



CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
NUMBER 1, 2004

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**THE ACCOUNTABILITY OF MULTINATIONALS FOR
HUMAN RIGHTS VIOLATIONS IN EUROPEAN LAW**

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Abstract

The discourse on corporate social responsibility (CSR) has been on the rise in the European Union since 2001. The concrete realizations, however, remain limited, with the main result being the holding of a “Multistakeholder Forum on CSR” hosted by the European Commission, joining business, NGOs, and unions, and which was finalized in June 2004. This paper explores which tools are at the disposal of the European Union to improve the accountability of multinational corporations domiciled in the EU, beyond the voluntary commitments they would agree to make in the framework of CSR as currently understood and implemented. It argues that the EU and its Member States have a responsibility towards developing countries to ensure that their corporations do not violate human rights when they invest in those countries. It examines how the civil liability of EU-based multinational enterprises could be engaged by victims of such violations committed abroad, and whether such liability could be complemented by the imposition of a criminal liability. It also examines how the EU Member States could use their economic muscle to incentivize multinational enterprises to better respect human rights in the course of their activities, especially by devising a public procurement policy to that effect.

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Introduction

Multinational enterprises (MNEs) domiciled in the Member States of the European Union may generally be said to benefit from a complete impunity when they commit human rights violations abroad. This is especially true in the typical situation in which they invest in developing countries, either by extending their activities in those countries or by the creation of subsidiaries having a distinct legal personality, because of the lack of interest local governments may have in the protection of human rights or, more often, because of their inability to ensure that protection effectively. The impunity of MNEs is a reality, whether these enterprises are directly responsible for human rights violations or whether their responsibility is more indirect, for instance because their presence in certain jurisdictions facilitates or encourages human rights abuses by governments.¹

The main question I would like to address is what the law of the European Union has achieved, and which directions it could take in the future, to put an end to that practical state of impunity. To a large extent, the problems faced by EU law are not specific to that legal order. EU law faces the same dilemmas as those with which lawyers working on the accountability of multinationals for human rights violations, at the intersection of international economic law and international human rights law, are so familiar with. Should this increased accountability rely on the mechanisms of the market, for example by introducing ethical or social criteria in public procurement policies or by encouraging social labelling so as to facilitate the sanction by the consumers of unethical practices, or should legally binding solutions be preferred? If one chooses for the second branch of the alternative, should we prefer civil liability, and thus privilege the objective of compensating the victims of human rights violations, or criminal liability, with the sometimes more efficient tools it makes available for repression by involving the state apparatus in the investigatory process? And what division of tasks should we favor, in this progress towards more accountability of MNEs for human rights violations in foreign jurisdictions, between international law and municipal law? Should we confine international law to imposing on the States to protect the human rights of those whom the activity of the MNE affects, by regulating this activity? Or should international law directly impose obligations on the MNEs, as it already does, with respect to some international crimes, on individuals?² If this latter option is preferred, should we count on voluntary initiatives by the MNEs, albeit encouraged perhaps by the definition of large frames like—in the United Nations—the “Global Compact” initiative or—in the European Union—the notion of “Corporate Social Responsibility”? Or should we focus rather on harder norms of international law, imposing on MNEs obligations to respect human rights just as these obligations have been traditionally imposed on States?

¹ This study focuses on the liability of multinationals, i.e. corporations the economic activities of which develop in different countries, either directly or by the creation of subsidiaries having a distinct legal personality but which are *de jure* or *de facto* under the control of the parent corporation. It should be emphasized however that, however difficult it may appear to impose on MNEs certain obligations in the field of human rights, the difficulties we face in that respect are even more insuperable when human rights violations appear in the course of economic activities developed in a number of States, when different corporations, at different stages of the production and marketing of a good, cooperate in the international division of labor. MNEs are, relatively speaking, easy targets for regulation, because of the centralized control the parent company exerts on a chain of activities; but the impunity of economic actors operating transnationally is even more difficult to challenge when there is no such central locus of control, and where the different entities are bound by exclusively contractual relationships.

² On the promises of this line, see the International Council on Human Rights Policy, *Beyond Voluntarism. Human Rights and the developing international legal obligations of companies* (2002).

We shall discover that not only are the questions familiar; the answers, too, point in the same direction: just like general public international law or the law of international organizations like the International Labour Organisation or the Organisation for Economic Cooperation and Development, European Union law is reluctant to impose too strict requirements to multinational enterprises operating from within one of its Member States; except for a still rather vague emphasis on the voluntary contribution corporations should make towards “a better society and a cleaner environment”—as it appears in the definition of corporate social responsibility, a concept as promising for the future as it is underdeveloped in the present³—the control of the activities of MNEs in third countries is still essentially left to the States acting individually: the prisoner’s dilemma situation in which this leaves us, in which no State dares to move forward out of fear that the enterprises will leave its national territory once they feel the threat becomes too imminent to still be ignored, is again an all too well-known consequence of this state of matters, just compounded perhaps within the EU by the degree to which free movement of investments in capital has been achieved.

Before detailing this diagnosis and the possible avenues for overcoming its insufficiencies, however, European Union law must be located in a more general context. A first chapter will analyze the two components of the regulative gap already alluded to: first, still very much indebted to its stato-centrist origins—international law as obliging *States*, its primary subjects—the international legal order fails to impose directly obligations on MNEs as such; second, the ability of individual States, acting separately, to regulate the activities of multinationals remains limited, because of “the ability of multinationals to move capital between different countries, to create flexible structures, and exploit the legal fiction that subsidiaries are independent from their parents.”⁴ A second chapter will examine whether the European Convention on Human Rights—one of the remarkable features of which, indeed, is the extent to which it has imposed on its Contracting States an obligation to prevent violations committed by private parties—distinguishes itself from this general picture of public international law, including international human rights law. The answer, we shall see, is a disappointing one: beyond certain exceptional circumstances to which the activities of their MNEs abroad do not belong, the States parties to the Convention are not under an obligation to protect the fundamental rights of persons whose situation, perhaps, they may influence, but who live outside their “jurisdiction,” understood essentially as referring to the national territory of the Contracting States.

The following chapters will focus more specifically on the European Union. In chapter III, I will locate the question of the accountability of multinationals in the broader framework of the attitude of the European Union towards the promotion of global labor standards, as it influences its trade and development cooperation policies. In chapter IV, I will detail under which conditions MNEs domiciled in the EU could be civilly liable for human rights violations outside the EU, committed

³ “Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment. At a time when the European Union endeavours to identify its common values by adopting a Charter of Fundamental Rights, an increasing number of European companies recognise their social responsibility more and more clearly and consider it as part of their identity. This responsibility is expressed towards employees and more generally towards all the stakeholders affected by business and which in turn can influence its success” (Commission of the European Communities, Green paper—Promoting a European framework for corporate social responsibility (COM(2001) 366 final, 18.7.2001), para. 8). This definition of corporate social responsibility is essentially unchanged in the Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development (COM(2002) 347 final, 2.7.2002), which built upon the reactions received on the presentation of the Green Paper.

⁴ Council on Human Rights Policy, *supra* note 2, at 12.

either in the course of their activities or by their subsidiaries. In chapter V, the focus will be rather on criminal liability, and on the respective roles of the EU and its Member States in adopting extra-territorial criminal legislation prohibiting certain violations of human rights. In chapter VI, I will comment on the voluntary contribution of MNEs to the promotion of human rights: corporate social responsibility, indeed, refers to voluntary initiatives by which corporations go beyond the legal requirements imposed upon them to meet the expectations of all the stakeholders, and some of these initiatives, especially the adoption of codes of conduct, may serve to better ensure the observance by the business community of fundamental rights. At last, chapter VII comments briefly on one important lever the EU Member States have at their disposal to encourage corporations to fully respect human rights: besides acting as regulators, States act as economic actors on the market. Public procurement policies and public credits to exports, especially, could take better account of human rights concerns, and the EU may have a role in encouraging such an inclusion by its Member States.

This is a study of the tools available in European Union law to ensure that multinational enterprises respect their human rights obligations. It focuses on mechanisms, rather than on substantive norms. I will discuss issues such as the civil liability of multinationals domiciled in the EU for human rights violations committed abroad, the imposition of a criminal liability on corporations in such a situation, the potential of codes of conduct and the notion of corporate social responsibility, and the linkage of access to export credits or public contracts to the human rights obligations of the companies applying for such credits or contracts. On the other hand, I will not discuss the extent of human rights obligations of corporations—for example, what should be considered the “sphere of influence” of a corporation, in which it has to promote human rights, or which notion of complicity we should adhere to when a corporation is accused of encouraging, or even not denouncing, the violations committed in the States where they invest. Although they are separated for the sake of this analysis, the two questions, procedural and substantive, are closely connected. For instance, it is obvious that the extent of the obligations which may be imposed on companies on the basis of a code of conduct they voluntarily adopt is larger than the extent of the obligations which may be imposed by criminal legislation targeting the same actors, especially if that legislation extends its geographical scope of application beyond the national territory of the State which adopts it, or even confers a universal jurisdiction to the courts of that State. This interrelationship will be explored, I hope, in other places.

1. The immunity of multinational enterprises

The reasons why violations by MNEs of internationally recognized human rights generally remain unpunished are relatively easy to apprehend.⁵ International law is classically addressed to States. Only in exceptional cases does it hold individuals directly responsible for its violations. Even when international law does impose obligations on individuals directly, the liability of corporations will depend on the procedures set up by the States, in the absence of adequate institutional mechanisms in the international legal order for imposing such obligations on legal persons rather than natural persons. States, in principle, are under an obligation not only to respect the internationally protected human rights by which they agreed to abide, but also to protect these rights from violations which

⁵ For a lucid analysis, see Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights,” 46 *N.I.L.R.* (1999), at 171-203. For an attempt to define the regime of the legal responsibility of corporations for human rights abuses which they commit or of which they are complicit, see Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility,” 111 *Yale L. J.* (2001) at 443. See also N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002), esp. chap. VI.

would be committed by private persons on whom they can exercise control. However, the international law on State responsibility does not support the assertion that all the acts of a State's nationals, even committed abroad, would be imputable to the State, because the jurisdiction of the State could extend to those acts under the active personality principle. On the other hand, the States on the territory of which foreign corporations conduct their activities will more than occasionally be unwilling to impose that these activities fully respect the human rights of the persons whom they affect, or will be unable to so do effectively. In sum, although international human rights contains norms which could easily lend themselves to being imposed on private corporations, the enforcement mechanisms are still inadequate.

A. Individual responsibility under international law

In the famous words of the International Military Tribunal of Nuremberg, which revived for the modern era the notion of direct responsibility of individuals under international law, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁶ But even in the restricted field of crimes against international law which may be committed by individuals who are then responsible directly under international law—genocide, crimes against humanity, and war crimes,⁷ which together represent but a small subset of human rights violations—the enforcement mechanisms of international law have at yet reached not legal persons, but natural persons: "men" indeed, "not abstract entities." Even the International Military Tribunal of Nuremberg, although it could declare an organization criminal⁸—which meant that his membership of such an organization or financial support in knowledge of its criminal activities could lead to the conviction of an individual—only had jurisdiction over natural persons. Like the IMT itself, the various Allied tribunals created under Article 10 of the Control Council Law, although they did hold certain corporate officials criminally responsible for the acts of the company, still excluded finding the corporation as such, the "instrumentality" of the individuals, criminally liable.⁹

⁶ International Military Tribunal for the Trial of Major War Criminals, judgment of 1 October 1946, repr. 41 *A.J.I.L.* (1947) 172, at 221. It is also as individuals acting in their private capacity, and not solely as agents of the State, that natural persons may commit international crimes. A. Clapham cites the following passage of the *Flick Case*, a trial concerning the head of a group of industrialists found guilty of war crimes for employment of slave labor and spoliation of public and private property. The defendant, Friedrich Flick, did not belong to the apparatus of the Nazi State. The U.S. Military Tribunal said on that circumstance: "It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts judged criminal when done by an officer of the Government are criminal also when done by a private individual. ... There is no justification for a limitation of responsibility to public officials" (Case 48, *Trial of Friedrich Flick and Five Others* [1947], 9 *Law Rep. of the Trials of War Criminals* 1, at 18, reproduced in 14 *International Law Rep.* (1947), at 266, and also cited by Clapham, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000) 139, at 166).

⁷ See on the definitions of these crimes against international law the Statute of the International Criminal Court adopted on 17 July 1998 in Rome, articles 6 to 8.

⁸ Charter of the International Military Tribunal (Annex to the 8 August 1945 London Agreement establishing an ad hoc International Military Tribunal, 28 UNTS 284), Art. 9 and 10.

⁹ The U.S. Military Tribunal stated, in the *Flick case*, *supra* note 5, that "the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts ... were committed. But corporations act through individuals ." See I. D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (2001), at 228.

The Rome Conference of the Summer of 1998, which would lead to the adoption of the Statute of the International Criminal Court, represents the latest attempt to move international criminal law in the direction of identifying criminal liability in legal persons. Although the draft statute presented at the beginning of the Rome Conference did provide that the International Criminal Court would have jurisdiction over legal persons “when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives,”¹⁰ this possibility was removed during the last stage of the negotiations. Under the Statute finally adopted, only natural persons may be tried before the ICC, although the crimes which they may be convicted for include those crimes committed “by a group of persons acting with a common purpose.”¹¹ The final suggestion to confer to the Court jurisdiction over “juridical persons” when the natural person charged with having committed genocide, a crime against humanity, or a war crime, both “was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed” and was acting “on behalf of and with the explicit consent of that juridical person and in the course of its activities,” was not retained, not because of insuperable objections of principle, but rather because of the technical complexities raised by the suggested innovation and the time constraints the participants in the Conference were facing.¹²

Of course, the lack of an institutional mechanism in international human rights law authorizing legal persons other than States to be sued directly, by no means can be interpreted as meaning that the international law of human rights does not in its present stage impose obligations on legal persons, and in particular corporations. Indeed, even in the restricted field of international criminal law, there is no reason why the criminal liability of juridical persons would not be affirmed in the future, perhaps when, in 2009—seven years after the entry into force of the Statute—the Review Conference will have to decide on amendments to the Statute. This development would not be completely unprecedented in international criminal law: as A. Clapham reminds us,¹³ the war trials held after the second world war led to the conviction of certain German industrialists, notably the directors of I.G. Farben, whose criminal liability was based on the finding that *the company* itself had committed war crimes—and it is for purely jurisdictional reasons, rather than substantive ones, that the corporation I.G. Farben was not convicted as such by the U.S. Military Tribunal in Nuremberg which convicted its directors.¹⁴ It nevertheless remains true that, under international criminal law, the jurisdictional obstacle remains to this day. And should that obstacle be removed, it still would concern only a limited domain of the human rights internationally protected.

¹⁰ Article 23 para. 5 of the draft Statute (UN Doc. A/CONF.183/2/Add.1, at 49), cited by Clapham, *supra* note 6, at 143-144.

¹¹ Article 25 (3)(d) of the Statute.

¹² Clapham, *supra* note 6, at 157. See, however, on the difficulties resulting during the drafting of the Rome Statute from the fact that “the very principle of corporate criminal responsibility is not recognized in some domestic systems, and, in respect of those jurisdictions where such a principle is accepted, there is no commonly accepted means of application,” Seiderman, *supra*, note 9, at 229.

¹³ See also Ratner, *supra* note 5, at 477-479 and Lippman, “War Crimes Trials of German Industrialists: The ‘Other Schindlers,’” 9 *Temp. Int’l & Comp. L.J.* (1995), at 173.

¹⁴ Clapham, *supra* note 6, at 166-171.

B. The obligation of States to protect individuals under their jurisdiction

Perhaps it may be requiring too much from international law, at the present stage of its development, to affirm the direct liability of corporations in the international legal order and institute the mechanisms adequate to impose it. In most cases where international law will impose on companies an obligation to respect the internationally recognized fundamental rights, it will do so, *indirectly*, through the mediation of the international responsibility of the State. As a party to international treaties in the field of human rights or as bound, in any event, by the peremptory norms of international law¹⁵—which include the prohibition of slavery and slave trade, genocide, racial discrimination, *apartheid*, and torture¹⁶—States will be under an obligation, not only to *respect* the human rights binding upon them by abstaining from taking any action through their organs which could lead to a violation of these rights, but also to *protect* these rights from violations which could be committed by other private parties and would lead to the same practical effect for the individual victim. It sometimes happens that international treaties specifically affirm such an obligation, and they may even add that the States parties must adopt measures against organizations or corporate entities which commit such acts which, if adopted by State organs, would constitute a violation by the State of its international obligations. A good example is the International Convention on the Elimination of All Forms of Racial Discrimination, which includes Articles 2(1)(d) and 4(b) imposing on the Contracting Parties an obligation to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation,” and an obligation to “declare illegal and prohibit organisations ... which promote and incite racial discrimination.”¹⁷ But the ICERD is not isolated in that respect. The Convention Against Torture,¹⁸ the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁹ and the Convention on the Rights of the

¹⁵ According to Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS, at 331), a norm has that status if it is a norm “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See especially Wolfke, “*Jus Cogens* in International Law,” 6 *Polish Yearbook of International Law* (1974), at 145; Simma and Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles,” 12 *Australian YB of International Law* (1992), at 82; M. Ruggazi, *The Concept of International Obligations* (1997); or I. D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (2001).

¹⁶ In the Case *Concerning Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, ICJ Reports (1970) 3, at 32, the International Court of Justice mentioned that the obligations *erga omnes* which “are the concern of all States” include “the outlawing of the act of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including slavery and racial discrimination.” Although it is doubtful that all human rights impose obligations *erga omnes* on States, the prohibition of torture has certainly acquired the status of a peremptory norm of international law. See Human Rights Committee, General Comment n° 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, 10 December 1998, Case n° IT-95-17/I-T, (1999) ILM 317, para. 153 (“Because of the importance of the value it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”); Case *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* judgment by the House of Lords of 24 March 1999, [1999] 2 W.L.R. 827, [2000] AC 147; Eur. Ct. H. R. (GC), *Al-Adsani v. the United Kingdom* (Appl. n° 35763/97), judgment of 21 November 2001, para. 61. See also the sources cited in J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 246.

¹⁷ International Convention on the Elimination of All Forms of Racial Discrimination, UNTS No. 195.

¹⁸ See CAT, Art. 4.

¹⁹ See CEDAW, Art. 2(e) (States parties are under an obligation to “take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”).

Child²⁰ all contain provisions obliging the States parties to take measures against private parties whose activities could threaten the rights these instruments seek to guarantee. A last example, immediately relevant for corporate conduct, is that of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials, Article 2 of which provides that “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”²¹

In all these situations, international law in effect indirectly imposes obligations on private parties, including legal persons, by imposing directly on the States, its primary subjects, an obligation to protect the rights of individuals from interferences by others. Even without a specific provision relating to that obligation of the State in an international human rights treaty, however, it is today generally agreed that, what States may not do directly—infringing human rights they are bound to respect—they will not be authorized to do indirectly—by remaining passive in the face of comparable violations committed by private persons.

The consequences flowing from the essentially stato-centric character of public international law would therefore be lessened if the obligation of the States under international law to protect internationally recognized human rights by regulating the activities of MNEs were fully respected: indeed, in its broadest understanding, the obligation of the States to protect the human rights they have undertaken to guarantee would include not only an obligation on the host States, where MNEs develop their activities (usually by setting up a subsidiary having a distinct legal personality), to protect human rights on their own national territory, but also an obligation on the home State, of which the MNE has the nationality, to regulate its activity wherever it takes place, because of the effective control it may exercise on that company. Let us briefly consider this latter obligation, before examining the usefulness of affirming the former.

C. The absence of an obligation of home States to control their nationals abroad

Except in certain limited fields such as the prohibition of bribery,²² international law has been reluctant to impose such a far-reaching obligation as the one just stated on the home States of multinational enterprises. It is true that, in principle, the national of a State remains under the control of the State of which he is a national even after entering another State, although he then also falls under the jurisdiction of that other State.²³ It has been argued on that basis that, at least with respect to *jus cogens* norms, home States should be under an obligation to exercise that control to prohibit their nationals, whether real or corporate, from violating peremptory norms of international law even when they commit these violations abroad—the “meaningfulness of *erga omnes* obligations,” indeed, resting “on the idea that state responsibility exists for the violation of any of those obligations which

²⁰ See CRC, Art. 2(2), 3(3) and 19(1).

²¹ Art. 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 thereby obliges States Parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals (see also Art. 4 of the Convention). See Joseph, *supra* note 5, at 184, and Nichols, “Regulating Transnational Bribery in Times of Globalisation and Fragmentation,” 24 *Yale Journ. of Int’l Law* (1999), at 257.

²² See above, note 21.

²³ *Skirotos v. Florida*, 313 U.S. 69 (1941) (stating that the United States “is not debarred by any rule of international law from governing the conduct of its own citizen upon the high seas or even in foreign countries” (Hughes, CJ)).

can be directly or indirectly traced to the acts or omissions of the state.”²⁴ According to this thesis, “the conduct of the national is assimilated to that of the state itself by not seeking to prevent that conduct where the state had knowledge of it nor punish the national once the harm was caused.”²⁵ In fact, such an obligation to control the national abroad may be seen as the correlative to the right of the State, under international law, to protect his nationals by exercising his diplomatic protection²⁶—a rule the practical operation of which has often been connected to the colonial enterprise and the need for the colonial powers to guarantee the foreign investments of their corporations, but which still seeks its counterpart in a postcolonial regime on State responsibility. This could be defended on two grounds. First, if a State claims a right to *protect* his nationals from injuries suffered in another State, must the home State not exercise *control* itself on its nationals abroad, insofar as the threat of the exercise of diplomatic protection diminishes, in effect, the control which may be exercised on those persons by the States which host their activities? Second, if a foreign corporation violates the rights of citizens of a State hosting its activities, should this State not be authorized to exercise protection of its own nationals (as a form of diplomatic protection) by invoking the responsibility of the home State of the corporation?

Such a thesis does not describe adequately the present status of the law of State responsibility. According to the International Law Commission’s Articles on State Responsibility, “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct” (Article 8). In other situations than those listed, the acts of private individuals, whether or not they are nationals of the State, will not be attributable to the State. Even when a private individual is “highly dependent” on the State for, e.g., the subsidies granted by the State or other forms of support received from it, his/her acts will not for that sole reason be considered to be those of the State. This was the principle affirmed in the *Military and Paramilitary Activities in and against Nicaragua* case, where the International Court of Justice held with respect to the alleged responsibility of the United States for the violations of human rights and humanitarian norms by the *contras* that:

even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United

²⁴ See Sornarajah, “Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States,” in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), chap. 18, esp. at 502. For another argument in favor of that position, de Arehega and Tanzi, “International State Responsibility,” in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), at 359, cited by M. Sornarajah.

²⁵ Scott, “Introduction,” in Scott, *supra* note 24, at 21. M. Sornarajah defines his position slightly otherwise: according to him, State responsibility must be recognized in respect of violations of *jus cogens* principles in two situations: where a State “knowingly permits its nationals to engage in violations of *jus cogens* principles whilst abroad,” and where “a State gives active assistance to those who are known to violate or are seen as capable of violating such *jus cogens* principles” (Sornarajah, *supra* note 24, at 504).

²⁶ F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1965). After quoting from the *Mavromattis Palestine Concession Case*, 1924 PCIJ Series A, No. 2, at 12 (in which the Court said: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law”), M. Sornarajah comments: “The converse of this is that a developing state should be able to assert its rights of protection of its nationals when an alien causes damage in its state and its nationals are not provided relief in the home state of the alien in which his assets are situated and to which he has repatriated profits of his operations in the host state” (Sornarajah, *supra* note 24, at 497).

States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts would well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.²⁷

With respect to the operations of MNEs in foreign countries and the violations it commits there of international human rights, this lack of imputability to the State of the acts of private individuals, including legal persons, not acting on its instructions or under its direction or control could only be met—compensated for—by insisting that the positive obligation of a State, under international human rights law, to “protect” these rights against the acts of private parties should extend beyond borders of the national territory, to all situations to which the State may indeed extend its protection without violating the principles of international law, including the principle of comity with other nations. These situations would include those where the threat to human rights emanates from its own nationals, whose activities, indeed, the State has the competence to control under the active personality principle. However desirable this may be, such does not represent the contemporary extension of a State’s international responsibility.

D. The obligation of host States to regulate the conduct of MNEs operating within their national territory

Should one then turn to the other branch of the alternative, and be satisfied with the obligation of the host State in which the MNE conducts its activities to protect internationally recognized human rights under its jurisdiction? The difficulty, however, is not in the theoretical existence of such an international legal obligation, quite apart from the consideration that not all international treaties in the field of human rights have benefited the quasi universal ratification of the Convention on the Rights of the Child, for example, a fact which the growth of customary international law does not wholly compensate for. The problem is really elsewhere. It lies in the incentives the States may have to fully respect these obligations, not only by the adoption of legislative measures, but also by investing sufficient means in their effective monitoring and implementation.

First, one cannot of course count on the host State ensuring that human rights will be respected on its territory where the State itself is the prime violator of these rights, and when the violations committed by the MNE either are imposed by the host State (whose domestic laws, for instance, require discriminatory practices in recruitment), or consist in the support the MNE lends to those violations by the State (in which case the MNE may be said to be complicit in the governmental abuses). Second, even when the host State is not deliberately engaged on a path of human rights violations, its authorities may lack the means or the political will to enforce its domestic legislation which, for instance, imposes certain health and safety conditions in the working environment, prohibits discrimination based on union membership, or would protect, in theory, from the threats to physical

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, ICJ Reports (1986), para. 115.

integrity by the private security services of the firms operating within the national territory.²⁸ In a situation where many developing states urgently need foreign investment as a condition for economic growth, “some governments may have neither the interest nor the resources to monitor corporate behavior.”²⁹ Foreign Direct Investment (FDI) represented half the level of official development aid in 1990; ten years later, it represented three times that level. This gives an idea of the growing dependency of developing countries on FDI: not only is FDI a condition of economic growth and of the enhancement of the export capacities of the developing countries in a context where they often have to face very important debt burdens, but moreover, as it involves a long-term relationship between the parent company and the subsidiary it controls, it may favor technology transfer and develop human resources.³⁰ This dependency places the developing States in fact in a prisoner’s-dilemma kind of situation in which, whilst *all* States may have preferred to be presented with a different set of options, no State *individually* wishes to impose too heavy burdens on the corporations investing in its territory, out of fear that these corporations might choose to shift their activities to less requiring locations.³¹ One could think that, perhaps, the developing States which may attract foreign investment by their natural resources in the oil or mining industries, would constitute here an exception, as potential investors have nowhere to go except where such resources can be found; but these States are in other ways even more dependent from the presence of MNEs on their territory, because of the technology they require to have access to to exploit these mineral resources.

The competition which exists between developing States seeking to attract foreign investments is a difficulty not to be underestimated. Although it would be extremely costly for *each State individually* to take steps towards the imposition of highly requiring standards on MNEs operating within its territory, it would benefit *all the developing States*, not only to have imposed on MNEs globally uniform standards but also to subject them to an effective surveillance machinery: indeed, the imposition of such uniform standards would make developing States less vulnerable to the threat of an MNE that it will leave the territory if the local regulations become more demanding or costly to comply with. However, this competition between developing States is not the only problem. Indeed, another, no less serious obstacle to effective regulation of MNEs by the host States is that, when these are developing States, they are also in competition with developed States, especially the Member States of the OECD, in globalized markets in which, in some cases, the goods they produce are competitive precisely because of the lack of stringent environmental, social or ethical standards, facilitating low-cost production. It is well known that developing States opposed an increased recognition by the WTO of environmental, health and social concerns, as advocated by the international NGO movement and by the European Union, because of their fear that the imposition of

²⁸ Joseph, *supra* note 5, at 176-177; J. A. Paul & J. Garred, *Making Corporations Accountable—A background paper for the United Nations Financing for Development Process* (2000); K. De Feyter, *World Development Law* (2000), at 182.

²⁹ Ratner, *supra* note 5, at 462.

³⁰ Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, “Towards a global partnership for sustainable development,” COM(2002) 82 final, Brussels, 13.2.2002, at 5 and 18.

³¹ According to S. R. Ratner, “Host states have adjusted domestic laws to make them more attractive to corporations, handed over tracts of land to de facto control by corporations, or simply turned a blind eye to violations of domestic law” (Ratner, *supra* note 5, at 460). The notion of a “global ‘prisoner’s dilemma’” is put forward by Benvenisti, “Exit and Voice in the Age of Globalization,” 98 *Mich. L. Rev.* (1999), at 167. See also van Wezel Stone, “Labor and the Global Economy: Four Approaches to Transnational Labour Regulation,” 16 *Mich. J. of Int’l L.* (1995), at 987; and Lippman, “Transnational Corporations and Repressive Regimes: The Ethical Dilemma,” 15 *Calif. Western Int’l L. J.* (1985), at 542.

such standards—at least if defined at the level of those prevalent in developed countries—might endanger the comparative advantage they enjoy.³² To these developing States, the insistence on production processes which respect labor rights, environmental standards, and the interests of the local communities, may be resented as economic protectionism veiled behind the rhetoric of universal human rights. This view may be criticized as relying on a narrow definition of human development, focussed exclusively on economic growth rather than, as Amartya Sen has most eloquently advocated, on an expansion of the basic freedoms of the individual.³³ It may also be denounced as adopting a too short-term perspective on the protection of basic rights such as the right to education (as opposed to children’s labor³⁴), the right to health (as opposed to environmental pollution), or the right to a fair remuneration (as opposed to the competitive advantage gained by low salaries in developing countries)—which, indeed, although costly in the short term, may appear in the longer term as highly rewarding investments.³⁵ Whatever the usefulness of these critiques in the global discussion on the universalization of ethical, social and environmental standards, they do not address the immediate needs of developing States which have no other choice but to seek to attract foreign investment on their territory, either for macro-economic reasons or because this is the only way for them to have access to the updated technology necessary for the exploitation of their natural resources.

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We are thus confronted with a void: the international law does not directly reach the corporate actor; it does not impose an obligation on the home State to control the activities of corporations of its “nationality” abroad, not even when these activities are conducted directly, without any creation of a subsidiary company or by subcontracting; finally, even when international law imposes on the State hosting the investment to protect its population from human rights violations—and thus to impose on all actors operating within its national territory to respect these rights—the host State will in the typical case lack the incentive or the resources to adopt effective measures in that respect.

One could have hoped that the European Convention on Human Rights would have offered a remedy to that situation. Indeed, perhaps in no other international or regional instrument for the protection of human rights has an obligation to protect been extended more fully than in the Convention, imposing on the Contracting States far-reaching duties to adopt measures to prevent violations committed by private parties. However, despite its remarkable achievement in this respect, the European Convention on Human Rights presents a limitation which makes it essentially useless as a tool to compensate for the deficiencies of general public international law with regard to the imposition of human rights obligations on corporations operating transnationally. Indeed, although it

³² De Feyter, *supra* note 28, at 99. On this debate, see O. Mehmet, E. Mendes & R. Sinding, *Towards a Fair Global Market. Avoiding a new slave trade* (1999); Thwaites, “La ‘clause sociale’: protection des droits humains ou protectionnisme économique ?,” in J. D. Thwaites (ed.), *La mondialisation, Origines, développement et effets* (2000), at 261 ; Scherrer, “The Pros and Cons of International Labour Standards”, in N. Malanowski (ed.), *Social and Environmental Standards in International Trade Agreements: Links, Implementations and Prospects* (1997).

³³ A. Sen, *Development as Freedom* (1999).

³⁴ See, e.g., De Feyter, “The prohibition of child labour as a social clause in multilateral trade agreements,” in E. Verhellen (ed.), *Monitoring Children’s Rights* (1996).

³⁵ See in particular UNDP, *Human Rights and Human Development: World Report on Human Development 2000* (2000).

has been interpreted since over twenty years as imposing on its Contracting States not only to abstain from violating the rights and freedoms it recognizes but also to adopt measures to protect these rights and freedoms from violations committed by others, it by no means derogates from the classical framework of public international law, with the limitation I have just been emphasizing: although the States parties to the Convention must control private individuals acting under their jurisdiction, when these individuals appear to threaten the rights of others with whom they interact, they are not under an obligation to control their nationals operating outside the national territory.

2. The European Convention on Human Rights

A. The “essentially territorial” notion of jurisdiction

In an inadmissibility decision of 12 December 2001, the Grand Chamber of the European Court of Human Rights unanimously rejected the application of citizens of the Federal Republic of Yugoslavia, who had been injured or had lost relatives in the bombing of the Serbian Radio and Television (RTS) buildings in Belgrade, on 23 April 1999, during the air strikes campaign of the NATO forces which lasted from March to June 1999. Notwithstanding the wording of Article 1 of the Convention,³⁶ the applicants submitted that the impugned acts of the respondent States, which were located either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States. The Court rejected that presentation. It held that:

... the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.³⁷

In this view, “jurisdiction” is seen as the exercise of powers normally at the disposal of the government on a particular geographical area. Although the European Court of Human Rights states that this “geographical” understanding of the notion of jurisdiction may be extended in exceptional cases recognized in customary international law or in treaties,³⁸ and although it presents its judgment as interpreting the Convention in conformity with general public international law,³⁹ its identification of

³⁶ According to which “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of [the] Convention.”

³⁷ Eur. Ct. H. R. (GC), *Bankovic et al. v. Belgium and 16 other States* (Appl. n° 52207/99), dec. of 12 December 2001, para. 71.

³⁸ See para. 73 of the *Bankovic* decision: “...the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.”

³⁹ See para. 57 of the decision and, on the relationship between the *Bankovic* decision and general public international law, N. Riou, *L'Europe des libertés*, January 2002, n° 7, at 18; and Cohen-Jonathan, “La territorialisation de la juridiction de la Cour européenne des droits de l’homme,” *Revue trimestrielle des droits de l’homme* (2002), at 1069, esp. at 1074-1082.

the imputability of certain situations to the Contracting States is in fact more restrictive than what general public international law would imply—not considering, at least, the fact (heavily insisted upon by the European Court) that the European Convention on Human Rights is a *regional* instrument for the protection of human rights, constituting a specifically *European* public order.⁴⁰ The generally accepted rules of public international law on the scope of State responsibility consider as an act of the State the conduct of any State organ acting in that capacity⁴¹—this rule having, as recognized by the International Court of Justice, a customary character.⁴² The International Law Commission observed in 1975 that “Such conduct [by a State organ] is and remains an act of the State to which the organ belongs, by virtue of draft articles 5 et seq. [43], which set no territorial limitation on the attribution of the State of the acts of its organs.”⁴⁴ No developments since in its codificatory enterprise suggest that this view would have now become invalid.

Perhaps the most convincing argument in favor of the holding the *Bankovic* Court arrives at, therefore, is not to be found in the compatibility this holding maintains between the European Convention on Human Rights and general public international law, but rather in the rules specific to the Convention, and more precisely, in the intent of the Contracting States when they inserted the expression “everyone within their jurisdiction” in Article 1 of the Convention, to designate vis-à-vis whom the States were undertaking to secure the rights and freedoms set forth in that instrument. Although, admittedly, this expression replaced the more restrictive initial draft provision (“... the Member States shall undertake to ensure to *all persons residing within their territories*”) with an amended formulation adopted with the intention to “widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention,” this expansion never was meant to extend to persons found beyond the territories of the Contracting States: the preparatory works show beyond any doubt that the Convention was drafted to benefit all persons residing, living, traveling through, remaining either legally or illegally, on their territories—it was not intended, however, to impose obligations on States parties beyond that closed circle of persons.⁴⁵

Whichever the firmness of its basis in the preparatory work of the Convention, it may nevertheless be asserted that the inadmissibility decision in the case of *Bankovic and others* constitutes a retreat from the previous case-law, both of the European Commission on Human Rights and from the Court itself.⁴⁶ The European Commission of Human Rights has always stipulated that when agents of the

⁴⁰ See para. 80 of the *Bankovic* decision.

⁴¹ See Article 4 (“Conduct of organs of a State”) of the ILC’s Articles on State Responsibility.

⁴² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999), 62, at 87, para. 62.

⁴³ These articles correspond to articles 4 et seq. of the Articles on State Responsibility adopted by the International Law Commission on 9 August 2001, constituting chap. II (“Attribution of conduct to a State”) of the final text.

⁴⁴ 2 *Yearbook of the ILC* (1975), at 83.

⁴⁵ On the debates surrounding the wording of the provision which has now become Article 1 of the European Convention on Human Rights, see Lawson, “The Concept of Jurisdiction and Extra-territorial Acts of State,” in *Liber Amicorum Peter Kooijmans* (2001). In this excellent study, the author—a counsel of the applicants in *Bankovic*, but writing then before the admissibility decision was known in that case—arrives, however, at a different conclusion than my own on the lessons to be drawn from the genesis of Article 1 ECHR.

⁴⁶ See generally on this question, Decaux, “Le territoire des droits de l’homme,” in *Liber amicorum Marc-André Eissen* (1995), at 65; O. De Schutter, *Fonction de juger et droits fondamentaux* (1999), at 315-318; Giakoumopoulos, “L’étranger en ‘zone internationale’ et les garanties de la Convention européenne des droits de l’homme,” in *Frontières du droit, Frontières des droits*, (1993), at 211; E. Wyler, *L’illicite et la condition des*

States—not only diplomatic or consular agents,⁴⁷ but also armed forces—act outside the national territory, “not only do they remain under its jurisdiction when abroad but [they also] bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.”⁴⁸ This case-law has been adopted by the Court from the Commission in *Drozdz and Janousek v. France and Spain*. In that case, the European Court of Human Rights had to decide whether the situation complained of—the alleged violation of Article 6 of the Convention (fair trial) by the Andorran courts, at a time when Andorra was not covered by the Convention—was imputable to either France or Spain, because of the very specific status of Andorra in public international law and because its relationships with Spain or France may not be assimilated to relationships between two sovereign States. The Court held in its judgment of 26 June 1992 that in the situation complained of the applicants were not “within the jurisdiction” of either France or Spain. Indeed, while agreeing with the applicants that “The term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory,”⁴⁹ the Court noted in para. 96 of its judgment that

Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain. Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial ...

This passage from the *Drozdz and Janousek* judgment⁵⁰ illustrates that, at that time at least, the European Court of Human Rights fully agreed with the pre-existing case-law of the European Commission according to which, even when they act outside the national territory of the State party, the official organs of a Contracting Party to the Convention may engage the responsibility of that

personnes privées, La responsabilité internationale en droit coutumier et dans la Convention européenne des droits de l'homme (1995), at 105-108.

⁴⁷ See already Eur. Commiss. H.R., *X v. F.R.G.*, decision of 26 September 1965, 8 *Yearbook of the ECHR* (1965), at 158 (recognizing that the Federal Republic of Germany may violate the Convention through the acts adopted by its Embassy in Morocco, vis -à-vis German nationals). This hypothesis in which the acts of State organs may be imputed to that State even if occurring outside the national territory and even if that territory is not covered by the Convention is not put into question by the *Bankovic* decision: the acts of consular or diplomatic authorities are, as we have seen, one of the exceptions recognized by para. 73 of the decision.

⁴⁸ Eur. Commiss. H.R., *Cyprus v. Turkey* (Appl. n° 6780/74 and 6950/75), decision of 26 May 1975, 2 *D.R.*, at 136. See also, inter alia, Eur. Commiss. H.R., *Ilse Hess v. the United Kingdom* (Appl. n° 6231/73), decision of 28 May 1975, 2 *D.R.*, at 73 (concerning the detention of the husband of the applicant in the Spandau Prison in Berlin, under the joint authority of the four allied powers (France, the USSR, the United Kingdom and the USA), the Commission notes: “a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory”). See also the other examples cited in the *Drozdz and Janousek* judgment of 26 June 1992, at para. 91 (see hereunder).

⁴⁹ Eur. Ct. H.R., *Drozdz and Janousek v. France and Spain* judgment of 26 June 1992, Series A n° 240, para. 91.

⁵⁰ The *Drozdz and Janousek* doctrine was confirmed with respect to the Principality of Andorra: Eur. Commiss. H.R., *Albert Llovera v. Andorra and subsidiarily France and Spain* (Appl. n° 18582/91, decision of 30 November 1992; and Eur. Commiss. H.R., *Francisco Iribarne v. France* (Appl. n° 16462/90), decision of 19 January 1994 (see also the judgment of the European Court of Human Rights in that case, of 24 October 1995, Series A n° 325-C). This doctrine was also extended to violations alleged to have taken place in the Principality of Monaco: Eur. Commiss. H.R., *Jacques Meignan v. France* (Appl. n° 21392/93), decision of 28 June 1993.

State.⁵¹ It is only because the judges from France and Spain sitting in the Andorran courts did not do so “in their capacity as French or Spanish judges” and because the French or Spanish authorities did not attempt to “interfere with the applicants’ trial” that these applicants were not considered to be, *ratione personae*, under the jurisdiction of either France or Spain. In fact, in at least two cases still pending before the European Court of Human Rights at the time of this writing, the Court has declared admissible applications directed against States parties to the Convention for acts of their organs committed not only outside their national territory but also outside a territory otherwise covered by the Convention, in situations where they were not exercising total *de facto* control of a particular geographical zone as was the case in the *Loizidou* case, with respect to the occupation of Northern Cyprus by the armed forces of Turkey;⁵² in the case of *Öcalan*, the leader of the PKK arrested and abducted from Kenya and from there brought to Turkey where he now faces trial, the Court did not in principle exclude that the circumstances of the initial deprivation of liberty of Öcalan and of his abduction could trigger the international responsibility of Turkey;⁵³ in the case of *Issa and others*, the Court declared admissible an application by Iraqi shepherds complaining for the acts of Turkish forces in Northern Iraq.⁵⁴ The *Bankovic* decision recognizes the tension with these previous cases, where it says that “in any event the merits of those cases remain to be decided.”⁵⁵ Respectfully, this may be considered quite a strange way to draw a convincing distinction.

B. The link with the obligation to prevent violations by private actors

After the inadmissibility decision in *Bankovic*, the European Court of Human Rights may be said to adopt a position retreating from general public international law on the basis of a professed fidelity to the original understanding of the Convention. It may also be safely asserted that this position, far from being dictated by its previous case-law, in fact constitutes an unavowed overruling of its own precedents. It would be rather vain, if facile, to speculate on the political motives which could have led the Court in that direction. Far more interesting—and, for the purposes of this study, relevant—is the link between this position of the Court and its important case-law imposing on the States parties to the Convention to protect the rights of individuals under their jurisdiction, i.e., to take measures seeking to prevent other private parties from violating the rights and freedoms of the individual which the State organs may not violate directly. The “all-or-nothing” approach adopted by the *Bankovic* decision with respect to the notion of “jurisdiction” may have been guided by the idea that, because the obligation of the Contracting States goes beyond a simple obligation to “respect” the rights and freedoms set forth in the Convention and extends to an obligation to “protect” these rights and freedoms from the threats of other private individuals, it would be unworkable to consider that the “jurisdiction” of a State, defining the set of situations in which the State is bound by the Convention,

⁵¹ This is already implicated by the very structure of the judgment, in the part relating to the preliminary objections raised by the French and Spanish governments. The Court considers first whether the applicants, when tried by the Andorran courts, could be said to fall under the jurisdiction *ratione loci* of France or Spain, a question which the Court answers in the negative; it then considers whether, *alternatively*, the applicants fall under the jurisdiction *ratione personae* of either of the defending States. The very separation of these two questions illustrates that the notion of “jurisdiction,” as it appears in Article 1 of the Convention, may not be reduced to the national territory of the States parties to the Convention.

⁵² Eur. Ct. H.R., *Loizidou v. Turkey*, judgment of 18 Dec. 1996, *Rep.* 1996-I, at 2235-2236, § 56. See also Eur. Ct. H.R., *L. Christodoulidou v. Turkey* (Appl. no. 16085/90), admissibility decision of 7 December 1999.

⁵³ Eur. Ct. H.R. (1st sect.), *Abdullah Öcalan c. Turquie* (Appl. n° 46221/99), admissibility decision of 14 December 2000.

⁵⁴ Eur. Ct. H.R., *Issa and others v. Turkey* (Appl. n° 31821/96), decision of 30 May 2000.

⁵⁵ Para. 82.

extends not only beyond its national borders but also beyond those situations on which the State exercises a control as effective as that it exercises on its national territory, for example in cases of military occupation.⁵⁶ In finding that the “jurisdiction” of Turkey extends to the Northern part of Cyprus, occupied since 1974 by the Turkish military forces, the Court noted that, notwithstanding the establishment of the “Turkish Republic of Northern Cyprus,” Turkey could be held responsible for the acts of the authorities of this entity. The effective control over the territory implied, in the view of the Court, that the acts of the “TRNC” could be imputed to Turkey:

It is not necessary to determine whether ... Turkey actually exercises detailed control over the policies and actions of the authorities of the ‘TRNC’. It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. *Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the ‘TRNC’.* Those affected by such policies or actions therefore come within the ‘jurisdiction’ of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.⁵⁷

This may be analogized with the acts of private parties under the jurisdiction of a State party to the Convention. “Jurisdiction” must mean “effective control,” because a State bound by the Convention must “secure” the rights and freedoms to all persons under its jurisdiction, not only by not violating these rights or freedoms directly through the activities of his organs, but also by not remaining passive in the face of violations committed by private persons whom the State, therefore, should effectively coerce. The analogy remains limited however, because, when—as under the Convention—a State is bound by an obligation to prevent,⁵⁸ it does not mean that, *as such*, the conduct of private individuals will be imputable to the State: indeed, it is only *in combination with a failure to act* by the State organs (the legislator has failed to make certain conduct punishable, the executive has failed to prosecute, the judge has failed to grant reparation) that the responsibility of the State will be

⁵⁶ It is also obvious that, if the notion of “jurisdiction” were to be restricted to the national territory of the State, defined as the geographical area on which the State *declares* to exercise his sovereignty, it would be possible for a State to exclude certain situations from the scope of applicability of the Convention simply by defining as “extra-territorial” certain zones, even when such zones are under the effective control of the State. See, e.g., Eur. Ct. H.R., *Amuur v. France* judgment of 25 June 1996, note De Schutter, “Privation de liberté et maintien en zone internationale,” 89 *Rev. dr. étr.* (1996), at 341. At § 52 of its *Amuur* judgment, the Court notes that “even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status.” The effective control exercised by the French authorities on the applicants, Somali asylum-seekers detained in the so-called “international zone” of a French international airport, therefore places them under French “jurisdiction,” notwithstanding the definition by French law of that zone as “extraterritorial.”

⁵⁷ Eur. Ct. H.R., *Loizidou v. Turkey*, judgment of 18 Dec. 1996, *Rep.* 1996-I, at 2235-2236, § 56.

⁵⁸ The notion of an obligation to prevent was defined in Article 23 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading (1999). The Articles on State Responsibility adopted by the International Law Commission in 2001 do not include, like in the preceding drafts, a typology of the international obligations of States, such a classification being considered unnecessarily complicated and doctrinal, and entailing limited consequences. However, Article 14 of the Articles adopted, which deals with the extension in time of the breach of an international obligation, does allude to the specificity of the obligation to prevent. This specificity consists in that, when it is bound by such an obligation, the State must prevent a particular event from occurring, whichever the means chosen by the State to that effect: see Art. 14 (3).

affirmed.⁵⁹ The European Convention on Human Rights remains in that respect within the orthodoxy of international law, which does not consider that may *directly* be attributed to the State, and perhaps trigger its international responsibility, all the acts by private persons which the State may have prevented. It is one thing for the State organs to be obliged to prevent certain events from occurring under the jurisdiction of the State; it would be quite another to impute directly to the State—whether or not these preventive measures have indeed been adopted—acts committed by private individuals under its jurisdiction, and to find the State internationally responsible simply because the preventive measures it has adopted have failed to achieve the intended result.

The latter regime would move international law in a direction which, ultimately, may have the dangerous consequence of obliging a State to exercise a much more extensive control on events occurring under his jurisdiction than is now usually the case.⁶⁰ As explained in the Commentaries of the International Law Commission's codification of a list of Articles on State Responsibility, although such a large notion of imputability to the State could have been theoretically imagined, this approach is rejected in international law, "both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority."⁶¹ Therefore the general regime in international law—leaving aside certain rules concerning more specific situations which do not lend themselves to being easily summarized—is that a particular conduct may be attributed to the State either (1) when it constitutes the conduct of a person or entity which, according to the internal law of the State, is an organ of a State, or (2) when the conduct is that of a person or entity exercising powers constitutive of certain elements of the governmental authority which have been delegated to that person or entity by the State, or (3) when the conduct is that of certain private persons or groups of persons who are "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."⁶²

C. The absence of an obligation of Contracting States to control the activities of their nationals abroad

As a result of the restriction imposed on the extra-territorial scope of the Convention in *Bankovic*, it would be quite clearly impossible today to rely on that instrument to impose on a Contracting State to exercise a control on the conduct of its nationals acting outside the national territory, or on the conduct abroad of enterprises incorporated within the concerned State or having established in that State their headquarters, even when these persons' conduct leads to the violation of the fundamental rights of those with whom they interact.

Prior to *Bankovic*, such a hope could have been entertained. The European Commission on Human Rights has at least on one occasion noted that not only the "acts" by the public authorities of a State

⁵⁹ See, e.g., Eur. Ct. H.R., *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 22, and De Schutter, "L'intervention de l'Etat dans les relations familiales: droit au respect de la vie familiale et droit à la protection de l'enfant dans la jurisprudence de la Cour européenne des droits de l'homme," *Rev. trim. dr. fam.* (1999), at 427.

⁶⁰ See generally A. Clapham, *Human Rights in the Private Sphere* (1993).

⁶¹ Crawford, *supra* note 16, at 91.

⁶² The latter formulation is that of Article 8 of the Articles on State Responsibility adopted by the International Law Commission on 9 August 2001. Chapter II of these Articles constitutes the latest and most authoritative statement on the situations in which conduct may be attributed to the State in general public international law.

party abroad, but even their “omissions” could lead to a finding of violation of the Convention⁶³—although it appears, from the very case in which that statement was made, that the conduct of a private individual occurring outside the national territory would trigger the international responsibility of the Contracting State only insofar as it could be proven that the individual acted under the instructions, direction or control of the State.⁶⁴ Perhaps more importantly, some members both of the Court and of the Commission had made clear in the pre-*Bankovic* era that the responsibility of the State under the Convention could be based not only on the exercise of “enforcement jurisdiction” abroad by a State party to the Convention (i.e., the acts of State agents abroad or of private persons acting under the instruction, direction or control of the State), but also on the exercise of “prescriptive jurisdiction” (i.e., the exercise by a State of its power to apply its regulations to persons or activities outside its own national territory),⁶⁵ even in cases where the alleged violation would have resulted from an unwillingness to act rather than from the adoption of a particular legislation. This appears from certain isolated opinions formulated in the case of *Drozd and Janousek*, on which I have already relied. In that case, the European Court of Human Rights alluded to the fact that, if the French and Spanish magistrates sitting the Andorran courts had been acting “in their capacity as French or Spanish judges,” the applicants—who complained about the conditions in which they were convicted by the Andorran courts—would be under the “jurisdiction” of either France or Spain (indeed, probably of both States jointly). On the other hand it clearly did *not* consider sufficient for the situation complained of to fall under the “jurisdiction” of France (in the meaning of Article 1 of the Convention) that France could have influenced the norms under which the applicants were convicted. In a joint dissenting opinion however, five judges of the Court⁶⁶ quoted approvingly from the dissenting opinion of J. Frowein, one of the most eminent members of the Commission, in whose view

France's responsibility could [only] be excluded if France had no real power to guarantee observance of the rights set out in the Convention (no. 6231/73, *Ilse Hess v. the United Kingdom*, decision of 28 May 1975, DR 2, pp. 72-75). As its competence to legislate and its appointment of judges show, France does have the power to ensure that the Convention is respected.

⁶³ Eur. Commis. H.R., *Stocké v. Germany* (Appl. n° 11755/85), Rep. of 12 October 1989 (Series A, 1999, at 24), § 166.

⁶⁴ This condition was not satisfied in *Stocké*. The applicant, a German national who had fled his home country, where he was suspected of tax offences, to join France, was induced under a false pretext by a private police informer, Mr Köster, to board a plane which ended up landing in Germany, where he was arrested. Neither the Commission nor the Court, however, considered it established that the private informant has acted under the direction of the German police, rather than upon his own initiative. The Court considered in § 54 of its judgment “that it has not been established that the cooperation between the German authorities and Mr Köster extended to unlawful activities abroad. Accordingly, it does not deem it necessary to examine ... whether, if it had been otherwise, the applicant's arrest in the Federal Republic of Germany would have violated the Convention” (Eur. Ct. H.R., *Stocké v. Germany*, judgment of 19 March 1991, Series A n°199, § 52).

⁶⁵ On this distinction, see Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms,” in Scott, *supra* note 24, at 45, 54.

⁶⁶ Judges Pettiti, Valticos, Lopes Rocha, approved by judges Walsh and Spielmann. Laying the accent on the participation of France and Spain in the administration of the entity of Andorra, the dissenting opinion concludes: “It must thus be considered that the [French and Spanish Co-Princes of the Principality of Andorra] should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights, which has the force of law or even overrides national law in their own countries, and more generally is a basic element of the rule of law in Europe.”

Considering the unchallenged rule according to which the State may impose obligations on its nationals even when these are abroad (active personality principle of jurisdiction), such an opinion would have had potentially far-reaching consequences, making it an obligation for the States parties to the Convention not only to guarantee the rights and freedoms of the Convention to all the persons within their national territory, but also to adopt legislation imposing on their nationals abroad not to act in violation of the rights and freedoms listed in the Convention—for example, by committing torture, restricting the freedom of association rights of their employees, or committing sexual abuses. This view, however, has not prevailed. Under *Bankovic*, the Contracting States do not owe the benefit of the European Convention on Human Rights to persons found outside their national territory, even where the source of the violation these persons are victims of is located within that territory: in a situation where the violation of rights protected under the Convention would be committed abroad, say, by the subsidiary of a parent corporation domiciled in a State party to the Convention, but with the parent corporation exercising a direct control on the activities of its subsidiary, a literal reading of *Bankovic* would imply that the victims of this violation could not trigger the international responsibility of that State, even though it could have easily regulated the activities of the parent company—even though, in other terms, the author of the violation clearly is under the “jurisdiction” of the State.

D. A two-tiered approach to the relationship between “jurisdiction” and national territory

The consequences of the position defended by J. Frowein within the European Commission of Human Rights may be far-reaching. Such extreme consequences, however, would not per necessity have followed from a different holding in *Bankovic and others*, more in line with the previous case-law of the Convention. Rather than to adopt the “all-or-nothing” approach of the notion of “jurisdiction” which characterizes that case, it would have been perfectly defensible to settle for a two-tiered solution according to which, whilst the States parties to the Convention would have been under an obligation to *protect* the rights and freedoms of the Convention of all persons on their national territory, they would only be obliged to *respect* these rights and freedoms when acting, through their organs, outside the national territory. This would have meant that, whether they act within the national territory or abroad, the organs of the States remain under an obligation to respect the Convention, but that their obligation to adopt positive measures to prevent certain violations from occurring, when these violations have their source in the acts of private parties, would only be imposed in situations where they exercise effective control, i.e., in situations either located on their national territory or on which—as Turkey does in Northern Cyprus—it exercises a *de facto* control of equivalent scope. In this system, the national territory would serve to ground a *presumption of effective control* by the Contracting State.⁶⁷ But the notion of effective control is only useful when one has to decide on the extent of the obligation of a State to take measures to protect individuals from the acts of other private parties: no “effective control” is required when all that is required from the State is not to violate the rights and freedoms of the Convention through the acts of its organs.

The main advantage of such a regime of extra-territoriality of the Convention, based on this two-tiered distinction between the obligation to “respect”—an obligation *not to interfere with* the rights protected under the Convention, which would be imposed on the organs of the Contracting States wherever they act—and the obligation to “protect”—an obligation to *take measures* to effectively

⁶⁷ On such a presumption, see Ch. de Visscher, *Les effectivités du droit international public* (1967), at 119 and 157; Lenoble, “Responsabilité internationale et contrôle territorial,” *R.B.D.I.* (1981-1982), at 95.

prevent violations of the Convention having their immediate source in the acts of private parties, and which would only extend to situations on which the State may effectively exercise control, i.e., its own territory or the geographical zones on which the State exercises comparable authority—would therefore be to justify a limited extra-territorial applicability of the Convention, whilst avoiding to impose on the Contracting States certain obligations which they will not be able to comply with.

The case of *Al-Adsani v. the United Kingdom* may serve as an illustration of the usefulness of such a distinction, precisely for the sake of proposing a realistic approach to the extra-territoriality of the European Convention on Human Rights.⁶⁸ In this case, the applicant, who had both the British and the Kuwaiti nationality, alleged to have been tortured by an influential Sheikh related to the Emir of Kuwait, and by Kuwaiti state officials. He had instituted civil proceedings in England, but, because of the immunity granted to the Kuwaiti government from civil suit, had failed to obtain compensation against the Sheikh and the Government of Kuwait in respect of injury to his physical and mental health caused by these acts of torture. In his application lodged against the United Kingdom, Mr. Al-Adsani alleged a violation of Article 3 of the Convention: according to him, the United Kingdom had failed to secure his right not to be tortured. The Court rejected the claim:

The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.⁶⁹

Leaving aside the question of the immunity of the foreign State which will arise each time compensation is sought from a foreign government,⁷⁰ as in *Al-Adsani*, it would be theoretically imaginable to impose on the States parties to the Convention to offer a judicial remedy to all their nationals alleging to have suffered from a violation of the rights and freedoms guaranteed to them by the Convention, wherever that violation occurs. However, this would mean obliging these States to adopt extra-territorial legislation, on the basis of the passive personality principle (legislation prohibiting certain acts when the victim is a national), when this remains the most contested basis on which extra-territorial criminal legislation by a State may be justified under international law,⁷¹ and when the question of whether States may authorize their courts to exercise their jurisdiction in actions claiming damages in respect to serious crimes of international law committed outside the territory of

⁶⁸ Eur. Ct. H. R. (GC), *Al-Adsani v. the United Kingdom* (Appl. n° 35763/97), judgment of 21 November 2001. On the developments within English courts of the *Al-Adsani* litigation, see Byers, “Al-Adsani v. Government of Kuwait and others,” *British Yearbook of International Law* (1996), at 67. For a commentary on the outcome of the case, Zwanenburg, “Het EVRM, staatsimmunitie en jus cogens,” *27 NJCM-Bull.* (2002) 6, at 760.

⁶⁹ *Al-Adsani*, § 40.

⁷⁰ On this question, see Kloth, “Immunities and the right of access to court under the European Convention on Human Rights,” *27 E.L.Rev.* (2002), at 33.

⁷¹ See H. Steiner and Ph. Alston (eds), *International Human Rights in Context* (2000), at 1133 (citing the American Law Institute, *Restatement (Third), The Foreign Relations Law of the United States*, 1987, sect. 402). The “passive personality principle” is defined in the Restatement as “prescribing with respect to acts committed outside a state by a non-national where the victim was a national.” See, e.g., Article 689-1 of the French Criminal Code (code de procédure pénale), according to which any foreigner having committed a crime outside the French territory may be prosecuted and judged according to the French criminal legislation when the victim is of French nationality.

the forum State has proven to be so divisive at the Hague Conference on Private International Law.⁷² Moreover, this would have the effect of imposing on the Contracting States an obligation to *remedy* a violation of the Convention rights which they are, in fact, not in a position to *prevent* from occurring. Affirming such an obligation could create the mistaken impression that the duty of the States under the Convention is, rather than not to violate the rights and freedoms they are bound to respect, to simply offer a form of compensation when such violations do occur. And such a compensation is not even certain to be obtained, if the defendant—author of the violation for which the victim seeks a remedy—cannot be found on the territory of the forum State, and the judgment thus has to be given *in absentia*. Perhaps, despite these objections, the worst violations of human rights—those which, universally condemned, are violations of *jus cogens* norms—should still be proscribed by extra-territorial legislation, opening a remedy to the victim either when the victim is a national of the forum state (passive personality principle) or whichever his nationality (universal jurisdiction), even when the author of the violation is not found in the forum state. However, this would be unworkable with respect to the whole set of rights protected under the European Convention on Human Rights.

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In the two preceding parts of this paper, I have sought to explain why there existed a regulative gap with respect to imposing on MNEs obligations to respect human rights, and why, regarding the European States bound by the European Convention on Human Rights, this instrument has proved unable to fill this gap: although they are the home States of many multinationals operating outside Europe, the States parties to the European Convention on Human Rights are neither under an obligation to control the activities of their multinationals operating abroad—if any violations of the Convention occur in the course of these activities, they will be considered to fall outside the “jurisdiction” of the States parties, in the meaning of Article 1 of the Convention—nor are they under an incentive to do so. As to the States in which multinationals invest, whether or not, under international law, they should protect the human rights of those affected by the acts of the MNEs on their territory, they will more often not be in a position to do so—even when they are not, themselves, the primary violators of those rights. In the absence of enforceable norms of international law directly imposing obligations on MNEs, therefore, their impunity remains essentially unchallenged.

3. The European Union and human rights in third countries

Although neither the European Union nor the European Community have been given an explicit competence to fulfill fundamental rights, except in rather specific settings,⁷³ EU law does occupy a particularly advantageous position, which justifies seeking to rely on it to put an end to this state of practical impunity. A first advantage is too obvious and well-known to require emphasis. A distinct

⁷² Perhaps I can be excused for simply referring to Van Schaack, “In defense of civil redress: the domestic enforcement of human rights norms in the context of the proposed Hague judgments convention,” *Harvard Int'l L. J.* (2001), at 141.

⁷³ See generally Weiler and Fries, “A Human Rights Policy for the European Community and Union: The Question of Competences,” in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights* (1999), at 147.

feature of European Community law, which sets it apart from general public international law and may justify the—perhaps somewhat overblown—statement by the European Court of Justice that “the Community constitutes a new order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals,”⁷⁴ resides in the combination of the doctrine of the direct effect of EC law and of the referral mechanism which, under article 234 EC, in fact obliges the national jurisdictions to submit to the interpretation of the requirements of EC law by the European Court of Justice, by creating a direct channel of communication between the national courts of the Member States and the European Court of Justice.⁷⁵ The significance to us of this specificity of the legal order of the European Union cannot be overstated: in contrast to most international treaties, the European treaties not only confer rights to private individuals and impose obligations on them, but they do so *directly*, without necessarily having to rely on the fidelity with which the States (under the jurisdiction of which these individuals are situated) respect their international obligations.

Another advantage is more worthy of emphasis, because it is more recent and bears a more direct link to the topic of this study. It is that, at an accelerated pace for a few years, the Member States of the European Union and the institutions of the EU have adopted a number of initiatives by which they demonstrate their attachment to certain values—in the social, environmental, and ethical field—and their intent to ground on these values the further stages of the construction of the European Union. Although the proclamation of the Charter of Fundamental Rights of the European Union on 7 December 2000⁷⁶ may constitute the most well-known example of that evolution, away from the initial goal restricted to economic integration and towards an integration driven by the pursuit in common of certain shared values, two other manifestations of this trend—of this new identity which the Union is seeking for itself—may be insisted upon. A first manifestation is the growing role the values of human rights and democratization occupy in the commercial and development cooperation policies of the European Union.⁷⁷ A second manifestation is the insistence on the responsibilities corporations have with respect to their environment—their employees, their clients, and the collectivity as a whole—which the concept of “corporate social responsibility” purports to summarize.⁷⁸

⁷⁴ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 3, 12.

⁷⁵ See also, under Title VI TEU, Art. 35 § 5 (defining the conditions under which a referral may be made to the European Court of Justice). However, the decisions and framework decisions which are to be adopted under that Title of the Treaty of the European Union do not produce direct effects (see Art. 34 § 2 (b) and (c)). See Monjal, “Le droit dérivé de l’Union européenne en quête d’identité, à propos de la première décision-cadre du Conseil,” *R.T.D.E.* (2001), at 335.

⁷⁶ *OJ* 2000 C 364/1.

⁷⁷ See generally Simma, Aschenbrenner and Schulte, “Human Rights Considerations in the Development Co-operation Activities of the EC,” and Riedel and Martin, “Human Rights Clauses in External Agreements of the EC,” both in Ph. Alston, M. Bustelo and J. Heenan (eds), *supra* note 73, at 571 and at 723; M. Bulterman, *Human Rights in the Treaty Relations of the European Community, Real Virtues or Virtual Reality?*, Antwerpen-Groningen-Oxford, Intersentia-Hart, 2001; European Commission, *Communication from the Commission to the Council and the European Parliament: The European Union’s role in promoting human rights and democratisation in third countries*, COM(2001) 252 final, 8 May 2001.

⁷⁸ See esp. European Commission, *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development*, COM(2002) 347 final, Brussels, 2nd July 2002. On this theme, see recently Gatto, “The European Union and Corporate Social Responsibility: Can the EU Contribute to the Accountability of Multinational Enterprises for Human Rights?,” 32 *Working Paper, K.U. Leuven, Faculty of Law, Institute for International Law* (2002), 97 pages.

A. The promotion of human rights, in particular core labor standards, in the EU trade and development cooperation policies

I will spend little energy on the first of these two developments which is, indeed, less directly related to the topic of this study. Of course, if third States, and especially developing countries, are given incentives to better respect human rights—and among them, in particular, the core labor standards—this may in time diminish the chances of MNEs disregarding these rights when operating in these countries, and it will reduce the risk that these MNEs will make themselves complicit in human rights abuses, committed either by the host government or, with the passive tolerance of the government, by the MNEs' local subcontractors. The link between the accountability of MNEs for human rights violations and the improvement of the record of the host State in the field of human rights would remain, in any event, an indirect one.

But my second reason for devoting less space to the commercial and development cooperation policies of the European Union, although these policies do list human rights among their objectives, has to do with the substantive content of these policies. Indeed, these policies appear to be hostage to the fear regularly expressed by developing States that if a link were to be created between trade and fundamental rights, in particular social standards, it might be abused for protectionist purposes. This fear, at yet, has constituted the single most important obstacle to the introduction of social concerns in the agenda of the WTO. The following passage of the 1996 Singapore WTO Ministerial Declaration—in effect operating a clear division of tasks between the WTO and the ILO, the former concerning itself with free trade, the latter entrusted with the promotion of labor standards—clearly expresses this difficulty, where it states, in words which the Council of the European Union will repeat practically word by word three years later:

We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.⁷⁹

This fear can be met, to some extent, by progressing towards universally agreed definitions of the content of the core labor standards and of their precise requirements. The Copenhagen Declaration on Social Development and its accompanying Programme of Action, adopted on 12 March 1995 at the conclusion of the World Summit for Social Development, as well as, especially, the adoption on 18 June 1998 by the International Labour Conference of the Declaration on Fundamental Principles and Rights at Work, constitute important steps in that direction, insofar as they identify authoritatively the core labor standards of universal applicability.⁸⁰ The identification of such standards does not

⁷⁹ See the Council Conclusions of October 1999 on trade and labor, adopted in preparation of the third WTO Ministerial Conference.

⁸⁰ In the Programme of Action adopted at the 1995 Copenhagen World Summit for Social Development, governments committed themselves to “safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organise and bargain

create the link between liberalization of trade and respect for labor standards, which the EU, in particular, has been calling for since the initial Conference of Marrakech creating the WTO.⁸¹ The two issues continue to be dealt with separately; a sanctions-based approach to the respect of the core labor standards—which would lead to imposing trade barriers against products originating from countries failing to meet these standards—is unanimously rejected. And, although studies by the OECD have demonstrated that stronger labor standards improve efficiency and lead to faster economic growth, and have not damaged the export performances of the countries having adopted them,⁸² it is considered nevertheless that the improvement of the core labor standards should result from a choice by the concerned State, rather than be imposed on it by the threat of commercial sanctions.

The stated rejection of a “sanctions-based approach” nevertheless does not seem to exclude the development of certain incentives, encouraging the adoption and effective implementation of the core labor standards by the developing countries with whom the EC enters into cooperation agreements. Since 1992, the agreements concluded between the EC and third countries are required to include a clause defining human rights as an essential element. In the 23 June 2000 Cotonou Agreement, which has taken the succession of the previously existing Lomé Agreements between the EC and the ACP States, the Parties “reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant ILO Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect of employment” (article 50 (1)). But this commitment translates into an undertaking by the parties to cooperate with a view to the promotion of core labor standards, *inter alia*, by exchange of information, education and awareness-raising programs, enforcement of existing national legislation and strengthening of existing legislation (article 50 (2)), whilst “The Parties agree that labour standards should not be used for protectionist trade purposes” (article 50 (3)).

The Community Generalised System of Preferences scheme constitutes another example of the rejection of a sanctions-based approach combined with the institution of a mechanism encouraging developing countries to adopt the core labor standards set universally. Under the GSP scheme, initially promoted by the UNCTAD after its creation in 1964, industrialized countries grant autonomous and non-reciprocal trade preferences to all developing countries. The EC implemented its own scheme in 1971, after the GATT Contracting Parties agreed on an “enabling clause” allowing for an exception to the principle of the most-favored-nation treatment in favor of developing countries, thus facilitating a form of positive discrimination in favor of developing countries. The

collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment, fully implementing the conventions of the International Labour Organisation (ILO) in the case of States parties to those conventions, and taking into account the principles embodied in those conventions in the case of those countries that are not States parties to thus achieve truly sustained economic growth and sustainable development.” The Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference on 18 June 1998, identifies as the four core labor standards freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

⁸¹ On the position of the EU, see European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, “Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation,” COM(2001) 416 final, Brussels, 18.7.2001.

⁸² Two OECD studies on International Trade and Core Labour Standards have been completed, respectively in 1996 and in 2000.

current regime is the product of important evolutions since the original system was set up. One of the most remarkable of these evolutions is a change in the notion of development itself, which is not limited to economic growth, but should include the respect and improvement of environmental standards and fundamental social rights, an idea which is captured by the notion of “sustainable development.” This results in the distinction of two different levels in the Regulations implementing the GSP scheme: alongside the “general arrangements,” which provide basic trade preferences aiming at the traditional objectives of economic development—with more or less important reductions of the duty rates according to the category to which a product belongs (from the most sensitive products to the least sensitive ones), and duty free access for almost all the products originating from the least developed countries—other arrangements provide for incentives favoring the respect for fundamental social rights and the protection of the environment. Since 1995, countries which respect these environmental and social standards are rewarded by the granting of additional preferences.⁸³ Thus, under Article 14(2) of Regulation 2501/2001 of 10 December 2001, countries must prove that they comply with ILO Conventions n° 29 and n° 105 on forced labor, n° 87 on the freedom of association, n° 98 concerning the right to organize and to bargain collectively, n° 100 and n° 111 on non-discrimination in respect to employment and occupation and n° 138 on child labor, to qualify under the social policy incentive clause.⁸⁴ Not only must the national legislation incorporate “the substance” of these conventions; this legislation must also be “effectively applied.” The countries which satisfy these conditions may obtain increases in preferential treatment,⁸⁵ but the request is only granted after an assessment by the European Commission not only on the regulatory measures adopted by the requesting country to satisfy these social standards, but also on the effective implementation of these standards and the monitoring procedures provided in the country. The examination of the request is preceded by the publication of a notice in the *Official Journal of the European Communities*, making it possible for all interested parties to make their views known in writing.⁸⁶

⁸³ Until the entry into force of the current Regulation—covering the period from 1 January 2002 to 31 December 2004—the provisions relating to these incentives appeared under Title II (Articles 8 to 21) of the Council Regulation (EC) No 2820/98 of 21 December 1998, which entered into force on 1 July 1999 (Council Regulation (EC) No 2820/98 of 21 December 1998, OJ 1998 L 357/ 1, last amended by Regulation (EC) No 416/2001, OJ 2001 L 60/43); they now appear under Title III (Articles 14 to 20 (labor standards) and 21 to 24 (environmental standards)) of Council Regulation (EC) No 2501/2001 of 10 December 2001 (Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ 2001 L 346/1).

⁸⁴ This list is longer than the list of ILO instruments mentioned in Article 11 of Regulation No 2820/98, which only mentioned ILO Conventions n° 87 on the freedom of association, n° 98 concerning the right to organize and to bargain collectively, and n° 138 on child labor. The new Regulation thus brings the special incentive arrangements into line with the concept of “fair labor standards,” as adopted at the level of the ILO. See Commission of the European Communities, Proposal for a Council Regulation applying a scheme of generalized tariff preferences for the period 1 January 2002 to 31 December 2004, COM(2001)293 final, Brussels, 12.6.2001, para. 32 of the Explanatory Memorandum; and the position of the Commission as expressed in the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, “Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation,” COM(2001) 416 final, Brussels, 18.7.2001, at 22.

⁸⁵ Special incentive arrangements are also provided for the protection of the environment. Under Article 21 of Regulation n° 2501/2001, they may be granted to the countries which apply the international standards on the sustainable management of tropical forests.

⁸⁶ At the beginning of 2002, only the Republic of Moldova appeared to benefit from the special incentives with respect to labor rights. See the Annex to Regulation No 2501/2001.

The Community GSP scheme also provides for the possibility of temporary withdrawal of preferences, in the face of certain clearly unacceptable practices among which are the practice of any form of slavery or forced labor, serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, use of child labor, or the export of goods made by prison labor (Article 26).⁸⁷ When the Commission or a Member State receives information that may justify temporary withdrawal, the Commission may begin an official investigation on the alleged practices, if sufficient grounds exist for such an investigation (Articles 27 and 26). The investigation is confidential. However, the interested parties are invited to contact the Commission and their cooperation in the investigation is sought; the Commission seeks to collect all the available information in the most impartial way, including by consulting the findings of the ILO and economic actors operating within the country concerned by the investigation. The investigation leads either to a termination of the proceedings or to the submission of a proposal to the Council recommending the withdrawal of the preferential treatment; the Council decides on the proposal within 30 days, by a qualified majority (article 29 (4)). In the case of Burma, the systematic character of the violations in the form of forced labor and child labor led the EC to withdraw the additional preferential rights after an observation period of 10 years.⁸⁸

The combination of an official rhetoric denying that the violation of core labor standards may justify the imposition of commercial sanctions with a practice which, simply by resorting to “incentives,” both positive and negative, in fact does reward or penalize developing countries on the basis of their willingness to improve their social and environmental standards at home,⁸⁹ demonstrates the acuteness of the dilemma. The central question is whether developing countries may seek to ameliorate the position of their export products on the global markets by diminishing—or, more often, by not rising—the social and environmental standards at home, or not. There are at least three difficulties in this respect.

The first difficulty is in the identification of the labor standards which may be universally imposed. The reference to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, even apart from the fact that it refers neither to environmental standards nor, more broadly, to ethical standards, may not wholly be up to the task, because, for example, it would be compatible with those principles for a country to keep the wages at very low levels, even below minimal subsistence levels, to maintain the competitiveness of its products without making efforts to improve the productivity of its fabrication processes.⁹⁰ On the other hand, the heroic efforts to present the imposition of core labor

⁸⁷ Here again, the list of the violations of core labor standards which may lead to the temporary withdrawal of preferential arrangements provided for in the GSP Community scheme is expanded in Regulation n° 2501/2001. Comp. art. 26 of this Regulation with the corresponding provision (Art. 22) of Regulation n° 2820/98.

⁸⁸ See Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, OJ 1997 L 85/8.

⁸⁹ According to the Council Conclusions of October 1999 on trade and labor, the EU encourages “further positive measures building on the incentives already applied by the EU for the enhancement of labour rights, in particular through additional improvements in market access for developing country exports, and not through trade-restrictive measures.” The distinction between a positive discrimination approach benefiting countries respecting labor rights and a sanctions-based approach appears rather formalistic.

⁹⁰ Of course, it could be argued that “Association and collective bargaining rights enable workers to secure wage levels commensurate with the productivity of their labour. They do not eliminate worldwide differences in workers’ incomes, but the gap may gradually be closed. To this extent a comparative advantage remains” (Opinion of the Economic and Social Committee on “Human Rights in the Workplace” (2001/C 260/14), OJ 2001 C 260/79, 3.2.5.).

standards in the agenda of trade negotiations as not constituting “a protectionist policy on the part of the industrialised countries,” because these are values which are genuinely sought after by these countries quite apart from the economic consequences of their promotion at a universal level, will not seem particularly convincing to the impartial observer.⁹¹

The second difficulty is that there may be a tension between insisting on the idea that respect for core labor standards represents an investment in future development and, in fact, an asset in globalized competitive markets, and at the same time using incentives—a euphemism to designate commercial sanctions—to coerce developing countries into the adoption and implementation of these standards. The following comment by the Economic and Social Committee expresses the dilemma quite explicitly, where the promotion of better labor standards is presented as being in the advantage of the developing countries themselves, as if they were to be rescued from their temptation—or that of their governments—to seek only immediate advantages in the growth of exports, whilst neglecting the future:

World trade must bring benefits for all. Every effort must be made to avoid fierce competition between developing countries using comparative advantages solely based on low wages and exploitation. In many cases, they cannot compete with the production quality of the industrialised countries. In order for the poorer countries to escape from this trap, the foundations must be laid for higher productivity and innovative capacity—and this begins with people in the workplace. Infringements of association and collective bargaining rights, along with child labour and forced labour, are not really comparative advantages for the developing countries.⁹²

A third difficulty is that, while it insists on the universal respect for core labor standards, the European Union remains largely passive in the face of the activities of multinational enterprises on which it may exercise a control—because they are incorporated in a Member State of the Union or have their headquarters in a Member State—although one of the reasons developing countries may have in maintaining labor and environmental standards at a low level is precisely to attract foreign direct investment on their territory. Indeed, the promotion by the EU of core labor standards in the context of globalization—which led to the Commission of the European Communities to adopt an important communication on that subject on 18 July 2001—explicitly relies on a territoriality-based understanding of the protection of fundamental social rights. MNEs, whichever their State of origin, are to be regulated by the host States in which they invest, rather than by their home States of origin: the EU support of the initiatives by host States should encourage the implementation of national labor legislation “that adapts the international consensus of the ILO conventions to local realities, thus facilitating ratification and implementation,” and it should encourage the institution of “realistic

⁹¹ See the Opinion of the Economic and Social Committee on “Human Rights in the Workplace” (2001/C 260/14), OJ 2001 C 260/79, 3.3.2.: “In the overall context of such a negotiating package it is clear that the core labour standards are not and must not be seen by developing countries as a protectionist policy on the part of the industrialised countries. If the European Union is making respect of the core labour standards a key part of its core political agenda, then it must obviously pursue a policy based on these principles and implement them itself and in its external relations.”

⁹² Opinion of the Economic and Social Committee on “Human Rights in the Workplace” (2001/C 260/14), 3.2.2.

monitoring mechanisms likely to strengthen compliance with the legislation by domestic employers and MNEs.”⁹³

On this third question, another route could be chosen. As the Commission of the European Communities recognizes in its recent communication “Towards a global partnership for sustainable development,” it should be part of any sustainable development strategy of the European Union—this “sustainability” refers, in this context, to a development not reduced to economic growth, but which includes respect for the environment and core labor standards—to “encourage European companies’ commitment to corporate social responsibility.”⁹⁴ Indeed, the influence of multinational enterprises can be such that they should be invited to play a part in “increasing respect for human rights worldwide” and in using “their often considerable influence within a developing country to support rather than undermine that country’s own efforts to achieve sustainable development.”⁹⁵ The assignment of a responsibility of multinational enterprises with such a role should be placed in its larger framework: that of the emergence of a new discourse on the relationship of economic actors with their immediate environment and with the collectivity as a whole.

It is in this broader context, therefore, that the trend towards better accountability of MNEs should be understood. Indeed, one way to conceptualize the link between the strong support of the EU in favor of a universal respect of the core labor rights—which translates into both its trade policy and its development cooperation policy—on the one hand, and the initiatives it may take in controlling MNEs operating from a Member State of the EU, is by analyzing the trend towards enhancing the accountability of MNEs as a way for the EU to accept its responsibilities in the promotion of human rights in third countries without making itself vulnerable to accusations of disguised protectionism or, even worse, of punishing the populations of third countries whose governments commit human rights abuses. It is with that view in mind that I now turn to the notion of corporate social responsibility, the “external dimension” of which offers a translation of the need for greater accountability of MNEs for human rights violations committed abroad. The notion imposes responsibilities on multinational actors operating, in coordinated fashion, under different jurisdictions, of both EU States and developing States. By focussing on private actors and their economic activities, rather than on States and their national territories, it facilitates the move beyond the dilemma, either not to contribute to the promotion of human rights (and especially labor standards) or to enter a spiral of incentive schemes which will be vulnerable to the accusation of protectionism.

B. Corporate social responsibility

⁹³ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, “Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation,” COM(2001) 416 final, Brussels, 18.7.2001, at 18.

⁹⁴ Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, “Towards a global partnership for sustainable development,” COM(2002) 82 final, Brussels, 13.2.2002, at 9.

⁹⁵ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, “The European Union’s role in promoting human rights and democratisation in third countries,” COM(2001) 252 final, Brussels, 8.5.2001, at 3. The communication goes on: “It is in the interest of those companies [to contribute to an increasing respect for human rights]: stable countries and free societies are also the best places to invest and to do business. For that reason, the promotion of human rights and democracy is also an essential complement to the EU’s support for multilateral trade and investment facilitation.”

The notion of corporate social responsibility (CSR) is defined by the European Commission as “a concept whereby companies decide *voluntarily* to contribute to a better society and a cleaner environment,” and thus go beyond legal compliance, for instance, to use more environmentally responsible technologies or to improve working conditions of management-employee relations. Why should the companies do so? Because CSR, we are told, improves competitiveness. Indeed, the positive impact of socially responsible practices is both direct (impact on productivity) and indirect (impact on business reputation):

Positive direct results may for example derive from a better working environment, which leads to a more committed and productive workforce or from efficient use of natural resources. In addition, indirect effects result from the growing attention of consumers and investors, which will increase their opportunities on the markets. Inversely there can sometimes be a negative impact on a company's reputation due to criticism of business practices. This can affect the core assets of a company, such as its brands and image.⁹⁶

This does not mean, however, that any form of regulation or other form of public intervention would be made superfluous if businesses were to turn more massively to socially responsible practices, either because they would be enlightened on where their best interests lie, or because they are driven to such practices by the forces of the market—especially consumers and investors. Indeed, for the “indirect” positive economic impact of CSR to occur, certain mechanisms should be put in place to facilitate the market incentives rewarding CSR. In many cases, except for the most flagrant situations where a company is publicly denounced for its practices, the ethical choices by consumers will only be possible if certain indicators help them make these choices. These indicators, sparing the public a very time-consuming search on which products it is “ethical” to purchase, may take the form of social or ethical labelling or, under certain conditions, of codes of conduct backed by independent and credible monitoring (see chapter VI). Although the searching capacities of large investors are much more important, they, too, may require to be guided in their options, if they wish to take into account those dimensions of the companies in which they invest which the market does not visibly sanction or reward, i.e., which are distinct from the sheer profitability of the investment. As to the “direct” positive economic impact of CSR for the companies who act responsibly, again a regulatory framework may usefully contribute to such an impact occurring. With respect to many socially responsible practices, companies will frequently find themselves in the familiar situation where what would be profitable in the long run if other competitors act similarly, will be costly in the short run, where certain competitors, seeking an immediate return on the investment of the shareholders, will act otherwise. Corporate social responsibility is an investment, perhaps, but as such, its returns are not immediate. Therefore:

⁹⁶ Commission of the European Communities, Green Paper “Promoting a European Framework for Corporate Social Responsibility,” COM(2001) 366 final, Brussels, 18.7.2001, at 7. See also Commission of the European Communities, *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development*, COM(2002) 347 final, Brussels, 2nd July 2002, at 6 and 9-10 (developing the same arguments). This latter Communication, however, confesses a certain uncertainty about the importance of CSR to “long-term business success”: the document notes that, although it has “been argued that opportunities and advantages for enterprises stemming from complying with international social and environmental conventions, norms or ‘soft law’ instruments can outweigh costs,” and although “most businesses support the assumption of a positive impact of CSR on competitiveness, particularly in the long run,” “they are however not able to quantify this effect” (at 9).

Corporate social responsibility should ... not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.⁹⁷

Is CSR, then, to be left to the voluntary initiatives of the companies who feel they should do more than simply obey the existing legislations? Or is it a pretext for imposing, by the adoption of regulations, new and further-reaching obligations on companies? Is it economically profitable, and should we count on the blind powers of the market to push in that direction? Or do the market forces, left to themselves, not suffice, and how then should they be helped to produce the effects we hope for? These elements already give us some understanding of the ambiguities of the notion of corporate social responsibility, of course, but also—and perhaps precisely *because of* these ambiguities rather than *despite of* them—of the wealth of its potential.

The business of business is not just to make business: it is to improve the quality of the workforce by providing training, it is to contribute to a cleaner environment by adopting less polluting production methods, it is to combat violations of labor standards not only by respecting these standards in its own production plants but also by refusing to deal with subcontractors who violate these standards or work with subcontractors who themselves commit such violations, it is to use their influence on governments who abuse human rights to promote a fuller respect for these rights. This new role for companies, as such, may translate into different methods of implementation. In the remainder of this study, I will analyze these methods as they relate to the activities of European MNEs in developing countries. Building on the simple finding that companies cannot shield themselves anymore behind their purely profit-seeking motive, I will discuss four ways by which the human rights dimension of CSR has led, or may in the future lead to initiatives in the European Union. I will move from the most compulsory method—the imposition of legally binding obligations—to the least compulsory—codes of conduct, social labelling initiatives, and the introduction of incentives in public procurement policies or by other mechanisms making it profitable for business to respect human rights.

4. The civil liability of multinationals under European Union law

The imposition of legal obligations on MNEs domiciled in the European Union, to ensure that they respect fundamental human rights in their activities abroad whether these are conducted directly or through a subsidiary company, could take essentially two forms. This chapter analyzes the conditions under which European MNEs may be found civilly liable for human rights violations committed abroad, by the MNE itself or a subsidiary which is its “alter ego,” or even—when the MNE may be considered complicit to the violation—by the State hosting the investment. The next chapter will turn to the question of the criminal liability of the MNE in the same circumstances.

A. A European ATCA?

⁹⁷ Commission of the European Communities, Green Paper “Promoting a European Framework for Corporate Social Responsibility,” *supra* note 96, at 7.

Under European Community law, the national jurisdictions of the Member States of the European Union are in principle competent to receive civil proceedings against corporations based in the EU which—either directly or, indirectly, through the control exercised on subsidiaries—are civilly liable for certain acts, wherever these take place, and even if the damage occurs or is caused outside the territory of the Member States. This results from the partial harmonization of the conditions of judicial competence in the European Union. The use of the rule in the context of human rights litigation, for violations committed abroad, especially in developing countries where European multinationals operate, has been explicitly envisaged by the European Parliament. On 15 January 1999, the European Parliament adopted a ‘Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct.’⁹⁸ In the Preamble, the Parliament mentions that the resolution is adopted “having regard to Article 220 of the EC Treaty regarding reciprocal recognition of court judgments [⁹⁹], to the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, usually known as the Brussels Convention, and to the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union [¹⁰⁰] concerning action to combat trafficking in human beings and sexual exploitation of children.” The operative part of the Resolution, however, does not mention these instruments. But the draft text—the Motion for a Resolution initially presented by Mr. Richard Howitt, MEP—included a paragraph 24 which stated that the European Parliament:

24. Request the European Council confirm the interpretation in the 1968 Brussels Convention that, for cases of basic duty of care, legal action may be taken against a company in the E.U. country where its registered office is, in respect of any third country throughout the world, and calls on the Commission to study the possibility of enacting legislation, which open European courts to lawsuits involving damage done by MNEs, thus creating a precedence for developing customary international law in the field of corporate abuse.

This passage was outvoted by 96 votes to 89, and has thus disappeared from the text finally adopted. However, this should not distract from the fact that, indeed, such a use of the 27 September 1968 Brussels Convention,¹⁰¹ now consolidated as Community law in Council Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,¹⁰² could be defended, and indeed appears to face no major

⁹⁸ A4-0508/1998, *OJ* 1999 C 104/176.

⁹⁹ Now renumbered as Art. 293 EC.

¹⁰⁰ Now renumbered as Art. 31 TEU.

¹⁰¹ The European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 came into force in 1973; its principles were extended to EFTA countries by the Lugano Convention of 1988. For the last consolidated version of the Brussels Convention, see *OJ* 1998 C 27/1.

¹⁰² *OJ* 2001 L 12/1. The Regulation entered into force on 1 March 2002. The subject of judicial cooperation in civil matters entered Community law with the changes brought to the Treaty of Rome by the Treaty of Amsterdam of 2 October 1997, which entered into force on 1 May 1999. On the relationship between the 1968 Brussels Convention and Regulation n° 44/2001, see Article 68 of the latter instrument. On Regulation n° 44/2001, see H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (2002); Kennet, “The Brussels I regulation,” *I.C.L.Q.* (2001), at 725; Droz and Gaudemet-Tallon, “La transformation de la Convention de Bruxelles du 27 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale,” *Rev. crit. de dr. int. privé* (2001), at 601; Nuyts, “La communautarisation de la Convention de Bruxelles,” *J.T.* (2001), at 913; Schmidt, “De EEX-Verordening: de volgende stap in het Europese procesrecht,” *N.I.P.R.* (2001), at 150; Watté, Nuyts and Boularbah, “Le règlement ‘Bruxelles I’ sur la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale,” *J.T.D.E.* (2002), at 161.

obstacle.¹⁰³ Under Article 2 § 1 of Regulation n° 44/2001, “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” Article 2 of the Brussels Convention contained the same rule of *forum rei*. Article 60 § 1 of the Regulation simply adds to the rule of the 1968 Brussels Convention, for the sake of predictability with respect to the identification of what is understood by the “domicile” of legal persons,¹⁰⁴ that for the purposes of the Regulation, “a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business.”

Regulation n° 44/2001 also provides for two alternative grounds for jurisdiction of the courts of one Member State, which the plaintiff may wish to rely on in certain circumstances. First, “in matters relating to tort, delict or quasi-delict,”¹⁰⁵ the plaintiff may sue “in the courts for the place where the harmful event occurred or may occur.”¹⁰⁶ Importantly, the European Court of Justice has found that

where the place of the *happening of the event* which may give rise to liability in tort, delict or quasi-delict and the place where that event *results in damage* are not identical, the expression “place where the harmful event occurred” in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.¹⁰⁷

As a consequence, where a decision is taken, for instance by a board of directors, in a Member State other than the Member State where the company is domiciled, which causes the damage for which a reparation is sought, the plaintiff should be able to sue in the first Member State where the decision was adopted: in certain cases, admittedly rather exceptional—for instance if the plaintiff resides in the Member State where the decision was taken and therefore would more easily launch his suit in that State—this basis of jurisdiction may be favorable to the plaintiff.

Second, “A person domiciled in a Member State may, in another Member State, be sued ... as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”¹⁰⁸ This means that a company domiciled in a Member State may be sued in another Member State where it has

¹⁰³ See esp. Betlem, “Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts,” in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000), at 283.

¹⁰⁴ For the determination of the domicile of the defendant, the private international law rules of each forum State normally should apply (Article 59 § 1 of Regulation n° 44/2001). This was also the case with respect to the determination of the domicile of legal persons in the Brussels Convention. The current Regulation considers that “The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction” (Preamble, Recital 11).

¹⁰⁵ In the framework of the 1968 Brussels Convention, the European Court of Justice considered that “tort, delict or quasi-delict” was to be taken as an independent concept “covering all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1)” (Case 189/87 *Kalfelis v. Schröder* [1988] ECR 5565, paragraph 18).

¹⁰⁶ Article 5 § 3.

¹⁰⁷ Case C-51-97, *Réunion européenne SA and others*, [1998] ECR I-6511, para. 28 (my emphasis). See already Case 21/76, *Bier v. Mines de Potasse d'Alsace* [1976] ECR 1735, para. 24-25.

¹⁰⁸ Article 5 § 5.

established a branch, an agency or an establishment¹⁰⁹ in cases where, for instance, “operations” of that subsidiary or branch have caused a damage which a tort action seeks compensation for.¹¹⁰ It appears from the case-law of the European Court of Justice on the notion of “operations of a branch, agency or other establishment,” that these include acts whose effects are not restricted to the territory of the forum State.¹¹¹ Therefore, “if harm ensued from any operations of that branch, even where the damage occurred outside the forum State, its parent company can be sued” in the State where the branch is located.¹¹²

These provisions therefore recognize that the jurisdictions of the Member States are competent to hear tort actions based on the damage suffered by victims, wherever these are domiciled and whatever their nationality, caused by the activities of a multinational enterprise domiciled in a Member State or by any of its branches: the action will be lodged either in the State where the parent company is domiciled or, where a branch of that company has actually been at the basis of the act causing the damage, in the State where that branch is located.

Such a use of the 1968 Brussels Convention, and now of Regulation n° 44/2001, would analogize these to a European “Foreign Tort Claims Act.” The expression refers of course, by modifying it, to the *Alien Tort Claims Act* (ATCA) initially in section 9 of the First Judiciary Act of 24 September 1789, conferring jurisdiction upon the United States federal courts on actions lodged by aliens claiming damages for torts committed in violation of the law of nations, wherever the harm occurred.¹¹³ The ATCA has been spectacularly revived since a decision of 30 June 1980 by the

¹⁰⁹ The concept is interpreted to exclude the situation of an independent commercial agent who, although he/she represents a company domiciled in another Member State, “merely transmits orders to the parent undertaking without being involved in either their terms or their execution” (Case 139/80, *Blanckaert and Willems PVBA*, [1981] ECR 819, para. 13).

¹¹⁰ Article 5 § 5 of the Brussels Convention (now Art. 5 § 5 of the Regulation n° 44/2001) has been read by the European Court of Justice to give this provision an extended meaning. In a judgment of 9 December 1987, the Court agreed that, for reasons of legal certainty and because of the appearances created by such a situation in the eyes of other economic actors, the clause could apply to a case in which “a legal entity established in [a Member State] maintains no dependent branch, agency or other establishment in another [Member State] but nevertheless pursues its activities there through an independent company with the same name and identical management which negotiates and conducts business in its name and which it uses as an extension of itself” (ECJ, 18 Dec. 1987, Case 218/86, *SAR Schotte GmbH*, [1997] ECR 4905, para. 17). Not only may the clause be invoked in the presence of two legally independent entities—rather than in the situation explicitly envisaged by Art. 5 § 5 where a single company creates a branch, an agency or an establishment in another Member State—but it may even be invoked when the defending entity, domiciled in another Member State, is in fact a subsidiary of the entity situated in the Member State before the jurisdictions of which the action is lodged.

¹¹¹ See the discussion by Betlem, *supra* note 103, comparing Case 33/78, *Somafer SA v. Saar-Ferngas AG*, [1978] ECR 2183, at 2194, with the more recent Case C439/93, *Lloyd’s Register of Shipping v. Société Campenon Bernard*, [1995] ECR I-961, para. 20 (“undertakings may form part of the operations of an ancillary establishment within the meaning of Article 5(5) of the Convention even though they are to be performed outside the Contracting State where it is situated, possibly by another ancillary establishment”).

¹¹² Betlem, *supra* note 103, at 288.

¹¹³ First Judiciary Act 1789 (ch. 20, § 9 (b)), now codified as 28 U.S.C. § 1350: “The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” There exists some controversy on the original intent behind the adoption of this section of the Act: comp. Burley, “The Alien Tort Statute and the Judiciary Act 1789: A Badge of Honor,” 83 *A.J.I.L.* (1989), at 461 (for an expansive view), with Sweeney, “A Tort Only in Violation of the Law of Nations,” 18 *Hastings International and Comparative Law Rev.* (1995) at 445 (for a more restrictive view), and see also Koh, “Transnational Public Law Litigation,” 100 *Yale L.J.* (1991), 2347, at 2353. See also the dissenting opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), at 782-783.

Court of Appeals of the Second Circuit in the case of *Filartiga v. Pena-Irala*,¹¹⁴ before being further extended to cover actions filed against multinational corporations domiciled in the United States for violations of universally recognized norms of international law committed outside the U.S. territory.¹¹⁵ In one respect at least, it could be said that the use of the 1968 Brussels Convention advocated by the rapporteur for the European Parliament on EU standards for European enterprises operating in developing countries would even expand the jurisdiction of European courts in comparison to that of the United States federal courts under ATCA.¹¹⁶ Indeed, the ATCA may only be relied on by plaintiffs who are aliens; the scope of the jurisdiction conferred upon European courts by Regulation n° 44/2001 is not thus limited—so that we may be justified in speaking of that Regulation as constituting, in part, a *Foreign Tort Claims Act*, rather than an *Alien Tort Claims Act*. However, this difference between the two instruments must not be exaggerated, and certainly should not lead us to dismiss the comparison between them. First, with respect to the crimes of torture or extra-judicial killing committed under authority or color of law of a foreign nation, this limitation to the ATCA was removed by the Torture Victim Protection Act of 1991.¹¹⁷ Moreover, in the kind of suits we are concerned with, lodged against MNEs for human rights violations committed abroad either directly or by subsidiaries, the limitation is of little practical importance: the vast majority of the victims, indeed, are nationals of the host States, where the violations produce their effects, rather than nationals of the State home to the MNE. On three other questions of major importance however, the European system based on the 1968 Brussels Convention now transformed into Regulation n° 44/2001 appears either more generous than the United States Alien Tort statute, or at least potentially as generous.

B. The question of the forum conveniens

First, the potential of ATCA is to some extent limited by the *forum non conveniens* doctrine, developed with the objective of avoiding jurisdictional forum shopping in the United States by victims seeking redress who would have other avenues open to them. According to the *forum non conveniens* doctrine, even when United States federal courts would formally have jurisdiction on a particular action brought to them, they may dismiss the action where there exists an alternative forum open to the plaintiffs and where the balancing of the public and private interests involved leads to the

¹¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

¹¹⁵ See especially the suits against the Californian corporation Unocal for the complicity of its subsidiaries in gross human rights violations committed by the Myanmar military in ex-Burma: *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). Another spectacular example is the suit lodged by relatives of Ken Saro-Wiwa and other activists of the Ogoni community in Nigeria, after the execution of these activists in November 1995, which followed the repression by the Nigerian authorities of protests against the presence of Shell in the area of Nigeria where the Ogoni people reside: *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386(KMW), 2002 WL 319887 (S.D.N.Y., Feb. 28, 2002). Both these suits are still currently pending before the U.S. federal courts, awaiting their conclusion.

¹¹⁶ For a recent synthesis, Stephens, “Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations,” 27 *Yale J. Int’l L.* (2002), at 1.

¹¹⁷ See the *Torture Victim Protection Act* of 1991, 28 U.S.C. § 1350(2) (1994), Pub. L. No. 102-256, 106 Stat. 73: “An individual who under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual, or (2) subjects an individual to extrajudicial killing shall in a civil action, be liable for damages to the individual’s legal representative or to any person who may be a claimant in an action for wrongful death.”

conclusion that turning to the alternative forum is preferable.¹¹⁸ Although it was hardly even alluded to in *Filartiga*, because of the lack of any alternatives to the victims in that case,¹¹⁹ the doctrine has played an important role, for example, in *Wiwa v. Royal Dutch Petroleum Co. and Shell Transport*. In that case, the plaintiffs¹²⁰ sought reparation from Royal Dutch and Shell Transport, respectively incorporated and headquartered in the Netherlands and in the United Kingdom. The plaintiffs alleged that Shell Nigeria, a subsidiary company jointly controlled by the two named defendants, planned and supported gross human rights abuses committed by the Nigerian government and military against the resistance movement to the destruction of the homeland of the Ogoni people by the oil exploration activities of Shell Nigeria. After the district court had considered that the suit should be dismissed because the plaintiffs could have sued in the courts of the United Kingdom, the United States Court of Appeals for the 2nd Circuit decided, on 14 September 2000, that “in balancing the interests, the district court did not accord proper significance to a choice of lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.” The presumption that the choice of the forum by the plaintiff should normally be deferred to is based on a realistic reading of the difficulties faced by victims of officially sponsored torture. The Court of Appeals noted:

One of the difficulties that confront victims of torture under color of a nation’s law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as “not our business.”¹²¹

The question whether the doctrine of *forum non conveniens* is or not in conflict with the harmonization in civil jurisdiction and enforcement sought by the 1968 Brussels Convention (and, today, by Regulation n° 44/2001) has been hotly debated, in the context of the application of the criteria of these European instruments by the British and Irish courts.¹²² The question is not of purely

¹¹⁸ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-508 (1947); or *Koster v. American Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

¹¹⁹ See *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (1984) (“The United States policy against forum shopping does not warrant a denial. Plaintiffs could get no redress in Paraguay and sued Pena where they found him”).

¹²⁰ The plaintiffs were relatives of the writer and Ogoni activist Ken Saro-Wiwa, and of John Kpuien, another member of the Movement of the Survival of the Ogoni People also executed by the Nigerian authorities on 10 November 1995 with eight other militants of the Ogoni resistance movement. On the background, see S. I. Skogly, “Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria,” 15 *Neth. Quar. H. R.* (1997), at 47.

¹²¹ The *pro victima* reading of the *forum non conveniens* doctrine by the Court of Appeals has been implicitly approved of by the United States Supreme Court, which decided on 26 March 2001 to deny certiorari to an appeal by the defendants (cert. denied, 00-1168). See on the developments of this case: <http://www.earthrights.org/shell/>

¹²² See esp. Collins, “*Forum non conveniens* and the Brussels Convention,” 106 *L.Q.R.* (1990), at 535; Fentiman, “Jurisdiction, Discretion and the Brussels Convention,” *Cornell International Law Journal* (1993), at 73; Hartley, “The Brussels Convention and *Forum Non Conveniens*,” 17 *E.L. Rev.* (1992), at 553; Kennett, “*Forum non conveniens* in Europe,” *Cambridge L. J.* (1995), at 555; Gaudemet-Tallon, “*Le forum non conveniens*, une menace pour la Convention de Bruxelles?,” *Rev. crit. dr. inter. privé* (1991), at 510; Marongiu Buanaitu, “*Forum Non*

theoretical or academic importance, considering the large number of multinational corporations which have chosen to be incorporated in the United Kingdom, especially for fiscal reasons. To compensate for the very large attribution of jurisdiction to them even in the presence of an element of extraneousness in the case, the courts in the United Kingdom have traditionally exercised a relatively broad discretion on whether to continue proceedings or to suspend them, where an alternative forum was identified and appeared more closely linked to the dispute.¹²³ Soon after the High Court had decided that the very purpose of the Brussels Convention—to harmonize the rules on jurisdiction in the European Community, so as to limit the potential for conflict between national courts of different Member States—would be defeated if the courts in the United Kingdom retained an element of discretion in situations where, according to the Brussels Convention, they would have jurisdiction as of right,¹²⁴ the Court of Appeal decided, in *Re Harrods*,¹²⁵ that *when third States are involved*¹²⁶—the case involved a Swiss-owned company domiciled in the United Kingdom, but conducting all its activities in Argentina—this purpose of the Brussels Convention did not come into play anymore—indeed, the Convention only seeks to avoid conflicts *between Member States of the European Community*—and that moreover, it would be strange, from the point of view of public international law, to have the Brussels Convention extend its effects to third States, which are not parties to that treaty.¹²⁷ Although an interpretation of the requirements of the 1968 Brussels Convention on that point was requested from the European Court of Justice, the case referred to the Court was struck off after a friendly settlement was reached by the parties.¹²⁸ The compatibility of the Harrods judgment of the Court of Appeal with the Brussels Convention therefore remains a source of controversy to this date.

Conveniens Facing the Prospective Hague Convention and E.C. Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,” *Riv. di dir. eur.* (1999), at 3; North, “La liberté d’appréciation de la compétence (jurisdictional discretion) selon la Convention de Bruxelles,” *Mélanges François Rigaux* (1993), at 383; and A. Nuyts, “L’exception de *forum non conveniens* (étude de droit international privé comparé)” (Ph.D. on file at the Faculté de Droit de l’Université libre de Bruxelles, Bruxelles, 2002, at 187 ff.).

¹²³ See *Sim v. Robinow* (1892), 19 R., 665 at 668, per Lord Kinneir: “the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.” And especially *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, at 476: “The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”

¹²⁴ See *S & W Berisford plc v. New Hampshire Insurance Co.* (1990) 2 QB 631; and *Arkwright Mutual Inc. Co. v. Bryanston Insurance Co. Ltd.* (1990) 2 QB 649.

¹²⁵ *Re Harrods (Buenos Aires) Ltd* (1991) 4 All ER 334, (1992) Ch. 72 (C.A.). See Diuntjer Tebbens, “The English Court of Appeal in *Re Harrods*: an unwelcome interpretation of the Brussels Convention,” in M. Sumampouw, *Law and Reality: Essays on national and international procedural law* (1992), at 60; and Beernaert and Coibion, “La doctrine du *forum (non) conveniens*—Réconciliation avec le texte de la Convention de Bruxelles ?,” *Journal des tribunaux* (2000), at 409.

¹²⁶ See *Re Harrods (Buenos Aires) Ltd* (1991) 4 All ER 334, 339, on the distinction between the two situations. *Forum non conveniens* may not be invoked when the alternative forum to that designated by the Brussels Convention (in particular the domicile of the defendant) is a court of a Member State of the European Community.

¹²⁷ The position of the Court of Appeal in *Re Harrods* appears to have been heavily influenced by the thesis defended the previous year in the *Law Quarterly Review* by Collins, *supra* note 122, who expressed the opinion that “The contracting states were setting up an intra-Convention mandatory system of jurisdiction. They were not regulating relations with non-contracting states” (at 539).

¹²⁸ Case C-314/92, *Lademinor v. Interconfinanz*, OJ 1992 C 219/4; and order of 21 February 1994, OJ 1994 C 103.

The case of *Lubbe v. Cape plc* is illustrative of the significance of the controversy with respect to the possibilities of acting against MNEs domiciled in the United Kingdom.¹²⁹ In February 1997, claims to compensation were lodged by five employees of an asbestos mine in the Northern Province of South Africa, which was managed by a subsidiary wholly owned by Cape plc, a company domiciled in England. The plaintiffs suffered from asbestosis and an asbestos-related form of cancer. The liability of Cape plc was based on the negligent control by the parent company on the operations of its subsidiary, which it should have obliged to limit to a safe level the exposure to asbestos. The defendant company argued that, although it was domiciled in the United Kingdom and that, therefore, Article 2 of the Brussels Convention gave the English courts jurisdiction on the case, these courts should relinquish jurisdiction in favor of South African courts, to the jurisdiction of which Cape plc offered to submit. Cape plc also insisted that South Africa was the proper forum, as the injuries were suffered there, and as the factual allegations were based in that jurisdiction. A first decision favorable to that thesis, adopted on 12 January 1998 by the Queen's Bench Division, was reversed by the Court of Appeal on 30 July 1998,¹³⁰ on 14 December 1998, the House of Lords refused leave to appeal from that judgment. However, the decision on jurisdiction, favorable to the claimants, led a group of 1539 new claimants to lodge another suit before the High Court,¹³¹ leading the Court of Appeal to reverse its attitude in a second judgment of 29 November 1999.¹³² In a judgment of 20 July 2000, after having granted leave to appeal from both judgments by the Court of Appeal, the House of Lords decided that the plaintiffs should be able to pursue the proceedings before the English courts, because returning them to the South African courts could lead to a denial of justice, because of the difficulties they would be facing in obtaining legal representation and because of the lack of experience of those courts in the handling of group actions.¹³³

The leading opinion of Lord Bingham of Cornhill did not specifically adopt a position on the preemption of the *forum non conveniens* doctrine by Article 2 of the Brussels Convention.¹³⁴ Indeed, the House of Lords having concluded to the jurisdiction of the English courts, any answer to that question would have been of no practical incidence. However, the opinion does contain a suggestion that, in cases where the question of jurisdiction is governed by the Brussels Convention, the doctrine of *forum non conveniens* should not constitute an obstacle to the exercise of their jurisdiction by the English courts where the competing forum is a jurisdiction of another State party to the Convention. The leading opinion introduces its discussion of the *forum non conveniens* doctrine by saying that “the principles to be applied by the English court in deciding that application *in any case not governed by Article 2 of the Brussels Convention* are not in doubt.”¹³⁵ The lengthy

¹²⁹ Meeran, “Liability of Multinational Corporations: A Critical Stage in the UK,” in M. T. Kamminga and S. Zia-Zarifi, *supra* note 103, at 251, at 258-261; Muchlinski, “Corporations in international litigation: problems of jurisdiction and the United Kingdom asbestos cases,” *I.C.L.Q.* (2001), at 1; Fentiman, “Stays and the European Conventions: End-Game?,” *C.L.J.* (2001), at 10.

¹³⁰ *Lubbe et al. v. Cape plc* (CA 30 July 1998) [1998] C.L.C. 1559.

¹³¹ *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) [2000] 1 Lloyd's Rep. 139.

¹³² *Rachel Lubbe et al. v. Cape plc* (CA 29 Nov. 1999) [2000] 1 Lloyd's Rep. 139.

¹³³ *Lubbe v. Cape plc*, [2000] 1 W.L.R. 1545 (H.L.).

¹³⁴ In the second judgment by the Court of Appeal (of 29 November 1999), Pill L.J. expressly noted that the plaintiffs—who, indeed, did not wish the proceedings to be delayed while a reference would be made to the European Court of Justice—had not pursued their contention that Article 2 of the 1968 Brussels Convention deprived the English court of any discretion to stay an action brought against a defendant domiciled in the United Kingdom (*Rachel Lubbe et al. v. Cape plc* (CA 29 Nov. 1999) [2000] 1 Lloyd's Rep. 139, at 164-165).

¹³⁵ This formulation by Lord Bingham of Cornhill, although it seems to be inspired by the terms of the *Civil Judgments Act 1982* which introduced the 1968 Brussels Convention in the U.K. national legal order (the *Act*

discussion of the *forum non conveniens* doctrine in the judgment seems to indicate that the House of Lords considers it is to follow the solution of the Court of Appeal in the above-mentioned *Harrods* case: where the competing forum is a third State rather than a Contracting State to the Brussels Convention, the question of jurisdiction should still be guided by the *forum non conveniens* doctrine.

Although it was not disapproved of by the House of Lords in *Lubbe*, the *Harrods* doctrine would seem to be incompatible with recent developments within the case-law of the European Court of Justice.¹³⁶ In a judgment it delivered on 13 July 2000,¹³⁷ the Court answered a concern expressed by a French judge that Community law would be applied in third States if the rules on jurisdiction established by the Brussels Convention could be invoked by a claimant domiciled outside the Community. The Court stated that “the system of common rules on conferment of jurisdiction established in Title II of the Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective [either] of the nationality of the parties,”¹³⁸ or of “the plaintiff’s domicile or seat,”¹³⁹ the rationale for that rule being that it is easier, in principle, for the defendant to defend him- or herself in the place where he or she is domiciled. Therefore, “the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country”¹⁴⁰; according to the Court, the general rule of jurisdiction being conferred on the courts of the domicile of the defendant could be disapplied “only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff’s domicile being in a Contracting State.”¹⁴¹ The position thus expressed by the European Court of Justice seems to suggest that, if it had answered either the *Harrods* or the *Lubbe* courts on the interpretation of the 1968 Brussels Convention in those cases, it would probably have found the application of the *forum non conveniens* doctrine in situations where the United Kingdom has jurisdiction based on the domicile in that State of the defendant, to be incompatible with the requirements of the Brussels Convention—or, today, with those of Regulation n° 44/2001. This impression is further reinforced by the wording of recital 11 in the Preamble of this Regulation, which insists that

the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

mentions that “Nothing in the Act shall prevent a court in the United Kingdom from staying, striking out or dismissing any proceedings on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention” (Art. 49)), in fact postulates that either the Brussels Convention will be applicable, or the doctrine of *forum non conveniens* will apply. But this delimitation of the respective scope of application of the two rules was not, in fact, what Article 49 of the *Civil Judgments Act* had intended. Rather, this provision did not exclude that the Brussels Convention could refer back to the principles from national law (including the doctrine of *forum non conveniens* in the U.K.), on certain questions it did not rule on itself.

¹³⁶ See Muchlinski, *supra* note 129, at 12-13.

¹³⁷ But see also, in the previous case-law, Case C-190/89, *Rich*, (1991) ECR I-3855 (judgment of 25 July 1991).

¹³⁸ Case C-412/98, *Group Josi Reinsurance Company SA*, [2000] ECR, para. 34 (judgment of 13 July 2000).

¹³⁹ Para. 53.

¹⁴⁰ Para. 59.

¹⁴¹ Para. 61.

Although this does not constitute an explicit condemnation of the preemption of the jurisdiction attributed by the Regulation by the *forum non conveniens* doctrine, that is clearly the spirit of the insistence of this recital on “predictability.”¹⁴²

C. The question of the applicable law

It is on the question of the law applicable to the damage claim that the two systems seem to differ most strikingly. The Alien Tort Claims Act concerns only torts committed “in violation of the law of nations”—a restriction which the Court of Appeals for the 2nd Circuit in *Filartiga* justifies by noting that “Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”¹⁴³ In most of the cases presented to the federal courts of the United States under the ATCA, such a reference to the “universally accepted norms of the international law of human rights” served not only to justify the exercise of their jurisdiction by those courts, but also to identify the rules applicable to the tort action, thus removing the choice of law question from the court.

It is true that some federal courts have chosen a different attitude, first very hesitatingly introduced by Judge Edwards in his opinion in the D.C. Court of Appeals judgment in *Tel-Oren v. Libyan Arab Republic*, in which the Palestine Liberation Organization (P.L.O.) was sued by the victims of an attack on a civilian bus in Israel.¹⁴⁴ The suggestion to grant jurisdiction once the plaintiff pleads a violation of international law, but then to turn either to municipal tort law or to the *lex loci delicti* for the identification of the standard of liability,¹⁴⁵ may indeed present the advantage of dispensing the judge from what Judge Edwards called her “awesome duty ... to derive from an amorphous entity—i.e., the ‘law of nations’—standards of liability applicable in concrete situations.”¹⁴⁶ It may also end any confusion which may still be present in the consequences of a violation of international law by a private individual who is not in any way connected to the State. Indeed, some United States federal courts have taken the view that only torts committed by individuals in violation of international law “under color of an official authority” may imply jurisdiction under the ATCA. Such a view appears to have a purely accidental origin in the *Filartiga* jurisprudence where, indeed, acts of *torture* were reproached to the defendant, Mr. America Pena-Irala, a Paraguayan police officer found in the U.S. at the time the action was filed: as would be later confirmed in the 1984 Torture Convention, torture is only prohibited in international law when practiced by a person acting in an official capacity or at the instigation, or with the consent or acquiescence of, a public official.¹⁴⁷ But the restriction of

¹⁴² H. Gaudemet-Tallon grounds on this argument her position that the *forum non conveniens* doctrine must certainly be considered inapplicable where jurisdiction is based on Regulation n° 44/2001 and where the competing forum is another Member State of the EC. She would be prepared to admit for more flexibility where third States are involved: see Gaudemet-Tallon, *supra* note 102, n° 77 and 81.

¹⁴³ *Filartiga v. Pena-Irala*, 630 F.2d 876, 881.

¹⁴⁴ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

¹⁴⁵ See, for an approach which remained isolated in that respect, *In Re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (application of Philippine wrongful death statutes to a suit for torture, leading to the death of the victim, by Philippine intelligence officers).

¹⁴⁶ *Tel-Oren*, 726 F.2d at 781.

¹⁴⁷ The *Filartiga* decision relies on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 9, 1975 (Res. 3452(XXX)). For another example of such a restriction with respect to acts of torture, see *In re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v. Marcos*, 978 F.2d 493, 501-502 (9th Cir. 1992).

ATCA suits to violations committed either by agents of the State, or private persons closely connected to the State or acting under its instructions or effective control, is encouraged by the notion that international law is primarily directed to the States, and only exceptionally reaches directly the acts of the private individual—as with crimes of genocide, war crimes, or crimes against humanity.¹⁴⁸ Perhaps this restriction—which threatens to severely limit the reach of the ATCA¹⁴⁹—would be more easily removed if the reference to the “law of nations” in the statute were seen as necessary to grant jurisdiction to the federal courts, whilst not determining the issue of the applicable standards of liability. These advantages, however, do not seem to compensate for what would be missed in such an understanding of ATCA suits: as eloquently expressed by a federal district court in the *Xuncax* litigation against a former Guatemalan Defense Minister,

reading the Alien Tort Claims Act as essentially a jurisdictional grant only and then looking to domestic tort law to provide the cause of action mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the kind of wrongs meant to be addressed under the Alien Tort Claims Act: those perpetrated by *hostis humani generis* (“enemies of all human kind”) in contravention of *jus cogens* (peremptory norms of human rights law). In this light, municipal tort law is an inadequate placeholder for such values.¹⁵⁰

It will therefore be easily explained that, in the context of the ATCA, the liability of the defendant will be identified on the basis of those norms of international law which will be considered at once specific, universal, and obligatory. It may be said that the form of extra-territoriality which victims relying on the ATCA invoke is both *adjudicative* and *prescriptive*.¹⁵¹ not only are United States federal courts competent, they also will apply international norms, rather than refer back to the law of the place where the event took place or where the damage occurred. In apparent contrast with the ATCA, the form of extra-territoriality we are led to by relying on the 1968 Brussels Convention to claim compensation against an MNE having its domicile in an EU Member State remains purely *adjudicative*, and leaves open the question of which law will be applicable to the liability claim. The law applicable to the tort action will generally be the *lex loci delicti*, the law of the jurisdiction where the harmful event took place. Although, in most cases, the applicable national law will identify serious human rights violations such as torture or forced labor as a tort or a delict, the reference to the *lex*

¹⁴⁸ For an admission of individual liability for such crimes, see *Kadic v. Karadzic*, 70 F.3d 232, 242-243 (2d Cir. 1995).

¹⁴⁹ In the *Tel-Oren* litigation which has just been mentioned, the Court of Appeals of Washington, D.C., refused to accept jurisdiction in the suit brought against Libya and the PLO by victims of a terrorist attack in Israel, on the basis that the PLO is not a “State” (Libya was judged to have immunity from the suit); the United States Supreme Court denied certiorari. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). See, D’Amato, “What Does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations is Seriously Mistaken,” 79 *A.J.I.L.* (1985), at 92; and Koh, “Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation,” 22 *Texas Int’l L.J.* (1987) 169, at 202-208. Other decisions are less clear in this respect: see, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

¹⁵⁰ *Xuncax v. Gramajo*, 886 F. Supp. 162, 182-83 (D. Mass. 1995). Still, the reference only to *jus cogens* norms—whilst, in fact, all universally recognized norms of international law may be invoked in ATCA suits—alerts us to the price which is to be paid as we seek to rely on the substantive norms of international law in such suits: only those norms of international law which are sufficiently detailed and specific to function as defining a standard of liability will be usefully invoked in such a context.

¹⁵¹ In the categories suggested by Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms,” in Scott, *supra* note 24, at 54.

loci delicti as the applicable law may create a difficulty where that law is insufficiently protective of the victims, either because the national legislation designed as applicable by the rules of private international law of the forum State tolerates (or even imposes) certain practices like gender discrimination, violations of freedom of association, or environmental damage, or when certain amnesties are granted in the applicable national legal system to those having committed the tortious acts. In these cases, however, the application of the foreign law will face the obstacle of the public policy of the forum: British courts, for example, consider that although courts should be “very slow to refuse to give effect to the legislation of a foreign State in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction,” a law constituting a grave infringement of human rights—at issue was a Nazi nationality law that deprived Jews outside Germany of their nationality—should not be recognized “as a law at all” by the courts in the United Kingdom.¹⁵² It may also be argued that the application, by European courts, of a foreign law which would entail gross violations of human rights, would constitute a violation of the obligations of the State of which these courts are organs under the European Convention on Human Rights.¹⁵³ At last, the principle of *lex loci delicti* may sometimes lead to the application of the law of the forum, even when victims of human rights violations seek to obtain damages from the parent company for having insufficiently exercised control on the activities of its subsidiary operating abroad, by suing where the

¹⁵² *Oppenheimer v. Cattermole*, [1976] AC 349.

¹⁵³ On this question, see Cohen, “La Convention européenne des droits de l’homme et le droit privé français,” *Rev. critique de dr. inter. privé* (1989), at 451; Mayer, “La Convention européenne des droits de l’homme et l’application des normes étrangères,” *Rev. critique de dr. inter. privé* (1991), at 651; Van Loon, “De wisselwerking tussen internationaal privaatrecht en rechten van de mens,” in *Grensoverschrijdend privaatrecht: Een bundel opstellen over privaatrecht in internationaal verband, Mélanges J. Van Rijn van Alkemade* (1993); Courbe, “Le droit international privé et les difficultés d’insertion de la Convention dans le système français,” in P. Tavernier (ed.), *Quelle Europe pour les droits de l’homme? La Cour de Strasbourg et la réalisation d’une union plus étroite (1950-1995)* (1996); Herzog, “Constitutional limits on choice of law,” 234 *R.C.A.D.I.* (1992), at 249; Docquir, “Le droit international privé à l’épreuve de la Convention européenne des droits de l’homme,” 4 *Ann. Dr. Lv.* (1999), at 473. In a case concerning the recognition by the Italian courts of a judgment adopted by the courts of the Vatican in violation of the right to a fair trial and the rights of defense of the applicant, the European Court of Human Rights found the situation imputable to the Italian State (Eur. Ct. H.R. (2nd sect.), judgment *Pellegrini v. Italy* (Appl. n° 30882/96) of 20 July 2001). In *Gentilhomme*, however, the applicants were complaining that their children, having both the Algerian and the French nationality (although Algeria does not recognize such situations of double nationality with respect to Algerian nationals), were denied access to French teaching institutions in Algeria after a unilateral decision in 1988 by the Algerian authorities to denounce a 1962 agreement between France and Algeria concerning cultural cooperation and providing for the education in French public teaching institutions of children defined as binationals according to French law. The Court considered that the French authorities had merely submitted to a decision taken by Algerian authorities and applicable on the national territory of Algeria, although of doubtful validity in regard to public international law. By accepting that decision, France had not exercised its “jurisdiction,” in the meaning of Article 1 of the Convention; the situation complained of, therefore, could not be imputed to France: “Les faits dénoncés en l’espèce, ... sont ... la conséquence d’une décision prise unilatéralement par l’Algérie. Quelle que soit la régularité de cette décision au regard du droit international public, elle s’analyse concrètement en un refus de l’Algérie de se conformer à l’accord du 19 mars 1962. Les autorités françaises, dont l’exercice en l’espèce de la “jurisdiction” sur le territoire algérien avait son seul fondement dans cet accord, n’ont pu qu’en tirer les conséquences quant à la scolarisation des enfants se trouvant dans la situation de ceux des requérantes. Bref, les faits dénoncés ont été causés par une décision imputable à l’Algérie, prise souverainement par elle sur son propre territoire et échappant au contrôle de la France. Autrement dit, dans les circonstances particulières de la cause, lesdits faits ne peuvent être imputés à la France” (Eur. Ct. H.R. (2nd sect.), judgment *Gentilhomme, Schaff-Banhadji and Zerouki v. France* (Appl. n°s 48205/99, 48207/99 et 48209/99) of 14 May 2002, § 20). The contrast between the two cases should not be exaggerated, however, as they can be distinguished on one crucial point: in *Gentilhomme*, the French authorities simply had no choice but to submit to the Algerian change of mood; in *Pellegrini* instead, the Italian courts were left with the possibility of choosing to recognize the annulment of the marriage or not.

defendant company is domiciled. Indeed, although the damages were effected abroad, the violation of the duty, at the origin of the liability claim, occurred in the forum State, where the parent company is domiciled.¹⁵⁴

*D. The question of the parent-subsidiary relationship and of the corporate veil*¹⁵⁵

In the context of legal suits alleging the civil liability of an EU-based corporation for acts committed outside the EU, one of the most difficult questions is that of the possibility of imputing the violation to that corporation, when it may have only an indirect relationship to the act causing the violation. The question of the imputability of the alleged violation committed abroad to the corporation domiciled in a Member State of the European Union will depend on the nature of the links which exist between the direct author of the violation and that corporation (whether the direct author of the violation is a branch of the above-said corporation, its subsidiary, or an autonomous entity enjoying variable degrees of independence) and the recognition given in doctrine to these links, when these are *de facto* rather than *de jure*.

The diversity of solutions may be summarized thus. The nature of the relationship between the direct author of the violation and the EU-based defendant corporation may be either societal (A) or contractual (B). A societal relationship is obviously present where the direct author of the violation is a mere branch or agency of the defendant corporation (A1). No problem of imputability exists in that case: the act will be directly imputed to the corporation which committed it, albeit in the course of business activities it leads outside the jurisdiction where it has its headquarters or where it is registered. Where the direct author of the violation and the EU-based defendant corporation have distinct personalities, however—and this will be the most frequent hypothesis—the issue is more complex (A2). The parent-subsidiary relationship still is societal rather than contractual, but there may be differing degrees of control of the parent corporation on the activities of its subsidiary. Piercing the corporate veil may be possible in some cases, for instance where the parent corporation fully owns the subsidiary or possesses above 50% of the shares of the subsidiary company, so that it is in a position to control effectively its activities, or where the board of directors of both companies is composed essentially or fully of the same individuals.

Where the link between the direct author of the violation and the EU-based defendant corporation is contractual rather than societal, this latter reasoning may still justify imputing the acts of the direct author of the violation to the corporation which, although it has no formal means of controlling the activity of that author, exercises a *de facto* influence on that activity—because of the economic dependency of the direct author on the defendant corporation.¹⁵⁶ Here, piercing the corporate veil must be understood not as identifying the formally existing relationships between two corporate

¹⁵⁴ Comp. with the *Mines de Potasse* case-law of the European Court of Justice (Case 21/76 *Bier v. Mines de Potasse d'Alsace*, [1976] ECR 1735), with respect to the interpretation to be given to Article 5 § 3 of the 1968 Brussels Convention—now Article 5 § 3 of Regulation n° 44/2001. The Court considered that the expression “where the harmful event occurred” which appears in that provision refers either to the place where the damage occurred or to the place where the event causing the damage occurred.

¹⁵⁵ See esp. Meeran, “The Unveiling of Transnational Corporations: A Direct Approach,” in M. K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), at 161; and by the same author, “Liability of Multinational Corporations: A Critical Stage in the UK,” in Kamminga and Zia-Zarifi, *supra* note 129, at 251.

¹⁵⁶ P. Muchlinski, *Multinational enterprises and the law* (1995), at 327.

entities having separate legal personalities, and thus as going beyond the reliance on the sole criterion of distinct legal personality: it must be understood, rather, as taking into account *de facto* control the defendant corporation could exercise on its subcontractor, because of the economic pressure it would be capable of exercising on that subcontractor (B1). A last situation is that of an existing contractual relationship between the EU-based defendant corporation and a subcontractor abroad, which allegedly violates human rights, but on which the former corporation is incapable of exercising an influence: in this case, one probably has to exclude attributing the act of the latter to the former, and despite the business relationship between the EU-based defendant corporation and the foreign company, it will be very difficult to assert that the European corporation is civilly liable for the damage caused by the violations committed by the foreign company (B2). This of course does not exclude that, where the EU-based defendant corporation participated in the decision causing directly the violation, or even did not react to information that such a decision would be taken when it would have been able to discourage it, the joint liability of the two companies may be asserted.

Of these four situations thus distinguished, two especially are problematic: those where, despite the distinct legal personalities of the EU-based corporation and the foreign corporation, the former exercises a *de jure* (A2) or *de facto* (B1) control on the latter such that it may be justified, in some instances, to attribute the acts of the foreign corporation to the European corporation. Whether or not such an attribution can be made will depend not only on the reality of the control exercised *in general* on the activities of the foreign corporation by the EU-based corporation, but also on the implication of this latter corporation, if any, *in the specific activity or business decision* of the foreign corporation which has led to the violation complained of. Between these two elements, we may postulate a relationship in the form of communicating vases. If the general level of control exercised by the EU-based corporation on its subsidiary (A2) or its subcontractor (B1) is sufficiently important, it will matter less if the particular act reproached to the foreign company was not adopted in the knowledge of the EU-based corporation: this corporation should have exercised due diligence on the activities of the foreign company, because of the *de facto* or *de jure* control it exerts on it. Conversely, if the control exercised by the EU-based corporation on its subsidiary or its subcontractor is weak, the act of the latter will be attributable to the defendant corporation only if it can be shown that, in the particular circumstances, it took an active part in the decision which led to the human rights violation for which reparation is sought, or at least was informed of that decision when it was made and did nothing to prevent it or discourage it. But we then will find ourselves in a classical case of joint liability, with two distinct liabilities of two separate actors which acted together.

The “unity of concern” or “enterprise” approach developed by the European Court of Justice in European Community competition law illustrates one route by which the corporate veil may be pierced where the corporation which is the direct author of the violation and the defendant corporation have distinct legal personalities, and where the latter seeks to shield itself from a legal suit by invoking that separation. But the doctrine also illustrates the communicating vases relationship just alluded to between the degree of effective control exercised by a company on another, and the implication of the controlling company in the specific act which may trigger its civil liability. Of course, the context in which the European Court of Justice developed this approach is quite distinct from ours. The “unity of concern” approach has led the European Court of Justice to consider that actions by subsidiaries could be imputed to the parent company if it appeared that the parent has actually acted through its subsidiary: following this approach, Articles 81 and 82 of the EC Treaty can reach certain undertakings, whether domiciled or not in the EU, which effectively control parties to an

agreement impeding competition within the common market¹⁵⁷ The question we are facing is not identical to that of the liability of the parent company domiciled outside the European Union for an anti-competitive behavior producing effects in the European Community.¹⁵⁸ In fact, ours is, to some extent, exactly the reverse question: it is whether the parent company domiciled within the European Union may be held liable for the acts committed abroad by its subsidiary, and, if the corporate veil may be pierced, under which conditions—which level of control by the parent company on the acts of its subsidiary, in other terms, will be considered sufficient for the unity of the enterprise to predominate on the distinctiveness of the separate legal personalities?

Despite the fact that the respective settings are clearly distinguishable, we may seek inspiration from the answer given to that question by the European Court of Justice. Consider, by way of example, the controversy which led to the *Stora* judgment of 16 November 2000. One of the submissions of *Stora Kopparbergs Bergslags AB*, the applicant company before the European Court of Justice, was that the Court of First Instance had erred in imputing to *Stora* the commercial policy of its wholly-owned subsidiary, *Kopparfors*, on the market of cartonboard. In paragraph 80 of the contested judgment, the CFI had reasoned that

80 In the present case, since the applicant has not disputed that it was in a position to exert a decisive influence on *Kopparfors*' commercial policy, it is, according to the case-law of the Court of Justice, unnecessary to establish whether it actually exercised that power. Since *Kopparfors* has been a wholly -owned subsidiary of the applicant since 1 January 1987, it has necessarily followed a policy laid down by the bodies which determine the parent company's policy under its statutes (see Case 107/82 *AEG v. Commission* [1983] ECR 3151, paragraph 50). In any event, the applicant has not submitted any evidence to support its assertion that *Kopparfors* carried on its business on the cartonboard market as an autonomous legal entity which determined its commercial policy largely on its own and had its own board of directors with external representatives.

The reasoning of the Court of First Instance, according to which a parent company detaining 100% of the shares of a subsidiary necessarily has the power to exercise a decisive influence on the policy of that subsidiary, so that there is a presumption of control which the parent company faces the burden of rebutting, is confirmed by the European Court of Justice in its judgment of 16 November 2000. It is useful, however, to locate this approach as an intermediate one on a scale of solutions. At one end of the scale, perhaps, there would be the idea that the corporate veil may not be pierced—that the attribution to the subsidiary of a distinct legal personality excludes holding another economic actor liable for its acts, except in situations of joint liability where, for whichever reason, the acts of the parent company have joined their effects with those of the subsidiary entity in creating the damage. This solution would not be realistic, or rather, its effect would be to ensure parent

¹⁵⁷ Case 48/69, *ICI v. Commission*, [1972] ECR 619, 692 ff. (Advocate General Mayras); Case 6/72, *Continental Can and Europemballage v. EC Commission*, [1973] ECR 215, para. 14-16; Joined Cases 67/73, *CSC and ICI v. Commission*, [1974] ECR 223, para. 26-31. See P. J. Kuyper, "European Community Law and Extraterritoriality: Some Trends and New Developments," 33 *I.C.L.Q.* (1984), at 1013.

¹⁵⁸ The "single economic unity" approach of the European Court of Justice is also used to exculpate companies from the accusation of violating the prohibition of agreements laid down in Art. 81 EC Treaty: where a subsidiary does not enjoy real autonomy, it cannot be said to have concluded an agreement with the parent company; the "agreement" will be analyzed, rather, as the division of tasks between a single economic group. In this respect the approach of the European Court of Justice is favorable to the companies of that group.

companies complete impunity for acts which not only they may have avoided by exercising due control on their subsidiaries, but which, moreover, they may have explicitly approved of or even instructed to commit. It would conflict the classical statement according to which

the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company ... in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.¹⁵⁹

At the other end of the scale, there would be the idea that once a parent company is in a position to effectively exercise a decisive influence on its subsidiary—because it owns 50% of the shares or more—any act of the latter should be imputable to the former, without there being any need to show that, in the particular circumstances of each case, the parent company gave guidelines or instructions to the subsidiary. This would totally subordinate the legal organization of the group of companies in separate legal entities to the economic understanding of the power relationships within the group.

Between these extreme solutions, a number of intermediate positions may be preferred, even in the specific situation of a wholly-owned subsidiary. For instance, one could consider that the effect of a 100% shareholding in the subsidiary implies per necessity that the competent organs in the parent company also determine the subsidiary's policy, irrespective of any other specific indicia of effective control on a particular act. Such a position could be read in certain judgments of the European Court of Justice.¹⁶⁰ One could also consider that a 100% shareholding must be combined with other elements—for instance the existence of a same management of the parent company and its subsidiary, or that “the parent company actually exercised the power to influence the conduct of the subsidiary which its control of the latter's shares conferred on it,” for imputability to exist.¹⁶¹ Or one could take the position that, although the acts of a totally-owned subsidiary are presumptively attributable to the parent company, the presumption is not complete, in that other indicia should be put forward to buttress the presumption of control and, thus, of imputability. This would appear to be the position of Advocate General J. Mischo in *Stora*: “although the Commission has the burden of proving that the parent company in fact exercised decisive influence over its subsidiary's conduct, that burden is eased in the case of 100% control. Something more than the extent of the shareholding must be shown, but it may be in the form of indicia,” indeed “When a parent company owns all the shares in another company, it can be assumed that it is much more probable that it will exercise tight

¹⁵⁹ Case 48/69, *International Chemical Industries*, [1972] ECR 619; Case 6/72, *Europemballage and Continental Can v. Commission*, [1973] ECR 215, para. 15.

¹⁶⁰ Case 107/82, *AEG v. Commission*, [1983] ECR 3151, para. 50. After having recalled its previous case-law to the effect that “the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company ... in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company” (para. 49), the Court goes on to say that the check “whether [the parent company] actually made use of this power” is superfluous in the case of a wholly-owned subsidiary, which “necessarily follows a policy laid down by the same bodies as [determine the parent company's policy]” (para. 50). In his opinion delivered on 18 May 2000 in the case of *Stora Kopparbergs Bergslags AB*, Advocate General J. Mischo summarizes this case-law as meaning that “a wholly-owned subsidiary necessarily follows a policy laid down by its parent company, so that the parent may have the subsidiary's conduct imputed to it without the need to show in any way that it gave instructions or guidelines to its subsidiary” (para. 18).

¹⁶¹ This seems to have been the position of *Stora Kopparbergs Bergslags AB* in Case C-286/98 P.

control over the subsidiary in regard to strategic decisions on pricing, salaries and major investments than that the parent company is not interested in such matters and that the subsidiary enjoys complete autonomy.”¹⁶² As already mentioned, the position of the European Court of Justice in *Stora*, supportive in that respect of the Court of First Instance, was that although “a 100 per cent shareholding in itself [is not sufficient] for a finding that the parent company was responsible,” nevertheless there may be circumstances where this situation operates to reverse the burden of proof, i.e., may legitimately lead one to suppose “that the parent company in fact exercised decisive influence over its subsidiary’s conduct.”¹⁶³ This position is close to that of Advocate General Mischo, but not identical: it seems that the European Court of Justice accepts that in certain situations, the fact that the parent company wholly owns a subsidiary and does not deny that the subsidiary lacks decisional autonomy may lead to a reversal in the burden of proof.

Depending on where precisely the line is drawn—and the special case of a wholly-owned subsidiary is, of course, not the one fraught with the most difficulties—we will arrive at different understandings of the scope of the obligation of the parent company to exercise a form of due diligence on the acts of its subsidiary. The question of imputability to the parent company of the acts of the subsidiary is, indeed, not a question of fact, but a normative question. The question is not: typically, which influence *does* a parent company exercise on the operations of a subsidiary under specified conditions? Rather, it is: which obligations, of which reach, do we decide we *want* to impose on parent companies with respect to the acts of their subsidiaries? A presumption of control, and thus of imputability, in certain situations, translates into the imposition of a duty on the parent company to exercise due diligence: it will be under an obligation to protect the human rights of those whom, being affected by the acts of its subsidiary, are within the “sphere of influence” of the parent company. The absence of any presumption of that kind, and the correlative requirement, in each case, to justify the imputability to the parent company of the acts of its subsidiary, will lead, conversely, to impose on the parent company only an obligation to respect human rights in the course of its activities: as long as the violations committed—elsewhere—by its subsidiary cannot be traced back to initiatives the parent company has taken, it will escape liability, as the legal persons remain distinct.

E. The future use of Regulation n° 44/2001 against MNEs domiciled in the EU

It will be recalled that the Resolution on “EU standards for European enterprises operating in developing countries: towards a European Code of Conduct” adopted by the European Parliament on 15 January 1999 does not mention, except for a vague passage in its Preamble, what was then the 1968 Brussels Convention. However, in the Resolution recently adopted—on 29 May 2002—on the Commission Green Paper on promoting a European framework for corporate social responsibility, the European Parliament, again on the basis of a report by R. Howitt,

Draws attention to the fact that the 1968 Brussels Convention [as consolidated in Regulation 44/2001 (OJ L 12, 16.1.2001, p. 1)¹⁶⁴] enables jurisdiction within the courts of EU Member

¹⁶² Opinion of Advocate General J. Mischo, delivered on 18 May 2000, para. 48-49.

¹⁶³ ECJ, 16 November 2000, *Stora*, para. 28-29.

¹⁶⁴ This precision lacks in the adopted resolution, although it figured in the proposed Motion for a Resolution included in the Draft Report on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (Committee on Employment and Social Affairs of the European Parliament, rapporteur: R. Howitt, 5 March 2002). I have no explanation for this change.

States for cases against companies registered or domiciled in the EU in respect of damage sustained in third countries; calls on the Commission to compile a study of the application of this extraterritoriality principle by courts in the Member States of the Union; calls on the Member States to incorporate this extraterritoriality principle in legislation.¹⁶⁵

The passage is rather encouraging. It invites us to consider the 1968 Brussels Convention, now codified as Regulation 44/2001, as pregnant with a “European ATCA,” an evolution which it presents as possible without further legislative changes.¹⁶⁶ The time is ripe, it seems, for legal actions on that basis. That neither the European Commission, in its Communication of 2 July 2002 concerning Corporate Social Responsibility,¹⁶⁷ nor the Council of Ministers in its Resolution on Corporate Social Responsibility of 3 December 2002,¹⁶⁸ allude to that possibility, should not constitute an obstacle.

5. The criminal liability on multinationals under European Union law

This chapter considers whether, and under which conditions, European Union law could encourage the development of the criminal liability of EU-based multinational enterprises in most extreme cases of corporate misconduct. In some cases, this route may be more promising than the track of civil liability.¹⁶⁹ First, the state apparatus will be put in service of the fight against impunity of corporations for human rights violations, which may more efficiently deter corporate misconduct and facilitate the burden imposed on victims to prove the reality of that misconduct. Second, affirming the criminal liability of the corporation as such may be, in many cases, preferable to affirming the criminal liability of particular individuals, for instance the directors of the company or the executives more immediately involved in the alleged mispractices where these took place. Finding the legal person responsible will ensure a more adequate compensation for the victims. It may ensure that the same violations will not be repeated in the future, especially where the sanctions imposed on the corporation include not only

¹⁶⁵ Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM(2001)366 – C5-0161/2002 – 2002/2069(COS)), para. 50. The two last sentences of this paragraph were adopted as an amendment proposed by A. Van Lancker, MEP from the Socialist Group.

¹⁶⁶ Comp. with the corresponding paragraph in an initial draft resolution on the Green Paper: the European Parliament in that first proposed motion for a resolution “Calls for the 1968 Brussels Convention to be reviewed in order to clarify the possibility of legal jurisdiction within European Courts for cases of corporate criminal liability involving the worst (and exceptional) cases of corporate negligence in third countries, where access to justice is limited.” This much more hesitant wording—which suggested, indeed, that the present text would not suffice to evolve towards a European ATCA—moreover presented the disadvantage of including a form of the *forum non conveniens* doctrine in the application of the jurisdictional rules of the 1968 Brussels Convention. Although the resolution is more assertive, it should be noted, however, that an amendment proposed by R. Howitt by which the E.P. “furthermore calls on the Commission to explore the possibility of bringing forward a liability directive to address liability of those multinational corporate groups that are headquartered in one or more EU Member States for serious environmental damage or injury to the health of people in third countries” was not adopted.

¹⁶⁷ COM(2002) 347 final.

¹⁶⁸ Employment, Social Policy, Health and Consumer Affairs Council, 2470th Council Meeting, Brussels, 23 December 2002, 14892/02 (Presse 376).

¹⁶⁹ See esp. on these advantages the Preamble to the Recommendation No R (88) 18 of the Committee of Ministers to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, adopted on 20 October 1988 at the 420th meeting of the Ministers’ Deputies. The Recommendation of the Committee of Ministers encourages the Member States of the Council of Europe to apply criminal liability and sanctions to enterprises, “where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require.”

fines but also confiscation of property or the closure of certain businesses. At last, it may prove very difficult, if not impossible, to identify within a complex corporate structure, comprising multiple levels of decision, whom is the individual directly responsible for the alleged violation, and whose criminal liability, therefore, could be engaged where the activities of the corporation lead to such a violation.

Of course, these reasons merely imply that extending the criminal liability of companies for human rights violations which may be imputed to them may be necessary for the effective protection against abuses from corporate conduct. It should be seen neither as a substitute for civil liability, which presents its own advantages,¹⁷⁰ nor for the criminal liability of the individuals directly responsible for the violations which occurred in the course of the corporate activity, whenever these individuals can be identified.

A. The example of extra-territorial criminal legislation on sexual exploitation of children

One of the instruments the Howitt Resolution of 15 January 1999 mentions in its Preamble is the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union (now Article 31 TEU) concerning action to combat trafficking in human beings and sexual exploitation of children.¹⁷¹ With respect to trafficking in human beings, the Joint Action has been superseded since by the adoption of a normative instrument, in the form of a Framework Decision adopted on 19 July 2002.¹⁷² The reference remains interesting because this is an example of an instrument adopted under Title VI of the Treaty on the European Union—now limited to police cooperation and judicial cooperation in criminal matters, previously concerning more broadly justice and home affairs—presenting three combined characteristics: it exemplifies the use of the competences of the European Union in the field of criminal judicial cooperation to ensure an adequate level of protection of fundamental rights; it defines the conditions of criminal liability of legal persons; and it encourages the Member States to adopt criminal legislation extending its reach beyond the national territory.

First, the Joint Action of 24 February 1997, and now the Framework Decision of 19 July 2002, are adopted with a view to guaranteeing fundamental rights: according to its Preamble, the Joint Action is adopted “Recalling Article 34 of the Convention on the Rights of the Child of 20 November 1989. Whereas trafficking in human beings and sexual exploitation of children constitute serious infringements of fundamental human rights, in particular human dignity.”¹⁷³ Article 34 of the Convention on the Rights of the Child provides, indeed, that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent [three listed forms of sexual abuse].” Harmonization between the Member States’ criminal legislations is required because it will facilitate judicial cooperation between the Member States, and thus effective law enforcement.

¹⁷⁰ See Jägers, *supra* note 225, at 212-214.

¹⁷¹ OJ 1997 L 63/2.

¹⁷² Council Framework Decision (2002/629/JHA) of 19 July 2002 on combating trafficking in human beings, OJ 2002 L 203/1.

¹⁷³ See also the 3d Recital of the Preamble to the Framework Decision of 19 July 2002.

Second, the Joint Action imposes on each Member State not only to ensure that certain defined forms of behavior are made criminal offences punishable by “effective, proportionate and dissuasive criminal penalties,” but also that

legal persons may, where appropriate, be held administratively liable in connection with the offences listed in [the Joint Action] or criminally responsible for such offences, committed on behalf of the legal person in accordance with modalities to be defined in the national law of the Member State. That liability of the legal person is without prejudice to the criminal responsibility of the physical persons who have been accomplices in or instigators of those offences.¹⁷⁴

Sanctions against legal persons may include confiscation of property or temporary or permanent closure of establishments which have been used or intended for committing such offences.

Third, the Joint Action imposes on Member States to give extra-territorial effect to their national criminal provisions concerning trafficking in human beings and sexual exploitation of children¹⁷⁵ With the exception of one of the offences listed in the joint action, the States must provide that their authorities will be competent not only when the offence is committed on their national territory, but also in cases where the person committing the offence is “a national or a habitual resident of [the] Member State.”¹⁷⁶ Although the Member State may provide that the adoption or the exercise of such an extra-territorial competence will depend on whether the offence is also punishable under the law of the State where it was committed, this exception to the rule of extra-territorial jurisdiction will only be admitted where another solution, not including this exception, would be “contrary to the established principles of [the concerned State’s] criminal law relating to jurisdiction.” Moreover:

Where a Member State maintains the requirement of double criminality ... it shall keep its law under review, with a view to ensuring that this requirement is not an obstacle to effective measures against its nationals or habitual residents who are suspected of engaging in such offences in jurisdictions which may not have taken adequate measures as referred to in Article 34 of the Convention on the Rights of the Child of 20 November 1989.

This requirement of extra-territorial incrimination, however, remains wholly within the boundaries which, arguably, are set by public international law to such an expanded prescriptive and adjudicative jurisdiction.¹⁷⁷ Indeed, although the definition of these boundaries remains a matter for controversy after the International Court of Justice failed to address this question in the case of the *Arrest*

¹⁷⁴ Title II, A, c), of the Joint Action.

¹⁷⁵ See also Recommendation Rec(2001)16 on the protection of children against sexual exploitation, adopted by the Committee of Ministers of the Council of Europe on 31 October 2001 at the 771st meeting of the Ministers’ Deputies, encouraging the Member States of the Council of Europe to “consider taking such measures as may be necessary in order to establish extra-territorial jurisdiction over the offences defined under article 2. *c, d* and *e* in cases where: *a.* these offences are committed by their nationals; *b.* these offences are committed by any person who has his/her habitual residence on their territory; and, as appropriate, *c.* the victim is one of their nationals.” The Member States are also requested to “Consider the possibility of establishing jurisdiction over offences of sexual exploitation of children, also in cases where the facts are not punishable under the law of the state where they are committed in particular on account of the age of the victim” (§ 64).

¹⁷⁶ Title II, A, f), of the Joint Action.

¹⁷⁷ I use here the term “prescriptive jurisdiction,” in conformity with the distinction C. Scott suggests between “enforcement jurisdiction,” “prescriptive jurisdiction,” and “adjudicative jurisdiction,” already mentioned above.

Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),¹⁷⁸ it is undisputed that, aside from criminalizing certain forms of conduct which occur within its national territory (territoriality principle), a State may adopt legislation criminalizing certain conducts when adopted by its nationals, wherever that conduct takes place (active personality principle of jurisdiction); that it may extend the reach of its criminal legislation to acts committed outside the national territory when the victims are its nationals (passive personality principle of jurisdiction); and that it may enact criminal legislation intending to protect certain very important interests of the State (protective principle of jurisdiction).

Thus, the Joint Action of 1997 and the Framework Decision of 2002—which also contains such a principle of extra-territorial legislation¹⁷⁹—are perfectly compatible even under the most restrictive reading of which territorial scope of application a State may give its criminal law. Not only is it normally admitted for a State to exercise a form of personal jurisdiction on its nationals even with respect to their activities outside the national territory—the Joint Action only slightly expands the traditional rule by including jurisdiction on “habitual residents”—but, moreover, the compulsory exercise of such competences by the authorities of the Member State is defined so as to make their intervention subsidiary to that of the authorities of the State where the offence was committed: the Member States having adopted the Joint Action may provide that double incrimination will be required—within the limits just mentioned, especially those imposed by the Convention on the Rights of the Child which requires effective protection of the child from sexual exploitation; and they may decide, moreover, that the extra-territorial jurisdiction will only be exercised “if certain procedural conditions are fulfilled, or where the alleged offender cannot be extradited because of a refusal by the Member States concerned to comply with a request for extradition made by the State where the offence was committed, or a confirmation by that latter State that it does not intend to request the extradition of the alleged offender, or failure by that State to request the extradition of the alleged offender within a reasonable time.”¹⁸⁰ Moreover, as the reference to the Convention on the Rights of

¹⁷⁸ In that case, one of the arguments initially put forward by Congo was that “The universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law [of 16 June 1993]” constituted a “violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.” However, Congo dropped this argument in the later developments of the proceedings. In its judgment of 14 February 2002, the International Court of Justice therefore considers that “in view of the final form of the Congo’s submissions, the Court will address first the question whether, *assuming that it had jurisdiction under international law to issue and circulate the arrest Warrant of 11 April 2002* [delivered against the then Minister for Foreign Affairs A. Yerodia], Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo” (para. 46). In her dissenting opinion, the *ad hoc* judge for Belgium, Ms. Van den Wyngaert, vehemently criticized this methodology. In her view, not only should the International Court of Justice have addressed the question of whether or not Belgium was in violation of international law by recognizing its courts have universal jurisdiction for certain crimes of international law; it should also have answered that question in the negative.

¹⁷⁹ Under Article 6(1) of the Framework Decision (*supra* note 172), “Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in Articles 1 and 2 where: (a) the offence is committed in whole or in part within its territory, or (b) the offender is one of its nationals, or (c) the offence is committed for the benefit of a legal person established in the territory of that Member State.” The latter two grounds of jurisdiction are optional, however, when the offence is committed outside the territory of the Member State concerned: see Art. 6(2).

¹⁸⁰ Title II, D, of the Joint Action.

the Child indicates, there exists on the question of combating “sex” with children such a consensus worldwide that the extraterritoriality of the legislation may be easier to defend.¹⁸¹

B. The added value of harmonization at the level of the European Union

Notwithstanding the specificity of combating sexual exploitation of children, it should be obvious that these different characteristic features of the Joint Action of 24 February 1997 could furnish the basis for a similar initiative with a view to harmonizing the criminal legislations of the Member States of the European Union in the field of violations of human rights committed abroad by MNEs incorporated in the EU. Leaving aside here the state of the public opinion, there are essentially two differences between both issues. First, it is at best doubtful whether Article 31 TEU provides a legal basis for the adoption of an act (a framework decision probably) seeking to harmonize the criminal legislation of the Member States of the EU with respect to human rights violations committed by legal persons. Our question should be, therefore, not what we should do in the existing constitutional framework, but whether the framework we have should be changed to make such an initiative possible. Second, the adoption of such an instrument under Title VI of the TEU would lead the Member States to expand their criminal legislation much further than they were required to do so after the adoption of the 1997 Joint Action on sexual exploitation of children, and perhaps, in some States, to adopt wholly new provisions in their criminal codes to target particularly egregious forms of corporate conduct. But this in fact pleads in favor, rather than against, such an initiative at the level of the European Union. Could it not be presumed that, if the Member States acting separately are slow to criminalize corporate conduct violating human rights, and even more so to adopt legislation having an extra-territorial scope to that effect, it is because it would be extremely costly for them to do so? Should they not act together, therefore, if, acting alone, they are paralyzed? Could it not be considered, moreover, that important differences of attitude between Member States with respect to human rights violations committed by companies domiciled under their jurisdiction may justify an initiative by the European Union because of the distortions of competition these differences may entail between these companies, according to the Member State where they are established, at least in a context where extra-territorial legislation is essentially based on the active personality principle rather than on a principle of universal jurisdiction?¹⁸²

The Belgian example may serve to illustrate the added value which could result from the adoption of an instrument in the European Union. Between 1993 and 2003, there existed a law attributing

¹⁸¹ Craig Scott rightly notes that “The more consensus there is of a common international interest in a specific form of legal sanction with respect to specific subject matter the more that this will count in favour of the acceptability of extraterritorial regulation.” Referring to sexual exploitation of children, the author continues: “The real question now is not whether states are permitted to regulate their nationals’ conduct but whether they have a duty to do so as an extension of their duty to ensure human rights. The more debate focuses on this question, the more it is reasonable to assume that states at least have (prescriptive and adjudicative) jurisdiction over their nationals’ behaviour.”

¹⁸² Comp. with the opinion of the European Parliament according to which “the legal and tax provisions of certain Member States which allow tax deductibility for bribes paid in third countries are totally contrary to the Treaty, particularly as regards the provisions concerning aid granted by Member States, since they distort or threaten competition by favouring particular undertakings or products” (Resolution of 6 October 1998 on the communication from the Commission to the Council and the European Parliament on a Union policy against corruption (COM(97)0192 – C4-0273/97) (A4-0285/98), Preamble, Recital N (OJ 1998 C 328/46)).

“universal” jurisdiction to the Belgian courts for war crimes.¹⁸³ Initially limited to war crimes, the law was further extended in 1999 to cover the crime of genocide, as defined by Article 2 of the Convention of 9 December 1948 and Article 6 of the Treaty of Rome containing the Statute of the International Criminal Court, and crimes against humanity, the definition of which is borrowed from Article 7 § 1 of the same Statute.¹⁸⁴ It is a procedure launched under this law against the then Minister for Foreign Affairs of Congo, A. Yerodia, which led the Democratic Republic of the Congo to file proceedings against Belgium before the International Court of Justice, in the *Arrest Warrant of 11 April 2000 Case* already referred to. The Law on serious crimes against international humanitarian law has been combined on two occasions with the Law of 4 May 1999 on the criminal liability of legal persons.¹⁸⁵ A first complaint was filed in October 2001 against the president of Congo-Brazzaville, Denis Sassou Nguesso, for crimes against humanity committed during and after the civil strife of 1997. The French company TotalFinalElf is mentioned as complicit, for the logistical support it would have offered to the main defendant. A second complaint was filed in May 2002, this time against unidentified authors of crimes against humanity, including acts of torture, arbitrary killings and slavery, in Myanmar (ex-Burma), with TotalFinaElf and two of its executives designated as accomplices. These lawsuits, as well as a number of other legal actions based on the Law of 16 June 1993 which appeared politically motivated and were considered an embarrassment to the Belgian diplomacy, led to severe pressures being exercised for the revision of the “universal jurisdiction” this legislation provided for. The world of business especially denounced the Law of 1993 as creating in Belgium a climate inhospitable to MNEs deploying activities in different parts of the world, including in countries and under regimes where, because of the abuses committed by the government or with its approval or tolerance, it would be very difficult to be an investor without facing the threat of being accused of complicity with these abuses.¹⁸⁶

As a result of these pressures, the 1993 Law, after having been expanded in 1999, was seriously restricted in 2003. Leaving the terrain of “universal jurisdiction,” the Law of 5 August 2003¹⁸⁷ modifies the Law of 1993 by introducing a requirement that some form of link must exist between the situation complained of and the Belgian legal order. Three alternative possibilities are now open: either the author is a Belgian national or resides in Belgium, legally or not, when the prosecution commences against him/her (active personality principle); or the victim is a Belgian national or resides in Belgium for three years at least at the moment the violations occur—but whether or not a complaint of the victim may lead to a criminal investigation will depend in this case on an appreciation by the prosecution authorities whether or not the complaint is admissible and whether there is no alternative forum available (passive personality principle); or the author of the violations is found on the Belgian territory, where a conventional or customary rule of international law admits of that

¹⁸³ 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, *M.B.*, 5 August 1993. See esp. Andries, David, Van den Wijngaert and Verhaegen, “Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire,” *Rev. dr. pén. et de crim.* (1994), at 1114; and David, “La loi belge sur les crimes de guerre,” *R.B.D.I.* (1995), at 668.

¹⁸⁴ Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire, *M.B.*, 23 March 1999. See P. d’Argent, “La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire,” *Journal des tribunaux*, 1999, at 549.

¹⁸⁵ Loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales, *M.B.*, 22 June 1999.

¹⁸⁶ See Wouters and De Smet, “De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het licht van de Belgische Genocidewet,” in E. Brems and P. Vanden Heede (eds.), *Bedrijven en mensenrechten. Verantwoordelijkheid en aansprakelijkheid* (2003) 309.

¹⁸⁷ Loi du 5 août 2003 relative aux violations graves du droit international humanitaire, *M.B.*, 7 August 2003.

ground of jurisdiction of Belgian courts. These modifications restrict the scope of application of the Belgian Law on serious crimes against international humanitarian law, which in its present form does not provide for “universal jurisdiction” at all. This is a step backwards in the fight against impunity for crimes of international law, which is hardly compensated by the almost simultaneous entering into force of the Rome Statute of the International Criminal Court. By making these changes, Belgium wished to reassure certain countries whose officials had been threatened by the 1993 Law. But it also intended to protect its attractiveness to companies, which may have been discouraged from investing in Belgium or locating their domicile in Belgium, where they also conduct activities in foreign jurisdictions where they may be found to be complicit in human rights abuses. However, another route could have been preferred. It would have been to insist on the adoption by the other Member States of the European Union of similar legislation, to share between European States the burden of offering a forum to the victims of the most serious human rights violations wherever they take place.

It is true that none of the relevant international instruments—the Geneva Conventions of 1949 and their additional Protocols of 1977, the 1948 Convention on the Prevention and Repression of Genocide, the 1984 Convention against Torture or the 1998 Statute of the International Criminal Court—imposes on the States Parties to adopt the principle of a truly *universal* jurisdiction for the crimes they identify, although they may impose, to some extent, the extra-territorial application of the provisions in national legislation which criminalize these acts.¹⁸⁸ However, neither does Article 34 of the United Nations Convention on the Rights of the Child, which relates specifically to sexual exploitation of children, nor any other provision of that instrument, impose on States Parties to adopt extra-territorial legislation to combat certain forms of violations of the rights of the child, and the Joint Action of 24 February 1997 was nevertheless adopted with a view to giving effect to that provision. To move towards European harmonization, there is no need to have to fulfill an international obligation imposed on the Member States: it is enough that the required legal basis exists and that the intervention of European Union law presents an added value, in comparison to what Member States could achieve individually. As the Joint Action on the trafficking in human beings and sexual exploitation of children shows, moreover, this added value may reside in facilitating the fuller respect by the Member States of their international obligations.¹⁸⁹

¹⁸⁸ Article 5, § 1, b), of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985), 1465 UNTS, at 85, provides that each State party shall establish its jurisdiction over acts of torture “when the alleged offender is a national of that State.”

¹⁸⁹ It is doubtful, but cannot be excluded wholly, that in some future, the States parties to the European Convention on Human Rights may be under an obligation to provide access to a court to victims of the most serious forms of human rights violations, constituting violations of peremptory norms of international law (*jus cogens*), including the prohibition of torture, when no rule of international law imposes to recognize an immunity to the defendant (see Clapham, “Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts,” in Scott, *supra* note 24, at 513; as well as the “Postscript” by the same author, esp. on *Al-Adsani*, at 721-722). Indeed, the judgment of the European Court of Human Rights in *Al-Adsani v. the United Kingdom* leaves the question open. In that case, the Court declared that it had not been provided with “a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of torture”—but this could be read to mean that, should an action be launched against an *individual* rather than a *State*, at least when the defendant enjoys no immunity imposed by public international law (see ICJ, *Case concerning the Arrest Warrant of 11 April 2000*, judgment of 14 February 2002, *supra* note 178), the British courts should have declared themselves competent. The European Court of Human Rights itself suggests that this could be a valid distinction: it noted that the courts of the United Kingdom, in the *Pinochet* case, “held that, after the Torture Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no

In fact, Belgium offers a second example equally worth mentioning at this juncture. A Bill has been introduced in the House of Representatives, which, according to its title, seeks the “universal criminalization of certain violations of fundamental social rights.”¹⁹⁰ The objective is to build on the emergence of certain norms considered of universal applicability in the field of social rights—the eight core conventions of the International Labour Organisation, the essential content of which is reiterated in the Declaration on the Fundamental Principles and Rights at Work of 18 June 1998—to extend the notion of “universal” jurisdiction to the violation of those norms—or to extend it, more precisely, to the violation of the Belgian national legislations which correspond to these norms. The principle is that all persons, whichever their nationality, having violated these norms—including legal persons, after the entry into force of the previously mentioned Law of 4 May 1999—can be prosecuted in Belgium if they are found on the Belgian territory. There is no requirement of double incrimination: the norms the violation of which is sanctioned are universally accepted by the international community, so that it would not constitute an encroachment on the sovereignty of other States to promote their universal respect.

What are the chances of such a Bill being adopted? It will immediately be seen that it faces two kinds of critiques, apparently in contradiction with one another, in fact perfectly complementary. One critique would be that, by adopting such a law, Belgium would be choosing a protectionist attitude in the field of social rights: the law, disguised behind altruistic motives, would in fact be promoting the self-interest of the Belgian—or, more largely, the Northern—workers. Another critique would be that the adoption of such a law, especially if it does lead to some well-publicized prosecutions, would scare off from Belgium a part of the business world: it would therefore not be in the interest of Belgium to adopt it. Both these critiques in fact are directed at the falsely ingenuous departure point of the law, according to which any State may take on itself to promote the universal respect of certain norms the universal character of which is recognized. This position, which constitutes the most obviously available answer to both critiques, in fact neglects the gap between the existence of universal norms such as freedom of association, non-discrimination in employment, prohibition of child labor or of forced labor, and the rather diverse implementation of these norms in different parts of the world. Here, again, the promotion of such a legislation at the level of the European Union would be much more favorable, both for reasons of efficacy—if the purpose is truly to deter, by imposing a criminal liability on the offenders, certain acts constituting a violation of fundamental social rights as recognized by the ILO—and for policy reasons—if one wishes to avoid that a single Member State will attract all the criticism generally addressed to extra-territorial legislations for the legal imperialism it manifests. Simply put: action may be required at the level of the Union, because a Member State acting individually, even if it is genuinely motivated by a wish to promote universal respect of an internationally recognized right, may simply not be in a position to do so.

immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But ... that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts” (para. 65, referring to the judgment of the House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* judgment of 24 March 1999 [2000] AC 147).

¹⁹⁰ Proposition de loi insérant un article 10quinquies dans le titre préliminaire du Code de procédure pénale, en vue de l’incrimination universelle de certaines violations des droits sociaux fondamentaux, *Ch.*, sess. 1999-2000, doc. n° 0315/001, 9 December 1999.

C. Imposing criminal liability of corporations for human rights violations

If it is agreed that an initiative from the European Union would be desirable to encourage the Member States to adopt legislation imposing a criminal liability on corporations for serious human rights violations committed either at home or abroad, which characteristics should such an initiative present? Three questions are to be considered: the form of extra-territoriality which would be most desirable; the norms the violation of which should lead to criminal sanctions; and the relationship between the criminal liability of the corporation and the criminal liability of the individuals within that corporation who are directly responsible for the violations which have been committed.

The EU initiative which is called for should base the jurisdiction of the Member States, ideally, not only on the normal territoriality principle, but also on the active personality principle: the national courts should have jurisdiction on the nationals of the forum State, or on the corporations established in that State.¹⁹¹ This form of extra-territoriality, short from universal jurisdiction, would nevertheless be “pure” extra-territoriality, in that it would not require double incrimination.¹⁹² Such a solution should be seen as a compromise between territoriality of the offence as the sole basis for jurisdiction and pure universal jurisdiction, whichever the place of the offence, the nationality of the author, and the nationality of the victim. It would avoid the hypocrisy of the first solution, in which our MNEs are authorized to inflict upon others what we refuse them to do to our workers and communities at home. But it would also escape the accusation of protectionism and judicial imperialism so easily thrown at the second solution: in effect, by imposing extra-territorial jurisdiction based on the active personality principle, the European States would be imposing on “their” MNEs an obligation to respect certain fundamental rights when operating abroad, directly or through subsidiaries, without imposing the respect of these norms directly on third States; and an exception could be provided, with respect to fundamental rights which are neither part of peremptory norms of international law nor binding on the host State by virtue of the international conventions that State adhered to, when the national legislation of the host State imposes that certain restrictions be brought to these rights. Such a conception of permissible extra-territoriality would appear to be compatible with the present state of international law, including the principle of comity between nations.¹⁹³

¹⁹¹ See Art. 6(1) of the Framework Decision (2002/629/JHA) of 19 July 2002 on combating trafficking in human beings, *supra* note 172.

¹⁹² Van den Wijngaert, “De toepassing van de strafwet in de ruimte. Enkele beschouwingen,” in *Liber amicorum Frédéric Dumon* (1983), at 516.

¹⁹³ In the context of the OECD, the Member States have agreed, under the 21 June 1976 Declaration on International Investment and Multinational Enterprises, to “co-operate with a view to avoiding or minimising the imposition of conflicting requirements on multinational enterprises” (para. III). Under the General Considerations concerning conflicting requirements imposed on multinational enterprises, it is stated that “In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries should,” *inter alia*, “have regard to relevant principles of international law,” and “endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries.” It is further stated in a note that “Applying the principle of comity, as it is understood in some Member countries, includes following an approach of this nature in exercising one’s jurisdiction.” Although these considerations apply formally only between the Member States of the OECD, they may be seen as an interpretation of the relationship of extra-territorial jurisdiction with the principle of comity. The OECD Guidelines, especially as revised in June 2000, will be discussed further in broader detail.

A second question concerns the identity of the norms the violation of which by corporations operating from the EU to conduct activities abroad could justify imposing on them a criminal liability. Essentially the same criteria as have inspired the United States federal judiciary in interpreting the notion of “law of nations” in the context of the Alien Tort Claims Act should be relied upon. First, the norms in question should benefit almost universal recognition—universal recognition should not be confused, of course, with universal obedience.¹⁹⁴ It would be both unadvisable and impractical to have the Member States impose on “their” companies obligations which go beyond these universally recognized norms of international law. Indeed, at least in some extreme cases and with respect to certain environmental or social norms, this would put these EU-based corporations at a disadvantage in comparison with their competitors based in other, more tolerant jurisdictions, with the implication that the political support for the imposition of such extended obligations may be difficult to find, and that some corporations might even be tempted to delocalize their headquarters. Moreover, because of the impression of legal imperialism necessarily entailed by the adoption of an extra-territorial legislation, especially of a criminal sort, it may be opportune to base such legislation on universally recognized norms of international law, to escape the reproach of wishing to impose one’s own values—for instance one’s values as to how to conduct ethical business—on other States. At last, the more universal the norms are which extra-territorial legislation adopted by the home State of a multinational enterprise seeks to impose wherever the activity takes, the less there is a risk of conflicting requirements being imposed on the same business activity.¹⁹⁵

Second, the international norms on the basis of which the incriminations could be based would need to be implemented at a sufficient level of specificity to lend themselves to the imposition of criminal sanctions in cases of violation. It should be emphasized, however, that it is not the international norm which would need to be specific, as in the case of the ATCA where international law directly serves as a basis for a civil action in tort liability lodged with the United States courts. The suggestion here is, rather, that a right such as the right to health, although defined in relatively vague terms in the International Covenant for Economic, Social and Cultural Rights, may—by its very presence in the Covenant—justify recognizing an extra-territorial reach to certain provisions from the criminal code of an EU Member State, for example with respect to the marketing of dangerous products or environmental pollution detrimental to the health of the population. What needs to be universal is the fundamental right the effective protection of which justifies the adoption of extra-territorial criminal legislation. What needs to be specific is the precise incrimination, which in the typical case will rely on norms more detailed and complete than the international norm itself—although rights such as the right to respect for private or family life, freedom of expression or freedom of association may well constitute exceptions.

A third question is that of the relationship between the criminal liability of the legal person as such for certain severe violations of human rights, and that of the natural persons who are the direct authors of

¹⁹⁴ An adequate starting point for the listing of such international norms, both benefitting almost universal recognition and relevant for the conduct of companies may be found in the European Parliament’s 15 January 1999 Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct (rapporteur R. Howitt) (A4-0508/1998, *OJ* 1999 C 104/176), at para. 12.

¹⁹⁵ The risk should not be overestimated. The sheer lack of adequate protection of certain fundamental rights, in the legal system of certain jurisdictions, does not lead to conflicting requirements being imposed on economic actors conducting activities there: it is only if the law of the host State imposes certain violations that the conflict arises. In any event, the extra-territorial legislation envisaged could provide for an exception in such cases, unless the local rule is in violation of a peremptory norm of international law.

the violation complained of. Any definition of this relationship should take into account two conflicting requirements: first, of course, to ensure that the criminal liability of the legal person serves a useful effect, i.e., is not so narrowly defined that it will be in most cases impossible to engage; second, however, there is a need to avoid any sense of collective punishment, where one individual uses his or her position within a company as a shield to escape his or her own liability, or uses the company apparatus and operational resources to commit offences for the purely private purposes he or she has.¹⁹⁶ The need to steer away from collective responsibility justifies the Principle, formulated for instance by the 1988 Recommendation of the Committee of Ministers of the Council of Europe to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, according to which “The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission” (Principle I.4). Therefore, although the criminal liability of the enterprise may help to attain certain objectives of the criminal law and augment both its dissuasive effect and the chances of reparation of the victims, which will even justify the imposition of a criminal liability of enterprises “for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise,” not all faults of its employees can be imputed to the company: either the “directing minds” of the company must have played a role in the commission of the offence—in the vocabulary of the common law¹⁹⁷—or the company must have failed to exercise due diligence on the activities of its employees.

These principles have now gained common acceptance.¹⁹⁸ They clearly also guide Article 4 of the Framework Decision of 19 July 2002 on combating trafficking in human beings, which states under the heading “Liability of legal persons” that “Each Member State shall take the necessary measures to ensure that legal persons can be held liable” for the offences identified in the Decision, “committed *for their benefit* by any person, acting either individually or as part of an organ of the legal person, *who has a leading position within the legal person*, based on: (a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person”—and then adds that, apart from that situation where the “directing minds” of the enterprise have played a role in the offence, “each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision

¹⁹⁶ It will be noted, in relation to the use of the expression “collective punishment” in this context, that the sanctions usually imposed on legal persons found criminally liable, such as the exclusion from entitlement to public benefits or aid, the disqualification from the practice of commercial activities, or the temporary or permanent closure of establishments which have been used for committing the offence (see Art. 5 of the Framework Decision (2002/629/JHA) of 19 July 2002 on combating trafficking in human beings, *supra* note 179), will affect not only the legal person as such, but also—per definition—all its employees, who will suffer the economic consequences of the losses entailed and may, for instance, be laid off as a consequence of a liability which is not theirs personally.

¹⁹⁷ G. Ferguson, “Corruption and Corporate Criminal Liability,” paper presented at the conference *Corruption and Bribery in Foreign Business Transactions: A Seminar on New Global and Canadian Standards*, 4-5 February 1999, Vancouver, Canada, at 6. Cited in M. Wagner, “Corporate Criminal Liability: National and International Responses,” International Society for the Reform of Criminal Law 13th International Conference, *Commercial and Financial Fraud: A Comparative Perspective*, Malta, 8-12 July 1999.

¹⁹⁸ See also, e.g., Article 9 § 1 of Council of Europe Convention on the Protection of the Environment through Criminal Law of 4 November 1998 (E.T.S., n° 172), stating that “Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in [the provisions of the Convention defining certain environmental offences] has been committed by their organs or by members thereof or by another representative.” On 1 June 2002, only one State (Estonia) has ratified the Convention, which should be ratified by at least 3 States before it may enter in force.

or control” by a person having such a leading position in the company “have rendered possible the commission of [the offence] for the benefit of that legal person by a person under its authority.”

In sum, there would be few difficulties if the choice was made by the European Union to invite the Member States to adopt certain measures to ensure that certain forms of corporate conduct, leading to severe violations of human rights, are made punishable by criminal legislation applicable not only in the territory of each Member State, but also to the conduct of corporations established in a Member State, even when the conduct takes place outside the territory. It is true that, in the present form of the treaties, an adequate legal basis may still be lacking. This should be remedied. But the questions of principle raised by such an initiative—to ensure the effectiveness of which norms, by which form of extra-territoriality, with which combination of individual and corporate responsibility—have met their answers in other contexts. None of the problems which would be met seems insuperable.

6. The voluntary contribution of multinationals to the promotion of human rights: codes of conduct

Codes of conduct have acquired, deservedly, a bad reputation in human rights circles. When they are self-designed by the concerned companies, when they lack any independent and public monitoring mechanism, they are, indeed, merely public relations exercises. Their sudden proliferation is suspicious: by adopting codes of conduct and presenting self-regulation as the most adequate way for them to accept social responsibility, are companies not avoiding the drive towards the regulation of their activities? However, although it is essentially well-founded, the difficulty with this across-the-board condemnation of codes of conduct is that it fails to distinguish between different types of codes, and the different control mechanisms their adoption can be combined with to give them effect. It will be useful, then, to present the variety of techniques which fall under the notion of “codes of conduct,” so as to identify the conditions under which these may be said to serve a useful purpose, rather than simple window-dressing.

A. The 1977 Code of Conduct for EU enterprises operating in South Africa

An historical example offers a point of departure. After the United Kingdom joined the European Communities in 1973, the Community—inspired by the British example of the Code of Practice which was then being imposed on U.K. firms having subsidiaries operating in South Africa—adopted (on 20 September 1977) a Code of Conduct¹⁹⁹ with the same philosophy: under the growing pressure of the public opinion to boycott South Africa or, at least, to stop investing there, the purpose was to guarantee that the economic actors operating under the regime of apartheid would respect certain principles and thus not become complicit in racial discrimination.²⁰⁰ The Code was adopted under the European Political Cooperation (EPC), the predecessor of the Common Foreign and Security Policy (CFSP) introduced with the Maastricht Treaty. Given the extreme fragility of the European foreign policy at the time, the adoption of the Code of Conduct was considered to be a success, notwithstanding its important limits. The Code, which was to be voluntarily adopted by European businesses operating in South Africa—although a minority of the Member States and the

¹⁹⁹ *Bull. EC*, 9-1977, at 50.

²⁰⁰ On the context of the adoption of the Code, see M. Holland, *European Union Common Foreign Policy: From EPC to CFSP Joint Action and South Africa* (1995), at 36-39.

European Parliament strongly advocated a mandatory code—covered a number of employment practices, imposing, for example, freedom of association (including the recognition of black trade unions), desegregation in the workplace or minimum wage levels. Under Article 7 of the Code, the firms agreeing to abide by the Code were to report annually on its application: the report was to mention the number of Black Africans employed in the undertaking and comment on the progress made in each of the six fields covered by the Code. These reports were to be transmitted to the national governments. This implementation by the Member States, each government receiving reports from its own enterprises, of the Code of Conduct soon appeared to constitute one of its main handicaps: Martin Holland notes that, behind the impression of a common uniform measure, “there were serious discrepancies in application between member states resulting in superficial uniformity”;²⁰¹ a Resolution adopted soon after the Code of Conduct was first inaugurated mentions that a uniform application of the Code is required if distortions in competition between European enterprises operating in South Africa are to be avoided.²⁰² Although improvements were brought to the system when the Code was revised in November 1985, by the introduction of a more detailed common reporting format to ensure uniformity in firm reporting, by involving the national parliaments, the European Parliament and the Economic and Social Committee in the annual reporting process, and by providing for a consultation between the diplomatic representations of the Member States in South Africa,²⁰³ this remained a difficulty throughout the period of existence of the Code.

The creation of a transitional government in South Africa in 1993 led to the abandonment of the requirement of formal reporting under the Code of Conduct, which had by then outlived its purpose. The results of a decade and a half of implementation of the Code appeared to be extremely meager. Not only did the number of employees covered by the Code diminish after 1985-1986, when the divestment policy was adopted, but moreover the objectives set by the Code were hardly met during the period: in 1990 still, ‘universal recognition of black trade unions was absent; the use of migrant labour continued to represent 10 per cent of the Community’s black workforce; 2 per cent of employees were still paid below the recommended minimum ‘supplemented living level (SLL)’; and ‘a small number of companies ... had not yet achieved full desegregation’ as required by section 6 of the Code.’²⁰⁴ Almost from the start, the Code of Conduct was criticized from certain business circles and conservative political groups as impeding the competitiveness of European enterprises in South Africa; and at the same time, it was dismissed by progressives as inspired by an outmoded paternalism and as simply legitimating the businesses remaining in South Africa when the priority was to leave.

*B. The 1998 Code of Conduct for arms exports*²⁰⁵

The lessons from the Code of Conduct for European undertakings operating in South Africa were not wholly assimilated yet in 1991-1992, when the EU Member States for the first time agreed on a list of eight criteria governing arms exports, here again in the field of intergovernmental cooperation

²⁰¹ Holland, *supra* note 198, at 39.

²⁰² Résolution sur la forme, le statut, le contexte et l’application du code de conduite pour les entreprises de la Communauté ayant des filiales, des succursales ou des représentations en Afrique du Sud, OJ 1979 C 127/56, para. 10 of the resolution.

²⁰³ On these changes, Holland, *supra* note 198, at 42-43.

²⁰⁴ Holland, *supra* note 198, at 50.

²⁰⁵ I am basing my presentation on A. McLean, “The European Union Code of Conduct on Arms Exports,” in Addo, *supra* note 155, at 115.

given the presence of an explicit clause in the Treaty of Rome reserving to the Member States the questions related to arms production and trade.²⁰⁶ Indeed, although these criteria were common—they required, *inter alia*, to take into account the human rights record of the recipient, whether or not the export was to a region of tension, and whether or not the recipient was at war or in a process of internal repression—they were interpreted in widely different terms by the EU countries, with little coordination between them as to, for example, how to judge the eligibility of a particular country in the face of human rights abuses committed by its government, or whether or not a particular region of the world should be defined as a “region of tension.” The lack of a uniform interpretation of the criteria led a coalition of NGOs led by Saferworld to propose a more detailed European Union Code of Conduct for arms exports, and a vast campaign for the adoption of such was launched during the period 1993-1998. The United Kingdom presidency of the Union from the first semester 1998 represented a breakthrough. Early during that presidency, the European Parliament expressed its regret that “the existing common EU criteria governing arms exports, agreed by the Council in 1991-1992, are being applied by each individual Member State according to its own interpretation and have not prevented the flow of arms from EU Member States to countries which violate human rights, to regions of instability and military aggressors.”²⁰⁷ The newly elected Labour government, having secured the support of the French government, seized the occasion. It proposed a much more stringent Code, comprising a system of coordination between the attitudes of the Member States for its uniform implementation.

The resulting system is far from perfect, but it still represents a notable step forward in comparison with the 1991-1992 criteria and their system of implementation. Among other criteria, the Code of Conduct on arms exports, adopted on 25 May 1998, stipulates that “Member States will not issue an export licence if there is a clear risk that the proposed export might be used for internal repression,” if the export is to a region of instability, or “if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert a territorial claim.” It is essential of course for the effectiveness of the Code that the denial by one Member State of an export licence will not be undercut by another. Therefore, the Member States are to inform one another when they refuse an export licence because it does not satisfy one of the listed criteria, and if a country wishes to take up the contract nevertheless, it must consult with the Member State which previously denied the licence. The system is only partly satisfactory, because these consultations remain purely bilateral—thus not meeting the expectations of the European Parliament²⁰⁸—which according to A. McLean “will inevitably lead to a lack of consistency in the implementation of the Code.”²⁰⁹ This is only partially compensated by the annual reports Member States have to circulate on their national arms exports and implementation of the Code, as these reports are not made public—a measure which would facilitate parliamentary control—and in any case are only retrospective—and therefore can hardly serve the purpose of a priori coordination of policies. This

²⁰⁶ See Article 223 EEC Treaty (now, after modification, Article 296 § 1 EC).

²⁰⁷ European Parliament, Resolution of 15 January 1998 on a European code of conduct on the export of arms (B4-0033, 0058, 0064, 0081, 0086 and 0104/98), OJ 1998 C 034/163.

²⁰⁸ Prior to the adoption of the Code, the European Parliament called on the Council and the Member States “to improve the prevailing situation by agreeing on consultation mechanisms which ensure that all Member States are swiftly informed of approvals and denials of export licences, and that any Member State intending to undercut a decision by another is obliged to inform and consult with all other Member States about its intention”: see the Resolution on a code of conduct for arms exports (B4-0502, 0505, 0520, 0522, 0529 and 0546/98), OJ 1998 C 167/226, para. 2 of the resolution.

²⁰⁹ McLean, *supra* note 203, at 120.

lack of multilateral coordination is further accentuated by the absence of a common list of countries which, because of their human rights record, should not be issued licences.

Andrew McLean concludes from his presentation of the May 1998 Code of Conduct on Arms Exports that the decisions whether or not to grant export licences “will continue to be made according to national discretion and the effectiveness of the Code is likely to depend on the extent to which the Member States consider themselves as being bound by export licence denials which are issued by other governments.”²¹⁰ This may be seen as a result of the conflicting needs of the arms industry in the EU, which requires common rules to ensure that the particular arms export policy of each national government will not put some companies at a competitive disadvantage in comparison to competitors in other Member States, but at the same time prefers the least stringent rules possible. By attempting to satisfy both needs, the compromise solution embodied in the 1998 Code of Conduct may end up meeting neither: the temptation of arms export policies guided by national economic interests remains present, and the victims of arms exports to repressive regimes in third countries remain insufficiently protected. In this context, it is regrettable that, just as it has not as yet affirmed the obligation of States Parties to the European Convention on Human Rights to offer a remedy against the most serious forms of human rights abuses either caused by their nationals or of which their nationals are victims (according to, respectively, the active and the passive personality principle in the exercise of jurisdiction), the organs of the Convention have considered that the decision of a State party to authorize the selling of arms to an oppressive regime does not trigger the international responsibility of that State party, even when this decision results in damage being caused to the victims of that regime, in the absence of a sufficiently direct link between the failure of the State to effectively control arms exports from its territory and the injury caused abroad.²¹¹ A more extensive definition of the obligation of the States parties to the Convention to protect the rights of individuals, even when the effects of the violation occur abroad, against the consequences of the decisions taken by their organs, may have provided the necessary incentive for Member States of the European Union to make further progress on this question.²¹²

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²¹⁰ McLean, *supra* note 203, at 121.

²¹¹ Eur. Comm. H.R., *Rasheed Tugar v. Italy* (Appl. n° 22869/93), decision of 18 October 1995, unpublished. The applicant, an Iraqi national, was employed as a mine-clearer in Iraq, when, in April 1993, he stepped on a mine and had to be amputated from his lower right leg. In 1982, the Iraqi Ministry of Foreign Affairs had made a contract with the Italian company V. M., regarding the supply by V. M. to Iraq of 5,750,000 anti-personnel mines to be delivered before December 1983. Before 1990, there was no specific law in Italy regulating the export of weapons. The Ministry of Foreign Trade enjoyed a wide margin of discretion in delivering export licences. The applicant alleged that he was a victim of the violation by Italy of the right to life protected under the Convention: Italy “did not regulate the sale of anti-personnel mines not containing any self-detonating or self-neutralising mechanism, thus failing to secure his right to life as guaranteed by Article 2 of the Convention.” The Commission dismissed the application as manifestly ill-founded, reasoning that “the applicant’s injury can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible ‘indiscriminate’ use thereof in a third country, the latter’s action constituting the direct and decisive cause of the accident which the applicant suffered.”

²¹² It may not be purely coincidental that Ms. Françoise Hampson (Essex University), who played a major role in the Saferworld-led campaign of 1993 in favor of a European Code of Conduct on Arms Exports, was during the same period representing M. R. Tugar before the European Commission on Human Rights.

The experience of the Code of Conduct for European Community enterprises operating in South Africa shows that, for a Code of Conduct to be effectively implemented, two conditions should be fulfilled: first, the Code of Conduct should impose clearly verifiable obligations on the enterprises who decide to adopt them, and violations of the Code should be sanctioned; second, to ensure comparability between the undertakings, uniform standards should be set, although the concrete significance these standards will take may differ from sector to sector or from context to context. Codes of Conduct, per definition, are voluntarily adopted; if they are imposed, there is nothing to distinguish them from regulation, and the expression then loses its specific meaning. This voluntary character of Codes of Conduct should not per necessity lead to the conclusion that they are useless—harmless to companies, of no help to their workers or the communities they affect by their activities. Not only are Codes of Conduct standards which companies proclaim to adopt and abide by, which implies that trade unions will be able to rely on these standards in the course of negotiating collective agreements²¹³ or that the content of the code of conduct may serve the purpose of identifying what constitutes a “fault” in the context of civil liability proceedings against the company.²¹⁴ But, moreover, Codes of Conduct could—once they are voluntarily adopted or accepted by companies—impose on these certain obligations, either by the institution of independent monitoring mechanisms or by the use of the 1984 Directive concerning misleading and comparative advertising. And Codes of Conduct facilitate the functioning of market mechanisms obliging a company to internalize, to some extent at least, the costs of violating social, ethical or environmental standards, under the pressure of consumers or investors.

C. The code of conduct as misleading advertising of a company's practices

In its May 2002 Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility, the European Parliament “calls on the Commission to enforce strong consumer protection measures to uphold the credibility of corporate information in relation to environmentally and socially responsible business practice, in particular applying the provisions regarding misleading advertising.”²¹⁵ Codes of Conduct, whether drafted by an enterprise to suit its own needs and specificities or whether adopted from a Model Code, primarily serve as a message to the consumers that the goods or services they are acquiring are produced in socially, ethically or environmentally acceptable conditions. Codes of Conduct, in that sense, advertise the practices of the company to its customers, whose choices are increasingly guided by non-purely economic considerations. The Council Directive of 10 September 1984 concerning misleading and comparative advertising defines “advertising” in the broadest fashion possible, as “the making of a representation

²¹³ See, e.g., the Code of Conduct adopted in September 1997 by the social partners in the European textile and clothing sector (European Apparel and Textile Organisation EURATEX (employers) and European Trade Union Federation of Textiles, Clothing and Leather ETUF:TCL (workers)). As remarked in a Newsletter from the European Commission: “Through the inclusion of its clauses in national collective agreements – which are negotiated and concluded at national level in the Member States of the European Union – the content of this code acquired legal status and binding force. It therefore constitutes a good example of how problems related to implementation and monitoring of codes of conduct can be tackled” (European Social Dialogue (Newsletter from the EC Employment & Social Affairs DG), May 1999, at 5-6).

²¹⁴ See, e.g., McCrudden, “Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?,” 19 *Oxford J. Legal Stud.* (1999), at 167; or Betlem, *supra* note 103, at 294-295.

²¹⁵ Resolution, *supra* note 164, para. 33. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of laws, regulations, and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250/17) is mentioned in the Preamble of the Resolution.

in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services²¹⁶ Codes of Conduct are covered by this definition. The information misleading to the consumers which, “by reason of its deceptive nature, is likely to affect their economic behaviour,” includes the method of manufacture or the geographical origin.²¹⁷ thus, whenever codes refer to the working conditions in which the advertised goods were produced, or—as may be justified when certain boycott campaigns are launched—to the countries in which the production took place, this information, if deceptive, should be sanctioned, and Member States are under an obligation to ensure that adequate and effective means exist to combat advertising referring to it. The Directive details the procedural safeguards which must be provided by national legislations of the Member States, for the consumer to be effectively protected against misleading advertising. In particular, organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising should be able to take legal or administrative action,²¹⁸ and, perhaps even more important, in such proceedings courts or administrative authorities should have the power “to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case,” and “to consider factual claims as inaccurate” if the evidence thus demanded “is not furnished or is deemed insufficient by the court or administrative authority.”²¹⁹

D. Monitoring of the compliance with Codes of Conduct

By relying on the national legislations implementing the Directive of 10 September 1984 on misleading and comparative advertising, consumer organizations could therefore request from the competent national authorities that they become overseers of the practices of undertakings. According to the Directive, when these decide to publicize a Code of Conduct by which they present their methods of production as respecting certain social, ethical or environmental standards, they must accept a scrutiny of their activities. This illustrates that Codes of Conduct, whichever the initial purpose of the company adopting it, may lead to the imposition of new obligations on that company, because it binds itself by the Code it adopts. Aside from the specific mechanism of the 1984 Directive on misleading and comparative advertising, a proposal has been made for the systematic independent monitoring of the codes of conduct adopted by EU-based enterprises, as a condition of the credibility of these codes of conduct. The July 2001 Green Paper of the European Commission on corporate social responsibility notes that

With respect to human rights there is a need for ongoing verification where the implementation and compliance with codes is concerned. The verification should be developed and performed following carefully defined standards and rules that should apply to the organisations and individuals undertaking the so-called "social auditing". Monitoring, which should involve stakeholders such as public authorities, trade unions and NGOs, is important to secure the credibility of codes of conduct. A balance between internal and external verification schemes

²¹⁶ Article 2 of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, OJ 1997 L 290/18, corrigendum OJ 1998 L 194/54.

²¹⁷ Article 3 of Council Directive 84/450/EEC.

²¹⁸ Article 4 § 1 of Council Directive 84/450/EEC.

²¹⁹ Article 6 of Council Directive 84/450/EEC.

could improve their cost-effectiveness, in particular for SMEs. As a result there is a need to ensure greater transparency and improved reporting mechanisms in codes of conduct.

The 1999 Howitt Resolution already called on the Commission to study the possibility of setting up a European Monitoring Platform, as an independent and impartial forum in which the social partners, NGOs from North and South and representatives of indigenous and local communities would be represented, and one of the tasks of which would be to receive information about the voluntary initiatives and conduct of business and industry “so that their compliance with ... private voluntary codes of practice (if adopted) could be properly assessed.”²²⁰ Such a mechanism would, in effect, oblige the enterprises to abide by their own, self-imposed, standards, by imposing on enterprises to report on the implementation of their code of conduct and by providing for an independent control of the compatibility of their conduct with the standards set forth in the code. In the 2001 Resolution on the Green Paper of the Commission on corporate social responsibility, based on the consultations and findings of the same rapporteur, the European Parliament calls for the creation of an “EU Multi-Stakeholder CSR Forum, comprising representation from business, trade unions, non-governmental organizations and public authorities including from developing countries,” and entrusted with the registration of voluntary codes of conduct and with their verification “against minimum applicable international standards such as the OECD Guidelines for Multinationals and the ILO Core Labour Standards.”²²¹ The European Monitoring Platform called for by the European Parliament in its 15 January 1999 Resolution has been set up, as yet, only in a preliminary format. The Communication of the European Commission on Corporate Social Responsibility of 2 July 2002 merely states that codes of conduct should “include appropriate mechanisms for evaluation and verification of their implementation, as well as a system of compliance,” and it invites the EU Multi-Stakeholder Forum on CSR to “consider the effectiveness and credibility of existing codes of conduct and how convergence can be promoted at European level.”²²²

Especially for SMEs, the institution of such an independent monitoring body, publicly funded and working on a permanent basis, would present another advantage: it notably diminishes the costs of adopting a code of conduct made credible by the existence of such a control mechanism. And for all enterprises, it may limit the tension between their desire to reassure the buyers of their products or services as to the conformity of these with certain standards, and the need not to do so at a too costly competitive disadvantage, in the presence of other enterprises competing on the same market but, possibly, less scrupulous, either in the standards they adopt or in ensuring that their conduct corresponds to the norms they profess to adhere to. In these two ways, the institution of a monitoring body at a European level, perhaps operating as a Commission Office, should be seen not as a further obstacle imposed on the economic activity of enterprises based in the European Union, but as a public good furnished to these enterprises, facilitating their socially responsible conduct in a competitive environment which does not necessarily immediately reward such conduct.

²²⁰ Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, adopted by the European Parliament on 15 January 1999, A4-0508/1998, *OJ* 1999 C 104/176, para. 17.

²²¹ Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM(2001)366 – C5-0161/2002 – 2002/2069(COS)), para. 13-14.

²²² Communication of the Commission on Corporate Social Responsibility, COM(2002) 347 final, at 8. See also on the missions of the CSR EMS Forum at 18 of the Communication. More should be known on the potential of that Forum in 2004, when it is to file a report with the Commission on its future role.

However, the 1999 Howitt Resolution also recommended the regular organization of public hearings on specific cases of corporate conduct, both good and bad. The purpose is to put pressure on companies by the negative publicity certain practices could receive through such hearings, the effectiveness of which in monitoring corporate conduct heavily relies on the interest the media could take in the public discussion of certain situations. The second of such hearings was held in October 2001, when a French company (TotalFinaElf) and a British company (Premier Oil) were questioned on allegations according to which, through their oil exploitation activities in Burma, they were complicit in wide-scale human rights abuses committed by the Burmese military.

In the context of such a procedure, too, the adoption by a company of a code of conduct may prove more compromising for the company than it initially would have imagined. Indeed, the attendance of the public hearing is voluntary, and the only sanction for a company refusing to attend—as Adidas chose to do in the first such public hearing, organized on the theme of the textile industry in Southeastern Asia and in which the CleanClothes campaign had a prominent role—will be a possible negative reaction from the public of consumers, at least if the media advertise sufficiently widely the uncooperative attitude of the enterprise. But a company which has adopted a code of conduct will find it difficult to refuse even to discuss the conformity of its practices with the code. Such a refusal will immediately make the code of conduct appear as purely an exercise in public relations, and the negative impression created on the public will be important.

E. Model Codes of Conduct

As the recent Resolution of the European Parliament on the Green Paper on corporate social responsibility states in its findings, “the broad diversity of voluntary codes of conduct and labels with very different standards and verification mechanisms makes comparison of effective performances problematic.”²²³ Indeed, this diversity²²⁴ makes it very difficult for the consumer to distinguish between credible and less credible codes. This leads to an asymmetry of information between the enterprise and the consumer, for the enterprise may know what its self-adopted code is worth (according to both its standards and monitoring mechanisms), but this will be very difficult for the consumer to discover. As a result—as in Gresham’s law revisited by G. A. Akerlof in his famous analysis of the market of used cars—if enterprises and consumers are left to themselves, the worst codes of conduct may drive out the better ones.²²⁵ Whilst the existence of good codes of conduct benefits all the enterprises, by enhancing the reputation of a particular sector or market or of the act of adopting a code of conduct in general, it will be more advantageous for each individual enterprise to adopt a less requiring code of conduct, as the consumer will be unable to tell the difference: in the long run, the worst codes will dominate the market, as there will be no incentive for individual enterprises to accept costs associated with the adoption of more requiring codes which will bring rewards to the sector as a whole. It is therefore necessary to reduce the uncertainty, the asymmetry

²²³ Preamble, I.

²²⁴ It appeared from a review by the ILO of 233 codes of conduct and social label systems that many of these codes or labels were incomplete, when compared to the Core Labour Standards: see the Study Prepared by the Working Party on the Social Dimensions of the Liberalisation of International Trade, ILO, Governing Body, 273d session, Geneva, November 1998 (GB.273/WP/SDL/1(Rev.1)).

²²⁵ See Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism,” 84 *The Quarterly Journal of Economics* (1970), at 488; reproduced in G. A. Akerlof, *An Economic Theorist’s Book of Tales* (1984, 2nd ed. 1993), chap. 2.

between the consumers (buyers) and the enterprises (sellers). Model Codes serve precisely to counteract the effects of quality uncertainty of codes of conduct.

The institution of a Model Code of Conduct for European businesses was perhaps the single most important proposal put forward in the 1999 Howitt Resolution, which, with that objective in view, listed the international standards which the drafting of such a code should take into account.²²⁶ The focus seems now to have changed. Rather than the drafting of a new Model Code, the Commission is encouraged to ensure better compliance with already existing codes and, in particular, to support the OECD Guidelines for Multinational Enterprises—which, indeed, present the advantage of being applicable in principle not only to European companies, but also to their most important competitors from other industrialized countries (including Canada, Japan, Korea, New Zealand, Turkey, and the United States). It is encouraged by the European Parliament to “verify” the voluntary codes of conduct “against minimum applicable international standards,” which would amount in fact to a form of certification by the Commission—or, rather, by the EU Multi-Stakeholder CSR Forum which is currently being set up—of these codes, again so as to ensure that the consumer will not be misled by the presentation of codes which do not meet these minimum standards.

The promotion of the OECD Guidelines deserves an explanation.²²⁷ The OECD Guidelines for Multinational Enterprises were adopted on 21 June 1976 by the OECD member States (with the exception of Turkey) and were presented at the time as the needed counterweight to the extensive protection granted during the same period to the rights of investors.²²⁸ These Guidelines are recommendations made to the enterprises from the 30 Member States of the OECD, as well as to three non-Member States which have adopted them.²²⁹ Revised OECD Guidelines were adopted in June 2000. They now include a provision according to which enterprises should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”²³⁰ As remarked by N. Howen and the other authors of the report of the International Council on Human Rights Policy on *Human rights and the developing international legal obligations of companies*, the phrase not only “extends the responsibility of enterprises far beyond respect for the labour rights of their workers” to include, “for example, ensuring that their activities do not harm the human rights of those in the communities in which they operate”; it also “makes clear that multinational enterprises should measure their conduct against the international obligations of the host state and not merely national laws, especially if these are weaker than international standards.”²³¹ But the 2000 revision also sought to revitalize the monitoring process, based on the institution of National Contact Points, usually governmental offices, in each OECD country. These NCPs should promote the guidelines, handle enquiries about them, but also assist in the difficulties social partners may encounter in implementing them, by aiding in the interpretation of the Guidelines. NCPs may also receive complaints, when Member States,

²²⁶ See Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, adopted by the European Parliament on 15 January 1999, A4-0508/1998, *OJ* 1999 C 104/176, para. 12.

²²⁷ See esp. S. C. van Eyck, *The OECD Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Schrew* (1995); J. Oldenziel, *The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct?* (2000); Jägers, *supra* note 5, at 101-109.

²²⁸ See Karl, “The OECD Guidelines for Multinational Enterprises,” in Addo, *supra* note 155, at 89.

²²⁹ Argentina, Brazil, and Chile.

²³⁰ Para. II.2.

²³¹ International Council on Human Rights Policy, *supra* note 2, at 67.

enterprises or trade unions, but also “other parties concerned,” allege that a particular enterprise has violated the Guidelines, either on the territory of a Member State, or in its activities in a third State.²³² If a solution is not found at the national level—or if the NCP considers there is a need to clarify a point of interpretation of the Guidelines so as to avoid differing readings from country to country—the situation may be referred to the Committee on International Investment and Multinational Enterprises (CIME), which is entrusted with the final responsibility for clarification of the Guidelines. Since the 2000 revision, the NCP, however, must issue a statement when no agreement is reached at the national level, which may include naming the denounced corporation, unless “preserving confidentiality would be in the best interests of effective implementation of the Guidelines.”²³³ Although the procedure could develop into a truly effective complaints mechanism, its efficiency is still limited at the present stage of its evolution: not only is compliance with the Guidelines totally voluntary, but moreover there is no enforcement procedure even on the companies which choose to abide by these Guidelines and are found to have violated them. However, the 2000 revision of the supervisory mechanism of the Guidelines may hold certain promises for the future. The confidential character of the proceedings before the NCP and the CIME, which previously had in fact excluded pressure to comply by consumers, is not absolute anymore; and the *locus standi* of NGOs before the NCPs has been improved.

By calling on the Commission to implement contact points for the OECD Guidelines for Multinational Enterprises in “all its delegations in third countries where EU-based companies operate,” to staff these contact points with officers trained in CSR matters, and to ask for reports from the EU Delegations abroad on the result of the work of those contact points,²³⁴ the European Parliament confirms that these Guidelines should be chosen, above any other specifically “European” Code of Conduct, as setting universally applicable standards for MNEs from industrialized countries. This

²³² International Council on Human Rights Policy, *supra* note 2, at 100, referring to OECD, National Contact Points, Procedural Guidance, I.C.5. The original Declaration on International Investment and Multinational Enterprises (21 June 1976) mentioned, with respect to the Guidelines, that the Member States “jointly recommend to multinational enterprises *operating in their territories* the observance of the Guidelines ...” (I). However, the Preamble of the Guidelines, in para. 3, noted that “Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the Organisation, international co-operation in this field should extend to all States. Member countries [will seek to cooperate with non-Member States, in particular developing countries] with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimising and resolving the problems which may arise in connection with their activities.” The OECD 1996 study on *Trade, Employment and Labour Standards* (OECD Publ., 1996) mentions that the Guidelines “have a role to play as a voluntary instrument to promote responsible behaviour of MNEs. This role would be enhanced if home and host countries made it known that they expect foreign investors to follow the Guidelines worldwide and if non-Member countries were encouraged to endorse the Guidelines.” The 2000 revision of the Guidelines merely confirms that these Guidelines are binding upon multinational enterprises domiciled in the OECD countries, wherever they operate: this revision has erased any doubts as to the geographical scope of the Guidelines.

²³³ OECD review June 2000, *Procedural Guidance*, C 4.(b).

²³⁴ Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM(2001)366 – C5-0161/2002 – 2002/2069(COS)), para. 47. The Commission has not at yet followed upon this suggestion. It did however state that it would seek to “promote awareness and application of CSR abroad, including through its Delegations, by encouraging debate and exchange of good practice, between and among third country and European stakeholders,” and that it would insist on the inclusion in EU external relations agreements of the phrase: “The Parties (or the European Community and its Member States) remind their multinational enterprises of their recommendations to observe the OECD Guidelines for Multinational enterprises, wherever they operate” (see Communication of the Commission on Corporate Social Responsibility: A business contribution to Sustainable Development, COM(2002) 347 final, at 26).

choice will be followed by the European Commission in its Communication of 2 July 2002 on Corporate Social Responsibility.²³⁵ It is coherent with the objective of limiting, in the interest of both business and consumers, the diversity of standards applicable to the activities of MNEs. As remarked by the EP's Committee on Industry, External Trade, Research and Energy in the short justification preceding its opinion on the Commission Green Paper on corporate social responsibility, the OECD guidelines are "the only multilaterally endorsed comprehensive framework of rules governing the activities of multinational enterprises. ... Rather than developing further codes of conduct, the EU should draw on initiatives such as these and the UN Draft Fundamental Human Rights Principles for Business Enterprises."²³⁶ This also may be understood in the context of the increasingly diverging representations the EU and the United States have of the social responsibility of corporations: the development of specifically European standards for MNEs operating in third countries could have adverse consequences on the competitiveness of European companies in comparison to their United States counterparts, a situation which, as illustrated by the experience of the Community Code of Conduct for enterprises operating in South Africa between 1977 and 1993, may in time undermine the effectiveness of the standards.²³⁷

F. Conclusion

In the synthesis paper of a conference held in November 2001 under the Belgian Presidency of the EU, "The European Social Agenda and the EU's International Partners," we read that the European Social Model "encourages the mobilisation of consumers and social NGOs in monitoring the implementation of these codes. However, it does not rely on these voluntary efforts by themselves: it holds regulation and legislation in reserve. It thereby distances itself from the neo-liberal position of those who would look to the market and consumer pressure to drive economic development and respect for social rights, with government playing only a minimal role."²³⁸ Indeed, if codes of conduct are simply tools which are meant to guide the choice of the consumers, leaving it to the market mechanisms not only to ensure the effective respect of their codes of conduct by the companies who publish them but also to define the content of these codes, the risk is real that these voluntarily adopted codes will mislead the consumers, will lack credibility in the absence of any form of independent monitoring, and will settle on minimal standards or contain important lacunae in comparison with what internationally agreed standards would impose. It is as a basis for public action that voluntarily defined and adopted codes of conduct may present some utility. Absent these conditions, they will remain merely the resulting window-dressing initiatives by companies who wish to satisfy the ethical requirements of the consumers.

²³⁵ See Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, COM(2002) 347 final, at 6: "the OECD Guidelines for Multinational Enterprises are the most comprehensive, internationally endorsed set of rules governing the activities of multinationals. In promoting CSR in developing countries, EU businesses should demonstrate and publicise their world-wide adherence to them." The CSR strategy of the Commission, it is stated, is based inter alia on "support and compatibility with *existing* international agreements and instruments" (at 8, my emphasis).

²³⁶ Annexed to the Report of the Committee on Employment and Social Affairs on the Commission Green Paper, 30 April 2002, A5-0159/2002, at 24-25.

²³⁷ This is also why the European Parliament states the obvious when, in its 15 January 1998 Resolution on a European code of conduct on the export of arms, it says it is "convinced that any such EU code of conduct will be all the more successful when the other main arms exporters, such as the USA, but also the Russian Federation and China, agree to similar rules." The same conviction is expressed in the second resolution it adopted three months later on the same topic.

²³⁸ "The European Social Agenda and the EU's International Partners," Brussels, 20-21 November 2001, at 11.

7. The EU Member States as economic actors

Besides its activity as a direct regulator of the conduct of MNEs, the European Union could encourage positive developments in corporate conduct by authorizing the Member States to reward the most deserving enterprises, thus providing companies with an incentive to comply with certain ethical standards.²³⁹ The areas in which such incentives could be imagined are diverse. The Communication of the Commission on Corporate Social Responsibility mentions two examples: “Making access to subsidies for international trade promotion, investment and export credit insurance, as well as access to public procurement, conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, while respecting international commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Investment.”²⁴⁰

These tools can essentially be described as levers by which, using its economic muscle as purchaser of public goods²⁴¹ or as creditor or insurer, the State seeks to take into account certain non-purely economic criteria in the decisions adopted by its public authorities on the market. The example of the debate on public procurement,²⁴² however, illustrates that, in comparison to social or environmental criteria, ethical criteria—the respect a corporation shows for human rights—remain suspect of being more easily manipulated, and thus instrumentalized for less justifiable reasons, in particular for protectionist purposes. An indication of this is that, whilst the Commission has presented interpretative communications on the Community law applicable to public procurement and the possibilities for integrating both social²⁴³ and environmental²⁴⁴ considerations into public procurement,

²³⁹ States could also encourage private investors to selectively invest, by ensuring more transparency on the social, environmental, and ethical performances of companies (see, on Socially responsible investment and the contribution the Member States of the EU to its extension, the Green Paper of the Commission, Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 final, 18.7.2001, para. 3.5., and the corresponding passage in the Communication of 2 July 2002 on Corporate Social Responsibility, COM(2002) 347 final, para. 5.5.). This question is not developed in the present study. It would fit, rather, in the preceding chapter: by facilitating transparency and thus informed choices being made by investors, States are still acting as regulators rather than as economic actors on the market.

²⁴⁰ Communication of the Commission on Corporate Social Responsibility: A business contribution to Sustainable Development, COM(2002) 347 final, at 23.

²⁴¹ The potential of this tool should not be underestimated. The acquisition by the public authorities of goods, services, and works represent 14% of the GDP (Gross Domestic Product) in the EU: see *Single Market News*, March 2000, cited by P. Lefèvre, “Les considérations sociales et environnementales dans les marchés publics européens,” *Journal des tribunaux – Droit européen* (2000), at 245.

²⁴² The example of the linkage of access to export credits to ethical criteria, and especially to companies’ compliance with the OECD Guidelines for Multinational Enterprises—as advocated by the European Parliament (Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM(2001)366 – C5-0161/2002 – 2002/2069(COS)), para. 27)—will not be detailed here. See, esp., the Dutch example, and in Belgium, a recent Bill proposed to that effect by Mr. D. Van der Maelen (Wetsvoorstel ter bevordering van duurzaam en verantwoord ondernemen van Belgische bedrijven in het buitenland), on which the parliamentary discussion still has to be launched. A number of NGOs advocate the insertion of social, environmental, and ethical clauses in Council Directive 98/29/EC of 7 May 1998 on harmonization of the main provisions concerning export credit insurance for transactions with medium and long-term cover, *OJ* 1998 L 148/22.

²⁴³ COM(2001) 566 final of 15.10.2001.

²⁴⁴ COM(2001) 274 final of 4.7.2001.

it has not presented a similar communication on the integration of human rights concerns in such policies. And, while Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts²⁴⁵ does provide that contract performance conditions may seek to favor the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment, or that they may include a requirement, for instance, that the contractors comply with the basic conventions concluded within the International Labour Organisation (ILO), to the extent that these conventions are implemented in national legislation (Article 26), it does not provide for the possibility that the Member States may decide to award their public contracts only to economic operators which undertake to respect, ensure the respect of, and protect human rights in their spheres of activity and influence, and who effectively agree to submit to monitoring procedures which ensure that this undertaking is complied with. However, there would be no insuperable technical obstacles to providing for this possibility. In particular, the authorization of States to rely on such an “ethical clause” to select their contractors would not necessarily lack the required objectivity, and create the risk of discrimination or non-transparent practices. For instance, the Member States could be authorized to require that economic operators wishing to compete for public contracts agree to abide by the Guidelines for Multinational Enterprises set up by the Organisation for Economic Co-operation and Development, and to comply with any procedures initiated within those Guidelines.

Directive 2004/18/EC already provides that economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering may be excluded from public contracts (Article 45). It would have been desirable, and an important contribution to enhancing the credibility of the discourse of the European Union institutions on corporate social responsibility, to go further. For instance, economic operators who have been found by a judgment having the force of *res judicata* to have committed, or to have aided and abetted to commit, or to have been complicit in, violations of the fundamental rights of workers as enumerated in the 1998 Declaration of the International Labor Conference on Fundamental Rights and Principles at Work, should be excluded from public contracts, just like under the current Directive they should be excluded if they have been found in violation of national legislation implementing Directives 2000/78/EC or 76/207/EEC, which relate to non-discrimination on the basis of race, ethnic origin, or sex. A similar exclusion should be imposed on those undertakings which have been found liable on the basis of the United States *Alien Tort Claims Act* 1789 (U.S.C. § 1350 (1994)), as the finding of such a liability would mean that the concerned undertaking has violated specific norms universally recognized as part of the “law of nations.”

Indeed, the reasoning held by the European Court of Justice with respect to the integration of social or environmental criteria in public procurement policies of the Member States could be easily transposed to the insertion of ethical clauses in public contracts. Consider for instance the attitude of the Court when the Commission of the European Communities lodged an application against France, seeking a declaration that France had violated its obligations under European Community law by setting forth as an award criterion in a number of contract notices for the construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord a

²⁴⁵ OJ L 134 , 30.4.2004, p. 114.

condition relating to employment linked to a local project to combat unemployment.²⁴⁶ The Court considered that although under Article 30(1) of Directive 93/37,²⁴⁷ the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, and technical merit, “that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services,” at least as long as the criterion is “applied in conformity with all the procedural rules laid down in [Directive 93/37], in particular the rules on advertising.”²⁴⁸ Although France was found to have violated its Community obligations for a number of other reasons, the judgment of 26 September 2000 relies on a reading of the previous case-law of the European Court of Justice²⁴⁹ which implies that it may be extended, beyond social clauses, to environmental or ethical conditions.

With respect to environmental clauses, the extension was authorized by the Court before it was formally recognized by the European legislature in the public procurement Directive 2004/18/EC of 31 March 2004. In its judgment of 17 September 2002 in the case of *Concordia Bus Finland*—where a Finnish municipality took into account the environmental performances which could be satisfied in the execution of the contract to be awarded—the European Court of Justice considered that “where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50^[250], it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.”²⁵¹ Just as the requirements of environmental protection are to be integrated into the definition and implementation of Community policies and activities—this provision of Article 6 EC justifying, according to the Court, a reading of Article 36(1) of Directive 92/50 favorable to the States wishing to take into account environmental criteria in the assessment of the economically most advantageous tender—the requirements of fundamental rights are ranked among the principles on which the Union is founded, and which are considered to be common to all its Member States.²⁵² Thus, nothing seemed in the way of an extension of the *Beentjes-Commission v. France*—

²⁴⁶ Case C-225/98, *Commission of the European Communities v. France*, [2000] ECR I7445 (judgment of 26 September 2000).

²⁴⁷ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199/54.

²⁴⁸ Case C-225/98, *Commission of the European Communities v. France*, para. 50-51.

²⁴⁹ Case 31/87 *Beentjes v. Netherlands State* [1988] ECR 4635, paragraphs 28 and 37.

²⁵⁰ Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209/1) (defining the criteria on which the contracting authority may base the award of contracts where the award is made to the “economically most advantageous tender,” as “various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price”).

²⁵¹ Case C-513/99, *Concordia Bus Finland Oy Ab (previously Stagecoach Finland) v. Helsingin kaupunki et HKL-Bussiliikenne*, nyr, Recital 64 (judgment of 17 September 2002).

²⁵² Art. 6(1) TEU.

Concordia Bus Finland line of cases to the integration of ethical criteria in the procurement policies of the Member States. In that context, the absence of a formal recognition of that possibility in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 constitutes a clear source of disappointment.

Despite its limitations, the Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, adopted on 15 October 2001 did not exclude such an extension. The third part of that Communication (Social Provisions applicable to Public Procurement) explicitly refers to a number of instruments, not only from European Community law but also from the International Labour Organisation, which protect fundamental social rights. There would be no difficulty in principle in extending such references to other instruments from international human rights law: respect of these instruments—as they are implemented in the national legislation of the Member States, which the European Court of Justice would recognize as embodying an imperative requirement of general interest which may justify national measures restricting the exercise of one of the fundamental freedoms of Community law—could, then, be defined as a condition for the awardance of public contracts, provided all the requirements of transparency and non-discrimination are respected.

8. Conclusion

This study has been about mechanisms, rather than substantive norms or criteria of liability. However, what was initially resented as a limitation turned out to be the approach best fitting to the subject matter. The mechanisms for imposing human rights obligations on MNEs fail us. The norms MNEs should be obligated to respect, on the other hand, are available. Identifying them with the requisite precision should not prove to be an insuperable task. As all the other actors of society,²⁵³ MNEs are firstly under a duty to respect the basic rights and freedoms of all whom are affected by their activities and fall within their sphere of influence; and whenever their objective to make profit appears to conflict with the full preservation of the rights of others (employees, families of employees, neighboring communities), the conditions under which States may restrict certain non-absolute rights or freedoms for public interest reasons should apply, *mutatis mutandis*, to the restrictions imposed by corporate actors to the rights and freedoms of those with whom they interact: these restrictions should be necessary for the fulfillment of the legitimate aims of the corporation, and they should remain within the limits required by the principle of proportionality.²⁵⁴

²⁵³ See Resolution 53/144 of the General Assembly of the United Nations, “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,” 8 March 1999 (A/RES/53/144). Although the Declaration, first approved by the Commission on Human Rights, recognizes that “Each State has the prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms” (art. 2 § 1), it insists on the responsibility of each member of the society—individuals, groups, insitutions, and non-governmental organisations—in the promotion of human rights. According to Article 11 of the Declaration annexed to the Resolution, “Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct of ethics.”

²⁵⁴ See Ratner, *supra* note 5, at 513-515. The voluminous case-law of the European Court of Human Rights concerning the application of the European Convention on Human Rights between private parties illustrates how such a transposition—from obligations imposed on States in the field of human rights to obligations imposed on

All other things being equal, the equation with the State authorities of the private party, with respect to the extent of the obligations imposed on the latter, will be all the more justified if this private party is in a position of dominance which justifies this assimilation: where the corporation in fact exercises an element of governmental authority by delegation or is in a situation of monopoly and thus may coerce others (subcontractors, customers, employees) into interacting with it, where, therefore, it exerts the greatest power, the assimilation may be complete; where the corporation is an economic actor among others, in conditions of true competition, and is thus unable to impose itself on others with whom it deals, a less requiring transposition of the duties of States to the corporation may be justified. Such an evaluation of the position of the corporation in comparison to that of the territorial State may especially be required where one wishes to go beyond the affirmation of an obligation to *respect*—i.e., not to violate the rights of others with whom the corporation interacts—to affirm an obligation of the corporation to *protect* or to *promote* the human rights of the persons who are under the sphere of influence of the corporation. Whether the corporation should, for instance, ensure that the children of its employees receive an adequate education and are not coerced to work, or whether it should use its leverage upon the local authorities to encourage democratization, may depend on whether or not the corporation is in fact in a sufficiently dominant position, either in a geographical area or in the host State in general, to effectively fulfil such obligations: responsibility should derive from control, and control is not an all-or-nothing concept, especially not with respect to private actors which, per definition, have no pretense to being sovereign.

Not only must corporations, like the other actors of society, respect the human rights of others; they must also not be complicit in the violations committed either by the States in which they invest or by the other private persons with whom they interact. The notion of complicity must per necessity supplement the imposition of the elementary obligation not to commit direct violations of human rights, or else it will be far too easy for corporations to escape any form of liability, civil or criminal, when participating in human rights violations—for example, by hiring a subcontractor to impose certain forms of forced labor or child labor, which the corporation itself would be prohibited to resort to directly; or by conducting operations in countries where the government itself bans unions or imposes racial discrimination, which the corporation will then present as not raising its own liability, as it simply “benefits” from an environment created by the government. How far should the responsibility of the corporation extend, if it is to go beyond the scope, strictly defined, of the violations it commits itself directly? The answer, it has been suggested above, may have to depend on the nature of the instruments which are used to assert this responsibility.

It appears therefore possible to derive from the standards existing in the international law of human rights certain duties imposed on legal persons, and in particular on multinational enterprises. Although the orthodox understanding of international law sees it as imposing enforceable obligations *directly*

private actors—is relatively easy to perform. See, e.g., the inadmissibility decision of 28 June 2001 in *Verlière v. Switzerland* (Appl. n° 41953/98) (complaint by the applicant that her activities has been spied upon by private detectives recruited by the insurance company whom she had sought compensation from for what she alleged to be consequences of a car accident); or the judgment by the Eur. Ct. H.R. of 29 February 2000, *Fuentes Bobo v. Spain* (Appl. n° n° 39293/98), § 50 (applicant discharged from the Spanish Television (TVE) after having made offensive public statements against the directors of his company, and having failed to obtain compensation from the Spanish courts for what he considered to be an unjustified dismissal, decided in violation of his freedom of expression: the Court simply applies to the relationship between two private parties the proportionality test developed in the context of the vertical relationships between individuals and public authorities).

only on States or—exceptionally, and only with respect to certain international crimes—on natural persons, the norms codified in the international law of human rights lend themselves to such a transposition. The problem of enforceability of these obligations remains, however, in situations where the MNE develops activities in States other than the State where it is incorporated. Neither the home State nor the host State of the investment have an incentive to take measures to ensure that the MNE will respect its obligations derived from international law. In the present stage of development of the international law of State responsibility, home States of MNEs are not under an obligation to act in that respect. And although host States may be under such an obligation, because of their duty to protect the fundamental rights of all persons within their jurisdiction, they will, as a rule, be reluctant to invest in monitoring the activities of MNEs operating within their territory, because their primary objective is to make their territory attractive to foreign investment, rather than to adopt dissuasive measures.

It would be a mistake to think of the power thus exercised by MNEs, in the face of such unwillingness or such incapacity of the States to impose on these actors a more stringent respect of social, environmental or ethical standards, as a matter of fate. The power of MNEs should not be attributed to the sheer economic weight of these “leviathans” as it may appear, for example, from the famous comparison between the GNP of certain countries and the total sales of the main multinationals.²⁵⁵ It has its origin, rather, in the capacity of these enterprises to move their investments from one country to another, thus permanently holding both the countries in which they invest and those in which they are domiciled under the threat of a departure if the conditions offered by the host or the home country come to seem less attractive. However, what may appear in a static analysis as a disempowerment of the States confronted with a new form of sovereignty competing with theirs²⁵⁶ is, it should be remembered, the result of the emergence of a global marketplace which is initially a creation of the States. Less than ever should we exculpate States from their asserted inability to tame the new leviathans.

²⁵⁵ See the table 1.1. presented in the *1999 Human Development Report* published by the United Nations Development Programme, Oxford, Oxford Univ. Press, 1999, at 32 (ranking countries and corporations according to these values and placing General Motors above Thailand or Norway, or Ford Motor and Mitsui & Co. above Saudi Arabia).

²⁵⁶ The authors of the study of the International Council on Human Rights Policy present their ambition thus: “The concept of the sovereignty of states, which has been eroded by the development of human rights, should not be replaced by a new corporate sovereignty, which is unrestricted or unaccountable” (International Council on Human Rights Policy, *supra* note 2, at 10).