

# RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS: DEFICIENCIES OF INTERNATIONAL LEGAL BACKGROUND AND SOLUTIONS OFFERED BY NATIONAL AND REGIONAL LEGAL TOOLS

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***Abstract.** The article deals with the question how transnational corporations can bear direct responsibility for human rights abuses they commit by analysing the deficiencies of the current international legal background with respect to human rights and transnational corporations, and the solutions offered by national and regional legal tools. By establishing that current international law is incapable of reducing or compensating for governance gaps, the case law analysis shows that the litigation system under the Alien Tort Claims Act in the United States and ATCA-like litigation possibility in the European Union present a feasible alternative to international law in the field of human rights protection when abuses are committed by transnational corporations.*

***Keywords:** transnational corporations, human rights, responsibility, the United States, Alien Tort Claims Act, European Union.*

## Introduction

Globalisation as an inevitable international integration with its central figure – a transnational corporation (hereafter referred to as ‘TNC’) – is a process of increasing reliance on a free market, growing influence of international financial markets and institutions in determining the viability of national policy priorities, diminution of the role of the State and the size of its budget, deregulation of a range of activities to facilitate investment and reward individual initiative, increase in the role and responsibilities attributed to private actors, both in the corporate sector, in particular to the TNCs, and in the civil society.<sup>1</sup> It also includes privatisation of various functions previously considered to be the exclusive domain of the State,<sup>2</sup> which illustrates the growing power and influence of TNCs because States are dependent on the world financial markets.

Taking that into account, human rights issues become extremely important because State power seems to be weakening and influential non-state actors that threaten and abuse human rights are emerging. Thus, it is relevant to speak of *governance gaps* which mean that there is a space between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse effects.<sup>3</sup> This means that even though a free market economy is needed for State development, human rights included, effective sanctioning or reparation mechanism is a necessity as well, since these governance gaps create a permissive environment for unlawful acts by TNCs.<sup>4</sup> What is needed, on one hand, is a possibility to freely purchase businesses in foreign countries and make investments, generate profits and create new jobs. That, on the other hand, needs to be balanced with parent corporations’ responsibility for abusive conduct of its subsidiaries. Simply put, those governance gaps have to be reduced or compensated for. Nevertheless, the current international legal background has serious deficiencies in this respect and thus solutions need to be found elsewhere – in national or regional legal tools.

Therefore, this article is focused on analysing the deficiencies of international legal background for holding TNCs accountable for human rights violations, and on

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- 1 Danailov, S. The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations. Geneva, October 1998, p. 4–5 [interactive]. [accessed on 12-11-2011]. <[http://www.humanrights.ch/upload/pdf/000303\\_danailov\\_studie.pdf](http://www.humanrights.ch/upload/pdf/000303_danailov_studie.pdf)>.
  - 2 McCorquodale, R.; Simons, P. Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law. *The Modern Law Review*. 2007, 70(4): 607. An example of the situation when former State functions and responsibilities are attributed to private actors can be that of the AWB, an Australian corporation which primarily was a governmental agency – the Australian Wheat Board. The AWB had the responsibility for marketing and exporting of Australian wheat to foreign countries. After privatisation it retained this power. Moreover, it was the largest supplier of food to the Iraqi Oil for Food programme managed by the UN. This corporation was investigated on allegations that it bribed Iraqi officials in order to sell Australian wheat.
  - 3 Whelan, G.; Moon, J.; Orlitzky, M. Human Rights, Transnational Corporations and Imbedded Liberalism: What Chance Consensus? *Journal of Business Ethics*. 2009, 87: 374.
  - 4 Ruggie, J. *Protect, Respect and Remedy: a Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 7 April 2008. A/HRC/8/5, p. 3.

the possibilities that actual practice using national or regional legal tools offers an alternative to shortcomings under international law. The aim of this article is to analyse the potential of national/regional alternatives to international law for holding TNCs directly accountable for human rights violations. The methods of analysis, deduction, induction and generalisation were used for writing this article. The topic on the responsibility of TNCs has been widely analysed in literature, offering solutions starting from strengthening of State responsibility to including TNCs in the list of duty bearers in international law, or strengthening national tools. At present, using and strengthening the national tools to solve this problem of responsibility is the most promising.

## 1. Deficiencies in International Legal Background Regarding Responsibility of Transnational Corporations for Human Rights Abuses

The meaning of human rights and the scope of the subject-matter of international human rights instruments have expanded progressively over the decades after the adoption of the Universal Declaration of Human Rights (hereafter UDHR) in 1948 by the United Nations (hereafter referred to as the ‘UN’). The UDHR, followed by two binding Covenants adopted in 1966<sup>5</sup>, and their two Optional Protocols<sup>6</sup> create the most influential part of human rights law incorporated in the UN system of international law.<sup>7</sup> Apart from these human rights instruments there are many others, dedicated to prevention of discrimination, rights of the child, rights of women, etc., also regional human rights instruments, as well as various human rights standards, recommendation and declarations.<sup>8</sup> Regardless of the abundance of human rights instruments, they fail to reduce governance gaps because they are all addressed to the States. The obvious reason for this is that TNCs are not subjects of international law, and they are subjected to jurisdictions of States where they operate. Such situation adds to the governance gaps problem since the power and financial capabilities of TNCs are far greater than those of the States where they conduct their business (as these are mainly less developed States).

As TNCs directly affect lives of millions of people and are in a position both to respect human rights and abuse them, putting a direct responsibility on a TNC for human rights abuses would be the most effective. The basis for this approach can be

5 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights (adopted December 16, 1966 (UN General Assembly resolution 2200 A (XXI). Entered into force on January 3, 1976.) UNTS 993 and 999.

6 Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966 U.N. General Assembly resolution 2200 A (XXI). Entered into force on 23 March 1976); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (U.N. General Assembly resolution 44/128 of December 15, 1989.) UNTS 999.

7 Mayer, A. M. Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories. *Journal of Business Ethics*. 2009, 88: 563.

8 E.g. World Conference on Human Rights, The Vienna Declaration and Program of Action, 1993. The Global Compact, 2000.

found in international human rights law as there are attempts to interpret human rights instruments so as to include TNCs as subjects to respect human rights. Human rights principles laid down in the UDHR form a common standard for everyone, including every individual and every organ of society, to respect human rights.<sup>9</sup> According to the prominent human rights authority, Louis Henkins, the expression *every organ of society* can be understood as including TNCs.<sup>10</sup> Nevertheless, the abundance and wide scope of international human rights instruments does not oblige corporations. Therefore, they cannot bear responsibility arising from the breach of these instruments. Regardless of the assertions that this interpretation of the UDHR is too stretched and far reaching, it gained support from the Amnesty International and the UN. The preamble of the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises recognises States as primary actors to protect, respect and remedy human rights, it also recognises the obligation of TNCs to respect human rights following the UDHR.<sup>11</sup> Nevertheless, this broad interpretation lacks wider international recognition.

An approach to holding TNCs directly responsible for human rights violations has been taken by various international organisations by creating initiatives in this respect. From the mid 70's four initiatives have been drawn up. Those were the UN Draft Code of Transnational Corporations (1977), the Sullivan Principles (1970), the OECD Guidelines for Multinational Enterprises (1976), the International Labor Organization Tripartite declaration of principles concerning MNEs (1977). Starting with the new millennium, more initiatives were drafted, such as the Global Compact (2000), the UN Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – “Protect, Respect and Remedy: a Framework for Business and Human Rights” (2008).

Regardless of the fact that these initiatives had an ambitious goal for TNCs to respect human rights, to gain publicity through reporting system, and voluntary nature, they had serious shortcomings that made these initiatives only a little more than mere declarations. These drawbacks were lack of monitoring and enforcement mechanisms and voluntary nature. Voluntary nature can be both advantage and disadvantage here because TNCs are more willing to be part of these initiatives when they are not forced into them, but then again due to voluntary nature they implement these initiatives the way they see fit only so as to continue their profitable operation. Nevertheless, the “Protect, Respect and Remedy” Framework calls for further elaboration of the principles set out therein. The attempts have been made by revising the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises in May 2011 to incorporate the principles provided for in the Ruggie's 2008 report,<sup>12</sup>

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9 Mayer, A. E., *supra* note 7, p. 568.

10 *Ibid.*

11 *Ibid.*

12 The 2011 update of the OECD Guidelines for Multinational Enterprises [interactive]. [accessed on 24-04-2012]. <<http://dx.doi.org/10.1787/9789264115415-en>>.

also by the review of International Finance Corporation Performance Standards on Social and Environmental Sustainability aimed at strengthening the approach towards human rights based on the “Protect, Respect and Remedy” framework.<sup>13</sup> In addition, Ruggie’s principles were introduced into the ISO 26000 standard on corporate social responsibility released by the International Standards Association in November 2010.<sup>14</sup>

The tendency of these initiatives is that progress is made towards developing enforceable obligations. Various non-governmental organisations, such as Amnesty International, Global Witness, Oxfam International, World Wildlife Fund, etc., maintain that responsible corporate behaviour can only be reached through binding norms and through institutions that could bring TNCs under scrutiny and supervision.<sup>15</sup> It can be asserted that the process is not easy since there are various obstacles to overcome and define how much the responsibility of corporations can be extended, what enforcement mechanisms are feasible. Thus, currently no international human rights instruments bind TNCs to respect human rights.

## 2. National and Regional Practice on Holding TNCs Directly Accountable for Human Rights Violations

Due to deficiencies in international legal background towards holding TNCs directly accountable for human rights violations they commit it is relevant to talk about another way of subjecting TNCs to observe human rights, which is through mobilising the legal systems of “home” States in order to police and sanction corporate conduct in places where it is either impossible or impractical to invoke the law of the “host” State.<sup>16</sup> Two approaches will be analysed further on – litigation under the Alien Tort Claims Act (hereafter ATCA) in the United States and the possibility of ATCA-like litigation in the European Union.

### 2.1. Litigation under the Alien Tort Claims Act in the United States

ATCA (1789) allows people to sue extra-territorially in federal courts of the United States. As the Court of the Second Circuit explained it, international law is not set in stone, it is changing and developing, as well as interpretation of it, therefore, this view

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13 As of 1 of January 2012 some changes relating to access to cultural sites, indigenous people’s rights, biodiversity conservation and sustainable management, risk to communities, etc., have been introduced [interactive]. [accessed on 24-04-2012]. <[http://www1.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Frameworkrk+-+2012/](http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Frameworkrk+-+2012/)>.

14 The ISO 26000 Standard on Social Responsibility [interactive]. [accessed on 24-04-2012]. <[http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/social\\_responsibility/sr\\_iso26000\\_overview.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm)>.

15 Shamir, R. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility. *Law & Society Review*. 2004, 38(4): 644.

16 *Ibid.*, p. 637.

towards it allowed using ATCA as a tool for the protection of human rights in federal courts of the United States.<sup>17</sup> The distinctive aspects of this system are few. First, national court's jurisdictional power is being extended to cover the events that had occurred in foreign countries to and by non-citizens of the United States. It allows aliens bring civil actions to the US federal courts for a tort committed in violation of treaties of the US or international law.<sup>18</sup> Second, only non-American plaintiffs can bring a claim under the ATCA.<sup>19</sup> Those two issues on causes of action and jurisdiction will be explained further in more detail.

Until 1980, when the *Filártiga v. Pena-Irala*<sup>20</sup> case was examined, ATCA had hardly been invoked. The court found that federal courts had the authority to hear civil law suits that were brought by aliens for violation of international law.<sup>21</sup> The decision in this case demonstrated that ATCA could be used to allow the US courts try cases of aliens seeking redress for human rights abuses that were committed against them in their home countries.<sup>22</sup> Even though this case did not concern TNCs or any other type of corporations to that matter, it nevertheless opened the door for claims to be brought against TNCs as the court held that violations of international human rights could induce ATCA jurisdiction.<sup>23</sup>

It is important that being a national tool, litigation under ATCA requires federal courts to incorporate international human rights law into examination of ATCA claims.<sup>24</sup> The findings of the *Filártiga v. Pena-Irala* case have been followed by other courts. Taking these aspects into account, it can be stated that ATCA's reach is truly extraterritorial, since it allows American courts apply international human rights norms to events that took place in foreign States and the parties that are non-American citizens.<sup>25</sup>

Analysing the meaning of the ATCA provision, two questions are raised. The first is whether an enforceable private cause of action is created by this Act, or does it merely have a potential to grant jurisdiction? If the answer to the first question is 'yes', then the second one raises the issue of identification of those causes of action, additionally asking whether federal courts are vested with the power to introduce new causes of action that would be in accordance with the developments of international law.<sup>26</sup> The

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- 17 Posner, T. R. *Kadic v. Karadzic* 70 *F.3d* 232. *American Journal of International Law*. 1996, 90(4): 661.
- 18 Mostajelejan, B. Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations. *The George Washington International Law Review*. 2008, 40: 501. Also Posner, T. R., *supra* note 17.
- 19 Posner, T. R., *supra* note 17, p. 658; Shamir, R., *supra* note 15, p. 639.
- 20 This case concerned a claim brought against a Paraguayan police officer who had tortured a young man to death for the political beliefs of his father, and then immigrated to the United States.
- 21 Davis, J. Justice Without Borders: Human Rights Cases in U.S. Courts. *Law & Policy*. Baldy Center for Law and Social Policy and Blackwell Publishing Ltd. 2006, 28(1): 62.
- 22 Posner, T. R., *supra* note 17, p. 660.
- 23 Mostajelejan, B., *supra* note 18, p. 501.
- 24 Ochoa, C. Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act. *Indiana Journal of Global Legal Studies*. 2005, 12(2): 631.
- 25 Shamir, R., *supra* note 15, p. 639.
- 26 *Ibid.*, p. 641.



answers are provided by case law. In the *Filartiga* case it was established that torture created a private cause of action, thus it opened the courts of the United States for plaintiffs seeking redress for human rights abuses (such as torture, killings, violence by authorities, etc.). It was a rather liberal view because it allowed the courts create new causes of action as it turned to customary international law to justify torture as a new private cause of action for individuals.<sup>27</sup> Therefore, it shows the court's position that international law has to be interpreted according to realities of current international law, not in a way it was understood back in the day when the Act was enacted.

With a restrained approach taken by the Supreme Court of the United States in the *Sosa v. Alvarez-Machain* (2004) case, it was an end for liberalism for the courts to interpret ATCA and international law as to create new private causes of action. This case concerned kidnapping and arbitrary detention of a Mexican national in Mexico, and the court ruled that ATCA provision provides for a limited number of causes of action, namely a violation of safe conduct, infringement of the rights of ambassadors, and piracy and otherwise it solely grants jurisdiction to the U.S. courts and that the causes of action have to be found elsewhere.<sup>28</sup> Nevertheless, the court did not want to close the door for ATCA litigation for good, so it set the requirement that an ATCA claim had to be based on a present-day international law norm which was (a) specific, (b) universal and (c) obligatory.<sup>29</sup>

The decision in *Sosa* case does not object the findings in *Filartiga* case, but recognises limitations to ATCA claims, it also includes TNCs into ATCA's jurisdictional reach, thus extending it. In *Sarei v. Rio Tinto* case (which was examined after *Sosa*) the court has stated that ATCA provided a forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place,<sup>30</sup> therefore, as long as personal jurisdiction requirements are met, claims under ATCA can be examined. In order to find personal jurisdiction where a defendant is a corporation, it is not necessary for a corporation to have its headquarters or place of business in the United States, it is enough to find that a TNC has a subsidiary, branch or office within the US, or has any other type of connection to the forum State.<sup>31</sup> This connection requirement is satisfied when "minimum contact" is established. In order to do that, the criterion of "presence" or "continuous and systematic business" is looked into.<sup>32</sup> In its unanimous decision

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27 Chanin, J. M. The Regulatory Grass is Greener: A Comparative Analysis of the Alien Torts Claims Act and the European Union's Green Paper on Corporate Social Responsibility. *Indiana Journal of Global Legal Studies*. Indiana: Indiana University Press. 2005, 12(3): 755.

28 *Jose Francisco Sosa v. Humberto Alvarez-Machain*, 542 U.S. 692 (2004), p. 17. Also, Shamir, R., *supra* note 15, p. 642.

29 Ochoa, C., *supra* note 24, p. 639.

30 *Sarei v. Rio Tinto*. No. 09-56381 D.C. No. 2:00-cv-11695-MMM-MAN. Central District of California, Los Angeles. Opinion. Filed on 25 October 2011, p. 19338.

31 Mostajeleian, B., *supra* note 18, p. 504.

32 Wouters, J.; De Smet, L.; Ryngaert, C. Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act? *Working Paper No. 46*. Insitute for International Law K.U. Leuven. November 2003, p. 9.

in *Goodyear Dunlop Tires Operations S.A. v. Brown*<sup>33</sup> the Supreme Court found that sporadic sales were only an elusive connection to the State<sup>34</sup> and it fell short of the continuous and systematic general business contacts necessary to empower a federal court to examine a suit on claims unrelated to the State.<sup>35</sup> In *Bauman v. DaimlerChrysler Corp.* the court stated that if one of the two tests, “alter ego” test or “agency” test, was satisfied, then the necessary contacts for the exercise of personal jurisdiction were found.<sup>36</sup> The first test is predicated upon showing parental control over the subsidiary, namely, that there is unity between a parent corporation and its subsidiary which indicates that they are not separate entities, and not viewing them as one entity would not be justifiable.<sup>37</sup> The “agency” test is predicated upon showing that services of a subsidiary are of special importance to the parent corporation, and if it did not have subsidiary to perform them, then it would perform these functions itself.<sup>38</sup> The difference between these two tests is that the former requires showing a greater level of control than the latter. In its conclusion the court has ruled that these tests cannot be applied mechanically, but must take current realities into account in order to determine whether it is reasonable to subject a parent corporation to the jurisdiction of the US federal courts for action of its subsidiary.<sup>39</sup> Thus, the requirements of presence in the United States are minimal, so even if a corporation is merely doing business and maintains regular and systematic activity within a state it is generally sufficient to provide a federal district court with personal jurisdiction over it.<sup>40</sup>

Another restriction on the scope of ATCA jurisdiction is the requirement of State action, with exceptions regarding slave trading, genocide and war crimes.<sup>41</sup> The United States Court of Appeals held that international law does not create obligations for States only, but might as well hold individual non-State actors liable for certain acts, such as genocide or war crimes.<sup>42</sup> The court found that there are two separate circumstances when a private actor can be held responsible for violations of international obligations. First, when the wrong committed by an individual is of such gravity that there is no need to show State action (i.e. genocide, war crimes, etc.). Second, when violations committed are sufficiently tied to State actions, then international standards will apply to action of private actors.<sup>43</sup> It means that whenever a corporation is charged on other grounds than

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33 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, No. 10-76 (2011).

34 *Ibid.*, p. 13.

35 *Ibid.*, p. 13.

36 *Bauman v. DaimlerChrysler Corporation*. No. 07-15386 D.C. No. CV-04-00194-RMW. Opinion (2011), p. 6576.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*, p. 6596.

40 Enneking, L. F. H. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases. *The George Washington International Law Review*. 2009, 40: 914.

41 Shamir, R., *supra* note 15, p. 642.

42 Posner, T. R., *supra* note 17, p. 659.

43 Ochoa, C., *supra* note 24, p. 634.



slave trading, genocide and war crimes, it has to be showed that the corporation was acting in a capacity of a state actor.<sup>44</sup>

Taking that into account, it can be concluded that ATCA provides both subject-matter jurisdiction and personal jurisdiction, though restrained, in federal courts of the United States. Putting aside the claims from other States, international organisations and scholars that the use of ATCA amounts to the “legal imperialism” of the United States,<sup>45</sup> this system provides an example of holding transnational corporations directly accountable for human rights abuses employing tools in national law. Moreover, it does not simply provide a forum, the United States courts offer guarantees of a due process, something that is quite the opposite in many of the “host” States.<sup>46</sup> Since many domestic courts in countries where human rights abuses have been committed are either unfit to handle actions brought by victims, and are unwilling to maintain cases that might have negative economic consequences for the country, or are seen as unlawful by these countries.<sup>47</sup> Additionally, the benefit of ATCA litigation is publicity, which not only generates sympathy for human rights victims and raises public awareness, but also impacts reputation of corporations. As negative impacts equals to monetary loses, this means that it influences decision and policy-making by TNCs and governments so as to include, among others, human rights standards. Nevertheless, it also has to be kept in mind that such a system is always balancing on a thread of mingling with internal affairs of another State, therefore it has to be used with great caution. And lastly, this system is suffering from the common initiatives disease – non-enforcement of decisions. It is difficult to enforce court decisions and for the plaintiffs to receive monetary awards since the defendants are usually located in foreign countries and it is impossible to reach their assets.

## 2.2. Possibility of ATCA-like Litigation in the European Union

None of the European Union Member States has a similar code like ATCA.<sup>48</sup> However, there is an alternative that can achieve similar results. That alternative is to use ordinary tort law. Even though it in no way substitutes ATCA litigation in full, it can produce similar results.<sup>49</sup>

The approach in the EU towards holding TNCs accountable for various violations, human rights included, is based on voluntary actions of TNCs. When in 2001 the European Commission issued a Green Paper on corporate social responsibility (hereafter referred to as ‘CSR’) seeking to start debate on various levels on the issue, it also defined CSR as voluntary integrating social and environmental concerns in business operations

44 Shamir, R., *supra* note 15, p. 642.

45 *Ibid.*, p. 653–654.

46 Chanin, J. M., *supra* note 27, p. 764.

47 Ochoa, C., *supra* note 24, p. 644.

48 Enneking, L. F. H., *supra* note 40, p. 904–905.

49 *Ibid.*

and interaction with stakeholders.<sup>50</sup> Later on, the Commission Communication of 2006 revealed that regulatory framework was not needed and it took purely voluntary approach, even though the Parliament was favouring the mixed regulatory/voluntary approach.<sup>51</sup> Another impetus for debate on this issue was given when the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (hereafter SRSG), John Ruggie, published a “Protect, Respect and Remedy” framework in 2008. This framework has been taken into account and the debate has indeed started, but for now no substantive policy is achieved that could allow for foreign direct liability cases to be heard in EU courts.

Nevertheless, the European Parliament resolutions of 2002 and 2007 on the matter of foreign direct liability referenced to the Brussels Convention<sup>52</sup> and its successor, the Brussels I Regulation,<sup>53</sup> as providing the necessary jurisdictional basis for foreign direct liability cases before the courts of the EU Member States.<sup>54</sup> Article 2 of the Brussels I Regulation lays down the main provision on the determination of jurisdiction, requiring to be domiciled in a Member State.<sup>55</sup> Article 60 explains the meaning of a corporation or other legal person being domiciled in a Member State, requiring a corporation to have (a) statutory seat, or (b) central administration, or (c) principal place of business.<sup>56</sup> In case a TNC is not domiciled in a Member State, then the laws of a Member State, where the case is to be heard, will determine the jurisdiction of its courts.<sup>57</sup> It is obvious from these provisions that Brussels I Regulation does not provide as wide a jurisdictional framework as does the United States framework, according to which merely to do business and maintain regular and systematic activity within the State is sufficient for a court to find personal jurisdiction to examine the case.<sup>58</sup> One example of this difference can be the case of *Wiwa v. Royal Dutch Petroleum*, in which the U.S. federal court found jurisdiction to hear the case because the two defendant corporations had an investor relations office and its manager within the U.S. jurisdiction.<sup>59</sup> In such a situation no jurisdiction could be found under the Brussels I Regulation.

It gets more problematic when claimants bring a foreign direct liability case against a corporation that is not domiciled in any Member State of the EU, because then jurisdiction is to be found according to the rules of a Member State in the court of which the case is brought. An example of such a rule is the Dutch *forum necessitatis* rule, which allows Dutch courts exercise jurisdiction over cases that have no link to the Dutch legal order in case that no other forum is available, or where there are sufficient

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50 Enneking, L. F. H., *supra* note 40, p. 907.

51 *Ibid.* p. 908.

52 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1998 OJ (C 27) 1.

53 Council Regulation 44/2001, 2001 OJ (L 12) I (EC).

54 Enneking, L. F. H., *supra* note 40, p. 911.

55 Council Regulation 44/2001, *supra* note 53, Article 2.

56 *Ibid.*, Article 60.

57 *Ibid.*, Article 4.

58 Enneking, L. F. H., *supra* note 40, p. 914.

59 *Ibid.*, p. 916.

contacts with the Dutch legal order and it would be unacceptable to expect the plaintiff to bring his case before a foreign forum.<sup>60</sup> Compared to the US framework, the regime under the Brussels I Regulation has an advantage to the effect that it precludes any decline of jurisdiction for cases that fall within the scope of the Brussels I Regulation, by a Member State based on *forum non convenience* doctrine, which is one of the obstacles to invoke jurisdiction in ATCA litigation. Even for cases that fall outside the scope of the Brussels I Regulation, the *forum non convenience* doctrine does not hamper the foreign direct liability cases, because this doctrine is generally associated with common law jurisdictions, which in the EU are only two – the United Kingdom and the Republic of Ireland.<sup>61</sup>

A suggestion to broaden the jurisdiction of the EU Member States' courts in foreign direct liability cases is to rely on Article 6 of the ECHR.<sup>62</sup> This Article was relied on in the 1997-2000 case *Lubbe v. Cape Plc.* in the United Kingdom. In this case the plaintiffs contended that a stay of the proceedings in favour of South African courts based on the grounds of *forum non convenience* would violate their rights under Article 6 of the ECHR, since due to the lack of funding and legal representation in South Africa it would deny a fair trial on terms of litigious equality with the defendant.<sup>63</sup> A right of access to a court does not flow directly from the text of Article 6 of ECHR but was developed through Court's case law.<sup>64</sup> Article 6 obliges ECHR Member States to ensure litigants a right of access to their courts that is both effective and practical.<sup>65</sup> Since the "host" State victims can have access to justice only by bringing foreign direct liability cases in the courts of "home" States, the European Court of Human Rights has stated in case of *Markovic v. Italy*, that when civil proceedings are brought in the domestic courts, Article 1 of the ECHR requires a State to secure in those proceedings respect for the rights protected by Article 6.<sup>66</sup> Thus, once a civil action is brought in a court of a State, for the purposes of Article 1 there is a jurisdictional link.<sup>67</sup> As claimants bringing a foreign direct liability case against a parent TNC based on ordinary tort law will need their case to meet the threshold requirements set for it, they can rely on Article 6 if their access to justice is seriously hampered by certain features of the legal system of the forum

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60 Enneking, L. F. H., *supra* note 40, p. 917.

61 *Ibid.*, p. 918.

62 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950. Entered into force on 21 September 1971) 213 UNTS 221. Article 6 reads as follows: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.“

63 Enneking, L. F. H., *supra* note 40, p. 919.

64 See e.g. Case of *Golder v. United Kingdom* (dec), App. no. 4451/70, ECHR, 21 February 1975, §§26–36; Case of *Lupas and Others v. Romania*, App. Nos. 1434/02, 35370/02, 1385/03, ECHR, Judgment of 14 December 2006, § 62.

65 Enneking, L. F. H., *supra* note 40, p. 919.

66 Case of *Markovic and Others v. Italy*, App. no. 1398/03, ECHR, Judgment of 14 December 2006, §54.

67 *Ibid.*

State, such as excessively complicated civil procedure.<sup>68</sup> Therefore, the applicability of Article 6 may play an important harmonising role and provide claimants with additional guaranties to their exercise of their right of access to a court, in such way that judgments of the European Court of Human Rights on Article 6 may press all the EU Member States to get rid of certain procedural barriers to access a court.<sup>69</sup>

As for a cause of action, it has to be found in the laws of the EU Member States separately, because the specific basis in tort upon which claimants can bring foreign direct liability cases falls outside the scope of EU regulation. The way in which such a case can be based on international law depends on how international law affects national law of a specific country. As for customary international law, the same rules as for ATCA litigation apply. Thus, in order to be relied on, customary international law norms have to be specific, universal and obligatory. For a case not to be dismissed, the human rights violation has to be equated to a claim actionable as a domestic tort. Thus, claimants would need to allege a domestic tort of assault in cases of torture, wrongful death for disappearances and killings, and negligence for injuries from unsafe working conditions.<sup>70</sup> Of course, such transformation of human rights violations into domestic torts is inappropriate, but in the light of the current limitations within the EU Member States' domestic legal systems it is the only option in order not to get a claim dismissed.<sup>71</sup> As for the choice of law, the regime under the Rome II Regulation<sup>72</sup> applies in the EU. The general rule provides that the applicable law in such case would be the law of the country in which the damage occurs.<sup>73</sup> The choice of law under the ATCA in the US is different from that in the EU as the former always apply their own law.<sup>74</sup>

Overall, it turns out that the litigation under ATCA is more favourable to the victims of human rights abuses by TNCs than the one in the EU, due to the fact that some important aspects of foreign direct liability litigation are still falling outside the regulatory ambit of the European Union and are regulated by domestic laws of the Member States. Nevertheless, the latter framework offers an important alternative to ATCA litigation.

In conclusion, it should be stated that the 2008 Report by John Ruggie provides that national remedies should be strengthened so as to provide remedies for corporate-related abuses, obstacles, such as high costs, lack of standing of non-citizens, obstacles by statutes of limitation, etc.<sup>75</sup> It is further provided that States should strengthen their judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, they should also address obstacles for foreign plaintiffs to access justice – especially where alleged abuses reach the level of widespread and

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68 Enneking, L. F. H., *supra* note 40, p. 921.

69 *Ibid.*, p. 933.

70 Mostajeleian, B., *supra* note 18, p. 513.

71 *Ibid.*

72 Council Regulation 864/2007, 2007 OJ (L. 199) 40 (EC).

73 *Ibid.*, Article 4(1).

74 Enneking, L. F. H., *supra* note 40, p. 926.

75 Ruggie, J., *supra* note 4, p. 23.

systematic human rights violations.<sup>76</sup> Ultimately, a more thorough relief from corporate human rights violations could be achieved through a multinational agreement, such as a jurisdictional treaty, or the establishment of universal jurisdiction across nations.<sup>77</sup>

## Conclusions

1. Regardless of the abundance of international human rights instruments ranging from conventions to declarations, when the abuser of human rights is a transnational corporation, these instruments fail to offer more effective and feasible solution. As the international human rights instruments are addressed to States, transnational corporations escape responsibility for human rights violations, and a wide interpretation of these instruments so as to include transnational corporations lacks international recognition.

2. Litigation under the Alien Tort Claims Act is the most effective way for holding transnational corporations directly accountable for human rights violations they commit due to low jurisdictional threshold that is based on minimum contact requirement, its extraterritorial nature, and choice of law, which is always the law of the United States. And regardless of the fact that ATCA provides for a very limited number of causes of action, case law shows that a claim can be based on an international legal norm as long as it is specific, universal and obligatory. Thus, victims of human rights abuses have a real opportunity to sue transnational corporations in the United States for violations committed abroad.

3. None of the European Union Member States has a statute comparable to ATCA, but ATCA-like litigation is possible in the EU using the ordinary tort law. Higher than the US jurisdictional threshold could be overcome by relying on Article 6 of the ECHR when access to court is seriously hampered. As for the choice law, the general rule refers to the law of the State where the abuse was committed. For a case not to be dismissed, a human rights violation has to be equated to a claim actionable as a domestic tort. Thus, claimants would need to transform abuses suffered into a domestic tort. Overall, the system under ATCA is more favourable to victims, but the system in the EU is an important alternative and has a few aspects more beneficial to victims than the ATCA system.

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<sup>76</sup> Ruggie, J., *supra* note 4, p. 23.

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## TARPTAUTINIŲ KORPORACIJŲ ATSAKOMYBĖ UŽ ŽMOGAUS TEISIŲ PAŽEIDIMUS: TARPTAUTINIO TEISINIO REGULIAVIMO TRŪKUMAI IR NACIONALINĖS BEI REGIONINĖS TEISĖS SIŪLOMI SPRENDIMAI

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**Santrauka.** Straipsnio tikslas – išnagrinėti, kokie tarptautinio teisinio reguliavimo, susijusio su žmogaus teisėmis, trūkumai užkerta kelią tiesioginei tarptautinių korporacijų atsakomybei tarptautinėje teisėje už žmogaus teisių pažeidimus ir kokias alternatyvas siūlo nacionalinė ir regioninė teisė. Atsižvelgiant į tai, kad tarptautiniai žmogaus teisių dokumentai neįpareigoja tarptautinių korporacijų gerbti ir saugoti žmogaus teises, nes šios korporacijos nėra tarptautinės teisės subjektai, kyla klausimas, ar galima esamus žmogaus teisių aktus interpretuoti plačiau, jų privalomumą išplečiant ir tarptautinėms korporacijoms. Šis siūlymas nesulaukė platesnio tarptautinio pritarimo, todėl tarptautinės korporacijos pasižada gerbti žmogaus teises prisijundamos prie įvairių neprivalomų tarptautinių standartų, gairių ir deklaracijų.

Kadangi efektyvaus problemos sprendimo tarptautinė teisė nepateikia, nacionalinės ir regioninės teisės pateikiamos alternatyvos įgauna ypatingą reikšmę, nes siūlo vienintelį galimą efektyvų žmogaus teisių apsaugos nuo korporacijų daromų pažeidimų būdą. Jungtinių Amerikos Valstijų sistema pagal „Užsieniečių deliktinių pretenzijų aktą“ yra efektyviausia, nes ji remiasi minimalaus ryšio su teismo valstybe taisykle, byloms taiko tik Jungtinių Valstijų ir tarptautinę teisę, garantuoja tinkamą bylos nagrinėjimą ir viešumą. Nors Jungtinių Valstijų sistema yra unikali, Europos Sąjunga turi galimybių pritaikyti ją savo teisėje. ES teisės aktų jurisdikciniai reikalavimai yra aukštesni nei Jungtinėse Valstijose, tačiau galėtų būti įveikti remiantis EŽTK 6 straipsniu. Dar vienas trūkumas yra tai, kad ES valstybės narės byloms beveik visada taikys valstybės, kurioje padarytas pažeidimas, teisę, o žmogaus teisių pažeidimus turės transformuoti į civilinės teisės deliktus. Atsižvelgiant į Jungtinių Valstijų ir Europos Sąjungos modelių privalumus ir trūkumus, Jungtinių Valstijų modelis yra palankesnis žmogaus teisių pažeidimų aukoms, tačiau Europos Sąjunga, kuri reguliuoja ne visus su problema susijusius aspektus, palikdama juos valstybėms narėms, vis dėlto turi potencialo įgyvendinti tiesioginę tarptautinių korporacijų atsakomybę už žmogaus teisių pažeidimus.

***Reikšminiai žodžiai:*** *tarptautinės korporacijos, žmogaus teisės, atsakomybė, Jungtinės Valstijos, Užsieniečių deliktinių pretenzijų aktas, Europos Sąjunga.*

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