



UNIVERSITY OF TRENTO - Italy  
School of International Studies

Ph.D. Dissertation

**A Story of Law and Incentives:  
A Comparative Legal Understanding of Corporate Risk and  
Incentives in Relation to Human Rights Liability**

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## CHAPTER 1

### Introduction

Economic globalization has changed the premises of the international system on various counts; multinational corporations (MNCs) operate worldwide and have risen to become major players in the international arena. Based on their territorial reach, their strategic positioning in many developing countries and emerging markets, and their economic impact, corporations are the major beneficiaries of an inter-connected economic world. The annual revenue of some MNCs exceeds the GDP of many States; thus, e.g. the annual revenues of Walmart in 2007 (around 350 billion USD) equals the GDP of Sweden, Belgium, and Switzerland combined. This reality has led civil society and governments alike to call on corporations to take responsibility for the societies they are operating in. It is a fact that human rights abuses are no longer confined to State actions, but have increasingly been affected, in many different ways, in the context of a corporation's overseas business operations; the scope of human rights affected by international business ranges from alleged complicity in international crimes in the extractive sector,<sup>1</sup> to labor rights violations in the manufacturing industry,<sup>2</sup> and to freedom of expression and privacy challenges for information communication technology (ICT) companies.<sup>3</sup> Human rights have become one of the integral pillars of Corporate Social Responsibility (CSR), alongside labour rights, environment, and anti-corruption.<sup>4</sup> The Business and Human Rights Resource Center—known for providing the broadest array of “balanced information of business and human

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<sup>1</sup> Charges involve complicity in human rights abuses (including crimes against humanity, torture, extrajudicial killing, forced displacement, and genocide) committed by government security forces or government authorities against local communities to secure pipeline operations on the ground; e.g. Royal Dutch/Shell and Chevron in Nigeria, Total and Unocal in Myanmar, and Talisman in Sudan.

<sup>2</sup> Charges include e.g. child labor in Nike's supplier facilities in Pakistan; human trafficking in J.C. Penny supply factory in American Samoa; child labour on Nestle's suppliers' cocoa farms in West Africa.

<sup>3</sup> Yahoo! was alleged of complicity in torture and other human rights abuses by providing user identification information to the Chinese authorities. Google, as many other internet companies, has been confronted with severe challenges with regard to freedom of expression in face of stringent censorship requirements of the Chinese government.

<sup>4</sup> See THE TEN PRINCIPLES, UNITED NATIONS GLOBAL COMPACT, at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

rights”<sup>5</sup>—tracks the human rights performance of over 3000 corporations worldwide in over 180 countries and across 27 industrial sectors. This shows the significance that human rights issues have, as part of the broader CSR agenda, for contemporary business practice. The question, however, remains how human rights compliance on part of corporations can be best achieved: through legal enforcement or rather corporate self-regulation. Accounting for the differences in domestic liability schemes in the United States and Europe, this dissertation will link the litigation approach to the issues at hand with theories of behavioral economics, the goal being to demonstrate whether legal enforcement, by virtue of litigation, is in fact the most effective way to enhance human rights compliance of corporations.

CSR has evolved in various stages over the last twenty years: ranging from a moral responsibility under a ‘social contract’ paradigm, to mandatory compliance under hard law, and a ‘social enterprise’ business model that informs a company’s core business choices.<sup>6</sup> In the early 1990s, a new variable was introduced in the CSR debate: the increasing risk for multinational corporations of being subjected to liability suits in domestic courts for their human rights performance abroad; up to then, CSR had primarily been left to the realm of corporate self-regulation rather than been subject to legal liability. This development has changed the premises underlying CSR policies of companies and has required them to adapt their corporate policies and strategies. The focus of much research and many scholarly works has been liability litigation in the CSR field, mainly in U.S. courts under the Alien Tort Statute<sup>7</sup> (ATS).<sup>8</sup> This dissertation builds upon experiences with CSR liability litigation in the United States and then examines select European jurisdictions with the objective to compare and contrast the different

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<sup>5</sup> Mary Robinson (Director of the Ethical Globalization Initiative, former United Nations High Commissioner for Human Rights and President of Ireland) in: *Business & Human Rights Resource Center: A Brief Description*, (London, et al.), 16.

<sup>6</sup> See David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 334-397 (2011).

<sup>7</sup> The ATS, passed by the Congress in 1789, confers on district courts “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.” 28 U.S.C. § 1350.

<sup>8</sup> Luisa Antonioli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law before U.S. Federal Courts*, 12 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 651-66 (2005); Sandra Coliver, Jennie Green, Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INTL’L L. REV. 169-72, 207-23 (2005); PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE 58-59, 72-88, 93-96 (2009).

legal approaches to the issues at hand. The differences in liability schemes will provide the basis for a critical analysis—informed by behavioral economics—that will test the ‘deterrence theory,’ according to which legal punishment deters future crime/non-compliance.<sup>9</sup> Whereas this deterrence methodology has been proven in the context of atrocity crimes prosecution,<sup>10</sup> it has not been tested yet for CSR enforcement through domestic courts. This study aims to shed light on this and related aspects.

Major cases against MNCs for involvement in human rights violations committed abroad have been brought in both U.S. courts under the ATS and in European courts. The litigation against the French corporation Total S.A. (Total) and the U.S.-based Unocal Corp. (Unocal) illustrates vividly the significance of this new reality for MNCs. Charges of complicity in human rights violations in connection with a joint venture for oil exploitation in Burma (now Myanmar) were filed in U.S.,<sup>11</sup> French,<sup>12</sup> and Belgian courts<sup>13</sup> and led to a multitude of lawsuits in different legal systems. It is a reality that almost all lawsuits holding corporations accountable for human rights violations have been brought in U.S. courts under the ATS.<sup>14</sup> Thus, whereas the litigation risk has materialized for corporations in U.S. courts, it did not do so to the same extent in European courts, despite the fact that effective remedies in fact would be available for victims.<sup>15</sup> However, most recent developments in ATS litigation in U.S. courts, respectively in *Kiobel*<sup>16</sup>

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<sup>9</sup> There exists a broad literature on the deterrence hypothesis, especially in the law and economics field. Among others, see: George Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON., 526 (1970); John Harris, *On the Economics of Law and Order*, 78 J. POL. ECON., 165 (1970); I. Ehrlich, *Crime, Punishment, and the Market for Offences*, 10 J. Econ. Persp. 43 (1996).

<sup>10</sup> See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

<sup>11</sup> *Doe v. Unocal Corp.*, 395 F.3d 932, 948, 951 (9th Cir. 2002).

<sup>12</sup> Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Mar. 10, 2006 (Fr.), see at [http://burma.total.com/en/controverse/p\\_4\\_2.htm](http://burma.total.com/en/controverse/p_4_2.htm); see also Sarah JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION*, 13-13 (2004).

<sup>13</sup> *Prosecutor v TotalFinaElf et al.*, Cour de Cassation, 28 March 2007, AR P.07.0031.F, <http://www.cass.be> (Belg.); see *Total Settles Rights Case*, N. Y. TIMES, November 29, 2005, available at <http://www.nytimes.com/2005/11/29/business/worldbusiness/29iht-total.html>

<sup>14</sup> See, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, at <http://www.business-humanrights.org/LegalPortal/Home/Countrywherelawsuitfiled/Americas>

<sup>15</sup> See Thompson, Ramasastry, and Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 894 (2009).

<sup>16</sup> The majority opinion in *Kiobel* held that no action can be brought against a corporation under the ATS, thus challenging two decades of precedents in U.S. federal courts, which had confirmed corporate liability under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

and *Talisman*,<sup>17</sup> have created uncertainty<sup>18</sup> with regard to legal liability of corporate entities for their overseas operations; this has made it necessary for victim groups and NGOs to look for alternative remedies beyond tort liability under the ATS and even beyond the United States as a jurisdictional forum. Not only has the most recent jurisprudence of the U.S. Court of Appeals for the Second Circuit given momentum to careful consideration of judicial remedies available in key European markets and jurisdictions for overseas corporate operations; it also prompts the question *why* almost all major litigation against corporations for their overseas human rights performance has been brought in U.S. courts under the ATS, rather than in the courts of their European counterparts. Furthermore, the decisions in *Kiobel* and *Talisman* require examination of the wider picture with regard to CSR enforcement; thus, both decisions provide the context for critically assessing the effectiveness of litigation with regard to influencing corporate behavior. Is what we see really what we get? In other words: does legal liability for violations of international law and human rights incentivize corporations in the way intended and induce enhanced human rights and social compliance? This question deals with the concept of “incentive-compatibility,” namely what is entailed to structure policies and laws in a way that “self-interest induces people to behave in the way that the authorities want.”<sup>19</sup>

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<sup>17</sup> The Second Circuit Court of Appeals in *Talisman* established a “purpose” criterion for aiding and abetting liability under the ATS. *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). This has raised the bar from a mere “knowledge” standard, as previously endorsed by the United States Court of Appeals for the Eleventh Circuit (see among others, *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005)) and by several district courts in the Second Circuit (see among others, *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-294 (E.D.N.Y. 2007); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005)) to a “purpose” standard that requires that the aider and abettor shares intent to commit the crime. This standard is so high that it in fact forecloses any kind of litigation against corporations under the ATS; based on the core business mission in their bylaws and the corporate objective under the law, the primary objective of a corporation is shareholder value maximization. Almost never will a corporation have the intent to commit crimes, but it rather will be indifferent to the means that will help its end to increase profits.

<sup>18</sup> There exists a decided circuit split on the *mens rea* standard for aiding and abetting and corporate liability under the ATS. Currently, the Seventh Circuit Court of Appeals (*Flomo v. Firestone Natural Rubber Co. LLC*, *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011)), of the Eleventh Circuit (*Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)), and of the D.C. Circuit (*Doe VIII v. Exxon Mobile Corp.*, No. 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011)) endorse corporate liability under the ATS. Moreover, the Eleventh and D.C. Circuit Court of Appeals endorse a knowledge standard for aiding and abetting under the ATS. The Second Circuit Court of Appeals is the outlier on both issues. Judgment on both issues is still pending before the Ninth Circuit Court of Appeals: *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

<sup>19</sup> JOHN BLACK, OXFORD DICTIONARY OF ECONOMICS (2003).

This work assesses corporate liability for human rights violations under the ATS or equivalents in select European jurisdictions from a behavioral economics perspective, taking a comparative law approach. This study aims at filling a critical gap in the literature,<sup>20</sup> which (1) has taken a high-level rather than a comparative procedural law approach to the civil-criminal divide of liability schemes in a cross-country comparison, yielding unspecified results, and (2) has missed assessing the field of CSR from a ‘law and economics’ perspective in a way that applies a behavioral economics perspective to corporate liability adjudication in the area of human rights. However, as this dissertation will show, a cross-disciplinary approach to the subject provides valuable lessons and informs a comprehensive treatment of the challenges at hand. Telling “a story of law and incentives,” this study has the goal of fostering a comparative legal understanding of corporate risk and incentives in relation to human rights liability. It aims to develop a framework for legal *and* intrinsic (i.e. economic or altruistic) incentives that can stir corporate behavior in a way that enhances compliance with social standards and furthermore intends to determine the ‘incentive compatibility’ of the different endogenous and exogenous measures of CSR implementation, including legal liability enforcement. The research goals are twofold: (1) to shed light on the prominence of civil litigation under US courts for the issues concerned, by examining the implications of the civil or criminal nature of the liability scheme for enterprise risk in the context of the respective legal systems, and (2) to assess the ‘incentive compatibility’ of the different liability systems and develop a measure for how legal incentives may be effectively complemented by endogenous ones.

The work starts out with the legal perspective on CSR. Thus, Chapter 2 maps corporate liability risks before domestic courts and shows that the ‘incentive compatibility’ depends largely on the civil or criminal nature of the liability system as well as the underlying legal

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<sup>20</sup> See Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK, ZERP-DISKUSSIONSPAPIER (2005); see also Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 THE YALE J. OF INTL. L., 1-58 (2002); Robert C. Thompson et. al, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INTL. L. REV., 841-902 (2009).



culture. For this purpose, it conducts a comparative analysis of civil and criminal liability schemes for adjudicating human rights responsibilities of corporations before domestic courts in the United States and select European jurisdictions. Looking at human rights redress against MNCs at a domestic level, a divergence in civil and criminal remedies can be observed: Whereas civil human rights litigation is a phenomenon peculiar to the United States, most European jurisdictions provide criminal remedies with the option for the victims to attach civil claims to the criminal proceedings.<sup>21</sup> Much of the analysis hinges upon the concept of ‘partie civile;’ the latter creates a hybrid civil-criminal remedy structure that has important procedural law implications and yields complex results with regard to legal risk and the underlying ‘incentive compatibility’ of the liability rules. Even though the analysis will show that the civil-criminal divide is often blurred, the results are still distinct. In many instances, the civil/(torts)-criminal dichotomy translates into a common law-civil law distinction that implicates enterprise risk. However, there are also implications derived from the civil or criminal nature of the liability scheme that are relevant when determining corporate risk and the extent to which this risk incentivizes corporations to comply rather than default. Thus, unlike other scholarship, this work argues that the civil or criminal nature of the remedies is not just a non-literal “translation” of a “common concept – accountability for human rights abuses - . . . in the legal ‘language’ of each domestic legal system,”<sup>22</sup> but rather it is contended that procedural differences have a profound impact on the substantive scope of human rights responsibilities of MNCs.<sup>23</sup>

Chapter 3 examines substantive law concepts, which illustrate this conflated civil-criminal remedy structure. Apart from touching on imputation principles, this section primarily

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<sup>21</sup> See Thompson, Ramasastry, and Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 894 (2009).

<sup>22</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 2, 4 (2002).

<sup>23</sup> Whereas the ATS is quite vague, by providing remedies for a “violation of the law of nations,” European statutes prescribe remedies for human rights violations along the lines of the categories of crimes against humanity, war crimes and genocide. Thus, unlike in European legal systems, where redress is confined to abuses that qualify as international crimes, the ATS potentially provides enough flexibility in its terms in order to potentially accommodate a broader set of cases involving infringements of labor standards, for example. Moreover, the substantive law standards diverge in civil and criminal liability systems inducing different legal demands on MNCs; thus, agency liability—as a civil principle of imputation—requires control of the principal over the agent, whereas complicity liability—as a criminal law concept—requires actual or reasonable knowledge on part of the MNC.

focuses on a discussion of corporate personhood in the context of the U.S. Supreme Court's decision in *Citizens United*;<sup>24</sup> it analyzes how the Supreme Court's reasoning that corporations (as legal persons) can be bearers of rights under the U.S. Constitution, informs the debate about the responsibilities and obligations of corporations in a CSR context. A thorough analysis of the recent decision in *Kiobel*,<sup>25</sup> where the Second Circuit took on the question whether there is corporate (criminal) liability under the ATS, points towards a confusion in civil and criminal elements that traces back to the hybrid nature of the acts at issue and that amounts to a tension between procedures and substantive law standards. Since the holding in *Kiobel* in September 2010, a decided circuit split in the United States federal courts has evolved with the Seventh, Eleventh, and D.C. Circuit Courts of Appeal endorsing corporate liability under the ATS.<sup>26</sup> A petition for writ of certiorari in *Kiobel* has been granted and the U.S. Supreme Court has seized the case.<sup>27</sup>

Chapter 4 takes a behavioral economics perspective to CSR litigation and shows that incentives induced by legal liability may be limited and do not necessarily guide corporate behavior in the way desired; this is particularly true when monetary incentives are involved.<sup>28</sup> Moreover, the economic perspective on human rights liability of corporations is elaborated; particularly, the conceptual identity question of CSR will be addressed, concerning how legal liability can be accommodated under the concept of CSR, originally intended as corporate self-regulation.<sup>29</sup>

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<sup>24</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

<sup>25</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. Sept. 17, 2010).

<sup>26</sup> *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Doe VIII v. Exxon Mobile Corp.*, No. 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

<sup>27</sup> The petition for writ of certiorari was granted by the U.S. Supreme Court in *Kiobel* on the question of corporate liability under the ATS. *Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3728, No. 10-1491 (Oct. 17, 2011).

<sup>28</sup> Bruno Frey, *Motivation crowding theory – a new approach to behavior*, in: BEHAVIOURAL ECONOMICS AND PUBLIC POLICY, 37, 39 (2008).

<sup>29</sup> See Fabrizio Cafaggi on the interdependencies between corporate law and corporate governance models, Fabrizio Cafaggi, *Fiduciary duties, models of firms, and organizational theories in the context of relational interdependencies*, in: LEGAL ORDERINGS AND ECONOMIC INSTITUTIONS, 268-309 (Fabrizio Cafaggi ed., 2007); see also Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of 'Extended' Corporate Governance: an Explanation Based on The Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, in: REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW (Fabrizio Cafaggi ed., 2006).

According to Frey, a prominent scholar in the field, when an external intervention is perceived to be “controlling,” intrinsic motivation is substituted by this intervention because “the outside intervention is responsible instead.”<sup>30</sup> Frey/Bohnet/Huck find that legal rules and their enforcement can ‘crowd in’ as well as ‘crowd out’ preferences,” such as intrinsic motivation and guilt or shame.<sup>31</sup> It therefore depends on the characteristics of the respective liability system whether there are “hidden ‘costs’”<sup>32</sup> that might ultimately achieve the opposite of what is expected under the “price effect,” namely that the higher the cost of breaching, the more likely compliance will result.<sup>33</sup> This study applies the economic theory of the ‘crowding out’ effect (that has primarily been applied to the enforcement of contractual relationships in the workplace in order to determine how to incentivize employees with rewards or commands)<sup>34</sup> to a CSR context, with the goal to assess the effectiveness of measures of CSR implementation, particularly legal liability across different legal systems and cultures.

The premise is that in an enforcement environment, behavior cannot only be guided by the expected cost of breach but also by intrinsic motivation.<sup>35</sup> This dissertation argues that there exist key characteristics in domestic liability systems that can trigger a ‘crowding out’ of intrinsic motivation, under identifiable conditions, leading to counterintuitive compliance results. The two most prominent factors are: (1) the availability of the legal option of out-of-court settlements, and (2) the availability of corporate human rights liability as opposed to liability of corporate officers (in terms of derivative liability). It is a reality that to date most tort cases under the ATS, which were about to enter trial phase, were settled out of court by the corporate defendants. Accounting for factors such as settlement sum, nature of the settlement,

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<sup>30</sup> Bruno Frey, *Motivation and Human Behavior*, in: RISK, TRUST, AND WELFARE, 31, 36 (Peter Taylor-Gooby ed., 2000).

<sup>31</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV. at 32 (2001); see also Bruno Frey, *Motivation crowding theory – a new approach to behavior*, in: BEHAVIOURAL ECONOMICS AND PUBLIC POLICY at 39 (2008).

<sup>32</sup> Bruno Frey, *Motivation crowding theory – a new approach to behavior*, in: BEHAVIOURAL ECONOMICS AND PUBLIC POLICY 37, 42 (Australian Government Productivity Commission, 2008).

<sup>33</sup> See *Id.*

<sup>34</sup> See *Id.*; see also Bruno Frey et al., *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV., 131 (2001).

<sup>35</sup> See Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV., at 132 (2001).

and motivation to settle, this work finds that out-of-court settlements usually award to the victims monetary damages that are rather modest (when compared to the company's annual revenues) but not insignificant in sum, while not setting legal precedent. Under the 'crowding out' theory this equals a medium level of enforcement, in terms of probability and magnitude of fines. The expected payoff for society is so high that, even when non-compliance is anticipated, it creates a situation of unconditional trust that 'crowds out' trustworthiness and makes corporations, which maximize shareholder profits while not complying with CSR standards, more successful than the ones that forsake profitable opportunities to comply with CSR standards. As a result, intrinsic motivation is 'crowded out' leading to suboptimal compliance results.<sup>36</sup> This finding is in line with the specifications of the deterrence theory as illustrated by Gneezy and Rustichini.<sup>37</sup> According to their work, the deterrence theory holds when a fine is sufficiently large; however, empirical data has shown that it does not hold when the fine imposed is "relatively small, but not insignificant."<sup>38</sup> Introducing a modest fine can lead to a change in social norms by commodifying human rights and transforming the relationship into a market exchange. This changes the rules forever.<sup>39</sup>

Past research has shown that there are also factors, such as personal relationships, that can 'crowd in' intrinsic motivation.<sup>40</sup> Currently, most litigation targets corporations as an institutional entity rather than individual corporate officers for the wrongs committed in overseas operations. As a consequence, intrinsic motivation is 'crowded out,' which reduces compliance on part of corporations.<sup>41</sup> Those and other factors, which will be discussed below, inform the conclusion that current liability systems, on various counts, do not live up to their full

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<sup>36</sup> *See Id.*

<sup>37</sup> Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 THE J. OF LEGAL STUDIES, 1 (2000).

<sup>38</sup> *See Id.*, at 5.

<sup>39</sup> *Id.*, at 13-14.

<sup>40</sup> Bruno Frey, *Motivation and Human Behavior*, in: RISK, TRUST, AND WELFARE, 31, 37-38 (Peter Taylor-Gooby ed., 2000).

<sup>41</sup> This finding is to be understood from a strictly behavioral economics perspective; from a litigation perspective, there might be evidentiary problems when trying to hold corporate officers liable for corporate acts committed 'on their watch.'

potential with regard to incentivizing corporations and rather induce an opposite effect of what is intended, i.e. increased compliance.

Frey/Bohnet/Huck's work offers an interesting perspective on how to deal with this dilemma: in experiments they have shown that in fact "more order [can also be achieved] with less law." Thus, the level of enforcement has a "nonmonotonic effect on behavior" in a way that "performance rates are [not only] high when the expected cost of breach is sufficiently large but also when it is sufficiently low."<sup>42</sup> Low levels of enforcement through external intervention, that is perceived to be "supportive" rather than "controlling," induces compliance by 'crowding in' intrinsic motivation.<sup>43</sup> Therefore, an environment that provides a framework for corporate self-regulation and that develops social norms<sup>44</sup> might be as or even more effective, from a behavioral economics perspective, to induce corporations to comply than the legal liability system in its current form and enforcement practice. Another option, under Frey/Bohnet/Huck's framework, to achieve optimal compliance results is to impose very high fines or more severe sanctions, for example in form of criminal punishment.

Concluding the modest--even if not non-existent--role of legal liability in a CSR context, the normative content of CSR is examined and it is illustrated how endogenous incentives may self-enforce CSR.<sup>45</sup> Endogenous incentives can include altruistic motivation or economic self-interest, ranging from ancillary competitive advantage through reputational benefits to direct bottom-line impact through 'shared value,' i.e., the intersection between business and social

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<sup>42</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV., at 132 (2001).

<sup>43</sup> Frey, Bruno, *Motivation crowding theory – a new approach to behavior*, in BEHAVIOURAL ECONOMICS AND PUBLIC POLICY, ROUNDTABLE PROCEEDINGS, 37, 41 (Australian Government Productivity Commission, 2008).

<sup>44</sup> See Huang, Peter & Wu, Ho-Mou, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J. OF LAW, ECONOMICS, & ORGANIZATION 390-406 (1994).

<sup>45</sup> See Lorenzo Sacconi, *Rawlsian View of CSR and the Game Theory of its Implementation (Part I): the Multi-stakeholder Model of Corporate Governance*, in: CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE: THE CONTRIBUTION OF ECONOMIC THEORY AND RELATED DISCIPLINES 157-193 (Lorenzo Sacconi et al. eds., 2011); Lorenzo Sacconi, *A Social Contract Account for CSR as an Extended Model of Corporate Governance (II): Compliance, Reputation and Reciprocity*, 75 J. OF BUSINESS ETHICS, at 77, 83 (2007). Sacconi coins the concept of CSR as an "extended model of corporate governance," where endogenous incentives and motivations under a social contract have created extended fiduciary duties that are self-enforcing.

value, as promoted in Michael Porter’s most recent work.<sup>46</sup> Since liability schemes in their current design and structure might not stir corporate behavior as expected under traditional economic theory, it is to explore how legal incentives can be effectively complemented with economic ones depending on the respective industry sector. There is no “one-size-fits-all” approach, but rather the extent to which economic endogenous incentives complement legal ones depends on the nature of the liability system, the industry structure, and the respective business model. Showcasing Google’s approach to China’s rigorous censorship requirements and continuous violations of user privacy,<sup>47</sup> lessons can be drawn on how to align business and societal interests, thus generating Porter’s “shared value” for other industries beyond the ICT sector. Specifically, Google’s open opposition to government censorship in China vividly illustrates how freedom of expression ties into Google’s core business to “facilitate access to information”<sup>48</sup> and how it informs its strategic decision-making.<sup>49</sup> Acknowledging that ICT companies’ business model intersects with human rights in a unique way, this work argues that it also provides valuable lessons beyond the ICT sector that can inform a new way forward for companies across all sectors by aligning business and societal values. The ICT sector, where protection of freedom of expression is inherently tied to the company’s *core* business to provide broad access to information, can be contrasted to the extractive sector, where legal incentives are primarily induced by litigation in a reactionary way, and the consumer product sector where

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<sup>46</sup> Michael Porter & Mark Kramer, *The Big Idea: Creating Shared Value: How to reinvent capitalism—and unleash a wave of innovation and growth*, HARVARD BUSINESS REVIEW (January-February 2011).

<sup>47</sup> Google announced on its corporate blog on January 12, 2010, that it is “no longer willing to continue censoring our results on Google.cn” and that “[w]e recognize that this may well mean having to shut down Google.cn, and potentially our offices in China.” (David Drummond, *A New Approach to China*, THE OFFICIAL GOOGLE BLOG (Jan. 12, 2010), at <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html>.) Google’s “new approach to China” had been prompted by cyber attacks that targeted Google’s computer system and the system of at least 20 other companies; evidence suggested that the attacks primarily aimed to access Gmail accounts of Chinese human rights activists and political opponents. For a first assessment of Google’s China strategy, see John Quelch & Katherine Jocz, *Google in China (A)*, HARVARD BUSINESS SCHOOL, CASE NO. 510071 (January 21, 2010); Deborah Compeau, Yulin Fang, and Majela Yin, *Google in China (B)*, HARVARD BUSINESS SCHOOL, CASE NO. 910E11, 1-11 (June 18, 2010).

<sup>48</sup> See Benjamin Edelman & Thomas Eisenmann, *Google Inc.*, HARVARD BUSINESS SCHOOL, CASE NO. 910036, at 13 (Jan. 28, 2010).

<sup>49</sup> Google announced on its corporate blog on March 22, 2010, that it stopped censoring its search results on its China web site Google.cn and is now redirecting all users from mainland China to Google’s Hong Kong server, where they can access uncensored search services in simplified Chinese. David Drummond, *A New Approach to China: An Update*, THE OFFICIAL GOOGLE BLOG (Mar. 22, 2010), at <http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html>.

*ancillary* economic incentives are mainly induced by reputational risk, since CSR has been made an integral part of a company's brand image.

The key to assessing the incentive metrics for corporations is a company's core business and how it aligns with societal and human rights concerns; the less the core business mission happens to align itself, the more it has to be relied on legal incentives, ancillary economic incentives, or simply intrinsic motivation. Thus, whereas Porter's 'shared value' paradigm is the most effective and sustainable approach to CSR (due to a so-called 'market driven staying power'), it might not be a 'natural fit' across all legal systems and industry sectors where business incentives and societal interests cannot be aligned.

The recent example of Cisco Systems shows that even where interests can be aligned and first attempts are made to do so at a high-level managerial level, it is a path full of challenges and temptations, to say the least. The leading plaintiffs' counsel in the most recent law suit against the software giant even compared Cisco's actions to "IBM's behavior in Nazi Germany,"<sup>50</sup> where IBM provided data processing technology through a punch card system to identify and track prisoners in concentration camps.<sup>51</sup> After coining the 'good for society and business' paradigm in their corporate strategy and organization,<sup>52</sup> Cisco now finds itself in the halls of the U.S. District Court for the Northern District of California on charges of complicity in torture, arbitrary detention, wrongful death and other gross violations of human rights committed at the hands of the Chinese government; it is alleged that Cisco customized and promoted its products as being capable of facilitating censorship and repression of dissident groups in China.<sup>53</sup> This illustrates the sad reality that even for corporations where business and societal interest intersect and could be successfully aligned, short term profitable opportunities

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<sup>50</sup> Cited in: Global Post, *Chinese political prisoners sue tech giant Cisco*, (August 16, 2011), at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/110816/chinese-political-prisoners-sue-tech-giant-cisco>.

<sup>51</sup> EDWIN BLACK, *IBM AND THE HOLOCAUST* (2002).

<sup>52</sup> CISCO INC., *CORPORATE SOCIAL RESPONSIBILITY*, at <http://www.cisco.com/web/about/citizenship/index.html>

<sup>53</sup> See John Markoff, *Suit Claims Cisco Helped China Pursue Falun Gong*, N. Y. TIMES, May 22, 2010, available at <http://www.nytimes.com/2011/05/23/technology/23cisco.html>; Du Daobin et al. v. Cisco Systems Inc., Thomas Law, et al., Complaint, U.S. District Court for the District of Maryland, No. 8:11-CV-0153 (June 6, 2011); *Doe et al. v. Cisco Systems Inc.*, John Chambers, et al., Complaint, U.S. District Court for the Northern District of California, No. 5:11-CV-02449 (May 19, 2011).

still prevail over a long term vision of commercial viability, which is socially responsible and respects basic human rights. Among other reasons, this might be the result of a current system that considers the advantages from ‘contracting’ (in metaphorical terms under a ‘social contract’ paradigm) with corporations greater than not doing so, which leads to trustworthiness being ‘crowded out,’ in Frey’s terms;<sup>54</sup> it will not be demanded and thus not be delivered.

Has there a regulatory and economic system arisen where trustworthiness is not appreciated and thus does not guide corporate behavior? Evidence seems to suggest so: Despite the fact that Yahoo! faced a lawsuit before U.S. courts for its policies in China,<sup>55</sup> Cisco is following Yahoo!’s unfortunate example. Further, a year and a half after Google has transferred its search engine from mainland China to Hong Kong to avoid stringent Chinese censorship requirements,<sup>56</sup> Microsoft is filling the void that Google left. Microsoft is now penetrating the Chinese market through a partnership with the Chinese search engine, Baidu.com, thus reaping the profits from the world’s largest internet market with 470 million users in return for censoring its search results while merely emphasizing “differences of opinion with official content management policies.”<sup>57</sup> Along similar lines, an executive of another computer giant confirms the solely profit-driven mentality that might not cut anymore in a post-2008 era. *The Wall Street Journal* quoted an executive at Hewlett-Packard with reference to the “Chongqing project” (an extremely sophisticated and extensive video surveillance system that will “cover a half-million intersections, parks and neighborhoods of nearly 400 square miles”): “It’s not my job to really understand what they’re going to use it for.”<sup>58</sup>

The 2008 financial crisis has shown that trustworthiness on the part of corporations is indispensable for the sustainable well-being of society and corporate success alike. The recent

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<sup>54</sup> See Bruno Frey et al., *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV., 132 (2001).

<sup>55</sup> Xiaoning et al v. Yahoo! Inc., et al., Case No. CO7-02151CW (N.D. Cal 2007).

<sup>56</sup> Miguel Helft et al., *Google Shuts China Site in Dispute Over Censorship*, N.Y. TIMES, Mar. 22, 2010, at A1, available at <http://www.nytimes.com/2010/03/23/technology/23google.html>.

<sup>57</sup> See David Barboza, *Microsoft to Partner with China’s Leading Search Engine*, N. Y. TIMES, July 4, 2011, available at [https://www.nytimes.com/2011/07/05/technology/05microsoft.html?\\_r=1&ref=davidbarboza](https://www.nytimes.com/2011/07/05/technology/05microsoft.html?_r=1&ref=davidbarboza)

<sup>58</sup> Loretta Chao & Don Clark, *Cisco Poised to Help China Keep an Eye on Its Citizens*, Wall Street Journal, July 5, 2011, available at <http://online.wsj.com/article/SB10001424052702304778304576377141077267316.html>



experiences and developments have the potential of being game changers if the international business community recognizes them as such; they have vividly illustrated that commercial viability and responsibility for the society in which corporations operate are more closely related than acknowledged in the past. The latest efforts about transparency and disclosure of non-financial information (i.e. environmental, social and governance (ESG) factors)<sup>59</sup> marks this important lesson and shows a new awareness that might enlighten a promising way forward. We will have to critically assess the current legal and economic system and the incentives that it induces for corporations to ensure that the ‘social contract’ that society has with the corporate world is not unconditional anymore, but rather encourages, induces, and eventually rewards trustworthiness in a fashion that is responsible with regard to society and businesses.

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<sup>59</sup> There have been efforts to include ESG factors in filings to the Securities Exchange Commission (SEC), most prominently spearheaded by the “21st Century Disclosure Initiative,” initiated by Christopher Cox, former chairman of the SEC. 14 institutional investors signed on the initiative and call on the SEC to include environmental, social, and governance factors as part of its disclosure requirements. *See* 21<sup>ST</sup> CENTURY DISCLOSURE INITIATIVE, at <http://www.sec.gov/disclosureinitiative>.

## CHAPTER 2

### The Civil and Criminal Divide in Domestic Liability Schemes: The role of procedural rules in extraterritorial cases of corporate human rights liability in the United States, France and Belgium

#### I. SCOPE OF ANALYSIS AND METHODOLOGY

There are many different ways how companies and the international community can deliver on Professor John Ruggie's "Respect, Protect, and Remedy" framework when in the realm of corporate human rights compliance.<sup>60</sup> Whereas companies have the responsibility to conduct due diligence to ensure respect for human rights throughout their business operations and corporate structures,<sup>61</sup> States have their own responsibility to protect against human rights abuses by non-State actors within their territory or jurisdiction and to provide effective remedies to victims of abuses.<sup>62</sup> Ruggie's framework is one of complementarity rather than exclusivity, thus emphasizing that the aforementioned responsibilities all exist alongside each other and one does not preempt the other.<sup>63</sup> Thus, many nations have opened their courts, within their jurisdictional limitations, to victims of human rights abuses from all over the world. In their quest for profit and competitive advantage in a globalized world, MNCs often find themselves in situations where they expose themselves to allegations of complicity in human rights violations committed in connection with their overseas operations.<sup>64</sup> A mere deference to domestic law of the host State is not enough on the part of corporations to protect themselves from litigation.<sup>65</sup> Rather, non-compliance with international standards, especially human rights principles, bears

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<sup>60</sup> John Ruggie's business and human rights framework consists of three "differentiated but complementary responsibilities," namely "the State duty to *protect* against human rights abuses by third parties, including business; the corporate responsibility to *respect* human rights; and the need for more effective access to *remedies*." [emphasis added.] (PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, A/HRC/8/5, at para. 9 (2008)).

<sup>61</sup> *Id.*, at para. 56-64.

<sup>62</sup> *Id.* at para. 18.

<sup>63</sup> *Id.* at para. 9.

<sup>64</sup> For an overview of corporate case under the ATS, see Katherine Gallagher, Civil Litigation and Transnational Business: An Alien Tort Statute Primer, 8 Journal of International Criminal Justice, 745-67 (2010).

<sup>65</sup> Microsoft CEO Steve Ballmer states in face of Google's threat to pull out of China due to the government's stringent censorship requirements: "We've been quite clear that we are going to operate in China, (and) we're going to abide by the law," cited in: Tom Krazit, *Microsoft on China: We're Staying*, CBSNEWS (Jan. 14, 2010), at <http://www.cbsnews.com/stories/2010/01/14/tech/cnettechnews/main6098111.shtml>.

the imminent risk of litigation before the courts of multiple jurisdictions that makes it difficult for corporations to appropriately identify their legal risks on a global scale.<sup>66</sup>

Knowledge about the legal risks of corporations for non-compliance in the field will provide the basis for critically assessing whether the different venues of legal enforcement in fact contribute effectively to the objective to deter non-compliance. For such purpose, this chapter will conduct a comparative analysis of liability schemes for adjudicating overseas human rights violations against corporations before domestic courts in the United States and select European jurisdictions. The analysis relies upon a detailed treatment of the French and Belgian systems as a counterpoint to the U.S. system. However, given the similarities between the French-Belgian systems and other civil law systems in Europe, I will occasionally simply refer to the contrast between the common law (of the United States) and the civil law (of continental Europe) for purposes of brevity and simplicity.<sup>67</sup> There will always be exceptions to any general point raised below when surveying all civil law systems in Europe, but the French-Belgian model is a very sophisticated and useful comparison to the U.S. model for purposes of contrasting the European civil law with the American common law approach to corporate human rights liability.

### **1. Comparative Tort Liability in Criminal Disguise**

It is common among most jurisdictions that both civil and criminal remedies are available to hold corporations liable for misconduct within the territory of the sitting jurisdiction.<sup>68</sup> Certainly, ways of attribution might differ, but the legal concept of civil<sup>69</sup> and

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<sup>66</sup> See ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT, LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, A SURVEY OF SIXTEEN COUNTRIES, EXECUTIVE SUMMARY (2006).

<sup>67</sup> Eric Engle confirms this position by pointing out that “the majority of civil law countries in Europe more closely follow the French civil law.” Eric Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 37-38 (2005). Since, as Engle points out, German civil law shows some basic differences to the francophone legal culture, reference will occasionally be made to the German legal system as a counterpoint in order to illustrate the common, but in some details still diversified, legal tradition and practice in Europe. *Id.*, at 38.

<sup>68</sup> SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, 11 (2004); see also FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS VIOLATIONS, 57 (2008).

<sup>69</sup> Brief of David J. Scheffer as *Amicus Curiae* On Writ of Certiorari at 5, *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_ (2011), No. 10-1491 (U.S. 20 December 2011).

criminal liability<sup>70</sup> of corporations is well-established across jurisdictions. However, there is significant divergence among jurisdictions with regard to corporate liability for human rights abuses that occurred abroad, i.e., outside of the sitting jurisdiction's territory.<sup>71</sup> Even though a great number of countries joined the fight against impunity by allowing access to their court system to remedy human rights abuses that occurred abroad, i.e., outside the territory of the sitting jurisdiction, their approach with regard to legal remedies is very different.<sup>72</sup> Whereas the United States provides for civil human rights liability under the Alien Tort Statute (ATS), a statute that is peculiar to the U.S. legal system,<sup>73</sup> European jurisdictions dispose of an inadequate civil liability system for these matters, as will be shown below, and thus mainly rely on criminal prosecution of corporations and/or their corporate officers with the option for victims to attach their civil tort claims to the criminal proceedings (the so-called 'partie civile' mechanism). It is a reality that to date most lawsuits of such kind have been brought in the United States, whereas in Europe they rarely occur. Specifically, the number of human rights lawsuits filed against corporations under the ATS counts "approximately fifty,"<sup>74</sup> while in Europe only a handful of similar cases were brought under the 'constitution de partie civile' mechanism.<sup>75</sup> This stark

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<sup>70</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT'L L. REV., 871-72 (2009) (13 out of 16 surveyed countries indicated that they provide for criminal liability of corporations either *de lege* or in practice).

<sup>71</sup> See Brief of Ralph G. Steinhardt as *Amicus Curiae* Supporting Petition for Writ of Certiorari at 15-16, *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_ (2011), No. 10-1491 (U.S. 13 July 2011).

<sup>72</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L., 3 (2002).

<sup>73</sup> Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV., 404 (2001).

<sup>74</sup> Based on Beth Stephens' data analysis in *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOKLYN J. OF INT'L L., 773 (2008). For a break-down of "corporate defendant human rights cases" pre- and post-Unocal, see *Id.* at 813-18.

<sup>75</sup> In Belgium, an 'action civile' was brought by citizens of Myanmar (formerly Burma) against TotalFinalElf S.A. (henceforth: Total) (a France-based oil company and joint venture partner of Unocal in the Yadana pipeline project in Burma that gave rise to litigation before U.S. federal courts) for complicity in crimes against humanity, among others, forced displacement and forced labour, in relation with the construction of the pipeline. BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 38 (2006). In France, Myanmar citizens brought similar charges against Total for its involvement in the Yadana pipeline project in Burma based on an 'action civile.' ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 19 (2006); see also Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT'L HUMAN RIGHTS, para. 97 (2008). Other ATS-like cases were brought under the 'partie civile' procedure against the French company Rougier S.A. in 2002 (for illegally cutting down forest areas in Cameroon that were the main source of livelihood for local communities) and against DLH France in 2009 (for allegedly knowingly buying timber from local companies that were supporting the repressive Charles Taylor regime during the Liberian civil war). See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS

divergence in litigation volume on the issues at hand prompts the question of what are the reasons for this discrepancy. This chapter will explore the reasons for the prominence of litigation under the ATS before U.S. courts and shed some light on the reality why similar litigation has not been pursued before European courts to the same extent.

This requires first identifying the key differences between the United States and European liability system with regard to such lawsuits. On its face, the difference seems to be that the United States is using civil as opposed to criminal proceedings as a vehicle for liability litigation in such cases. However, there is more to this. The following chapter will specify the actual differences and show its practical implications. The existing scholarship has mainly focused on the differences in substantive law as they result from this civil-criminal dichotomy in liability adjudication. The following chapter will show that differences between the United States and Europe do not only exist with regard to substantive law standards. Rather, the different legal culture and underlying societal premises about the role of litigation in the courts and, most importantly, differences in procedural rules between human rights litigation under the U.S. ATS and European remedy venues<sup>76</sup> are key drivers in litigation of such cases and explain why the United States may provide a more attractive forum for victims in this regard. The notion of ‘American Exceptionalism’ (in terms of the uniqueness of American culture) has been commented on for the last century<sup>77</sup> and is indicative of unique characteristics of American ideology, which are, according to Martin Lipsek, “liberty, egalitarianism, individualism, populism, and laissez-faire.”<sup>78</sup> These unique cultural features, as has been argued by scholars,

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OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 5(2006); *see also* Global Witness, *International timber company DLH accused of funding Liberian war* (November 18, 2009) at <http://www.globalwitness.org/library/international-timber-company-dlh-accused-funding-liberian-war>.

<sup>76</sup>Also, Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 93 (2008) (indicating that one of the reasons why there have not been more civil damage cases against corporations before European courts are “procedural laws in Europe [that] are less favorable than in the U.S.”)

<sup>77</sup> See e.g. SEYMOUR LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996); Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 277-301 (2002).

<sup>78</sup> SEYMOUR LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD*, at 33 (1996).

explain the litigious character of American society.<sup>79</sup> This makes the United States a unique jurisdictional forum that is particularly favorable to private litigation.

It is to be noted, however, that the tort-criminal divide is not clear-cut but is rather blurred as the ‘partie civile’ mechanism in France and Belgium vividly illustrates. The ‘partie civile’ procedure, also referred to as ‘action civile,’ provides a mechanism by which the victim of a crime can attach his civil claim for damages suffered to the criminal case and therefore become a (civil) party to the criminal proceedings.<sup>80</sup> Attaching a ‘partie civile’ to criminal proceedings yields complex results that merge criminal and civil proceedings, thus consolidating procedural rules. Also, even though the ATS clearly provides for civil tort liability, such hybrid elements are not foreign to ATS litigation either; thus, e.g., U.S. courts mainly have resorted to the criminal concept of aiding and abetting liability for imputing abuses to corporate defendants instead of the corporate law concepts of agency or joint venture liability. These mixed remedy structures in the United States and Europe have important implications for procedural aspects of liability litigation and thus influence the practical results for victims and corporations.

Some scholars have argued that the civil or criminal nature of the remedies is merely a non-literal “translation” of a “common concept – accountability for human rights abuses - . . . in the legal ‘language’ of each domestic legal system.”<sup>81</sup> Unlike this scholarship, the following chapter argues that the theoretical similarity between different venues of corporate liability in pursuit of the common/unifying goal of promoting accountability for human rights violations does not implicate the same practical results for the corporate defendants and the victim plaintiffs. Rather, the respective procedural and cultural differences have a profound impact on the substantive scope of human rights responsibilities of MNCs. Thus, within the civil law and common law culture of the respective legal systems, the tort or criminal nature of the liability

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<sup>79</sup> See Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 277-301 (2002).

<sup>80</sup> See Patrick Campbell, *Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT’L & COMP. L. REV., 323 (1980); see also Eric Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 28 (2005).

<sup>81</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 4 (2002).

system and related procedural rules have significant implications for the effectiveness of victims' redress on the one hand and corporate legal risk on the other hand.

The focus of analysis will be comparing and contrasting corporate tort liabilities for overseas human rights violations across different domestic legal systems. The 'partie civile' mechanism in Europe is crucial for the analysis, as it provides, at least in theory, an effective vehicle for tort claims that can be channeled through a main criminal procedure. No legal statute exists in Europe that is similar to the ATS in nature and reach. As it will be shown below, ordinary tort liability under domestic law falls short for these kind of cases as does tort liability on the jurisdictional basis of EU law, in particular the Brussels I Regulation. This has prompted scholars and legal experts to consider the 'constitution de partie civile' (in the context of criminal proceedings) combined with universal<sup>82</sup> or passive nationality criminal jurisdiction<sup>83</sup> (preferably with no double-incrimination requirement<sup>84</sup> and jurisdictional extension to foreign national refugees<sup>85</sup>) as an (close-to) equivalent to universal civil jurisdiction for human rights liability under the ATS. However, as will be shown below, this approximation might be limited due to jurisdictional constraints requiring nationality on part of the victim plaintiffs and/or double criminality of the offenses under the laws of the home and host country. Moreover, the full or broad discretion of the prosecutor to initiate a case also puts limitation on the success of tort claims in connection with the criminal act. It needs to be emphasized that the focus of this comparative analysis is on the comparison and contrast of tort liability under the ATS and tort liability under the 'partie civile' mechanism as part of the main criminal proceeding. The mixed

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<sup>82</sup> INTERNATIONAL BAR ASSOCIATION, REPORT OF THE TASKFORCE ON EXTRATERRITORIAL JURISDICTION, 128 (2009).

<sup>83</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, in: GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER, PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR, 59, 101 (Andrew Morriss ed., 2010).

<sup>84</sup> In France, 'double criminality' is not required to assert passive nationality jurisdiction. Then again, unlike Belgium, France requires French nationality of the victims what significantly limits access to French courts for ATS-like cases. Art. 113-7 French CC; See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 100. (Translation by Fédération internationale des ligues des droits de l'Homme (FIDH))

<sup>85</sup> This is the case in Belgium for "a grave violation of international humanitarian law" as defined in volume II, title Ibis of the Belgian Criminal Code (henceforth: Belgian CC) (i.e. genocide (Art. 136bis), crimes against humanity (Art. 136ter), and war crimes (Art. 136quater)), see Art. 10, Ibis Belgian Preliminary Title to the Code of Criminal Procedure (henceforth: Belgian PTCCP). (Translation by FIDH)

civil/criminal nature of the ‘partie civile’ concept has important implications for procedural rules and substantive law as applied in the cases concerned and might shed some light on the fact that tort claims have almost exclusively been brought before U.S. courts under the ATS, rather than before the courts of its European counterparts.

Legal scholarship has only scarcely focused on the interplay between substantive law deterrence and procedural rules, especially with regard to civil claims.<sup>86</sup> As pointed out in the previous chapter, this dissertation takes an incentives-based approach to human rights compliance by corporations. It will be shown that incentives induced by legal adjudication cannot only be found in substantive law, but also in procedural rules governing litigation, as some scholars have argued. Thus, procedural rules and practicalities of litigation might alter the legal deterrence effect envisioned by legal theory.<sup>87</sup> Moreover, I argue in Chapter 4 that the civil or criminal nature of the respective liability schemes has implications for the incentive-compatibility of the latter. The following chapters will build upon the scholarship on comparative civil procedure,<sup>88</sup> tort law incentives,<sup>89</sup> and comparative corporate responsibility law<sup>90</sup> and will be extending the findings on the interplay between procedures and substantive

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<sup>86</sup> A few scholars have focused on this substantive and procedural interdependence, see Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 INDIANA L.J., 60 (1997); Jeffrey Parker, *Comparative Civil Procedure and Transnational “Harmonization”*: A Law-and-Economics Perspective, Presented at the 11<sup>th</sup> Travemunder Symposium on the Economic Analysis of Procedural Law, GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES (2008).

<sup>87</sup> See Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 INDIANA L.J. 99-108 (1997). (Arguing that the U.S. procedural system alters deterrence incentives in two ways not taken into account by tort theory).

<sup>88</sup> See Scott Dodson & James Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 BOSTON COLLEGE INT’L & COMP. L. REV., 1-26 (2011); Oscar G. Chase et al., CIVIL LITIGATION IN COMPARATIVE CONTEXT (2007) (Conducting a comparative approach to the civil procedure of various legal systems while addressing the divide between common and civil law systems and delineating the implications of transnational civil litigation in those systems.); Ernst Stiefel & James Maxeiner, *Civil Justice Reform in the United States-Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?*, 42 THE AMERICAN JOURNAL OF COMPARATIVE LAW 147-62 (1994); JAMES MAXEINER, PHILIP HOWARD, GOYOOHO LEE, AND ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011).

<sup>89</sup> Some scholars have critically assessed whether tort law in fact achieves the deterrence effect that is envisaged by legal theory. Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 INDIANA L.J. 60-117; John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966-67 (1984); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381-87 (1994).

<sup>90</sup> See MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY – A LEGAL ANALYSIS (2009); Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 59-158; Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 841-902 (2009); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 2-57 (2002).



law deterrence to corporate tort liability for violations of international law, especially human rights standards.

By comparing and contrasting relevant procedural rules at the pre-trial and trial phase, differences among the United States and Europe will be identified that implicate the corporate risk of litigation and effectiveness of victims' redress and therefore directly influence the substantive scope of corporate responsibilities and victims rights. The differences trace back to both (1) the civil law and common law culture of the respective jurisdictions and (2) the torts or criminal nature of the liability schemes. Furthermore, an analysis of the substantive law principles relating to jurisdictional prescription and corporate liability aims to reinforce the differences and complements the understanding why most victims resort to the U.S. system for relief. The following analysis will shed light on the existing preferences of forum when it comes to litigating ATS-like cases but will also yield some results that might seem counter-intuitive at first sight, as will be seen below. Moreover, one must emphasize that the comparison between the United States and Europe is not perfectly bi-polar; rather, despite many commonalities, there are some minor, but significant differences among the select European countries' approaches to human rights adjudication targeted at corporations. To understand these differences among European jurisdictions will demonstrate the diversified legal character of Europe. The sooner we recognize the diversified character of Europe with regard human rights redress, the better can we distill characteristics of legal liability schemes and their adjudication that are most compatible with the desired incentives under the law, namely to deter violations and improve compliance.

## **2. Rationale for Selection of Country Case Studies**

This work aims to conduct a comparative legal analysis of civil and criminal remedies for corporate human rights cases in the U.S. common law system and France and Belgium, representative of Continental civil law systems. The United States is unique in its concept and practice of providing for human rights redress under the ATS and can be viewed to be the

standard against which other legal systems will be compared.<sup>91</sup> Eric Engle confirms the choice of European legal systems by stating that “the majority of civil law countries in Europe more closely follow French civil law.”<sup>92</sup> France has been one of the first countries in Europe to introduce corporate criminal liability in its criminal code in 1994;<sup>93</sup> this makes it an interesting legal system to look at with regard to corporate human rights violations. Concerning Belgium, it is to be noted that even though Belgium follows the French legal tradition,<sup>94</sup> it still made its own mark, for example with its broad universal jurisdiction in absentia (the most far-reaching jurisdiction in Europe until 2003)<sup>95</sup> and its granting recognized refugees the same protection as Belgian nationals with regard to international crimes.<sup>96</sup> These and other features of the Belgian legal system particularly in extraterritorial cases, has made Belgium a unique litigation forum for extraterritorial human rights cases. The intention of this work is, by choosing France and Belgium as the European counterparts in the analysis, to illustrate that differences between those two European civil law systems might not be as stark as between others (such as Germany), but they can be decisive and have a needle-moving impact with regard to access to courts for human rights plaintiffs and thus with regard to (substantive law) deterrence of corporations. Occasionally, the French and Belgian approach will be contrasted with the German one since, on many counts, Germany can be considered the “odd-man out” among the majority of European legal systems following the French legal tradition; those rather stark differences between

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<sup>91</sup> See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV., 404 (2001).

<sup>92</sup> Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 37-38 (2005).

<sup>93</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 73-74. France has been a strong advocate during the Rome negotiations to make legal persons, in addition to natural persons, subject to jurisdiction of the International Criminal Court. Kai Ambos, *Art. 25: Individual Criminal Responsibility*, in: COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, para. 4 (Triffterer ed., 1999).

<sup>94</sup> Belgium has been influenced significantly by the French legal system; Hubert Bocken and Walter De Bondt explain that “during most of the nineteenth century, independence of the [Belgian] legal system was further away than ever. ... There were few changes to French codes. Most attempts at revising them failed.” HUBERT BOCKEN & WALTER DE BONDT, INTRODUCTION TO BELGIAN LAW, 11 (2001) [internal citation omitted]. Even though “Belgian law has still ties with French law” (*Id.*, at 13 [international citation omitted]), Belgium has developed a common “Belgian attitude toward law,” what is characterized by pragmatism and a willingness to look to international law and other legal systems. (*Id.*, at 21).

<sup>95</sup> See *id.*, at 26.

<sup>96</sup> See Art. 10 1bis Belgian PTPP.

Germany and countries following the French civil culture can prove helpful to get a broader understanding of the ‘European’ approach to corporate human rights litigation, since many countries in Eastern Europe have successfully exported the German legal system.<sup>97</sup>

Another reason for structuring the comparative legal analysis around the United States on the one side and Belgium and France on the other hand is an important common feature between France and Belgium. Both legal systems are spearheading the ‘partie civile’ procedure as an option for civil parties to criminal proceedings.<sup>98</sup> The ‘partie civile’ procedure is of strategic importance, especially in corporate human rights cases, and trumps municipal tort actions under the Brussels I Regulation as a viable option for litigating those issues, as will be shown below. Scholars have considered the ‘partie civile’ procedure to be a competitive venue for redress under the ATS.<sup>99</sup>

Finally, the comparative analysis of the ‘partie civile’ procedure in Belgium and France will also allow drawing conclusions with regard to the effectiveness of corporate human rights redress in other jurisdictions in Europe and beyond. Thus, a survey conducted among 16 jurisdictions about private sector remedies for grave violations of human rights showed that among the 8 jurisdictions of the sample group that have endorsed the principle of prosecutorial discretion, the majority (i.e. six jurisdictions) still provided for some kind of “mechanisms for individuals or organizations to initiate and/or participate in criminal proceedings” and four jurisdictions provided for an ‘action civile’ mechanism.<sup>100</sup>

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<sup>97</sup> See Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 38 (2005).

<sup>98</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 882(2009); Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 97 (2008) (Pointing out cases against French company Total brought for their operations in Burma (now Myanmar) before French and Belgian courts under the ‘partie civile’ procedure.)

<sup>99</sup> See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 19 (2002); Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, 1/20 ZERP-DISKUSSIONSPAPIER, 21 (2005) (arguing that the empirical evidence of partie civile procedures or equivalent across most civil jurisdictions “proves that [...] the Alien Tort Statute is not idiosyncratic.”)

<sup>100</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 882 (2009).

## II. AVAILABLE TORT REMEDIES IN EUROPE: THE BRUSSELS I REGULATION AND ITS LIMITS

Apart from tort liability under the ATS and criminal liability with the option to attach civil claims under European criminal codes, there also are other remedies available both in the United States and Europe. However, the latter do not bear the same litigious potential for the reasons set out below.<sup>101</sup> Thus, ordinary tort liability actually is a viable option for victims to hold corporations accountable before European courts.<sup>102</sup> However, there are various reasons why those tort venues, despite being available in theory, in fact have not been resorted to by litigious parties to the same extent as the ATS or the European ‘partie civile’ procedure. Jan Wouters has pointed to the future potential of the Brussels I Regulation after the European Courts of Justice’s decision in *Andrew Owusu v. N.B. Jackson*,<sup>103</sup> where the Court declared the *forum non conveniens* doctrine as inapplicable in cases under the Brussels I Regulation and thus lifted an important procedural hurdle for ATS-like cases in Europe. This change in legal practice might turn out to be a decisive advantage over litigation under the ATS, which is often challenged and dismissed on grounds of *forum non conveniens*.<sup>104</sup>

It is a generally accepted view both in countries with a common law tradition and those with a civil law tradition that the violation of a criminal standard which aims to protect a particular individual, entails tort liability for the damage suffered.<sup>105</sup> Under common law, this doctrine is referred to as ‘negligence per se,’ meaning that the violation of a criminal provision

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<sup>101</sup> The first successful tort action for complicity in crimes against humanity has only been granted by a French administrative court in its June 2006 landmark decision in the “Lipietz” case. See Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes against Humanity: The Lipietz Case*, 56 THE AMERICAN JOURNAL OF COMPARATIVE LAW, 363-401 (2008). See also Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 93 (2008) (asking the question “why, if the Brussels I Regulation can be a useful tool for European civil damages claims against European corporations for human rights abuses abroad, have there not been more cases?”).

<sup>102</sup> See Bahareh Mostajeleian, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or its Failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*, 40 THE GEORGE WASHINGTON INT’L L. REV., 512-13 (2008); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 31-32 (discussing the possibility to use municipal torts as an alternate cause of action under domestic law to address human rights violations.); Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, 5 (2008).

<sup>103</sup> *Andrew Owusu v. N.B. Jackson*, Case C-281/02, 2005 E.C.R. O.J. (C 106).

<sup>104</sup> Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, 299 (2008).

<sup>105</sup> See GEORGE FLETCHER, *TORT LIABILITY FOR HUMAN RIGHTS ABUSES*, 57-58 (2008).

triggers tort liability in negligence.<sup>106</sup> This rule does not only apply to violations of criminal standards but any protective laws that create individual rights. Thus, in the United States, the *Bivens* principle creates a tort based on violation of a right under the Constitution.<sup>107</sup> Therefore, no matter whether the cause of action is derived from a ‘violation of the law of nations’ under the ATS or a violation of a criminal standard, ordinary tort liability is available as redress for victims of human rights abuses attributable to a corporation.

In the United States, there is no need for victims to resort to ordinary tort remedies, as the ATS provides a special statutory basis for extraterritorial violations of the law of nations against aliens. In Europe, however, using regular torts law, as opposed to the ‘partie civile’ mechanism in connection with a criminal proceeding, offers a serious alternate route for redress. The question remains, however, why in fact ordinary tort liability is not resorted to by victims and their plaintiffs in Europe. There are various reasons that make regular torts law less attractive for victims’ redress than the ATS and the ‘partie civile’ mechanism. In brief, the main reasons are jurisdictional limitations for tort liability and rules of international private law that produce sub-optimal results for the fact situation at hand.

First and foremost, there exists no equivalent to universal civil jurisdiction, as prescribed under the ATS, in any other legal system.<sup>108</sup> This limits the access to tort remedies in Europe significantly. Universal civil jurisdiction is a highly controversial concept under international law, which according to Judges Higgins, Kooijmans, and Buergenthal of the International Court of Justice “has not attracted the approbation of States generally.”<sup>109</sup> In Europe, the jurisdiction of civil courts over misconduct that occurred abroad is determined by the European Council Regulation No 44/2001 of December 22, 2000, on jurisdiction and the recognition and

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<sup>106</sup> See Restatement of the Law (Third), Torts: Liability for Physical Harm, § 14 ‘Statutory Violations as Negligence Per Se’ (2010).

<sup>107</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>108</sup> See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV. 404 (2001).

<sup>109</sup> Joint Separate Opinion of Judges Higgins, Kooijmans, Buergenthal, in Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 2002 I.C.J. Reports 63, at para. 48.

enforcement of judgments in civil and commercial matters (co-called Brussels I Regulation).<sup>110</sup>

The Brussels I Regulation establishes civil jurisdiction of European courts based on the domicile of the defendant. Therefore, French and Belgium courts, e.g., have jurisdiction over civil cases involving corporate acts which have taken place outside of the EU as long as the defendant company is “domiciled” in the forum jurisdiction,<sup>111</sup> even if the damage is sustained in third countries<sup>112</sup> and irrespective of the nationality and domicile of the victim.<sup>113</sup>

According to Art. 60 of the Brussels I Regulation, a company is considered to be “domiciled” where it has its “(a) statutory seat, or (b) central administration, or (c) principal place of business.” Prof. Olivier de Schutter has claimed that the Brussels I Regulation constitutes the European equivalent to the ATS.<sup>114</sup> However, compared to the civil jurisdiction under the ATS, which does not require any link with the United States aside from establishing personal jurisdiction over the corporate defendant,<sup>115</sup> the Brussels I Regulation does not extend to the misconduct of foreign corporations, i.e., corporations that are not “domiciled” within the EU; for the very least a company must have its principal place of business within the EU. This, it is argued, diminishes its impact and importance of the Brussels framework for extraterritorial civil human rights litigation in Europe.<sup>116</sup>

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<sup>110</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. (L 12/1) (“Brussels I Regulation”). The Brussels I Regulation succeeds the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Convention (EC) of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 [1972] O.J. L (299) 32.

<sup>111</sup> Art. 2(1) Brussels I Regulation.

<sup>112</sup> See Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 80 (2008).

<sup>113</sup> Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC), Case C-412/98, 2000 E.C.R. I-5925, at para. 45.

<sup>114</sup> Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS, 227 (P. Alston ed., 2005).

<sup>115</sup> See section C on “Comparative Jurisdictional Reach” below (p. 34-51); Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 109.

<sup>116</sup> Bahareh Mostajelean, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or is it failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*, 40 THE GEORGE WASHINGTON INT’L L. REV. at 507 (2008).

For foreign companies (i.e., those outside of the EU), jurisdiction cannot be based on the Brussels I Regulation, but must be established under domestic law.<sup>117</sup> Thus, e.g., Belgian civil courts can assert extraterritorial jurisdiction over torts of foreign (i.e. outside of the EU) companies within the scope of Art. 96 or Art. 11 of the 2004 Belgian Code on Private International Law (henceforth: Belgian PIL Code).<sup>118</sup> Even though Art. 96 provides a special ground for tort liability, the plaintiff can decide which ground he wants to rely on for jurisdiction.<sup>119</sup> Both Art. 96 and Art. 11 of the Belgian PIL Code pose challenges to the victim plaintiffs.

Art. 96(2) Belgian PIL Code<sup>120</sup> grants jurisdiction to a Belgian civil judge to hear a case involving obligations resulting from a tort “(a) when the event giving rise to the obligation has arisen or threaten to arise, in all or in part, in Belgium,” or “(b) if and *to the extent* [emphasis added] that the harm [in terms of damage<sup>121</sup>] has been suffered or threaten to be suffered in Belgium.”<sup>122</sup> Whereas option (a) focuses on the tortfeasor as a determining factor for jurisdiction, option (b) focuses on the (impact on the) victim. Option (a) enables a claim for compensation for the entire damage (irrespective whether it occurred in Belgium or abroad), provided that “one of the constituting elements of the event giving rise to the damage” be located on Belgian territory.<sup>123</sup> However, considering the advanced compartmentalization of

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<sup>117</sup> Art. 2 of the Belgian Code on International Private Law prescribes that international treaties or acts of the European Union regulating non-contractual obligations are considered *lex specialis* to the provisions of the IPL Code. See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 62-63, 69 (2006) (emphasizing that Art. 96 Belgian PIL Code only applies to defendants “living outside of the European Union.”).

<sup>118</sup> Loi portant le Code de droit international privé (July 16, 2004) [Belgian Code on Private International Law].

<sup>119</sup> *Id.*, at 69.

<sup>120</sup> Art. 96 (2) Belgian PIL Code mirrors Art. 5(3) of the Brussels I Regulation and thus interestingly applies the same standard to tort liability of corporations domiciled within the European Union and the ones domiciled outside of the EU. See ARNAUD NUYTS, COMPARATIVE STUDY OF “RESIDUAL JURISDICTION” IN CIVIL AND COMMERCIAL DISPUTE IN THE EU, NATIONAL REPORT FOR BELGIUM, 3(2006), at [http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_belgium\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_belgium_en.pdf)

<sup>121</sup> Translation by: BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 70 (2006).

<sup>122</sup> See Arnaud Nuyts, Comparative Study of “Residual Jurisdiction” in Civil and Commercial Dispute in the EU, National Report for Belgium, 7 (2006), at

[http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_belgium\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_belgium_en.pdf).

<sup>123</sup> *Id.*

MNCs into a net of legally independent subsidiaries,<sup>124</sup> it might not be an easy task for the victims of overseas human rights violations to link the ‘act creating the damage’ back to Belgium. Especially considering the only very limited instances when courts are willing to ‘pierce the corporate veil,’<sup>125</sup> imputing abuses that occurred overseas in the larger context a company’s business operations, puts a burden on the victim plaintiffs and also exposes them to a situation of legal uncertainty concerning interpretation by the domestic courts, in this case Belgium, about when an “act creating the damage” has (at least in part) occurred in Belgium.

Option (b) on the other hand, also proves to be useful only in a limited way; most likely, option (b) will lead to a situation where a Belgian judge has jurisdiction over a plaintiff who lives in Belgium, since damage usually occurs where the plaintiff has its assets, which often intersects with his place of living.<sup>126</sup> Applying this hypothesis to human rights-related torts in connection with a company’s overseas operations, victims will only be able to have a Belgian judge assess their civil claims if they reside in Belgium, either on a refugee status or otherwise. This limits the impact and usefulness for victims from developing countries and emerging markets where MNCs conduct their business operations and where related torts occur. Moreover, Art. 96 (2)b Belgian PIL Code contains an important restriction: a Belgian judge can only assert jurisdiction over the part of the claim that aims to redeem compensation for the damage that occurred in Belgium , unless the event giving rise to the damage occurred (at least in part) in Belgium (Art. 96 (2)a Belgian PIL Code). Thus, if damage has occurred in

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<sup>124</sup> The OECD Guidelines for Multinational Enterprises (2011 version) define multinational enterprise as follows: “They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.” Concepts and Principles I.4. (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> ; see also Peter Muchlinski, *The Company Law Review and Multinational Corporate Groups*, in: THE REFORM OF UNITED KINGDOM COMPANY LAW 249, 251 (John de Lacy ed., 2002) [Cited in: Wells, Celia & Elias, Juanita, *Catching the Conscience of the King: Corporate Players on the International Stage*, in NON-STATE ACTORS AND HUMAN RIGHTS, 141, 148-49 (Philip Alston ed., 2005)].

<sup>125</sup> SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, 129-32 (2004); already the first European Company Law Directive from March 1968 required member States to “ensure certainty in the law as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity,” thus limiting the instances where the corporate form can be disregarded. First Council Directive 68/151/EEC (9 March 1968); See also KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL: A TRANSNATIONAL APPROACH (2007).

<sup>126</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 69 (2006).



more than one jurisdiction—which is very likely in cases of corporate-led human rights violations, considering that the primary damage has occurred in the host country—Belgian courts will *only* assume jurisdiction over the part that are linked to Belgium.<sup>127</sup> In line with the European Court of Justice’s jurisprudence on Art. 5(3) Brussels I Regulation,<sup>128</sup> Arnaud Nuyts, a prominent Belgian law scholar, has argued that “the place where the harm is suffered” under Art. 96(2) Belgian PIL is considered to be the “‘place of impact’ of the tort, irrespective of the place where the consequences of the damage are felt;” it is not sufficient that mere economic damage to the plaintiffs assets was felt in the forum jurisdiction.<sup>129</sup>

As mentioned above, the victim plaintiff can also rely on Art. 11 of the Belgian PIL Code on “exceptional attribution of international jurisdiction” as a ground for jurisdiction. Thus, Belgian courts can exercise extraterritorial jurisdiction for cases that “ha[ve] narrow links with Belgium *and* [emphasis added] when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are initiated abroad.”<sup>130</sup> Proceedings abroad are deemed impossible or unreasonable when a fair trial might not be guaranteed.<sup>131</sup> This “exceptional” international jurisdiction, however, does not institute a universal jurisdiction ground in civil matters. However, commentaries have indicated that the required link should not be construed too narrowly and certainly does not require Belgian nationality on part of the plaintiff or the defendant.<sup>132</sup> Thus, whereas Art. 11 Belgian PIL Code provides a more general ground for jurisdiction and might capture cases that preempt the limitations of Art. 96 Belgian PIL Code, as discussed above, it also puts a significant burden on the plaintiffs to prove that all

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<sup>127</sup> *See id.*, at 70.

<sup>128</sup> *Marinari v. Lloyds Bank et al.*, 1995 C-364/93, ECR I-2719.

<sup>129</sup> ARNAUD NUYS, COMPARATIVE STUDY OF “RESIDUAL JURISDICTION” IN CIVIL AND COMMERCIAL DISPUTE IN THE EU, NATIONAL REPORT FOR BELGIUM, 7 (2006).

<sup>130</sup> Art. 11 is an implementation of Art. 6 of the European Convention of Human Rights (right to access to courts) into Belgian law. *see* BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 67(2006).

<sup>131</sup> *See id.*, at 68 (2006). [Citing: Arnaud Nuyts, *Article 11*, in: HET WETBOEK INTERNATIONAAL PRIVAATRECHT BECOMMENTARIEERD, 67 (J. Erauw et al, eds., 2006)] (Discussing whether impossibility in law or fact is covered from Art. 11 Belgian PIL.)

<sup>132</sup> *Id.* at 68 [Citing: Arnaud Nuyts, *Article 11*, in: HET WETBOEK INTERNATIONAAL PRIVAATRECHT BECOMMENTARIEERD, 68-69 (J. Erauw et al, eds., 2006)].

conditions of Art. 11 Belgian PIL Code are met.<sup>133</sup> Considering that this requires sensitive inside knowledge about foreign court systems and access to documentation showing the effective access to a fair trial is not ensured abroad, Art. 11 Belgian PIL Code proves only partly useful for human rights victims. This limitation is amplified by the significant legal uncertainty that is associated with the interpretation of ‘narrow links with Belgium’ by the courts. Taking into account that in Europe the loser in a civil lawsuit pays not only for his own legal costs but also the legal expenses of the defendant,<sup>134</sup> victim plaintiffs will not easily take the risk to prove jurisdictional grounds that bear legal uncertainty or that lack clear interpretational guidance by the courts. Belgium provides an example of how European jurisdictions regulate tort claims dealing with foreign corporations; furthermore, Belgium is known to be rather excessive when asserting its jurisdiction<sup>135</sup> and is therefore emblematic of an approach that might come closest to the reach of the ATS. Still, this analysis of Belgium’s jurisdictional reach suggests the conclusion that access to European civil courts for victims of overseas human rights violations is limited and clearly falls short of the universal civil jurisdiction prescription of the ATS.

Aside from a more narrow scope of jurisdiction over torts committed abroad, another major disincentive for human rights litigation in Europe is that the law applicable to extraterritorial torts is less favorable for victims of overseas human rights abuses than the ATS or criminal proceedings before European courts. The reason is that the Brussels I Regulation is merely adjudicative in nature. The latter merely lays out rules for identifying which courts are competent to hear the claims.<sup>136</sup> The ATS on the other hand, establishes both jurisdiction and prescribes the cause of action and thus the applicable law, i.e., the “law of nations,” as defined

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<sup>133</sup> See *id.* at 68-69 (2006).

<sup>134</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 400 (1999).

<sup>135</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 69 (2006). [Citing: Thalia Kruger, *Art. 96*, in HET WETBOEK INTERNATIONAAL PRIVAATRECHT BECOMMENTARIEERD, 490 (J. Erauw et al. eds., 2006)].

<sup>136</sup> Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 83 (2008).

by federal common law.<sup>137</sup> In Europe, however, once jurisdiction is established on the basis of the Brussels I Regulation, international private law has to be consulted to determine the applicable substantive law.<sup>138</sup> In Europe, the principle of ‘lex loci delicti’ prevails, as codified in the European Council Regulation of July 11, 2007 No. 864/2007 on the law applicable to noncontractual obligations (so-called the Rome II Regulation).<sup>139</sup> Thus, the non-contractual obligation based on a tort/delict is governed by the “law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred [ . . . ]” (Art. 4 para. 1 Rome II Regulation); it is irrelevant whether the applicable law is the law of a non-EU member State. (Art. 3 Rome II Regulation) This leads to a situation where the law of the host State is applied to human rights litigation before domestic European courts. This deference to the principle of ‘lex loci delicti,’ diminishes the practical relevance of the Brussels I Regulation in the context of human rights litigation.<sup>140</sup> Host states for international business will usually be developing countries or emerging markets with often repressive regimes (e.g., China) or with a strong urge to compete in a globalized economy which leads to a ‘race to the bottom.’<sup>141</sup> In both instances, host States might apply less stringent standards to corporate conduct and fall short of international human rights standards. De Schutter points out, for example, that the law of the host State may be “unsufficiently protective of the victims” or grant amnesties to the perpetrators.<sup>142</sup> The effectiveness of victim redress under European tort law

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<sup>137</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (“Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”).

<sup>138</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 115; see Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 83 (2008).

<sup>139</sup> Art. 4 (1) Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations, O.J. 2007 (L199/40) (“Rome II Regulation”); see Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 116.

<sup>140</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 118. It is to be noted that the applicable law before European courts for torts committed abroad by a foreign company (i.e. registered or domiciled outside of the European Union) would be the same as under the Rome II Regulation, i.e. usually the law of the host State. (See f.ex. Art. 99 of the Belgian PIL Code).

<sup>141</sup> See Wells and Elias, *Catching the Conscience of the King: Corporate Players on the International Stage, in NON-STATE ACTORS AND HUMAN RIGHTS*, 141, 143 (Philip Alston ed., 2005).

<sup>142</sup> Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER, NEW YORK UNIVERSITY SCHOOL OF LAW, at 41(2004), available at <http://www.chrgj.org/publications/docs/wp/s04deschutter.pdf> [reprinted in: NON-STATE ACTORS AND HUMAN RIGHTS, 227-314 (P. Alston ed., 2005)].

would be enhanced if, as e.g., Art. 96 of the Belgian PIL Code does for jurisdictional purposes, it was not decisive where the damage occurred but rather where the tort act creating the damage has occurred, since, within the complex, multi-layered structure of MNCs, an even indirect involvement of the European company presence might be able to link the tort act back to a European jurisdictional forum.

The reasons outlined above, as well as European procedural rules<sup>143</sup> that will be discussed in detail below and that most prominently include fee shifting rules, which confer the burden of paying the winning party's legal fees on the losing one and the unavailability of contingency arrangements,<sup>144</sup> could explain why (regular) tort liability has not been the primary recourse against corporations in European courts. These elaborations shed some light on why victims in Europe, if at all, rather resort to the 'partie civil' mechanism when pursuing their private claims. As will be shown below, attaching a civil claim to the main criminal proceeding has important advantages for the victims' plaintiffs and the effectiveness of redress. Just to name a few, considering the high standard of proof in civil cases in Western jurisdictions with a civil law tradition<sup>145</sup> and a less liberal discovery process,<sup>146</sup> the 'partie civile' mechanism enables the private party to benefit from the investigation and evidence production by the prosecutor. Moreover, it is common in the select European jurisdictions that the civil case will be suspended as long the criminal proceedings are underway;<sup>147</sup> thus, it is more efficient for victims to merge and streamline the civil and criminal proceedings from the outset.

The focus of comparison, moving forward, will be the corporate risk related to *civil* human rights redress under the ATS as compared to the European primarily *criminal* remedy redress by

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<sup>143</sup>See Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT'L HUMAN RIGHTS, para. 93 (2008); see also Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 113.

<sup>144</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 381, 403-04 (1999).

<sup>145</sup> Kevin Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW, 245 (2002). (The reasonable-doubt standard in civil cases prevails in Europe and beyond, thus leading Clermont to refer to a "common-law exception" with regard to the standard of proof.)

<sup>146</sup> See Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 293-94 (2002).

<sup>147</sup> Bahareh Mostajeleian, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or is it failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*, 40 THE GEORGE WASHINGTON INT'L L. REV. at 511; see also Art. 4 French Code of Criminal Procedure and Art. 4 Belgian PTCCP.

virtue of a ‘partie civile’ complaint (also referred to as ‘action civile’). Municipal tort law actions in the select European jurisdictions, namely Belgium and France, will not be discussed further, due to their limits in these cases as stated above. Therefore, the following section will compare and contrast tort liability under the ATS in the context of U.S. civil litigation and tort liability under the French and Belgian ‘constitution de partie civile’ procedure in the context of the underlying criminal proceedings. Special attention will be given to the dynamics and specific parameters and implications of the ‘action civile,’ as it bridges prosecution in the public interest with the interests of affected private parties and secures those parties a significant influence on and role in the primary criminal proceeding.

### **III. COMPARATIVE JURISDICTIONAL REACH**

Before assessing how procedural rules implicate substantive law and deterrence thereunder, it is indispensable to take a comparative look at extraterritorial jurisdictional reach in the selected jurisdictions, since it directly implicates corporate litigation risk and informs the strategy choice of forum by victim plaintiffs to sue and by corporations to structure/design their global presence and operations. Specifically, domestic jurisdictional prescriptions implicate corporate risk factors that induce legal incentives on corporations to comply in the respective forum; one of these decisive factors is the (non-)applicability of the ‘double criminality’ requirement for different bases of jurisdiction. Moreover, a comparative understanding of jurisdictional prescriptions informs conclusions about the availability of the ‘partie civile’ procedure. Together with procedural rules and legal culture, jurisdictional bases in the selected jurisdictions shed light on why proceedings against corporations for overseas human rights violations have been brought almost exclusively in the United States as opposed to Europe; the comparative legal findings will help to show the impact of legal procedures and culture on substantive law deterrence in the field.

Finally, the following section will compare and contrast the extraterritorial jurisdictional reach of the ATS on the one hand and French and Belgian criminal law on the other. There are good reasons to compare *civil* jurisdiction under the ATS with extraterritorial *criminal* jurisdiction under the select European jurisdictions. First and foremost, litigation under the ATS features a mixed civil/criminal approach in practice, resorting to criminal law concept such as aiding and abetting liability, despite the tort nature of the cause of action. On the other side, the civil complaint procedure under the ‘constitution de partie civile’ piggybacks the underlying criminal proceedings which constitute the main proceeding<sup>148</sup> (thus following mainly criminal rules)<sup>149</sup> to which the civil claim is merely attached. Since the ATS is somewhat criminal in elements of its adjudication and, most importantly, since the civil claims under ‘constitution de partie civile’ is driven by the primary criminal proceedings,<sup>150</sup> a comparison of civil jurisdiction under the ATS and criminal jurisdiction in select European jurisdictions is warranted.

The following elaborations on the *materiae personae* aim to draw the contours of the jurisdictional reach over eligible parties to civil proceedings under the ATS and to similar cases under criminal proceedings in European jurisdictions. It will focus on key comparative aspects between the United States and France and Belgium (as representative examples of European legal systems) as they inform (1) the legal risk that corporations encounter for their overseas operations under the respective legal system; and (2) the rights enforcement by victim plaintiffs. The aspect of extraterritorial reach of jurisdiction and law is a decisive one with regard to the scope of the human rights of victims and the liability of corporations. The jurisdictional reach

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<sup>148</sup> See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 19 (2002) (Describing the ‘action civile’ mechanism as a procedural vehicle that allows “the victim of a crime [to] join the criminal prosecution as a *partie civile*, becoming a party to the case with the right to access to the proceedings ...”).

<sup>149</sup> See Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV., 698 (1965) (Outlining the “consequences of a civil action brought before criminal judges,” thus implying that the criminal proceeding is the principal and thus dominant one. This is confirmed by Larguier’s statement emphasizing that “[t]he civil action always makes the victim a party to the consequences.”)

<sup>150</sup> Arnaud Nuyts is stressing that “the court seized of a criminal proceedings can ... entertain the civil claim brought by the victim.” ARNAUD NUYTS, COMPARATIVE STUDY OF “RESIDUAL JURISDICTION” IN CIVIL AND COMMERCIAL DISPUTE IN THE EU, NATIONAL REPORT FOR BELGIUM, 7 (2006).

under the ATS diverges significantly in magnitude and the prescriptive base from European jurisdiction, namely for the purpose of this study, Belgium and France.

The ATS confers (subject matter) jurisdiction on U.S. courts for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States;”<sup>151</sup> therefore, for what concerns personal jurisdiction, no link to the United States is required with regard to the nationality of the perpetrator, the nationality of the victim, or the ‘loci delicti.’ As will be shown below, the ATS is unique and unprecedented in its broad jurisdictional reach and in the fact that it institutes a base for “universal civil” jurisdiction, a concept whose legitimacy under international law has been much debated.<sup>152</sup> As pointed out above, European countries, such as France and Belgium, rather rely on criminal law than tort liability to hold corporations accountable for their overseas operations. Universal jurisdiction prescriptions are commonly found in criminal law enforcement and, even though there is no obligation for States under international law to exercise universal jurisdiction for violations of fundamental norms of international law, it certainly is possible for States to do so.<sup>153</sup>

Granted that the subject matter jurisdiction is very different in nature comparing the ATS and corresponding European criminal code provisions, it might be hard to say that one has a more extensive reach than the other. This is particularly true since the broad subject-matter scope of ‘violations of the law nations’ under the ATS has been significantly restricted by the U.S. Supreme Court in *Sosa v. Alvarez Machain*, so as to “require [that] any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [this Court] ha[s] recognized.”<sup>154</sup> The differences are starker when comparing the personal jurisdictional reach; these differences then inform plaintiffs’ litigation preferences and corporate risk profiles, as they diverge between the U.S. and European legal systems.

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<sup>151</sup> 28 U.S.C. § 1350.

<sup>152</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 109.

<sup>153</sup> *Id.*, at 108-09.

<sup>154</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

In the United States, the personal jurisdictional reach of the ATS is very broad; thus, it is not only allowed for, but even required, that the victim plaintiff invoking the ATS is an “alien.” Moreover, it has been common jurisprudence across various Circuits that the ATS extends also to foreign corporate defendants.<sup>155</sup> With no further requirements, the ATS provides for a quasi-universal reach of jurisdiction, as long as the defendant has “minimum contacts” to the U.S. forum.<sup>156</sup> Following the principle of “doing business” jurisdiction, U.S. courts assert personal jurisdiction on the mere basis that a corporation engages in substantial activity in the United States, without requiring any nexus of the dispute and the defendant’s conduct to the forum.<sup>157</sup> It is possible in the United States to establish jurisdiction over non-resident units of MNCs, provided that there are “sufficient factors connecting that defendant with the forum.”<sup>158</sup> Usually, the presence of an affiliate enterprise within the forum jurisdiction will establish personal jurisdiction over the non-resident entity. First and foremost, the necessary connection to the forum jurisdiction can be found through ownership and control of the non-resident parent company over the resident local entity.<sup>159</sup> However, according to U.S. case law mere ownership of shares in the local subsidiary is not sufficient for U.S. courts to assert jurisdiction over a non-resident parent company; a further connector is necessary.<sup>160</sup> To assess whether such connection exists, “an analysis of fact will have to be undertaken which is not dissimilar to a ‘lifting the corporate veil’” in order to establish the liability of the parent company over the acts of its subsidiary.<sup>161</sup> The plaintiff bears the burden to show that the subsidiary is an ‘alter ego’<sup>162</sup> or

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<sup>155</sup> See e.g. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94-95(2<sup>nd</sup> Cir. 2000); *Ntsebeza v. Daimler A.G. (In Re South African Apartheid Litigation)*, 2009 U.S. Dist.LEXIS 34572617 at 46-70 (S.D.N.Y. 2009); *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 919-31 (9<sup>th</sup> Cir. 2011).

<sup>156</sup> *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (Holding that a nonresident defendant can be sued in a foreign forum if the defendant maintains minimum contacts to the forum and the lawsuit does not unfairly burden the defendant.) For an overview of personal jurisdiction rules in the U.S. and other countries, see PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 140-53 (2007).

<sup>157</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 109.

<sup>158</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 140 (2007).

<sup>159</sup> *Id.*, at 140-41.

<sup>160</sup> See e.g. *Cannon Manufacturing Co v. Cudahy Packing Co*, 267 US 333 (1925); *Harris Rutsky and Co. Insurance Services Inc. v Bell and Clements Ltd.*, 328 F 3d 1122 (9<sup>th</sup> Cir., 2003).

<sup>161</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 143 (2007).

<sup>162</sup> The ‘alter ego’ test sets the bar very high, requiring the plaintiffs to show “(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard



acting as an ‘agent’ of the parent company.<sup>163</sup> For that purpose, the degree of economic integration between the resident subsidiary and non-resident parent company is decisive.<sup>164</sup>

U.S. courts have been rather liberal in establishing this necessary link. Thus, the Court of Appeals of the Second Circuit exercised personal jurisdiction over the two non-resident holding companies: Royal Dutch Petroleum Company (incorporated in the Netherlands) and Shell Transport and Trading Co. (incorporated in the UK).<sup>165</sup> The court found a sufficient relationship with the United States based on the fact that an Investor Relations Office in New York was “facilitating the relations of the parent holding companies with the investment community,”<sup>166</sup> even though the Investors Relations Office was “nominally part of Shell Oil Company,” which is owned by Shell’s U.S subsidiary,<sup>167</sup> and is thus part of a legal entity that is separate from the parent company.<sup>168</sup>

The recent decision on personal jurisdiction issues by the Court of Appeals of the Ninth Circuit in *Bauman vs. Daimler* follows this liberal approach, confirming the District Court’s decision to extend the jurisdictional reach even more by reformulating the agency test as a means to impute U.S. jurisdiction to the non-resident parent company.<sup>169</sup> Thus, it is sufficient to show that the subsidiary’s activities are “important to [the parent] [in a manner] that they would almost certainly be performed by other means if [the subsidiary] did not exist.”<sup>170</sup> In his dissent, Judge O’Scannlain accuses the majority to “drastically expand[ing] the reach of personal jurisdiction beyond all constitutional bounds” and “ignor[ing] the Supreme Court’s warnings that the Due Process Clause [of the Fourteenth Amendment] permits ‘defendants to structure

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[their separate identities] would result in fraud or injustice.” *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001).

<sup>163</sup> *See id.*; *Dole Food Company v. Watts*, 303 F.3d 1104 (9<sup>th</sup> Cir. 2002).

<sup>164</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 143 (2007).

<sup>165</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94-95(2<sup>nd</sup> Cir. 2000). The two holding companies “jointly control and operate the Royal Dutch/Shell Group, a vast, international [. . .] network of affiliated but formally independent oil and gas companies.” *Id.* at 92.

<sup>166</sup> *Id.* at 93.

<sup>167</sup> All shares of the Shell Oil Company are held by Shell Petroleum Inc., the U.S. subsidiary company of the parent holding companies. *Id.* at 93.

<sup>168</sup> *Id.* at 93, 96-98.

<sup>169</sup> *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 931 (9th Cir. 2011).

<sup>170</sup> *Id.*, at 922.

their primary conduct with some minimum as to where that conduct will and will not render them liable to suit.”<sup>171</sup>

Certainly, the Ninth Circuit is pushing the envelope with regard to extraterritorial reach of U.S. jurisdiction and it in fact might challenge, to some extent, the long-standing principle of “corporate separateness,”<sup>172</sup> as a “principle of corporate law deeply ingrained in our economic and legal systems.”<sup>173</sup> This principle has been subject to much controversy in legal scholarship, though. Some scholars have argued that “with the development [ . . . ] of the holding company with its unlimited number of subsidiary and the formation of corporate groups,” entity law reinforced by the concept of limited liability has “bec[o]me largely dysfunctional when applied to multi-tiered corporate groups,” by unduly “atomiz[ing]” it into many separate corporations for legal purposes.<sup>174</sup> Blumberg argues that the law fails to recognize that the traditional legal objective of limited liability granted with incorporation has been to shield shareholders from the liabilities of the corporation, not to shield the parent company from the conduct of its subsidiaries.<sup>175</sup>

Kerr/Janda/Pitts echoe Blumberg’s concerns but looks at the issue from a social contract perspective arguing, that the privilege of incorporation (and thus limited liability) has traditionally been granted in exchange for the corporation to pursue a public purpose with its business activities.<sup>176</sup> Thus, the Ninth Circuit might spearhead a new legal trend that defies the technicality of legal separation of corporate entities under some circumstances, accounting for the complex group structure of modern-day MNCs.<sup>177</sup> It is to be noted, though, that the reservations of the dissent in *Bauman vs. Daimler* seem to resonate with Justice Breyer’s concurrent opinion in *Sosa*, where he points out that concerns with international comity do arise

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<sup>171</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

<sup>172</sup> *Bauman v. Daimler Chrysler Corp.*, 2011 U.S. App. LEXIS 22612, 11 (9th Cir. 2011) (Judge O’Scannlain concurring.)

<sup>173</sup> *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

<sup>174</sup> Phillip Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AMERICAN J. OF COMP. L., 528 (2002).

<sup>175</sup> *Id.*, at 529.

<sup>176</sup> See MICHAEL KERR ET AL., *CORPORATE SOCIAL RESPONSIBILITY – A LEGAL ANALYSIS*, 57 (2009).

<sup>177</sup> See *id.*, at 147.

when foreign conduct is concerned that does not involve own nationals of the country that provides the cause of action.<sup>178</sup>

Thus, even though, as mentioned above, courts across various Circuits have a long history of asserting jurisdiction under the ATS over foreign defendants, over-extending the jurisdictional scope in this regard might trigger the “comity concerns” raised by Justice Breyer.<sup>179</sup> This is particularly true when the only temporary presence of officers of the non-resident unit on U.S. territory is deemed sufficient to exercise personal jurisdiction.<sup>180</sup> Whereas the Supreme Court has upheld this approach in a non-commercial case,<sup>181</sup> it might be in tension with the Courts standard in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, where it held that a foreign corporation can only be subject to jurisdiction if its contacts with the forum are “so continuous and systematic as to render [it] essentially at home in the forum State.”<sup>182</sup>

In Europe, particularly in Belgium and France, there are only limited instances where personal jurisdiction can be asserted when a foreign victim is involved or the perpetrator is a non-national of the forum jurisdiction and even then it is usually required for the defendant to be present on the forum’s territory before criminal proceedings can be initiated.<sup>183</sup> In general, issues of imputation and piercing the corporate veil can be expected to be similar. However, as has been pointed out by the Court in *Bauman vs. Daimler*, many European countries are more

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<sup>178</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004).

<sup>179</sup> *See id.*

<sup>180</sup> PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, 149 (2007) [Citing: *Amusement Equipment v. Mordelt*, 779F 2d 264 (5<sup>th</sup> Cir. 1985)].

<sup>181</sup> *Burnham v. Superior Court of California*, 495 U.S. 604, (1990).

<sup>182</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>183</sup> *See* Art. 12 Belgian PTCCP (Prescribing that as a general rule, criminal proceedings can only be initiated when the suspect is “found in Belgium.” Especially, universal jurisdiction *in absentia* is not provided for anymore in Belgium. Exceptions from the presence requirement are available for certain international crimes under active nationality jurisdiction (Art. 6 Belgian PTCCP) and under passive nationality jurisdiction (Art. 10, 1bis Belgian PTCCP) (*See* BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 55-57, 61 (2006)] *See* Article 689-1 of the French CCP (Requiring that the suspect needs to “be found” in France before launching any criminal proceedings on the basis of universal jurisdiction for the international crimes prescribed by Art. 689-11 of the French CCP. Unlike Belgium, extended and privileged active and passive nationality jurisdiction are not available for international crimes. However, a judicial exception from the presence requirement is available for torture. (*See* JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 131-32(2010)).

reluctant to impute jurisdiction than the United States.<sup>184</sup> The European approach to jurisdictional reach imputed from an EU-based subsidiary to non-EU based parent company is not coherent. Thus, the European Commission and the European Court of Justice apply an ‘enterprise entity test’<sup>185</sup> in antitrust cases that in fact renders the mere existence of a parent-subsidiary relationship sufficient in order to establish jurisdiction over the non-EU based parent company.<sup>186</sup> Antitrust law might inform and cross-stimulate the European approach to imputing jurisdiction also in other areas of law, such as corporate criminal liability.

Looking at France and Belgium, as examples of European civil law systems, the following points of comparison are prominent and distinct from the U.S. system. France and Belgium use nationality (on part of the perpetrator or the victim) or territoriality as a base for jurisdiction, rather than the more extended jurisdictional reach of US courts, as discussed above.<sup>187</sup> This limits opportunities for litigation against corporations in the European forum in significant part, because of the narrow jurisdictional reach of the French and Belgian courts.

The active personality principle is one base for jurisdiction in France and Belgium. Both in France<sup>188</sup> and Belgium,<sup>189</sup> jurisdiction based on the nationality of the perpetrator is prescribed for any felony and misdemeanor<sup>190</sup> committed by a French/Belgian national outside of their national territory. It is argued that the justification for this broad concept of active personality jurisdiction under French law derives from “the fact that France does not extradite her

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<sup>184</sup> *Bauman v. DaimlerChrysler Corp.*, 2011 U.S. App. LEXIS 22612, 16 (9th Cir. 2011) (Judge O’Scannlain concurring) [Citing: Brussels I Regulation].

<sup>185</sup> *Re Cartel in Aniline Dyestuffs*, Commission Decision 69/243 (24 July 1969), CMLR D23. Upheld in Case 48/69, *ICI v. Commission*, 1972 ECR 619, [1972] CMLR 557.

<sup>186</sup> See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 145 (2007).

<sup>187</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 100, 105-07; see BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 56-58 (2006); see ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ FAFO AIS, 24 (2006).

<sup>188</sup> Art. 113-6 French CC.

<sup>189</sup> Art. 7 Belgian PTCCP; see *lex specialis* in Art. 6, 1bis PTCCP for “a grave violation of international humanitarian law defined in volume II, title Ibis, of the Criminal Code.” (Translation in: EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 85(2010)).

<sup>190</sup> As a general rule, the offense has to be criminalized under Belgian/French law and the law of the country where the act took place, see Belgium, Art. 7 PTCCP; France, Art. 113-6 CC.

nationals.”<sup>191</sup> However, the concept of active personality jurisdiction is significantly broader in its reach in Belgium in a different regard; while France only asserts jurisdiction over offenses committed by “French national[s]”, Belgium extends its jurisdiction beyond its own nationals to include individuals having their “main residence in Belgium.”<sup>192</sup> According to the legislative will, “main residence” is intended as the “place where the [...] [individual] usually lives.”<sup>193</sup>

It remains to be seen how this concept of “main residence” would be translated into the corporate sphere and whether for MNCs and their complex corporate network of corporate entities it is to be relied on the principal place of business, the administrative seat, of the place of incorporation. De Schutter has argued that ‘active personality’ is deemed to be “particularly justified” to hold corporations accountable for their overseas conduct.<sup>194</sup> However, problems are likely to arise when determining the ‘nationality’ of a highly decentralized MNC disposing of a complex network of legally independent subsidiaries. In fact, foreign subsidiaries are not considered to be of the same nationality as the parent company, since they are legally independent under the domestic legal system where they are located; there is no derivative nationality allocation based on a corporate group identity.<sup>195</sup>

In theory, the contrast between the U.S. and European systems is not as stark in this regard. The further the disaggregation of the corporate structure between the jurisdiction of incorporation and the jurisdiction of the conduct, the more difficult it becomes under the U.S. and European legal systems to frame a plausible cause of action. However, the nationality of a European MNC appears to be a more important factor in civil law systems than the nationality of a corporation with U.S. connections in lawsuits before U.S. courts. Whereas France has

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<sup>191</sup> ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 23 (2006).

<sup>192</sup> Art. 6, 7 Belgian CC.

<sup>193</sup> See DE KAMER, SESSION 2003, DOC. 51 – 0103/001, LEGISLATIVE PROPOSAL, EXPLANATION OF MOTIVES, 22 July 2003, at 4.

<sup>194</sup> OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS, 24 (2006), available at <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (Arguing that the main reason why ‘active personality’ jurisdiction is a particularly justified basis for corporate human rights cases is that traditionally nationals may not be extradited; thus, ‘active personality’ jurisdiction ensures that crimes do not go unpunished.)

<sup>195</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 103.

embraced the ‘active nationality’ principle not only for criminal (as is the case in Belgium) but also for civil proceedings,<sup>196</sup> the United States has exercised jurisdiction on the base of the defendant’s nationality only in a very limited number of instances that do not resemble ATS-like cases.<sup>197</sup> In specific, a tort claim for extraterritorial “violations of the law of nations” does not require that the corporate defendant be a U.S.-incorporated company, but, according to a longstanding jurisprudence across several Circuits, applies to foreign corporations as well.<sup>198</sup>

The passive nationality principle is of limited usefulness in ATS-like cases, since it only confers jurisdiction on domestic courts<sup>199</sup> for extraterritorial offenses<sup>200</sup> where the victim is a national of the forum jurisdiction, irrespective of the nationality of the perpetrator.<sup>201</sup> In contrast, the framework of the ATS is entirely based on a denial of passive nationality, namely that the victim must be an alien of the forum jurisdiction (i.e., the United States).<sup>202</sup> In France, the victim must be a French national at the moment of the facts.<sup>203</sup> In Belgium, the victim must be either (1) a Belgian national,<sup>204</sup> or (2) for certain crimes under international law, including the three crimes under the Rome Statute,<sup>205</sup> an individual having had “effective,” “usual” and “legal” residence in Belgium for at least three years, or alternatively an individual recognized as a refugee and with his habitual residence in Belgium.<sup>206</sup> Therefore, the adjudication of certain crimes under international law is clearly privileged under Belgian law, as nationality is not an

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<sup>196</sup> See *id.*, at 102.

<sup>197</sup> These limited cases include issues relating military service and trading with the enemy. Restatement (Third) of the Foreign Relations Law of the United States para. 402, reporters note 1.

<sup>198</sup> See e.g. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94-95(2<sup>nd</sup> Cir. 2000); *Ntsebeza v. Daimler A.G. (In Re South African Apartheid Litigation)*, 2009 U.S. Dist.LEXIS 34572617 at 46-70 (S.D.N.Y. 2009); *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 919-31 (9<sup>th</sup> Cir. 2011).

<sup>199</sup> For Belgium, see Art. 10 (5) Belgian PTCCP; for France, see Art. 113-7 French CC.

<sup>200</sup> In France, the *ratione materiae* covers all felonies and misdemeanours punished by imprisonment, see Art. 113-7 FCC, while Belgium only asserts jurisdiction based on passive nationality “if the law of the place where the crime[s] ha[ve] been committed [...] criminalizes the act with a punishment above 5 years of imprisonment,” see Art. 10 (5) Belgian PTCCP [translation by: BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 57 (2006)].

<sup>201</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 57 (2006); see ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 24 (2006).

<sup>202</sup> 28 U.S.C. § 1350.

<sup>203</sup> Art. 113-7 French CC; See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 100.

<sup>204</sup> Art. 10(5) Belgian PTCCP.

<sup>205</sup> Belgian CC, Book II, Title *Ibis*.

<sup>206</sup> Art. 10, *Ibis* Belgian PTCCP in conjunction with amended Criminal Code, Book II, Title *Ibis*.

indispensable requirement to bring a claim before Belgian courts. However it is to be noted that illegal residence will bar the victim plaintiffs from bring their claims as a ‘partie civile,’ unless they have a recognized refugee status in Belgium.<sup>207</sup> Even though France and Belgium are emblematic of the application of the passive nationality principle in criminal proceedings in Europe, Belgium has a significantly more far reaching prescription that has proven favorable to plaintiffs in human rights cases. Thus, the charges against Total, a French corporation, could not only be brought in France as the country of Total’s incorporation, but also in Belgium courts by victims who held an official refugee status in Belgium.<sup>208</sup>

One potential hurdle for victim plaintiffs when seeking redress for extraterritorial corporate misconduct before European courts is that they might be required to show ‘double criminality,’ i.e., that the conduct is punishable under the law of the State where it occurred and under the law of the sitting jurisdiction.<sup>209</sup> This might prove particularly difficult for victims of overseas human rights violations, considering that the legal protections in the country of conduct—often times emerging markets with repressive regimes, such as e.g. in China—fall short of international human rights standards.<sup>210</sup> As a rule, ‘double criminality’ is a mandatory requirement to assert jurisdiction based on active and passive nationality in Belgium;<sup>211</sup> French criminal law on the other hand does not feature a ‘double criminality’ requirement for jurisdiction based on the (French) nationality of the victim<sup>212</sup> and puts forward a qualified rule in Art. 113-6 CC for jurisdiction based on the nationality of the perpetrator, according to which ‘double criminality’ is a mandatory requirement only for overseas misconduct by French nationals that constitutes misdemeanors. Acknowledging that French rules seem less stringent with regard to ‘double criminality,’ it still needs to be noted that, as Anna Triponel states, most

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<sup>207</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 58 (2006).

<sup>208</sup> *Prosecutor v TotalFinaElf et al.*, Cour de cassation de Belgique, Arrêt, 28 March 2007 No. P.07.0031.F.

<sup>209</sup> See, e.g., Art. 113-6, paragraph 2 French CC.

<sup>210</sup> See David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 383 (2011).

<sup>211</sup> Art. 7 and Art. 10(5) Belgian PTCCP.

<sup>212</sup> Art. 113-7 French CC; see also Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 101.

cases involving human rights litigation in France courts were classified as misdemeanors,<sup>213</sup> with the consequence that Art. 113-7 CC can be a real impediment for plaintiffs claims based on extraterritorial human rights violations.

Moreover, Belgium has significantly lowered the threshold to establish jurisdiction for certain crimes under international law. The Belgian legal system clearly privileges the adjudication of the core international crimes of genocide, crimes against humanity, and war crimes when asserting jurisdiction based on the active or passive nationality principle; therefore, ‘double criminality’ is not required, i.e. victim plaintiffs only have to show that the offense is criminalized under Belgium law and do not have to show that the offense is equally criminally punishable in the State where it has been committed.<sup>214</sup> France, on the other hand, requires ‘double criminality’ for genocide, crimes against humanity, and war crimes, if the State where the crimes were committed or the State of nationality of the suspect is not a signatory to the Rome Statute.<sup>215</sup> In the United States, victim plaintiffs do not have to overcome the hurdle of showing that the offense in question is also punishable under the law of the host State, but rather show that the misconduct constitutes a “violation of the law of nation.”

Aside from asserting jurisdiction on the base of nationality, both France and Belgium extend their domestic jurisdiction extraterritorially in a narrow set of instances. France exerts jurisdiction over “any person who has committed one of the crimes [...] outside of the territory of the French Republic” based on certain international treaty obligations of France.<sup>216</sup> As part of France’s treaty obligations, French courts have jurisdiction over torture,<sup>217</sup> among others, and the crimes under the limited *ratione materiae*, *temporis* and *loci* of Security Council Resolution 827 (of 25 May 1993) and 955 (of 8 November 1994), setting up the ad hoc tribunals for

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<sup>213</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 101.

<sup>214</sup> Art. 6, 1bis Belgian PTCCP, Art. 10, 1bis, Belgian PTCCP.

<sup>215</sup> Art. 698-11 CCP (Introduced by a 2010 law implementing the crimes under the Rome Statute and thus delivering on France’s obligation as a state party.)

<sup>216</sup> Art. 689-1 French CCP.

<sup>217</sup> Art. 689-2 French CCP. For other crimes over which French courts can exercise universal jurisdiction, *see* Art. 689-3-10 CCP.



Rwanda and Yugoslavia.<sup>218</sup> On August 9, 2010, a new basis for universal jurisdiction was introduced into the French Code of Criminal Procedure (henceforth: French CCP)<sup>219</sup> with Art. 689-11, implementing the Rome Statute (to which France is a State party) at a domestic level.<sup>220</sup> Even though this recent law has expanded the jurisdictional reach of French courts significantly, it also establishes a rigid set of conditions for the exercise of universal jurisdiction over genocide and crimes against humanity; specifically, those requirements include presence of the suspect and ‘double criminality.’<sup>221</sup> As a matter of fact, already before its adoption, the draft bill gave rise to criticism not only by advocates of universal jurisdiction but also by France’s legislative branch. The Foreign Affairs Commission of the French National Assembly emphasized that the bill would in fact render universal criminal jurisdiction (for the three core international crimes) meaningless in France, considering the high threshold of ‘double criminality’ and the monopoly of the prosecutor to initiate proceedings.<sup>222</sup> These requirements restricts extraterritorial human rights litigation against corporations, since jurisdiction of French courts is limited to corporations that have a business presence in France and to misconduct that is also criminalized under the law of the host State, which is often times not the case, as pointed out above.

Conversely, under Belgian law the adjudication of the three core international crimes is privileged in the regard that not only the ‘double criminality’ requirement is waived, as mentioned above, but also that an exception is granted from the general rule (Art. 12 Belgian Preliminary Title to the Code of Criminal Procedure (henceforth: Belgian PTCCP))<sup>223</sup> that the

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<sup>218</sup> See PERMANENT MISSION OF FRANCE TO THE UNITED NATIONS, COMMENTS TO THE U.N. SECRETARY-GENERAL ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION, AT/sec No. 214 (27 April 2010), para. 3, available at [http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/France\\_E.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf)

<sup>219</sup> Code pénale français [French Criminal Code] (version consolidée au 29 mars 2012), (English translation by John Rason Spencer, *French Criminal Code* (last updated Oct. 12, 2005), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3618>).

<sup>220</sup> Law no. 2010-930 of 9 August 2010, amending the Criminal Code and the Code of Criminal Procedure on the Adaptation of the French Criminal Law to the Rome Statute.

<sup>221</sup> Art. 689-11 French CCP.

<sup>222</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 111 [Citing: Nicole Ameline on behalf of Foreign Affairs Commission of (French) National Assembly].

<sup>223</sup> Loi contenant le titre préliminaire du code de procédure pénale belge (April 17, 1878) [Preliminary Title of the Code of Criminal Procedure], available at <http://www.droitbelge.be/codes.asp#pen>.

suspect must be “found in Belgium” for extraterritorial jurisdiction to be exercised.<sup>224</sup> Despite the privileged access to Belgian courts for claims concerning the three crimes under the Rome Statute, Belgium has significantly scaled back on exercising jurisdiction based on the principle of universality (i.e., regardless of the country where the offenses were committed and regardless of the nationality or the perpetrator or victim). In the past, Belgium has experimented with ‘true’ universal criminal jurisdiction and experienced the risks and uncertainties of broad universal jurisdiction and through that experience legislated a narrower jurisdictional reach in 2003. According to the amended Art. 12bis Belgian PTCCP, Belgian courts only have criminal jurisdiction over offenses that have been committed outside of Belgium violating “a rule of international treaty- or customary law,” provided that Belgium is *required* under these rules of international law to extend its criminal jurisdiction extraterritorially. The Cour de Cassation has provided its judicial interpretation of Art. 12bis of the Belgian PTCCP in a 2004 decision, in which the court held that no international legal norm obliges Belgium at this point to exercise “universal jurisdiction” based on Art. 12bis Belgian PTCCP. According to the court, this includes the Rome Statute and the 1984 Torture Convention.<sup>225</sup> It has been argued that the court “erroneously” concluded that no international legal norm mandates Belgium to exercise universal jurisdiction.<sup>226</sup> In fact, it has been stated in a State survey submitted by Belgium as part of a cross-country data collection project<sup>227</sup> and later confirmed in Belgium’s reply to the United Nations Secretary-General on the scope of its universal jurisdiction,<sup>228</sup> that Belgian courts have jurisdiction based on ‘universality’ for torture. Moreover, the Belgian government has also confirmed that “there are also customary obligations which require States to incorporate

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<sup>224</sup> Art. 12bis Belgian PTCCP (Codifying that there is no presence requirement where international law requires jurisdiction *in absentia*), Art. 6,1bis Belgian PTCCP, Art. 10, 1bis Belgian PTCCP; *see also* EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 79-80 (2010).

<sup>225</sup> Cour de Cassation [Supreme Court], AR P.04.0352.F (19 May 2004) (Belg.).

<sup>226</sup> THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION, REPLY BY BELGIUM, UN Doc. A/65/181, at para.11 (April 27, 2010), available at: <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml>

<sup>227</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 61 (2006).

<sup>228</sup> THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION, REPLY BY BELGIUM, UN Doc. A/65/181, at para.10 (April 27, 2010), available at: <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml>

rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole [...].”<sup>229</sup> Clarifying and rectifying the judicial interpretation of the Cour de Cassation, Belgium has, in its reply to the SG, pointed to the Rome Statute as evidence of Belgium’s obligation to prosecute especially crimes against humanity.<sup>230</sup> Universal jurisdiction over foreign corporations involving extraterritorial conduct against non-Belgium nationals is de jure provided for in Belgium. But it is contingent upon the evolving status of international law. Therefore, a realistic possibility exists that Belgium’s jurisdictional reach might expand in the future alongside changes in international treaty or customary law. This situation provides legal uncertainty for the victims, since they bear the burden to show that international law in fact requires Belgium to exercise extraterritorial jurisdiction. Overall, even though Belgium’s jurisdictional reach has been construed increasingly more broadly since 2004, it still falls short of the French reach after the statutory amendments based on the 2010 law, implementing the Rome Statute.

It is important to emphasize that unlike the ATS’s alleged universal civil jurisdiction,<sup>231</sup> extraterritorial jurisdictional prescriptions in France and Belgium are not truly ‘universal.’ Even though often referred to as “universal,”<sup>232</sup> France’s jurisdiction in these instances should be rather characterized as “quasi-universal,” the reason being that it requires the defendant is present in France in order for proceedings to be initiated.<sup>233</sup> The same is true in Belgium.<sup>234</sup> One decisive difference in this regard between France and Belgium is that while Belgium (post-2003)

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<sup>229</sup> *Id.*, at 11.

<sup>230</sup> *Id.*

<sup>231</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 108-09; Jack Goldsmith, Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of the Respondents at 2-3, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 3, 2012).

<sup>232</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 110.

<sup>233</sup> Art. 689-1 French CCP; see also PERMANENT MISSION OF FRANCE TO THE UNITED NATIONS, COMMENTS TO THE U.N. SECRETARY-GENERAL ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION, AT/sec No. 214 (27 April 2010), available at

[http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/France\\_E.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf)

<sup>234</sup> Art. 12bis Belgian PTCCP; see also BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 61 (2006).

does not allow for universal jurisdiction *in absentia* anymore<sup>235</sup> (at least under the current state of international law),<sup>236</sup> France is one of the few countries that allows for trials *in absentia*. The Cour de Cassation ruled that for universal jurisdiction cases involving torture, Belgian authorities are entitled to conduct a judicial investigation without the suspect being present in France. The court held that the suspect only needs to present on French territory at the time of filing of the complaint in order to trigger jurisdiction.<sup>237</sup> What the presence requirement specifically entails for crimes against humanity, war crimes, and genocide under the new Art. 689-11 French CCP and whether the time of the filing of the complaint is decisive or the conducting of the judicial investigation, is still open to for interpretation by French courts.<sup>238</sup> The possibility to conduct judicial investigation without the suspect being present, resembles the liberal U.S. approach, where jurisdiction can be imputed to a non-resident corporate entity and the mere temporary presence of corporate officers can trigger personal jurisdiction.<sup>239</sup> The French caveat to conduct a trial *in absentia* is of significant importance when prosecuting individual officers (as opposed to the corporate legal person itself), thus establishing jurisdiction over companies without a permanent France presence.

France heavily resorts to yet another basis for jurisdiction that can prove a very resource-full option for the litigation of ATS-like cases in Europe. According to the territoriality principle enshrined in Art. 113-2 CC, French courts have jurisdiction where one of the constituent elements of the offense was committed or reputed to have been committed on French territory. This provision directly implicates the risk profile of MNCs if the harmful act can be traced back to France. A territorial link can be established where the accomplice act to a foreign offense was

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<sup>235</sup> With the exception of cases concerning crimes against humanity, genocide, and war crimes, Art. 6, 1bis Belgian PTCCP, Art. 10, 1bis, Belgian PTCCP.

<sup>236</sup> Art. 12bis Belgian PTCCP; see also BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS' 61 (2006).

<sup>237</sup> See decision of the Cour de Cassation [Supreme Court], n° 07-86.412 (9 April 2008) (Fr.); see also Cour de Cassation [Supreme Court], n°07-88.330 (21 January 2009) (Fr.). [Cited in: EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 132 (2010)].

<sup>238</sup> See EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 132 (2010).

<sup>239</sup> See PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, 148-49 (2007).

(or was reputed to have been) committed in France, or where the principal act to a foreign accomplice was (or was reputed to have been) committed in France.<sup>240</sup> France's willingness to resort to an extended territoriality principle to assert jurisdiction over extraterritorial (principal or accomplice) act, is of strategic importance for victims human rights redress against corporations, since usually these types of cases involve complicity on part of the corporation.<sup>241</sup> Yet, Art. 113-5 French Criminal Code (henceforth: French CC)<sup>242</sup> restricts the application of French criminal law to hold the accomplice accountable. Art. 113-5 provides that French criminal law only applies to a "person who, on the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanor committed abroad *if the felony or misdemeanor is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court.*" [emphasis added]. This 'double criminality' requirement for accomplice liability, where a constituent act can be traced back to France and the requirement of a final decision with regard to the principal's liability, set the bar very high for victim plaintiffs.<sup>243</sup> The *Rougier* case before French courts vividly illustrates the challenges when establishing corporate liability based on the territoriality principle.<sup>244</sup>

In sum, acknowledging Belgium's future potential for a more extended jurisdictional reach, Belgium and France clearly fall short of the jurisdictional reach of the ATS. This reality restricts the possibility of victim redress in European jurisdictions as opposed to the United States. There are certainly some feasible venues available in Europe to establish criminal jurisdiction over corporations extraterritorially, as was shown by the example of France and

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<sup>240</sup> See ABIGAIL HANSEN & WILLIAM BOURDON, FAFOAIS SURVEY RESPONSE, LAWS OF FRANCE, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 22 (2006); see Art. 113-5CC.

<sup>241</sup> For a comprehensive account of different types of corporate complicity cases, see Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L., 91-159 (2002); see also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NORTHWESTERN J. OF INT'L HUMAN RIGHTS, 304-26 (2008).

<sup>242</sup> Code pénale français [French Criminal Code] (version consolidée au 29 mars 2012), (English translation by John Rason Spencer, *French Criminal Code* (last updated Oct. 12, 2005), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3618>).

<sup>243</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 105.

<sup>244</sup> See Dossier de presse, Les Amis de la Terre, 7 villageois camerounais attaquent Rougier devant les tribunaux français (Oct. 29, 2002), available at <[www.amisdelaterre.org/Dossier-de-presse-7-villageois,191.html](http://www.amisdelaterre.org/Dossier-de-presse-7-villageois,191.html)>.

Belgium. However, all bases of jurisdiction in the European legal systems analyzed require a link with the forum jurisdiction either based on the traditional notions of nationality of the corporate defendant or the victim, or the principle of territoriality. Extraterritorial jurisdictional prescriptions beyond these principles and extending to foreign defendants and foreign victims with the offense occurring abroad are very limited in both France and Belgium, which are representative of most European systems. The ‘door is still ajar’ for litigation of those cases where a ‘business presence’ of the corporate defendant can be shown in the forum jurisdiction, or where the victim has a recognized refugee status (Belgium), or where a constituent element of the offense can be traced back to France.

#### **IV. COMPARATIVE PROCEDURES**

Differences in procedural rules and how they implicate litigation preferences on part of plaintiffs and substantive law deterrence on part of corporate defendants will be developed along two lines of comparative analysis: first, decisive differences in procedural rules will be discussed with regard to litigation in the context of U.S. common law tradition and European civil law tradition. Second, the divide in primarily civil vs. criminal remedies will be examined and it will be shown how the primary nature of the proceedings matters and has crucial implications for access by victims and (substantive) law deterrence on part of corporate defendants. The goal is to shed light on why the United States is currently the prominent forum of choice for corporate human rights litigation, but also to closely examine the litigation culture and practice in both systems. This will provide the (legal) basis for the behavioral economics analysis of different (exogenous) measures of CSR implementation in Chapter 4 and will help to identify leverage points that might enhance the incentive-compatibility of liability litigation as a means of CSR enforcement.

## 1. Common Law – Civil Law Divide

### (a) Class Actions

The availability of class action lawsuits in civil matters is another unique feature of the U.S. legal system that facilitates the effective human rights redress against corporations and that makes the United States an attractive forum to adjudicate those issues. The American class action lawsuit is “exceptional” in its concept and finds no counterpart in any other jurisdiction.<sup>245</sup> Class action as a litigation vehicle allows a few plaintiffs, referred to as “class representatives,” to file a suit on behalf of all who have substantially similar claims by sharing “[common] questions of law or fact” against the same defendant.<sup>246</sup> Joint litigation of similar issues is argued to ensure judicial efficiency.<sup>247</sup> Consolidating the victims’ claims on behalf of a class representing possibly millions of victims, such as in the case of “Agent Orange,” provides a litigation vehicle that is particularly suited for human rights claims, since it enables claims that would have been “too small to be economically litigated alone.”<sup>248</sup> This is particularly true for local victims of overseas corporate human rights abuses, with often no or little financial resources, who confront MNCs of overwhelming economic power and resources to litigate for years to come. Class action lawsuits in the United States are a powerful tool for victims’ plaintiffs, since the aggregate of all individual damages makes it economically attractive for attorneys to front the costs of litigation under contingency fee arrangements, which will be discussed below. Historically, class action lawsuits in the United States have been considered to provide a vehicle for social change,<sup>249</sup> capitalizing on “group strength” vs. “individual powerlessness.”<sup>250</sup> This understanding and purpose of class litigation aligns itself neatly with the

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<sup>245</sup> With the exception in Europe of the UK, see Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN J. OF INT’L HUMAN RIGHTS, para. 82 (2008); Detlev Vagts, *Restitution for Historic Wrongs, The American Courts and International Law*, 92 AMERICAN J. OF INT’L L. 234 (1998); see Scott Dodson & James Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 BOSTON COLLEGE INT’L & COMP. L. REV., 2 (2011).

<sup>246</sup> Federal Rules of Civil Procedure 23.

<sup>247</sup> Richard Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMPLE INT’L AND COMP. L. J., 224-225 (1992).

<sup>248</sup> *Id.*, at 225.

<sup>249</sup> STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION*, 1 (1987).

<sup>250</sup> Boyd, Kathryn, *Collective Rights Adjudication*, 1999 BRIGHAM YOUNG UNIV. L. REV., 1167 (1999).

needs of human rights victims seeking legal redress and thereby facilitates the effectiveness of victim redress in U.S. courts.

It needs to be emphasized that the concept of class actions is unique to the United States and “nothing worth mention is being done in Europe to offer procedural civil justice in cases of mass victimization.”<sup>251</sup> By 2008, over half of the European Union member States did not provide for any collective redress mechanism in their domestic law.<sup>252</sup> Opt-out collective redress similar to the U.S. model (known as ‘actio popularis’) is the exception in Europe and is only provided for in Denmark, the Netherlands, and Portugal.<sup>253</sup> An increasing number of European countries have allowed for some kind of collective redress mechanisms, traditionally and most commonly in the context of consumer protection (for example, Germany, France, Italy (in 2009), and Finland (in 2007)) and more recently also with regard to shareholder and/or investor litigation (for example, Germany and France).<sup>254</sup> However, unlike in the United States, these collective redress mechanisms in Europe aim at injunctive relief rather than compensation to the class members.<sup>255</sup>

Belgium does not allow for any form of ‘actio popularis;’ according to Art. 17 Belgian Code of Civil Procedure, proceedings will be dismissed “if the plaintiff does not dispose of [ . . . ] an interest in introducing the proceedings.”<sup>256</sup> The interest to initiate proceedings needs to be current, i.e. “acquired already and [ . . . ] and immediate,”<sup>257</sup> in other words, the damage needs to have been suffered already.<sup>258</sup> Most importantly, the interest needs to be “personal and direct to

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<sup>251</sup> Richard Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 *TEMPLE INT’L AND COMP. L. J.*, 218-20 (1992).

<sup>252</sup> These European member States include: Belgium, Cyprus, the Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, and Slovenia. *See* Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 *COLUMBIA JOURNAL OF EUROPEAN LAW*, 415 (2009).

<sup>253</sup> *See id.*, at 415.

<sup>254</sup> *See id.*, at 416-21.

<sup>255</sup> *See id.*, at 416.

<sup>256</sup> Translation by BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 80 (2006).

<sup>257</sup> Art. 18 Belgian Code judiciaire belge, principes généraux (Oct. 10, 1967) [Belgian Code of Civil Procedure] [Translation by BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 81 (2006)].

<sup>258</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND



the plaintiff.” This is the key distinguishing factor from the U.S. class action system and constitutes a requirement that is construed strictly by Belgian courts.<sup>259</sup> A general interest is not enough and clearly would shut down the option of class action-like suits. Even a legal person whose statutory objective is to promote a general interest for a specific cause cannot file a claim in protection of this general interest.<sup>260</sup> Thus, no circumvention of the direct and personal damage prerequisite is permissible in Belgium. This poses a high threshold to victims, since they cannot rely on the efficiencies of consolidating their claims in class action lawsuits, as discussed above.<sup>261</sup> The requirement of an immediate and personal damage on part of the plaintiff also applies to a ‘constitution de partie civile’ before criminal courts. Thus, according to Art. 3 of the PTCCP, the ‘partie civile’ action is limited in its standing to sue to a party “which has suffered damage.”<sup>262</sup>

In France, as in Belgium, the general rule is that a civil party needs to have a personal interest in order to have standing to sue.<sup>263</sup> However, there has been some softening of this rule in France. Thus, unlike in Belgium, Arts. 2-4 of the French CCP allows for associations to bring civil actions in accordance with and in pursuance of their “constitution[al]” objective if the latter is “to combat crimes against humanity or war crimes, or to defend the moral interest and the honour of the Resistance.”<sup>264</sup> Therefore, civil society organizations can exercise the rights granted to civil parties, which can be a significant opportunity for individual victims, since human rights organizations organize and champion efforts to hold MNCs accountable for their responsibilities to the local communities in which they operate. Moreover, in a decision as early as 1982, the ‘Cour de Cassation’ has construed the concept of ‘individual harm’ in light of a

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CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 81 (2006). [Citing: B. Maes, *Inleiding tot het burgerlijk procesrecht*, Die Keure, 2004, 115].

<sup>259</sup> See *id.*, at 82.

<sup>260</sup> Cass. 19 September 1996, Arr. Cass. 1996, 775 [Cited in: BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ 82 (2006)].

<sup>261</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 82 (2006).

<sup>262</sup> See *id.*, at 50.

<sup>263</sup> See Art. 1382, French Civil Code.

<sup>264</sup> ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 19 (2006).

modern understanding of international criminal law, by holding that it is admissible for an individual victim plaintiff to bring a civil suit for crimes against humanity; the Court confirmed standing to sue in these instances holding that the “nature of a crime against a collectivity [. . . ] does not have the effect of excluding the possibility of individual harm.”<sup>265</sup>

Class remedies for mass human rights cases have been received both favorably and unfavorably by human rights experts. Whereas some scholars argue that class actions are particularly suited to address corporate misconduct in the human rights sphere against local communities, indigenous peoples, and cultural groups,<sup>266</sup> Professor Ralph Steinhardt, a prominent scholar who has been involved on the plaintiffs’ side in landmark cases such as against Unocal, has a critical view of class litigation in human rights cases. He argues that class representation for mass human rights violations compromises the autonomy of the victims.<sup>267</sup> Yet, despite conceptual reservations as put forward by Steinhardt, class action lawsuits can have great potential and impact to achieve increased corporate compliance with social and human rights norms by effect of deterrence based on the size of class remedies<sup>268</sup> and, even more importantly, the threat of reputational damage associated with mass human rights litigation against big consumer brands such as Yahoo!, Nike, or Royal Dutch Petroleum.

Boyd also raises an interesting issue with regard to class litigation in human rights cases when he suggests that the application of class certification under Rule 23 F. R. C. P. has an immediate effect on the development of the “substantive human rights asserted,” especially of collective rights in form of cultural and economic rights of groups. By defining the validity of the class status, courts have to identify the rights holders, a process which contributes to the interpretation and eventual manifestation of group rights.<sup>269</sup> Even though one might argue that this argument illegitimately blurs the line between rights holders and substantive rights, Boyd

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<sup>265</sup> Cour de Cassation [Supreme Court], Leguay case, Criminal Law Bulletin, No. 231 (Oct. 21, 1982) (Fr.). [Cited in: ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 19 (2006)].

<sup>266</sup> See Boyd, Kathryn, *Collective Rights Adjudication*, 1999 BRIGHAM YOUNG UNIV. L. REV., 1139 (1999).

<sup>267</sup> Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims against the Estate of Ferdinand Marcos*, 20 Yale J. Int’l L., 93 (1995).

<sup>268</sup> Boyd, Kathryn, *Collective Rights Adjudication*, 1999 BRIGHAM YOUNG UNIV. L. REV., 1211 (1999).

<sup>269</sup> *Id.*, at 1181 (1999).

explains an important aspect, that has been pointed to by several scholars before,<sup>270</sup> namely that procedural rules have substantive law consequences in human rights litigation.

### **(b) Fee Structure**

A unique fee structure is another defining element that sets the U.S. civil litigation system apart from most other civil and common law systems alike. Unlike most other legal systems around the world, the United States does not follow a ‘loser pays’ system of attorneys fees, but rather requires each party to bear its own legal costs irrespective of the meritorious outcome of the case.<sup>271</sup> Thus, in the United States, while the losing party usually has to bear the prevailing party’s court costs,<sup>272</sup> the losing party must only in narrow exceptional circumstances cover the prevailing party’s attorneys’ fees. As a general rule, there is no reimbursement for attorneys’ fees available in the U.S. system.<sup>273</sup> In contrast, most European legal systems have adopted a fee-shifting rule in civil litigation, according to which the prevailing party can recover its attorney’s fees from the losing party;<sup>274</sup> this is also the case in France<sup>275</sup> and Belgium.<sup>276</sup> The rationale behind fee-shifting is to “link the expected cost of litigation to the merits of the case” and therefore to encourage plaintiffs only to litigate strong and meritorious cases.<sup>277</sup> The purpose of the no-indemnity practice, as endorsed by the U.S. Supreme Court, is to promote broad access to courts. The U.S. Supreme Court elaborates: “[T]he poor might be unjustly

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<sup>270</sup> Richard Marcus, *They Can’t Do That, Can They? Tort Reform Via Rule 23*, 80 Cornell L. Rev. 858, 860 (1995); John H. Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724 (1974).

<sup>271</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 400 (1999); JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 599, 1026 (1994).

<sup>272</sup> See Federal Rules of Civil Procedure 54(d)(1).

<sup>273</sup> See James Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 THE AMERICAN J. OF COMP. L., 197, 200 (2010); see also W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 400 (1999).

<sup>274</sup> See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV., 411 (2001).

<sup>275</sup> See Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW AND CONTEMPORARY PROBLEMS, 44 (1984) (Stating that “[i]f any general statement can be made, it is that contrary to American tradition, most European countries (1) regard the objective fact of defeat as sufficient ground for imposing the costs on the losing party, without requiring any evidence of fault or bad faith...” *Id.*, at 72 (Citing that “France ... [is] generally accepting the principle of full cost fee shifting.”)

<sup>276</sup> See Mathias Reimann, *Cost and Fee Allocation in Civil Procedure*, in: GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, 197, 224 (2011).

<sup>277</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 82 (1997).

discouraged from instituting actions to vindicate their right if the penalty for losing included the fees of their opponents' counsel."<sup>278</sup>

The no-indemnity practice of attorneys' fees is a unique feature of the U.S. legal system, which has become known as the 'American Rule';<sup>279</sup> it is, however, not indicative of common law tradition in general. Thus, e.g., even the English common law system provides for indemnity of attorney fees by virtue of court order and within the discretion of the court; even though unlike in civil law systems, the indemnification is not imposed automatically by virtue of statute law but rather cost allocation is at the discretion of the court. Fee-shifting has been the norm in the English system as "the costs 'follow the event.'"<sup>280</sup> The 'loser pays' system is also referred to as the 'English Rule,' as opposed to the 'American Rule,' even though two-way fee shifting rules are used in many civil law systems, including France and Belgium.<sup>281</sup>

The respective fee system has, by concept, important implications for the litigation risk of the parties involved. As mentioned above, the goal of fee-shifting in many civil law countries is to fully compensate winners, deter frivolous lawsuits, and encourage settlements.<sup>282</sup> The risk of litigation is primarily on the losing party, since literally the 'loser pays;' the winner on the other hand will be reimbursed for its legal costs. In the United States, however, the plaintiffs bear a much less significant risk of failure in civil litigation since, even in case of losing, the legal costs of the opposing party do not have to be reimbursed. The underlying rationale for the 'American Rule' is that "it is not in the public interest to hinder an impecunious plaintiff from bringing a valid but difficult claim by making him run the risk of having to pay the attorney's fee

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<sup>278</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

<sup>279</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 400 (1999).

<sup>280</sup> W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 409 (1999); see also, David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 591 (2005).

<sup>281</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 403-04 (1999).

<sup>282</sup> David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 604-07 (2005).

of his opponent.”<sup>283</sup> It is to be noted that there is a significant number of statutory exceptions to the no-indemnity rule;<sup>284</sup> however, even where those exceptions are provided under U.S. federal and State statutes, the rationale is not to restrain litigation and reduce litigation to the most meritorious and strongest cases, but rather the opposite. Statutory exceptions for the most part aim to further encourage litigation in areas of public interest, such as civil rights, consumer protection, employment and environmental protection,<sup>285</sup> thus incentivizing plaintiffs to act as “private attorney general[s]” helping to enforce public policy concerns.<sup>286</sup> Fee-shifting rules under U.S. federal and State law mainly employ a one-way fee shifting, i.e., only the successful plaintiffs can recover attorney fees, as opposed to a two-way fee shifting that is prevailing in most civil law countries, according to which the loser, whether plaintiff or defendant, pays all his own and his opponent’s legal fees.<sup>287</sup> Therefore, rather than restraining litigation, most statutory fee-shifting provisions in the United States further encourage the filing of lawsuits, since plaintiffs have “no downside risks and, therefore, no reason *not* to sue.”<sup>288</sup> Some of these fee-shifting rules might be employed in favor of victim plaintiffs in ATS litigation and thus further minimize their financial litigation risk and strengthen their bargaining power in settlement negotiations.

Following the cost and thus risk allocation, the different fee systems also have crucial implications on the effectiveness of human rights redress, especially against MNCs. On its face, it seems to be reasonable and fair to link the cost allocation to the merits of the case, as is the case under a fee-shifting regime. However, in practice the risk of bearing all legal fees may result in a situation where risk-averse parties or parties with limited financial resources forgo a

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<sup>283</sup> *See id.*, at 604.

<sup>284</sup> There are more than 200 federal and almost 2000 state statutes providing for fee shifting in U.S. civil litigation. *See* David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 *IND. INT’L & COMP. L. REV.* 588 (2005); *see also* James Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 *THE AMERICAN J. OF COMP. L.*, 200 (2010). Still, the American Rule applies to most civil litigation in the U.S. *See* W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 *ARIZONA J. OF INT’L AND COMP. L.*, 402 (1999).

<sup>285</sup> Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers*, *WASHINGTON UNIV. J. OF L. & POLICY*, 1, 8 (2001).

<sup>286</sup> James Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 *THE AMERICAN J. OF COMP. L.*, 201 (2010).

<sup>287</sup> *Id.*, at 200-01.

<sup>288</sup> *Id.*, at 201.

meritorious lawsuit or settle early at a low recovery rate, since the cost of losing is overwhelming.<sup>289</sup> Particularly in human rights litigation against corporate defendants, plaintiffs are often financially under-sourced representing local communities (see litigation against Talisman, Unocal, Royal Dutch Petroleum, among others), or political opponents from the host State (see litigation against Yahoo!) that have suffered human rights abuses facilitated by the complicity of MNCs. Thus, unlike the European fee system, the U.S. no-indemnity approach provides effective access to courts to victim plaintiffs that dispose of scarce financial resources as is often the situation in ATS-like cases.

Moreover, the low financial risk of failure inherent in the U.S. fee system encourages the filing of valid but difficult private claims,<sup>290</sup> thus providing the procedural environment for creative lawyering that promotes dynamic civil litigation that puts forward innovative legal theories and statutory interpretations. Europe's fee-shifting system on the other hand follows a very different premise; it aims to incentivize strong lawsuits and not creative legal arguments.<sup>291</sup> The fee-shifting rule in Europe is in line with and emblematic of a legal culture where "civil liability is no longer oriented toward influencing socially undesirable behavior, but [primarily] toward compensation," as was stated by the European Commission.<sup>292</sup> Unlike in the United States,<sup>293</sup> civil litigation does not have a social change function in Europe. Civil courts in Europe are designated to decide private claims, not to implement public policy,<sup>294</sup> whereas in the United States "[t]he subject matter of the lawsuit is not [primarily] a dispute between private individuals

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<sup>289</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 12 (1997); see David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 607-08 (2005); see W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 410-11 (1999).

<sup>290</sup> See James Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 THE AMERICAN J. OF COMP. L., 203-04 (2010).

<sup>291</sup> See Thomas Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMPORARY PROBLEMS., 152 (1984).

<sup>292</sup> See Liesbeth Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 THE GEORGE WASHINGTON INT'L L. REV., 931 (2009).

<sup>293</sup> David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 599 (2005); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Holding that courts cannot enforce racially restrictive covenants on real estate.)

<sup>294</sup> See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV., 412 (2001) [internal citations omitted].

about private rights, but a grievance about the operation of public policy.”<sup>295</sup> The designated role of (civil) litigation, implemented by procedural rules, implicates the effectiveness of human rights redress in the respective forum jurisdiction. According to Prof. Beth Stephens, a prominent scholar on the comparative aspects of domestic litigation of corporate human rights responsibilities, “given this legal culture, the use of civil litigation as a means of impacting human rights policies is a natural development in the U.S. legal system,”<sup>296</sup> that is unprecedented among European civil law jurisdictions. Indeed, without an environment in favor of creative lawsuits and with a low-risk fee structure, victim plaintiffs would probably not have pursued a landmark case such as *Filartiga*<sup>297</sup> that has shaped the modern-day application of the ATS as a litigation vehicle for effective corporate compliance; rather, the ATS would probably have remained an obscure statute from 1784 that was adopted to remedy a narrow set of ‘violations of the law of nations,’ namely “violation of safe conducts, infringement of the rights of ambassadors, and piracy,”<sup>298</sup> and that has only scarcely been employed in the two centuries following its adoption.<sup>299</sup> Stephens, a prominent scholar on the ATS and foreign alternatives, even argues that “[n]one of the U.S. human rights plaintiffs could have risked filing their claims if they had faced the possibility of paying the legal fees of the defendants.”<sup>300</sup>

To conclude, the no-fee shifting system in the United States creates a viable environment for dynamic civil litigation that is unique and provides great advantages for ATS-like claims on two major counts. However, the no-indemnity rule does not only have significant upsides for victim plaintiffs, but also potential downsides. The lack of a fee-shifting mechanism can inhibit under-sourced plaintiffs to file a meritorious suit or rush into settlements since, even in case that they prevail in court, they would not be able to recover their attorneys’ fees from the losing

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<sup>295</sup> *Id.* [Citing: Abram Chayes, *The Role of the Judge in Public Law Litigation*, HARVARD L. REV., 1284 (1976)].

<sup>296</sup> Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV., 401 (2001).

<sup>297</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>298</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

<sup>299</sup> See GARY HUFBAUER & NICHOLAS MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 2 (2003) (Pointing out that between 1789 and 1980, there were only 21 cases filed under the ATS.)

<sup>300</sup> Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV., 411 (2001).

party.<sup>301</sup> The ‘American Rule’ reimburses neither the loser nor the winner.<sup>302</sup> As an article in the New York Times correctly stated with regard to the ‘American Rule:’ “You Win But You Lose;” this is not only true for defendants who successfully defend themselves but also for plaintiffs who successfully prove their case.<sup>303</sup> To address this pitfall of the American Rule and reinforce the overall goal of encouraging private litigation, some scholars have argued that the remedy structure in the United States has developed accordingly.<sup>304</sup> Thus, unlike in most civil law jurisdictions, U.S. courts often provide for generous award for pain and suffering in personal injury cases and punitive damages that in fact enable the plaintiff to recover his attorney fees and still gain compensation for his damage.<sup>305</sup>

Apart from a fee structure that is favorable to plaintiffs and generous damage awards, there are also other aspects that shape the unique economics that drive the proactive civil litigation before U.S. courts, which is unparalleled in an international comparison. One is the availability of punitive damages. Aside from the United States, only a handful of other legal systems provide for punitive damages. Most legal systems merely allow the plaintiff to recover compensation for the loss suffered.<sup>306</sup> In the United States, punitive damages can be granted in tort cases involving reckless conduct (or reckless disregard), instead of mere negligence.<sup>307</sup> Multi-million dollar awards for punitive damages are not uncommon in the United States. For example, Exxon Oil Corporation was ordered to pay \$507.5 million on top of \$3.4 billion in cleanup costs, compensatory payments and other fines for the Valdez oil tanker spill offshore

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<sup>301</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 401 (1999).

<sup>302</sup> See *id.*, at 401-402.

<sup>303</sup> Steven Brill, *You Win but You Lose*, N.Y. TIMES, July 2, 1980, at A27 [Cited in: David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583 (2005)].

<sup>304</sup> W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 402 (1999).

<sup>305</sup> *Id.*

<sup>306</sup> See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV., 412-13 (2001) [Citing: MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA*, at 1022 (1994)]. The Rome II Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations provides at the European Union level that “[t]he application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages to be awarded may [...] be regarded as contrary to the public policy (*ordre public*) of the forum.”

<sup>307</sup> Comment (b) to section 2 of the Third Restatement; see Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LOUISIANA L. REV., 741, 743 (2008).



Alaska.<sup>308</sup> Also of major importance is the availability of contingency fees as a means for plaintiffs to finance their litigation without having to pay a retainer fee or hourly bills upfront and before any verdict or settlement.<sup>309</sup> The option of entering into an arrangement according to which the attorney will receive a percentage share in the recovery (either through judgment or settlement) as compensation for his services significantly minimizes the plaintiffs' risk even further. Payment of the lawyer is contingent on a positive outcome for the plaintiff. If the plaintiff loses, the attorney will receive no payment.<sup>310</sup> Thus, the plaintiffs can shift their financial risk to their lawyers, who in turn can diversify the risk across a portfolio of cases.<sup>311</sup> As is the case with the no-indemnity practice, the United States is also unique in its wide use of contingency fees.<sup>312</sup> In the vast majority of civil and common law countries around the world, contingency fees are considered "intrinsically evil"<sup>313</sup> and champertous, what has led contingency fees being considered "illegal, unethical, or both in virtually all countries outside the United States."<sup>314</sup> In most countries, including in Europe, giving lawyers a direct stake in the result of a case is considered most likely to stir unethical practices in litigation.<sup>315</sup> Yet, the availability of contingency fees is decisive in providing broad access to courts especially for marginalized local communities in overseas' human rights litigation; it also resonates and reinforces the American understanding of the role of litigation to "cure societal problems,"

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<sup>308</sup> The original jury verdict was \$5 billion in punitive damages, which was then reduced by the Court of Appeals for the Ninth Circuit; eventually the Supreme Court set the punitive damages at \$507.5 million. See Mark Thiessen, *Court Orders \$507.5 Million Damages in Exxon Valdez Spill*, HUFFINGTON POST (June 15, 2009), at [http://www.huffingtonpost.com/2009/06/15/court-orders-5075-million\\_n\\_215832.html](http://www.huffingtonpost.com/2009/06/15/court-orders-5075-million_n_215832.html).

<sup>309</sup> See David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 592 (2005); Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 82 (1997).

<sup>310</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 371-72 (1999).

<sup>311</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 82 (1997).

<sup>312</sup> Aside from the U.S., there are only a handful of other countries that provide for contingency fees and the use thereof is significantly restricted in these few nations, namely Japan, Thailand, Indonesia. RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS*, 897 (1995). See also Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 403 (1999) (emphasizing that the 'American Rule' applies to most civil litigation in the U.S. even though there exist some judicial or statutory exceptions to the rule.)

<sup>313</sup> Arthur L. Kraut, *Contingent Fee: Champerty or Champion?*, 16, 18 CLEV. ST. L. REV., 15(1972).

<sup>314</sup> W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT'L AND COMP. L., 381 (1999).

<sup>315</sup> See *id.*, at 381.

promote social policies, and provide effective incentives to change social behavior, as elaborated above.<sup>316</sup>

It is to be noted that most civil law countries, including France, Germany and Belgium, have found their own ways to ensure access to the courts for low income private plaintiffs. First of all, civil litigation is usually significantly less expensive than in the United States, one reason being the existence of statutory tariffs for lawyers that can be exceeded only in very limited instances. One prominent example is Germany, where a ‘basic fee’ is determined by statute based on the amount in controversy (Gegenstandswert) with the percentage share being retrogressive, thus being low when the amount in controversy is high and vice versa.<sup>317</sup> Despite a regulatory environment that keeps legal costs modest, the financial risk can be quite high because of the ‘loser pays’ paradigm that prevails in most countries outside of the United States. To alleviate the burden on the low income-indigent plaintiffs, most civil law countries offer government-sponsored legal aid that is derived from the right to legal counsel that, unlike in the United States, is prescribed in many civil law countries for both civil and criminal cases.<sup>318</sup> Unlike the English legal aid system, most civil law countries, including Germany and France, do not provide for a free choice of the attorney by the client.<sup>319</sup> This certainly has to be considered a significant inhibiting factor for low income plaintiffs, particularly when it comes to the litigation of human rights issues that often times require a proactive, dynamic, and creative lawyering approach. Freedom of selection is crucial for victim plaintiffs to ensure effective remedy adjudication on their behalf. The levels of compensation under the different legal aid systems diverge widely, ranging from market-level compensation in England and compensation that is “not overly generous, [but] by no means at charity levels” in Germany, to rather modest

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<sup>316</sup> David Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 594 (2005). Granting access to courts and being considered an expression of commercial and political speech, contingency fees have been attributed high value by the U.S. Supreme Court. See Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. REV., 38 (1989).

<sup>317</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 384-85 (1999).

<sup>318</sup> See *id.*, at 385-86.

<sup>319</sup> See *id.*, at 385-87.

compensation under the French system.<sup>320</sup> Even assuming fair and competitive compensation under European legal aid systems, the U.S. contingency fee system enables a unique entrepreneurial law practice where lawyers, enticed by the prospect of a very lucrative payoff (particularly in class actions suits) and the ability to diversify their risk through a “portfolio” of different lawsuits, are “less risk averse than their clients and are willing to proceed [. . . ] in many cases that plaintiffs would otherwise forego” litigation.<sup>321</sup> This unique entrepreneurial approach to litigation creates a vibrant litigation ‘industry’ that is unparalleled outside of the United States and is often perceived to be a vehicle for an unethical pursuit of justice from the perspective of Continental legal systems:

“To a German lawyer a[n American] trial by jury can be quite breathtaking. After all, the attorney who stands to win fifty per cent of the proceeds will “go after it, gunning for justice.”<sup>322</sup>

Finally, it is to be noted that if private plaintiffs opt for the ‘partie civile’ procedure, as will be shown below, they will benefit from the investigative resources of the prosecutor, both in professional and financial terms. This mitigates some of the procedural hurdles of the Continental fee system in favor of the victim plaintiffs. Still, overall, one must be concluded that despite serious attempts to ensure access to courts for low income plaintiffs in Europe, the U.S. procedural environment is uniquely favorable, especially for human rights plaintiffs.

Another aspect pertaining to the fee structure in the United States, which is uniquely favorable to human rights litigation, is a very liberal discovery process<sup>323</sup> that enables the victim plaintiffs to request document production from the defendant while “not shit[ing] the costs of compliance to the party requesting discovery.”<sup>324</sup> This fee structure is particularly favorable for plaintiffs against institutional defendant such as a corporation, since complying with a request for document production is much more costly for MNCs with their complex network of local

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<sup>320</sup> *Id.*, at 386-387.

<sup>321</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *IND. L.J.*, 82 (1997).

<sup>322</sup> BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW*, 67 (1990).

<sup>323</sup> See below section 2 (a) on “Discovery Process.”

<sup>324</sup> *Fed. R. Ci. P.* 26-37; See Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *IND. L.J.*, 82 (1997).

subsidiaries and plants than for victim plaintiffs in human rights cases, which are often times local communities or representatives thereof.

According to Jonathan Molot, the United State's liberal discovery system, together with non-fee shifting and the availability of contingent arrangements, leads to over-deterrence beyond substantive law merits.<sup>325</sup> Molot argues that nonmerits factors in the form of procedural rules overshadow the merits of a case when plaintiffs decide to file and parties decide to settle. Accordingly, procedural litigation rules pertaining to the fee structure encourage plaintiffs to file lawsuits and increase their bargaining power in settlement negotiations, thus ensuring that suits are not settled for less than the merits warrant.<sup>326</sup> While Molot's first observation is universally applicable, his second one needs to be specified with regard to human rights litigation: Looking at the power balance through the prism of victim plaintiffs, it is to be agreed that non-fee shifting and liberal discovery process (without the option of reimbursement) certainly produces "high litigation costs that are beyond [the defendant's] control, and that [defendants] must bear regardless of the merits."<sup>327</sup> However, when determining who has a greater bargaining power it is not merely decisive how the financial risk is allocated under procedural rules, but also which party is in fact in a position to effectively shoulder this risk. Especially, victim human rights litigation against MNCs is emblematic of a consistent power asymmetry, cementing a 'David v. Goliath' paradigm. It therefore is not a surprise that, despite the favorable litigation environment in the United States., victims have usually settled ATS cases against corporations outside of court for amounts that would be probably often be considered to fall short of what the merits warrant.<sup>328</sup>

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<sup>325</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 62 (1997) ("When the three sets of rules are considered together, it becomes clear that defendants' total tort payments exceed what they would pay under substantive law alone.")

<sup>326</sup> *See id.*, at 81-86.

<sup>327</sup> *Id.*, at 62.

<sup>328</sup> *See* Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHTS, at <http://www.asil.org/insights090909.cfm>. Also, *see* table 1 in Chapter 4 giving an overview over the terms of the major settlements in corporate ATS litigation.

## 2. Torts – Criminal Law Divide

### (a) Discovery Process: Procedural Implications of the ‘Constitution de Partie Civile’

A claim for damages resulting from a criminal act can be filed as a tort action before a civil court or concurrently with the criminal proceedings before criminal court under the ‘constitution de partie civile’ procedure.<sup>329</sup> As pointed out in section B above, there are major hurdles to bringing an independent claim under domestic torts law for the purposes of holding corporations accountable for their overseas misconduct related to human rights. It is against this backdrop that the following section explores the ‘partie civile’ procedure before criminal courts as an attractive alternative to bring ATS-like cases before domestic European courts. The primary goal is to compare and contrast procedural differences between civil redress before criminal courts in Europe (i.e. ‘constitution de partie civile’) with tort redress before U.S. district courts under the ATS. To better understand the unique characteristics of the ‘partie civile’ procedure with regard to human rights litigation against corporations, reference will also be made to the respective procedural advantages of attaching a civil claim to criminal proceedings, as opposed to filing a separate tort action before civil courts.

The ‘constitution de partie civile’ procedure enables an independent civil action for damages to be attached to criminal proceedings when the injury was caused by a criminal act.<sup>330</sup> It is available in a fair number of civil law jurisdictions<sup>331</sup> and has been considered the closest of and ATS-equivalent in Europe, aside from the Brussels I Regulation discussed above.<sup>332</sup> The

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<sup>329</sup> See Bahareh Mostajeleian, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or its Failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*, 40 THE GEORGE WASHINGTON INT’L L. REV., 511 (2008); Art. 4 Belgian PTCCP; Art. 3 French CCP.

<sup>330</sup> Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, THE WAYNE L. REV., 115 (1987).

<sup>331</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 885-86 (2009).

<sup>332</sup> Engle argues that “the action civile, or a homologue, exists in most civilian jurisdictions,” since the latter recognize two fundamental concepts, namely “(1) the actionability of international crimes in domestic proceedings and 2) the possibility that an injured plaintiff may sue the defendant criminal tortfeasor.” Eric Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 21 (2005); see also Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 111.

‘action civile’ is unprecedented in modern-day common law jurisdictions.<sup>333</sup> Considering that even in many continental law countries the principle of prosecutorial discretion is prevailing,<sup>334</sup> the ‘partie civile’ mechanism is a powerful tool for victims’ plaintiffs.<sup>335</sup> Whereas, some legal systems (among others Germany and Italy) follow the “legality principle,” laying out an obligation of the prosecutor to commence a criminal investigation for any alleged offense, many countries (among them France, Belgium and the United States) leave it to the full discretion of the prosecutor to initiate criminal proceedings and file charges.<sup>336</sup>

As a general rule, the victim has no control over decision-making once a case is in the criminal justice system; rather “most decisions are made by the agents of the criminal justice process.”<sup>337</sup> The ‘constitution de partie civile,’ however, allows the victim to initiate criminal proceedings if the prosecutor declines to do so. In this case, the victim does not only initiate an independent private action (thus becoming a party to the criminal proceedings), but ipso facto also sets in motion the public proceedings.<sup>338</sup> If the prosecutor has used his discretion to initiate criminal proceedings, the ‘constitution de partie civile’ has the effect of attaching the civil claim to the criminal proceedings and thus making the victim a party to the pending proceedings.<sup>339</sup> In France and Belgium, victims cannot themselves trigger prosecution of their case, but the

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<sup>333</sup> C. Howard, *Compensation in French Criminal Procedure*, 21 *THE MODERN L. REV.*, 387 (1958). “Historically, the common law also permitted private persons to initiate prosecution of crimes in order to conserve very limited judicial resources. [However] [t]hat is no longer the case in the U.S.,” as confirmed by Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 20 (2005).

<sup>334</sup> It is to be noted that there are a limited number of European jurisdictions where the victim has a primary right to prosecute (namely in England, Ireland, Wales, Finland, and Cyprus) or a secondary right to prosecute if the public prosecutor refuses to bring charges (namely in Sweden, Norway, and Austria). Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, *THE WAYNE L. REV.*, 110-12 (1987). This right however comes with significant downsides, since “[f]rom the perspective of the victim, it is usually preferable to have the public prosecutor prosecute the alleged offender [...] due to considerations of expertise, cost, and convenience.” (*Id.*, at 113).

<sup>335</sup> C. Howard, *Compensation in French Criminal Procedure*, 21 *THE MODERN L. REV.*, 393 (1958); see Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 *CRIM. L. BULL.*, 30-31 (2008).

<sup>336</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 *THE GEORGE WASHINGTON INT’L L. REV.*, 882 (2009); Yue Ma Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 *CRIM. L. BULL.*, 32 (2008); Art. 28 *quarter Code d’instruction criminelle belge*, livre 1 (November 17, 1808) [Belgian Code of Criminal Procedure] (henceforth: Belgian CCP); Art. 40 French CCP.

<sup>337</sup> Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, *THE WAYNE L. REV.*, 102 (1987).

<sup>338</sup> See CHRISTINE VAN DEN WYNGAERT, *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, 115 (1993); see also HUBERT BOCKEN & WALTER DE BONDT, *INTRODUCTION TO BELGIAN LAW*, 123 (2001); for France, see Art. 1 al.2 COP; for Belgium, see BRUNO DEMEYERE, FAFO AIS, *SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’* 51 (2006).

<sup>339</sup> CHRISTINE VAN DEN WYNGAERT, *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, 17 (1993).

‘constitution de partie civile’ enables them to directly seize an investigative judge without the need of the prosecutor.<sup>340</sup> Still, the prosecutor remains the principal party in the criminal proceedings, to which the civil party merely attaches its civil claim.<sup>341</sup> This can be a great advantage for the private party, since it can benefit from the investigatory prerogative and powers of the prosecutor and the investigating judge.<sup>342</sup> It is to be noted that the ‘constitution de partie civile’ initiates an *independent* civil action that is based on the Belgian/French Civil Code.<sup>343</sup> As a consequence, the civil party bears the burden of proof to show the tort elements, namely all components of the offense, causality, and damage,<sup>344</sup> whereas the prosecutor bears the burden of proof in the criminal case.<sup>345</sup> In practice, however, the lines are rather blurred and there is significant overlap where the civil party can benefit from evidence obtained in connection with the underlying criminal investigation.<sup>346</sup> This involvement of the prosecutor on behalf of private party claims is crucial for the effectiveness of victims’ redress considering that, compared to the United States, procedural rules in European legal systems are less favorable for the civil party on many counts, as shown below. Scholars have identified the procedural advantages of using criminal proceedings for civil claims as being “faster, easier, and less expensive than initiating a separate civil proceeding.”<sup>347</sup>

By attaching the civil claim to criminal proceedings, the ‘partie civile’ procedure mitigates some of the procedural pitfalls for litigants in civil proceedings in Continental legal

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<sup>340</sup> Art. 2 French CC in conjunction with Art. 418 para. 2 and Art. 85 French CCP; Art. 63 Belgian CCP.

<sup>341</sup> See for Belgium: CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 115 (1993).

<sup>342</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 79 (2006); see CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 7, 32 (1993); Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, THE WAYNE L. REV., 116 (1987).

<sup>343</sup> Art. 1382 code civil belge (March 21, 1804) [Belgian Civil Code]; Art. 1382 code civile français [French Civil Code]; see also Patrick Campbell, *Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT’L & COMP. L. REV., 326 (1980).

<sup>344</sup> Art. 870 Belgian CCP (Prescribing that “every party to the proceedings needs to submit the proof of the facts it refers to.”) (Translated by BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 91 (2006)).

<sup>345</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 79-80 (2006).

<sup>346</sup> HUBERT BOCKEN & WALTER DE BONDT, INTRODUCTION TO BELGIAN LAW, 122 (2001).

<sup>347</sup> See Bahareh Mostajeleian, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or its Failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*, 40 THE GEORGE WASHINGTON INT’L L. REV., 511 (2008) [Citing: Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, THE WAYNE L. REV., 116 (1987)].

systems,<sup>348</sup> in particular an almost non-existent pre-trial discovery, paired with limited rights of civil parties to request evidence from their opponents.<sup>349</sup> Whereas in the United States plaintiffs play an active role in evidence production in civil proceedings and can themselves compel witness testimony and request access to the defendant's files, civil law jurisdictions take a less adversarial approach. There, evidence production is considered a government function and can only be mandated by the court, not by the plaintiffs.<sup>350</sup> Therefore, the prosecutor's investigation and evidence collection into the issue is indispensable for victim plaintiffs, especially at the pre-trial stage. This is particularly true since the pleading standard in European civil law systems, including France and Germany, sets a significant bar, requiring the plaintiffs to produce "substantial factual allegations;" mere notice pleading like in the United States is not sufficient.<sup>351</sup> Even at the trial phase, however the discovery process in many civil law jurisdictions is less liberal than in the US. Thus, not only do civil parties have to rely on the judge to issue requests for document production, but these requests must also be specific in identity of the document and its relevance to the case, rather than the more liberal standard of categorical identification of document requests in the U.S. legal system.<sup>352</sup> Also, some continental legal systems, such as France and Germany, grant strong privacy rights to corporations in both civil discovery and criminal proceedings, which shields corporations from liability in a way not available in the United States.<sup>353</sup> Certainly, one could argue from a Continental view point that it benefits the plaintiffs that the "judge takes on much of

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<sup>348</sup> See Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV., 687 (1965) (discussing the advantages of the 'partie civile' procedure).

<sup>349</sup> See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L., 21 (2002); Vivian Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the Lipietz Case*, 56 AMERICAN J. OF COMP. L., 399 (2008). ("The problems are intensified by the lack of anything remotely resembling U.S. civil discovery."); see REMO KLINGER, FAFO AIS, SURVEY RESPONSE, LAWS OF GERMANY, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 25 (2006).

<sup>350</sup> See Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 293-94 (2002).

<sup>351</sup> Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALABAMA LAW REVIEW, 144 (2008).

<sup>352</sup> See Gregory Hauser, *Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients From Civil Law Nations View Civil Litigation and Helping them Understand U.S. Lawsuits*, 17 INTERNATIONAL PRACTICUM, 136 (2004).

<sup>353</sup> Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 THE YALE L. J., 145 (2008); Vivian Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the Lipietz Case*, 56 AMERICAN J. OF COMP. L., 399 (2008).



investigative labor” and therefore also the costs of evidence production.<sup>354</sup> Grosswald has confirmed this important aspect stating that:

“Under the current French legal system, the absence of contingency fees favors wealthier plaintiffs in civil suits, whereas a *partie civile* in a criminal law case [...] benefits from the state’s investigative resources, both financially and professionally.”<sup>355</sup>

Even though this can in general be considered an advantage over the U.S. system, where the discovery process in ATS cases is not only “party-driven” but also “party-paid,”<sup>356</sup> with the financially burdensome discovery requests by the opposing party due to a non-fee shifting rule for discovery costs,<sup>357</sup> U.S. procedural rules still provide an environment that is particularly favorable to human rights claims against corporate defendants. First, mandatory pre-trial discovery tools that are available to the litigants help “level[s] the playing field” in that [it] gives an economically weaker party the means to make a deserving case that would otherwise be hidden in the files of a wrong-doer,” thus, eliminating information asymmetries.<sup>358</sup> Second, fees rules for the U.S. pre-trial discovery process rather disfavor the party with more extensive records and a more complex structure, such as MNCs; thus discovery costs are not a major inhibitor for human rights plaintiffs in the United States, especially considering also the availability of contingent arrangements. In fact, the existing cost structure might work in the plaintiffs’ favor and induce an attractive settlement.<sup>359</sup> Moreover, the French regulations on judicial costs in criminal procedures do curtail some of the cost benefits for plaintiffs who constitute themselves as civil parties to the criminal proceedings. Thus, a financial security deposit in the amount of the estimated trial costs is required if the criminal proceedings have not been pending before the civil party filing.<sup>360</sup> Finally, the U.S. procedural landscape gives civil parties (and their attorneys) the autonomy to “pursue a discovery program tailored by their own

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<sup>354</sup> See Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 295 (2002); see also Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV., 687 (1965).

<sup>355</sup> Vivian Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the Lipietz Case*, 56 AMERICAN J. OF COMP. L., 399 (2008).

<sup>356</sup> Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 295 (2002).

<sup>357</sup> Federal Rules of Civil Procedure 26-37.

<sup>358</sup> Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 295 (2002).

<sup>359</sup> Jonathan Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J., 74 (1997).

<sup>360</sup> HUBERT BOCKEN & WALTER DE BONDT, INTRODUCTION TO BELGIAN LAW, 21 (2001).

assessment of the best way to proceed in the particular case, without much judicial supervision.”<sup>361</sup> This “individualism”<sup>362</sup> is a driving force in human rights redress, adjudicated against corporations, since these claims often require creative lawyering under the ATS as a statute that has just recently, i.e. in the last 20 years, been applied actively against corporations. “Private litigation [in the United States] is for the most part controlled by the litigants, who provide its impetus, its direction and often, its ultimate resolution.”<sup>363</sup> According to Oscar Chase, this is to be considered as a key feature of the American way of dispute settlement and is linked to the underlying American values of “individualism” and “laissez-faire.”<sup>364</sup>

While the ‘constitution de partie civile’ initiates an independent civil action based on the respective civil code,<sup>365</sup> the latter civil claim for damages that is brought before criminal courts follows the respective rules on criminal procedure.<sup>366</sup> This hybrid system of a civil cause of action litigated under criminal procedure rules have pivotal implications on the effectiveness of victims’ redress. Thus, as mentioned above, the criminal investigation instigated by the prosecutor can help civil parties to overcome the lack of pre-trial discovery and meet their pleading standard for the civil case. Also, in case of defeat, the civil plaintiffs who attached their claim to the criminal proceedings under the ‘partie civile’ mechanism will not have to bear the costs of the proceedings, since the latter are born by the public prosecutor and thus the state.<sup>367</sup> This certainly constitutes an advantage of the ‘partie civile’ procedure over the option to pursue a private claim before civil court, where the rule of ‘the loser pays’ all his attorney fees and the costs of the opposing party.<sup>368</sup> While the advantages of attaching civil claims to criminal proceedings weigh heavily, there are also disadvantages to the procedure, one being that the

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<sup>361</sup> Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 295 (2002).

<sup>362</sup> *Id.*

<sup>363</sup> Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 283 (2002).

<sup>364</sup> *Id.*

<sup>365</sup> Art. 1382 Belgian Civil Code; Art. 1382 French Civil Code; see C. Howard, *Compensation in French Criminal Procedure*, 21 THE MODERN L. REV., 388 (1958).

<sup>366</sup> HUBERT BOCKEN & WALTER DE BONDT, INTRODUCTION TO BELGIAN LAW, 121 (2001); see Patrick Campbell, *Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT’L & COMP. L. REV., 326-27 (1980).

<sup>367</sup> CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 17 (1993).

<sup>368</sup> See above section 1 (b) on “Fee Structure.”

consolidation of the procedure conflates the role of the victim in court. Thus, the victim “often has two faces,” as Larguier put it. “He may be a violent accuser” pressing for criminal charges and “a calculating accuser” asking for civil damages.<sup>369</sup> This points towards a major issue, namely the question whether “torts fit the [international] crime” at all.<sup>370</sup> Another disadvantage is raised by Thompson; as he points out, the fate of the ‘partie civile’ will be tied to the prosecutor’s availability of resources (or lack thereof); a prosecutor lacking sufficient resources to even prosecute all serious domestic crimes will encounter difficulties effectively investigating cases involving crimes committed abroad as there prosecution is far more time- and cost-consuming than purely domestic cases.<sup>371</sup> Finally, despite the advantages for the plaintiff, instituting a civil claim before criminal courts has some other procedural implications that might not always work in favor of the private plaintiff. Thus, the plaintiff cannot rely on court-mandated request for information from the opposing party, since the private claim is handled under criminal procedure rules, according to which the defendant has “no duty to collaborate to proving the facts held against him” due to the assumption of innocence.<sup>372</sup> Moreover, the private party may no longer be a witness to the proceedings.<sup>373</sup> Overall, acknowledging that there are important advantages for the victim plaintiffs to bring their private claim in conjunction with the criminal proceedings, the ‘partie civile’ option still falls short of the effectiveness of human rights redress under the ATS, one major reason being that the procedural rules in the U.S. civil liability proceedings are more favorable to the plaintiffs, particularly in cases against MNCs, where there is an asymmetry in economic resources, where there are information asymmetries due to complex corporate structures, and where there is a group of plaintiffs that would benefit from a class certification as available in the United States. Moreover, despite the great potential

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<sup>369</sup> Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV., 688 (1965).

<sup>370</sup> See Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime*, 60 ALBANY L. REV. 579 (1997).

<sup>371</sup> Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 883 (2009).

<sup>372</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 80 (2006).

<sup>373</sup> Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV., 698 (1965); Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER, 21 (2005).

that the ‘partie civile’ concept may have for human rights redress against corporations for their overseas activities, there are still a significant number of instances in, for example, Belgium and France, where the ‘partie civile’ procedure is not available to the plaintiffs and the prosecutor has full discretion whether to initiate proceedings or not. The exceptions from ‘partie civile’ rule inhibit victims’ redress in ATS-like cases before European courts, since those exceptions extend particularly to extraterritorial offenses that amount to international crimes.

The ‘partie civile’ mechanism is significantly restricted in both France and Belgium for the three core atrocity crimes committed extraterritorially. This is of considerable importance with regard to the effectiveness of victims’ redress, since the three core international crimes under the Rome Statute can be considered as the baseline requirement for corporate compliance under a ‘do no harm’ paradigm in terms of John Ruggie’s corporate responsibility to respect human rights.<sup>374</sup> In Belgium, unless the accused is of Belgian nationality or has his ‘main residence’ in Belgium,<sup>375</sup> the decision whether to initiate a criminal investigation or proceedings is at the full discretion of the federal prosecutor; a ‘constitution de partie civile’ is not possible,<sup>376</sup> i.e., the alleged victim can file a complaint with the prosecutor but this will not initiate an investigation or criminal proceedings.<sup>377</sup> The possibility for private parties to lodge a ‘constitution de partie civile’ for the three crimes of crimes against humanity, genocide, and war crimes had been significantly limited in 2003,<sup>378</sup> after Belgium had encountered increasing diplomatic difficulties due to many ill-founded complaints under the ‘constitution de partie civile’ mechanism between 1999 and 2003, that were aiming at making a political statement

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<sup>374</sup> PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, A/HRC/8/5, at para. 24 (2008).

<sup>375</sup> Art. 6 1bis PTCCP.

<sup>376</sup> Art. 10 1bis and 12bis Belgian PTCCP.

<sup>377</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 89 (2006).

<sup>378</sup> Published in Belgisch Staatsblad / Moniteur belge of 7 August 2003.

rather than achieving legal redress. The abuse of the *partie civile* mechanism was amplified during that time by the availability of Belgium's broad notion of universal jurisdiction.<sup>379</sup>

In France, the '*constitution de partie civile*' option for the three core international crimes was restricted as part of the legislation of 2010 implementing the Rome Statute into the French CC.<sup>380</sup> This development creates a paradox: France has extended the extraterritorial reach of its courts by introducing a new basis for universal jurisdiction for the three crimes under the Rome Statute into the French CC, but at the same time trading-off legislatively as the autonomy of victims to lodge a '*constitution de partie civile*' and thus initiate criminal proceedings is abolished in these instances. This approach seems to suggest that France wanted to avoid similar problems that other jurisdictions such as Belgium had faced when it opened itself up to severe international criticism<sup>381</sup> for providing a broad jurisdictional basis for their domestic courts without establishing additional safeguards to prevent abuse of procedures for purely political purposes.

Access to the '*partie civile*' option is further diminished in Belgium. A victim that is of Belgian nationality (or has his legal residence in Belgium) is barred from filing a '*constitution de partie civile*' for these three international crimes if committed abroad by a foreigner or foreign entity.<sup>382</sup> This significant caveat in effective victims' redress under the '*partie civile*' mechanism for atrocity crimes is not mirrored in France. There, a *lege* exclusion of '*constitution de partie civile*' does not exist for atrocity crimes in cases where jurisdiction is established based on the principle of passive nationality. Rather, victims of French nationality (unlike in Belgium, legal residence is not sufficient) can lodge a '*constitution de partie civile*' for all felonies; according to Art. 113-8 CCP merely "the prosecution of misdemeanors may only be instigated at

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<sup>379</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 89-90(2006). Already in 1958 Howard pointed to the problem of abuse of the '*partie civile*' mechanism, indicating that it puts the victim of a criminal offense in a "very strong position," in fact "too strong." C. Howard, *Compensation in French Criminal Procedure*, 21 THE MODERN L. REV., 393 (1958).

<sup>380</sup> Law no. 2010-930 of 9 August 2010 amending the Criminal Code and the Code of Criminal Procedure to adapt to the Rome Statute. See EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION, REDRESS/FIDH, 131-32 (2010).

<sup>381</sup> See Verhaeghe, *The Political Funeral Procession for the Belgian UJ Statute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, at 141, Fn. 2 (Wolfgang Kaleck et al. eds., 2007).

<sup>382</sup> Art. 10. 1 bis Belgian PTPP.

the behest of the public Prosecutor.” As Triponel has noted, however, even this caveat has proven detrimental for the plaintiff’s claim in human rights cases before French courts.<sup>383</sup> Thus, in the first legal action brought against the French company Rougier SA and its foreign subsidiary for its overseas abuses, the human rights complained framed the charges as criminal misdemeanours under French law.<sup>384</sup> This triggered Art. 113-8 French CC and in fact led to the prosecutor exercising his discretion under the provision to decide not to initiate criminal proceedings for the misconduct.<sup>385</sup> According to Triponel, “most cases relating to human rights violations thus far,” have qualified the alleged acts as misdemeanours rather than felonies.<sup>386</sup>

Belgium’s and France’s approach to forestall abuse of the ‘partie civile’ procedure has been very different. Belgium came up with a sophisticated system of checks and balances on the prosecutorial discretion when it concerns cases involving the three core international crimes. According to the law of 22 May 2006,<sup>387</sup> the “federal prosecutor” (a new position introduced by the law of 5 August 2003) *has to* request an investigating judge to look into the complaint unless

1. *« the complaint is manifestly ill-founded » or*
2. *« the facts mentioned in the complaint do not correspond with a legal qualification of the crimes of genocide, crimes against humanity or war crimes » or*
3. *« the complaint cannot result in an admissible criminal proceeding » or*
4. *« the specific circumstances of the case indicate that, in the interests of a good administration of justice and in conformity with Belgium’s international obligations, the case should be brought either before the international courts, or before a court of the place where the facts occurred, or before a court of the State of which the perpetrator is a citizen, or before a court of the place where the perpetrator can be found, and this to the extent that the said court has the features of independence, impartiality and fairness, what can result, among*

<sup>383</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 65.

<sup>384</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 71.

<sup>385</sup> DOSSIER DE PRESSE, LES AMIS DE LA TERRE, LA PLAINTE DEPOSEE PAR 7 CAMEROUNAIS ET LES AMIS DE LA TERRE CONTRE LE GROUPE ROUGIER DEVANT LES TRIBUNAUX FRANCAIS, JUGEE PROVISoireMENT IRRECEVABLE 4 (Feb. 19, 2004), available at [www.amisdelaterre.org/IMG/pdf/dossier\\_presse\\_rougier\\_190204.pdf](http://www.amisdelaterre.org/IMG/pdf/dossier_presse_rougier_190204.pdf)

<sup>386</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 101.

<sup>387</sup> Published in Belgisch Staatsblad / Moniteur belge of 7 July 2006.

*other things, from the relevant international commitments binding upon Belgium and upon that State » (Art. 10 1bis, Art. 12 bis Belgian PTTTP)*

In France, on the other hand, victim plaintiffs are totally deferential to the prosecutor's discretion to initiate proceedings for the three core international crimes. Then again, France only excludes the 'partie civile' procedure in cases based on universal jurisdiction and not, as in Belgium, also in cases of passive nationality jurisdiction. This shows that even though France and Belgium are similar in their availability of a 'partie civile' procedure, there are some decisive differences that might directly impact the effectiveness of victims' redress and the suitability of the forum jurisdiction for human rights litigation.

**(b) Legal Culture: Do 'Tort Remedies Fit the Crime?'**<sup>388</sup>

The question whether 'tort remedies fit the crime'<sup>389</sup> divides the United States and Europe. From a victim's perspective, Beth Stephens argues that "human rights victims might view private civil litigation as an inappropriate response to the abuses they suffered, even as a trivialization of the grossly criminal abuses inflicted on them."<sup>390</sup> Vivian Grosswald confirms this point from a broader societal perspective. With reference to the Lipietz case, as the first tort law case before French courts for complicity in crimes against humanity (dealing with events during World War II), Grosswald points out that the victim plaintiffs faced severe criticism for allegedly "having demeaned historically important issues in an allegedly greedy question for monetary damages, and for bringing a legal action concerning historically important issues that was filed and managed by a plaintiffs' lawyer rather than by the state."<sup>391</sup>

These perceptions are a reflection of underlying legal traditions, which inform the choice of legal venue to address human rights issues. Thus, Oscar Chase posits that the way states settle disputes traces back to underlying cultural values. He argues, however, that the differences in

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<sup>388</sup> Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?*, 60 ALBANY L. REV., 579 (1997).

<sup>389</sup> *Id.*

<sup>390</sup> Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV., 412 (2001).

<sup>391</sup> Vivian Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the Lipietz Case*, 56 AMERICAN J. OF COMP. L., 364-65 (2008).

litigation between countries “are not wholly, or even predominantly, a matter of ‘legal culture’ as opposed to a national culture, i.e., a set of values and understandings generally shared by the population that constitutes the nation.”<sup>392</sup> It is a matter of cultural values (both legal and otherwise) and preferences about the role of private litigation in society. In most legal systems, civil litigation is merely conceived as settling a private dispute in individualistic situations. In the United States, on the other hand, the role of private litigation extends beyond solving a specific dispute to providing a grievance mechanism over an underlying public policy matter.<sup>393</sup> Grosswald confirms this observation for civil (i.e., tort) human rights remedies in France. She argues that through the lens of an Anglo-American perception of the role of litigation “being engaged in a quest for financial profit, plaintiffs were bringing their action ... of tort suits that go against the current ... law and that welcome ‘justice as a struggle’ for the sake of the ‘supremacy of principle.’”<sup>394</sup>

Another reason why European civil law countries, unlike the United States, deal with human rights issues primarily in criminal as opposed to civil proceedings is that a strict distinction between the private and public sphere is observed in the European jurisdictions.<sup>395</sup> Thus, punishment and the expression of moral judgment are in the public interest, which is effectuated merely by the criminal process.<sup>396</sup> In the United States, on the other hand, the private-public distinction is more blurred as mentioned above. Therefore, the civil/criminal divide between the United States and Europe on how to hold corporations accountable for human rights violations is not only the result of different procedural rules but also of different cultural values.

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<sup>392</sup> Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMERICAN J. COMP. L., 295 (2002).

<sup>393</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARVARD L. REV., 1284 (1976).

<sup>394</sup> Vivian Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the Lipietz Case*, 56 AMERICAN J. OF COMP. L., 366 (2008) [citations omitted].

<sup>395</sup> *See id.*, at 366.

<sup>396</sup> *See* Richard Cappalli & Claudio Consolo, *Class Actions for Europe? A Preliminary Inquiry*, 6 TEMPLE INT’L & COMPARATIVE L. J., 260-70 (1992).



## V. THE 'FOREIGN POLICY BIAS' IN DOMESTIC ADJUCATION OF HUMAN RIGHTS

The discussion on the 'partie civile' procedure has shown that, the civil-criminal divide with regard to corporate human rights remedies is rather blurred. In fact, it seems, as Beth Stephens has suggested, that the foreign policy objective to fight impunity for human rights violations supersedes strict procedural deference.<sup>397</sup> However, this does not deny the practical results of litigating a civil action under the ATS and a civil action under the 'partie civile' mechanism and the fact that they are dissimilar from each other. Rather, the analysis in this chapter has confirmed that decisive differences prevail under a common law–civil law and a torts–criminal law dichotomy. Those differences in procedural rules have implications for substantive law deterrence with respect to corporations. In particular, procedural rules have important implications for settlement dynamics. The extent of access to the legal option of out-of-court settlements has significant implications for the incentive-compatibility' of the respective liability schemes, as they induce a 'crowding out' effect of intrinsic motivation on the part of corporations.<sup>398</sup>

Beyond decisive differences in procedural rules and legal culture, a comparative look at relevant substantive law concepts (particularly corporate personhood) in the next chapter will further confirm the blurred civil-criminal distinction between the United States and Continental legal systems, albeit, here as well, the civil and criminal nature of the liability scheme has decisive implications for the 'incentive-compatibility' of the respective liability venue. Specifically, it is argued that a stricter deference to the civil or criminal nature of the proceedings might be warranted.<sup>399</sup>

Thus, this chapter has launched the examination of the overarching hypothesis of this dissertation, namely that the distinction between civil and criminal actions matters both from a risk assessment and, most importantly, from a behavioral economics perspective on corporate

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<sup>397</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L., 4 (2002).

<sup>398</sup> See chapter 3 for this analysis.

<sup>399</sup> See chapter 4 for this analysis.

human rights liability. The criminal/civil divide might not be as “dismantled” as Beth Stephens has suggested.<sup>400</sup>

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<sup>400</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 44 (2002).

### CHAPTER 3

## Conflated Civil/Criminal Remedy Structures: Confusion in the Courts —The Example of Corporate Personhood—

Beyond decisive differences in procedural rules and legal culture, a comparative look at relevant substantive law concepts (particularly corporate personhood) in the following chapter will further confirm the blurred civil/criminal law distinction. The civil and criminal nature of the liability scheme has decisive implications for the outcomes of the cases. As will be shown in Chapter 5, such outcomes impact the ‘incentive-compatibility’ of the respective liability scheme. The following chapter is part of the overall theme and argument that a more strict deference to the civil or criminal nature of the proceedings might be warranted in order to ensure optimal law deterrence and compliance results.

In particular, a comparative analysis of the concept of corporate liability in the United States, Belgium, and France shows that corporate *criminal* liability is a much more ambiguous concept in principle and practice than corporate *civil* liability. It will be shown that across common and civil law jurisdictions criminal liability of legal persons poses unique challenges that are addressed quite differently in the United States and Continental Europe. It therefore matters how international law norms are enforced at the domestic level; in particular, the results turn on whether the remedy structure is primarily criminal or civil in nature.

This chapter will focus on the landmark case in *Kiobel vs. Royal Dutch Petroleum*,<sup>401</sup> which deals with the question of corporate liability for violations of international law under a tort action based on the Alien Tort Statute (ATS). The case was adjudicated by the Court of Appeals for the Second Circuit and has been argued, as of this writing, before the U.S. Supreme Court. (The case is being reargued in the 2013 term of the Supreme Court.) The following chapter will uncover the multiple confusions in the Second Circuit’s reasoning, i.e., where to draw the line between the substantive cause of action and ancillary aspects of liability, between

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<sup>401</sup> *Kiobel v. Royal Dutch Petroleum Co.* at 3, 621 F.3d 111 (2d Cir. 2010).

international law and federal common law as the appropriate source of law, and how those choices implicate the results depending on a civil or criminal law treatment of the liability questions involved. The issue of corporate liability in *Kiobel* will be analyzed in the context of corporate personhood as delineated by the Supreme Court's decision in *Citizens United* in 2010.<sup>402</sup> The conflated civil and criminal law treatment of overseas corporate criminal offenses is no less prevalent in Europe, as has been illustrated by the 'partie civile' mechanism as discussed in the previous chapter.

## I. THE BLURRED CIVIL/CRIMINAL DISTINCTION

Even though the Alien Tort Statute provides a *tort* remedy for violations of the law of nations, courts across various U.S. Circuits have regularly applied *criminal* law principles when determining liability under the ATS. Thus, the Court of Appeals for the Second Circuit issued an unexpected request for expert views on the issue "(1) whether the violations of customary international law for which the ATS provides jurisdiction can encompass non-criminal conduct, and (2) what sources of international law evince with respect to whether customary international law recognizes corporate criminal liability."<sup>403</sup> This clearly demonstrates the struggle of courts to distinguish the nature of the international law norm (as a base of ATS claims) and the domestic remedy that enforces the international norm.<sup>404</sup> Especially with regard to modes of imputation of misconduct to the corporate entity, courts in several Circuits have regularly resorted to the criminal law concept of aiding and abetting liability and the criminal law requirements of *actus reus* and *mens rea* when determining corporate tort liability under the

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<sup>402</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

<sup>403</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT'L L., 358 (2011) [Citing: Letter issued by the United States Court of Appeals for the Second Circuit. *In re* South African Apartheid Litigation (Dec. 4, 2009)].

<sup>404</sup> See also Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

ATS.<sup>405</sup> Both the Ninth and the Second Circuit Court of Appeals, as the courts that have been spearheading a modern day interpretation of the ATS,<sup>406</sup> have consistently been pointing out that norms of customary international law have “been developed largely in the context of criminal prosecutions rather than civil proceedings.”<sup>407</sup> Thus, the relevant case law “has consistently relied on criminal law norms” in ATS cases.<sup>408</sup> Judge Scheindlin’s statement *In Re South African Apartheid Litigation* makes the inherent tension in this approach apparent when she notes that “the ATCA [ATS] provides an alternative civil remedy for violations of customary international law that are traditionally addressed as crimes.”<sup>409</sup> As a group of prominent international law scholars has established, this blended criminal approach in the context of a (civil) tort statute leads to a situation where a “sufficient condition” that the conduct in question be criminal is taken for a “necessary one,” which “amounts to a judicial rewriting of the statute.”<sup>410</sup> Judge McKeown correctly argues in her concurring opinion in *Sarei v. Rio Tinto* that torts and criminal law are overlapping.<sup>411</sup> However, even if acknowledging this common place in legal doctrine, it still does not justify applying civil and criminal concepts of liability interchangeably, particularly without considering the implications that this hybrid or conflated approach, which lacks clear deference to civil or criminal law, has for the scope of the ATS. For example, it is incoherent for the plaintiffs’ counsel in *Talisman*, on the one hand, to argue the

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<sup>405</sup> See, for example, *Doe v. Unocal Corp.*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7<sup>th</sup> Cir. 2011).

<sup>406</sup> The landmark decisions in *Filartiga (Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)) and *Kadic (Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)) that interpreted the ATS in a modern setting and made it a viable litigation vehicle for human rights victims, came out of the Second Circuit. One of the early corporate cases under the ATS was argued before the Ninth Circuit in *Doe v. Unocal Corp.* with a decision that had been cited extensively in the scholarship and referred to by other case law, since it was the first to provide guidance on the requirements of corporate aiding and abetting liability under the ATS even though the decision was eventually vacated due to an out-of-court settlement by the parties. (*Doe v. Unocal Corp.*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002))

<sup>407</sup> *Doe v. Unocal Corp.*, 395 F.3d 932, 949 (9<sup>th</sup> Cir. 2002).

<sup>408</sup> *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 270, n.5 (2d Cir. 2007) (Katzman, J., concurring).

<sup>409</sup> *Ntsebeza v. Daimler A.G. (In Re South African Apartheid Litigation)*, 2009 U.S. Dist. LEXIS 34572617 at 53 n. 144 (S.D.N.Y. 2009).

<sup>410</sup> Brief of International Law Scholars as Amici Curiae Supporting Plaintiff-Appellees at 9-10, *Balintulo v. Daimler AG*. No. 09-2778-CV (2d Cir. 2009).

<sup>411</sup> *Sarei v. Rio Tinto, PLC*, 2011 U.S. App. LEXIS 21515, at \*137 n. 17 (October 25, 2011) (McKeown J., concurring) (internal citations omitted).

*mens rea* requirement under an aiding and abetting paradigm as a *criminal* law concept,<sup>412</sup> but on the other hand to argue in *Kiobel* that whether a corporation can be sued under the ATS is informed by a corporate *civil* liability paradigm.<sup>413</sup> This civil/criminal convergence, or one could argue ‘confusion’ of the criminal and civil form of liability in a way that conflates civil and criminal liability elements, seems discretionary at times. It suggests an outcome-sensitive approach that is informed by a law and economics perspective. One is compelled to take into account implications for the effective access to justice and effective deterrence of future non-compliance.

Beth Stephens correctly pointed out that “the lines between torts and crimes [are] blurred” citing Friedman who charted the classification of torts and crimes across different legal systems and has concluded that “there is no natural category of tort or crimes and thus no essential distinction.”<sup>414</sup> This observation is certainly correct with regard to the *concepts* of torts and crimes. However, one has to be aware of the different implications that come with “dismantling the Criminal/Civil Divide.”<sup>415</sup> As the previous chapter has shown, there are decisive procedural differences inherent in the civil/criminal distinction (aside from considerations of legal tradition) that are decisive in corporate human rights cases in terms of who controls the proceedings, the discovery process, the cost structure, and the burden of proof. The following chapter will illustrate that, particularly in corporate human rights cases, the blurred civil/criminal distinction in ATS case law has game-changing implications also as far as substantive law concepts are concerned.

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<sup>412</sup> Petition for Writ of Certiorari, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (April 15, 2010). It is to be noted that the leading counsel for the plaintiffs is the same in *Talisman* and *Kiobel*, namely civil right litigator Paul Hofmann.

<sup>413</sup> See Paul Hoffman, Brief for Petitioners at 41, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011) (Stating that “[c]orporate liability for torts of the kind involved in this case is a general principle of international law common to all legal systems. Including corporations within the universe of ATS defendants is fully consistent with the way in which all legal systems treat corporations for *civil liability purposes*.” [emphasis added]).

<sup>414</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 45 (2002) [Citing: David Friedman, *Beyond the Tort/Crime Distinction*, 76 BOSTON UNIV. L. REV. 108-09 (1996)].

<sup>415</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 44 (2002).

Thus, the practical results in litigation under the ATS might be very different depending on the civil or criminal form of imputing acts to the (parent) company. Third-party liability can either be established directly pursuant to the criminal law concept of corporate complicity in the abuses or indirectly, i.e., intermediated through the local subsidiary operating under the corporate law concept of principal-agent liability.<sup>416</sup> Conceptually the two principles are clearly distinct from one another. Aiding and abetting liability is “derivative” in nature, meaning that it is contingent upon the principal’s offense, while the liability attaches due to the accomplice’s own action of facilitating the principal crime.<sup>417</sup> Agency liability, in contrast, is vicarious in nature and imposes liability on the corporation for the acts of its agents—the actual tortfeasor (for example, subsidiaries and subcontractors)—simply because of the principal-agent relationship.<sup>418</sup> This relationship can be hard to establish in court and sets a high bar, requiring that the principal dominates and controls the agent in a way that renders the agent an ‘alter ego’ or ‘mere instrumentality’ of the parent company. Only when this test is met can the corporate form be disregarded.<sup>419</sup> However, once an agency relationship has been shown, no further requirements have to be met. No *actus reus* or *mens rea* need to be proven with regard to the parent company. Complicity liability, on the other hand, requires an *actus reus* and *mens rea* on the part of the accomplice.

The *mens rea* standard for complicity liability under the ATS is highly contested. There is a decided circuit split between the Second Circuit, requiring ‘shared intent’<sup>420</sup> with the principal perpetrator, and the Eleventh<sup>421</sup> and D.C.<sup>422</sup> Circuits, holding that mere knowledge

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<sup>416</sup> See *Doe v. Unocal Corp.*, 395 F.3d 932, 964-69 (9th Cir. 2002).

<sup>417</sup> Tarek Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 39 NYU J. INT’L L. AND POLITICS, 44, n. 34 (2006) [Citing: Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 336-37 (1985) (Noting that “the term “derivative” as used here merely means that her liability is dependent on the principal violating the law.”)].

<sup>418</sup> Tarek Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 39 NYU J. Int’l L. and Politics, 44 (2006); see also Inés Tófaló, *Overt and Hidden Accomplices: Transnational Corporations’ Range of Complicity for Human Rights Violations*, in *Transnational Corporations and Human Rights*, 335, 342 (Olivier de Schutter ed., 2006).

<sup>419</sup> *Dewitt Truck Brothers v. W. Ray. Flemming Fruit Co.*, 540 F. 2d 681 (1976); see also Antoinette Lopez, *The Alter Ego Doctrine: Alternative Challenges to the Corporate Form*, 30 UCLA L. Rev., 129 (1982).

<sup>420</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

<sup>421</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

<sup>422</sup> *Doe VIII v. Exxon Mobile Corp.*, No. 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

suffices. Knowledge and even more so intent of the accomplice (parent) company are difficult to prove by victim plaintiffs in human rights cases due to the complex and decentralized corporate structure of MNCs.

This example illustrates that, even though torts and crimes overlap conceptually, caution is warranted when resorting to criminal law elements in the context of tort liability and vice versa. A blurred civil/criminal approach in corporate human rights cases is indicative of the mixed nature of the offenses in question. International law violations, which often amount to (international) crimes perpetrated by a corporation, also are governed by corporate law principles. Still, this work will show that despite the “common international law foundation [of accountability] underlying the Filartiga doctrine and its procedural cousins around the world,”<sup>423</sup> the differences in how international norms are enforced domestically are real, decisive, and cannot be ignored when assessing the effectiveness of legal liability as a means of CSR implementation.

## II. A COMPARATIVE PERSPECTIVE OF LIABILITY OF LEGAL PERSONS

A state’s duty to protect against corporate human rights abuses by third parties within its jurisdiction includes the responsibility to hold corporations accountable for misconduct.<sup>424</sup> However, international law does not prescribe how states are obliged to deliver on this premise. It remains up to the respective state to choose the venue (either criminal or civil) that they see fit within its domestic legal system.<sup>425</sup> As has become apparent in the Second Circuit’s decision in

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<sup>423</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 4 (2002).

<sup>424</sup> John G. Ruggie, United Nations Human Rights Council, 4th Session, *Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries* UN Doc. A/HRC/4/35/Add.1, at 3 (19 Feb 2007).

<sup>425</sup> See Bert Swart, *International Trends towards Establishing Some Form of Punishment for Corporations*, 6 J. INT’L CRIMINAL JUSTICE, 949 (2008). (Citing 17 international instruments which include provisions on corporate criminal liability which leave it to each state’s discretion what kind of sanctions to impose on corporations at the domestic level, i.e. criminal or otherwise.) Joanna Kyriakakis, *Prosecuting Corporations for International Crimes*, in: INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY, 108-138 (Larry May & Zachary Hoskins eds., 2010) (Citing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Arts. 2, 3(2), 4 (entered into force Feb. 15, 1999), the United Nations Convention Against Corruption, Arts. 26 and 42 (entered into force December 14, 2005), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Arts. 2(14) and 9 (entered into force May 5, 1992) as



*Kiobel*, civil and criminal liability elements are often conflated even within one domestic legal system. No strict deference to civil or criminal liability is observed.<sup>426</sup> This is true despite the fact that the availability and scope of civil and criminal liability of legal persons diverges significantly. Therefore, the civil or criminal nature of liability (elements) directly implicates practical litigation results.

Civil liability of legal persons is commonly accepted across virtually all jurisdictions.<sup>427</sup> Civil liabilities for contractual obligations, among others, is a concept inherently linked to the nature of the corporation as an actor of a modern market economy, as well as to the corporate objective of doing business itself.<sup>428</sup> When it comes to criminal liability of corporations as artificial entities or ‘legal fictions,’ however, the situation is far less clear among even Western legal systems. For a long time, the legal doctrine of *societas delinquere non potest* prevailed, especially in European civil law countries. It was the commonly accepted notion that abstract entities are incapable of committing a crime, since they lack a physical form to actually commit an *actus reus* and a mind to establish a *mens rea*, both elements which are necessary for criminal conviction.<sup>429</sup> Even though European civil law jurisdictions have increasingly followed the American lead to provide for criminal liability of legal persons,<sup>430</sup> many legal systems still struggle with practical challenges, such as to identify the appropriate sanctions that can be imposed on legal entities as opposed to natural persons in a way that reflects the punishment

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examples of international agreements governing transnational crimes with regard to businesses; all those instruments leave it to each state to determine the appropriate remedy within their respective domestic legal system.)

<sup>426</sup> *Kiobel v. Royal Dutch Petroleum Co.* at 3, 621 F.3d 111 (2d Cir. 2010).

<sup>427</sup> See Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 3, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011); INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOLUME 3, CIVIL REMEDIES at 10, n. 16 (2008) (“For a cross section of relevant laws in civil law jurisdictions see: Article 1382, and 1383 French Civil Code; Article 823, German Civil Code; Article 1, Section 1, Chapter 2, Finnish Tort Liability Act; Article 2043 Italian Civil Code; Article 1.089, Spanish Civil Code; Article 106, Section 1, Chapter VI, General Principles of the Civil Law of the Peoples Republic of China; Article 20, Chapter 2, Philippines Civil Code; Article 1058 (1) & (2), Section 1, Division 9, Chapter 60, Armenian Civil Code; Article 2314 (read with Article 2284) Chilean Civil Code; Article 2341 Colombian Civil Code; Article 927 Brazilian Civil Code; *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, Canadian Supreme Court...”

<sup>428</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 38 (2d Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>429</sup> See Cristina De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WHASHINGTON UNIV. GLOBAL STUD. L. REV. 548 (2005).

<sup>430</sup> See Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, Faculty of Law, MONASH UNIVERSITY RESEARCH PAPER NO 2009/45, 340-42 (2009).

character of international law. France has been the first civil law jurisdiction in Europe to adopt corporate criminal liability in 1994 and to elaborate a comprehensive catalogue of sanctions tailored specifically to when a legal person is the criminal perpetrator; French law considers nine different deprivations of corporate rights as suitable penalties, including dissolution of the corporation, ‘judicial surveillance,’ public display and distribution of the sentence, confiscation of assets, and closure of one or more of the firm’s establishments.<sup>431</sup> As John Coffee has put it in his landmark article, the conceptual challenge is to punish corporations in a criminal sense as they have “no soul to damn [and] no body to be kicked.”<sup>432</sup>

### **1. The Rome Legacy**

An important milestone was the negotiations for the Rome Statute to establish the International Criminal Court (ICC); during the drafting process (1995 – 1998), the question whether to include the liability of legal persons in the scope of the ICC’s jurisdiction was discussed at some length. Despite efforts, particularly by the French delegation, to link corporate liability to “individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities,” the concept of criminal liability of legal persons under the Statute could not prevail in the end.<sup>433</sup> It might seem surprising that more than four decades after the International Military Tribunal (IMT) in Nuremberg acknowledged the criminal responsibility of organizations and, to some extent of corporations, the international community was not able to find consensus on the issue of criminal liability of legal persons. Despite not having jurisdiction over corporations as such, the cases against employees and industrialists of I.G. Farben and the Krupp firm showed the early acceptance of the notion that

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<sup>431</sup> Andrew Kirsch, *Criminal Liability for Corporate Bodies in French Law*, EUROPEAN BUSINESS LAW REVIEW, 41 (1998).

<sup>432</sup> John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICHIGAN L. REV., 386 (1981).

<sup>433</sup> Kai Ambos, *Art. 25: Individual Criminal Responsibility*, in: COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, para. 4 (Triffterer ed., 1999).

the corporation as such was often the real perpetrator of the war crimes charged and its directors were convicted due to their affiliation with the corporation.<sup>434</sup>

The reasons and implications of not extending the jurisdictional reach of the ICC to corporations have been subject to much discussion and speculation. The exclusion of legal persons from the jurisdiction of the ICC has often been put forward as an argument against corporate liability for international crimes.<sup>435</sup> However, Amb. David Scheffer, who was the U.S. chief negotiator for the Rome Statute, rebuts this line of argument by stating that “no conclusion should be drawn regarding the exclusion of corporations for the jurisdiction of the Rome Statute other than that no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute [...]”<sup>436</sup> The Official Records of the United Nations Diplomatic Conference show that there was “a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute.”<sup>437</sup> The chairman of the working group on the subject confirmed that “[r]egarding ... the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce this notion”<sup>438</sup> and he later emphasized again that “the inclusion [of legal persons] gradually became acceptable to a wider group of countries, probably

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<sup>434</sup>It is to be noted however that no corporation was officially declared a “criminal organization” by the IMT under Art. 9 para. 1 of the IMT Statute, which would have triggered collective responsibility for all members of such an organization. See Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 238 (R. and P. Malcontent Thakur eds., 2004). See also Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. OF INT’L L. 108 (2002).

<sup>435</sup> See most recently, *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 7-8 (2nd Cir. Sept. 17, 2010) (Majority opinion).

<sup>436</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 360 (2011); see ALSO WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 15-21 (2007).

<sup>437</sup> OFFICIAL RECORDS OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, UN Doc. A/CONF.183/13 Vol 3, June 15-July 17, 1998, at 31, n. 71.

<sup>438</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Rome, 15 June-17 July 1998, *Official Records. Vol. 2, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 275 n. 10, U.N. Doc. NCONF.183/13 (2002).

a relatively broad majority, [but] [t]ime was running out.”<sup>439</sup> Andrew Clapham, a prominent international law scholar, also concludes that the final rejection of draft Art. 23 of the Rome Statute (a provision setting out the possibility to of trying legal persons, except for states) was not a sign of general conceptual rejection of the subjectivity of corporations under international law, but rather the result of practical problems on the penalty structure under the Statute and procedural issues.<sup>440</sup> Furthermore, the ICC would have faced tremendous evidentiary problems with regard to the criminal liability of organizations. At that point no recognized common standards existed in this area. The structural differences among the different legal systems of the signatory states and the fact that some member jurisdictions lacked any prescription for corporate criminal liability would have put at risk the practicability of the system of complementary as provided under Art. 17 Rome Statute.<sup>441</sup> As a group of international law scholars confirmed in a 2009 amicus brief in *Balintulo v. Daimler AG*, “deferring to national courts [...] requires corresponding criminal codes at the national level.”<sup>442</sup> This was the breaking point in 1998 at the conclusion of the treaty negotiations.

## 2. Developments After Rome

The legal landscape has changed significantly since Rome. A former international criminal judge and distinguished scholar in the field, Bert Swart, argues that much has happened in the ten years since the failed attempt to include a corporate liability provision in the Rome Statute. Specifically, he talks about the “striking phenomenon” that a great number (Swart cites 17) of international instruments have been adopted, all of which feature provisions on corporate criminal liability whereas before 1997 none existed at all.<sup>443</sup> In 2008, the Trial Chamber of the

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<sup>439</sup> Per Saland, *International Criminal Law Principles*, in: THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, 189, 199 (Roy S. Lee ed., 1999).

<sup>440</sup> ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 246 (2006); see also David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 359 (2011).

<sup>441</sup> Kai Ambos, *Art. 25: Individual Criminal Responsibility*, para. 4 (Triffterer ed., 1999).

<sup>442</sup> Brief of International Law Scholars as Amici Curiae Supporting Plaintiff-Appellees at 9-10, *Balintulo v. Daimler AG*. No. 09-2778-CV (2d Cir. 2009).

<sup>443</sup> Bert Swart, *Discussion: International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. INT’L CRIMINAL JUSTICE, 948 (2008).

ICC in its decision on victims' participation in *The Prosecutor v. Thomas Lubanga Dyilo*<sup>444</sup> made reference to the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', a UN resolution "identify[ing] mechanisms, modalities, procedures and methods" for victim reparations in implementation of (existing) international law and human rights obligations;<sup>445</sup> the Principles and Guidelines provide for "equal and effective access to justice [...] irrespective of who may ultimately be the bearer of responsibility for the violation (principle 3c). Principle 15 explicitly prescribes the liability of non-state actors by requiring states to provide for reparation "[i]n cases where a person, a legal person, or other entity is found liable." This vividly illustrates that state practice has changed since 1998 with regard to corporate liability. Moreover, the fact that the Rome Statute is silent about liability of legal persons does not preclude such liability at the domestic level.

Whereas in the United States, criminal liability of corporations has been a long-established concept that has been confirmed by the U.S. Supreme Court as early as 1909, a tentative shift towards corporate criminal liability occurred in Europe when the Council of Europe in 1988 urged member states to consider changing their criminal codes to include corporate criminal liability.<sup>446</sup> According to a 2006 survey covering 16 countries from different regions of the world, 11 of those countries apply criminal liability to legal persons.<sup>447</sup> During the last decades civil law nations have increasingly introduced corporate criminal liability schemes in their domestic criminal codes, including in Europe.<sup>448</sup> Most recently, Spain (June 2010)<sup>449</sup> and

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<sup>444</sup> Decision on victims' participation in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 (January 18, 2008).

<sup>445</sup> BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, A/RES/60/147 (March 21, 2006).

<sup>446</sup> CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 122 (1993) [Citing: *Recommendation of the Committee of the Ministers*, R (88) (18) concerning liability of enterprises having legal personality for offenses committed in the exercise of their activities (Oct. 20, 1988)].

<sup>447</sup> ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT, LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, A SURVEY OF SIXTEEN COUNTRIES, EXECUTIVE SUMMARY, 13 (2006).

<sup>448</sup> The Netherlands (1976), Indonesia (since the 1980s), Portugal (1983), Norway (1991), France (1992), Iceland (1993), Finland (1995), Denmark (1996), China (1997), Belgium (1999), South Africa, Switzerland (2003),

Luxembourg (March 2010)<sup>450</sup> have joined their European neighbors and now recognize criminal liability for legal entities. The increasing number of domestic laws prescribing liability of corporations for international crimes has been attributed to the increase in international and regional agreements relating to transnational crimes that mandate states to adjust their domestic legal systems accordingly and adopt provisions for corporate liability for certain crimes.<sup>451</sup> Despite this overall regulatory trend to implement corporate liability in domestic legal systems, there are still important outliers, such as Germany in Continental Europe. Germany remains a ‘bastion’ of the traditional principle *societas delinquere non potest*, with the result that under the German legal system a corporation as a legal person cannot be held criminally liable. Instead, the prosecutor must identify the individuals responsible and only prosecute those, a task that can prove significantly difficult when dealing with complex corporate structures of modern-day MNCs.<sup>452</sup> The case of Germany also illustrates another important point, namely that resistance against providing for criminal liability of legal persons is not necessarily rooted in conceptual doubts but rather in the practical difficulties of corporate criminal liability. Thus, the German Federal Court of Justice has explicitly emphasized that corporations in concept can be found criminally liable, but that (criminal) penalties against corporations are contradictory to the history of criminal law in Germany.<sup>453</sup>

### 3. A Comparative Look at the United States, France, and Belgium

When one examines the U.S. common law system and the French and Belgian civil law systems, there is an increasingly overall convergence with regard to the question whether corporations themselves can be indicted and convicted in criminal proceedings. However, there

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Argentina, Austria (2006). See Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, Faculty of Law, MONASH UNIVERSITY RESEARCH PAPER NO 2009/45, 340-42 (2009).<sup>449</sup> LO 5/2010, June 22, 2010.

<sup>450</sup>Law of March 3, 2010, see Nicole Atwill, *Luxembourg: New Law on Criminal Liability of Legal Entities*, at [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205401953\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401953_text).

<sup>451</sup> See Joanna Kyriakakis, *Prosecuting Corporations for International Crimes*, 108, 112-13 (Larry May & Zachary Hoskins eds., 2010) [Citing: De Schutter (citation omitted)]; see also Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. INT’L CRIMINAL JUSTICE, 949 (2008).

<sup>452</sup> See Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 THE YALE L. J., 142 (2008).

<sup>453</sup> BGHSt 5, p. 32 (NJW 1953, 1838).

are still important differences that can prove decisive in corporate human rights liability cases. The U.S. Supreme Court confirmed as early as 1909 that federal criminal statutes applying to “persons” also extend to corporations.<sup>454</sup> Accordingly, Title 1 of the United States Code § 1 lays down the rule of construction that in “determining the meaning of any Act of Congress, unless the context indicates otherwise-- the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” The U.S. approach to holding corporations (as legal persons) criminally liable has been pioneering and far ahead of its time with almost a century before European jurisdictions followed. This early commitment traces back to American criminal procedure, which, according to Edward Diskant, “imposes unique difficulties on American investigators and prosecutors seeking to root out individual white-collar criminals.”<sup>455</sup> Primarily attributed to that fact is the reality that in the United States a corporate attorney-client privilege exists “shield[ing] virtually any conversation between in-house counsel and employees related to their work.”<sup>456</sup> Therefore, the possibility of indicting and prosecuting the corporation itself gives American prosecutors much needed leverage over the corporation to cooperate, as part of a plea bargain, in the attempt to indict and convict individual employees and directors. Such cooperation on the part of the corporation, for example, can take the form of waiving the attorney-client privilege or conducting internal investigations.<sup>457</sup> Still, as a general rule, corporate liability needs to be specifically provided for under the respective criminal statute.<sup>458</sup> Today, corporate liability is well-established under both federal and state criminal laws. In fact, a corporation can be held liable in the United States for almost any crime.<sup>459</sup> However, unlike many signatory states to the

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<sup>454</sup> N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909).

<sup>455</sup> Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 THE YALE L. J., 126 (2008).

<sup>456</sup> *Id.*, at 131.

<sup>457</sup> *Id.*, at 131-31.

<sup>458</sup> See ROBERT THOMPSON, FAFO AIS, SURVEY RESPONSE, LAWS OF THE UNITED STATES OF AMERICA, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 4 (2006).

<sup>459</sup> See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve*, 7 HARVARD L. REV., 1488 (1996); see also Gilbert Geis & Joseph DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AMERICAN J. OF CRIMINAL L., 348 (2002); see U.S. Federal Sentencing Guidelines Manual §§ 8A1.1-8A1.2 (2010) (“This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor

Rome Statute,<sup>460</sup> the United States does not extend liability under federal criminal statutes covering genocide (18 U.S.C. § 1091), war crimes (18 U.S.C. § 2441), and torture (18 U.S.C. § 2340A) to legal persons.<sup>461</sup> Moreover, whereas a lot of European countries are signatories to the Rome Statute and most have implemented all three core international crimes under the Rome Statute in their domestic laws,<sup>462</sup> the United States as a non-party to the Rome Statute has not yet adopted a domestic cause of action for crimes against humanity.<sup>463</sup> This significantly limits criminal liability options for corporate human rights cases in the United States.

France has been a strong advocate for corporate criminal liability among its European neighbors and rallied hard during the treaty negotiations to include corporations under the jurisdictions of the International Criminal Court.<sup>464</sup> Like in the United States, France's criminal liability of corporations used to be determined on the base of the 'specialty principle,' prescribing that a corporation can only be liable for offenses that explicitly state that they apply to legal persons as well. This piece-meal approach to corporate criminal liability led to a legislative change with Act 2004-204,<sup>465</sup> which removed the phrase "in cases provided for by state and regulation" from Art. 121-2 French CC. With effect of January 1, 2006, France thus codified the 'generality principle.' This implied that legal entities can be held liable for *all* criminal offenses in the French Criminal Code without the requirement of express reference to corporate liability in the respective criminal provisions.<sup>466</sup> Like France, many other countries

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offenses.)" See also § 8A1.1 cmt., stating that "[o]rganization' means 'a person other than an individual.' 18 U.S.C. § 18."

<sup>460</sup> See ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT, LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW, A SURVEY OF SIXTEEN COUNTRIES, EXECUTIVE SUMMARY, 16 (2006).

<sup>461</sup> See THOMPSON, FAFO AIS, SURVEY RESPONSE, LAWS OF THE UNITED STATES OF AMERICA, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 13 (2006).

<sup>462</sup> See Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT'L L. REV., 852 (2009).

<sup>463</sup> See ROBERT THOMPSON, FAFO AIS, SURVEY RESPONSE, LAWS OF THE UNITED STATES OF AMERICA, 'COMMERCE, CRIMES, AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,' 12 (2006).

<sup>464</sup> Kai Ambos, "Art. 25: Individual Criminal Responsibility " in *Commentary on the Rome Statute of the International Criminal Court* ed. Triffterer (Baden-Baden: Nomos Verlag, 1999), para. 4.

<sup>465</sup> Law of 9 March 2004.

<sup>466</sup> See MINISTERE DES AFFAIRES ETRANGERES, HUMAN RIGHTS COORDINATION MISSION, MEMORANDUM RE: CRIMINAL LIABILITY OF PRIVATE LAW LEGAL ENTITIES UNDER FRENCH LAW AND EXTRATERRITORIALITY OF THE LAWS APPLICABLE TO THEM: REVIEW OF THE SITUATION AND DISCUSSION OF ISSUES, section 2 (June 5, 2006), available at [www.lancs.ac.uk/.../Criminalliabilityofflegalentities050606\\_000.doc](http://www.lancs.ac.uk/.../Criminalliabilityofflegalentities050606_000.doc); see also Anna Triponel,



also do not distinguish between natural and legal persons for purposes of corporate liability in their domestic criminal codes and therefore extend corporate liability to all statutory crimes, including international crimes.<sup>467</sup> It is to be noted, that even though the results in the United States and France are very similar as to a broad regulatory coverage of corporate criminal liability, the approach is however very different. These differences in conceptualization, namely specific as opposed to general extension of criminal laws to legal persons, reflect differences in legal traditions with regard to corporate criminal liability. Thus, America's broad regulatory coverage of corporate crimes, while still requiring specific statutory authorization, leaves questions open as to the general notion and status/place of corporate personhood in the U.S. legal system. This was demonstrated in the Supreme Court's landmark decision in *Citizens United*. The Court ruled that corporations can be rights holders. In the Supreme Court's pending proceedings in *Kiobel*, the Court will decide the question whether corporations can be considered obligation holders as well with regard to human rights responsibilities. Had the notion of treating corporations as persons been a general one that extended to all areas of law without any distinction whatsoever between corporations (as legal persons) and individuals (as natural persons), the Supreme Court most likely would not have to decide about the issue of corporate personhood before it at the time of this writing. The fact that the Supreme Court feels the need to delineate the contours of corporate personhood in more than one landmark case within the last few years, shows that the concept of criminal liability of corporations is not as settled and unambiguous in context despite that fact that most federal and states criminal laws today apply to corporations as well.<sup>468</sup>

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*Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 75 (Andrew Morriss ed., 2010).

<sup>467</sup> See Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT'L L. REV., 871 (2009).

<sup>468</sup> Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AMERICAN CRIMINAL L. REV., 1481 (2009) (Arguing that corporate criminal liability should be expanded further in the U.S.).

Belgium introduced criminal liability for legal persons with an act of May 4, 1999 (entered into force on July 2, 1999),<sup>469</sup> by inserting a new Art. 5 in the Belgian CC prescribing as a general rule that legal persons and economic actors as stipulated in Art. 5 para. 3 Belgian CC can be held liable for all criminal offenses under Belgian law. Until then, Belgian law did not prescribe criminal responsibility of legal persons, but rather followed the traditional principle *societas delinquere non potest*.<sup>470</sup> Art. 5 para. 3 establishes legal liability under the Art. 5 para. 1 also for a limited set of organizational structures without legal personality. Among them are joint ventures and companies in the process of being established.<sup>471</sup> Belgium therefore follows a liberal approach that is similar to the United States, where corporate criminal responsibility is conferred to different kind of groups irrespective of their incorporation under the law.<sup>472</sup> In France, on the other hand, the relevant Art. 121-2 French CC provides for liability only for “legal persons.” Under French statutory law, a group can only obtain legal personality upon recognition under the law, i.e., upon registration.<sup>473</sup> The different approaches to the scope of criminal liability of entities are endemic of the deference that the respective legal system gives to the corporate form. The United States and Belgium do not make corporate liability contingent on incorporation and thus prevent corporations from escaping liability simply by conducting their business through alternate business forms. As in France, criminal liability of legal persons constitutes a general principle that applies to all crimes, including international crimes. Art. 5 Belgian CC does not contain any restriction as to the scope of crimes it applies

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<sup>469</sup> Published in Belgisch Staatsblad / Moniteur belge of June 22, 1999.

<sup>470</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 6-8 (2006).

<sup>471</sup> See OECD, *Belgium: Review of Implementation of the Convention and 1997 Recommendation*, 7-8, available at <http://www.oecd.org/dataoecd/13/7/2385130.pdf>. See also BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS,’ 7 (2006).

<sup>472</sup> According to the U.S. Federal Sentencing Guidelines §§ 8A1.1, the following groups can be held criminally liable: “corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, *unincorporated organizations*, governments and political subdivisions thereof, and nonprofit organizations.” [emphasis added]

<sup>473</sup> Loi no. 66-879 du 29 novembre 1966 (Adopting Art. 1842 of the French civil code, which provides that companies obtain legal personality upon registration.)

to.<sup>474</sup> Of particular relevance with respect to criminal liability of corporations is Art. 136 *ter* point 3 Belgian CC, that incriminates slavery as a crime against humanity in accordance with Art. 7 para. 1 (c) Rome Statute.<sup>475</sup>

A comparative look at different jurisdictions shows that corporate criminal liability has become much more common in the last two decades. But it is still far from being unambiguous in concept and in practice even among fairly homogenous legal cultures and traditions in Europe. France, Belgium, Spain, and Italy, embrace the concept, whereas Germany still opposes it severely. As pointed out above, civil liability of legal persons is a well-established concept that is shared by most jurisdictions even across different legal traditions.

Despite convergence between an increasing number of civil and common law legal systems implementing the principle of corporate criminal liability in their domestic criminal codes, there is still a great divergence on how criminal liability of legal persons is established, particularly with regard to the required *actus reus* and *mens rea* on part of the corporation. These differences are a reflection of the view that respective legal systems have on the nature of the corporation and its responsibilities. Moreover, the different approaches in attributing the criminal offense and the guilty mind to a corporation might implicate different results with regard to the incentive-compatibility of the respective liability scheme. As will be discussed in chapter 4, according to Frey's economic theory, personal relationships can 'crowd in' intrinsic motivation.<sup>476</sup> Thus, looking to individuals to shape the compliance performance of a corporation rather than the corporation as an abstract legal entity might actually enhance corporate compliance and deter future non-compliance more effectively.

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<sup>474</sup> See Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT'L L. REV., 871 (2009); see also BRUNO DEMEYERE, FAFOO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 38 (2006).

<sup>475</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 28 (2006).

<sup>476</sup> Bruno Frey, *Motivation and Human Behavior*, in: RISK, TRUST, AND WELFARE, 31, 37-38 (Peter Taylor-Gooby ed., 2000).

It is a common place among legal systems that a corporation can only act through its natural persons.<sup>477</sup> However, taking a look at the United States, France, and Belgium it becomes obvious just how stark the differences are. Both in the United States and France, criminal liability of corporations is engaged by acts of individuals or groups of individuals either on behalf of the company (in France) or within the scope of employment (in the United States). France's approach to attribute acts to the corporation itself is, however, much more narrow and stringent than in the United States: Art. 121-2 French CC provides that a corporation is liable for "offenses committed on their account by their organs or representatives." Therefore, only an offense by either a company's organ, designated by the law or the corporate statute or bylaws, or a representative with delegation of power from the organ, can be attributed to the corporate entity as such.<sup>478</sup> In the United States, however, corporations may be held criminally liable for the acts of any, even a low-level, employee, as long as the acts are intended to benefit the company.<sup>479</sup> Among others, the fact that "[i]n the United States, corporations—as entities—can be criminally tried and convicted for crimes committed by [...] even low-level employees" makes the United States "relatively unique" in an international comparison, according to Diskant.<sup>480</sup> It is not undisputed among scholars, however, if this *respondeat superior* rule, which is originally a civil rule, is in fact the appropriate standard to apply in a criminal context, due to the absence of congressional guidance on the issue.<sup>481</sup> Again, it is interesting that civil law and criminal law are not necessarily as strictly separated in the United States as in some European

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<sup>477</sup> See Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 77 (Andrew Morriss ed., 2010).

<sup>478</sup> See *id.*, at 78.

<sup>479</sup> This rule of attribution has been confirmed by the jurisprudence of U.S. courts. *Egan v. United States*, 137 F.2d 369, 379 (8th Cir.), *cert denied*, 320 U.S. 788 (1943); *United States v. Gold*, 734 F.2d 800 (5th Cir. 1984); *United States v. Automatic Med. Lab., Inc.*, 770 F.2d 399 (4th Cir. 1985). See also Cristina De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASHINGTON UNIV. GLOBAL STUD. L. REV. 553-54 (2005). However, in U.S. states that have adopted the Model Penal Code, corporate criminal liability is limited to "where a corporate director or a high managerial agent authorized, commanded, performed, solicited, or recklessly tolerated an offense by a corporate employee or agent;" thus, those U.S. states feature a similar rule to France. See § 2.07(1) Model Penal Code (1962).

<sup>480</sup> Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 THE YALE L. J., 128-29 (2008).

<sup>481</sup> See Gregory L. Diskant, *Time to Rethink Corporate Criminal Liability*, 238 NEW YORK LAW JOURNAL (2007), available at <http://www.pbwt.com/files/Publication/9e54eb96-e971-46df-9971-0021d32f08a7/Presentation/PublicationAttachment/fab00938-b506-4237-b2b0-038f4bc7b53e/Diskant%20NYLJ.pdf>

countries, such as Germany, but rather informs one another with cross-applying substantive standards and rules. As will be shown below, this conflating of civil and criminal law concepts becomes apparent in the case of *Kiobel* as well, which is currently pending before the U.S. Supreme Court.

Compared to the United States and France, the principle of criminal liability of legal persons in Belgium is further abstracted and focused on the corporation itself as the perpetrator of the *actus reus*, rather than deriving corporate liability from a natural person's liability. Therefore, in order to criminally convict a legal person, no evidence needs to be established that an individual natural person within the organization has committed an offense that can be attributed to the corporation. Criminal liability of business entities is structured to be "autonomous" under Belgian law;<sup>482</sup> this is reflected in the fact that no provisions were enacted specifying how to attribute the actions and responsibility of the individual to the legal person.<sup>483</sup> It is left to the judge to determine on a case-by-case basis the criminal liability of the legal person by looking primarily at the behavior of the legal person's organs rather than the misconduct of individuals within the entity.<sup>484</sup> As a general rule, a legal person can be liable for all types of criminal offenses, provided that the offense has "an intrinsic link with the legal person's goal or with guarding its interests" or that "according to the specific circumstances, [it] ha[s] been committed on its behalf."<sup>485</sup> The Cour de Cassation applied a broad interpretation when defining the intrinsic link with the "legal person's goal." It held that it is not necessary that "the statutory goal needs to be directed towards offences." That would limit the scope of the provision in fact to "criminal organizations" as defined by the Charter of the International

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<sup>482</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 15 (2006).

<sup>483</sup> *Id.*, at 13.

<sup>484</sup> See OECD, *Belgium: Review of Implementation of the Convention and 1997 Recommendation*, 8.

<sup>485</sup> Art. 5 para. 1 Belgian CC; see also BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 12 (2006).

Military Tribunal in Nuremberg.<sup>486</sup> Rather, the Cour de Cassation held that it is sufficient that the offences had been committed while pursuing the statutory goal of the entity.<sup>487</sup>

With regard to how to attribute a state of mind to corporations as part of establishing guilt and intent, the U.S. and the Belgian approach is more similar in requiring a corporate *mens rea*. In contrast, France follows through on its overall stringent standards to establish corporate liability by relying on an entirely vicarious liability model. In France, “corporate blameworthiness” is irrelevant in order to establish corporate liability.<sup>488</sup> Rather, the *mens rea* needs to be attributed to the individual. Then, in a second step, merely the proof of causality in terms of “the cause and effect ...” leads to criminal liability attaching to the corporation.<sup>489</sup> This approach is a reflection of the prevailing notion in France that corporations lack minds and thus a corporation can only be guilty intermediated through its individuals within the entity.<sup>490</sup> The practical implication is that all elements of the offense need to be found in one individual what has been referred to as a “single-agent approach.”<sup>491</sup> In the United States, on the other hand, corporate guilt (in terms of corporate blameworthiness) needs to be established. This is done on the basis of the ‘collective knowledge’ similar or ‘aggregation theory.’ U.S. courts apply a ‘collective knowledge’ standard when attributing to a corporation the criminal acts of its agents under the federal doctrine of ‘respondeat superior.’<sup>492</sup> Since corporations have been recognized as aggregate bodies, it is no longer deemed necessary to prove which or whether any employee indeed had knowledge or intent. Rather, the totality of the knowledge of all employees acquired within the scope of their employment is imputed to the corporation.<sup>493</sup> Like the Belgian approach discussed below, this points clearly towards criminal responsibility of the corporation

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<sup>486</sup> Art. 9 Charter of the International Military Tribunal (8 August 1945).

<sup>487</sup> Cour de Cassation, February 16, 2005 [Cited in: BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 12 (2006)].

<sup>488</sup> Cristina De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WHASHINGTON UNIV. GLOBAL STUD. L. REV. 555 (2005).

<sup>489</sup> *Id.*, at 556.

<sup>490</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 80 (Andrew Morriss ed., 2010).

<sup>491</sup> *Id.*

<sup>492</sup> *United States v. Bank of New England*, 821 F.2d 844 (1<sup>st</sup> Cir. 1987); see also CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 118 (1993).

<sup>493</sup> CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 118 (1993).

as an organizational entity, rather than mere vicarious responsibility derived from the employees' acts and knowledge. Thus, as Anna Triponel has correctly stated, in the United States, "companies that compartmentalize negative information in bad faith can be found liable even in the absence of one wrongdoer."<sup>494</sup> The same is true for Belgium, where the legislature opted for a system that requires corporate guilt.<sup>495</sup> It needs to be proven that the offense resulted from a deliberate decision taken within the organizational structure of the legal person or from "negligence at the level of the legal person."<sup>496</sup> Corporate intent is lacking if there is a formal and instant objection to the criminal behavior of the individual by the legal person's organs.<sup>497</sup> Eventually, it is up to the judge to decide under the specific circumstances of the case, whether corporate intent is established. It remains to be seen in future jurisprudence whether a general 'no crime' policy of a corporation or an effective monitoring scheme of a corporation's employees is sufficient.<sup>498</sup> It is crucial, however, to keep in mind that the presumption of innocence is also applied in favor of legal persons, as was emphasized also by the Cour de Cassation.<sup>499</sup>

### **III. CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL NORMS: THE CASE OF *KIOBEL V. ROYAL DUTCH PETROLEUM CO.***

#### **1. Civil-Criminal 'Confusion' in the Courts**

The decision in *Kiobel* by the Second Circuit Court of Appeals came as a surprise to many, as it deviated from more than a decade of (including its own) jurisprudence that operated

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<sup>494</sup> Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, 8a (Andrew Morriss ed., 2010) [Citing: Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 THE GEORGE WASHINGTON INT'L L. REV., 237-38 (1997)].

<sup>495</sup> See BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 13 (2006).

<sup>496</sup> See OECD, *Belgium: Review of Implementation of the Convention and 1997 Recommendation*, 8; BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 13(2006).

<sup>497</sup> BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 13-14 (2006).

<sup>498</sup> *Id.*, at 14.

<sup>499</sup> Cour de Cassation, February 16, 2005 [Cited in: BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS, 14 (2006)].

on the premise that corporations may be held liable under the ATS.<sup>500</sup> The very lengthy judgment (138 pages in total) includes an extensive and passionate concurring opinion by Judge Leval. He points out internal inconsistencies in the majority opinion on various counts and referred to the majority opinion's reasoning as "illogical" on nine different occasions.<sup>501</sup> The U.S. Supreme Court granted certiorari in *Kiobel* on the question of corporate liability under the ATS.<sup>502</sup> In the amicus briefs for the Supreme Court hearing, a vast majority of international law scholars endorsed Judge Leval's reasoning and conclusions.

**(a) Authoritative Guidance by International Criminal Tribunals?**

It is striking that the Second Circuit's majority opinion in *Kiobel* concludes that there is no *tort* liability of corporations under the ATS. It reaches this conclusion not only by consulting international law on the existence of a "widespread agreement among the nations of the world to impose *civil* liability on corporations" for violations of the law of nations, but also by relying heavily on the practice and law of the international *criminal* tribunals.<sup>503</sup> Applying the *Sosa* test, according to which only those international norms are actionable under the ATS that are of the same "definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted,"<sup>504</sup> the Court of Appeals for the Second Circuit rejected corporate liability under the ATS on the ground that "customary international law has steadfastly rejected the notion of corporate liability for international *crimes*, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations."<sup>505</sup> [Emphasis added.] In his concurring opinion, Judge Leval dissects the majority's argument and applies a

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<sup>500</sup> Since the Second Circuit Court of Appeals has first upheld a claim under the ATS in *Filartiga v. Pena-Irala* (630 F.2d 876 (2d Cir. 1980)), the Court has issued various rulings in corporate cases under the ATS assuming, without addressing, corporate liability under the ATS. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

<sup>501</sup> See *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 4, 5, 9, 30, 31 n.18, 36, 28, 46, 68, 69 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>502</sup> Petition for writ of certiorari granted, *Kiobel v. Royal Dutch Petroleum Co.*, 132 U.S. 472 (October 17, 2011).

<sup>503</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 7-8 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>504</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (Arguing that only those international norms are actionable which are "specific, universal, and obligatory." [Citing: *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9<sup>th</sup> Cir. 1994)].

<sup>505</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 9 (2nd Cir. Sept. 17. 2010) (Majority opinion).



civil/criminal distinction with regard to remedies, a distinction that the majority opinion did not make.<sup>506</sup> Thus, he dismisses authoritative guidance by international *criminal* tribunals for the scope of the ATS, which provides a *civil* liability remedy for violations of the law of nations.

Judge Leval states:

“The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of *criminal* punishment, and have no application to the very different nature and purposes of civil compensatory liability.”<sup>507</sup>

Prof. David Scheffer, former U.S. chief negotiator for the Rome Statute, confirms Judge Leval’s point in general and specifically with regard to the Rome Statute for the International Criminal Court. He states that the majority opinion “misinterprets the drafting history of the Rome Statute”<sup>508</sup> when they argue that it “confirms the absence of [...] consensus among States concerning corporate liability for violations of customary international law.”<sup>509</sup> Rather, he emphasized that “[t]he lack of consensus at Rome concerned the varied state of corporate *criminal* liability among national laws and did not pertain to corporate civil liability under either national law or international law.”<sup>510</sup>

**(b) Civil/Criminal Liability Distinction under Domestic and International Law**

In *Kiobel*, Judge Leval clearly distinguishes between criminal and civil liability (of corporations) under domestic and international law.<sup>511</sup> He correctly recognizes that it is indicative for the outcome of corporate ATS cases whether corporate liability is construed as a matter of civil or criminal law, whereas the majority opinion has deemed this distinction neither

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<sup>506</sup>See *id.*, at 45 (Majority opinion).

<sup>507</sup>*Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 33 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>508</sup>Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011).

<sup>509</sup>*Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 33 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>510</sup>Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011).

<sup>511</sup>*Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 31-39 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

appropriate nor decisive for the case.<sup>512</sup> As I have shown above, whereas there is a common acceptance of civil liability of legal persons across all legal systems, the practice of criminal liability of legal persons is much more controversial and varies significantly around the world. In fact, as Judge Leval points out correctly, corporate criminal liability still “does not [even] exist in many nations of the world,” unlike corporate civil liability, which is “worldwide practice.”<sup>513</sup> For the question of corporate liability under the ATS this means that making civil liability the proper basis of analysis, as opposed to criminal liability, will affirm corporate liability under the ATS, since corporate civil liability can be considered a general principle of law that enjoys broad consensus around the world,<sup>514</sup> whereas “practice varies considerably in national systems around the globe on the criminal liability of corporations.”<sup>515</sup> Thus, the civil or criminal nature of liability is to be considered decisive for corporate human rights cases in general and under the ATS in specific.

The majority opinion in *Kiobel* takes on Judge Leval’s concurrence and accuses him of “inventing a distinction between civil and criminal liability in customary international law that is contrary to [the Second Circuit’s] ATS jurisprudence.”<sup>516</sup> According to previous case law in the Second Circuit, criminal law has been considered being the appropriate source of law when establishing the content of customary international law for purposes of the ATS, despite the civil

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<sup>512</sup> See *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 45-46 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>513</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 38 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>514</sup> Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 5, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011) (Pointing out the broad international consensus on corporate tort liability as opposed to corporate criminal liability where state practice still varies significantly.) *Id.*, at 10 (Confirming that “corporate civil liability exists as a general principle of law for torts.”) Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 15, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011) (Arguing that corporate liability (in any form, i.e. civil, criminal, or administrative) for serious harms is a general principle of law.) *Id.*, at 16 (Even though Steinhardt does not distinguish between civil and criminal liability of corporations when drawing his conclusion on what constitutes a general principle of law in these cases, he still emphasizes the prominent role of corporate civil liability, in particular; he states that “[even though] [t]he law of civil remedies does not necessarily use the terminology of human rights law [...], [...] in every jurisdiction it protects interests such as life, liberty, dignity, physical and mental integrity.” [emphasis added].)

<sup>515</sup> Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 5, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011).

<sup>516</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 45 (2nd Cir. Sept. 17. 2010) (Majority opinion).

nature of the statute. Thus, Judge Katzman in his concurrence in *Khulumani* spearheaded this position by pointing out that “[t]his [civil/criminal] distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS],”<sup>517</sup> a conclusion that he derives from Justice Breyer’s concurrence in *Sosa*.<sup>518</sup> However, this interpretation of Justice Breyer’s concurrence in *Sosa* is misleading. Justice Breyer stresses in *Sosa* that “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery” (thinking for example about the ‘partie civile’ procedure in Europe) and thus concludes that consensus regarding universal criminal jurisdiction also entails consensus regarding universal tort jurisdiction as a minimal and “no more threatening concept” to international comity than universal criminal jurisdiction.<sup>519</sup> But Breyer’s elaborations in *Sosa* do not merit the conclusion by the Second Circuit Court of Appeals that criminal law governs (all aspects of) liability under the ATS. This is especially true considering that the First Congress used its discretion to provide the appropriate remedy at the domestic level and it is civil in nature by Congressional choice.<sup>520</sup> Scheffer also agrees that the Second Circuit Court of Appeals erred in its interpretation of *Sosa* and confirms explicitly that a difference between civil and criminal liability is not only prevalent at the domestic law level, but also in international law.<sup>521</sup> He underscores his position by extrapolating that “*Sosa*’s identification of a greater requisite justification for criminal liability leads not to a similarity between the two types of liability, but a significant difference.”<sup>522</sup>

Judge Leval and prominent international law scholars, such as Prof. David Scheffer and Prof. Ralph Steinhardt (on behalf of 15 other international law scholars as amici in support of

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<sup>517</sup> *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 270, n.5 (2d Cir. 2007) (Katzman, J., concurring).

<sup>518</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Justice Breyer, concurring in part and concurring in the judgment).

<sup>519</sup> *Id.* (Justice Breyer, concurring in part and concurring in the judgment).

<sup>520</sup> See Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 6, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117-18 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011); *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 064876-cv at 48-49 (2d Cir. Sept. 17, 2010) (Leval, J., concurring only in the judgment).

<sup>521</sup> See Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 7-11, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011).

<sup>522</sup> *Id.*, at 8.

petitioners in *Kiobel*), all conclude that international law does not exempt corporations from its scope.<sup>523</sup> However, Steinhardt uses a different line of argument than Judge Leval and Scheffer, even though they all reach the same conclusion in favor of corporate liability under the ATS; thus, Steinhardt does not structure his argument around a strict civil/criminal liability distinction, but rather focuses on corporate liability overall, which can take different forms (i.e. civil, criminal, quasi-criminal, administrative) in different legal systems.<sup>524</sup> Instead of focusing on the differences between civil and criminal liability, as Judge Leval and Scheffer do, Steinhardt distills the commonality across legal systems. Thus, “no domestic jurisdiction exempts legal persons from *all* liability”<sup>525</sup> [emphasis added], irrespective of the nature of the remedy. Steinhardt therefore adopts a melded civil/criminal approach to corporate remedies under international law and is thus arguing within the paradigm of the majority opinion. However, he arrives at a conclusion contrary to that of the Second Circuit in *Kiobel*. Steinhardt’s approach mirrors Beth Stephens’ scholarship where she describes the diversity in domestic procedures as a merely different “translation” of the “common concept –accountability for human rights abuses” in the “legal ‘language’ of each domestic legal system”<sup>526</sup> and argues that “[a]n effort to impose a sharp distinction between international law’s treatment of criminal and civil actions” is misguided.<sup>527</sup> As it has been pointed out previously, this dissertation argues instead that the civil/criminal distinction needs to be upheld, since the nature of the liability is decisive in corporate human rights cases before domestic courts on various counts, namely from a procedural law perspective (see Chapter 2), from an international law perspective (see Chapter 3), and eventually from a behavioral compliance perspective (see Chapter 4).

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<sup>523</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv (2nd Cir. Sept. 17, 2010) (Leval, J., concurring only in the judgment); Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011); Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 25, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011).

<sup>524</sup> Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 25, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011).

<sup>525</sup> *Id.*

<sup>526</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L., 4 (2002).

<sup>527</sup> *Id.*, at 44.

It is to be acknowledged that Steinhardt's analysis is coherent and gives an accurate picture of the legal landscape with regard to corporate liability around the world. However, blurring the line between civil and criminal liability might have significant negative effects on the realization of the principal objectives of criminal punishment and civil compensation alike. It cannot be ignored that there are stark differences between civil and criminal liability of legal persons. In fact, many legal systems still feel uneasy about imposing criminal punishment on corporations and do not consider it to be an appropriate remedy. This "perceived inappropriateness of imposing *criminal* punishments on corporations," as Judge Leval correctly describes it, relates to the nature and purpose of criminal punishment, that is often considered to be in tension with the corporate form as a judicial construct. Thus, many courts and scholars have argued that a corporation cannot form a criminal intent which is necessary under the prevailing guilt principle of criminal law.<sup>528</sup> Judge Leval vividly illustrates that none of the objectives of criminal punishment (namely retribution for the benefit of society, change of future behavior, and warning and deterrence of others) are achieved when imposed on a fictional entity, which merely exists as a legal construct.<sup>529</sup> The reason, he continues, is that "[a] corporation, having no body, no soul, and no conscience, is incapable of suffering, of remorse, or of pragmatic reassessment of its future behavior. Nor can it be incapacitated by imprisonment."<sup>530</sup> Already in 1853, Pollock/Maitland assessed the nature of the corporation very similarly and pointed towards limitations when imposing sanctions on it as a fictional entity, stating that "[t]he corporation is invisible, incorporeal, immortal; it cannot be assaulted, beaten, or imprisoned; it cannot commit treason .... We even find it said that the corporation is but a name. On the other

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<sup>528</sup> See INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOLUME 2, CRIMINAL LAW AND INTERNATIONAL CRIMES, 58 (2008) ("[M]any perceive it to be impossible to prove that a business entity had criminal intent, or knowledge."); see also ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, 50 (1854) ("Criminal law is concerned with a *natural* person; a being of thought, feeling, and will. A *legal* person is not, strictly speaking, a being of these attributes, though, through the medium of representation and of government, the will of certain individuals is considered the will of the corporation; but only for certain purposes.")

<sup>529</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 33-34 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>530</sup> *Id.*, at 35 (Leval, J., concurring only in the judgment).

hand, it is a person. It is at once a person and yet but a name.”<sup>531</sup> Yet, most importantly “criminal prosecution of the corporation can *undermine* the objectives of criminal law by misdirecting prosecution away from those deserving of punishment.”<sup>532</sup> On the other hand, “the compensatory purposes of civil liability are perfectly served when it is imposed on corporations.”<sup>533</sup> John Coffee, a prominent corporate law scholar with a strong law & economics focus, has also been wary of entity liability arguing that in fact “more deterrence is generated by penalties focusing on an individual than on a corporation.”<sup>534</sup> Considering that it very much depends on the civil or criminal nature of the remedies imposed on corporations whether the liability objective can be achieved as part of an effective compliance regime, one has to be cautious to treat corporate remedies as a melting pot of civil and criminal law elements.

I leave it to other scholars in the field to determine which line of argument, irrespective of the pronounced or blurred civil/criminal distinction, is more appropriate and compelling. Judge Leval’s<sup>535</sup> and Professor Scheffer’s<sup>536</sup> approach treating civil tort liability as a matter of ‘remedy’ (which is regulated by and widely accepted among *domestic* legal systems) or Steinhardt’s approach to establish corporate liability as general principle of *international law*<sup>537</sup> (which is supported by relevant treaty provisions and reaches the level of customary

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<sup>531</sup> FREDERICK POLLOCK & FREDERIC W. MAITLAND, I THE HISTORY OF ENGLISH LAW, 490-491 (1895) [Cited in: Gilbert Geis & Joseph DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AMERICAN J. OF CRIMINAL L., 342 (2002).

<sup>532</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 35 (2d Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>533</sup> *Id.*, at 39.

<sup>534</sup> John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV., 422 (1980).

<sup>535</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 49-50 (2d Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment) (“[I]nternational law leaves the manner of remedy to the independent determination of each State.”).

<sup>536</sup> Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 5-7, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011) (In section I.A. Scheffer’s argument that “[t]he negotiators at Rome could not reach a consensus on criminal liability of judicial persons because, unlike that of civil liability, practice varies around the world” is premised on the fact that the ‘remedy’ question, i.e. how international law is enforced, is in fact a matter dealt with at the domestic level.); see also David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 366 (2011) (Stating that “[i]nternational law leaves to individual states the *remedy* for a violation of international law.” [emphasis added]).

<sup>537</sup> See Statute of the International Court of Justice, Art. 38 (1) (c), June 26, 1945.

international law).<sup>538</sup> The Second Circuit’s ruling in *Kiobel* is in contradiction to both these approaches, since (1) it considers the question of corporate liability under the ATS to be a question of international law,<sup>539</sup> and (2) it does not recognize norms that are accepted by all nations in *foro domestico* as a reflection of a common legal doctrine (i.e. general principles of law)<sup>540</sup> to be indicative of customary international law. On this premise, the majority opinion in *Kiobel* states: “[T]he fact that a legal norm is found in most or even all “civilized nations” does not make that norm a part of customary international law.”<sup>541</sup> This question, however important it may be to decide whether there is corporate liability under the ATS, goes beyond the scope of my analysis, which focuses primarily on the civil/criminal distinction with regard to corporate human rights remedies and the implications for liability objectives.

### (c) Adherence to the Civil Form of the ATS

The discrepancy between the majority opinion and Judge Leval’s concurrence on the (non-) existence of a civil/criminal distinction in international law, becomes apparent in another section of the judgment where the majority responds to Judge Leval’s critique and interpretation of their decision.

“Third, Judge Leval distorts our analysis by claiming that we hold ‘that the absence of a universal practice among nations of imposing *civil damages* on corporations for violations of international law means that under international law corporations are not liable for violations of the law of nations.’ Concurring Op. 5 (emphasis added). That is not our holding. We hold that corporate liability is not a norm that we can recognize and apply in actions *under the ATS* because the customary international law of human rights does not impose *any* form of liability on corporations (civil, criminal, or otherwise).”<sup>542</sup>

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<sup>538</sup> Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 22-26, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011) (Showing that corporate liability constitutes a general principle of law.); *Id.*, at 17-22 (Arguing that “a diverse array of treaties reveals the accepted understanding within the international community that corporations have international obligations and can be held liable for violations of international law.”) *Id.* at 3 (Stating that “[a]t a minimum customary international law does not recognize, preserve, or allow” the impunity of corporations as created by the majority opinion in *Kiobel*.)

<sup>539</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>540</sup> Lord Phillimore, Permanent Court of International Justice, Advisory Committee of Jurists, *Proces Verbaux of the Proceedings of the Committee, July 16-July 24<sup>th</sup>, 1920, with Annexes (The Hague 1920)* at 335 (Stating that general principles are “accepted by all nations in *foro domestico*.”). BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS*, 390 (1953) (Stating that general principles “belong to no particular system of law but are common to them all.”).

<sup>541</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>542</sup> *Id.*

Even though Judge Leval's contention that the majority rejected corporate liability under the ATS because there is no corporate civil liability under customary international law seems to resonate, at least implicitly, with the majority's holding, the majority opposes it vigorously. The majority opinion stands firm by its premise that international law does not distinguish between civil and criminal remedies; the main reason seems to be that otherwise the majority's holding in *Kiobel* would be inconsistent with the Court's previous decisions to hold individuals liable under the ATS.<sup>543</sup> Adhering to a strict deference to civil tort liability for violations of international norms for the purpose of the ATS, as Judge Leval and Scheffer do, would mean that not only corporations but also individuals were barred from liability under the ATS since "[n]o individual civil liability has ever proven in international for the commission of atrocity crimes, just as no corporate civil liability has ever been so proven."<sup>544</sup> By holding individuals but not corporations liable under the ATS, I have concluded in an earlier publication co-authored with David Scheffer, that the Court "confuses [yet again] criminal law and civil law remedies."<sup>545</sup> It seems at least questionable why the majority opinion in *Kiobel*, as it did before as well, for example, in *Khulumani*,<sup>546</sup> would be so rigorously ignore the civil form of the remedies under the ATS despite the clear legislative choice that the First Congress made when enacting the ATS. It almost appears as if this deflation of the differences between civil and criminal remedies for international law violations might be a vehicle to do what the majority accuses Judge Leval of,

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<sup>543</sup> See *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6-7 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment); see also Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 15, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011).

<sup>544</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT'L L., 366 (2011); see also *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 51, para. 1-3 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals."); Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 28, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011) ("Thus, the fact that no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international does not contribute to the analysis, because the same is true for natural persons.").

<sup>545</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT'L L., 366 (2011).

<sup>546</sup> See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 270, n.5 (2d Cir. 2007) (Katzman, J., concurring).



when he dismisses the evidentiary value of the jurisprudence of the international criminal tribunals, namely to achieve a desired result “with which [one] agrees.”<sup>547</sup> Certainly, tort liability under the ATS is available for violations of international law that amount to international crimes, but the criminal nature of the conduct is not a necessary condition, but rather a sufficient one.<sup>548</sup> Therefore, the Court of Appeals for the Second Circuit errs when it arrives at the conclusion that because of the fact that most violations of international law under the ATS amount to international crimes, criminal law is the go-to source of law to determine liability under the ATS.<sup>549</sup>

#### **(d) The ‘Remedy’ Question**

The controversy surrounding corporate liability under the ATS has been framed as a matter of substantive law vs. a matter of ‘remedy,’ each of which follows different rules of law. The following section will recap the discussion between the majority opinion in the Second Circuit ruling in *Kiobel* and Judge Leval’s dissent in light of the recent briefing and hearing before the U.S. Supreme Court on the issue of corporate liability under the ATS. The discussion sheds light on the complexity of human rights cases involving corporations due to the interplay between the international law and domestic law level. Where to draw the line between those two levels with regard to the different elements of liability is crucial and often decisive for the outcome of the cases. Particularly, the applicable law has immediate implications on corporate liability or impunity in the context of MNCs’ global operations, considering that corporate liability is a common, well-established principle in most domestic legal systems, especially in

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<sup>547</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 45 (2nd Cir. Sept. 17, 2010) (Majority opinion).

<sup>548</sup> Brief of International Law Scholars as *Amici Curiae* Supporting Plaintiff-Appellees at 2, *Balintulo v. Daimler AG*. No. 09-2778-CV (2d Cir. 2009); see also Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011).

<sup>549</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 7-8 (2nd Cir. Sept. 17, 2010) (Majority opinion). (“[C]ustomary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations.”) See also, *id.* at 45 (Majority citing Judge Katzman concurring in *Khulumani* decision: “This [civil/criminal] distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS].” *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d at 270 n.5).

civil proceedings,<sup>550</sup> whereas corporate liability is still an anomaly under the international legal system, which has traditionally been designed as a state-centered system binding state actors only.

Therefore, whether corporate liability is available under the ATS depends largely on the source of law that is considered authoritative in the matter. The U.S. Supreme Court gave some important guidance on the nature of the ATS in its *Sosa* ruling from 2004. According to the Supreme Court's holding in *Sosa*, the ATS provides a federal common law cause of action that is informed by international law.<sup>551</sup> The Supreme Court held that, in its historical conception, the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."<sup>552</sup> This hybrid nature of the ATS—as a federal common law action for violations of the law of nations—<sup>553</sup>is at the heart of the *Kiobel* case. The key question is how "defined by the law of nations" should be construed, i.e., which elements of liability under the ATS are in fact governed by the "law of nations" or by federal common law.

The majority opinion in *Kiobel* and Judge Leval are greatly divided on the question of which source of law is to be consulted to establish corporate liability under the ATS, federal common law, or international law. The Second Circuit Court of Appeals held that "[...] the substantive law that determines [...] jurisdiction under the ATS is neither the domestic law of the United States nor the domestic law of any other country." Therefore, it is argued that whether corporate liability exists under the ATS is a matter of international law, more specifically customary international law.<sup>554</sup> Prof. Jack Goldsmith, a prominent international law

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<sup>550</sup> As has been shown above, in criminal proceedings corporate liability has developed very differently in different legal systems and is far from being a common principle of law around the world.

<sup>551</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 714, 20-21, 24 (2004).

<sup>552</sup> *Id.*, at 712.

<sup>553</sup> In its amicus brief in support of the plaintiffs, the U.S. government accurately describes the nature of the ATS as follows: "Whether a federal court should recognize a cause of action in such circumstances is a question of federal common law that, while informed by international law, is not controlled by it." Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 14, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>554</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6 (2nd Cir. Sept. 17. 2010) (Majority opinion)

scholar, who filed an amicus brief on behalf of Chevron and five other corporations<sup>555</sup> in support of the corporate respondents in *Kiobel*, confirms the Second Circuit in its holding by construing *Sosa* to require “that ‘federal common law’ causes of action must conform strictly to the international law that it supports.”<sup>556</sup> Under this international law standard, the majority opinion in *Kiobel* denied corporate liability for a violation of international law norms.<sup>557</sup>

Judge Leval and later the petitioners in *Kiobel* before the Supreme Court and the U.S. government, as *amicus curiae* for the petitioners, take a different approach on the issue. They argue that the issue of corporate liability is a matter of ‘remedy,’ i.e., how international law norms are enforced, which is left to the discretion of each state.<sup>558</sup> This position is shared by a burgeoning body of legal scholarship in the field that argues that a distinction needs be made between the “standards of conduct” and “remedies” for the purpose of identifying the proper source of law under choice of law principles.<sup>559</sup> The majority opinion in *Kiobel* misconstrues the structure and functioning of international law when they argue that *all* aspects of liability under the ATS have to be answered by looking to international law only. Rather, one needs to look to international law to determine the tort (in form of an international norm that can be violated by a

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(Stating that “[W]e must ask whether a plaintiff bringing an ATS suit against a corporation has alleged a violation of customary international law.”).

<sup>555</sup> Aside from Chevron Corporation, these companies include: the Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company.

<sup>556</sup> Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of the Respondents at 26, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 3, 2012).

<sup>557</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 9 (2nd Cir. Sept. 17. 2010) (Majority opinion). This conclusion is also shared by Prof. Goldsmith on behalf of Chevron and five other amici for the respondents, see Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of the Respondents at 23, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 3, 2012).

<sup>558</sup> See Paul Hoffman, Brief for Petitioners at 19, 35, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011) (“[The *Kiobel* majority] turns a blind eye to federal common law and the universal availability of corporate civil liability in all legal systems, and it relies on the absence of an international law requirement for such liability even though international law leaves such issues to domestic legal systems.”); see also Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011); see also *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6, 48 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>559</sup> See Mara Theophila, ‘Moral Monsters’ Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after *Kiobel v. Royal Dutch Petroleum Co.*, *FORDHAM L. REV.*, 2906 (2011); see also Odette Murray, David Kinley, and Chip Pitts, *Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel*, 12 *MELBOURNE J. OF INT’L L.* 75-76 (2011).

private actor) and to federal common law to determine ancillary aspects of liability, such as the ‘remedy’ (in form of corporate liability).<sup>560</sup> Whereas ancillary aspects have previously mainly been considered to pertain merely to procedural issues,<sup>561</sup> they are now viewed more broadly to “include all other issues which, whether substantive or not, do not bear on the defendant’s conduct.”<sup>562</sup>

Thus, Judge Leval observes correctly, “[w]hat international law does is it prescribes norms of conduct. It identifies acts (genocide, slavery, war crimes, piracy, etc.) that it prohibits.”<sup>563</sup> Judge Hall, in his concurrence in *Khulumani*, referred to it as “a hornbook principle that international law does not specify the means of its domestic enforcement,” which leads him to conclude that “*Sosa*’s reliance on international law applied to the question of recognizing substantive offenses [only.]” Granted that Judge Hall made this statement regarding the issue of secondary liability and not the issue of corporate liability under the ATS. But the general principle holds nevertheless for both questions. Looking at how international treaties are designed, this basic principle of international law becomes apparent. Judge Leval uses the example of the Genocide Convention for this purpose. He writes:

“[In the] Genocide Convention, the “crime of genocide” is defined as a number of “acts” committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Convention on the Prevention and Punishment of the Crime of Genocide, arts. I, II, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277. The Convention then provides in Article V that the State parties “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide.” The Convention leaves the details for realizing its

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<sup>560</sup> See William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 644 (2006) (Arguing that “[t]he tort remedy in ATS litigation does not come from international law[;] [i]t is pure domestic law.” [emphasis added]. See also Odette Murray, David Kinley, and Chip Pitts, *Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel*, 12 MELBOURNE J. OF INT’L L., 75 (2011) (Arguing that “[f]ederal common law, not international law, governs ATS corporate liability.”) For a contrarian point of view on the choice of law principles governing ancillary aspects of liability under the ATS, see Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J., 61, 64 (2008) (Arguing that “accomplice liability [is] a conduct-regulating rule defined by international law, rather than an ancillary question governed by domestic law.”)

<sup>561</sup> Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 81 [Citing *Doe I v. Unocal Corp.*, 395 F.3d 932, 964 (9<sup>th</sup> Cir. 2002) (Reinhardt, J., concurring)].

<sup>562</sup> Mara Theophila, *‘Moral Monsters’ Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum Co.*, FORDHAM L. REV., 2907 (2011) [Citing: William Casto, citation omitted].

<sup>563</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 47 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

objectives to each nation. It says nothing about the nature or form of “effective penalties” to be imposed. It says nothing about civil and administrative remedies.”

The U.S. government, which supports the petitioners in *Kiobel* as *amicus curiae* before the Supreme Court, shared this view of international law and endorsed a distinction between the “substantive standards of conduct,” which are governed by international law, and “the means of enforcing those substantive standards,” which are dealt with at a domestic level.<sup>564</sup> In its brief, the U.S. government has convincingly shown that the majority’s test in *Kiobel*, which requires that *corporate liability* for a “violation of the law of nations” is a customary international law norm,<sup>565</sup> is misguided and inconsistent with the Supreme Court’s holding in *Sosa*. The U.S. government argues in its brief that:

“The limitation threshold prescribed by *Sosa*, namely “that any claim under the ATS must at least ‘rest on a norm of international character accepted by the civilized world and defined with’ sufficient ‘specificity,’ [Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)] at 725—pertains to the international-law norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS.”<sup>566</sup>

The wording of the ATS supports this interpretation. Thus, the award of damages under the ATS only requires that a “tort” has been committed premised on a “violation of the law of nations.” The ATS does not, however, put forward any specification with regard to who the perpetrator under its scope may be.<sup>567</sup> The U.S. Supreme Court has provided guidance for courts on how to properly construe a statute, holding that “courts must presume that a legislature says in a statute what it means and means in a statute what it says.”<sup>568</sup> Also, the Supreme Court has explicitly stated with regard to the ATS in a previous ruling that in fact “[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants.”<sup>569</sup> In lack of guidance by the

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<sup>564</sup> Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 18, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>565</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6-7 (2d Cir. Sept. 17, 2010) (Majority opinion).

<sup>566</sup> Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 7, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>567</sup> See Paul Hoffman, Brief for Petitioners at 19, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>568</sup> *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992).

<sup>569</sup> *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 438 (1989); Brief of International Law Scholars as *Amici Curiae* in Support of the Petitioners at 6 n.2, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 21, 2011) (Illustrating this point by making reference to other sections of the Judiciary Act which explicitly define the proper defendant.)

ATS itself, much of the confusion surrounding corporate liability has been stirred by footnote 20 in the Supreme Court's *Sosa* opinion, which reads as follows:

“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 791-795 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).”<sup>570</sup>

The *Kiobel* majority interprets footnote 20 in a way that conflates the tort and the tortfeasor and requires that both elements constitute customary international law. I elaborated on this point in an earlier publication co-authored with Prof. David Scheffer, where we stated:

“The *Kiobel* majority extrapolate from this dicta footnote an overarching principle that the tortfeasor must also be identified as such as a matter of customary international law - that the commission of the narrow band of torts or crimes qualifying for subject matter jurisdiction under the ATS must be shown under international law to be committed by certain categories of tortfeasors [...] in order to attract ATS jurisdiction.”<sup>571</sup>

Thus, the Second Circuit in *Kiobel* misreads footnote 20 as not only requiring that the international law norm prohibiting a certain conduct is universally accepted and binding, but also the way how to enforce a violation of this norm.<sup>572</sup> Reading footnote 20 closely, however, shows that it only requires that “international law extends the scope of liability” to a violation of an international law norm by a certain perpetrator. The relevant issue is not whether international law provides for corporate liability, but rather whether private actors can violate the respective international law norm in question.<sup>573</sup> As the U.S. government brief pointed out correctly, this requires a case-by-case analysis instead of the one-fits-all formula that the Second Circuit Court of Appeals adopted, which “examined the question of corporate liability in the

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<sup>570</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733, n. 20 (2004) (Justice Breyer, concurring in part and concurring in the judgment).

<sup>571</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT'L L., 364 (2011).

<sup>572</sup> Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 18, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>573</sup> See *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 30-31 (2d Cir. Sept. 17, 2010) (Leval, J., concurring only in the judgment).

abstract,”<sup>574</sup> and therefore did not address the decisive question whether a corporation as private actor can in fact violate the respective norm.<sup>575</sup> In addition to the structural misconception underlying the dicta of footnote 20, the majority opinion erred on yet another ground. The Second Circuit reads footnote 20 in a way that assumes that international law distinguishes between corporations and individuals for purposes of liability. In fact, neither the wording of footnote 20 nor international law supports this finding. The very terms of footnote 20 do not “imply[...] that natural persons and corporations are treated differently” for purposes of liability under the ATS, but rather that they are treated “identically.”<sup>576</sup> Footnote 20 states that a different consideration courts have to account for when recognizing a cause of action under the ATS is “whether international law extends the scope of liability for a violation of a given norm” to a certain defendant, “if the defendant is a private actor.” Footnote 20 then gives examples of private actors, namely corporations or individuals, rather than establishing two different categories of individuals and corporations by stating “private actors *such as* a corporation or individual.” [emphasis added]. Therefore, corporations and individuals are not to be treated differently, but identically according to the Supreme Court’s ruling in *Sosa*. In this reading, footnote 20 is perfectly in synch with international law. Thus, as pointed out by the U.S. government brief, “[t]he distinction between norms that apply only to state actors and norms that also apply to non-state actors [i.e. private actors] is well established in [...] international law,”<sup>577</sup> whereas “the distinction between natural and judicial persons [is] one that finds no basis in the relevant norms of international law.”<sup>578</sup> This reading of the Supreme Court’s footnote 20 in *Sosa* is further confirmed by the fact that footnote 20 explicitly makes reference to the *Kadic* decision, in which the Second Circuit held that genocide could be committed by either a state or a private

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<sup>574</sup> Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 21, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>575</sup> *Id.*, at 18.

<sup>576</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 30-31 (2d Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>577</sup> Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 17, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011).

<sup>578</sup> *Id.*, at 18.

actor.<sup>579</sup> Therefore, the Supreme Court set the stage for its message in footnote 20 as a matter of state vs. private actor liability under the ATS.<sup>580</sup>

Judge Leval specifies the ‘substantive law vs. remedy’ argument with regard to corporate *civil* liability especially. Thus, he drives home an important point, namely that the civil/criminal distinction is not foreign to international law but, moreover, that “[i]nternational law not only recognizes differences between criminal and civil liability, but treats them differently. While international institutions have occasionally been established to impose criminal punishments for egregious violations of international law, and treaties often impose on nations the obligation to punish criminal violations, the basic position of international law with respect to civil liability is that States may impose civil compensatory liability [...]”<sup>581</sup> This reading of the source of law issue at hand re-affirms once again the existence of a civil/criminal distinction under international law that stands in contrast to the ruling of the Second Circuit in *Kiobel*.

#### **(e) Extraterritorial Civil Jurisdiction**

In an unexpected move, the issue of extraterritorial/universal jurisdiction under the ATS took much of the center stage during the Supreme Court hearing on Feb. 28<sup>582</sup> that was originally scheduled to deal primarily with the question of corporate liability under the ATS.<sup>583</sup> In fact, after briefing and argument, the Supreme Court decided about a week after the hearing to expand the scope of review in *Kiobel* by the following question and put the case over to next term for re-hearing.

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<sup>579</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>580</sup> *See Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 30-31 (2nd Cir. Sept. 17, 2010) (Leval, J., concurring only in the judgment).

<sup>581</sup> *Id.*, at 42.

<sup>582</sup> Argument transcript, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 28, 2012).

<sup>583</sup> SCOTUS Blog, *Kiobel v. Royal Dutch Petroleum*: Issue, available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/> (The Supreme Court originally requested briefs on the following two questions: “(1) Whether the issue of corporate civil tort liability under the Alien Tort Statute, 28 U.S.C. § 1350, is a merits question or instead an issue of subject matter jurisdiction; (2) whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide [or] may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations.”)



“Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>584</sup>

In an international comparison, the ATS is unique in its concept and structure in that it prescribes universal civil jurisdiction.<sup>585</sup> It is safe to say the universal tort liability is a less common and more controversial concept among international law scholars than universal criminal jurisdiction, which enjoys international consensus at least for a limited set of norms.<sup>586</sup> This also confirms that in fact a civil/criminal distinction exists under international law. This distinction can prove decisive for the outcome of extraterritorial ATS cases. Justice Breyer addressed the issue of universal jurisdiction under the ATS in his concurrence in *Sosa*. In defense of the ATS, he assessed the legality of universal tort liability by determining its effect on international comity. He argued that universal tort liability is no more threatening to the principle of international comity than universal criminal jurisdiction (which is commonly accepted). Many legal systems around the world provide tort recovery as part of criminal proceedings.<sup>587</sup>

Goldsmith (on behalf of Chevron and five other amici in support of the respondents in *Kiobel*), takes a very different approach and reaches a contrary conclusion in his amicus brief. He does not take a comparative perspective on the issue of extraterritoriality as Justice Breyer does. Rather, the amici for the respondents once again aim to determine the issue based on their interpretation of international law arguing that extraterritorial civil jurisdiction over alleged human rights violations (as prescribed by the ATS) is contrary to international law.<sup>588</sup> For this

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<sup>584</sup> Order for re-argument and supplemental briefing, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 U.S. LEXIS 1998, No. 10-1491 (March 5, 2012).

<sup>585</sup> Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *Yale J. Int'l L.* 1, 17-34 (2002) (Explaining why other countries have not exercised universal tort jurisdiction over human rights violations.); Anthea Roberts, *Comparative International Law? The role of National Courts in Creating and Enforcing International Law*, 60 *INT'L & COMP. L. Q.* 76 (2011) (“Although the ATS is often celebrated by U.S. lawyers as a domestic mechanism for enforcing international law, non-U.S. lawyers frequently view it as a US peculiarity [...].”)

<sup>586</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Justice Breyer, concurring in part and concurring in the judgment).

<sup>587</sup> *Id.*, at 762-63.

<sup>588</sup> Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of the Respondents at 4-10,

purpose, Goldsmith relies on a case before the ICJ where three of the honorable judges commented on the extraterritorial scope of the ATS in civil matters and opined that “[...] this unilateral exercise [under the ATS] [...] has not attracted the approbation of states generally.”<sup>589</sup> This is not to be contested in any way. In fact, as the Goldsmith’s brief correctly states “[n]o other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses [...].”<sup>590</sup> The argument, however, is flawed in the same way as it is misguided with regard to the corporate liability debate under the ATS. As has been discussed above, international law does not govern how its norms are enforced by each state, but leaves it to each state’s discretion. Thus, it does not come as a surprise that international law is in fact silent about corporate civil liability. No conclusion as to the non-existence of corporate liability under international law can be drawn therefrom.<sup>591</sup> Rather, federal common law relegates the remedy to civil liability and the courts discipline the process through very conventional tools of, for example, ‘forum non convenience’ and the ‘political question doctrine.’ Moreover, minimum contacts of the non-resident entity of a MNC with the forum jurisdiction have been required by U.S. courts in order to establish personal jurisdiction under the ATS.<sup>592</sup> The exact extent of extraterritoriality jurisdiction under the ATS still remains to be determined and Paul Hoffman, lead counsel to the petitioners, correctly noted before the Supreme Court that this is “an issue that ought to be briefed on its own.”<sup>593</sup> (The Supreme Court justices agreed and set a reargument of the case for the 2013 docket.)

For example, in the case of Royal Dutch Petroleum, jurisdiction in fact was established, since there was an investor relations office in New York. Even though the office was a nominal

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Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 3, 2012).

<sup>589</sup> *Id.*, at 6-7 [Citing: Joint Separate Opinion of Judges Higgins, Kooijmans, Buergenthal, in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. Reports 63, at para. 48].

<sup>590</sup> *Id.*, at 6.

<sup>591</sup> See *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 6, 47-48 (2d Cir. Sept. 17, 2010) (Leval, J., concurring only in the judgment).

<sup>592</sup> See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 140-153 (2007) (Showing how personal jurisdiction can be established over non-resident entities.)

<sup>593</sup> Paul Hoffman, Argument transcript, 9, para. 3-4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 28, 2012).

part of Shell's U.S. subsidiary, it nonetheless had significant relations with the non-resident parent company.<sup>594</sup> This is in line with the American tradition to take a "doing business" approach to jurisdiction, i.e., establish jurisdiction based on a (minimum) connection between the forum and defendant. In contrast, the bar is higher and different in European civil law systems where jurisdiction is rather asserted based on a connection between the forum and the dispute.<sup>595</sup>

It is interesting that Goldsmith in his amicus brief for the respondents in *Kiobel* opened with the extraterritoriality argument and devoted almost half of the entire brief to the question. This is despite the fact that the Supreme Court never posed the question in the *Kiobel* case, and thus it was not briefed. It almost seems like an attempt to showcase their main argument (namely that international law is the proper source of law for all liability aspects under the ATS) by the example of allegedly 'universal civil jurisdiction,' which is neither supported by international law nor exercised by any other country outside the United States. Goldsmith might have considered the jurisdictional perspective to be a more compelling example to support their overall argument than the issue of corporate liability, which is well-established in civil form in *all* jurisdictions and in criminal form in *increasingly more* jurisdictions around the world<sup>596</sup> and is engrained in international law in terms of accountability of non-state, i.e. private, actors (which includes corporations and individuals).<sup>597</sup>

As mentioned before, in the *Kiobel* hearing the Supreme Court took great interest in one of the corporate brief's assertion that universal civil jurisdiction, as allegedly prescribed under

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<sup>594</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 96 (2d Cir. 2000) (Holding that a sufficient relationship between the local affiliate entity and the non-resident parent company existed since an Investor Relations Office in New York was "facilitating the relations of the parent holding companies with the investment community.")

<sup>595</sup> See Christen Broecker, *Alien Tort Statute Litigation and Transnational Business Activity: Investigating the Potential for a Bottom-Up Global Regulatory Regime*, NYU SCHOOL OF LAW INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, 16 EMERGING SCHOLARS PAPER, 42 (2010).

<sup>596</sup> See f.ex. Brief of David J. Scheffer as *Amicus Curiae* in Support of the Petitioners at 5, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. December 20, 2011). (Stating that "it is universally accepted that corporations are subject to civil liability under domestic law [...]"); *Id.*, at 12-16 (Showing that "[t]he trend in international law since the conclusion of the negotiations on the Rome Statute has been toward more corporate criminal liability [...]").

<sup>597</sup> See discussion above on footnote 20 in *Sosa* ruling; see Brief for the United States as *Amicus Curiae* in Support of the Petitioners at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. 2011) (Stating that some international law norms apply only to state actors, whereas others, such as genocide, can also be committed by non-state, i.e., private actors without any state involvement.).

the ATS, is unprecedented in any other country outside the United States and contrary to international law.<sup>598</sup> The broad extraterritorial reach of the ATS has been subject to much criticism, especially from European governments.<sup>599</sup> Among others, this might have motivated the Court to re-schedule a hearing with an expanded scope of review including the extraterritoriality question. Lyle Denniston, a journalist who has covered the U.S. Supreme Court for more than five decades, considers it “conceivable – if not very likely –“ that the Court might decide the case on constitutional grounds challenging “whether Congress has [even] the constitutional authority to pass a law authorizing a lawsuit in which both sides are non-citizens and the misconduct occurred entirely overseas.”<sup>600</sup> Justice Alito hinted in this direction in the February 28 hearing in *Kiobel*.<sup>601</sup> It remains to be seen whether the ATS, in addition to posing ambiguous and controversial questions of corporate law and international law as well as questions of international economics,<sup>602</sup> will also become a constitutional issue before the U.S. Supreme Court.

#### **IV. THE UNTAPPED POTENTIAL OF THE *KIOBEL* DISCUSSION ON CORPORATE LIABILITY: A BLESSING IN THE SKY?**

The case of *Kiobel* has demonstrated vividly and in numerous respects that a civil/criminal distinction exists both at the domestic and international law level. Therefore, this

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<sup>598</sup> Justice Kennedy, argument transcript, 3-4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 28, 2012).

<sup>599</sup> Among others, Germany has taken this position; see Counsel for the Federal Republic of Germany (FRG) in: Public Sitting, Verbatim Record, at 47 para. 36-17, *Jurisdictional Immunities of the State (Germany v. Italy)*, International Court of Justice CR 2011/17 (Sept. 12, 2011), available at <http://www.icj-cij.org/docket/files/143/16677.pdf>. Australia, Switzerland, and the United Kingdom have also voiced criticism against the ATS and submitted amicus briefs in *Sosa* arguing that “there is no basis in international law for the creation of an *explicit* U.S. civil cause of action involving disputes [...]” without any link to the United States. See Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner at 7, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), No. 03-339.

<sup>600</sup> Lyle Denniston, SCOTUSblog, *Kiobel to be expanded and reargued*, at <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>

<sup>601</sup> Justice Alito, argument transcript at 51, paras 9-10, 13-15, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 28, 2012) (“Is there an Article III source of jurisdiction for a lawsuit like this? [...] [W]hat’s the constitutional basis for a lawsuit like this, where an alien is suing an alien?”).

<sup>602</sup> See Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), Nos. 11-88 and 10-1491 (U.S. December 21, 2011).

distinction not only implicates the immediate outcome of ATS cases, but, especially with regard to corporate liability, implicates also the long-term incentive-compatibility of substantive law deterrence under the ATS. As correctly pointed out by Judge Leval in his *Kiobel* concurrence, the different principal objectives of criminal punishment and civil compensation cannot be ignored;<sup>603</sup> an understanding of the different objectives is indispensable for determining if the respective forms of redress and punishment for grave human rights violations are in fact achieving these objectives or not. Despite its erroneous interpretation of the structure and functioning of international law, Goldsmith makes a valid point in his amicus brief in *Kiobel* on a side note; the brief points to a structural difference between civil and criminal liability, namely that the former is enforced (randomly) by private individuals whereas the later is enforced (centrally) by the public administration.<sup>604</sup> Even though the conclusion that Goldsmith draws from this difference with regard to international law, namely that “universal civil jurisdiction is a different and greater intrusion on territorial sovereignty than universal criminal jurisdiction,”<sup>605</sup> is dubious, he makes a valid point highlighting this structural difference which helps to inform a behavioral economics perspective on liability enforcement in a CSR context. As will be shown in the next chapter, behavioral economics theory supports the conclusion that a form of institutional, i.e., prosecutorial, punishment in the form of criminal proceedings might be the venue of choice in order to achieve a deterrence effect in accordance with substantive law prescriptions, since the ‘veil’ of punishment might be necessary (instead of mere compensatory civil damages) to reach the threshold at which the deterrence theory in fact holds, according to behavioral economics literature.<sup>606</sup> So, the European approach of primarily dealing with human

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<sup>603</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 4-5 (2nd Cir. Sept. 17. 2010) (Leval, J., concurring only in the judgment).

<sup>604</sup> Jack Goldsmith, Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of the Respondents at 3, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), No. 10-1491 (U.S. February 3, 2012).

<sup>605</sup> *Id.*, at 2-3.

<sup>606</sup> See Bruno Frey et al., *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REV., 132 (2001) (Arguing that preferences, such as intrinsic motivation, get “crowded in” or “crowded out” depending on the level of enforcement; Frey’s metrics includes levels of high, medium, and low enforcement.)

rights cases against corporations in a criminal context in fact might be more ‘incentive-compatible’ than the U.S. approach of bringing such cases as a tort claim under the ATS. However, as pointed out in Chapter 2, the U.S. legal system is particularly favorable for plaintiffs in civil procedures in an international comparison and therefore the U.S. system is still an important and attractive forum for legal redress for these kinds of issues. Despite the ‘hysteria’ among human rights lawyers regarding the fate of *Kiobel*, it is to be noted that even if the U.S. Supreme Court were to shut down corporate liability under the ATS, there still would be other venues to hold corporations liable for their overseas misconduct. According to Jonathan Drimmer, a prominent lawyer in the CSR legal field and now in-house counsel for Barrick Gold Corp., the impact that *Kiobel* might have on holding corporations accountable in a global economy might be smaller than anticipated by many civil society groups and human rights lawyers. Even if the Supreme Court held to preclude corporations from the scope of the ATS, suits could still be brought under the ATS against corporate officers and directors.<sup>607</sup> Even the Second Circuit Court of Appeals in its *Kiobel* ruling, while rejecting corporate liability under the ATS, emphasized “that nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law.”<sup>608</sup>

Considering that behavioral economic studies have shown that ‘personal relationships’ can ‘crowd in’ intrinsic motivation and stir corporate behavior accordingly,<sup>609</sup> there might be some unexpected potential in lawyers having to possibly re-adjust their litigation strategy in corporate ATS cases as to target the key individuals responsible, instead of the corporation as a (fictional) entity. Many legal scholars have contemplated for a long time if liability of

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<sup>607</sup> Jonathan Drimmer, *Kiobel v. Royal Dutch Shell Petroleum Co. and the Alien Tort Statute*, 5442 EMERGING ISSUES, 7 (2010).

<sup>608</sup> *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv. 064876-cv at 11 (2nd Cir. Sept. 17. 2010) (Majority opinion).

<sup>609</sup> Bruno Frey, *Motivation and Human Behavior*, in: RISK, TRUST, AND WELFARE, 31, 37-38 (Peter Taylor-Gooby ed., 2000).

corporations as entities is in fact achieving the optimal deterrence effect, or whether corporations should just be seen as what they are, namely associations of individuals.<sup>610</sup> Along those lines, John Coffee has suggested that "more deterrence is generated by penalties focusing on an individual than on a corporation."<sup>611</sup> John Salmond, a prominent legal scholar of his time, also voiced concern with regard to the practicability of corporate entity liability since, as he states, "[t]en men do not in fact become one person because they associate themselves together for one end, any more than two horses become one animal when they draw the same cart."<sup>612</sup> Not only the practicability but also the appropriateness of liability of corporations as legal persons might be questionable. For example, Arthur Andersen's role in the Enron scandal, which ultimately resulted in a criminal indictment of the Andersen firm as a partnership, has been drawing attention to the consequences of criminal liability of corporations (aside with the responsible officers). William Laufer cut right to the point in an effort to uncover the "failure of corporate criminal liability" by asking, "[h]ow can the law-abiding work of so many be associated with the illegal acts of so few?"<sup>613</sup> This critique has been amplified by Albert Alschuler, who argues that "corporate liability is unjust since it effectively punishes innocent third parties (shareholders, employees, and so forth)."<sup>614</sup> This is not to say that collective criminal liability of the corporation itself should not be available in addition to individual criminal liability of responsible officers and directors. Rather, this work urges moving beyond pre-set notions of what lawyers believe does and does not work and taking a fresh perspective on the doctrine of corporate liability informed by an empirical approach based on behavioral economics.

However, from the perspective of effective victims' redress, there might be significant instant drawbacks of individual officer liability. Thus, evidentiary problems might arise since

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<sup>610</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 928 (Justice Scalia concurring.) (Justice Scalia stating that "[t]he association of individuals in a business corporation is no different [than an individual] ...")

<sup>611</sup> John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 422 (1980).

<sup>612</sup> JOHN SALMOND, JURISPRUDENCE, 285 (1920).

<sup>613</sup> WILLIAM LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY, 46 (2008).

<sup>614</sup> Albert Alschuler, *The Two Ways to Think About the Punishment of Corporations*, 46 AMERICAN CRIMINAL L. REV., 1366-67 (2009).

personal fault needs to be established on the part of the individual officer or manager. Corporate liability, on the other hand, can be established on the basis of the low ‘respondeat superior’ standard<sup>615</sup> and the ‘collective knowledge’ doctrine,<sup>616</sup> which merely requires that the members of the company had knowledge in an aggregate. This mental fiction lowers the evidentiary bar for the victim plaintiffs significantly. Moreover, the individual officer does not most likely have the financial resources to cover both full compensatory and possibly punitive damages resulting from the misconduct. As Beale has pointed out, “because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals.”<sup>617</sup> It might therefore be considered inappropriate to hold the individual officer liable for an act that, granted, he carried out, but that was amplified in its impact through the corporate context in which it was committed.

Considering this mixed account, it might be overstated to talk about a ‘blessing in the sky,’ but even an unfavorable decision regarding corporate liability in *Kiobel* has a good chance of giving momentum to a fresh perspective on corporate liability, i.e., its scope and effectiveness. It might initiate some critical thinking about what corporate liability wants to achieve and if the current system delivers on this premise. Time is ripe to start a serious discussion that goes beyond mere legal reasoning (however as important as it is) to reflect on the traditional objectives of civil and criminal liability, and address the bigger picture implications of ATS (and ATS-like) litigation as a means of CSR implementation. Joseph Stiglitz, an American economist and Nobel Prize winner, has contributed to this discussion with his recent amicus brief that he filed in *Kiobel*, where he illustrated the macro-economic implications of ATS litigation.<sup>618</sup>

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<sup>615</sup> See Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AMERICAN CRIMINAL L. REV., 1488 (2009).

<sup>616</sup> See CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 118 (1993).

<sup>617</sup> Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AMERICAN CRIMINAL L. REV., 1484 (2009).

<sup>618</sup> Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011), Nos. 11-88 and 10-1491 (U.S. December 21, 2011) (Showing that the ATS incentivizes corporations in a way that creates economic efficiencies. Also, showing that the



The next, and final chapter, will analyze the micro-economic implications of ATS litigation in the United States and ATS-like litigation (primarily under the ‘partie civile’ procedure) in Europe; the focus will be implications on the corporate incentive structure by conducting psychological game analysis that examines the correlation between monetary incentives (in form of commands through compensatory awards or settlements arrangements) and the ‘crowding in’ or ‘crowding out’ phenomenon of intrinsic motivation on part of the corporation. The question at the heart of the analysis will be, to put it in Geiss’ words: “What now exists in law could prove to be wrong in terms of what it seeks to achieve.”<sup>619</sup>

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ATS has no negative implications either for economic development or the level of Foreign Direct Investment in less developed countries (LDCs), or for economic opportunities for U.S. Businesses abroad.).

<sup>619</sup> Gilbert Geis & Joseph DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AMERICAN J. OF CRIMINAL L., 374 (2002).

## CHAPTER 4

### The Behavioral Economics of Legal Liability Enforcement as an Exogenous Measure of CSR Implementation: About ‘Crowding’ and ‘Contractarian Compliance’

#### I. WHAT IS THE CHALLENGE?

Litigation, especially under the Alien Tort Statute (ATS), has been viewed as a main vehicle to make companies more compliant with human rights standards. Under a traditional legal theory this makes sense since the deterrence hypothesis<sup>620</sup> predicts that high levels of punishment will deter crime, i.e. non-compliance. However, in recent years the scholarship on law and social norms has shown that law can also have indirect effects on incentives that are not predicted under the standard hypothesis and that can undermine the effectiveness of the punishment.<sup>621</sup>

From a game-theoretical perspective the compliance problem in a CSR setting presents itself as a classical ‘prisoner’s dilemma.’<sup>622</sup> The economics discussion on CSR has focused heavily on endogenous compliance mechanisms as a solution, as will be discussed in detail below. This final chapter aims to bridge the legal, psychology, and economic scholarship to assess the effectiveness of human rights liability of corporations as a form of ‘CSR liability.’ The main conceptual challenge that will have to be addressed is how legal liability litigation, as exogenous implementation, can be accommodated under a notion of CSR, which traditionally and by its nature was intended as corporate self-regulation.<sup>623</sup> Amartya Sen has described the role of enforcement from a game-theoretical perspective as follows:

“[All players] would be both better off with a mutual non-confession contract, but it would be in the interest of each to break it unless there is enforcement. Rousseau’s

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<sup>620</sup> See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 3 (2000).

<sup>621</sup> See e.g. ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Robert Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 THE JOURNAL OF LEGAL STUDIES 67-99 (1987). See also LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010).

<sup>622</sup> See Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 275 (2011).

<sup>623</sup> See Archie Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUSINESS AND SOCIETY, 268-295 (1999).

much-researched-on statement on the necessity of being ‘forced to be free’ seems to be shockingly relevant. But in the absence of enforcement, they are both worse off despite strictly ‘rational’ behaviour.”<sup>624</sup>

It is controversial, however, determining what the most effective basis for enforcement would be: rationality, morality, external intervention? This chapter draws upon the scholarship on the relationship between intrinsic and extrinsic motivation in order to develop a metrics against which existing liability schemes on the statutory basis of the ATS and the European ‘partie civile’ procedure can be benchmarked and their incentive-compatibility can be assessed. For such purpose, this chapter conducts a behavioral economic analysis of CSR compliance informed primarily by the scholarship on the ‘crowding’ effect.<sup>625</sup> On this basis, this chapter will show that over a certain threshold of punishment (in terms of economic costs) the deterrence hypothesis holds, but under a certain threshold, legal enforcement is not effectively stirring corporate behavior. In the latter instance, the argument rests on intrinsic motivation and resorts to endogenous measures of CSR implementation. This chapter joins Lynn Stout when she posits that “[I]argely missing from all this talk about ‘incentives’ and accountability is any serious discussion of the possibility that we might encourage or discourage particular behaviors by appealing not to selfishness, but instead to the force of conscience.”<sup>626</sup> In this light, this work concludes the modest--even if not non-existent--role of liability with regard to CSR and promotes a hybrid framework of voluntary standards, social norms, and hard law.<sup>627</sup>

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<sup>624</sup> Amartya Sen, *Choice, Orderings, and Morality*, at 66 (1974), available at <http://tek.bke.hu/regikorok/sen/docs/choice.pdf> (Reprinted in: AMARTYA SEN, *CHOICE, WELFARE, AND MEASUREMENT*, 74-83 (1982) and in: Amartya Sen, *Choice, Ordering and Morality*, in: PRACTICAL REASON, 54-67 (Stephan Körner ed., 1974).

<sup>625</sup> See e.g. BRUNO FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION*. (1997); Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 *AMERICAN POLITICAL SCIENCE REVIEW*, 131-144 (2001); Huang, Peter & Wu, Ho-Mou, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 *JOURNAL OF LAW, ECONOMICS, & ORGANIZATION*, 390-406 (1994).

<sup>626</sup> LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE*, 5 (2010).

<sup>627</sup> Wouters/Chanet have also argued for a hybrid of a voluntary and regulatory approach to CSR. See Jan Wouters and Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 *NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS*, 265-66 (2008).

## II. CSR AND THE LAW

This chapter aims to examine how endogenous and exogenous cooperative incentives can complement one another in a compliance setting. Traditionally, CSR norms have been considered to be voluntary and not externally enforceable by the legal system, but are rather left to the realm of corporate self-regulation.<sup>628</sup> Instead of legal incentives, compliance with CSR principles is stirred by endogenous incentives, which can be induced by economic considerations (for example, competitive advantage)<sup>629</sup> or moral/intrinsic considerations under a social contract<sup>630</sup> paradigm.<sup>631</sup> However, for some time now, the policy debate has been rather ambiguous over the right approach to ensure that global business is conducted in a socially responsible and sustainable manner.<sup>632</sup> Even within the European Union's own institutional structure there is a divide on the question of regulation or self-regulation of CSR. Thus, the European Commission promotes a strictly voluntary approach to CSR,<sup>633</sup> whereas the European Parliament champions a mixed approach which also entails regulation and adjudication of issues related to the CSR agenda.<sup>634</sup> According to a voluntary paradigm, CSR encompasses general principles in a way that is rooted in business ethics. Much of the debate about regulation or self-regulation in the CSR context is a reflection of the underlying debate about the relationship

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<sup>628</sup> Among others, Lorenzo Sacconi has argued for a voluntary approach to CSR in terms of self-regulation based on a social contract paradigm. Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of 'Extended' Corporate Governance: an Explanation Based on The Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, in: *Reframing Self-Regulation in European Private LAW*, 289-343 (Fabrizio Cafaggi ed., 2006).

<sup>629</sup> See Michael Porter & Mark Kramer, *The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARVARD BUSINESS REVIEW, 78-92 (2006).

<sup>630</sup> This work applies Jean Rousseau's social contract formulation, defined as a collective sovereign existing in the form of the "general will." JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE)* (1762) [Translated by G. D. H. Cole] (Stating the idea of the social contract as follows: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.")

<sup>631</sup> See Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the 'Sense of Justice': A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 273-310 (2011).

<sup>632</sup> For a stakeholder focused approach to CSR, see FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984). For a critical perspective on a stakeholder centric approach to corporate governance, see Michael Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUSINESS ETHICS QUARTERLY, 235-56 (2002) (Arguing that the stakeholder theory provides no clear performance criteria against which management can be measured.)

<sup>633</sup> Commission Green Paper (EC) COM (2001) 366 final on Promoting a European Framework for Corporate Social Responsibility, at 8 (18 July 2001).

<sup>634</sup> Parliament Resolution (EC) of April 1999 on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104/180), Recital F (Stressing that "voluntary and binding approaches to corporate Regulation are not mutually exclusive.")

between ethics and the law.<sup>635</sup> Ethics are to be understood as a set of accepted social norms based on conventions and agreements<sup>636</sup> and as such go beyond what the mere law prescribes.<sup>637</sup> This last point is crucial for an understanding of CSR in a legal setting and resonates with the European Commission in its 2001 Greenpaper on CSR: “By stating their social responsibility and voluntarily taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case, companies endeavor to raise the standards of social development environmental protection and respect of fundamental rights [...]”<sup>638</sup>

### 1. The Limits of CSR: Fiduciary Duties

The fact that CSR constitutes social norms, typically not codified by the law can put corporate managers and officers, who pursue (also) public interest objectives, at odds with their fiduciary duties as prescribed by corporate law. This is true particularly in common law systems where the premise of ‘shareholder primacy’ still prevails. Under standard economic and corporate law theory, fiduciary duties require corporate managers to further shareholder (not public) interests following the maxim of shareholder value, i.e., profit maximization.<sup>639</sup> This delineation of fiduciary duties is in line with Milton Friedman’s position that businesses have no responsibilities other than profit maximization.<sup>640</sup> Einer Elhauge has examined, in much detail, the question whether corporate managers have the discretion to “sacrifice profits in the public interest” or whether such an operational decision would constitute a violation of management’s

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<sup>635</sup> See Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of ‘Extended’ Corporate Governance: an Explanation Based on The Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, 289, 294-95 (Fabrizio Cafaggi ed., 2006).

<sup>636</sup> See RICHARD HARE, *MORAL THINKING: ITS LEVELS, METHODS, AND POINT* (1981).

<sup>637</sup> See Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of ‘Extended’ Corporate Governance: an Explanation Based on The Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, 289, 295 (Fabrizio Cafaggi ed., 2006).

<sup>638</sup> Commission Green Paper (EC) COM (2001) 366 final on Promoting a European Framework for Corporate Social Responsibility, at para. 3 (18 July 2001).

<sup>639</sup> See, e.g., STEPHEN BRAINBRIDGE, *CORPORATION LAW AND ECONOMICS*, 419–29 (2002); MICHAEL DOOLEY, *FUNDAMENTALS OF CORPORATION LAW*, 97 (1995).

<sup>640</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM*, 133 (1982) (Stating that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”)

fiduciary duty towards its shareholders and would therefore open management up to shareholder litigation in form of derivative actions.<sup>641</sup> The answer first depends on whether or not a social norm also is enshrined in a legal norm. Under well-established law, managers have a fiduciary duty not to violate the law in pursuit of profit maximization.<sup>642</sup> If, however, a particular conduct is not illegal but is still considered socially irresponsible, the situation is less clear.<sup>643</sup> It is a commonly raised objection against corporate decisions made primarily in the social interest that profit-sacrificing discretion to further a public interest goal imposes a “tax” on dissenting shareholders.<sup>644</sup> However, Elhauge refutes this position by arguing that “even if one narrowly (and mistakenly) defined efficiency to equal shareholder profit-maximization, managerial discretion ... is still necessary because the economic efficiencies that come from delegating the management of a business to someone other than shareholders ... cannot be achieved without creating such discretion.”<sup>645</sup> In specific, in order for agency costs to be at an optimal level in economic terms, a tradeoff between the costs of monitoring and of allowing managerial discretion is necessary.<sup>646</sup> Therefore, a certain degree of discretion of the managers and corporate officers to pursue public interest goals is indicated and economically sound.<sup>647</sup> Elhauge agrees with Blair/Stout that such managerial profit-sacrificing discretion is consistent with a profit-maximization duty since it enables management to make operational decisions that are *ex post* profit-minimizing, but can be *ex ante profit-maximizing* since they might “encourage

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<sup>641</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 733-869 (2005).

<sup>642</sup> Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VIRGINIA LAW REVIEW, 1281, 1316–18 (2001) (Noting that this illegality exception with regard to fiduciary duties is implicit in fact that statutes allow corporations to be established only for “lawful” purposes); *Miller v. AT&T Co.*, 507 F.2d 759, 762–63 (3d Cir. 1974) (Holding that illegal conduct, even when undertaken to benefit the corporation, violates the fiduciary duty owed by management to the corporation).

<sup>643</sup> See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 761 (2005).

<sup>644</sup> See e.g., STEPHEN BRAINBRIDGE, *CORPORATION LAW AND ECONOMICS*, 421-22 (2002); JAMES COX & THOMAS LEE HAZEN, *CORPORATIONS*, 69–70 (2003).

<sup>645</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 776 (2005).

<sup>646</sup> Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 JOURNAL OF FINANCIAL ECONOMICS, 305 (1976).

<sup>647</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 776-77 (2005).

firm-specific investments by other stakeholders.”<sup>648</sup> Thus, the firm invests in a relationship with its stakeholders and other constituents built upon the premise that the latter will comply with social or moral norms beneficial to the company on the reciprocal expectation that the company will do the same.<sup>649</sup>

In the end, it all comes back to the question how to construe fiduciary duties and determine what the baseline is, i.e., what is in fact in the interest of the corporation, against which management decisions are being judged. The approaches vary among legal systems around the world. Traditionally, common law countries have favored a shareholder-focused approach and thus have construed fiduciary duties narrowly to extend merely to shareholders and their interests, whereas civil law jurisdictions in Europe and Asia have embraced stakeholder-centric governance structures.<sup>650</sup> However, even in common law systems the focus is slowly shifting towards stakeholder inclusion. Thus, the UK has revised its Companies Act in 2006 to extend the fiduciary duties of directors to include the duty “to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to [...] the interests of the company’s employees, the need to foster the company’s business relationships with suppliers, customers, and others, [and] the impact of the company’s operations on the community and the environment [...]”<sup>651</sup>

Even in the United States, a majority of states (30 in number) have adopted constituency statutes that allow managers to take non-shareholder interests into account, including the interest of employees, customers, suppliers and society as a whole;<sup>652</sup> moreover, the ‘business judgment rule’ gives discretion to managers to take into account stakeholder interests, which has

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<sup>648</sup> *Id.* [Citing: Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 *Virginia Law Review* 275, 285 (1999)].

<sup>649</sup> See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *NEW YORK UNIV. L. REV.*, 780 (2005).

<sup>650</sup> MICHAEL KERR, RICHARD JANDA, AND CHIP PITTS, *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS*, at 113, 162 (2009).

<sup>651</sup> U.K. Companies Act 2006, Art. 172 (1).

<sup>652</sup> Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 85 *ANNUAL SURVEY OF AMERICAN LAW*, 95 (1999).

been confirmed by case law.<sup>653</sup> Even the supposedly conservative Delaware court system has affirmed by case law that managers are permitted to reject a takeover bid because of “the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).”<sup>654</sup> The court even went as far as declaring that “stockholder interests” are “not a *controlling* factor.” [emphasis added].<sup>655</sup> Supporters of a traditional profit-maximization duty have often interpreted these statutory provisions and case law narrowly as to permit managers “making donations, being ethical, and considering non-shareholder interests only to the extent that doing so maximizes profits in the long run,”<sup>656</sup> whereas others have argued that it also allows stakeholder-sensitive operational decisions such as “declining to make profitable sales that would adversely affect national foreign policy, [or] keeping an unprofitable plant open to allow employees to transition to new work.”<sup>657</sup> In contrast to the U.S. common law system, which still holds firm on the traditional notion of fiduciary duties to be owed to the interests of profits for the shareholders in the absence of statutory or judicial rules indicating otherwise, civil law systems such as in France, Germany, or Japan take a different approach. The latter group of jurisdictions feature a system of “mandatory integrated decision-making,” which provides for an institutional representation of different stakeholder groups within the corporate governance structure.<sup>658</sup> This opens the door for construing a director’s fiduciary duty more broadly so as to also extend to the consideration of social and environmental matters.<sup>659</sup>

It is crucial to properly delineate the scope of fiduciary duties under the *lege contendo* since endogenous measures of CSR implementation, such as corporate self-commitment to social norms or stakeholder-sensitive business decisions that would forego immediate

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<sup>653</sup> See MICHAEL KERR, RICHARD JANDA, AND CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS, at 172 (2009).

<sup>654</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

<sup>655</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 764-65 (2005) [Citing: *Unocal*, 493 A.2d at 955-56].

<sup>656</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 766 (2005) [Citing: ROBERT CLARK, CORPORATE LAW, 682-83 (1986); American Bar Association, Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 THE BUSINESS LAWYER, 2269 (1990)].

<sup>657</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 764 (2005).

<sup>658</sup> See MICHAEL KERR, RICHARD JANDA, AND CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS, 113-14, 163 (2009).

<sup>659</sup> *Id.*, at 114.



profitability goals, are only permissible when they do not violate fiduciary duties under the law. However, when defining a manager's fiduciary duty, Elhauge has argued convincingly that "the corporation's sense of social responsibility [should not] end[...] at the law's edge," meaning it should not only extend to social norms that have been codified in law. Elhauge elaborates:

"[T]here is no reason to believe that the law and the markets within which corporations operate are able to induce desirable behavior so completely that it would be beneficial to create a corporate law duty that would insulate corporations from the social and moral processes that help regulate non-corporate business activity."<sup>660</sup>

This view is not only held by the legal scholars. Lorenzo Sacconi, a prominent economics scholar, has argued that by virtue of a *social* contract, fiduciary duties extend to all of the firm's stakeholders.<sup>661</sup>

## 2. The Conflation of Soft Law and Hard Law

This chapter will deal primarily with exogenous measures of CSR implementation in the form of legal enforcement. However, as will be seen below, external interventionist measures, such as legal liability enforcement, might not always be the most effective (i.e., incentive-compatible) way to achieve optimal deterrence results. Therefore, this dissertation suggests a framework for CSR liability that is informed by behavioral economics and remains complementary of endogenous and exogenous incentives for CSR compliance. It is to be noted that the line between endogenous and exogenous mechanisms in the CSR compliance context is not as stark as it might seem at first glance. The effect of voluntary standards, as the result of an endogenous process, can be legalized in various ways. Thus, contract law can be used to include social standards in supplier and employment contracts, among others, and thus make those standards legally enforceable. Also, regulatory agencies have often referred to voluntary company and industry codes as mandatory reporting requirements under their institutional

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<sup>660</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 868 (2005).

<sup>661</sup> Lorenzo Sacconi, *A Rawlsian View of CSR and the Game Theory of its Implementation (Part I): the Multi-Stakeholder Model of Corporate Governance*, in: CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE: THE CONTRIBUTION OF ECONOMIC THEORY AND RELATED DISCIPLINES, 157-93 (Lorenzo Sacconi et al. eds., 2011); Lorenzo Sacconi, *A Social Contract Account for CSR as an Extended Model of Corporate Governance (I): Rational Bargaining and Justification*, 68 JOURNAL OF BUSINESS ETHICS, 259-281 (2006).

structure.<sup>662</sup> Eventually, a public endorsement of voluntary standards can give rise to claims of misrepresentation or misleading conduct in the courts of law.<sup>663</sup> Even where these legal vehicles are not available, corporate codes of conduct and other sources of soft law can have a normative effect and eventually lead to the creation of new legal standards in the field. Underlying this reasoning is the premise that state behavior can be shaped by the social environment in which those states are embedded.<sup>664</sup> Thus, legal standards can be induced by social behavior, rather than merely stirring behavior in a regulatory function.<sup>665</sup> Caffagi also confirms the blurred line between soft and hard law by showing that private self-regulation can be subject to liability claims on various grounds, specifically a “failure to regulate,” “abuse of regulatory power,” or “defective or wrongful regulation.”<sup>666</sup>

### III. BEHAVIORAL MODELS FOR CORPORATE COMPLIANCE

#### 1. The Compliance Problem

Corporate compliance under a social contract paradigm poses two independent choice problems that have to be overcome. According to David Gauthier, one must distinguish between the entry into the agreement and the compliance with the norms under the agreement.<sup>667</sup> Entering into an agreement, such as a social contract, is a case of ex ante rational bargaining that requires the acceptance by *all* players recognizing mutual benefits under the agreement. Compliance, on the other hand, is a case of an ex post *personal* rationality decision to violate or comply with the agreement contingent upon the predicted behavior of the other players.<sup>668</sup> Thus,

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<sup>662</sup> David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 957 (2004) [Citing: Halina Ward (citation omitted)].

<sup>663</sup> See the case against Nike as an example of such a claim arguing that Nike’s public statement about good labor conditions in its Asian factories violates California consumer protection laws. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2555 (2003) (Stevens, J., concurring).

<sup>664</sup> See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS, 240 (2000).

<sup>665</sup> Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOKLYN JOURNAL OF INTERNATIONAL LAW, 347-48 (1998).

<sup>666</sup> Fabrizio Cafaggi, *Rethinking Private Regulation in the European Regulatory Space*, in: REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW, 3, 69 (Fabrizio Cafaggi ed., 2006).

<sup>667</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT*, 116-18 (1986).

<sup>668</sup> Amartya Sen, *Choice, Orderings, and Morality*, at 66 (1974), available at <http://tek.bke.hu/regikorok/sen/docs/choice.pdf>.

an important difference between the level of bargaining and implementation is that the former requires impartial rationality, whereas compliance requires personal rationality based on “separate but interdependent strategy choices.”<sup>669</sup> Substantively, the main question in the agreement and compliance context is also very different. Whereas the rational choice required when entering into an agreement focuses on joint benefits and fair distribution thereof, the rational choice required at the compliance level is based upon personal incentives to violate or comply with the norm agreed upon.<sup>670</sup> Sacconi/Faillo/Ottone describe the compliance challenge as follows:

“[T]he main problem to be solved in the compliance context is how a norm can also generate motivational causal forces strong enough to induce the execution of the norm in a situation where it may require a *prima facie* counter-interested behavior by the agent at least in the immediate term.”<sup>671</sup>

Unlike entering into an agreement, which is representative of a cooperative game, the compliance level follows the rules of a non-cooperative game.<sup>672</sup> The reason, according to Amartya Sen, among others, is an underlying conflict between individual rationality and social optimality.<sup>673</sup> The compliance problem presents itself as a so-called “prisoner’s dilemma”<sup>674</sup> what vividly illustrates the strained relationship between rationality and morality. Thus, even though it would be best for both parties (and thus the collective interest) if they both made a mutual contract to comply, each player is even better off if he or she defected (in pursuit of his or her individual self-interest). The problem is that this non-cooperative behavior produces suboptimal results since both players are now worse off despite their rational (i.e., self-interested behavior).<sup>675</sup> With regard to CSR, this means that, since in a ‘prisoner’s dilemma’ the only equilibrium point is non-compliance, the social contract will not be complied with under this

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<sup>669</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 274 (2011).

<sup>670</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT*, 116-18 (1986).

<sup>671</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 274-75 (2011).

<sup>672</sup> See DAVID GAUTHIER, *MORALS BY AGREEMENT*, 116-18 (1986).

<sup>673</sup> *Id.*

<sup>674</sup> The ‘prisoner’s dilemma’ is illustrated in LUCE, R. DUNCAN & RAIFFA, HOWARD, *GAMES AND DECISIONS* (1958).

<sup>675</sup> See, e.g., Amartya Sen, *Choice, Orderings, and Morality*, at 56-57 (1974).

Hobbes's 'state of nature.'<sup>676</sup> The solution would be, as suggested by Sacconi/Faillo/Ottone, to try to change the underlying 'state of nature' by agreeing on a mode of mutually cooperative behavior instead of rational egoistic non-cooperative interaction between the players in the game.<sup>677</sup> This joins the 'contractarian' approach to compliance.<sup>678</sup> The challenge, however, is that compliance with such a cooperative agreement is not consistent with individual egoistic incentives to act.<sup>679</sup> Therefore, additional features must be added to the game in order to change the 'state of nature' so as not to depict a 'prisoner's dilemma.'<sup>680</sup> Several different attempts have been suggested by scholars in the field in order to change the preferences in a way that not only includes egoistic self-interest but also reconciles the discrepancy between individual and societal interest.

## **2. Solutions to The Compliance Problem**

### **(a) Trust**

An increasing body of economic scholarship has elucidated the significance of trust in economic interactions. Trust has widely been recognized to be a key determinant for economic performance. Kenneth Arrow has argued that a lack of trust and moral values can create serious market inefficiencies.<sup>681</sup> This hypothesis has been supported by cross-country empirical evidence which found that there is a positive correlation between higher trust levels and higher economic performance.<sup>682</sup> Trust, for example, can solve market failures, especially in financial

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<sup>676</sup> See Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the 'Sense of Justice: A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 276 (2011); see also Andrew Alexandra, *Should Hobbes's State of Nature Be Represented as a Prisoner's Dilemma?*, 30 SOUTHERN JOURNAL OF PHILOSOPHY, 1-16 (1992).

<sup>677</sup> *Id.*

<sup>678</sup> Lorenzo Sacconi, *A Rawlsian View of CSR and the Game Theory of its Implementation (Part I): the Multi-Stakeholder Model of Corporate Governance*, in: CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE: THE CONTRIBUTION OF ECONOMIC THEORY AND RELATED DISCIPLINES, 158 (Lorenzo Sacconi et al. eds., 2011).

<sup>679</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the 'Sense of Justice: A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 275-76 (2011);

<sup>680</sup> See *id.*, at 276.

<sup>681</sup> KENNETH ARROW, THE LIMITS OF ORGANIZATION (1974).

<sup>682</sup> See ROBERT PUTNAM, ROBERT LEONARDI AND RAFFAELA NANETTI, MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY (1993); see also Stephen Knack and Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 THE QUARTERLY JOURNAL OF ECONOMICS, 1251-1288 (1997).

markets,<sup>683</sup> or simply foster cooperation among actors and thus create market efficiencies.<sup>684</sup>

There can be many determinants of trust, one of them “sociality,” as suggested by Ben-Ner/Putterman. Thus, they have shown the important role of “sociality” as a determinant of trust (experimentally supported in trust games) and have suggested an “extended preference” model beyond “simply payoff maximization.”<sup>685</sup> The underlying reasoning suggested by Ben-Ner/Putterman, is that “while the company itself is not a human being with an evolved social nature, its managers, ... employees, customers, and even the politicians who determine relevant regulations and their constituents, are.”<sup>686</sup> Thus, in order for a company to operate successfully in a world of individuals, it will have to show a “human face” to its customers, employees, and the constituents surrounding them. Only then will a company be relatable in a way that creates trust on the part of those individuals.<sup>687</sup> Other scholars also have assumed that agents have preferences not only for money, but also for social goods and that those preferences can be motivational drivers for CSR.<sup>688</sup> Benabou/Tirole introduced another motivational factor in form of reputation. Along the lines of the crowding theory, which will be discussed in detail below, they found that monetary extrinsic incentives ‘crowd out’ social behavior because they decrease the altruistic perception and thus reputational benefits for the company.<sup>689</sup>

Aside from intrinsic motivation (as opposed to extrinsic motivation), which is the main focus of this dissertation, it is to be noted that CSR also can be viewed in a different way, namely a market-based way to address social issues. Thus, James Andreoni argues that corporate giving and political engagement are imperfect substitutes, whereas CSR (in terms of corporate

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<sup>683</sup> Luigi Guiso, Paola Sapienza and Luigi Zingales, *Trusting the Stock Market*, THE JOURNAL OF FINANCE, 2557-2600 (2008).

<sup>684</sup> Gianluca Grimalda and Luigi Mittone, *Generalized Trust: An Experimental Perspective*, in: SOCIAL CAPITAL, CORPORATE SOCIAL RESPONSIBILITY, ECONOMIC BEHAVIOR AND PERFORMANCE, 260, 278 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).

<sup>685</sup> Avner Ben-Ner and Louis Putterman, *Trusting, Trustworthiness, and CSR: Some Experiments and Implications*, in: CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE: THE CONTRIBUTION OF ECONOMIC THEORIES AND RELATED DISCIPLINES, 410, 413 (Lorenzo Sacconi et al. eds., 2011).

<sup>686</sup> *Id.*

<sup>687</sup> *See id.*, at 428.

<sup>688</sup> *See* Timothy Besley and Maitreesh Ghatak, *Competition and Incentives with Motivated Agents*, 95 AMERICAN ECONOMIC REVIEW, 616-36 (2005).

<sup>689</sup> *See* Roland Benabou and Jean Tirole, *Incentives and Prosocial Behavior*, 95 AMERICAN ECONOMIC REVIEW, 1652-78 (2006).

involvement) is a function of so-called “warm glow” preferences (i.e., the utility derived merely from the act of giving). This appeals to consumers or investors endowed with social preferences in addition to their pattern of consumption or investment.<sup>690</sup> Jason Saul has taken the market-based approach to CSR even further, in a more polemic but no less compelling way, by illustrating that there is “a market for social change” in which social change can be leveraged to drive business profitability, for example, by tapping into underserved markets (such as ‘food deserts’) or developing sub-market products that address a social need.<sup>691</sup>

### **(b) Conventions**

Focusing instead on a company’s intrinsic motivation to comply with social norms, the conventionalist school of thought has offered a different solution to the compliance problem.<sup>692</sup> Hume describes a convention as a “general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules.”<sup>693</sup> Sacconi/Faillo/Ottone describe conventions from a game-theoretical perspective as regularities of behavior that emerge in repeated games and that are common knowledge to all players. From a game-theoretical perspective, regularity gradually converges to a coordination equilibrium. Thus, conventions are Nash equilibria with no incentive for any player to deviate from the given regularity provided there are mutually consistent expectations with regard to preferences and actions.<sup>694</sup> However, conventional theory is only of limited use to solve the compliance problem since, as Sacconi/Faillo/Ottone have pointed out, it overstates the significance of repeated models. The “typical failure of individual rationality” which leads to suboptimal non-cooperative results is ignored as well as the fact that there initially is “complete

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<sup>690</sup> James Andreoni, *Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence*, 97 JOURNAL OF POLITICAL ECONOMY 1447-58 (1989)

<sup>691</sup> JASON SAUL, SOCIAL INNOVATION INC., 5 Strategies for Driving Business Growth Through Social Change (2010).

<sup>692</sup> See e.g., David LEWIS, CONVENTIONS. A PHILOSOPHICAL STUDY (1969); AOKI, MASAHIKO, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001) (Exploring the mechanism of evolution of different organizational conventions.)

<sup>693</sup> DAVID HUME, A TREATISE OF HUMAN NATURE, 490 (2000[1740]).

<sup>694</sup> See Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 276-77 (2011).

uncertainty about which of the possible conventions will emerge.”<sup>695</sup> Moreover, even after the emergence of a convention of coordination, already the uncertainty about what constitutes the optimal game solution will have suboptimal outcome consequences.<sup>696</sup> Therefore, conventional theory offers a valid solution to the compliance problem but it lacks a reliable selection procedure for the equilibrium.<sup>697</sup>

### (c) Rational Choice and Moral Dispositions

In another effort to reconcile rationality and morality in the compliance game, some scholars have revised rationality to include the rational choice of psychological dispositions to comply with a social norm.<sup>698</sup> Therefore, Gauthier as a representative of the rational-choice literature, views “morality as a set of rational principles for choice.”<sup>699</sup> The self-proclaimed goal of Gauthier’s moral theory is the “generation of moral constraints as rational.”<sup>700</sup> However, this approach also proves problematic since it reduces a moral disposition to comply with a norm of cooperation to a question of rationality. But if a disposition, and whether to develop it, is considered to be a rational choice, then this entails that a rational person decides to abide by a moral norm even before a corresponding disposition is able to constrain his behavior.<sup>701</sup> Also, other scholars have agreed that framing moral dispositions to comply with a norm as a rational choice decision produces contradictions.<sup>702</sup> Sacconi/Faillo/Ottone vividly show where a strictly rational choice approach to morality falls short and how morality can be introduced differently into the compliance game in order to yield optimal outcomes:

“What seems mistaken in this approach, however, is not the idea of analyzing moral dispositions but the idea that undertaking moral dispositions may be a matter of practical reasoning and sophisticated instrumental decision calculus, whereas it could be a matter of developing a moral sentiment (the ‘desire’ to be just) endowed with some motivational

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<sup>695</sup> See *id.*, at 278.

<sup>696</sup> *Id.*, at 11.

<sup>697</sup> See *id.*, at 7.

<sup>698</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); David Gauthier, *Economic Man and the Rational Reasoner*, in: *FROM POLITICAL ECONOMY AND BACK?*, 105-31 (James Nichols, Jr. and Colin Wright eds., 1990); Edward McClennen, *Rationality Constitutions and the Ethics of Rule*, 4 *CONSTITUTIONAL POLITICAL ECONOMY*, 94-118 (1993).

<sup>699</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT*, at 5 (1986).

<sup>700</sup> *Id.*, at 7.

<sup>701</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 *ANALYSE & KRITIK*, 283 (2011).

<sup>702</sup> See e.g., KENNETH BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT, VOL. I, PLAYING FAIR* (1994).

force on its own, and capable of generating additional motivational drives to act that can be introduced into the players' preference systems—under proper conditions to be defined.”<sup>703</sup>

Based on this deliberation, Sacconi/Faillo/Ottone suggest a different, novel approach to the compliance problem that connects this notion of moral sentiment to the social contract. Thus, the social contract itself has normative effect. The compliance decision is linked to the rationality choice of an ex ante social contract agreement.<sup>704</sup> Also, Amartya Sen has pointed out the conceptual shortfalls of framing morality as a rational choice. He writes that “[m]orality would seem to require a judgment among preferences whereas rationality would not.”<sup>705</sup> This makes both concepts incompatible by nature. Sen therefore suggests changing the focus of the choice analysis to express morality “in form of choice between preference patterns rather than between actions.”<sup>706</sup> For the purpose of this dissertation, which deals with aspects of law and morality with regard to CSR, the ‘contractarian’ approach to compliance is particularly suited, since it addresses the conceptual challenges of reconciling the notion of regulation and self-regulation under a CSR paradigm. Under a ‘contractarian’ understanding of compliance, CSR can be construed as an integration of contracts, in terms of ex ante impartial agreements based on an abstract norm of extended fiduciary duties.<sup>707</sup> Through self-endorsement by the company (for example, with a corporate code of conduct), the company could then be sued for a breach of its own commitment. Acknowledging that we are no longer in the realm of the legal order per se (“de jure condito”), but rather in the realm of normative innovation (“de jure condendo”), the ‘contractarian’ approach enables accommodating legal obligations and their external

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<sup>703</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 284 (2011).

<sup>704</sup> *See Id.*, at 284.

<sup>705</sup> Amartya Sen, *Choice, Orderings, and Morality*, at 55 (1974).

<sup>706</sup> *Id.*, at 59.

<sup>707</sup> *See* Giacomo Degli Antoni and Lorenzo Sacconi, *Modeling Cognitive Social Capital and Corporate Social Responsibility as Preconditions for Sustainable Networks of Relations*, in: SOCIAL CAPITAL, CORPORATE SOCIAL RESPONSIBILITY, ECONOMIC BEHAVIOR AND PERFORMANCE, 161, 163 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).



enforcement under the traditional notion of CSR, namely, norms intended to be voluntary by nature and subject merely to corporate self-regulation.<sup>708</sup>

**(d) A ‘Sense of Justice’<sup>709</sup> in a ‘Contractarian’ Compliance Model**

Sacconi/Faillo/Ottone’s ‘contractarian’ compliance approach draws upon John Rawl’s ‘sense of justice’ which is evolving from an ex ante agreement (under a ‘veil of ignorance’) on principles of justice and is then providing its own endogenous support of the stability of just institutions in a well-ordered society.<sup>710</sup> The moral sentiment, as quoted above, is consistent with Rawl’s ‘sense of justice.’<sup>711</sup> As Sacconi/Faillo/Ottone have pointed out, Rawl’s theory “was long overlooked by economists and game theorists because it is at odds with the methodologies of rational choice;”<sup>712</sup> rather, it assumes a moral sentiment as a socio-psychological result, which, independent from rational choice, induces just and fair behavior. But it is exactly this socio-psychological approach to moral sentiments in society which make Rawl’s theory so uniquely suited to capture the role and functioning of CSR in modern-day society. It seems to align more with reality to assume CSR compliance as a product of a higher moral sentiment than as a matter of rational choice considering that, at least under a traditional model of the firm, a firm’s self-interest is shareholder value maximization not societal interests. As Sacconi/Faillo/Ottone have put it, “the idea [of Rawl’s theory] is that motives to act are now enriched with a *new motivation* able to overcome the counteracting tendency to injustice” [emphasis added] in terms of defecting in a ‘prisoner’s dilemma’-like situation.<sup>713</sup>

In a psychological game experiment, Sacconi/Faillo/Ottone have shown how Rawl’s ‘sense of justice’ paradigm can be captured by a ‘behavioral model of contractarian conformist preference.’<sup>714</sup> They describe the ‘sense of justice’ as a psychological equilibrium based on

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<sup>708</sup> See Archie Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUSINESS AND SOCIETY, 268-295 (1999).

<sup>709</sup> JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>710</sup> *Id.*

<sup>711</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 286, 291 (2011).

<sup>712</sup> *Id.*, at 284.

<sup>713</sup> *Id.*, 287.

<sup>714</sup> See *id.*, 284, 291.

conformist preferences, thus providing a means of endogenous social contract compliance.<sup>715</sup>

Accordingly, economic agents are not only incentivized by ‘consequentialist,’ i.e. egoistic, but also by ‘conformist’ preferences in terms of intrinsic motivation to act in accordance with an agreed upon principle contingent on reciprocal beliefs and actions of the other agents.<sup>716</sup> The findings show that agents are not only incentivized by material payoffs but also by psychological payoffs.<sup>717</sup> Sacconi/Faillo/Ottone explain the theory of ‘contractarian conformist preference’ as follows:

“[A] disposition to conform with agreed principles of justice, conditional on [reciprocal beliefs] [(‘contractarian’ aspect)], may enter the preference system of a player by assigning psychological payoffs—additional to material payoffs—to choices that approximate an ideal of justice given the other players’ choices and their level of conformity [(‘conformist preference’ aspect)].”<sup>718</sup>

On this premise, Sacconi/Faillo/Ottone model the compliance problem based on psychological game theory,<sup>719</sup> but also add a new consideration to the game, namely that “conformity preferences depend on an ex ante impartial agreement on a principle.”<sup>720</sup> Psychological payoffs are introduced to the preference system of the firm (and its stakeholders) by virtue of the *rational choice* of a social contract agreement and the subsequent development of a *moral sentiment*. The ‘contractarian’ compliance model offers a solution to the ‘prisoner’s dilemma’ in a compliance setting in a way that is not at odds with rational choice theory but still accounts for the socio-psychological reality of CSR. As will be discussed below, other behavioral economic studies also have added intrinsic motivation associated with psychological payoff to the preference system in order to explain the relationship between motivation and behavior beyond the mere ‘price effect,’ which states that as the price increases, supply increases

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<sup>715</sup> *Id.*, at 285.

<sup>716</sup> *Id.*, at 292-93.

<sup>717</sup> See Giacomo Degli Antoni and Lorenzo Sacconi, *Modeling Cognitive Social Capital and Corporate Social Responsibility as Preconditions for Sustainable Networks of Relations*, 161, 165 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).

<sup>718</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 285 (2011).

<sup>719</sup> A similar approach has been taken by Matthew Rabin. See Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AMERICAN ECONOMIC REVIEW, 1281-1302 (1993).

<sup>720</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 285 (2011).

and demand falls. For example, Bruno Frey has shown that even when monetary incentives in form of fines are awards or involved, behavioral preferences are influenced by psychological payoffs as well.<sup>721</sup>

#### **IV. THE EFFECTS OF LEGAL RULES ENFORCEMENT ON CORPORATE BEHAVIOR: THE ‘CROWDING OUT’ PHENOMENON IN THE COMPLIANCE GAME**

##### **1. The ‘Crowding’ Effect in Exogenous Social Contract Enforcement**

The crowding theory has introduced a well-established empirical psychological effect<sup>722</sup> into economic theory in an attempt to account for complex human behavior that cannot be entirely captured by standard economic theory.<sup>723</sup> For the purpose of this work, corporate behavior is understood as managerial-decision making.<sup>724</sup> Behavioral economic studies have been coined particularly by Bruno Frey, who has shown that, under conditions to be identified, external intervention in the form of monetary rewards or commands does not necessarily induce behavior in the way desired and as predicted under the ‘price effect’ of standard economic theory. Rather, there are ‘hidden costs’ (and potentially also gains) associated with external incentives (i.e., set from outside the person considered).<sup>725</sup> According to Frey, the ‘crowding out’ phenomenon is the only socio-psychological effect capable of *reversing* and not only *weakening* the ‘price effect’.<sup>726</sup> Frey/Bohnet/Huck have studied the crowding out effect in the particular context of contract enforcement with regard to trustworthiness. In an experimental

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<sup>721</sup> BRUNO FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION (1997); Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131-144 (2001).

<sup>722</sup> Social psychologists have shown that external interventions in form of rewards diminish individuals’ intrinsic motivation. See e.g. Edward DECI AND RICHARD FLASTE WHY WE DO WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY (1995); MARK LEPPER & DAVID GREENE, THE HIDDEN COSTS OF REWARDS: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION (1978).

<sup>723</sup> Applying those psychology studies to an economics context has led to the development of the ‘crowding’ theory. For an overview of empirical evidence of the crowding effect in economic studies and experiments, see Frey, Bruno, *Motivation crowding theory – a new approach to behavior*, in BEHAVIOURAL ECONOMICS AND PUBLIC POLICY, ROUNDTABLE PROCEEDINGS, 37-54 (Australian Government Productivity Commission, 2008).

<sup>724</sup> Elhauge uses a similar premise in her analysis of legal implications of corporate behavior in terms of “any managerial decision to use their operational discretion to sacrifice corporate profits.” Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NEW YORK UNIV. L. REV., 740 (2005).

<sup>725</sup> *Id.*, at 39, 42.

<sup>726</sup> *Id.*, at 53.

game, they have shown that the crowding effect modifies and to some extent refutes standard economic analysis of law according to which compliance is more likely the higher the expected cost of breach.<sup>727</sup> Specifically, it has been found that certain rules of law and their enforcement can have a non-monotonic effect on behavior. Therefore, the structure and functioning of a legal enforcement mechanism (under proper conditions to be defined below) can ‘crowd out’ trustworthiness and intrinsic motivation to act and therefore affect behavior in a counterintuitive way that is not compatible with the incentives intended under the law. In countries where legal (contract) enforcement mechanisms are more prevalent, “interpersonal trust is replaced by institutional trust in the legal system” and intrinsic motivation to comply is replaced by external incentives.<sup>728</sup> The Bohnet/Frey/Huck crowding model provides important information on the relationship of formal law and intrinsic dispositions by showing that “the effectiveness of each depends on the other.”<sup>729</sup> This is an important aspect in order to understand and assess the effectiveness of current liability schemes to hold corporations liable for human rights violations.

The work by Bohnet/Frey/Huck adds an additional factor to the compliance problem as laid out above, namely legal rules and their effect on preferences. Whereas the theory of ‘contractarian conformist preferences’ introduces a model for endogenous support of an underlying norm, the theory of ‘motivation crowding’ provides a model when exogenous measures of implementation are involved, such as in form of legal enforcement. Therefore, another implementation level is added to the compliance problem leading to a situation where cooperative preferences cannot only be induced endogenously by the underlying social contract, but potentially also by legal rules depending on how those rules and their enforcement are structured.<sup>730</sup> In the Bohnet/Frey/Huck model, “the (legal) rules of a game have [...] effects on behavior because they affect preferences.”<sup>731</sup> Thus, unlike other scholarship on rules and

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<sup>727</sup> BRUNO FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION (1997); Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 131(2001).

<sup>728</sup> *Id.*, at 141.

<sup>729</sup> *Id.*, at 132.

<sup>730</sup> *See id.*, at 136.

<sup>731</sup> *Id.*, at 141.

preferences before, which provided for *differences* in preferences,<sup>732</sup> the Bohnet/Frey/Huck model accounts for *changes* in preferences depending on the legal rules of the game. This model provides a viable framework for assessing the incentive-compatibility of existing liability schemes for corporate human rights enforcement and identifying key characteristics with regard to legal rules and their enforcement, which have the potential to change preferences as predicted under the standard deterrence hypothesis. The ‘crowding’ theory suggests that under specific conditions (to be elaborated below) there is a trade-off between intrinsic and extrinsic motivation that can diminish the effectiveness of external legal enforcement. However, as Osterloh/Frey have pointed out, “[t]he most important condition for this trade-off is the existence of intrinsic motivation in the first place.”<sup>733</sup> This means that the ‘crowding’ theory cannot be applied in vacuum but requires a sound basis which induces intrinsic motivation in the first place. This basis is provided by a ‘contractarian conformist’ approach to preference formation.

It is to be noted that the ‘contractarian’ compliance model and the crowding theory share the important common feature of assuming that psychological costs are associated with breaching any agreement. Those psychological costs are considered motivational drivers and are capable of stirring behavior in an endogenous and exogenous implementation system.<sup>734</sup> However, there is also an important conceptual difference between the two models with regard to the contractual basis of their respective experimental analysis. Bohnet/Frey/Huck examine preferences in the context of *legal contract* enforcement (with regard to normal life contracts such as employment, investment, or lending contracts), but not in the context of *social contract*

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<sup>732</sup> Huang/Wu used a similar psychological game model as Bohnet/Frey/Huck, but the preferences (with regard to beliefs) in their model were fixed; Huang/Wu’s model did therefore not account for dynamic changes from one level to another. (Huang, Peter & Wu, Ho-Mou, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION, 390-406 (1994)). For a similar approach, see also Ernst Fehr and Klaus Schmidt, *A Theory of Fairness, Completion and Cooperation*, 114 QUARTERLY JOURNAL OF ECONOMICS, 817-68 (1999).

<sup>733</sup> Margit Osterloh and Bruno Frey, *Motivation and Knowledge Transfer*, 11 ORGANIZATION SCIENCE, 541 (2000).

<sup>734</sup> See Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 132 (2001). See Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 273, 285 (2011).

enforcement.<sup>735</sup> Therefore, the Bohnet/Frey/Huck model relies on a clear first and second mover dynamic that entails a deliberate choice on part of the first mover to enter a legal contract based on the perceived trustworthiness of the second mover.<sup>736</sup>

The goal of this chapter is to apply the crowding theory to exogenous measures of CSR implementation, specifically legal enforcement, in order to shed light on the effectiveness (in terms of incentive-compatibility) of existing legal liability regimes, which have been examined in the previous chapters. The conceptual challenge of doing so is that instead of real world legal contracts, we would have to presuppose a social contract as the basis for the crowding analysis. Certainly, one could object that the mechanism that induces intrinsic motivation to such legal contracts in *sensu stricto* is different from a social contract. However, it can be argued that the acceptance of a real world legal contract entails a ‘sense of justice’ in a way similar to a social contract since both constitute an impartial agreement that is the result of a rational bargaining game.<sup>737</sup> For the purpose of applying the crowding theory to legal enforcement under a social contract rather than a real world contract, this work uses the ‘contractarian’ compliance model to determine the contractual basis that induces trustworthiness and intrinsic preferences, which then might be subject to change depending on the respective legal rules of the game under the conditions identified by Bohnet/Frey/Huck and which are discussed below.

## **2. Weak and Strong Stakeholders**

Agreeing to a principle under the conditions formulated by Rawl and experimentally supported by the model of ‘contractarian conformist preferences’ introduces trustworthiness and reciprocal dispositions to cooperate into the compliance game, which is emblematic of the CSR implementation process. This understanding of CSR is closely related to and consistent with the notion of so-called ‘cognitive social capital,’ defined as dispositions and reciprocal beliefs which

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<sup>735</sup> See Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 132 (2001).

<sup>736</sup> See *id.*, at 131, 141.

<sup>737</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the ‘Sense of Justice:’ A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 273-74 (2011).

lead to trustworthy attitudes based on preferences to cooperate.<sup>738</sup> Social capital is understood as ‘generalized trust’ that induces a disposition to comply with social norms.<sup>739</sup> Like a social contract, social capital induces cooperation in the network (in terms of social networks that connect agents, here stakeholders).<sup>740</sup> Looking at CSR in terms of social capital, Antoni/Sacconi were able to draw important conclusions with regard to the effect that the credible threat of ‘punishment’ on the part of stakeholders vis-à-vis the firm would have on corporate behavior. Their findings shed light on the effects of (prospective) ‘punishment’ in a compliance game and are therefore indicative for the analysis of the behavioral economics of legal enforcement as a form of punishment.

Antoni/Sacconi show that one of the main factors to promote ‘structural SC’ in form of “cooperative linkages among agents” is “the existence of credible sanctions against the agents that decide not to cooperate.”<sup>741</sup> For this purpose, they introduce the distinction between weak and strong stakeholders. The former bring strategic assets to the firm rendering the discounted payoff of cooperating positive for the firm. In contrast, the latter do not dispose of any such assets with the effect that in this case the payoff of cooperating is negative for the firm. The firm therefore has no incentive to cooperate with weak stakeholders. Strong stakeholders, however, have actual leverage to punish the firm in cases of non-compliance.<sup>742</sup> Based on a psychological game model, Antoni/Sacconi show that if there exists an agreement between strong stakeholders and the firm on social norms, the strong stakeholders themselves “activate the other components of the firm’s and stakeholders’ cognitive social capital,” which in turn properly incentivizes strong stakeholders to punish the firm if it is not cooperating with weak stakeholders.<sup>743</sup>

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<sup>738</sup> Giacomo Degli Antoni and Lorenzo Sacconi, *Modeling Cognitive Social Capital and Corporate Social Responsibility as Preconditions for Sustainable Networks of Relations*, 161, 162 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).

<sup>739</sup> See e.g. Stephen Knack and Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 THE QUARTERLY JOURNAL OF ECONOMICS, 1251-1288 (1997).

<sup>740</sup> See Giacomo Degli Antoni and Lorenzo Sacconi, *Modeling Cognitive Social Capital and Corporate Social Responsibility as Preconditions for Sustainable Networks of Relations*, 161, 165-66 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).

<sup>741</sup> *Id.*, at 162.

<sup>742</sup> *Id.*, at 164.

<sup>743</sup> *Id.*, at 226.

Therefore, Antoni/Sacconi in a sense specify the theory of ‘contractarian conformist preferences’ in a way that an agreement on CSR principles between *any* stakeholder and the firm is not sufficient to establish a perfect psychological equilibrium. Rather, *strong* stakeholders (since they have leverage over the firm) need to enter into a social contract with the firm and need to be endowed with high cognitive social capital in order for cooperative behavior to be induced throughout the entire network, including between weak stakeholders and the firm.<sup>744</sup>

The option to resort to private stakeholder litigation can make weak stakeholders strong within this framework.<sup>745</sup> Thus, provided that those strong stakeholders are endowed with high ‘social capital’ (i.e., beliefs and dispositions) and conformist preferences, they have the right incentive to ‘punish’ the corporation if the latter does not cooperate. A punishment game can be modeled where the equilibrium strategy is cooperative behavior between the firm and its stakeholders induced by psychological payoffs under a social contract agreement and reinforced with the threat of legal litigation. ‘Punishment’ under a game-theoretical framework means endogenous punishment in terms of ‘no cooperation’ or ‘defect.’ Under economic theory ‘punishment’ is usually understood as a market strategy that does not entail resorting to an institutional legal framework that is superimposed on the transactions in the game.<sup>746</sup> However, because of bound rationality limitations, it is suggested here that legal litigation may play a crucial complementary role to induce cooperation since it improves the bargaining position of stakeholders in the bargaining and compliance game.

Therefore, this dissertation embraces a model of psychological equilibria based on conformist preferences, as an endogenous element of social contract compliance, that can be effectively complemented by legal liability litigation, as an exogenous element, as long as such social preferences are not changed under the ‘crowding’ theory below.

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<sup>744</sup> See *id.*, at 165, 226.

<sup>745</sup> See Giacomo Degli Antoni and Lorenzo Sacconi, *Modeling Cognitive Social Capital and Corporate Social Responsibility as Preconditions for Sustainable Networks of Relations*, 162, 166 (Lorenzo Sacconi and Giacomo Degli Antoni eds., 2011).

<sup>746</sup> See *id.*, at 165-66.



### 3. The Threshold Model

In their game experiment on contract enforcement, Bohnet/Frey/Huck have found a threshold effect where over a given level of external enforcement, legal incentives are effective in the conventional economics sense, but under the threshold level legal enforcement can be counterproductive since there are 'hidden costs' in terms of intrinsic motivation being reduced, i.e., 'crowded out.'<sup>747</sup>

The level of enforcement is determined by the probability of bearing the expected cost of non-compliance.<sup>748</sup> When the level of enforcement is high in those terms, no crowding out of intrinsic motivation is taking place since preferences of the actors are irrelevant in this setting. Personal trust is substituted by institutional trust and intrinsic motivation with extrinsic motivation. Actors in a game under these given conditions are effectively deterred by the external intervention.<sup>749</sup>

Under a certain threshold of the enforcement probability, which is an empirical matter as demonstrated below, trust in the contracting partner's behavior is crowded out.

Bohnet/Frey/Huck describe this as a case of a medium level of enforcement in the terms above.

At a level of medium legal enforcement, the expected payoff of entering the contract is greater than abstaining even if the second mover will breach the contract.<sup>750</sup> This leads to a situation where trustworthiness is irrelevant for the first mover's decision to enter the contract and is therefore crowded out. The second mover has no incentive to comply with the contract since there is no demand for trust and honesty. It is the classical 'prisoner's dilemma' in a compliance setting where betrayal is more beneficial to the defecting party than cooperating.<sup>751</sup>

Consequently, the first mover cannot rely on the second mover's reciprocal cooperative behavior or on the legal system since the cost of breach and the effectiveness of enforcement are diminished.

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<sup>747</sup> See BRUNO FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION (1997).

<sup>748</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 132 (2001).

<sup>749</sup> *Id.*, at 132.

<sup>750</sup> *Id.*

<sup>751</sup> *Id.*

Eventually, if the level of enforcement drops further to a low (as opposed to medium) level, the experimental study shows that compliance rates are high again. This confirms that the probability of contract enforcement and the associated costs of breach have a non-monotonic effect on compliance behavior.<sup>752</sup> Thus, contract compliance is not only likely when, as expected, “the ... cost of breach is sufficiently *large* but also [,counter-intuitively,] when it is sufficiently *small*.” [emphasis added].<sup>753</sup> The reason underlying this finding is that a low level of legal enforcement tends to ‘crowd in’ trustworthiness since the first mover cannot rely on the legal system to deter the second mover from breaching the agreement. The first mover therefore exercises cautious discretion before entering into a contract which in turn incentivizes the second mover to comply, with honesty being ‘crowded in.’<sup>754</sup> As Ronald Wintrobe puts it, “[t]he absence of enforceability generates a demand for trust.”<sup>755</sup> Thus, in contractual relationships with weak enforcement, behavior is not guided by the expected costs of breach (as a function of the extrinsic motivation provided by legal system), but by intrinsic motivation.

One may conclude under this experimental game model that “[t]he worst legal regime is not one in which contracts cannot be enforced but one with an intermediate level of enforceability.”<sup>756</sup> So, there are two viable options: either “more order with more law or more order with less law.”<sup>757</sup> With regard to the ‘crowding in’ effect in low enforcement systems, prudence is required when applying this finding to the realm of social contract compliance, the reason being that the social contract, unlike a formalistic legal contract, cannot simply be assumed to be already ‘out there’ without any further specifications. In fact, even Bohnet/Frey/Huck concede that their finding that more order can be achieved through trust-based relationships (instead of legal enforcement) only holds “when each party can predict the

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<sup>752</sup> *Id.*, at 132, 141

<sup>753</sup> *Id.*, at 132.

<sup>754</sup> *Id.*

<sup>755</sup> Ronald Wintrobe, *Some Economics of Ethnic Capital Formation and Conflict*, in: NATIONALISM AND RATIONALITY, 43, 46 (Albert Breton et al. eds., 1995).

<sup>756</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 136 (2001).

<sup>757</sup> *Id.*

other's likelihood of cooperation."<sup>758</sup> Under regular legal contracts such prediction might be easier to make than under a social contract paradigm, especially when based on a 'contractarian' compliance model as suggested here for the reasons laid out above.

Thus, Sacconi/Faillo/Ottone find that a 'sense of justice,' as a moral sentiment induced by an impartial social contract agreement, requires a reciprocal mental element entailing "shared knowledge" that all actors agreed and "shared belief" that they are all behaving in a cooperative way.<sup>759</sup> There is significant uncertainty in the game since a social contract agreement is not a formalistic legal contract per se. To be clear, if all conditions under the 'contractarian' compliance model were met with the effect that the social contract itself induced conformist preferences in form of a 'sense of justice,' then a valid policy suggestion would be to achieve more CSR compliance with either more stringent laws or with deregulation leaving it to the intrinsic motivation of corporations to comply. However, it cannot be argued that we are there yet and that such a social contract commitment can be taken for granted. Therefore, this work suggests that in order to achieve more order with a low enforcement regime, the social contract needs to be further instituted under international law by adopting voluntary standards, the content of which should be accepted and defined in a multi-stakeholder agreement and monitored by an independent third party.

#### **4. "A Fine is a Price:" The Commoditization of Human Rights**

The effect of (endogenous) punishment on behavior has been subject to long-standing scholarship in psychological, legal, and recently also economic studies. Even though the literature diverges on some caveats and specifications of the theory, the following deterrence hypothesis is accepted across the different disciplines: the introduction of a penalty reduces the behavior.<sup>760</sup> Legal<sup>761</sup> and psychological<sup>762</sup> scholarship have been defining the specific conditions

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<sup>758</sup> *Id.*, at 133.

<sup>759</sup> Lorenzo Sacconi, Marco Faillo and Stefania Ottone, *Contractarian Compliance and the 'Sense of Justice': A Behavioral Conformity Model and Its Experimental Support*, 33 ANALYSE & KRITIK, 273, 308 (2011).

<sup>760</sup> See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 3 (2000).

<sup>761</sup> The deterrence hypothesis goes back at least to JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789). This hypothesis has recently gained more attention from law and economic

under which the deterrence theory holds in a similar way, arguing that a punishment is most effective if it is severe, certain, and instantly follows the behavior.

A much cited case study has shown that the standard prediction under the deterrence theory, as cornerstone of psychology and the understanding of law deterrence, does not always hold.<sup>763</sup> The study looked at the effect of fines on the frequency with which parents arrive late to pick up their children from day-care centers and yielded the following results which refute the predictions under conventional theory. The introduction of a fine in fact resulted in a significant *increase* in the number of parents arriving late at a rate which was higher than when there was no fine imposed at all. Even after the fine was removed again, the level of late-coming parents remained at the same high. The monetary fine that was imposed was low but not insignificant.<sup>764</sup> The study argues that the deterrence effect would hold if the fine introduced was very large and thus punishment severe enough, as predicted by law and psychology theory.<sup>765</sup>

From this field study, Gneezy/Rustichini conclude that the introduction of a fine changes how we perceive our environment and our obligations therein or, to speak in economic terms, how we perceive the game and the equilibrium.<sup>766</sup> The reason is that a fine is usually introduced into an incomplete contract that does not specify the consequences of misbehavior. Introducing a fine, even though it makes the actual consequence of misbehaving worse, provides information and removes uncertainty about the punishment. It is exactly this uncertainty about what might happen if one misbehaves that restrained the actors. It is the process of information-gathering and learning for the actors. After the fine was introduced, parents tested the reaction of the day care center and learned that the fine imposed is in fact the worst that will happen to them.<sup>767</sup> As

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scholarship, see e.g., Gary Becker, *Crime and Punishment: An Economic Approach*, 76 JOURNAL OF POLITICAL ECONOMY, 169-217 (1968); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 THE JOURNAL ECONOMIC PERSPECTIVES 43-67 (1996).

<sup>762</sup> See e.g. BARRY SCHWARTZ, PSYCHOLOGY OF LEARNING AND BEHAVIOR (1984); William Estes, *An Experimental Study of Punishment*, 57 PSYCHOLOGICAL MONOGRAPHS, 1-40 (1944).

<sup>763</sup> Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 1-17 (2000).

<sup>764</sup> The day care fee for each child per month is NIS 1.400 (New Israeli Shekel); the penalty fee in the study is NIS 10 for a delay of 10 minutes or more. *Id.*, at 4-5.

<sup>765</sup> *Id.*, at 3, 15.

<sup>766</sup> *Id.*, at 3, 15-16.

<sup>767</sup> See *id.*, at 10-11.

has been shown in the previous chapter, corporations are confronted with many legal uncertainties when they are sued under U.S. law for compensatory and punitive damage awards due to the very vague nature of the ATS and its prescribed scope, with many questions still remaining open for judicial review, such as the extent of its extraterritorial use,<sup>768</sup> the *mens rea* standard for corporate aiding and abetting,<sup>769</sup> and the availability of corporate liability under the ATS in general.<sup>770</sup>

Until now, only a handful of cases under the ATS and foreign equivalents successfully imposed liability on corporations, whereas most of the major cases were settled by corporations out of court.<sup>771</sup> The settlement practice and terms provide information and certainty to corporations about the monetary risk they face when violating human rights in their overseas operations. This together with the litigation experience that procedural hurdles to jurisdiction set a high bar for victims to overcome (in fact, most cases get dismissed at the pre-trial stage),<sup>772</sup> firms learn that, in Gneezy's terms, fines at an aggregated amount are the worst that will happen to them. This however does not account for reputational damage, which a company, being alleged of overseas human rights abuses or complicity therein, might face and which can be exorbitant. To describe it in Warren Buffet's words: "It takes 20 years to build a reputation and five minutes to ruin it." Even though empirical evidence shows that a connection between socially responsible business and profitability is "at best ... inconclusive,"<sup>773</sup> reputational costs and benefits have increasingly become part of corporations' calculus in form of their risk

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<sup>768</sup> The U.S. Supreme Court has just recently extended the scope of its review in *Kiobel v. Royal Dutch Petroleum Co.* to also include the legal question of extraterritorial reach of the ATS. See Order for re-argument and supplemental briefing, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 U.S. LEXIS 1998, No. 10-1491 (March 5, 2012).

<sup>769</sup> There is currently a decided circuit split on the *mens rea* standard with the Second Circuit endorsing an intent standard and the Eleventh and D.C. Circuit endorsing a knowledge standard, see above note 17.

<sup>770</sup> The U.S. Supreme Court will be deciding about the issue of corporate liability under the ATS during its next term in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel v. Royal Dutch Petroleum Co* 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 U.S. 472 (2011)).

<sup>771</sup> See Beth Stephens, *Judicial Deference and the Unreasonable views of the Bush Administration*, 33BROOKLYN J. OF INT'L L., 813(2008).

<sup>772</sup> See *id.*, at 777. There are various grounds on which jurisdiction can be challenged, such as the 'political question doctrine,' 'the state action doctrine,' and 'comity' considerations. Cases can also be dismissed at the pre-trial stage on grounds of 'forum non conveniens.' See SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, 40-47, 87-99 (2004).

<sup>773</sup> DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS FOR CORPORATE SOCIAL RESPONSIBILITY, 29 (2006).

management as well as their branding and marketing efforts.<sup>774</sup> The uncertainty about the reputational hit and associated costs a company could incur, through investor and consumer pressure respectively, is an “unspecified and uncertain but possibly more serious consequence”<sup>775</sup> than the actual settlement outcome. It is therefore expected, based on Gneezy/Rustichini’s findings, that the deterrence theory should still hold to some degree but most likely not at an equilibrium point considering the experiences and learning with such litigation and settlements, as described above.

Aside from filling information gaps, the imposition of a (low) fine also changes the perception of the relevant acts and consequently leads to a change of social norms, which increases misbehavior and persists even if the fine is removed again.<sup>776</sup> By imposing a monetary fine, the relationship between the actors shifts from a non-market to a market orientation since the fine puts a price on the teachers’ over-time and thus commoditizes it.<sup>777</sup> Gneezy/Rustichini identify two major social norms<sup>778</sup> underlying this change in perception. First, “[w]hen [something] is offered for no compensation in a moment of need, accept it with restraint[;] when [something] is offered for a price, buy as much as you find convenient.” And second, “[a] fine is a price [under the given conditions of the study].”<sup>779</sup> The shown effect of monetary fines on social norms provides valuable insights into the relationship between legal liability enforcement (with monetary awards) and CSR.

Applied to a CSR context, Gneezy/Rustichini’s line of reasoning would play out as follows: If CSR is considered to be a non-market aspect by firms, then they would perceive the environment and society in which they operate as the constituent which granted them the

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<sup>774</sup> See MICHAEL KERR, RICHARD JANDA, AND CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS, at 45-46(2009).

<sup>775</sup> Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 10 (2000).

<sup>776</sup> *Id.*, at 14-15.

<sup>777</sup> *Id.*, at 14.

<sup>778</sup> Gneezy/Rustichi base their study on the definition of ‘social norm’ by J. Coleman who argues that a social norm is “a norm concerning a specific action [...] when the socially defined right to control the action is held not by the actor but by the others” with the authority of the others vested in them “by the social consensus.” (Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 13, n. 12 (2000) [Quoting: J. COLEMAN, FOUNDATIONS OF SOCIAL THEORY, 293 (1990)].

<sup>779</sup> Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 14 (2000).

generous privilege to do business and which they ought not to take advantage of. Under this paradigm, firms would strive to just do the “right thing” and not do harm by exercising due diligence. However, if by means of damage or settlements awards a price is put on human rights then firms would perceive violations as, to put it bluntly, mere collateral damage of their global business activities that can be compensated for if and as much is needed. Imposing a monetary fine prevents guilt or shame to attach since the act of buying a commodity is neutral in itself.<sup>780</sup>

Granted that this might be an overstated way of looking at this phenomenon in a CSR context, but the findings in this case study have proven valid and have been confirmed by the burgeoning crowding literature at the intersection of psychology and economics.<sup>781</sup> Moreover, the hypothesis of commoditizing non-market activities through legal liability awards also provides valuable lessons to the legal debate about social norms and the law.<sup>782</sup> Some might argue that a case study on a day care center and tardy parents is very different from human rights abuses in the context of global business activities. It is acknowledged that in substance the two different scenarios might be different. But as shown above, they share common traits which allow similar conclusions with regard to the effect of monetary punishment on behavior. Gneezy/Rustichini themselves declare their findings applicable to both private and *social* contracts.<sup>783</sup> The increasing literature on behavioral economics has supported

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<sup>780</sup> *See id.*

<sup>781</sup> Several scholars have explored the relationship between intrinsic and extrinsic motivation and found that under specific conditions there is a tradeoff between the two. Lepper/Greene have been referring to this phenomenon as “hidden costs of rewards” MARK LEPPER & DAVID GREENE, *THE HIDDEN COSTS OF REWARDS: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION* (1978). Deci has described the same phenomenon as “the corruption effect of extrinsic motivation” and Bruno Frey has framed it as a “crowding out effect.” EDWARD DECI, *INTRINSIC MOTIVATION* (1975); BRUNO FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* (1997).

<sup>782</sup> For the role of social norms with regard to the law and legal compliance, *see, e.g.*, Cass Sunstein, *Social Norms and Roles*, 96 *COLUMBIA LAW REVIEW*, 903-968 (1996) (Suggesting that “norm management is an important strategy for accomplishing the objectives of law.”) Also, *see* LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010).

<sup>783</sup> Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 *THE JOURNAL OF LEGAL STUDIES*, 1 (2000).

Gneezy/Rustichin's findings in different settings, such as legal rules enforcement<sup>784</sup> and taxation.<sup>785</sup>

In conclusion, the results of the case study by Gneezy/Rustichini are consistent with the crowding theory by Bohnet/Frey/Huck. Both works find that if a fine is imposed, which is not very high but not very low either, then this fine produces worse deterrence and worse compliance than would the imposition of no fine at all. Therefore, Gneezy/Rustichini predict a 'crowding out' effect for low but significant fines similar to the medium level enforcement measures under the Bohnet/Frey/Huck model. However, even when punishment is structured in a way that the deterrence theory holds, its effects can be reduced by another phenomenon. Under the economic analysis of the effects of punishment, "a complete consideration of market forces" requires that the decision problem of a single agent is not looked at in isolation since the agents' behavior affects one another.<sup>786</sup> Thus, for example, the predicted reduction in crime might be smaller than anticipated under the deterrence hypothesis when some agents abstain from their criminal behavior, since this in turn increases the returns of crime.<sup>787</sup>

#### **IV. HOW INCENTIVE-COMPATIBLE ARE U.S. AND EUROPEAN LIABILITY SYSTEMS WHEN IT COMES TO HUMAN RIGHTS ENFORCEMENT AGAINST CORPORATIONS? OR DOES THE DETERRENCE HYPOTHESIS HOLD?**

This section will assess how incentive-compatible the liability schemes are when imposed on corporations under the ATS and European criminal codes. For this purpose, this analysis builds upon the legal findings from Chapters 2 and 3 which aimed to distill the key features of the respective liability approaches to holding corporations liable for violations of

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<sup>784</sup> See Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131-44 (2001).

<sup>785</sup> Benno Torgler, *Tax Morale and Direct Democracy*, 21 EUROPEAN JOURNAL OF POLITICAL ECONOMY, 525-31 (2005). (Showing, at the example of Swiss cantons, direct democracy shapes tax morale.) Lars Feld and Bruno Frey, *Trust Breeds Trust: How Taxpayers Are Treated*, 3 ECONOMICS OF GOVERNANCE, 87-99 (2002) (Showing that the "psychological tax contract" is violated in hierarchical systems.).

<sup>786</sup> See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 2 (2000).

<sup>787</sup> *Id.*, at 3.



international law, respectively human rights. These comparative law findings will be tested under economic game theory and behavioral economics, as laid out above, with the goal to determine the effect of the different modes of punishment—in the United States and Europe—on the behavior of corporations.

### **1. Out-of-Court Settlements and the ‘Crowding Out’ Effect**

There is a civil-criminal divide between Europe and the United States when it comes to holding corporations liable for violations of human rights law. This dissertation has argued, contrary to some other scholars,<sup>788</sup> that the civil or criminal nature of the punishment matters with regard to the effectiveness of the redress and punishment under the respective liability system. One important feature of a civil as opposed to a criminal liability system is the legal option of the parties to settle the case out of court by agreement, usually providing for monetary awards in return for a disclaimer that the defendant is not assuming any legal responsibility and that the dispute between the parties is ended without trial. Most of the times the terms of the settlements are confidential.<sup>789</sup> In legal systems which impose criminal sanctions on corporations for overseas human rights violations, it is not within the victims’ power to decide whether to prosecute or stop prosecuting the criminal offenses. In most legal systems, especially in Europe, the rule of thumb is that it is at the sole discretion of the prosecutor to initiate proceedings or drop the charges.<sup>790</sup> The legal option for the parties to settle the case out of court is therefore an important difference between civil and criminal liability enforcement in the CSR context and, based on the crowding theory, impacts the effects that punishment has on corporate compliance behavior in the United States and Europe.

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<sup>788</sup> See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 THE YALE J. OF INTL. L., 1-58 (2002).

<sup>789</sup> See Marc Galanter and Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STANFORD LAW REVIEW, 1339-1391 (1994); Rule 16(c)(7) Federal Rules of Civil Procedure states that in pre-trial conferences judges might "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."

<sup>790</sup> See Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 882 (2009).

As pointed out in previous chapters, almost all cases against corporations for overseas human rights abuses have been brought in U.S. courts under the ATS.<sup>791</sup> Until now, only one case has been decided by verdict in favor of the plaintiffs with award of damages.<sup>792</sup> Many landmark cases against major MNCs, however, have been settled out-of-court, often just when the case was about to enter the trial phase.<sup>793</sup> To account for these realities in the context of holding corporations liable for human rights abuses, this section will conduct an empirical analysis of the major out-of-court settlements. The goal is to assess whether corporate liability enforcement under the ATS is incentive-compatible or whether it ‘crowds out’ intrinsic motivation and therefore produces results contrary to the predictions under the deterrence hypothesis. In other words, does the legal enforcement of human rights against corporations yield the results desired, i.e., optimal compliance? The findings with regard to the enforcement practice under the ATS will occasionally be contrasted with the criminal practice in Europe in order to determine key liability features for optimal compliance outcomes.

There has been one settlement in a case of alleged human rights abuses by a corporation in Europe. The case in question involved Total for its operations in Burma (now Myanmar). As a joint venture partner of Unocal, Total had been sued under the ‘partie civile’ mechanism as part of criminal proceedings launched against Total by the French prosecutor. As a general rule, civil parties do not have the autonomy to control the criminal proceedings in most legal systems, including France. Unlike in civil proceedings, the parties cannot enter into an arrangement that

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<sup>791</sup> See, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, at <http://www.business-humanrights.org/LegalPortal/Home/Countrywherelawsuitfiled/Americas> (For a list of all human rights cases filed against corporations distinguished by countries where the lawsuits were filed.)

<sup>792</sup> See Beth Stephens, *Judicial Deference and the Unreasonable views of the Bush Administration*, 33BROOKLYN J. OF INT’L L., 813(2008). In addition to one jury verdict against a corporate defendant under the ATS, another major judgment came down in Ecuadorian courts against Chevron where the plaintiffs were awarded damages in a record high of \$9.5 billion. See THE ECONOMIST, ENVIRONMENTAL LITIGATION: MONSTER OR VICTIM? (February 17, 2011), at <http://www.economist.com/node/18182242>.

<sup>793</sup> See Beth Stephens, *Judicial Deference and the Unreasonable views of the Bush Administration*, 33BROOKLYN J. OF INT’L L., 813(2008). (Illustrating that after 1997, when the Second Circuit held in *Doe v. Unocal Corp.* that a corporation can be liable under the ATS, “approximately [52] international human rights cases involving corporate defendants have been litigated (not including cases addressing abuses committed during World War II, which raise unique issues). Of the [52], [33] have been dismissed [...], [3] have settled, and in [1] a jury returned a verdict for the plaintiff.” Thus, a verdict was achieved for one plaintiff in *Jama v. Esmor Corr. Serv.*, Civ. No. 97-03093, 2008 WL 724337 (D.N.J. Dec. 7, 2007). This article that has not accounted yet for three further more recent settlements, namely in the cases of *Xiaoning et al v. Yahoo! Inc.* (2007), *Wiwa v. Royal Dutch/Shell* (2009), and *Adamu vs. Pfizer* (2011).

ends the criminal proceedings. Nevertheless, the parties settled the matter among themselves which *in fact* led to the prosecution's case to collapse. The victims would not be available anymore, under the terms of the settlement, to provide the necessary information and cooperate with the judicial and investigating apparatus in the host country, which can be cumbersome.<sup>794</sup>

The Total settlement will be excluded from the scope of the analysis because it is only *one* settlement in the context of the European 'partie civile' procedure and thus too small of a sample to draw meaningful conclusions in regard to the effects on corporate behavior. Also, including the Total settlement in the analysis of ATS settlements would distort the analysis and results since, as has been shown in Chapter 2, the procedural environment and legal culture are very different in the United States and Europe with regard to those matters. Eventually, including the Total settlement would make for an imperfect comparison because in that case the settlement was rather a matter of reality than a matter of law, what would have pointed only to limited conclusions with regard to the effects of the legal system on corporate behavior.

Settlement arrangements in which corporations agree to monetary awards in exchange for the victim plaintiffs to drop their lawsuit commoditize human rights, as discussed above. Human rights become a matter of market exchange under Gneezy/Rustichini's theory rather than a non-market aspect of compliance behavior induced by preferences. This leads to a 'crowding out' of intrinsic motivation under the conditions defined. Specifically, the 'crowding out' effect was observed when monetary incentives by virtue of external intervention are provided, which amount to a medium level of enforcement. The worst legal regime to induce compliance has been shown to be one of medium enforceability.<sup>795</sup> For the reasons stated above, the terms of settlements serve as the point of reference in order to determine the level of legal enforcement

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<sup>794</sup> See Jan Wouters and Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS, at para. 97 (2008).

<sup>795</sup> See Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 131, 141 (2001).

(in terms of economic cost of breach) according to Frey/Bohnet/Huck<sup>796</sup> or the magnitude of the fine according to Gneezy/Rustichini.<sup>797</sup> Both benchmarks are consistent with each other.

Looking at the out-of-court settlements in landmark cases of liability of corporations under the ATS, it will be accounted for in terms of (1) the settlement sum in U.S. dollars (contrasted to the worldwide revenue of the respective MNC in the year of the settlement), (2) the terms of the settlement (i.e., monetary/market exchange or non-monetary/intrinsic act), and (3) transparency (i.e., public or confidential). The goal of this dissertation is to provide a behavioral economics framework, informed by a comparative legal understanding, for assessing the effects of legal enforcement on corporate incentives to comply with human rights norms. The framework will be illustrated with some prominent examples, but this dissertation does not claim to conduct a full-fledged empirical analysis of the issues at hand since this would go beyond the scope of this work.

In order to properly assess the effect that settlements in the context of legal enforcement under the ATS have on corporate compliance behavior, one should determine (1) if the settlement relationship between the firm and its stakeholders is either a market exchange or an intrinsic act, which is accounted for by the monetary or non-monetary nature of the settlement terms, and (2) if the level of enforcement (in terms of the cost of breach) is high, medium, or low, which is accounted for by the total settlement sum in U.S. dollars (relative to annual revenues of respective firm). The transparency of the settlement agreement and its terms help to provide the broader context in which the agreement has to be seen. The public or confidential nature of the settlement does not directly impact the classification of the settlement agreement along the lines outlined above. It provides, however, some guidance regarding the reputational aspect pertaining to such litigation and settlements, which can have a needle-moving impact on corporate behavior since reputational damage attracts an indirect cost,<sup>798</sup> and might actually push

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<sup>796</sup> See *id.*, at 131-144.

<sup>797</sup> See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 1-17 (2000).

<sup>798</sup> See Terry O'Collaghan, *Disciplining Multinational Enterprises: The Regulatory Power of Reputation Risk*, 21 GLOBAL SOC'Y 100-14 (2007).

the respective punishment over the threshold level and reinstate the deterrence effect. An in-depth analysis of the reputational aspect in legal human rights enforcement and its effect on corporate behavior, under the crowding theory, would require further investigation and goes beyond the scope of this paper, which as pointed out above, primarily aims at developing a framework to assess the incentive-compatibility of corporate human rights enforcement rather than conducting a detailed empirical analysis.

The settlement sum compared to the annual revenues of the year of the agreement indicates whether the ‘cost of breach’ was high, medium, or low for the respective agent. The terms of the settlement (if disclosed) can be seen to an important indication of the nature of the relationship between a firm and its stakeholders. Providing merely monetary compensation would rather point towards the settlement being a business transaction and thus a market aspect, which can lead to a commoditization of human rights under Gneezy/Rustichini’s framework. If, however, the terms of the settlement also stipulate other commitments which extend beyond mere monetary compensation and do not account for a cost factor (under a cost-benefit analysis), the settlement agreement would also have features of a stipulation of an intrinsic CSR commitment in a non-market sense.

The transparency factor accounts for potential reputational costs. Major brand-name companies, which are subject to ATS litigation, particularly face a risk of reputational damage due to the highly polarized issues of human rights abuses and alleged corporate complicity in these cases. It therefore comes as no surprise that companies would be particularly inclined to settle human rights cases right when the cases were about to enter the trial phase, which would entail detailed evidence production and would therefore require a reconstruction of the facts and disclosure of internal company information regarding its business dealings in emerging markets.<sup>799</sup> For example, Shell, as is the reality with many other extractive companies, has

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<sup>799</sup> CENTER FOR CONSTITUTIONAL RIGHTS, *WIWA ET AL. V. ROYAL DUTCH PETROLEUM ET AL.*, at <http://ccrjustice.org/Wiwa>. (Confirming that the settlement in *Wiwa v. Royal Dutch Petroleum* was reached literally “on the eve of trial.”) As of 2008, only two corporate cases under the ATS went to trial; one of them was the case of

conceded in its Sustainability Report “[t]he search for oil and gas can take energy companies to places with poor human rights records. This clearly presents challenges and requires making trade-offs. Refusing to operate allows access to less principled competitors. Staying in such countries puts a company at risk of being seen as complicit in a government’s practices.”<sup>800</sup>

MNCs operate worldwide, including in emerging markets with often repressive regimes. There is usually an immediate business necessity for corporations to cooperate with the host government in joint ventures (particularly in the natural resources sector)<sup>801</sup> or sign on to the host government’s terms of conducting business in a closed society (particularly in the information communication technology sector in China).<sup>802</sup> This ties corporations to the repressive policies of such systems in a sensitive way in the eye of the public.<sup>803</sup> Even though this could be considered a reality of globalized business, it is one that corporations would rather not wish to discuss in the courts of law or even worse, in the court of public opinion. Bringing legal proceedings to an end with a confidential out-of-court settlement therefore can be considered as a way to control the information flow to the broad public and a company’s consumer base and control possible reputation risk.

Table 1 shows that, relative to the annual revenues of the respective companies, the amount for which human rights cases under the ATS were settled is rather low, but not insignificant. For confidential settlements with undisclosed terms, it is relied on approximations based on reported costs. Relative to the annual revenue stream of the companies concerned, the cost of breach that they encountered cannot be considered ‘high.’ For example, in 2009 Royal Dutch/Shell was heading up the list of Fortune 500 companies with an annual revenue stream of

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*Estate of Rodriguez v. Drummond Co.*, No. 7:02-00665 (N.D. Ala. July 26, 2007) which lost after a jury trial on appeal.

<sup>800</sup> ROYAL DUTCH SHELL, RESPONSIBLE ENERGY: THE SHELL SUSTAINABILITY REPORT 2007, 30.

<sup>801</sup> See Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 329-30 (2008), at <http://www.law.northwestern.edu/journals/jihr/v6/n2/5>.

<sup>802</sup> See David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. OF INT’L L., 383-85 (2011).

<sup>803</sup> See e.g. John Markoff, *Suit Claims Cisco Helped China Pursue Falun Gong*, N. Y. TIMES, May 22, 2010, available at <http://www.nytimes.com/2011/05/23/technology/23cisco.html>.

more than \$458 billion; a settlement for \$15.5 million is not insignificant but it is not very high considering such total revenue. With regard to damage awards by verdict –granted in only one case under the ATS before U.S. courts to date–the situation might be different. In 2011, an Ecuadoran court ordered Chevron to pay \$9.5 billion in damages, which would increase to \$17.2 billion if Chevron did not issue a public apology within 15 days.<sup>804</sup> David Uhlman, an expert on environmental law, has stated that this “is one of the largest judgments ever imposed for environmental contamination in any court.”<sup>805</sup> This leads one to conclude that *if* ATS and ATS-like cases in fact do succeed, this example would suggest that the damage awards might be of such a high level that the deterrence effect would hold. This might be particularly true in the United States where punitive damages are broadly available for civil plaintiffs.<sup>806</sup> However, it has to be kept in mind that most of such cases get dismissed at the pre-trial level due to procedural hurdles including the transnational and often politicized nature of overseas human rights cases. Eventually, the level of enforcement would rely not only on the magnitude of the fine, but also on the probability with which it is enforced.<sup>807</sup>

Further, Table 1 shows that the terms of all settlement arrangements focused primarily on granting significant monetary compensation, which has usually been managed through a trust fund. While this monetary focus clearly points towards the settlement arrangements as a market exchange and a commoditization of human rights, all settlement arrangement also commit the company to establish an additional fund addressing the broad social issues relating to the situation in question. This might make the settlement arrangement seem less of a business transaction and more of an act induced (at least particularly) by intrinsic motivation. However, first, the companies are usually not constructively involved in the work of these social funds

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<sup>804</sup> See THE ECONOMIST, ENVIRONMENTAL LITIGATION: MONSTER OR VICTIM? (February 17, 2011), at <http://www.economist.com/node/18182242>.

<sup>805</sup> Simon Romero and Clifford Krauss, *Ecuador judge orders Chevron to pay \$9 billion*, THE NEW YORK TIMES (February 14, 2011), available at <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>. [Quoting: David Uhlmann].

<sup>806</sup> See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZONA J. OF INT’L AND COMP. L., 402 (1999).

<sup>807</sup> Gneezy/Rustichini’s field study simply works on the assumption that there is high probability or even certainty that the fine will be enforced. Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 10 (2000). (“[N]o uncertainty of punishment exists, since parents are sure they will be detected.”).

beyond their monetary contribution. Second, all these social funds are so closely related to the situation charged in the class action lawsuits that they can be regarded as part of the compensation package.

Overall, the settlement arrangements that companies have entered into constitute a commoditization of human rights with the effects on deterrence and compliance, as laid out above. Merely, Yahoo! addressed the subject issue of the settlement within its own corporate structure by implementing a framework program for the established trust fund. Yahoo!’s Business and Human Rights Program became an integral part of its legal department and was endowed with the mandate “to coordinate and lead Yahoo!’s efforts to protect and promote free expression and privacy” to deliver on Yahoo!’s self-proclaimed “human rights obligations.”<sup>808</sup> This substantive commitment beyond monetary contributions offers an example of how settlement arrangements could be structured in a way that diminishes the commoditization of human rights and therefore achieves better future compliance rates. Finally, aside from one example, all settlement agreements were confidential, which enabled companies to control the information flow and reputation risk, as pointed out above.

Table 1

Case Settled (Year)	Total \$ Settlement Sum— \$ Annual Revenues	Terms of the Settlement	Transparency
Doe v. Unocal (2005) regarding operations in Myanmar (former Burma) <sup>809</sup>	Undisclosed (reportedly \$ 30 million)— \$ 8.2 billion (2004) <sup>810</sup>	Monetary compensation including funds to establish “to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.” <sup>811</sup>	Confidential
Xiaoning et al v. Yahoo! Inc. (2007) regarding operations in China <sup>812</sup>	Undisclosed— \$ 6.97 billion <sup>813</sup>	(1) Monetary compensation; (2) Creation of Yahoo!	Confidential

<sup>808</sup> YAHOO! BUSINESS AND HUMAN RIGHTS PROGRAM, at <http://www.yhumanrightsblog.com/blog/our-initiatives/business-human-rights-program/>.

<sup>809</sup> See THE ECONOMIST, A STITCH IN TIME: HOW COMPANIES MANAGE RISKS TO THEIR REPUTATION, available at <http://www.economist.com/node/10491043> (January 17, 2008); THE GUARDIAN, ENERGY GIANT AGREES SETTLEMENTS WITH BURMESE VILLAGERS (December 14, 2004), available at <http://www.guardian.co.uk/world/2004/dec/15/burma.duncancampbell>.

<sup>810</sup> See Federal Register, *Chevron Corporation and Unocal Corporation; Analysis of Agreement Containing Consent Order to Aid Public Comment* (June 20, 2005), at <https://www.federalregister.gov/articles/2005/06/20/05-12044/chevron-corporation-and-unocal-corporation-analysis-of-agreement-containing-consent-order-to-aid>.

<sup>811</sup> *Joint statement by plaintiffs and Unocal on Final Settlement Reached in Doe v. Unocal*, available at <http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal>.

<sup>812</sup> See *Joint Stipulation of Dismissal, Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. November 13, 2007), available at <http://docs.justia.com/cases/federal/district->



		Human Rights Fund “to provide humanitarian and legal aid to dissidents who have been imprisoned for expressing their views online.” <sup>814</sup>	
Wiwa v. Royal Dutch/Shell (2009) regarding operations in Nigeria <sup>815</sup>	\$15.5 million \$ 458 billion (2009) <sup>816</sup>	(1) Monetary compensation; (2) Creation of social and educational trust fund to benefit Ogoni people.	Public
Adamu vs. Pfizer (2011) regarding human experimentation in Nigeria —in U.S. courts— <sup>817</sup>	Undisclosed	US cases joined Healthcare/Meningitis Trust Fund established under settlements. <sup>820</sup>	Confidential
—in Nigerian courts— <sup>818</sup>	Undisclosed (reportedly \$75 million)— \$ 67.4 billion <sup>819</sup>	(1) Monetary compensation managed through newly established Healthcare/Meningitis Trust Fund; (2) Financial support of health care initiatives.	Confidential

### 3. A Metrics for Incentive-Compatibility of Liability Schemes

As Frey/Bohnet/Huck have stated, “[b]y providing a specific legal enforcement regime, the state affects the degree of trust and trustworthiness in a society.”<sup>821</sup> Based on their

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courts/california/candce/4:2007cv02151/191339/114/0.pdf?ts=1195000579; Catherine Rampell, *Yahoo Settles with Chinese Families*, THE WASHINGTON POST (November 14, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html>.

<sup>813</sup> Annual Financials for Yahoo! Inc., at <http://www.marketwatch.com/investing/stock/yhoo/financials>.

<sup>814</sup> *Joint Stipulation of Dismissal*, Xiaoning v. Yahoo!, Inc., No. C07-02151 (N.D. Cal. November 13, 2007).

<sup>815</sup> See Settlement Agreement and Mutual Release, *Wiwa v. Royal Dutch Petroleum Co.* (S.D.N.Y. June 8, 2009), available at [http://ccrjustice.org/files/Wiwa\\_v\\_Shell\\_SETTLEMENT\\_AGREEMENT.Signed-1.pdf](http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf); Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHTS, at <http://www.asil.org/insights090909.cfm>; Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, THE NEW YORK TIMES (June 8, 2009).

<sup>816</sup> *Global 500: 1. Royal Dutch Shell*, CNN MONEY, at <http://money.cnn.com/magazines/fortune/global500/2009/snapshots/6388.html>.

<sup>817</sup> See Bill Berkrot, *Pfizer Settles Remaining Nigeria, US suits*, REUTERS (February 22, 2011), at <http://af.reuters.com/article/investingNews/idAFJOE71L0MV20110222>.

<sup>818</sup> See BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, CASE PROFILE: PFIZER LAWSUIT (RE NIGERIA), at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/PfizerlawsuitreNigeria>.

<sup>819</sup> *Pfizer Inc., Earnings 2011*, BLOOMBERG BUSINESSWEEK, at <http://investing.businessweek.com/research/stocks/earnings/earnings.asp?ticker=PFE:US> (last accessed March 26, 2012).

<sup>820</sup> See Sue Reisinger, *Pfizer Settles Lawsuits Over Drug Trials on Children in Nigeria*, CORPORATE COUNSEL (February 23, 2011), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202482854504>.

<sup>821</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AMERICAN POLITICAL SCIENCE REVIEW, 132 (2001).

‘crowding’ framework and Gneezy’s ‘commoditization’ hypothesis, the following factors are decisive with regard to the trade-off between intrinsic and extrinsic motivation:

- (1) **Monetary incentives** in the form of the economic cost of a breach; monetary incentives are effective only when they are very high. Below a certain threshold, they can ‘crowd out’ intrinsic motivation and therefore yield non-monotonic and suboptimal compliance results.
- (2) **Punitive and non-monetary elements**; punitive rather than compensatory elements in the liability structure avoid a commoditization of human rights and therefore a ‘crowding out’ of intrinsic motivation. A criminal law approach to corporate human rights cases, such as in Europe, would be preferable to the U.S. system in this regard, especially considering that the legal option of out-of-court settlements does not exist in criminal proceedings, thus diminishing the commoditizing effect of the enforcement scheme.<sup>822</sup>
- (3) **Personal relationships**; individual officer liability as opposed to liability of the corporation as a legal person would add a personal dimension to legal enforcement schemes and would therefore increase personal accountability with the effect of ‘crowding in’ intrinsic motivation in the framework.<sup>823</sup> A criminal law approach to the issue, such as in Europe, would prevail over the U.S. approach in this regard as well. Since corporate liability is still an ambiguous concept in many civil law countries, as shown above, a significant number of continental European systems instead still rely on individual officer liability.<sup>824</sup> Individual officer liability is a function of the aggregation theory under corporate law, according to which a corporation is simply an aggregation of

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<sup>822</sup> It is to be noted, however, that there is some punitive element in American tort redress, since in addition to compensatory damages, punitive damages can be awarded. According to Dan Dobbs, punitive damages are “criminal or quasi-criminal punishments.” (Dan Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALABAMA L. REV., 837 (1988)).

<sup>823</sup> See Bruno Frey, *Motivation and Human Behavior*, in: RISK, TRUST, AND WELFARE, 31, 37-38 (Peter Taylor-Gooby ed., 2000) (Arguing that personal relationships ‘crowd in’ intrinsic motivation.). See also John Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AMERICAN CRIMINAL L. REV., 422 (1980) (Arguing that “more deterrence is generated by penalties focusing on an individual than on a corporation.”).

<sup>824</sup> See Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 THE YALE L. J., 142 (2008); see also Robert Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 THE GEORGE WASHINGTON INT’L L. REV., 871-72 (2009).

its management and shareholders as opposed to a separate artificial entity.<sup>825</sup> Also, Justice Scalia of the U.S. Supreme Court in his concurring opinion in *Citizens United* embraced this understanding of the corporation as a mere association of individuals.<sup>826</sup>

These characteristics can induce the incentive-compatibility of a liability system. They therefore identify levers than can be pulled in an effort to improve how liability systems in the context of corporate human rights enforcement are currently designed. Based on the three characteristics identified, the European approach of holding corporations liable in the form of public prosecution seems to be the more incentive-compatible methodology and it yields more optimal compliance results under behavioral economic theories. However, when examining this finding in relation to the findings in Chapter 2, a paradox emerges: Whereas the European approach is *in concept* designed to yield incentive-compatible compliance results and is thus superior the ATS structure, it *in practice* surrenders to the American approach. The reason is that the U.S. legal system provides a much more favorable forum for such claims than European legal systems in terms of procedural rules, such as discovery process, fee structure, and the availability of class action suits.

In conclusion, the best legal system is one that provides a high level of enforcement in terms of severe punishment and high fines. Only then can external interventions, such as legal liability enforcement, effectively stir corporate behavior in the desired way. A half-hearted system at a medium level of enforcement produces the worst results, which in fact are worse than having no punishment in place at all. In this chapter, I have argued that endogenous incentives under a social contract paradigm can be a viable solution provided that the social contract is not just taken for granted but that pro-active steps are taken at an international level to adopt coherent standards, which then translate into ‘conformist preferences’ according to

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<sup>825</sup> For an overview over the theories of the nature of the corporation, see David Millon, *Theories of the Corporation*, 1990 DUKE L. J., 224 (1990).

<sup>826</sup> *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 928 (Justice Scalia concurring.) (Justice Scalia stating that “[t]he association of individuals in a business corporation is no different [than an individual] -- or at least it cannot be denied the right to speak on the simplistic ground that it is not ‘an individual American.’”).

Sacconi/Faillo/Ottone. The result points to a mixed implementation system where endogenous and exogenous incentives complement one another.

## Conclusion

This dissertation has examined the relatively popular concept of CSR, particularly corporate human rights responsibility, by telling a “story of law and incentives.” Perhaps not surprisingly, the liability frameworks for holding corporations accountable for human rights violations vary considerably between the United States and Europe. Whereas civil human rights litigation is a phenomenon largely unique to the United States, most European jurisdictions provide criminal remedies with the option for the victims to join the criminal proceedings as a ‘partie civile.’ Rather than siding with the existing scholarship that those differences are merely a country-specific “translation” into the “language” of the respective legal system, this dissertation has illustrated that those differences arise for far more complex reasons. The European and American methodologies matter from multiple angles and have sensitive implications on the effectiveness of both legal redress for victims and punishment of corporate perpetrators.

Most of the scholarship dealing with human rights enforcement against corporations has mainly focused on substantive law issues, particularly under the ATS, without paying serious attention to comparative approaches in other legal systems, such as in Europe. An in-depth comparative legal analysis of corporate human rights liability under the ATS and the European ‘partie civile’ mechanism provides the basis to critically assess the effectiveness of the different liability systems as implicated not solely by substantive law, but also by procedural rules and legal tradition. Chapter 2 explores differences in procedures (in terms of civil and criminal liability) and differences in legal culture (in terms of a common law and civil law tradition) that explain why ATS-like cases have primarily been litigated in the United States as opposed to Europe. The in-depth analysis in Chapter 3 of the landmark case in *Kiobel*, currently before the U.S. Supreme Court, has confirmed the need for a strict deference to the criminal or

civil nature of the proceedings, rather than conflating both concepts interchangeably and at will, as has often been done in ATS jurisprudence. The reason is that conflating civil and criminal elements not only can impact the immediate outcome of the case, but they also can have unintended consequences with regard to the incentive-compatibility of corporate liability under the ATS.

Substantive law, procedural law, and legal tradition still do not provide a complete set of motivational drivers when determining how effective the respective liability approaches are in terms of influencing corporate behavior. Law is only one driver for CSR compliance that can be effectively complemented by social norms.<sup>827</sup> In particular, the behavioral economic scholarship provides valuable lessons that have not been applied yet in the context of CSR compliance. Most importantly, studies in the field found that external enforcement can yield counter-intuitive and suboptimal results since, under certain conditions, it ‘crowds out’ intrinsic motivation. Psychological predictions with regard to corporate behavior helped to develop a metrics of three factors that are decisive to ensure the incentive-compatibility of liability schemes in a way that is in line with the deterrence hypothesis. Those important factors are (1) economic cost of breach, (2) punitive elements, and (3) personal relationships.

Based on this metrics and key predictions under behavioral economics, this dissertation has found that the existing liability system to hold corporations accountable for human rights violations under the ATS is a system of medium enforceability, which, according to the scholarship by Frey/Bohnet/Huck<sup>828</sup> and Huang/Wu Works<sup>829</sup>, is the “worst” legal system since the deterrence effect is not high enough. But to its detriment, the CSR network of hard and soft compliance fails to appreciate the factor of trust enough. This

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<sup>827</sup> See e.g. LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010).

<sup>828</sup> Iris Bohnet, Bruno Frey and Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 *AMERICAN POLITICAL SCIENCE REVIEW*, 131-44 (2001).

<sup>829</sup> Huang, Peter & Wu, Ho-Mou, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 *JOURNAL OF LAW, ECONOMICS, & ORGANIZATION*, 390-406 (1994).

is not to say that the “hard” side of the equation—legal liability—does not have a role in inducing corporate compliance. It merely means that its role appears to be more modest than originally anticipated.

The overall goal of this dissertation is to understand why the American legal system is the forum of choice for victim plaintiffs over its European counter-parts and whether findings dictated by the procedural rules and legal tradition withstand a critical analysis from a behavioral economics perspective. Of particular note is the finding that even though the litigation environment in the United States is exceptionally favorable to ATS-like suits against corporations, it yields suboptimal results under behavioral theories. In contrast, the European approach to corporate human rights redress, while stifled by a less liberal and more bureaucratic procedural environment, comes out ahead in behavioral economics terms. Thus, the European approach to deal with corporate human rights violations in the context of criminal rather than purely civil proceedings entails two main characteristics, which, in concept, effectively induce corporate behavior. First, Europeans focus primarily on institutional punishment rather than generating a litigation environment that encourages ‘striking a deal’ in the form of monetary settlements, which leads to a ‘commoditization’ of human rights and thus achieves worse compliance results than no punishment at all.<sup>830</sup> Second, the European approach focuses on personal relationships, since corporate entity liability is a fairly controversial concept in criminal law (unlike in civil law). Therefore, many European civil law countries still rely on individual officer liability instead, which leads to a ‘crowding in’ of intrinsic motivation and therefore achieves better compliance rates.

This dissertation has sought to develop a framework within which the micro-economic implications of corporate human rights liability can be assessed in a way that is also sensitive to standard psychology literature. I did not aim to conduct a comprehensive

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<sup>830</sup> See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 THE JOURNAL OF LEGAL STUDIES, 1-17(2000).

empirical analysis since this would have been beyond the scope of this dissertation. Future research might be suggested to further elaborate on the specific variables in this framework and metrics. Specifically, it remains to be further examined how exactly reputational costs are to be factored in the 'level of enforcement' under the 'crowding theory.' As previously noted, reputational costs might be able to alleviate enforceability under the framework to a 'high' level where the standard deterrence theory holds. Also, the scope and nature of 'personal relationships' that would 'crowd in' intrinsic motivation in the network would merit a future area of research.

Sometimes more order can be achieved without more law by relying on intrinsic motivation. This is an important point to introduce into the discussions about corporate human rights litigation and CSR in general. It is therefore suggested to apply a differentiated model complementing endogenous and exogenous incentives depending on the respective legal rules of the game. Still, legal liability can be an effective, and sometimes indispensable, tool to ensure corporate compliance. However, this is only the case if we start thinking critically and constructively about how to provide both legal and non-legal incentives to affect corporate compliance behavior in the most effective and impactful way with an willingness to learn from other legal systems and without fear of uncovering counter-intuitive and perhaps undesired results.





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