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Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence

Nadia Perrone
Department of Law, University of Salento, Lecce, Italy
nadia.perrone@unisalento.it

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Abstract

The Proposal of the Directive regarding the Corporate Sustainability Due Diligence provides new judicial protection for environmental damages and climate litigation caused by corporations, even in an extraterritorial context, considering the Directive's scope of application. This prompts a discussion about the exercise of an extraterritorial jurisdiction by Member States' courts. At European Union level, the titles of jurisdiction, identified in the Brussels I Recast Regulation, allow foreign victims to proceed before the court of a Member State, but only if the parent company is established in that specific Member State. Otherwise, these criteria are generally considered inadequate and insufficient. The proposed Directive seems to be a new opportunity to reform the European private international law, aligning it with the right to access to justice, as provided by Article 10 of Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights.

Keywords

extraterritorial jurisdiction – access to justice – proposal of directive on corporate sustainability due diligence – European private international law

1 Introduction

The new European Proposal of Directive on Corporate Sustainability Due Diligence[1] ("CSDD") requires a commitment by companies to identify, prevent and mitigate their impacts on human rights, such as child labor and forced labor, and on the environment, such as pollution and Greenhouse Gases ("GHG") emissions. This new framework of obligations involves not only European companies, but also foreign enterprises operating in the EU which comply with some of the requirements of the Proposal. The involvement of this last category gives rise to some concerns in relation to the enforcement of the future Directive and the possible extraterritorial jurisdiction of Member States' courts.

This paper discusses the attempts and the failures in the definition of this kind of extraterritorial power for claims which transcend the EU boundaries, and it raises questions about the new challenges deriving from the above-mentioned Directive.

We will begin with a presentation of the mandatory sustainability due diligence, introduced by the proposed Directive, highlighting its potential in the judicial protection for environmental damages and its extraterritorial implications (Section 2). This will lead to a reflection on the extraterritorial jurisdiction as a useful tool in cases involving transnational damages concerning human rights and the environment. We will analyze the main doctrinal assumptions (Section 3). Then, we will focus on the legal basis for the exercise of jurisdiction by Member States' courts, examining the framework of European private international law (Section 4) and, subsequently, we will examine some case-law in the EU in which judges exercised their power extraterritorially (Section 5). After this overview, we will address the core of our analysis, i.e., the fact that the extraterritorial effect of the proposed Directive and its private enforcement scheme are not accompanied by any specific rules on jurisdiction (Section 6). We will conclude by proposing a broader interpretation of the "defendant's domicile" as defined by the current European private international law, and with the hope that the European Legislator uses this new Directive as an opportunity to reform it, thus ensuring the effectiveness of the future Directive (Section 7).

1 European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive, (EU) 2019/1937 COM (2022) 71 final, 23 February 2022.

2 A New Judicial Protection for Environmental Damage Under the EU Proposal of CSDD Directive and its Extraterritorial Effects

On 23 February 2022, The European Commission published the Proposal of the so-called "Corporate Sustainability Due Diligence" (CSDD) Directive. This directive aims to introduce an obligation for companies to implement an accountability system to assess their impact on human rights and the environment. Such a measure is deemed necessary to harmonize the legislations of Member States and to ensure the proper functioning of the internal market, avoiding regulatory discrepancies in cases where Member States make autonomous choices. For instance, France adopted its own legislation about a sustainability due diligence for enterprises located within its territory in 2017[2] and Germany followed suit in 2021.[3]

The main objective of the Proposal is declared in the first Article, which establishes corporate obligations to avoid negative impacts on human rights and the environment in their own operations, the operations of their subsidiaries, and throughout the value chain operations carried out by entities with whom the company has an established business relationship. Moreover, the Proposal lays down rules on liability for violations of these obligations, including civil liability, enforcement mechanisms and access to remedy provisions for victims of corporate abuse. Specifically, Article 22, as amended by the Proposal's revisions adopted by the European Parliament on 1 June 2023,[4] sets forth that "Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in this Directive and; b) as a result of this failure the company caused or contributed to an actual adverse impact that should have been identified, prioritized, prevented, mitigated, brought to an end, remediated or its extent minimized through the appropriate measures laid down in this Directive and led to damage".

These provisions appear to provide new judicial protection in cases of damages deriving from corporate activities concerning human rights as well as the environment. The second aspect represents a novelty of the Proposal.

2 Loi No. 399/2017 "Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", 27 March 2017.

3 Federal Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (*Lieferkettengesetz*), BGBl I 2021, 2959, 3 March 2021.

4 European Parliament, Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022)0071 – C9-0050/2022 – 2022/0051(COD).

Indeed, the European legislative initiative finds its foundation in the international framework defined by the "UN Guiding Principles on business and human rights" from 2011,[5] which only considers human rights violations. In contrast, the Proposal addresses environmental issues and introduces a new form of due diligence which involves the corporate impact on climate change. Article 3(b) provides a definition of "adverse environmental impact", which is considered as an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the second part of the Annex. This list includes twelve conventions, concerning biodiversity,[6] protection of the ozone layer[7] and of endangered species,[8] mercury[9] or chemical[10] pollution, the export of hazardous wastes.[11] The limited number of conventions recalled in the Proposal has been criticized, as well as the absence of a general clause on environmental damage.[12] Nevertheless, number 18 of the first part of the Annex gives a definition of "measurable environmental degradation", which includes harmful soil change, water or air pollution,

5 United Nations, Office of the High Commissioner for Human Rights, *UN Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework* (HR/PUB/11/04).

6 Convention on Biological Diversity, 5 June 1992, entered into force 29 December 1993; Cartagena Protocol on Biosafety to the Convention on Biological Diversity on the development, handling, transport, use, transfer and release of living modified organisms, 16 May 2000, entered into force 11 September 2003, and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29, October 2010, entered into force 12 October 2014 (number 1 in the list).

7 Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer, 22 March 1985, entered into force 22 September 1988 (number 9 in the list).

8 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), 3 March 1973, entered into force 1 July 1975 (number 2 in the list).

9 Minamata Convention on Mercury ("Minamata Convention"), 10 October 2013, entered into force 16 August 2017 (numbers 3, 4 and 5 in the list).

10 Stockholm Convention on Persistent Organic Pollutants ("POPs Convention"), 22 May 2001, entered into force 17 May 2004, in the version of Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (numbers 6, 7 and 8 in the list).

11 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes ("Basel Convention"), 22 March 1989, entered into force 1992 (numbers 10, 11 and 12 in the list).

12 CARELLA, "La responsabilità civile dell'impresa transnazionale per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla due diligence societaria a fini di sostenibilità", *Freedom, Security & Justice: European Legal Studies*, 2022, p. 10 ff., p. 28.

harmful emissions or excessive water consumption or other impact on natural resources.[13] These natural events need to be linked to a human rights violation, such as the right to water, the right to health, the right to safety, the right to the normal conduct of economic activity. Therefore, the Proposal embraces an anthropocentric conception and the damage to the environment is only considered as the right to a healthy environment.[14]

Another important aspect concerns the corporate climate impact, addressed in Article 15 of the Proposal. In order to combat climate change, companies are required to adopt a plan to align their business models and strategies with the transition to a sustainable economy and the goal of limiting of global warming to 1.5°C in line with the Paris Agreement.[15] The plan should also assess the extent to which climate change is a risk to or results from the company's operations. This indication should only concern the "information reasonably available to the company". In the first version of the Proposal, this Article was subject only to public authority control under Article 18, and civil liability was excluded (it was established just for violations of Articles 7 and 8, as Article 22 stated). However, due to the amendments adopted by the European Parliament,[16] the new Article 22 broadly refers to companies liable for damages if "they failed to comply with the obligations laid down in this Directive", thus including also the failure to adopt a climate change risk plan.

The future impact of this Directive on judicial protection for environmental damage and the implementation of climate change litigation appears significant. However, another related aspect that needs to be taken into account is the provision of civil liability in cases where a corporation fails to comply with the Directive's provisions. This may extend beyond Member

13 The complete definition is: "Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that (a) impairs the natural bases for the preservation and production of food or (b) denies a person access to safe and clean drinking water or (c) makes it difficult for a person to access sanitary facilities or destroys them or (d) harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or (e) affects ecological integrity, such as deforestation, in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights".

14 CARELLA, *cit. supra* note 12, p. 29.

15 UNFCC, *Paris Agreement to the United Nations Framework Convention on Climate Change*, 22 April 2016.

16 European Parliament, *cit. supra* note 4.

States' borders, raising questions about the exercise of an extraterritorial jurisdiction by Member States' courts.

Indeed, the scope of application of the Directive, as defined in the amended Article 2, includes both companies which are formed in accordance with the legislation of a Member State and ones established in third States, as long as they fulfil certain conditions. The first paragraph concerns EU-based companies with more than 250 employees and a worldwide turnover higher than EUR 40 million, and parent companies with over 500 employees and a worldwide turnover higher than EUR 150 million. Another category provided by the Article 2(2) of the Proposal concerns enterprises which are formed in accordance with the legislation of a third country and are active in the EU, provided their turnover exceeds EUR 150 million, with at least EUR 40 million generated in the EU. These non-EU companies can be held liable for human rights violations and for environmental damage if they do not respect their due diligence obligations. But, in this case, which Member States' court, if any, has jurisdiction to deal with such civil claims? Similar questions might also arise for foreign companies indirectly bound by the proposed directive, such as foreign company that is part of the value chain of a company subject to the Directive or the foreign parent company which has European subsidiaries included in the scope of the Directive.[17]

The Proposal, which seeks to safeguard the respect of human rights by enterprises, forgets to take into account the role of the private international law, as a tool of human rights protection, especially for its power to guarantee the right to access to justice for victims.[18] In particular, in the text there is no reference to a reformation of international private and procedure law, and new provisions in order to facilitate the access to European courts for victims of third States. The analyzed framework arises questions on how this gap could be closed, and sheds a light on an old issue, the extraterritorial jurisdiction of the Member States' Courts.

17 ENRIQUES, GATTI, "The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention", *Business Law Blog*, 22 April 2022, pp. 2-3, available at: <https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate>.

18 BOSCHIERO, "Verso il riconoscimento e la trasformazione della Convenzione di Roma: problemi generali", in PICONE (ed.), *Diritto Internazionale privato e diritto comunitario,* 1st ed., Padova, 2004, p. 360.

3 Access to Justice for Victims of Corporate Violations: The Reasons for an Extraterritorial Jurisdiction

The right of victims to have access to an effective remedy before an impartial judge is affirmed and guaranteed by the main tools of international law concerning human rights protection, such as the Universal Declaration of Human Rights,[19] the Covenant on Civil and Political Rights,[20] the European Convention on Human Rights,[21] the Charter of Fundamental Rights of the European Union.[22] In the field of litigation against multinational companies for violations of human rights and environmental law, some questions arise about the best way to guarantee effective access to justice for victims.

Traditionally, the host State was considered the one which, by the exercise of its territorial sovereignty, had the power to control the activities of multinational enterprises and to repress their unlawful conduct. Nevertheless, this principle meets a limit whenever the host State is the main transgressor in the field of both human rights and the environment: multinational enterprises cannot be considered responsible if the law of that State allows the violation.[23] Moreover, the extreme competition among developing countries in terms of foreign investments acquisition must be taken into account. For these developing countries, the enforcement of human rights in internal law would mean being less attractive for foreign capital with a potential loss of an important source of income. There is competition not only among *corporate friendly*[24] States but also between these States and developed countries. The former can only compete with the latter because of their lack of human rights and environmental laws, which allow them to produce low-cost goods, often referred to as *social dumping*.[25]

Such findings lead us to consider an alternative system to host State control, which could ensure a fair treatment and due process for corporate victims. Under certain conditions, the extraterritorial exercise of jurisdiction by home States would make it possible to overcome the *impasse* created by the current system. In this regard, McCorquodale recognizes the pivotal role of the State

19 United Nations, *Universal Declaration of Human Rights*, 1948, Articles 8 and 10.
20 United Nations, *Covenant on Civil and Political Rights*, 1966, Article 2(3).
21 Council of Europe, *European Convention on Human Rights*, 1950, Articles 6 and 13.
22 European Union, *Charter of Fundamental Rights of the European Union*, 2010, Article 47.
23 GATTO, *Multinational Enterprises and Human Rights, obligations under EU law and International Law*, Northampton, 2011, pp. 15-16.
24 JOSEPH, "Taming the Leviathans: Multinational enterprises and Human Rights", *Netherlands International Law Review*, 1999, p. 171 ff., p. 176.
25 ALSTON, *Non-State Actors and Human Rights,* Oxford, 2005, pp. 237-239.

where the headquarters of the multinational enterprise is located, deeming that this State may intervene in various ways in order to regulate the activity of the enterprise, even if its unlawful act occurred beyond the State's borders.[26] Firstly, the State may introduce norms applicable to its citizens and enterprises operating abroad, provided that they do not violate the national legislation of the host State. This is known as prescriptive extraterritorial jurisdiction.[27] Secondly, the State may use the parent company as a means to regulate subsidiaries operating abroad. Additionally, the home State may intervene every time the interest of the entire international community is involved. Indeed, the Vienna Declaration and Program Action of 1993[28] recognizes an obligation to cooperate between States, aimed at protecting shared fundamental values.

Finally, McCorquodale assumes, as a last chance of intervention by home States: the exercise of an extraterritorial jurisdiction of its courts. In this case, the State attributes to its judges the power to adopt decisions for situations that occurred abroad, known as adjudicative extraterritorial jurisdiction.[29] This jurisdiction is typically assigned to a State, often a developed one, with a sophisticated regulatory system and an efficient judiciary and administrative apparatus. This approach helps avoid relevant problems related to legal proceedings, which were started where the unlawful acts occurred. In such cases, State's justice system may prove itself to be inadequate in solving difficult legal disputes both in terms of substance and procedure, often due to high costs. In the United States, the Alien Tort Claims Act (ATCA)[30] was remarkable for its extraterritorial application. Under this Act, the US courts could exercise their jurisdiction extraterritorially in claims by non-US nationals related to violations of "the law of nations or a treaty of the United States" i.e. universally recognized norms of international law. The ATCA was revived in 1980 with the *Filartiga v. Peña Irala* case,[31] and from then it was extended to

26 MCCORQUODALE, *International Law Beyond the State, Essay on Sovereignty non State Actors and Human Rights,* London, 2011, pp. 224-227.

27 DE SCHUTTER, "Extraterritorial Jurisdiction as a tool for improving Human rights Accountability of Transnational Corporations", 22 December 2006, Catholic University of Louvain, p. 9. Available at: <https://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf>.

28 UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, (A/CONF.157/23), second part, letter B, para. 17.

29 See *infra* note 32, p. 9.

30 Alien Tort Claim Act, 28 U.S.C., Sec. 1350. It states that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

31 United States Court of Appeals, Second Circuit, *Filartiga v. Peña Irala,* 630 F.2nd 876, 1980.

cover litigation against multinational enterprises filed by aliens for breaches of their human rights abroad.[32] However, the ATCA encountered a setback with the *Kiobel v. Royal Dutch Petroleum Co.* case.[33] On 17 April 2013, the Supreme Court handed down its decision finding that ATCA cannot be applied to conduct which occurred outside of the United States. The Court excluded that district courts would have jurisdiction in cases where all the relevant conduct takes place outside the United States, rejecting the possibility to decide the so-called "foreign-cubed cases", characterized by the fact that both plaintiff and defendant are foreign, and the conduct occurred abroad.[34]

4 Legal Basis of Extraterritorial Jurisdiction of the European Union Member States' Courts

Having understood the potential of the extraterritorial jurisdiction as a possible way to guarantee access to justice, it is now necessary to delve into the European legal framework, which attributes jurisdiction to Member States' judges for transnational litigation.

At European level, the Brussels Convention[35] harmonized, for the first time, private international law with regard to jurisdiction and the enforcement of judgments in civil and commercial matters. The Convention was then modified and integrated into Regulation No. 44/2001[36] and Regulation No.

32 ALSTON, *supra* note 25, p. 266.

33 United States Court of Appeals, Second Circuit, *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 125 (2d Cir. 2010), 17 September 2010.

34 BONFANTI, "No Extraterritorial Jurisdiction Under the Alien Tort Statute: Which "Forum" for Disputes on Overseas Corporate Human Rights Violations After "Kiobel"?", *Diritti umani e diritto internazionale*, 2013, p. 379 ff., p. 381; THEOPHILA, "Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum Co.", *Fordham Law Review* 2011, p. 2862 ff., p. 2888; BOSCHIERO, "Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in Kiobel v. Royal Dutch Petroleum", *Rivista di diritto internazionale privato e processuale,* 2013, p. 249 ff., pp. 255-258.

35 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968, Consolidated version, CF 498Y0126(01).

36 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16 January 2001 (hereinafter "Brussels I Regulation").

1215/2012.[37] This latter identifies three cases in which Member States' judges have jurisdiction for matters of tort with transnational features: when people are domiciled in a Member State, whatever their nationality (Article 4); in case of prorogation of jurisdiction (Articles 25 and 26); when the harmful event occurred or may occur in a Member State (Article 7(2)). As far as the latter is concerned, the European Court of Justice has defined its correct interpretation, clarifying that the Article indicates, indistinctly, "both the place where the damage occurred and the place of the event giving rise to it".[38]

With reference to claims involving multinational enterprises with their headquarters in the European Union, the process before the judge of the Member State is allowed by Articles 4 and 63(1). This Paragraph identifies the domicile of a company or other legal persons at the place where it has its statutory seat, central administration or principal place of business. Therefore, this statement enables victims of third countries to sue the parent company domiciled in a European State for its responsibility for damage and violations, which occurred beyond the European territory. The parent company's responsibility could derive from the lack of control on the subsidiary which operates abroad and causes the harmful event. This legal framework, which recognizes the jurisdiction of the Member States in cases of damage suffered by victims of any nationality, determined by activities of enterprises domiciled in the Member State or by any of its breaches, has led to talk about a "European Foreign Tort Claims Act", expression which clearly refers to the Alien Tort Claims Act experience.[39]

However, such a system still appears inadequate to ensure an access to justice, as provided by Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights, since the access

37 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 20 December 2012 (hereinafter "Brussels I Recast Regulation"). See BOSCHIERO, "Il funzionamento del regolamento Bruxelles I nell'ordinamento internazionale: note sulle modifiche contenute nella proposta di rifusione del 2011", in *Diritto del commercio internazionale,* 2012, p. 253 ff.; GILLIES, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I: Back to the Drawing Board?", in *Journal of Private International Law,* 2012, p. 489 ff.; POCAR, VIARENGO, VILLATA, *Recasting Brussels I*, Bologna, 2012.

38 Case C-21/76, *Bier BV c. Mines de Potasse D'Alsace SA*, 1976, p. 1735.

39 ALSTON, *cit. supra* note 25, pp. 262–267.

is strictly connected to the defendant's domicile.[40] On this point, the European Commission had already expressed criticisms during the revision work of the Brussels I Regulation, assuming that the access to justice in EU was overall unsatisfying in disputes concerning defendants from outside the EU.[41] Indeed, this Regulation is applicable only when defendants are domiciled inside the EU. Otherwise, according to the Commission, the jurisdiction would be defined by national laws, which could differ from one another, and could cause unequal access to justice for EU companies with partners operating in third countries.

To harmonize jurisdiction rules for subsidiaries, Section 8 of the "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (hereinafter "Commission's Proposal") introduced two additional fora were introduced for disputes involving defendants domiciled outside the EU. The first principle was *subsidiary jurisdiction,* which, compared to other criteria, would have enabled plaintiffs to sue the non-EU defendant in the

40 Albeit, in this regard, it must be said that the ECHR adopted a restrictive interpretation of Art. 6(1) in *Naït-Liman v. Switzerland* decision, stating that the right of access to a court cannot be considered absolute, since Art. 6(1) does not imply an obligation to provide criteria for the exercise of civil jurisdiction for damage sustained by foreign who are victims of acts of torture committed abroad. European Court on Human Rights, *Naït-Liman v. Svizzera*, no. 51357/07, Application, 15 March 2018, para 217-220. For an analysis of this case, *ex multis,* FORLATI, FRANZINA*, Universal Civil Jurisdiction. Which way Forward?,* Leiden/Boston, 2021; MORA, "Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in Naït-Liman v. Switzerland"*, Netherlands International Law Review*, 2018, p. 155 ff.; PAVONI, "Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso Naït-Liman", *Rivista di diritto internazionale*, 2018, p. 888 ff.; DE MARZIIS, "Diritto di accesso a un giudice e giurisdizione civile universale dinanzi alla Corte europea dei diritti umani", *Diritti umani e diritto internazionale*, 2018, p. 693 ff.

41 European Commission, "Proposal for a Regulation of The European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", Brussels (Recast), COM (2010) 740 final, 14 December 2010, p. 3. See: VAN DEN EECKHOUT, VEERLE, "Corporate Human Rights Violations and Private International Law. The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?", 26 July 2011, p. 6 ff., available at: <https://ssrn.com/abstract=1895690> or <http://dx.doi.org/10.2139/ssrn.1895690>; AUGENSTEIN, JÄGERS, "Judicial remedies: The issue of jurisdiction", in ALVAREZ RUBIO, YIANNIBAS, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, 1st ed., New York/London, 2017, p. 7 ff.; WEBER, "Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation", *Rabel Journal of Comparative and International Private Law* (*RabelsZ*), 2011, p. 620 ff., p. 634; BONFANTI, "Diritti umani e imprese multinazionali dinanzi ai giudici europei: sulla revisione del Regolamento (CE) n. 44/2001", *Rivista di diritto internazionale privato e processuale*, 2011, p. 697 ff., p. 710.

Member State where moveable assets were located, provided that the value of these assets was not disproportionate compared to the value of the claim and that the dispute had a sufficient connection with that Member State.[42]

The second forum was introduced in Article 26 of the Commission's Proposal. This criterion, the *forum necessitatis,* would have allowed to proceed before a Member State's court, in the case that no other forum was able to guarantee the right to a fair trial. Indeed, this issue seems relevant, considering EU companies investing in countries with an immature legal system. In particular, the new Article required that it should be impossible and unreasonable for the plaintiff to start the process in the third State and that there should be a sufficient connection with the Member State where the court is seized.[43]

As clarified in the Commission's Proposal, this reformation of the current Regulation would have ensured an equal access to court in the EU for citizens and companies and a level playing field in the internal market. Nevertheless, both ideas were not endorsed by the European Parliament, which considered it premature to take this step without having carried out wide-ranging consultations and a political debate,[44] and in Brussels I Recast Regulation the defendant's domicile was confirmed as the primary jurisdictional standard.

5 Case-law on Extraterritorial Jurisdiction about Torts Committed Abroad by European Enterprises

The practice of foreign citizens proceedings before a European Court against a European enterprise operating abroad started at the beginning of the 1990s

42 FRANZINA, "The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?", *Diritto del Commercio Internazionale*, 2011, p. 789 ff., pp. 794-802.

43 European Commission, *cit. supra* note 41, p. 34. See: NWAPI, "Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor", *Utrecht Journal of International and European Law*, 2014, p. 24 ff., pp. 28-29; ROSSOLILLO, "Forum Necessitatis e Flessibilità dei Criteri di Giurisdizione nel Diritto Internazionale Privato Nazionale e dell'Unione Europea", *Quaderno de Derecho Transnacional,* 2010, p. 403 ff., pp. 412-413; FRANZINA, "Sul *Forum Necessitatis* nello spazio giuridico europeo", *Rivista di diritto internazionale*, 2009, p. 1121 ff., pp. 1128-1129.

44 European Parliament, Committee on Legal Affairs, "Draft report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)", 2010/0383(COD), (COM (2010)0748 – C7-0433/2010 – 2010/0383(COD)), 28 June 2011, p. 8.

in the United Kingdom. In *Thor Chemicals*, *Cape p.l.c.* and *RTZ* cases,[45] English Courts recognized their jurisdiction in claims concerning the violation of the right to health of South African and Namibian workers, because parent companies were located in England. Later, the judgment in *Chandler v. Cape p.l.c.*[46] case allowed the identification of the circumstances of the parent company's responsibilities for its subsidiaries' unlawful acts committed abroad. This sentence introduced the principle of parent company's *duty of care,* which defined its responsibilities in case "a) the businesses of the parent and subsidiary are in a relevant aspect the same; b) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; c) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and d) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection".[47]

In the Netherlands, the *Miliudefensie* case was the first proceeding against a Dutch multinational for an environmental damage allegedly caused abroad by its foreign subsidiary. The claimants stressed the direct liability of the parent company for its act or omission and the duty of care deriving from the subsidiary operations. Specifically, several separate actions of four Nigerian fishermen from the villages of Goi, Oruma and Ikot Ada Udo[48] were presented before the District Court of The Hague against the Royal Dutch Shell for torts committed by its subsidiary, the Shell Petroleum Development Company of Nigeria ("SPDC"). In this claim, plaintiffs asked for compensation for the environmental damage caused by oil spillages and a remedy for soil and water pollution, claiming both parent and subsidiary companies liable for negligence. The Dutch court asserted its jurisdiction on the basis of Articles 4 and 63 of

45 England and Wales Court of Appeal, *Lubbe v. Cape Plc.*, (1998) EWCA Civ. 1351, (1998) CLC 1559, 30 July 1998; England and Wales Court of Appeal, *Ngcobo v. Thor Chemicals Holdings Ltd.*, 1995, 1995 WL 1082070, 9 October 1995; England and Wales Court of Appeal*, Sithole and Others v. Thor Chemical Holdings Ltd.*, 1999, 1999 WL 477489, 3 February 1999; UK House of Lords, *Connelly v. RTZ Corporation Plc*, Judgment of 24 July 1997, (1997) 3 WLR 373. See MUCHLINSKI, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases", *International and Comparative Law Quarterly*, 2001, p. 1 ff.

46 England and Wales Court of Appeal, *Chandler v. Cape Plc*, 25 April 2012, available at: <casemine.com>.

47 *Ibid.,* para. 80.

48 Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, 200.126.843 (case c) and 200.126.848 (case d), 18 December 2015. See BRIGHT, "The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands", in BONFANTI (ed.), *Business and Human Rights in Europe*, 1st ed., New York/London, 2019, p. 6 ff.

Brussels I Regulation, since Shell had its headquarters there. Regarding the claim against the subsidiary in Nigeria, the court recognized its international jurisdiction due to the Article 7(1) of the Dutch Code of Civil Procedure, which allows the connection between claims "to the extent that reasons of efficiency justify a joint hearing".[49] Thus, the court deemed that the claims against the parent company and its subsidiary were so closely connected that it was necessary to hear and decide them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

This approach was also confirmed in following judgements by English courts in the more recent *Unilever*[50] and *Vedanta* cases.[51] The latter was quite revolutionary, since the Supreme Court based its final decision directly on the principle of "substantial justice", deeming it was meaningless to attribute jurisdiction to the State where the damage occurred, if there were not guarantees of a fair trial for victims in that particular State.[52]

In Italy, a similar case was filed by the Nigerian community of Ikebiri against the Italian multinational enterprise, ENI. The indigenous population, through its representative Ododo Francis Timi, sued ENI and its controlled company, the Nigerian Agip Oil Company Limited ("NAOC") before the Court of Milan for the environmental damage which had occurred in Nigeria in 2010.[53]

Pursuant to the presence of ENI's representatives in the San Donato Milanese headquarters, it was possible to attribute the jurisdiction to the *Tribunale di Milano*, under Articles 3 of the Italian law No. 218 of 1995[54] and

49 Article 7(1) of the Dutch Code of Civil Procedure provides that: "If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency".

50 England and Wales Court of Appeal, *AAA & Ors v. Unilever plc & Unilever Tea Kenya Limited,* Case No. A2/2017/0721, April 2018.

51 UK Supreme Court, *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines*, UKSC 2017/0185, 10 April 2019, available at: <www.supremecourt.uk>.

52 *Ibid.*, paras. 100-101. See BOSCHIERO, "Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù. Una valutazione alla luce del diritto internazionale consuetudinario, del diritto internazionale privato europeo e dell'agenda delle Nazioni Unite 2030 (parte seconda)", *Rivista telematica Stato e Chiese*, 2021, p. 62 ff., pp. 144-145.

53 Friends of Earth Europe, "ENI and the Nigerian Ikebiri case", Press briefing, 4 May 2018. available at: <http://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf>.

54 Act No. 218/1995 Reform of the Italian system of private international law, 31 May 1995, published in *Gazzetta Ufficiale, Supplemento Ordinario* No. 128, 3 June 1995.

Article 4 of the Brussels I Recast Regulation.[55] As in the English and Dutch cases, Italian jurisdiction towards NAOC was based on the strong bond with its parent ENI, also in order to avoid two pending cases in two different States for the same harmful event.

The *Ikebiri* case was settled in May 2019, nevertheless, it was a relevant precedent to the recognition of an Italian extraterritorial jurisdiction for environmental damages produced by an Italian multinational subsidiary abroad. The Court of Milan rejected the ENI and NAOC's arguments on jurisdiction, implicitly declaring to have the power to decide.

6 The Member States' Extraterritorial Jurisdiction in the Light of the Proposal of CSDD Directive

Having understood the reasons of an extraterritorial jurisdiction, how and when this was used at European level for claims concerning environmental damage produced by European multinational enterprises abroad, it is now possible to analyze why the proposal of the Directive on CSDD could be a good opportunity to better define this kind of judicial power of Member States' courts.

As mentioned above, the current regulatory framework in European private international law allows an extraterritorial jurisdiction of Member States' courts but only when defendants, liable directly or indirectly for its subsidiaries' faults, are domiciled inside the EU. Thus, if the society is domiciled in a Member State, or if in the Member State it has its parent company, for the identification of the court with jurisdiction, the application of Articles 4 and 63 of the Brussels I Recast Regulation remains unaffected. These criteria allow victims of subsidiaries to start an action in the Member State of the parent company, regardless of the plaintiff's nationality or the place where the event occurred.

Nevertheless, the proposed Directive on CSDD will require an adaptation to sustainability due diligence rules across the globe from any company who are part of the value chain of any company operating in the EU. With regard to litigation which could arise against such companies, not established in Member States, but therein operating (Article 2(2) of the proposed Directive), the foreign element would be more than one: the place of event, both the victims nationality and the defendant's nationality (a sort of "foreign cubed

55 All case documents are available at: <https://studiolegalesaltalamacchia.com/cause-ambientali/comunita-ikebiri-contro-eni-naoc/>.

case").[56] In these cases, the real challenge lies in the definition of the court with jurisdiction, considering that criteria of the Brussels I Recast Regulation are not applicable, since the foreign company is not domiciled in a Member State. The question needs to be solved by the private international law of each Member State, which may assign the jurisdiction to its judges (for instance, in case of *forum necessitatis* provisions), or not. Therefore, a new legal basis for the extraterritorial jurisdiction of Member States' courts for cases against foreign firms, including potential "foreign cubed cases" seems necessary in view of the effectiveness of the future Directive. The current gap in European private international law creates a discrepancy between companies, which are domiciled in a Member State, or not. The foreign companies would be subject to the obligations of the Directive, but only for the EU companies would there be effective judicial remedies in order to guarantee the respect of its provisions.[57]

For these reasons, during the first part of the legislative initiative, the Draft Report presented by the European Parliament's JURI Committee to the European Commission in September 2021[58] had already suggested amendments to both the Brussels I Recast Regulation and the Rome II Regulation. If we only take the jurisdiction issue into account for the modification of the Brussels I Recast Regulation, the Draft Report of the European Parliament Legal Committee put forward two amendments: the introduction of Paragraph 5 to Article 8 and the provision of a new Article, 26a.

To go into more detail, the new Paragraph of Article 8 would have stated that an undertaking domiciled in a Member State might be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship, pursuant to Article 3 of the Proposal of Directive. This new provision does not provide much more details than the current Article 8(1) of the Regulation. Indeed, in both cases the jurisdiction by connection is applicable only if all defendants are domiciled in Member States. It has also been argued that such a provision would only have created unnecessary confusion as to whether the venue of general jurisdiction, provided by Article 4 and 63, was suitable even when in the absence of "damage

56 See, *cit. supra* note 34.

57 HO-DAC, "Brief Overview of the Directive Proposal on Corporate Due Diligence and PIL", *EAPIL Blog*, 27 April 2022, available at: <https://eapil.org/2022/04/27/brief-overview-of-the-directive-proposal-on-corporate-due-diligence-and-pil/>.

58 European Parliament, "Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability", 2020/2129(INL), 11 September 2020, available at: <https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf>.

caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship."[59]

Thus, the jurisdiction by connection over non-EU entities, such as the foreign subsidiary or suppliers of EU-domiciled companies, can only be determined by the rules of domestic private international law,[60] which sometimes prove difficult to apply.[61] Since the Brussels I Recast Regulation limits this mechanism and only takes into account the defendant's domicile, there is no level playing field for companies. A more useful amendment would have been the introduction of a legal basis for a connected claim, as suggested by the European Group for Private International Law in their recommendation for future Directive on CSDD.[62] The extension of Article 8 would have legitimized that a person not domiciled in a Member State, being one of a number of defendants, may be sued for the violation of due diligence obligations before the court of the Member State where any one of them is domiciled.

The introduction of Article 26(a) would have provided the *forum necessitatis* criterion for all litigation concerning human rights violations or environmental damage, occurring outside the EU and having defendants domiciled outside the EU. This new Article would have defined a forum and avoided a denial of justice for such claims since the Brussels I Recast Regulations does not provide an access to a European court for these situations. In particular, Article

59 THOMALE, "On the EP Draft Report on Corporate Due Diligence", in *Conflict of law.net,* 27 October 2020, available at: <https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>.

60 For instance, it is possible in France, Art. 42 para. 2, Code de Procédure Civile; Italy, Art. 3(2), Law No. 218/95 (PIL Act), and in Netherlands, Art. 7, Code of Civil Procedure.

61 European Parliament, "Study Requested by the DROI committee "Access to legal remedies for victims of corporate human rights abuses in third countries", p. 34, available at: <https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2019)603475>. For an analysis of the *Kik* case in Germany see: WESCHE, SAAGE-MAASS, "Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK", *Human Rights Law Review*, 2016, p. 370 ff., p. 374.

62 European Group for Private International Law (GEDIP), "Draft Recommendation of the European Group for Private International Law to the European Commission concerning Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]", 3 June 2021. The text proposed as following: "A person not domiciled in a Member State may in respect of due diligence obligations under [in matters falling within the scope of] this Instrument be sued, where (s)he is one of a number of defendants, in addition to the courts available under the Brussels I Recast Regulation in the courts for the place where anyone of them is domiciled, provided the claims are connected such that it is expedient to hear and determine them together."

26(a) allows the plaintiff access to the court of the Member State, if it can be demonstrated that the case has a sufficient link with that State.[63]

Scholars have expressed divergent views about the introduction of these two criteria. The dissenting opinions deemed that the introduction of *forum necessitatis* was unnecessary considering the new direction of the United States Supreme Court.[64] Another criticism concerned the inconsistency of such reforms with the current Brussels I Recast Regulation system and its principle of predictability for rules of jurisdiction (Article 15). Nevertheless, a new provision concerning *forum necessitatis* would not imply that Member States' courts could assume jurisdiction for cases unrelated to the EU. Unlike the universal civil jurisdiction, which does not require a particular link between the case and the forum,[65] the forum of necessity usually relies on two cumulative conditions: an obstacle preventing the claimant from obtaining justice abroad and a connection with the forum. The criterion of *forum necessitatis*, still remaining subsidiary to the ordinary rules of jurisdiction, can be used to "enlarge traditional jurisdiction in the service of ensuring access to justice and avoiding impunity".[66]

Moreover, the introduction of both the rule of co-defendants and of *forum necessitatis* would have been in line with the provisions of private international law of recent initiatives, such as the "Draft Treaty on Business and Human Rights"[67] and "Sofia guidelines for international civil litigation for human rights violation".[68]

63 *Ibid*, p. 29. Full text of proposed new Article 26(a): "Regarding business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of Directive on Corporate Due Diligence and Corporate Accountability, where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seized".

64 THOMALE, *cit. supra* note 59.

65 BOSCHIERO, *cit. supra* note 52.

66 MILLS, "Rethinking Jurisdiction in International Law", *The British Yearbook of International Law*, 2014, p. 187 ff., p. 225.

67 UN Human Rights Council (OEIGWG), "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises", OEIGWG Chairmanship Second Revised Draft, 6 August 2020.

68 International Law Association (ILA), "Final Report International Civil Litigation for Human Rights Violations", Sofia Conference, 2012.

In any case, the Legal Committee's ambitious proposals to extend the jurisdiction of European courts were not honored. These suggestions remained without a collocation in the Proposal of the Directive, elaborated by the European Commission. The only reference to private international law concerned the overriding mandatory application of the Directive (Article 22 (5)).

In the absence of an intervention of the European Legislator, a hypothetical solution could be found in a broader interpretation of the "authorized representative" role, provided by Article 16 of the Proposal.[69] This Article states that the obligation of every foreign company, which operates in the Member States, is to designate a legal or natural person as its authorized representative, established or domiciled in one of the Member States where it operates. Actually, this figure is strictly connected with the activity of the Supervisory Authority which, pursuant to Article 17, should be established in each Member State in order to supervise the respect of due diligence obligations. For companies falling into the scope of Article 2(2), the Supervisory Authority would be that of the Member State where the company has a branch or, in the absence, in the Member State where the foreign company generated most of its net turnover. In the "explanatory memorandum" of the Proposal, the power of the authorized representative is described quite broadly, deeming that it could be addressed by the competent authorities of Member States on all issues necessary for the reception, compliance, and enforcement "of legal acts issued in relation to this Directive".[70] By means of this representative, companies may receive communications necessary for compliance with the Directive, as transposed by States. Moreover, these companies are required to provide their authorized representative with the necessary powers and resources to cooperate with the Supervisory Authorities.

This above-mentioned solution, provided for public enforcement and connected to the work of Supervisory Authorities, if applied to private enforcement, might allow the legitimization of the jurisdiction of the Member State where the foreign company has its authorized representative. Therefore, the defendant's domicile, as a general criterion of European Private International law, would be more broadly interpreted by considering non-EU companies domiciled in a Member State due to the presence of their authorized representative. This place should be considered in accordance with the text of Article 63 of the Brussels I Recast Regulation. The location of its subsidiary and of its representative in a Member State would be a sort

69 HO-DAC, *cit. supra* note 57.

70 European Commission, *supra* note 1, p. 25.

of "central administration" or "principal place of business" for the foreign company in relation to context of the European Union.

7 Conclusion

The current system of European norms concerning the definition of jurisdiction still appear inadequate in addressing the need to facilitate access to justice for victims often harmed by European companies in third States. The intention to extend the access to European courts has remained unfulfilled both during the revision of the Brussels I Regulation and in the recent Proposal of the CSDD Directive. The latter could present a new opportunity for the European legislator to better define and harmonize this aspect at European level. Considering the potential extraterritorial scope of the Directive, which refers to a wide range of European and non-European enterprises, a simultaneous modification of the access to justice regulation seems necessary. The jurisdictional issue is strictly linked to the effectiveness of the future Directive: an obligation must always be associated with the possibility of access to justice to ensure its enforcement. In this regard, while the legal framework may seem sufficient for European companies as defendants, defining a competent judge for litigation against non-EU enterprises could prove challenging. Consequently, this gap in the European system of private international law would greatly undermine the availability and effectiveness of judicial remedies for corporate damage.