilization': Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (reflecting how some Americans feel threatened by international law); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630-40 (2005); Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, *in* TRANSATLANTIC REGULATORY COOPERATION 469 (George A. Bermann et al. eds., 2000).

237. *See* Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 Am. Soc'y Int'l L. Proc. 305, 307 (2004); Donald J. Kochan, *No Longer Little Known but Now A Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 131 (2005); John Gerard Ruggie, *Exemptionalism and Global Governance*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 325 (Michael Ignatieff ed., 2005); *but see* Justice Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of (Human)kind": The Value of A Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 357-59 (2005); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Sandra Day O'Connor *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002).

238. *See, e.g.,* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006-21 (2004); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1747-48 (2009), *but see* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, (1995).

239. *See, e.g.,* Roger P. Alford, *Misusing International Sources To Interpret the Constitution*,

Judges do not have lawmaking powers, so they have not been permitted to incorporate customary international laws into the federal common law as the ATS has required.[240] The permanent representative to the United Nations during the Bush administration, John Bolton, described mechanisms for extraterritorial jurisdiction, such as the statute as allowing "'offenses' by 'the common enemies of mankind' that do not readily fit within . . . [the law] . . . [to] be subject to creative interpretations . . . , whether slow-witted national legislators ever vote on them or not."[241] U.S. courts lately have been held to have jurisdiction to adjudicate only U.S. legislation.[242]

If the U.S. Constitution is the supreme law of the land, excluding any reference to outside authority, the customary international laws on which ATS claims depend no longer seem to have a place in domestic courts. Congressional testimony has bemoaned "substantial litigation abuse . . . [in] the importation of foreign claims into U.S. courts."[243] The extraterritorial reach of the ATS, a statute the Congress drafted in 1789 to provide jurisdiction over violations of international laws, has been narrowed precisely because it requires U.S. judges to apply international laws.[244]

B. Europe instead relinquished sovereignty to protect democracy and solidifies its identity in promoting international rights

Europe, because of its history, has regarded intrusions on national sovereignty as a safeguard for democracy. The member states united to form the European Union to constrain antidemocratic tendencies within a transnational network.[245] Their participation in the regional system familiarized them with

98 AM. J. INT'L L. 57, 58-61 (2004); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2309 (1991).

240. Curtis A. Bradley & Jack L. Goldsmith, *Commentary, Federal Courts and the Incorporation of International Law,* 111 HARV. L. REV. 2260 (1998)*;* John Cerone, '*Dangerous Dicta': The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication,* 32 WM. MITCHELL L. REV. 543, 551-54 (2006); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 660-61 (2007); *but see* A.M. Weisburd*, State Courts, Federal Courts, and International Cases,* 20 YALE J. INT'L L. 1, 48-56 (1995). *See also* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

241. Bolton, *supra* note 230, at 213.

242. *See, e.g., The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

243. *Can We Sue Our Way to Prosperity?: Litigation's Effect on America's Global Competitiveness: Hearing on H. Subcomm. on the Constitution, Comm. on the Judiciary*, 112th Cong. 2 (2011), *available at* http://judiciary.house.gov/hearings/pdf/Beisner05242011.pdf (testimony of John H. Beisner on Behalf of the U.S. Chamber Institute for Legal Reform).

244. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118-120 (2d Cir. 2010).

245. *See, e.g.*, *Summaries of EU Legislation – Treaty establishing the European Coal and Steel Community, ECSC Treaty*, EUROPA http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm (last updated Oct. 15, 2010); ROBERT

DOI: doi:10.15779/Z38CW7K

restrictions on their national authority, and they grew more accustomed to conforming to outside rules. As the European project has encountered obstacles and they have sought a new purpose for the union, they have begun to locate a European identity in the extraterritorial promotion of international standards for human rights.[246]

The experience of World War II educated Europe in the precariousness of democratic systems.[247] In its wake, sovereign European countries agreed to cede national authority.[248] They empowered external institutions, such as the European Court of Justice, to restrain the will of the people and guard basic rights.[249] The Universal Declaration of Human Rights established a floor for fundamental rights, and the European Convention on Human Rights has mandated their protection.[250]

SCHUMAN, THE SCHUMAN DECLARATION (1950), *available at* http://europa.eu/abc/symbols/9-may/decl_en.htm.

246. *See, e.g.*, Samantha Besson, *The European Union And Human Rights: Towards A Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 324 (2006) (positing that "economic integration is to a large extent exhausted as a vision for further integration in the European Union" and "the prospects of enlargement have further contributed in the last few years to identifying national, regional and global threats to human rights and hence to conscientise the EU's vision of itself as a global entity, whose 'one boundary is democracy and human rights'").

247. *See, e.g.*, Charles Leben, *Is There A European Approach to Human Rights?*, *in* THE EU AND HUMAN RIGHTS (Philip Alston ed., 1999) ("awareness, arising out of the tragic history of the 1930s and 1940s of the need actively to defend human rights").

248. *See, e.g.*, Jodie A. Kirshner, *'An Ever Closer Union in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the Societas Europaea*, 84 ST. JOHN'S L. REV. 1273, 1280 (2010); Victoria Curzon, THE ESSENTIALS OF ECONOMIC INTEGRATION: LESSONS OF EFTA EXPERIENCE 28-29 (1974) ("The end of World War II was a time of heroic plans for institutionalizing inter-state relations so as to bring order into international affairs and thus blot out the danger of another war. Nowhere were these feelings expressed more strongly than in Western Europe, where a federation of European states was considered by many to be the only sound basis upon which to build a lasting peace").

249. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (also established the European Court to Justice).

250. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; *see, e.g.*, Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, *in* THE EU AND HUMAN RIGHTS 1 (Philip Alston ed., 1999); Iris Halpern, *Tracing The Contours Of Transnational Corporations' Human Rights Obligations In The Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 137 (2008). The history of the development of the European Convention of Human Rights and the European Union is substantially intertwined. Both are part of the project of European integration. After direct experience of serious rights violations during World War II, many European citizens gathered at the Hague Congress in 1948 to call for the development of a regional system of Human Rights and for the creation of a European Assembly, in order to avoid the serious rights violations that took place during the War and to protect against Communism. Winston Churchill presided over a discussion at the Conference about developing European political cooperation. The Council of Europe was founded in 1949 by ten European countries (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the UK.), and the European Coal and Steel Community came into being in 1951. The Convention on Human Rights was drafted in Strasbourg in 1949, under the auspices of the Council of Europe. (The

The establishment of the European Union has exposed the member states to nondomestic laws and extraterritorial enforcement. European member states must routinely accept regulations drafted in Brussels and interpreted in Luxembourg, in spite of the intrusion on national sovereignty.[251] Instead of the apparent U.S. ideal of a discreet body of domestic rules, the European member states have implemented supranational directives and invalidated conflicting national legislation.[252]

The incorporation of external laws has extended to international conventions. The member states have ratified them into national legal codes without concern for their "countermajoritarian" status.[253] When the national constitutions of Germany and France blocked participation in the ICC, both countries amended their constitutions.[254]

Although the European Union developed social rights provisions to organize the relationships among its institutions, member states, and citizens, the Union has primarily followed a program of economic integration.[255] The focus

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Council of Europe now includes every European country but Belarus, Kazakhstan, and Vatican City, 47 member states. All are party to the Convention). The European Court of Human Rights enforces the Convention. Although the Court of Justice of the European Union is a separate institution, it is bound by the decisional law of the Court of Human Rights. Because the European Union and all of the EU Member States are signatories to the Convention, the ECJ also refers cases to the Court of Human Rights and views the Convention as integral to EU law. Both the European Union and its member states are subject to the Convention and external monitoring of their human rights activities. EU institutions are also bound under article 6 of the EU Treaty of Nice to conform to the Convention. In 2007, the Council of Europe and the European Union signed an agreement to cooperate to advance shared values.

251. *See, e.g.*, Anna Triponel, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 907 (2007). On Brussels and Luxembourg as the locations of the legislature and court, *see, e.g.*, *Lesson 4: How Does the EU Work?,* EUROPA http://europa.eu/abc/12lessons/lesson_4/index_en.htm.

252. For example, The Human Rights Act 1998 incorporated the European Convention on Human Rights into UK law.

253. *See* discussion in Section IV.B. *But see* M. Ličková, *European Exceptionalism in International Law*, 19 EUR. J. INT'L L. 463 (2008) (suggesting that the European Member States only "embrace" their EU obligations without "infringing international ones" by negotiating exceptions from international standards).

254. *See, e.g.*, Rabkin, *supra* note 230, at 278.

255. *See, e.g.*, Council Directive 68/151, 1968 O.J. (L 65) 8 (EC) (information disclosure, contracts, and dissolution); Council Directive 77/91, 1976 O.J. (L 26) 1 (EC) (capitalization of public companies); Council Directive 78/855, 1978 O.J. (L 295) 36 (EC) (mergers of public limited liability companies); Council Directive 78/660, 1978 O.J. (L 222) 11 (EC) (annual accounts); Council Directive 82/891, 1982 O.J. (L 378) 47 (EC) (divisions of public limited liability companies); Council Directive 83/349, 1983 O.J. (L 193) 1 (EC) (consolidated accounts); Council Directive 79/1072, 1979 O.J. (L 331) 11 (EC) (refund of value added tax); Council Directive 89/666, 1989 O.J. (L 395) 36 (EC) (company branches and disclosure); Council Directive 89/667, 1989 O.J. (L 395) 40 (EC) (private limited liability companies). *See also* Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, 46 MCGILL L.J. 849, 858 (2001); Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy and Individual Rights Under the European Community's Legal Order*, 37 HARV. INT'L L.J. 307, 308-10 (1996) ("The primary concern of the Community has always been

DOI: doi:10.15779/Z38CW7K

made support from disparate political groups possible and elided cultural differences.[256] After unifying the coal and steel industries, the European Union gradually expanded to a broader common market.[257]

As possibilities for further expansion of the common market approach a limit, however, and the prospect of financial default among the member states throws economic plans into disarray, the European Union has appeared to look to human rights promotion to provide a new rallying purpose.[258] Difficulty ratifying the Maastricht and the Lisbon treaties weakened the popular legitimacy of the union.[259] A sense that the potential for economic harmonization had been exhausted has led to calls for a new project, one that would be less technocratic and easier for European citizens to understand and support.[260]

The prospect of federalizing under the banner of human rights seems to provide a potentially compelling "raison d'etre" for the European Union.[261] European elites have talked openly of rights promotion as a means of relevance.[262] The NGO community has agitated for treaty revisions that would make human rights central.[263]

Increasingly, the European Union has seemed to see itself not just as an

economic integration; issues relating to social policy are viewed as secondary, to be addressed only to the extent that they impact upon economic integration. Economic integration, however, has not occurred in a political or social vacuum, and it is generally agreed that the Community has developed a social policy component that arises from, and is consistent with, its broader economic objectives.").

256. *See, e.g.*, BEN ROSAMOND, THEORIES OF EUROPEAN INTEGRATION, 2, 7, 10, 30 (2000); Kirshner, *supra* note 248, at 1282; Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon,* 11 HUM. RTS. L. REV. 645, 647-8 (2011); John Donahue & Mark Pollack, *Centralization and its Discontents: The Rhythms of Federalism in the United States and the European Union*, *in* THE FEDERAL VISION 95-98 (Kalypso Nicolaidis & Robert Howse, eds. 2001).

257. *E.g.,*Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11; Single European Act*,* 1987 O.J. (L. 169)1, [1987] 2 C.M.L.R. 741.

258. *But see* Alston & Weiler, *supra* note 250; Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649 (2011) (arguing that the current EU human rights system is less robust and less ambitious than that envisaged in the 1950s, such that the EU's aspiration to be taken seriously as a global normative actor is hindered by the double standard created by its internal and external human rights policies).

259. *See, e.g.*, Gráinne de Búrca, *If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 FORDHAM INT'L L.J. 1472, 1483-84 (2010); Brendon S. Fleming, Book Note, 15 COLUM. J. EUR. L. 561, 562-63 (2009).

260. *See, e.g.*, Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1308 (2000).

261. *But see id.* at 1338.

262. Andrew T. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29 OXFORD J. LEGAL STUD. 549, 576-77 (2009) ("[M]erely preserving the EU is no longer sufficient. Its survival must also reflect a 'moral politics' that respects articulated values in a concrete fashion."); Samantha Besson, *The European Union and Human Rights: Towards a Post-national Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 326 (2006) (arguing "for a conception of the EU *qua* a post-national institution of global justice").

263. *See, e.g.*, EU Select Committee, Eighth Report: EU Charter of Fundamental Rights, 1999-2000, H.L. 67, 161 at 172-74 (U.K.).

economic project, but as a force for good, and it has advanced a more visible human rights policy.[264] The European Court of Justice ruled that it could shape general principles of Community law from international human rights, and the European Parliament succeeded in enacting a charter of fundamental rights.[265] Concern for promoting human rights abroad has begun to appear in judicial opinions and in new documents and treaties.[266] Their reach has extended as the European Union enlarges and participates in international development projects.[267]

Unlike the United States, in which a U.S. identity appears to arise from a unique set of national rules that flow only from the Constitution and from the Congress, Europe seems to be finding an identity through a deliberate process of human rights promotion. It has tolerated sublimation of national sovereignty to absorb international conventions and has broadcast its commitment to them. Its rhetoric has promoted its extraterritorial goals: the 2003 Athens Declaration described the European Union as "a project to share our future as a community of values," which would "uphold and defend fundamental human rights, both inside and outside the European Union . . . ."[268]

CONCLUSION

Multinational corporations expose the limits of territorially based legal

264. COMITÉ DES SAGES, EUROPEAN UNIVERSITY INSTITUTE, LEADING BY EXAMPLE: A HUMAN RIGHTS AGENDA FOR THE EUROPEAN UNION FOR THE YEAR 2000: AGENDA OF THE COMITÉ DES SAGES AND FINAL PROJECT REPORT (1998). *But see* Andrew Clapham, *Where Is the EU's Human Rights Common Foreign Policy, and How Is It Manifested in International Fora?*, *in* THE EU AND HUMAN RIGHTS 83 (Philip Alston ed., 1999).

265. Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491; Case 5/88,Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609; Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.

266. *See, e.g.*, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125; Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491; Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609; Case C-260/89, ERT v. DEP, 1991 E.C.R. I-2925; Consolidated Version of the Treaty on European Union, 2010 O.J. (C 83) 13, arts. 6(1), 6(2), 7, 11, 46, 49, 177; *Laeken Declaration on the Future of the European Union*, EUROPEAN COUNCIL, http://european-convention.eu.int/pdf/lknen.pdf. *See also* Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS 859 (Philip Alston ed., 1999).

267. *See, e.g.*, Fourth ACP-EEC Convention, 1991 O.J. (L 229) 3 (EC); *On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries*, COM (95) 216 final (May 23, 1995); Partnership Agreement Between the Members of the African, Caribbean, and Pacific Group of the One Part, and the European Community and its Member States, of the Other Part, 2000 O.J. L (317) 43; European Initiative and Programme in Democracy and Human Rights; *Accession Criteria*, EUROPEAN COMMISSION, http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm. *See also* Besson, *supra* note 262, at 324.

268. Athens Declaration of 16 Apr. 2003, Informal European Council, 2003 O.J. (L 236), *available at* http:// www.eu2003.gr/en/articles/2003/4/16/2531/index.asp?.

systems. Single states applying national laws within national jurisdictions lack the capacity to police interconnected, international corporate groups. To hold them accountable, the legal structure must match the economic structure. The enforcement of human rights standards has demanded a flexible approach to sovereignty and openness to extraterritorial jurisdiction.[269]

Landmark opinions endorsing the use of the ATS have acknowledged the difficulties individual, territorial legal systems have in making multinational corporations responsible for human rights. The statute has enabled U.S. courts to navigate at the margins of other legal systems and interact with international law. Its extraterritorial character has offered jurisdiction concomitant to globalized business and allowed claims to reach human rights abuses of foreign subsidiaries.

The retraction of extraterritorial jurisdiction in the United States has generated concern that the governance gap will reemerge.[270] U.S. courts have narrowed the ATS out of concern for encroachments on national sovereignty and related discomfort with international laws.

Instead, the European Union and many of its member states have stepped forward, offering nascent mechanisms of extraterritorial accountability. The economic interdependence of multinational corporate groups has parallels to the political interdependence of Europe itself. The European Union has achieved some common goals through cooperation,[271] and member state courts have appeared more comfortable with intrusions on national sovereignty and extraterritoriality. [272]

The climate therefore presents new avenues for judicial redress of corporate human rights abuses. Developments in Europe counterbalance the shift taking place in the United States. As U.S. courts grow less open to extraterritorial cases, recognition of the broader global context gains importance. Continuing to bring extraterritorial claims in U.S. courts wastes resources. Even if egregious cases can achieve favorable outcomes, the litigation risks the piecemeal development of inconsistent law.

If international human rights norms grow more established within European judicial forums, they eventually could achieve sufficient momentum to pave the way for renewed recognition in U.S. courts. Justice Breyer cited the

269. *See, e.g.*, THE ECONOMICS OF GLOBALIZATION (A. Razin & E. Sadka eds., 1998).

270. *See, e.g.*, U.N. General Assembly, Human Rights Council, 8th Sess., Agenda Item 3, U.N. Doc. A/HRC/8/5, at 3 (7 Apr. 2008) ("root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences").

271. *See, e.g.*, Jodie Adams Kirshner, *An Ever Closer Union in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the Societas Europaea*, 84 ST. JOHN'S L. REV. 1273, 1274, 1276 (2010).

272. *See, e.g.*, Andrew Moravcsik, *Conservative Idealism and International Institutions,* 1 CHI. J. INT'L L. 291, 305 (2000) ("Today we can afford a broader, more flexible understanding of sovereignty – one that permits us to profit from interdependence . . . .").

European Commission in order to interpret the ATS, and the English Court of Appeal later referenced his opinion to support extraterritorial jurisdiction.[273] The interlocking citations evidence shared values and a joint willingness to support fundamental rights, in spite of diverging attitudes towards extraterritoriality.

273. Sosa v. Alvarez-Machain, 542 U.S. 692, 763 (2004) (Breyer, J., concurring); Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya (the Kingdom of Saudi Arabia) and others, [2004] EWCA (Civ) 1394, [60] (Eng.); *see also* Menno Kamminga (2005), *supra* note 186, at 124; Donald Francis Donovan, *Introductory Remarks*, 99 AM. SOC'Y INT'L. L. PROC. 117, 117 (2005).

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DOI: doi:10.15779/Z38CW7K