

***Contribution to the work of the UN Secretary-General's Special Representative on human rights and transnational corporations and other businesses***

***Extraterritoriality as an instrument***

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**INTRODUCTION**

1. This memorandum on extraterritoriality is a contribution to the discussion initiated by John Ruggie, the UN Secretary-General's Special Representative on human rights and transnational corporations and other businesses<sup>1</sup>. It is a response to a body of work on extraterritoriality on the Special Representative's website, especially the highly detailed report prepared at the Special Representative's request by Mrs Jennifer Zerk (the "Report on Extraterritorial Jurisdiction")<sup>2</sup>. It takes account of the discussion that took place during an expert seminar in Boston on 14 September 2010 and continued thereafter in a series of e-mail exchanges.

2. Extraterritoriality is a "situation in which state powers (legislative, executive or judicial) govern relations of law situated outside the territory of the state in question"<sup>3</sup>. The purpose of the discussion is to determine to what extent it is appropriate for states to extend their powers beyond their own territory in order to combat breaches of human rights committed by businesses.

3. Extraterritoriality raises many problems of both a legal and a practical nature. One of the most complex is to determine at what point a situation is located in a given territory, in a context where boundaries are blurred by modern communication technology, the transnational structure of some corporations and economic and financial globalisation<sup>4</sup>. Matters are further complicated by different national legal traditions in the field. That is why this memorandum focuses on the particular approach of countries in the Romano-Germanic law tradition of

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<sup>1</sup> The Secretary General of the United Nations designated a special representative on this topic in 2005, at the request of the former Human Rights Commission (E/CN.4/RES/2005/69). His mandate was prolonged in 2008 by the Human Right Council for a three years period (A/HRC/RES/8/7). The last report of the Special Representative is dated 9 April 2010 (A/HRC/14/27).

<sup>2</sup> Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Area*, A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, June 2010, Working Paper n°59 [[http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_59\\_zerk.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf)].

<sup>3</sup> Jean Salmon (ed.), *Dictionnaire de droit international public*, Bruylant / Agence universitaire de la Francophonie, Bruxelles, 2001, p. 491.

<sup>4</sup> For that reason, the traditional distinction between direct and indirect extraterritoriality, as used in the *Report on Extraterritorial Jurisdiction (passim)*, is highly relative. It is probable that the same international law principles apply to all forms of extraterritoriality.

continental Europe<sup>5</sup>, under-represented in the work mentioned earlier. It draws mainly on French law, with references to EU law and public international law.

4. After some remarks on the legal framework established by public international law (Section 1), we shall consider extraterritoriality in criminal law (Section 2), civil law (Section 3) and administrative law (Section 4). Section 5 looks at certain sets of rules designed to protect the environment, an area with many specific features. The final section contains proposals.

### ***Section 1. Extraterritoriality rules in public international law***

5. Rules on state jurisdiction in public international law are based on three principles: sovereignty, non-intervention and cooperation.

6. The principle of sovereignty implies that a state has exclusive jurisdiction on its territory for acts of coercion. Concerning normative powers, in contrast, the celebrated 1927 *Lotus* judgment of the Permanent Court of International Justice posed a presumption of the liberty of the state<sup>6</sup>, thus ruling out the opposite presumption of restriction in the absence of express authorisation under international law. The *Lotus* approach has often been challenged in legal theory, though no international court has as yet had occasion to return to the issue<sup>7</sup>. It might therefore be supposed that states make the best of current practice in extraterritoriality, despite some official protests, or manage to organise it within more or less formal agreements.

7. The principle of non-intervention restricts the extraterritorial exercise of state powers. It is entirely consistent with the principle of sovereignty insofar as it prohibits acts of coercion by one state on the territory of another state without the latter's consent<sup>8</sup>. The effects of the principle are less clear-cut where normative powers are concerned, even though several UN General Assembly resolutions mention the inadmissibility of both direct and indirect intervention<sup>9</sup>. It has been regularly invoked by governments and by the European Union against regulations introduced by the United States that were intended to sanction another country and imposed obligations on their nationals in order to do so<sup>10</sup>. This doubtless explains why countries tend to restrict themselves where extraterritoriality is concerned.

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<sup>5</sup> « Romano-Germanic law » or « continental law » is an expression equivalent to « *civil law* » as used by English-speaking lawyers from the *common law* tradition. Lawyers from the Romano-Germanic tradition would normally not use the expression « *civil law* » to refer to their own legal tradition. Moreover, the expression « *Civil law* » is confusing, because civil law is also a field of law.

<sup>6</sup> PCIJ, judgment of 7 September 1927, Series A, n°10, p. 19 : « [a]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty ».

<sup>7</sup> The question was directly raised by two States before the International Court of Justice. However, in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the parties eventually agreed not to deal with this question in their pleadings, focusing on immunities (judgment of 14 February 2002). In the case of *Certain criminal proceedings in France (Republic of the Congo v. France)* (application of 9 December 2002), Congo withdrew its application in 2010.

<sup>8</sup> See ICJ, *Corfu Channel (United Kingdom v. Albania)*, judgment of 9 April 1949. Another exception is rooted in Article 2, para. 7, of the United Nations Charter, which enables the Security Council to lift the prohibition when acting under Chapter VII of the Charter.

<sup>9</sup> General Assembly resolutions 2131 (XX), 2625 (XXV), 31/91, 36/103.

<sup>10</sup> There were numerous negative official reactions to the « Helms-Burton » and « d'Amato-Kennedy » Acts of 12 March and 5 August 1996 (*ILM*, vol. 35, p. 357-378 and 1273-1279). Those reactions were listed by the Secretary General of the United Nations (Doc. NU, A/50/401). The European Union adopted a blocking instrument with a mirror effect: Council Regulation (EC) n°2271/96 of 22 November 1996.

8. The principle of cooperation requires countries to settle conflicts relating to extraterritorial jurisdiction peacefully and in good faith. This obligation has led to the conclusion of many treaties spelling out the normative jurisdiction authorised or prescribed by international law in a given field.

9. The combination of these three principles has gradually led to the emergence of customary and treaty-based rules establishing bases of state jurisdiction. A state with a basis of jurisdiction in a given situation may claim to act in compliance with international law. The main bases of jurisdiction are as follows:

- territorial jurisdiction, where the situation is located in all or some of the state's territory;
- personal jurisdiction, where the perpetrator ("active" personal jurisdiction) or the victim ("passive" personal jurisdiction) has the state's nationality;
- protective jurisdiction (or "*in rem* jurisdiction", or "*service public*" jurisdiction), where the situation is prejudicial to a fundamental interest of the state;
- universal jurisdiction, where the matter concerns the defence of universal values, in the absence of classic links corresponding to the other titles of competence.

10. Let us dwell for a moment on universal jurisdiction, the subject of heated debate both in criminal law, because several European countries have used the principle to prosecute international crimes, and in civil law, because of the suits filed in the United States on the grounds of the Alien Tort Statute. In criminal law, universal jurisdiction is imposed by certain treaties, albeit generally in the form of an alternative: prosecute or extradite (*aut dedere, aut judicare*). This alternative applies to individuals and suggests that the suspect must be present on the territory of the state exercising universal jurisdiction<sup>11</sup>. This does not mean that universal jurisdiction cannot be authorised and applied to legal entities according to customary international law. In such a case, however, its material scope is limited to the most serious breaches of human rights, *i.e.* so-called core crimes. In civil law, the issue has not been expressly addressed in any treaty, even if a criminal offence is also a civil offence (tort) and the perpetrator or the legal entity of which the perpetrator is the agent may thereby incur non-contractual liability. It could be supposed from this that customary international law authorises universal jurisdiction in civil matters in the same proportion as in criminal matters. The existence of additional conditions, like subsidiarity or some sort of link with the territory, remains a subject of debate in both criminal and civil law<sup>12</sup>.

11. In principle, customary international law does not stipulate any priority rule in the exercise of the different bases of jurisdiction. Certain treaties contain such rules, in particular to forestall conflicts of jurisdiction in civil or commercial matters, in which case they take the form of rules on *lis pendens*. Some systems of national law prefer the "reasonableness" criterion, as in United States constitutional law<sup>13</sup>, in some cases in the form of a *forum conveniens* (or *non conveniens*) theory. Such approaches are much less common in Romano-

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<sup>11</sup> Contrary to what is suggested by the *Report on Extraterritorial Jurisdiction*, which insists on the Belgian and the Spanish examples (p. 120), the debate is rather about the methods acceptable for the exercise of universal jurisdiction, especially those going beyond the alternative *aut dedere aut judicare*.

<sup>12</sup> In favor of a condition of subsidiarity : Brief of *Amicus Curiae* of the European Commission in support of neither party, in the Supreme Court of the United States, *Sosa v. Alvarez-Machain*, 23 January 2004.

<sup>13</sup> Concurring, with serious doubts concerning the justification of such a condition: John H. KNOX, « A Presumption Against Extrajurisdictionality », *American Journal of International Law*, vol. 104, n°3, July 2010, p. 351-396, especially p. 352.

Germanic law than in common law systems, probably because they require the establishment of case-law criteria and their case-by-case application by the courts. In criminal law, however, the exercise of extraterritorial jurisdiction may be conditional on a decision by the prosecution service, taken either on a discretionary basis or against the yardstick of statutory criteria. These points may be illustrated from examples in French law.

## ***Section 2. Extraterritoriality in criminal law***

12. Let us begin by recapitulating the criminal liability of legal entities and how criminal proceedings are triggered in France. Since the new Penal Code came into effect on 1 March 1994, all legal entities except the state incur criminal liability on the dual condition that the offence was committed by one or more individuals in their capacity as bodies or representatives of the legal entity and on the legal entity's behalf. Although initially legal entities could be prosecuted only under a special text, their criminal liability was extended to all offences by Act 2004-204 of 9 March 2004<sup>14</sup>. It is also a criminal offence for legal entities to aid and abet the commission of a criminal offence (Articles 121-6 and 121-7 of the Penal Code). Under the ordinary rules of criminal procedure, a prosecution may be triggered not only by the prosecution service but also by victims as "civil parties" claiming compensation for damages.

13. While French criminal law is very open to normative extraterritoriality, its implementation may be complicated by procedural conditions that constitute exceptions to ordinary law or by substantive conditions. Our subsequent reasoning will be guided by the different bases of jurisdiction, including territorial jurisdiction, since it can reveal indirect forms of extraterritoriality.

14. French criminal law applies where criminal offences are committed on the territory of the French Republic (Article 113-2 of the Penal Code) and where a primary offence committed in another country is aided and abetted in France (Article 113-5). Where aiding and abetting are concerned, however, the application of French law is subsidiary and subject to two conditions: double criminality and a final judgment of the foreign courts convicting the perpetrator of the primary offence. In determining whether an offence has been committed on French territory, case law is guided by the theory of ubiquity: an offence is deemed to have been committed in France where one of its constituent elements, whether action or outcome, is located in France (Article 113-2, para. 2).

15. Under these rules, French criminal courts have jurisdiction to try, for example, an insider trading offence involving the securities of a foreign company listed on a foreign market where the stock market order was placed in France (place of the action), or the pollution of a watercourse touching French territory caused by a firm located in Belgium (place of the outcome)<sup>15</sup>. An extensive interpretation of location criteria caused a major stir in the *Yahoo* case involving the sale of Nazi memorabilia on the internet. A French judge in chambers held that French criminal law applied (Article R. 645-1 of the Penal Code), generating a civil wrong, since the site could be consulted from France and therefore caused a

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<sup>14</sup> Act n°2004-204 of 9 March 2004 on the Adaptation of Justice to the Evolution of Criminality (« Perben II »), art. 54, modifying Article 121-2 of the Criminal Code. *Adde* : loi n° 2009-526 du 12 mai 2009 de simplification et de clarification du droit et d'allégement des procédures, art. 125 (modifications in twenty-five other codes).

<sup>15</sup> Respectively: Cour de cassation, chambre criminelle, 3 novembre 1992 (*Dalloz*, 1993, p. 120) ; Cour de cassation, chambre criminelle, 15 novembre 1977 (*Revue de sciences criminelles*, 1978, p. 627).

prejudice in France. He ordered Yahoo and Yahoo France to prevent internet users in France from accessing the web pages in question<sup>16</sup>. Yahoo withdrew the objects from its site, having failed in its attempt to obtain a judgment in the United States that would impede enforcement of the French order<sup>17</sup>. The matter of law was not finally settled.

16. Where personal jurisdiction is concerned, French criminal law applies to a very large number of offences committed by or against a French individual or legal entity outside France. Where the perpetrator has French nationality, extraterritorial jurisdiction applies to all offences classified as "*crime*" (felony) and, subject to double criminality, to those classified as "*délit*" (misdemeanour) (Article 113-6). If the victim has French nationality, extraterritorial jurisdiction extends to any "*crime*" and to any "*délit*" punishable by imprisonment, with no double criminality requirement (Article 113-7). For less serious offences (*délits*), a prosecution may be brought only on the initiative of the prosecution service and also requires a complaint by the victim or an official accusation by the authorities of the country on whose territory the offence was committed (Article 113-8).

17. To give an illustration, a complaint on the ground of personal jurisdiction was filed against the oil company Total in France on 16 August 2002 in connection with allegations of forced labour on a gas pipeline in Burma between 1995 and 1998. The facts were identical to those of the *Unocal* case in the United States. The offence in question was that of sequestration, since forced labour as such is not a criminal offence in French law. However, the matter did not come to trial because of the lack of factual information provided by the complainants to the investigating magistrate, resulting in a nonsuit on 10 March 2006. At the same time, on 20 November 2005 the complainants concluded an agreement with Total providing for compensation and the funding of various humanitarian initiatives at a cost of €5.2 million<sup>18</sup>.

18. The condition that only the prosecution service may bring criminal proceedings may hamper the prosecution of less serious offences (*délits*) committed by French nationals abroad. In the *Rougier* case in 2002, this condition prevented the admissibility of a complaint filed by seven Cameroon farmers and the association Les Amis de la Terre against the French parent of a Cameroon company and its managers, accused of illicit trade in wood and bribery. The complaint also came up against another obstacle: as the subsidiary was not prosecuted in Cameroon there was no final judgment, thus preventing prosecution in France for aiding and abetting<sup>19</sup>. On the matter of bribery, prosecutors have been required since the issuance of a circular on 21 June 2004 to treat victims' complaints in the same way as complaints to an investigating magistrate, meaning that they cannot drop the case on grounds of expediency. This was a response to an OECD recommendation issued as part of the follow-up to

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<sup>16</sup> Tribunal de grande instance de Paris, Ordonnance de référé, *UEJF et Licra c. Yahoo ! Inc. et Yahoo France*, 22 mai 2000.

<sup>17</sup> The first instance judge affirmed that the application of the order on the territory of the United States would contradict the First Amendment of the Constitution on the Freedom of Speech (US District Court, District of California, San Jose Division, 7 November 2001). This being said, the real problem was the application of the order in France..., which necessitated indeed that the firm adopted technical decisions in the United States. Because of the complexity of the case and opting for a strict interpretation of its jurisdiction, the appeal judge annulled the first instance decision (US Court of Appeals for the Ninth Circuit, 12 January 2006).

<sup>18</sup> See the website of Total : [[http://birmanie.total.com/fr/controverse/p\\_4\\_2.htm](http://birmanie.total.com/fr/controverse/p_4_2.htm)].

<sup>19</sup> Cour d'appel de Paris, chambre de l'instruction, arrêt du 13 février 2004, upholding the order on the inadmissibility of the request. On this case and, more broadly, on trafficking in tropical woods, see Julie Vallat, « Mondialisation du commerce illicite de bois et droit pénal français : un déficit de juridiction », *Revue de Science criminelle*, 2005, p. 21.

implementation of the Convention of 21 November 1997 on combating bribery of foreign public officials in international business transactions<sup>20</sup>.

19. As regards both the protective principle and universal jurisdiction, no distinction is made between French and foreign nationals. The ordinary rules of criminal procedure also apply, so that a victim's claim for damages can trigger prosecution even where less serious offences (*délits*) are concerned. The protective principle applies to specific offences mentioned either at Article 113-10 of the Penal Code or elsewhere<sup>21</sup>. Universal jurisdiction as French law conceives it corresponds to cases where a treaty to which France is party or an act of the European Union gives it jurisdiction (Article 689 of the Code of Criminal Procedure). The texts in question are listed at Articles 689-2 to 689-10 and 689-12 of the Code<sup>22</sup>. Although the condition that the perpetrator must be present in France applies for all cases (Article 689-1), it is sufficient that one of the suspects is present to initiate a criminal proceeding; jurisdiction may therefore extend to the participation of other suspects in the same offence<sup>23</sup>. To these cases French lawmakers have added universal jurisdiction for crimes under the jurisdiction of the *ad hoc* international criminal tribunals for former Yugoslavia and Rwanda, with the same condition that the perpetrator or accomplice must be present on French soil<sup>24</sup>.

20. Finally, Act 2010-930 of 9 August 2010 added the Statute of the International Criminal Court to the list of conventions justifying the extraterritoriality of French criminal law. However, new Article 689-11 constitutes more an extension of active personal jurisdiction to

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<sup>20</sup> The monopoly of the public prosecutor in the initiation of a criminal proceeding for misdemeanors of bribery does not apply to bribery of public officials of the European Union, for which there is a universal basis of jurisdiction (art. 689-8 of the Criminal Procedure Code).

<sup>21</sup> In Article 113-10 : atteintes aux intérêts fondamentaux de la nation (trahison et espionnage, atteintes aux institutions de la République, à l'intégrité du territoire national ou à la défense nationale), falsification ou contrefaçon du sceau de l'Etat ou de la monnaie, crimes ou délits commis contre les agents ou les locaux diplomatiques ou consulaires français à l'étranger. Moreover, the basis of jurisdiction for offences against French ships or aircrafts, or offences committed on board, is very close to protective jurisdiction (art. 113-3 and 113-4 of the Criminal Code). The same holds true for offences against French military bases or military materials located abroad (art. L-121 § 7 of the Code of Military Justice), and for the counterfeiting of foreign currency (art. 442-1 of the Criminal Code), etc.

<sup>22</sup> The list is the following one : torture as defined in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ; offences resulting from the application of a series of treaty concerning the fight against terrorism or the protection of certain kinds of properties or persons (European Convention on the Suppression of Terrorism of 27 January 1977, Agreement between the member states of the European Communities concerning the implementation of the European Convention for the Suppression of Terrorism of 4 December 1979, Convention on the Physical Protection of Nuclear Material of 3 March 1980, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988, Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988, International Convention for the Suppression of Terrorist Bombings of 12 January 1998, International Convention for the Suppression of the Financing of Terrorism of 10 January 2000) ; offences protecting the interests of the European Union (Protocol to the Convention on the Protection of the Communities' Financial Interests of 27 September 1996, Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997). For offences resulting from Regulation (CE) n°561/2006, the alleged universal basis of jurisdiction is actually closer to an emerging European territorial basis of jurisdiction (Article 689-12 of the Code of Criminal Procedure).

<sup>23</sup> Cour de cassation, chambre criminelle, 10 janvier 2007, n°04-87.245, *Bull. crim.* n°7.

<sup>24</sup> Acts n°95-1 of 2 January 1995 and n°96-432 of 22 May 1996.

residents<sup>25</sup>. In addition, and among other conditions, only the prosecution service can trigger prosecutions.

### ***Section 3. Extraterritoriality in civil law***

21. French civil law admits extraterritoriality under the conditions laid down by the rules of private international law, the sources of which are at once international, European and French. Here, we shall focus mainly on rules relating to conflict of jurisdictions, which determine the competent national court or courts, before briefly reviewing the rules on conflict of laws, which determine the law applicable to the merits of the case, the rules of procedure being a matter of the *lex fori*.

22. Civil and commercial disputes brought before the courts of EU Member States are governed by the common rules of jurisdiction contained in the "Brussels I" regulation<sup>26</sup>, which supersedes the Brussels Convention of 1968. In principle, jurisdiction is based on the defendant's domicile (Article 2) which, for legal entities, corresponds to the place where it has its statutory seat (or place of registration in the UK and Ireland) or central administration or principal place of business (Article 60). The residence criterion thus goes beyond mere active personal jurisdiction and may, for certain enterprises, imply a number of potentially competent jurisdictions.

23. Alternative rules of jurisdiction apply, under the regulation where the defendant is domiciled in an EU Member State and the rule designates the courts of another Member State, under national law in other cases. The main rules in the European regulation correspond to various forms of territoriality: in matters of contract, the place of performance of the obligation forming the basis of the suit, and in matters of tort, delict or quasi-delict, the place where the harmful event occurred. Exclusive rules of competence exist in some matters, which also refer to domicile or to a form of territoriality. The designation of a court by agreement between the parties (prorogation of competence) is admitted and exclusive, unless it contravenes an exclusive competence (Article 23). In order to avoid *lis pendens* in cases of alternative competence, the regulation provides for the priority of the first court seised (Articles 27 to 30). Where the European regulation is applicable, courts that apply the *forum non conveniens* doctrine, like the English courts, must refrain from doing so, since the Court of Justice of the European Union has found it to be incompatible with EU rules<sup>27</sup>. Where the situation does not fall within the scope of EU law, the rules of national law apply. Similar solutions result from the application of French law, albeit with the additional and purely French alternatives that arise from Articles 14 and 15 of the Civil Code where one of the parties to the dispute has French nationality.

24. Under these rules, the French courts have for example declared themselves competent to hear a civil complaint filed by an association that defends the rights of Palestinians against the French companies Veolia and Alstom on the basis of their involvement in building and operating a tramway linking Jerusalem to certain Israeli settlements on the West Bank.

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<sup>25</sup> A similar extension was made for mercenary in Article 431-3 of the Criminal Code.

<sup>26</sup> Council Regulation (EC) n°44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

<sup>27</sup> CJEC, judgment of 1<sup>st</sup> March 2005, *Andrew Owusu v. N.B. Jackson e.a.*, C-281/02 (on the Brussels Convention at that time).

Classically, the ground is the defendant's domicile. The case has not yet been heard on the merits<sup>28</sup>.

25. In addition, both exceptional and subsidiary bases of jurisdiction exist. They reflect the idea that jurisdiction may be admitted in certain circumstances despite the absence of traditional attachment criteria. Although a link with the state of jurisdiction is still required, it may be relatively loose. Thus, there is an exceptional base of competence in French law based on the prohibition of denial of justice, where no other court is in a position to exercise jurisdiction<sup>29</sup>. When French courts make use of this exception nowadays, they generally cite Article 6 of the European Convention on Human Rights as the ground. It has been used, for example, to enable a French court to appoint an arbitrator in an arbitration between an Iranian company and the state of Israel and to rule out the immunity of an international organisation in a dispute relating to an employment contract<sup>30</sup>. In EU law, Council Regulation 4/2009 of 18 December 2008 on maintenance obligations also institutes an exceptional base of jurisdiction, called *forum necessitatis*, where no EU Member State has jurisdiction under the other criteria set forth in the regulation, where proceedings cannot "reasonably" be initiated or conducted or where proceedings prove impossible in a third State with which the case is closely connected<sup>31</sup>.

26. As far as applicable law is concerned, a distinction should be drawn between contractual and non-contractual (delictual or quasi-delictual) matters. For contractual matters, the EU Rome I regulation, which came into effect on 17 December 2009, institutes the principle of the parties' freedom of choice and, in the absence of choice, designates the applicable law on the basis of the seller's or service provider's residence or other criteria according to the nature of the contract<sup>32</sup>. For non-contractual matters, the Rome II regulation, which came into effect on 11 January 2009, designates the law of the country in which the damage occurs<sup>33</sup>. The rules of conflict of laws are sometimes seen as limiting the liability of enterprises in a transnational context because they can lead a court with international jurisdiction to apply a law different from its own which may prove to be less protective of human rights. However, the court hearing the case may apply its public order laws or mandatory rules rather than the foreign law and, if it does apply the foreign law, may ignore provisions that it deems to be clearly incompatible with the public policy of the forum<sup>34</sup>.

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<sup>28</sup> Tribunal de grande instance de Nanterre, Judgment of 15 April 2009, upheld by the Cour d'appel de Versailles on 17 December 2009. Initially, the case was about contractual liability (lack of validity of the contract because of an illegal cause or object). After the production of the contract was ordered by the judge, it appeared that the Israeli judge had been elected by the parties in a forum selection clause. The request was thereafter reappraised as introducing a case about non-contractual liability (or quasi-delictual liability, for damages suffered by thirds because of a contract). The basis of jurisdiction is the residence of the defendants.

<sup>29</sup> See Lycette CORBION, *Le déni de justice en droit international privé*, PUAM, Aix-en-Provence, 2004, 365 p.

<sup>30</sup> Respectively : Cour de cassation, 1<sup>ère</sup> chambre civile, arrêt n°404, 1<sup>st</sup> February 2005, *NIOC c. Etat d'Israël*, and Cour de cassation, chambre sociale, 25 January 2005, *Banque africaine de Développement*.

<sup>31</sup> Council Regulation (EC) n°4-2009 of 18 December 2008, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations (*OJEU* of 10 January 2009, L7/1), Article 7.

<sup>32</sup> Regulation (EC) n°593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) (*OJEU* of 4 July 2008, L. 177/6).

<sup>33</sup> Regulation (EC) n°864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II) (*OJEU* of 31 July 2007, L. 199/40).

<sup>34</sup> Articles 9 and 21 of Regulation Rome I ; Articles 16 and 26 of Regulation Rome II. About interactions between private international law and human rights, see Fabien MARCHADIER, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruylant, Bruxelles, 2007, xxi-728 p.



#### **Section 4. Extraterritoriality in administrative law**

27. Administrative authorities exercise oversight over firms' transnational activities in many ways. One of the most familiar is customs control of imported and exported goods. Although it generally takes place on home soil, except where control is delegated to private inspection firms before shipping, it has indirect extraterritorial effects. Links with human rights and environmental protection exist, such as application of an economic embargo on a country for breaches of human rights committed by that country, in particular under UN Security Council resolutions, and the fight against illegal trade in protected species<sup>35</sup>. Although less clear-cut, respect of international humanitarian law was nevertheless present in the background in a recent case before the European Court of Justice relating to the control by German customs of certificates of origin of goods produced in Israeli settlements in the West Bank<sup>36</sup>.

28. The tax authorities exercise extraterritorial control when they take an interest in the structure of international groups of companies, and especially in their transfer pricing practices, in order to determine the amount of income tax for which their establishments on French soil are liable<sup>37</sup>. Since 1996, the tax authorities can ask firms suspected of indirectly transferring profits for detailed information about their links with associated undertakings or groupings established outside France, about their activities and operations and about how prices are set<sup>38</sup>. In addition, since 2010 some firms have been required to provide precise documentation on these matters to the authorities on request, the requirement being stepped up for transactions with associated undertakings established or incorporated in a non-cooperative country or territory<sup>39</sup>. If it transpires that profits have been indirectly transferred, they are incorporated into the earnings of the audited undertaking in order to determine the amount of its income tax. These provisions apply to undertakings that are "dependent on" undertakings situated outside France, that "have control" over undertakings situated outside France or that are "dependent on" an undertaking or a group that also "has control" over undertakings situated outside France<sup>40</sup>. Although the link between this branch of law and human rights is indirect, two techniques may be noted: extension of the scope of the documentation requirement to a group of companies, and use of the notions of control and dependence to assess the links between discrete legal entities.

29. Competition law, whether national or EU, is often mentioned as an example of an area in which administrative control of extraterritorial scope exists. EU law admits the theory of effects, since the Commission deems itself competent to react to anticompetitive practices that have effects on the European market even where the undertakings concerned are not European

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<sup>35</sup> In the context, notably, of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (« CITES »), Washington, 3 March 1973 (entered into force on 1<sup>st</sup> July 1975).

<sup>36</sup> CJEC, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 29 October 2009, C-386/08. The limitation of the *ratione loci* scope of the free-trade agreement between the European Union and Israel clearly aimed at excluding such products, whereas similar Palestinian products are covered by the free-trade agreement between the European Union and the Palestinian Authority. The transfer by a State of a part of its own population to a territory it occupies is prohibited by the law of war. The duty of non-recognition of unlawful situations could explain the restriction of commercial relations with those plants.

<sup>37</sup> On this theme, see Bernard CASTAGNEDE, *Précis de fiscalité internationale*, PUF, Paris, 3<sup>ème</sup> éd., 2010, p. 81 s.

<sup>38</sup> Article L13 B of the Livre des procédures fiscales.

<sup>39</sup> Articles L 13 AA et L 13 AB of the Livre des procédures fiscales. The duty to collect documentation was introduced by the Loi de finances n°2009-1674 of 30 December 2009, art. 22-II.

<sup>40</sup> Article 57 of the Code général des impôts.

and the putative restraint of trade has taken place outside the EU<sup>41</sup>. Potential disputes with other countries are avoided by means of agreements between administrative authorities, encouraging the institution of rules for allocating competence and sharing information<sup>42</sup>.

30. These techniques are to be found in other areas where oversight is entrusted to independent administrative authorities. Banking is a particularly instructive illustration insofar as money laundering issues are not entirely unconnected to human rights issues, even if the primary purpose of banking supervision is to preserve the equilibrium of the global economic and financial system. Principles for apportioning competence in the supervision of banks in other countries emerged within a relatively informal framework for international cooperation, the Basel Committee on Banking Supervision, which includes the main national regulatory authorities in the banking sector<sup>43</sup>. The creation of a foreign subsidiary or branch is conditional on prior home country and host country authorisation. Institutions must then be supervised on an individual basis by the host country authority and on a consolidated basis by the home country authority. Exchanges of information or even on-site inspections are necessary for the home country authority to supervise banking groups and may be the subject of agreements. Within the EU, where the freedom of establishment and the freedom to provide services are guaranteed, these principles are taken up in Directive 2006/48/EC, under which the group and branches are supervised in the home country and subsidiaries are supervised in the host country or countries<sup>44</sup>. In France, the Autorité de Contrôle Prudentiel (ACP) may refuse to allow a foreign bank to offer banking services in France if it has its origin in a state that is not a member of the European Economic Area whose law is liable to impede "performance of the supervisory function in relation to the applicant firm"<sup>45</sup>. The ACP and the Autorité des Marchés Financiers may conclude agreements relating to the exchange of information with their counterparts in other countries<sup>46</sup>. The following features may be taken from this example: consolidated supervision of a group of undertakings by the home country; international apportionment of competence; international exchange of information; supervision entrusted to national regulatory authorities that generally enjoy guarantees of independence within the administration.

## ***Section 5. Extraterritoriality in special environmental protection systems***

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<sup>41</sup> In case-law, see : CJEC, *Ahlström Osakeyhtiö e.a. c. Commission* (« Pâtes de bois »), joint cases 89, 104, 114, 116, 117 et 125 à 129 / 85, judgment of 27 September 1988. For details, see Jennifer Zerk, *Report on Extraterritorial Jurisdiction*, p. 91 s.

<sup>42</sup> See Walid BEN HAMIDA (dir.), *Mondialisation et droit de la concurrence : les réactions normatives des Etats face à la mondialisation des pratiques anticoncurrentielles et des opérations de concentration*, Litec, 2008, 533 p.

<sup>43</sup> Since the enlargement of March 2009, the Basle Committee is composed of representatives of twenty-seven States or territories. The main instruments for apportioning competence are : *Report on the Supervision of Banks' Foreign Establishments*, 26 September 1975 ; *Principles for the Supervision of Banks' Foreign Establishments*, May 1983 ; *Information Flows between Banking Supervisory Authorities*, April 1990 ; *Minimum Standards for the Supervision of International Banking Groups and Other Cross-Border Establishments*, July 1992 ; *The Supervision of Cross-Border Banking*, October 1996 ; *Core Principles for Effective Banking Supervision*, October 2006 (see the website of BIS : [www.bis.org](http://www.bis.org)).

<sup>44</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the Taking up and the Pursuit of Credit Institutions (recast) (amended by directives 2007/18/CE, 2007/44/CE, 2007/64/CE, 2008/24/CE, 2009/83/CE, 2009/110/CE, 2009/111/CE, 2010/16/UE).

<sup>45</sup> Code monétaire et financier, Article L 511-10 alinéa 7.

<sup>46</sup> Code monétaire et financier, Articles L 632-1 à -7.

31. The purpose of this section is not to give a comprehensive review of environmental regulation but to draw attention to some specific features that may inform thinking on extraterritoriality. We shall look in particular at international rules for compensating damage caused by oil pollution, the environmental liability created by EU law, and French law on liability in groups of companies.

### **5.1. The compensation of damage caused by oil pollution (international law)**

32. In order to compensate damage resulting from pollution of the marine environment, the 1982 UN Convention on the Law of the Sea encourages countries in broad terms to develop international law relating to responsibility and liability. It also mentions the possibility of compulsory insurance or compensation funds<sup>47</sup>. These procedures had been implemented with regard to the pollution resulting from spills of persistent oil from tankers in the 1969 and 1971 Conventions on, respectively, civil liability and the creation of an international compensation fund. The two conventions were amended by two protocols in 1992, plus a 2003 protocol creating a supplementary fund<sup>48</sup>. Under current rules liability is channelled to the ship-owner, who is also required to take out insurance for tankers carrying more than 2,000 tonnes of oil. The courts of the place where the damage occurs have exclusive jurisdiction. However, the ship-owner may limit his liability to an amount defined by the Convention according to the ship's tonnage. This liability is strict; the owner may be partly or wholly exempt if he can prove that the oil pollution was caused by a third party's deliberate fault. Compensation covers all damage caused to persons and goods, the cost of safeguard measures and, since the 1992 Protocol, impairment to the environment, or pure environmental damage, albeit limited to "costs of reasonable measures of reinstatement actually undertaken or to be undertaken". Where the ship-owner has been negligent or is insolvent or where the liability limit is exceeded, victims can turn to international funds, provided that the damage has been caused on the territory or in the exclusive economic zone of a State Party to the 1992 or 2003 Protocol. The sums available for compensation amount to 203 million SDR for the 1992 IOPC Fund and 750 million SDR for the Supplementary Fund. The funds are constituted by contributions from States Parties levied on firms or agencies receiving oil.

33. The rationale of insurance is to externalise risk, the rationale of funds is to pool it. Both may have the drawback of making the cost of remediation less than the cost of prevention for those responsible for the damage. However, the system is intended to share the burden fairly between ship-owners, insurers and the oil industry, though the amounts available from the funds for a single incident are not always sufficient to compensate all the damage. Countries have drawn directly on these systems to conclude other similar conventions, though they are not in effect because they have not obtained the requisite number of ratifications<sup>49</sup>. In some cases they have relaxed the channelling of liability by providing for other forms of liability, namely strict liability for one of the economic agents, often the operator, and liability for

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<sup>47</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 (entered into force on 16 November 1994), Art. 235, para. 3.

<sup>48</sup> International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969 (entered into force on 14 March 1988), and Protocol of 19 November 1992 (entered into force on 30 May 1996); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971, and protocols of 27 November 1992 (entered into force on 30 May 1996) and of 16 May 2003 (entered into force on 3 March 2005).

<sup>49</sup> International Convention on Liability and Compensation for Damages in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001.

negligence for other undertakings involved in the operation. These conventions have not yet taken effect either<sup>50</sup>.

34. The case of the *Erika*, an oil tanker that sank off the French coast on 12 November 1999, highlights some of the limitations of the current system in international law and the complexity of European and national environmental regulations. Many victims were compensated by the insurer and by the IOPC Fund; however, the limits were exceeded for the safeguard and reinstatement measures taken by the public authorities, who sought to hold the French oil company Total liable, since the Total group was both the seller of the oil and the charterer of the ship through two subsidiaries located outside France<sup>51</sup>.

35. The European Court of Justice, asked for a preliminary ruling by the French Court of Cassation in a civil suit, found that oil spilt at sea and mixed with water or sediment constituted waste within the meaning of EU Directive 75/442<sup>52</sup>. Under the polluter-pays principle, the seller and charterer, as previous holder of the waste, could be held responsible for the cost of eliminating the waste, especially if it had contributed to the pollution event through its negligence. This theoretically made it possible to circumvent the channelling of liability effected by international law.

36. At the same time, other victims had initiated criminal proceedings in the French courts, which finally had to rule on both the criminal and the civil liability of Total and the other defendants, namely the ship-owner, the manager and the certification company. For the criminal aspect, the Paris Criminal Court judgment of 16 January 2008 and the Paris Appeal Court judgment of 30 March 2010 both found the defendants guilty of pollution, the fines being set at €375,000 for legal entities and €75,000 for individuals. Total was found guilty of the criminal offence of negligence. The court also had no hesitation in ruling out the fictitious legal personality of the Panamanian company Total Transport Corporation (TTC), created by Total to effect its transport activities<sup>53</sup>. For the civil aspect, both judgments admit the existence of pure ecological damage, which is particularly remarkable, for an amount raised to €200.6 million on appeal. However, the Appeal Court judgment, unlike the lower court decision, found that Total did not incur civil liability, firstly because of the channelling of liability effected by the 1992 Protocol to the Convention on Civil Liability for Oil Pollution Damage and secondly because of the absence of intent required by ordinary law in matters of

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<sup>50</sup> Protocol on Liability and Compensation for Damages Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal, Basle, 10 December 1999 ; Protocol on Civil Liability and Compensation for Damages Caused by the Transboundary Effects of Industrial Accidents on Transboundary Watercourses and International Lakes, Kiev, 21 May 2003.

<sup>51</sup> The case illustrates perfectly the complexity of legal situations in a global world: the ship-owner was a Maltese company, controlled by two Liberian companies whose shareholder was Italian; the charter company was a Panamanian subsidiary of the French oil company Total, which concluded a transportation contract with a British subsidiary of Total; the owner of the oil was a company incorporated in the Bermuda Islands, subsidiary of Total; the oil was to be transported to Italy, and sold to an Italian company.

<sup>52</sup> CJEC, 24 June 2008, *Commune de Mesquer v. SA Total Raffinage Distribution et Société Total International Ltd.*, case n°C-188/07.

<sup>53</sup> Cour d'appel de Paris, pôle 4, 11 ch., 30 March 2010, RG n°08/02278, « Erika » (chapitre 3) : « *La société TTC (...) n'avait aucun effectif, qui n'avait pas de locaux au Panama où elle était immatriculée, qui n'avait (...) pas d'indépendance décisionnelle, pas d'autonomie ni juridique ni financière et dont l'objet était uniquement d'individualiser l'activité du groupe TOTAL en matière de transport (...), n'avait en réalité pas les moyens, par elle-même, d'assurer un pouvoir de contrôle ou de direction sur la gestion ou la marche de l'Erika.* »

civil liability<sup>54</sup>. Compensation is therefore the responsibility of the other convicted parties, who have appealed to the Court of Cassation. Total also says that it has spent €370 million on clean-up operations and out-of-court compensation for certain victims following the lower court judgment in 2008 and before the Appeal Court judgment in 2010<sup>55</sup>.

## 5.2. Environmental liability (EU law)

37. "Environmental liability" is a set of legal rules relating to dangerous activities created by the European Union with both a preventive and a remedial purpose<sup>56</sup>. It is often described as a public order mechanism because, although the operator of a dangerous activity is under a general obligation to take the necessary measures, it is up to the administrative authority alone – in France the prefect – to spell out those obligations or to take the necessary measures itself, the cost generally being borne by the operator. Victims of the damage or those with a sufficient interest to assert, like environmental protection associations, may ask the public authorities to act and may challenge their actions or shortcomings before an independent and impartial body, in France the administrative courts. Environmental liability applies solely to pure environmental damage, which thus excludes damage to goods and persons, the remediation of which continues to be a matter of ordinary civil liability. Certain areas covered by international conventions, like oil pollution and damage due to nuclear materials, are excluded from the scope of environmental liability. The operator's liability may be strict or for fault, depending on the circumstances. Directive 2004/35/EC was transposed into French law by Act 2008-757 of 1 August 2008, supplemented by the decree of 23 April 2009.

38. It is not easy to identify the extraterritorial effects, if any, of European environmental liability law. Firstly, liability is limited to the operator, who is defined as "any natural or legal [...] person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, [...] or the person registering or notifying such an activity"<sup>57</sup>. Thus, it is possible to envisage a situation in which the person responsible is a national of a country that is not the country on whose territory he operates a dangerous activity, or where the control criterion means that a chain of liability can be traced from the local-law subsidiary to the parent<sup>58</sup>. The administrative authority's sphere of competence is linked to the place of the damage, which may be where it originates or where it occurs. In the event of crossborder damage, it would therefore be logical for the cost of measures taken by the administrative authority with territorial competence to be borne by the operator of an activity which, though not operated in the country concerned, causes damage there. While the Environmental Liability Directive suggests this, it mainly emphasises the obligation on States to cooperate and exchange information in such an event<sup>59</sup>. Because environmental liability is a relatively

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<sup>54</sup> This raises a difficult problem of a potential conflict between a treaty binding some member States of the European Union and an act adopted by the EU. Moreover, the dissociation between the criminal fault and the civil fault is noteworthy.

<sup>55</sup> See the website of Total : [<http://www.total.com/fr/groupe/actualites/actualites-820005.html&idActu=2333>]. The out-of-court compensations were not questioned afterwards.

<sup>56</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage. This directive was completed and modified by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the Management of Waste from Extractive Industries.

<sup>57</sup> Directive 2004/35, Art. 2 § 6.

<sup>58</sup> See Patrick THIEFFRY, *Droit de l'environnement de l'Union européenne*, Bruylant, 2008, p. 611 s.

<sup>59</sup> Directive 2004/35, Art. 15 § 3.

new concept that has only recently been transposed into French law, it is too soon to be able to give any illustrations or come to any conclusion on the most sensitive points.

### 5.3. Liability in groups of companies (French law)

39. As the *Erika* case shows, one of the main difficulties in asserting the liability of undertakings, especially multinational firms, lies in the complexity of their legal structure. The autonomous nature of legal personality often makes it impossible to follow a chain of liability from subsidiary to parent, even where the subsidiary is not in a position to assume the consequences of its harmful activities<sup>60</sup>. The only response provided by ordinary liability law lies in applying the theory of misuse of law to sanction a fictitious parent-subsidiary link. Another means of following the chain of liability has recently been added to French environmental law. Under Act 2010-788 of 12 July 2010 on national commitment to the environment (the Grenelle 2 Act), a parent may be made to finance all or some of the necessary clean-up measures when a subsidiary ceases its activity. For that to be the case, the subsidiary must be in court-supervised liquidation and the parent must have committed a "specific fault [...] that has contributed to an insufficiency of the subsidiary's assets"<sup>61</sup>. Specific voluntary commitments made by the parent in order to assume all or some of the preventive or remedial obligations of a subsidiary or of a company that it controls are also deemed to be legally binding<sup>62</sup>.

40. In addition to these provisions of a remedial nature, the Grenelle 2 Act contained preventive measures that take account of the complex structure of certain firms. The Commercial Code as amended now requires listed companies or companies exceeding a certain size to provide information about the way in which they take account of the "social and environmental consequences" of their activity and their "societal commitments in favour of sustainable development". Where they draw up consolidated financial statements, they must also provide such information on a consolidated basis, i.e. for the parent, its subsidiaries and all the companies under its control. The information must be verified by an "independent third-party body"<sup>63</sup>.

41. Public authorities also have obligations as to their conduct in this sphere. Under the Grenelle 1 Planning Act, France is required to defend the "principle of acknowledging the liability of parents for their subsidiaries in the event of serious damage to the environment" at European and international level<sup>64</sup>. In order to ensure that this rule and the one described in the previous paragraph are actually applied, under the Grenelle 2 Act the Government is required from 2011 to submit a three-yearly report to Parliament on how firms are fulfilling

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<sup>60</sup> See especially Blandine ROLLAND, « Responsabilité environnementale et groupes de sociétés », in Chantal Cans (dir.), *La responsabilité environnementale – Prévention, imputation, réparation*, Dalloz, 2009, p. 215-229.

<sup>61</sup> Article 227-II of Act n°2010-788 (*JORF* of 13 July 2010), modifying Article 512-17 of the Commercial Code. If the parent company cannot finance the measures and is a subsidiary of another company, this other company has to finance the measures. If the same problem reappears for this last company, its parent company has to finance the measures.

<sup>62</sup> Article 227-I of Act n°2010-788 (*JORF* of 13 July 2010), modifying Article L.233-5-1 of the Commercial Code. For the definition of control, reference is made to Article L.233-1 of the Commercial Code, *ie* a participation in equity beyond 50% of the capital of the company.

<sup>63</sup> Article 225-I of the Act n°2010-788 (*JORF* of 13 July 2010), modifying Article L.225-102-1 of the Commercial Code. For the definition of control, reference is also made to Article L.233-1 of the Commercial Code (see its provisions for details, including the size of the companies concerned).

<sup>64</sup> Article 53, last paragraph but one, of Act n°2009-967 (*JORF* of 5 August 2009).

their reporting requirement and on action to "promote corporate social responsibility" taken at national, European and international level<sup>65</sup>.

### ***Section 6. Concluding proposals***

42. In light of the foregoing, extraterritoriality may be seen as an instrument that can be used to ensure respect of human rights and protection of the environment by firms in a crossborder context, including – or especially – when they have a transnational structure. The methods used in criminal law – in those countries that admit the criminal liability of legal entities – and in civil, tax, banking and environment law show that countries do not hesitate to apply laws with extraterritorial effect or scope, without encountering serious challenges or causing numerous interstate disputes as a result. The most important factor is that extraterritoriality should be used in accordance with the principles of sovereignty, non-intervention and cooperation, as required by public international law.

43. Thus, an **international instrument** in this area would seem an appropriate solution. A recent report from the Council of Europe Parliamentary Assembly came to a similar conclusion<sup>66</sup>. Such an instrument could take the form of guidelines or a recommendation, without ruling out the prospect of a convention in the medium term. That being said, the more specific proposals that follow may be implemented equally well together, in a single text, or individually, in binding or non-binding instruments with more limited objectives or not devoted exclusively to human rights. Bringing some of them together in an instrument that would relate to a given factual context, like firms' activities in conflict zones, would be another possibility.

44. The first proposal concerns criminal law and consists in considering the criminalisation of certain forms of conduct by firms and/or their managers. A convention couched in over-general terms would certainly be inappropriate, given the number of existing conventions and the degree of precision required for defining criminal offences and determining bases of jurisdiction. However, consideration could be given to defining cross-cutting offences such as the **financing of unlawful activities** or **concealment of the proceeds of offences**, drawing on the work done in connection with the 1999 International Convention for the Suppression of the Financing of Terrorism.

45. Taking a sectoral approach, a review of existing conventions reveals a loophole relating to **forced labour** in the serious breaches of human rights liable to be committed by firms. It is true that there are two ILO conventions on the subject, the Forced Labour Convention of 28 June 1930 (no. 29) and the Abolition of Forced Labour Convention of 25 June 1957 (no. 105). However, they do not contain any criminal provisions and do not deal directly with the conduct of private persons. At the same time, forced labour is universally reprobated, as demonstrated by its inclusion in the United Nations Global Compact. A draft measure in this sphere would therefore be useful and could be extended to include so-called modern forms of slavery.

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<sup>65</sup> Article 225-I, 3<sup>rd</sup> paragraph, of Act n°2010-788 (*JORF* of 13 August 2010), modifying Article L.225-102-1 of the Commercial Code.

<sup>66</sup> Council of Europe, Parliamentary Assembly, Committee of Legal Affairs and Human Rights, report by Mr. Holger Haibach, *Human Rights and Business*, Doc. 12361, 27 September 2010, 27 p.

46. With regard to the **liability of legal entities**, a significant number of conventions already contain rules that require countries to provide for criminal, civil or administrative sanctions against them. The number of different types of sanction makes it possible to take account of the specific features of national legal systems, not all of which admit that legal entities may incur criminal liability<sup>67</sup>. The inclusion of provisions of this type in all relevant existing or future conventions may therefore be recommended. Restarting discussion of the criminal and civil liability of legal entities within the Assembly of States Parties to the Statute of the International Criminal Court would also be helpful.

47. Another point to be emphasised is the **removal of procedural obstacles** to criminal liability actions before domestic courts, especially where they are raised by public prosecutors. This could warrant the creation of an international oversight body for the purpose. At the very least, the international monitoring bodies created by existing conventions could be urged to step up their oversight in that area.

48. In civil law, the prevailing rules of jurisdictional competence already offer numerous possibilities for remedy. The problem stems more from the autonomous nature of legal personality, which makes it impossible to seek remediation from a parent for the actions of its subsidiaries abroad. Steps should be taken so that **the chain of liability may be followed to the parent** whenever a subsidiary or affiliate is not in a position to assume its responsibilities, using the notions of control or dependence. In addition, a supplementary base of jurisdiction for **denial of justice** could be introduced, if it is established that the country or countries competent to try the subsidiary's harmful actions are unable or unwilling to bring the case to trial. This criterion of a country's inability or unwillingness already exists in criminal law in the Statute of the International Criminal Court as an exception to the principle of complementarity. It could also be applied in civil law. The *forum necessitatis* for maintenance obligations in EU law points also in that direction.

49. Various proposals focusing as much on prevention and dialogue as on sanction may also be made. The first is to recommend the creation of a **network of national public regulators** in the field of corporate respect of human rights. Such networks exist in areas deemed particularly sensitive for the economy and the public interest, such as banking supervision. Why not apply the same method to the protection of human rights and the environment? Such a network could draw on national advisory commissions for human rights or on the national contact points established by the OECD. However, steps should be taken to ensure that the regulators in question enjoy guarantees of independence within their respective legal systems. The first tasks of such a network would include drawing up rules for apportioning competence for the oversight of groups of companies and defining terms and conditions for the exchange of information.

50. From a mainly preventive standpoint, steps should also be taken to extend the scope of reporting requirements to the whole of a **group of companies** where the firm has a transnational structure and exceeds a certain size.

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<sup>67</sup> United Nations Convention against Corruption of 31 October 2003 (art. 26) ; United Nations Convention against Transnational Organized Crime of 15 November 2000 (art. 10) ; Optional Protocol to the International Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, of 25 May 2000 (3 § 4) ; Convention of the Council of Europe n°172 on the Protection of the Environment through Criminal Law of 4 November 1998 (art. 9) (not yet entered into force) ; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 (1 § 2).



51. On the environmental front, and in particular for activities where a technology risk exists, steps should be taken to encourage forms of pooling that do not adversely affect the prevention objective. The creation of **international funds**, with sufficient financial support from the industry concerned, is still desirable in order to compensate victims and finance clean-ups. However, this kind of pooling is not suited to breaches of human rights, which do not in any way constitute a socially accepted risk. International funds in this field, like the one set up by the International Criminal Court or the United Nations Fund for Victims of Torture, could be topped up from the fines imposed on legal entities whose employees acting on their behalf have been found liable.

52. Lastly, concerning the activities of **firms in conflict zones**, the first priority is to reassert the state's duty to protect, especially where government functions have been delegated to private enterprises. It is the state's duty to ensure that those functions are properly performed. Another priority is to develop rules of international law that impose obligations directly on **private military and security companies** and to extend states' bases of extraterritorial jurisdiction in their regard. The Montreux Document<sup>68</sup> adopted by seventeen countries could serve as a source of inspiration in that respect.

December 2010

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<sup>68</sup> *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflicts*, 17 September 2008, annexed to Document NU, A/63/467 and S/2008/636, 6 October 2008.