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A matrix of jurisdiction: extra-territoriality 'divided and tailored'

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States' duties to ensure access to effective remedy under the EU Proposal for a Directive 2022/0051 on corporate sustainability due diligence

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Abstract:

What are jurisdictional implications when the EU is regulating companies’ conduct outside of the EU, and enshrines judicial remedies for victims of corporate human rights violations that occurred abroad? The EU initiative for a Directive on corporate sustainability due diligence is an important step towards a legally binding framework, which this thesis takes up to inquire into a particular tension: (i) the well-established lack of access to effective remedies in the EU for victims who are based in a third country, (ii) the call on Member States to reduce legal, practical, and other barriers as given mandatory expression in the Commission Proposal, and (iii) the right of access to effective remedy in international human rights law as mediating between the former two. The inquiry has the following steps: Part 1 introduces the structuring role of concepts of ‘jurisdiction’ both for States’ competences to act within and outside their borders, and for the scope of States’ obligations under human rights law. Then it highlights jurisdictional obstacles and barriers inherent in the EU jurisdictional framework. Part 2 compares the negotiation mandates of the Commission, Parliament and Council with respect to their scope as regards remediation, presenting scenarios to illustrate the mechanisms that would be available for victims to bring claims against private parties, and against the State. Part 3 extrapolates three specific bases of States’ extraterritorial jurisdiction and the according substantive and procedural standards that States need to observe under the Articles 1, 6(1), and 13 of the ECHR, informing the discussion of the scenarios developed before. In light of the opposing tendencies in the three mandates, linked to substantively different remediation for victims outside the EU, a framework of ‘forms of extraterritorial jurisdiction’ is assessed.

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An introduction: The State duty to ensure effective access to remedy and extraterritorial jurisdiction

In the beginning of June 2023, the European Commission, and the European Union (EU) co-legislators, the Parliament and the Council, took to the negotiation table, each with their own draft and mandate, to start the interinstitutional trilogue on a future EU Directive on Corporate Sustainability Due Diligence.[1] In accordance with the Commission Proposal published in February 2022, the future Directive should establish horizontal human rights and environmental due diligence requirements for companies based in the EU and abroad. In detail, the new legislation aims to cover the entire value chain of companies' operations, sets out civil liability of companies for damages, accompanied by a sanctions mechanism, and contains as a third substantive component provisions to ensure effective remedies for victims of corporate-related human rights and environmental harm inside and outside the EU.[2]

Much has been written about the failure of governments and States to regulate the negative effects of corporate activities on human rights and the environment on a global scale,[3] and the EU initiative for legislation is an important step towards a legally binding framework built on a new consensus between governments, companies, and peoples. In a more critical tone, the future Directive has the potential to start filling the 'regulatory', 'protection', and 'responsibility' gaps that were first framed more neutrally as 'governance gaps created by globalization' in the 2008 'Protect, Respect and Remedy' Framework for Business and Human Rights, devised by the Special Representative of the United Nations Secretary General on Business and Human Rights, John Ruggie.[4] Those gaps refer, on the one hand, to protection

[1] Commission Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] COM (2022) 71 final ("Commission Proposal" or "Proposal"); European Parliament, Committee on Legal Affairs, Draft Report 2022/0051 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022]; Council of the EU, Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach [2022] No. 6533/22; For all three negotiation mandates see : Council of the EU (b), General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – 4 column-table No. 10267/23.

[2] Commission Proposal (n 1) Articles 6-11, 15, 17-20, 21; Commission Proposal (Explanatory Memorandum) 20.

[3] d'Aspremont, Jean, et al. "Sharing responsibility between non-state actors and states in international law: introduction." *Netherlands International Law Review* 62 (2015): 49-67, 53; UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/GC/24 (2017).

[4] Ruggie, John. Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on Business and Human Rights, UN Doc. A/HRC/8/5 (7 Apr. 2008), para. 3. Available at: https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf (accessed on 27 June 2023); See on responsibility gaps; Scott, Richard Mackenzie-Gray. *State Responsibility for Non-State Actors: Past, Present and Prospects for the Future*. Bloomsbury Publishing, 2022, 31-32; protection

withheld from persons due to a lack of actionable rights, or a lack of implementation of rights,[5] and, on the other hand, the lacuna that emerges when holding companies' responsible is not possible, and establishing state responsibility for unlawful conduct under international law and its numerous sub-fields 'does not happen'.[6]

The subsequent work by the Special Representative of the Secretary General led to a document with guiding intention, which has since become a common standard and baseline in terms of principles and language with respect to business and human rights, the *United Nations Guiding Principles for Business and Human Rights* (UNGPs) (2011).[7] As such, the UNGPs have offered impetus to the developments at the EU level,[8] and set standards that the Proposal for a EU Directive aims to be consistent with.[9]

The UNGPs are structured into three pillars that describe complementary parts of a system of preventative and remedial measures, which in different ways aim to fill in the different 'gaps'. (1) The first pillar is the state's duty to protect against human rights abuses by third (private) parties. (2) The second pillar lays down the corporate responsibility to respect human rights, which requires business enterprises to act with due diligence with respect to the rights of others, and places upon them responsibility for adverse impacts of activities in which they are involved. (3) The third pillar spells out, as a subset of the state's duty to protect, the

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gaps: Shany, Yuval. "Digital Rights and the Outer Limits of International Human Rights Law." *German Law Journal* 24.3 (2023), 461-472, 463; regulatory gaps: Zerk, Jennifer A. 2010. "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas." Corporate Social Responsibility Initiative Working Paper No. 59. Cambridge, MA: John F. Kennedy School of Government, Harvard University, 12, 202-203; Mende, Janne. "Business authority in global governance: Companies beyond public and private roles." *Journal of International Political Theory* 19.2 (2023), 200-220; Chang-hsien Tsai & Ching-Fu Lin, Shedding New Light on Multinational Corporations and Human Rights: Promises and Limits of "Blockchainizing" the Global Supply Chain, 44 MICH. J. INT'L L. 117 (2023). Available at: https://repository.law.umich.edu/mjil/vol44/iss1/4 (accessed on 27 June 2023).

[5] Shany (n 4) 463.

[6] Scott (n 4) 31-32, 187.

[7] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework' (2011) A/HRC/17/31. ('UNGPs').

[8] European Commission. A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM (2011) 681 final (Brussels: European Commission). Available at: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index.en.htm; Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD(2015) 144 final, 14 July 2015; Council of the EU, 'Council Conclusions on Business and Human Rights', 3477th meeting of the Foreign Affairs Council, 10254/16 (20 June 2016); See also: Augenstein, Daniel, Mark Dawson, and Pierre Thielbörger. "The UNGPs in the European Union: The open coordination of business and human rights?." *Business and Human Rights Journal* 3.1 (2018): 1-22; and Ramasastry, Anita, Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability (2015). Journal of Human Rights, Vol. 14, No. 2, pp. 237-59 (2015), University of Washington School of Law Research Paper No. 2015-39, 251. Available at https://ssrn.com/abstract=2705675,

[9] Commission Proposal (n 1) recital 12.

obligation to ensure victims' right to access effective remedies, judicial and non-judicial, and the complementary role of business enterprises therein.[10] Distinctly the third has been referred to as the 'forgotten pillar' and as 'the least proactive one', addressing the dormant potential that lies in the residual capacity of domestic courts to provide for judicial remedy, as well as monitor, sanction, and enforce complementary, non-judicial mechanisms.[11] Indeed, it was noted that the third pillar has the hardest time in making meaningful progress in cohering the diverse set of proceedings and standards that exist at the domestic level to ensure access to effective remedies for victims of human rights harms in which companies are involved.[12] Also at the operational level, implementation of the third pillar by corporate actors has been identified as especially weak.[13] In relation to the distribution of harms done, it has been established that they most frequently occur outside the EU, positing a rationale for the Directive.[14] With respect to both judicial and non-judicial remedies, public and private, the legal and practical obstacles that limit access to remedies for victims impacted by corporate-related human rights and environmental abuse have been found to be compounded and more severe in cases of an extraterritorial nature.[15]

Accordingly, this thesis focuses on the obligation of states, connected to the State duty to protect, and the attendant responsibility of companies, to ensure access to justice and effective remedy for victims of human rights violations in which transnationally operating companies are involved, specifically in the context of the EU initiative for a Directive. In particular, this thesis focuses on extraterritorial human rights obligations and violations. In relation to that, it inquires into the tension between (i) the 'well-documented lack of access to

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[10] UN Human Rights Council, *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, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: https://www.refworld.org/docid/484d2d5f2.html [accessed 14 July 2023], para. 6.

[11] Rivera, Humberto Cantú & Miguel Barboza López. "Corporate Liability for Human Rights Abuses in Latin American Courts: Some Recent Developments." *Business and Human Rights Journal* 7.3 (2022): 481-486, 482; Ramasastry (8) 248.

[12] *ibid.*

[13] McCorquodale, Robert, and Martijn Scheltema. "Core Elements of an EU Regulation on Mandatory Human Rights and Environmental Due Diligence." (2020). 13, 21; Zerk (4) 141.

[14] European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. (2020). *Study on due diligence requirements through the supply chain – Final report*, Publications Office. https://data.europa.eu/doi/10.2838/39830, 15.

[15] *ibid.*, 228ff.; Axel Marx, Claire Bright and Jan Wouters, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (February 2019), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf (European Parliament, 2019); Ramasastry (n 8) 248; Augenstein, Daniel, and David Kinley. "Beyond the 100 acre wood: in which international human rights law finds new ways to tame global corporate power." *The International Journal of Human Rights* 19.6 (2015): 828-848; Fundamental Rights Agency of the European Union, Improving access to remedy in the area of business and human rights at the EU level (2017), 28.

effective remedies' in the EU for victims who are based in a third country,[16] (ii) the call on states to reduce legal, practical, and other barriers as given mandatory expression in the Commission Proposal, and (iii) the right of access to effective remedy in international human rights law as mediating between the former two.

The concept of 'jurisdiction' appears to structure both the capacity of states to act within and outside its borders in accordance with (ii); and the scope of states' obligations under human rights law referred to under and (iii). Framing a definition of extraterritorial jurisdiction, Jennifer Zerk refers to "the ability of a state, via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory".[17]

A useful typology of jurisdiction that will be employed in this thesis differentiates between (i) prescriptive (or "legislative") jurisdiction, which concerns the ability of states to apply its domestic laws, and, with respect to extraterritorial jurisdiction, the reach of a state's authority to make rules and decisions that apply to or affect actors and conduct outside its own territory; (ii) enforcement (or "executive") jurisdiction, which concerns the capacity of states to ensure compliance with their laws, whether outside of its territory or not; and (iii) adjudicative (or "judicial") jurisdiction, which concerns the ability of courts to adjudicate private disputes, including those with a foreign element.[18]

In the context of the analysis of the Commission Proposal, especially the latter type of jurisdiction - the adjudication and remedial of cases of an extraterritorial nature - is relevant. At present, the jurisdictional framework under EU law as defined through the Brussels Ia Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,[19] by and large excludes from its scope claims against 'foreign', non-EU-domiciled defendants, including subsidiaries, suppliers, and partners of EU-based companies.[20] Now, the Commission Proposal includes under its scope, pursuant to Article 2(2), companies which are formed in accordance with the legislation of a third country, extending both the foreseen due diligence requirements, and the substantive provisions on remediation to the third-country companies that fall under the conditions in that Article. Also, it requires Member States

[16] European Commission study (n 14) 228.
[17] Zerk (n 4) 13.
[18] Zerk (n 4) 13; Mari Takeuchi, Asian Experience with Extraterritoriality Forthcoming in Austen Parrish and Cedric Ryngaert (eds), Research Handbook on Extraterritoriality (Edward Elgar) (2023), 2; Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of Jurisdiction' in Malcom Langford and others (eds), Global Justice, State Duties (Cambridge University Press 2013) 153-191, 156; Augenstein, Daniel, and Nicola Jägers. "Judicial remedies: the issue of jurisdiction." *Human Rights in Business*. Routledge, (2017), 11.
[19] Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012) Article 4(1), Article 63(1) ('Brussels Ia Regulation').
[20] European Parliament study (n 15) 34.

to ensure access to effective remedy for victims of human rights and environmental harms, actual or potential, through public judicial and non-judicial remediation mechanisms, as well as through private operational-level mechanisms. To explore to what extent the global scope of the proposed Directive interacts with and has implications for the exercise of jurisdictional competences of States' extraterritorially, the following research questions are guiding:

To what extent can the focus on remediation in the Commission Proposal on corporate sustainability due diligence provide potential grounds to establish extraterritorial jurisdiction of EU Member States?

How can the material scope of the Commission Proposal be evaluated in light of the Parliament and Council negotiation mandates?

To what extent can case law of the ECtHR on extraterritorial jurisdiction under Article 1, 6(1), and 13 ECHR assist in the conceptualisation of proceedings that could be brought within the scheme of the Commission Proposal?

As a cue towards the exploration of the implications that the future Directive might have in terms of extraterritorial jurisdiction, a noteworthy case in the area of European international private will be introduced. The *Braskem SA* case concerns an interim judgement by the District Court of Rotterdam from 21 September 2022. Central to that case is the question of whether or not the court has international jurisdiction to adjudicate the case brought by applicants located in Brazil, who have suffered human rights and environmental harm, allegedly in connection with the mining activities of Braskem SA.[21] Importantly, the proceedings are brought against Braskem SA, which is domiciled in Camaçari, Brazil, as the parent company of the Braskem group, and against three subsidiaries, who have their seat in Rotterdam, the Netherlands (NL). The first subsidiary, Braskem NL B.V. is active in the supply of raw materials to the Braskem group, and in reselling of petrochemical products produced in Brazil.[22] The latter two, Braskem NL Finance B.V., and Braskem NL INC. B.V., pursue financial activities within the Braskem group.[23]

The facts of the case date back to March 2018, when several earthquakes occurred in Maceió, a city in the Brazilian state of Alagoas, forcing the evacuation of approximately 8000

[21] Rechtbank Rotterdam (C/10/618313 / HA ZA 21-415) 21 September 2022 ECLI:NL:RBROT:2022:7549 (henceforth "*Braskem SA*", para. 2; For a commentary see: Warmington, S. & Timmerman, S.. (13 Oct 2022). Brazilian claimants alleging environmental harm against salt mine operators in the Netherlands. *Hausfeld*. Available at: Hausfeld | Brazilian claimants alleging environmental harm against salt mine operator in the Netherlands ; See also for an account of a resident of Maceió in English: Gazzaneo, Nathalie. (3 June 2021). The Rock Salt of the Earth. Available at: The Rock Salt of the Earth | ReVista (harvard.edu)

[22] *ibid.,* para. 3.2.

[23] *ibid.,* para. 3.3.

families, and leaving roads, houses, and other buildings damaged, people homeless and without work.[24] The claimants allege that the mining activities destabilised cavities under parts of the city, which entailed the collapsing of land and heightened vulnerability in the case of earthquakes.[25] The claimants, eleven members of communities living in Maceió, base their case on Brazilian environmental liability law, and specifically the doctrine of indirect polluter's liability,[26] seeking before the court that the defendants be held jointly and severally liable for the damage suffered, and an order to pay compensation.[27] While it is undisputed that the court has jurisdiction to adjudicate over the Dutch subsidiaries, the issue is whether or not the District Court has international jurisdiction over Braskem SA.[28]

In line with the general rule under the Brussels Ia Regulation that was outlined before, the court asserts that it cannot find jurisdiction under EU law as it currently stands, as Braskem SA is not domiciled in the territory of an EU Member State, thus falling outside the scope of the Regulation.[29] Notably, however, the court finds that it has jurisdiction to render an interim (*prima facie*) judgement under the rules of Dutch private international law laid down in Articles 1-14 of the Dutch Code of Civil Procedure.[30] In establishing jurisdiction, the District Court relies on Article 7(1) Rv, interpreted in light of Article 8(1) Brussels Ia Regulation.[31] Article 7(1) Rv states:

> If (..) the Dutch court has jurisdiction over one of the defendants, it shall also have jurisdiction over other defendants involved in the same proceedings, provided that the claims against the various defendants are so interrelated that reasons of expediency justify joint proceedings.[32]

The court elaborates that this is to be understood as requiring that the claims are so closely connected that the proper administration of justice requires their simultaneous hearing and trial in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.[33] A

[24] *ibid.,* para. 3.5.; Warmington & Timmerman (n 21).
[25] *ibid.*
[26] Warmington & Timmerman (n 21) comment: 'the indirect polluter principle allows that each defendant may, in principle, be held jointly and severally liable for the harm caused by the salt mines'; See on this principle: Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities) UN Doc. A/CN.4/543 (2004).
[27] *Braskem SA.* (n 21) para. 4.
[28] *ibid.,* paras. 2, 5, 6.2.
[29] Brussels Ia Regulation (n 19) Article 4 and 63.
[30] *Braskem SA.* (n 21) para. 6.4.; Wetboek van Burgerlijke Rechtsvordering, short "Rv".
[31] *ibid.*, para. 6.10.
[32] Warmington & Timmerman (n 21).
[33] *Braskem SA*. (n 21) para. 6.12.

relevant factor set out by the court is that 'it was foreseeable to the defendants that they could be sued in the Member State in which one of them is domiciled'.[34]

The defendants raise a number of arguments that challenge whether the efficient administration of justice would be served in the case of the court taking international jurisdiction. First, the challenge of the court's jurisdiction. As such, the case is described as concerning matters that fall exclusively to Brazilian courts to decide upon. Second, the defendants raise questions with respect to the application, interpretation, and even formation of Brazilian law by the Dutch District Court, as well as issues with respect to access and review of evidence. Accordingly, the defendants argue that for the District Court to exercise jurisdiction would propel the risk of conflicting judgments.[35]

In setting out its reasoning, the District Court reasons that the claims against the Braskem NL subsidiaries and the Braskem SA are inextricably linked by virtue of similarity in law and in fact, as they concern their liability, jointly and severally, for the same damage that arose as a consequence of the earthquakes in 2018 (semblance in fact). Furthermore, the legal basis underlying the claims is the same, namely Brazilian environmental liability law, and the doctrine of indirect polluter's liability in particular (semblance in law).[36] With respect to the criterion of foreseeability, the District Court finds that as the Braskem group, including Braskem SA, chose the place of incorporation of the entities that make financial decisions to be the Netherlands, it was reasonably foreseeable that not only its Dutch subsidiaries but also Braskem SA, as the top holding company of the Braskem group, could be sued before a Dutch court.[37] In accordance with the interim (*prima facie*) nature of the ruling, the court reserves any question as to the substantive admissibility of the claims, in whole and in part, to be settled in the main proceedings.[38] The defendants have been ordered to submit a substantive file in defence, and pay the costs of the proceedings.

The case is noteworthy, as it provides an example of the potential reach of domestic court's jurisdiction under private international law, going further both in substance and interpretation of the Brussels Ia Regulation by joining the third-country-domiciled parent company to the proceedings. While keeping in mind that it is an interim judgement, composite but not constituent of the right to access effective remedy, the ruling offers a positive scenario for victims' access to judicial remedy in an EU Member State court at first instance. Especially

[34] *ibid.*
[35] *ibid.*, para. 6.14.
[36] *ibid.*
[37] *ibid.*, para. 6.18.
[38] *ibid.*, para. 6.16.

in light of repeated criticism of the narrow interpretation and application of Article 8(1) Brussels I(a) Regulation, the *Braskem SA* case sets the scene to unpack the concepts of extraterritorial jurisdiction, access to effective remedy, and provides for a reference point with respect to the analysis of the Commission Proposal.

(i) Terminology

This thesis uses the following terminology: 'company' is used encompassingly to refer to private corporate entities,[39] and only in citing the UNGPs, the term 'business enterprise' is adopted.[40] The terms "home state" and "host state" are used as in the UNGPs, drawing on their meaning in international investment law: the state where an investor has its domicile and/or is legally incorporated (the home state), and the state where investments have been made (the host state).[41]

'Corporate-related human rights and environmental harms' is used interchangeably with 'adverse human rights and environmental impacts' as defined in the Commission Proposal.[42] Likewise, 'grievance mechanism' and 'remediation mechanism' are used interchangeably, depending on whether it is in the context of the Commission Proposal or generally. 'Victim' refers to the persons entitled to effective remedy due to their direct or indirect exposure to actual or potential harm as defined before.[43] The concepts 'jurisdiction' and access to effective remedy' will be spelled out in more detail in Chapter 1.

(ii) Methodology

This thesis was primarily executed as desk research of the relevant legislation, legal scholarship, relevant jurisprudence, and engagement in and with the wider academic discussion. During the course of the research, a conference by the European Parliament was attended, which informed the research presented in Part 1 and 2. A comparative approach was followed in Part 2 and 3, joining a private and public law perspective. The selection of cases

[39] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 54; For an overview of the different terms used across EU legislation see: McCorquodale & Scheltema (n 13) 7.
[40] UNGPs (n 7) Principle 1
[41] Ramasastry (n 8) 240; The terms home and host state are one of the examples whereby the UNGPs draw on concepts that have roots in different fields of law and a business context, linking them to human rights issues.
[42] Commission Proposal (n 1) Articles 3(b), (c), and (l); Please note that the definitions are not adopted in their precise relation to a limited set of human rights and environmental law provisions as in the Annex to the Commission Proposal but as references to violations of human rights and environmental law more broadly.
[43] It contrasts the broad definition of stakeholders in Article 3(n) of the Commission Proposal (n 1).

has been guided by the two-fold focus on the right to access to effective remedy and extraterritorial jurisdiction.

(iii) Structure

Part 1 unpacks the conceptual framework with a focus on the concept's jurisdiction, the State duty to protect, and access to effective remedy. Then it provides an empirical overview of the hurdles that victims face in accessing effective remedy in the EU, highlighting jurisdictional obstacles and barriers inherent in the EU jurisdictional framework.

Part 2 introduces the Commission Proposal, studying its provisions on remediation and outwards focus. Thereafter, it takes a comparative turn, drawing on the Parliament and Council Mandates with respect to their scope as regards remediation, presenting scenarios to illustrate the mechanisms that would be available for victims to bring claims against private parties, and against the State.

Part 3 turns to the individual right of access to justice and effective remedy as core rights enshrined in international human rights law,[44] and in particular to Article 6 and Article 13 of the European Convention of Human Rights (ECHR).[45] In relation to extraterritorial jurisdiction, three specific bases and the according substantive and procedural standards that States need to observe when victims are 'within their jurisdiction' but outside their sovereign territorial boundaries for the purpose of Article 1 ECHR will be highlighted and discussed in relation to the Commission Proposal.

In my conclusion, I consider limitations and directions for further research.

Part 1: Theoretical and empirical approaches

This part sets the stage in three steps: 1) clarification of the meanings of the term 'jurisdiction' that will be used, and relating them to the State duty to protect; 2) conceptualisation of access to remedy in the UNGPs; and 3) the link between access to effective remedy and extraterritorial jurisdiction by an empirical overview of the obstacles that victims are faced with.

[44] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 29 June 2023], Article 8; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 29 June 2023], Article 2(3); Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 Article 47 ("the Charter").
[45] Hereinafter "ECHR" or "the Convention".

1.1. The concept of jurisdiction

To the extent that private international law, international law, and international human rights law are relevant to the present thesis inquiry, next to the many fields of national law,[46] the different notions of jurisdiction attached will briefly be unpacked, although it has to be noted that those parts of the law interact, and are used together in some cases,[47] which is part of where the conceptual focus of this thesis lies.

1.1.1. A public international law notion of jurisdiction

To return to the typology of jurisdiction introduced before - prescriptive, enforcement, and adjudicative jurisdiction - they are commonly associated with the notion of jurisdiction in public international law.[48]

This entails, as Augenstein & Jägers have referred to, that 'the starting point of assessing 'jurisdiction', in all its forms, in this field of law is presumed to be territory-based'.[49] Relatedly, the concept of 'jurisdiction' under public international law has been described as closely connected to the notion of State sovereignty.[50] That is: a State's authority to lawfully regulate, enforce, and adjudicate extends so far as its sovereignty reaches, and it is limited by the rule of non-intervention with respect to the sovereignty of other States.[51] Heijer & Lawson have referred to this as the allocating function of public international law with respect to States jurisdictional competencies.[52] In brief, the public international law notion of jurisdiction in its 'ordinary sense',[53] and the typology corresponding to it, are territory-based, extending

[46] I am referring here to constitutional, administrative, civil, corporate, criminal, labour, liability, and the relevant procedural laws.
[47] Lizarazo Rodriguez, Liliana. "UNGP on business and human rights in Belgium: state-based judicial mechanisms and state-based nonjudicial grievance mechanisms, with special emphasis on the barriers to access to remedy measures." (2017) 5; Heijer & Lawson (n 18) 158.
[48] Zerk (n 4); Heijer & Lawson (n 18).
[49] Crawford (2012) as cited by Augenstein & Jägers (n 18) 11-12.
[50] Heijer & Lawson (n 18) 156; This view could be extended to the concept of territorial sovereignty under international law, cf. *Island of Palmas* case & *Namibia* case in UN Survey of Liability Regimes (n 26), paras. 421-422.
[51] Augenstein, Daniel. "Towards a new legal consensus on business and human rights: a 10th anniversary essay." *Netherlands Quarterly of Human Rights* 40.1 (2022): 35-55, 48; Heijer & Lawson (n 18) 155-156; Augenstein & Kinley (n 15); On the concept of outward extraterritoriality see: Takeuchi (n 18), 1-3.
[52] Augenstein (n 51) in a similar vein refers to 'jurisdiction' operating as a threshold criterion for the applicability of international human rights treaties, 48; See also: Heijer & Lawson (n 18) 155;
[53] ECtHR, 12 Dec 2001, *Banković and Others v. Belgium and Others* (no. 52207/99), para. 59.

extraterritorially in accordance with certain, well established exceptions under international law.[54]

1.1.2. The term jurisdiction in private international law

With respect to the private international law sense of 'jurisdiction', it refers to the competence of national courts to adjudicate and resolve cases between private parties, including where proceedings involve a foreign element.[55] National courts usually have jurisdiction where they can ascertain 'a sufficiently close connection between the facts of the case and the forum state'.[56]

The general rule on this in EU law, pursuant to the Article 63(1) Brussels Ia Regulation, pinpoints the EU Member State in which a defendant is domiciled as the forum state, generally not covering non-EU-domiciled defendants, including subsidiaries, suppliers, and partners of EU-based companies.[57] It has been pointed out that national courts, in establishing their own residual jurisdiction under private international law over cases that involve a foreign element, are subject, at least to some degree, to the limits of a state's jurisdiction under public international law. While this is being somewhat mitigated in situations where the adjudicating court uses the law of the (third) host state, fulfilling its function to protect the parties' legitimate interests in cross-border disputes, ensuring an adequate and efficient judicial process, and avoiding the risk of obtaining conflicting judgments in different courts and jurisdictions, "it is also an expression of the allocation of jurisdiction in public international law that protects the state's sovereign authority over its territory and people therein against undue external interference by other states".[58]

1.1.3. Jurisdiction in international human rights law

Similarly, the inherent limits of the public international law understanding of 'jurisdiction' and States' exercise thereof outside their borders have been observed to inform debates about the

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[54] *ibid.,* para. 61, listing: "nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality"; See also: Heijer & Lawson (n 18)155.
[55] Augenstein & Jägers (n 18) 11; Zerk (n 4).
[56] *ibid.*
[57] Brussels Ia Regulation (n 19) 63(1): 'domicile' is being determined on the basis of a company's statutory seat, its central administration, or its principal place of business.
[58] Augenstein & Jägers (n 18) 12, fn. 9; See also: Takeuchi (n 18) 2: More generally this dependency relationship between assertions of jurisdictional competencies extraterritorially also finds expression in the concepts 'outward extraterritoriality' and 'inward extraterritoriality', which refer, respectively, to how far a State's domestic law can reach vis-à-vis a State's reaction to the exercise of (extraterritorial) jurisdiction by other States'.

applicability of international human rights Treaties, including, notably, the ECHR.[59] While the interpretation given to the notion of 'jurisdiction' under Article 1 ECHR will be the focus of Chapter 3, it is noted here that the ECtHR has long defended its understanding as established in the *Banković* case: that the 'ordinary meaning' of the term refers to primarily territorial jurisdictional competence of States, unless exceptional grounds provided for in accordance with the international law understanding of the term 'jurisdiction' apply.[60] In more recent case law, the Court turned away from the primarily territory-based approach to jurisdiction, and established that for the purposes of Article 1 in cases of an extraterritorial nature the Convention rights and freedoms can be "divided and tailored".[61] Thereby, the Court adopted a notion of 'jurisdiction' that had been articulated by the applicants in the *Banković* case but not concurred with by the Court then, suggesting that the contracting States incur positive obligations under Article 1 to secure the Convention rights and freedoms in accordance with the particular circumstances of the extra-territorial act in question".[62] Important in that shift, and subject to enduring submissions to the contrary by defendant States before the ECtHR, is that the use of 'jurisdiction' under the ECHR, and international human rights law more generally, differs in that the assessment of connecting ties between a victim and a State are assessed independently from the lawfulness of that State's exercise of jurisdiction outside its sovereign territory under public international law.[63] To stay with the ECHR, the decisive factor in determining the existence of a 'jurisdictional link' for the purposes of Article 1 ECHR, and thus whether or not an individual comes 'within the jurisdiction' of a Contracting State, is not decided by the legality or illegality of State conduct but by the relationship between a State's exercise of authority and control, directly or indirectly over a foreign territory and/or the individual(s) located there.[64] Zooming out once more to introduce a further dimension of 'extraterritoriality' warrants recourse to the State duty to protect human rights under the UNGPs.[65]

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[59] *ibid.*
[60] *Banković* (n 53) para. 59.
[61] ECtHR, 14 September 2022, *H.F. and Others v. Belgium and Others* (nos. 24384/19 44234/20), para. 186.
[62] *Banković* (n 53) para. 75.
[63] Augenstein & Jägers (n 18) 12; On an analysis of the *travaux préparatoires* to the ECHR that supports this stance, see: Heijer & Lawson (n 18) 162.
[64] ECtHR, 7 July 2011, *Al-Skeini and Others v. The United Kingdom* (no. 55721/07), paras. 136-138; Augenstein (n 51) 48; Augenstein & Jägers (n 18) 12; Heijer & Lawson (n 18) 159.
[65] For the academic discussion on the conceptual separation of the different notions of extraterritorial jurisdiction see: Bonnitcha, Jonathan, and Robert McCorquodale. "The concept of 'due diligence' in the UN guiding principles on business and human rights." *European Journal of International Law* 28.3 (2017): 899-919; Scott (n 4); Heijer & Lawson (n 18)

1.1.4. Pillar I of the UNGPs: The State duty to protect human rights

With respect to the extraterritorial dimension of the duty to protect, the UNGPs inscribe an approach to the relationship between States, companies, and individuals that is mirroring the international law custom at the time, stating the discretionary space for States to act in this field, moving in between permissiveness and prescriptiveness,[66] or entitlement and duty.[67] Indeed, while Principle 2 posits the role of States to set out expectations for companies domiciled in their territory and/or jurisdiction, the commentary adds:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.

Alongside this statement of States discretionary capacity to enact legislation, the UNGPs make a conceptual differentiation with respect to the exercises of States jurisdictional competences. The varying approaches enacted by States are classified as either "domestic measures with extraterritorial implications", or "direct extraterritorial legislation and enforcement".[68] In contrast to 'direct' extraterritorial jurisdiction, the Special Representative of the Secretary General highlighted that domestic measures with extraterritorial implications are still underpinned by a territorial link.[69] Likewise, Jennifer Zerk has argued that where home-state courts exercise civil jurisdiction over a local parent company with respect to human rights harms that occurred abroad, this does not fall under the category of extraterritorial jurisdiction yet may have extraterritorial implications.[70] To her, this holds generally where "parent-based" regulation is used to attach requirements to home-State-based companies' conduct because of the territorial nexus.[71] In contrast, it has been pointed out that this interpretation does not sit easily with the different notions of 'territoriality' and 'extraterritoriality' in international human rights law, which are linked to the (extra-)territorial location of the victim of corporate-related human rights abuse.[72] What is and what is not 'extraterritorial jurisdiction' becomes visible

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[66] Augenstein (51), fn. 74; Augenstein & Kinley (15) 836.
[67] Heijer & Lawson (n 18); Zerk (n 4) 12.
[68] UNGPs (n 7), Principle 2 (Commentary).
[69] UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 9 April 2010, A/HRC/14/27, available at: https://www.refworld.org/docid/4c0759832.html [accessed 14 July 2023], para. 48, p. 11.
[70] Zerk (n 4) 14.
[71] *ibid.*, 16; See also: UNGPs (n 7) Principle 2 (Commentary).
[72] Augenstein 2022 (51) 50, fn. 89; Also Augenstein & Kinley (n 15); Heijer & Lawson (n 18).

here as contested and complex, as well as dependent on both the context and the field of law applied.

In explicating his preparatory work towards the UNGPs, the Special Representative of the Secretary General underlined the existence of diverse forms of extraterritoriality, thereby seeking, it appears, to correct and neutralise the objections raised in the discussions around extraterritoriality as a point of contention in the field of business and human rights.[73] In presenting the different State measures concerned, the Special Representative of the Secretary General used the image of a matrix yielding six 'extraterritorial forms' with a range of options attached. To recount:

> One can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, export credit agency criteria, or consular support); regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches and enforcing judicial and executive decisions).[74]

To give form to the image, the following matrix depicts the envisaged forms of extraterritoriality.

	Public policies for companies	Prescriptive regulation	Enforcement actions
Domestic measures with extraterritorial implications	Cell 1	Cell 2	Cell 3
Direct extraterritorial jurisdiction	Cell 4	Cell 5	Cell 6

(Table 1)

[73] UN HRC (n 69) paras. 49-50, p. 11.
[74] *ibid.* para. 49, p. 11.

Notably, the typology of prescriptive, enforcement, and adjudicative jurisdiction can be matched with column two and three / three and four.[75] This is coherent with the argument that adjudicative regulation operates as a part of prescriptive or enforcement jurisdiction, depending on the circumstances.[76] While this connection should be kept in mind, it is helpful to treat adjudicate jurisdiction separately, as the Commission Proposal contains specific components with respect to adjudication and enforcement to ensure victims' access to effective remedy, which is the focus in Chapter 2. A conceptual note and the empirical mapping will precede, specifically with respect to the situation of victims of corporate-related human rights and environmental violations in transnational contexts who seek access to effective remedy before EU Member States courts.

1.2. Access to an effective remedy

First, for conceptual clarity, the right to an effective remedy, access to effective remedy, and access to justice will be looked at. The right to an effective remedy as a core right in international human rights law is enshrined in Article 13 ECHR, Article 8 of the Universal Declaration of Human Rights, and Article 2(3) of the International Covenant on Civil and Political Rights, relative to the scope of the respective provision, among others.[77] In the context of the EU, Article 47 of the Charter of Fundamental Rights of the EU lays down the right to an effective remedy and to a fair trial. Components of that right are, pursuant to the second subparagraph 'a fair and public hearing within a reasonable time by an independent and impartial tribunal', as well as the possibility of legal advice, defence, and representation; and pursuant to the third subparagraph, legal aid in so far as necessary to ensure effective access to justice.

1.2.1. Access to effective remedy in the UNGPs

Now, turning to the UNGPs for characterisation and conceptual purposes, access to effective remedy is also a core component of the Guiding Principles, underpinning their status of being 'squarely grounded in law' yet not law itself.[78]

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[75] Augenstein & Jägers (n 18), 11; Zerk (n 4) 13.
[76] Zerk (n 4) fn. 6; See also Heijer & Lawson (n 18).
[77] See also: African Charter on Human and Peoples' Rights, 1981 ((1982) 21 ILM 58) Art 7.1.
[78] Ramasastry (n 8) 245, 247; For another characterisation of the UNGPs see also: Smit, L. & Bright, C. (16.12.2020). Human Rights and Environmental Due Diligence as a Standard of Care. *Business & Human Rights Resource Centre*. Available at:

As such, Principle 1 requires States to take "appropriate steps to prevent, investigate, punish and redress" business-related human rights abuses within their territory and/or jurisdiction (the state duty to protect, Pillar I). Principle 22 provides that, where "business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes" (the corporate responsibility to respect human rights, Pillar II). The foundational Principle 25 of pillar III on access to remedy States shall "take appropriate steps to ensure that those affected by business-related human rights abuses within their territory and/or jurisdiction have access to effective remedy".[79] This goes to show that where victims of human rights and environmental harms in which companies are involved seek access to effective remedy before EU Member States courts, all three pillars of the UNGPs are triggered,[80] albeit in a "differentiated but complementary" fashion.[81]

With respect to the relation to the concepts 'right to an effective remedy' and 'access to effective remedy' in the context of the Guiding Principles, the Working group on the issue of human rights and transnational corporations and other business enterprises notes that 'access to appropriate remedial mechanisms should be provided by the bearers of a duty or responsibility to realise the right to an effective remedy', thus emphasising a dependency between these two, access being necessary for the right to an effective remedy.[82] Another paralleling concept is 'access to justice', which is characterised as more elastic, ranging from narrow to broad conceptions.[83] On the narrow end, it equates with the right or access to effective judicial remedies, whereas larger issues of injustice beyond the scope of individualised remedies come under the broad conception.[84] To give substance to the concept, however, the State's duty to ensure access to effective remedy in Pillar III will be unpacked now.

The State's duty with respect to access to remedy, pursuant to Principle 25 falls under their more general duty to protect. The commentary to that foundational principle specifies that the State's duty to ensure access to effective remedy is composed of both procedural and

https://www.business-humanrights.org/en/blog/human-rights-and-environmental-due-diligence-as-a-standard-of-care/ , 264-265.

[79] UN General Assembly, '*Human Rights* and *Transnational Corporations* and *Other Business Enterprises*',. A/*72/162* (18 July 2017), 4.

[80] UN HRC (n 69) para. 2, p. 4.

[81] Ramasastry (n 8) 244.

[82] UNGA (n 79) paras. 14-16, p. 7.

[83] *ibid.*

[84] *ibid.*; See also: Francesco Francioni, ed., "The rights of access to justice under customary international law", in Access to Justice as a Human Right (New York and Oxford, Oxford University Press, 2007), 3-4.

substantive aspects. Remedy is circumscribed with respect to exemplary forms it may take including "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition".[85] Impartiality, protection from corruption, and freedom from any attempts to unduly influence the outcome are stressed as important conditions of access to effective remedy, especially of due process.[86]

Under Principle 26 of the UNGPs, states are called on to reduce legal, practical and other relevant obstacles that could inhibit or limit victims' access to remedy through domestic judicial mechanisms. One such obstacle, the commentary to Principle 26 states, arises in situations where 'claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim', which presents one articulation of jurisdictional barriers to victims' access to effective judicial remedy in cases of an extraterritorial nature.[87]

Important in light of the research questions are the 'differentiated yet complementary' obligations of States and companies as articulated in the UNGPs.[88] In particular, this is the assertion that "States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime",[89] which, in a different tone, recurs in the formulation that the complementary responsibility to respect human rights on companies exists 'independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations'.[90] Likewise, the commentary to principle 25 emphasises that 'State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy'. How the right to access effective remedy fares in reality in the EU and its Member States is the subject of the next section.

1.3. The link between access to remedy and (extraterritorial) jurisdiction

This section presents an empirical overview of the obstacles that victims who are seeking to access effective remedy in the EU face, starting out with a broader mapping, and highlighting

[85] UNGPs (7) Principle 25 (Commentary).
[86] *ibid.,* Principles 25 and 26 (Commentary); UNGA (n 79) 4.
[87] Rivera & López (n 11) 481-486.
[88] Ramasastry (n 8).
[89] UNGPs (n 7) Principle 4 (Commentary); Note that Principle 4 addresses State and/or state-supported companies (business enterprises), which are not being discussed separately in this thesis.
[90] *ibid.*, Principle 11 (Commentary), Compare and contrast with Principle 25 (Commentary).

jurisdictional barriers and issues stemming from the EU private international law framework thereafter.

In the course of the preparation of the EU initiative, 'a well-documented lack of access to remedies' has been found for victims who have suffered corporate-related human rights and environmental harms, inside and outside of the EU.[91] The insufficiency and lack of public judicial grievance mechanisms available in EU Member States has been confirmed in several reports.[92] Connected to this, the irreplaceability of the former by non-judicial and voluntary grievance mechanisms provided for by private actors has repeatedly been underlined and thoroughly attested.[93] With respect to the structure of harms done, those have been found to most frequently happen in host states, which falls together with the finding of severe challenges faced by victims to access legal remedies there. Likewise, when victims try to bring their actions before companies' home-state courts, a long list of legal and practical barriers to actually and effectively accessing legal remedies has been documented.[94]

The European Commission funded study on due diligence requirements through the supply chain of 2020 lists the following:[95] (1) difficulties and costs to secure legal representation;[96] (2) resources and time, as well as difficulties to navigate a foreign civil liability regime, and in particular access to the information required to prove a claim;[97] (3) restrictive procedural law issues such as time-limitations on bringing claims; (4) immunities and non-justiciability doctrines; (4) challenges in establishing jurisdiction;[98] (5) issues relating to the applicable law; (6) the complexity of corporate structures and the attribution of legal responsibility among members of a corporate group;[99] (7) proving human rights violations; and (8) the reach and enforcement of remedies, as well as whether the latter is satisfactory.

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[91] European Commission study (n 14) 228; Augenstein, Daniel, and Chiara Macchi. "The Role of Human Rights and Environmental Due Diligence Legislation in Protection Women Migrant Workers in Global Food Supply Chains." *Research Policy Study commissioned by Oxfam Germany and Action Aid France in the framework of the EU DEAR Project 'Our Food. Our Future* (2021), 46.

[92] *ibid.*; European Parliament study (Axel Marx, Claire Bright and Jan Wouters, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (February 2019), Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf, p. 14; FRA report (n 15).

[93] European Parliament, Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)), A9-0018/2021, recital 5.

[94] European Commission study (n 14) 229; Augenstein & Macchi (n 91) viii, 26, 48; See also: UNGPs (n 7) Principle 26 (Commentary); UN HRC, Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse, A/HRC/32/19 (2016), paras 2, 5.

[95] European Commission study (n 14) 229 and the sources cited.

[96] *ibid.*; See also European Parliament study (n 15) 16.

[97] *ibid.*; See also European Parliament study (n 15) 17; Augenstein & Macchi (n 91) 26.

[98] *ibid.*; See also European Parliament study (n 15) 16.

[99] *ibid.*; See also European Parliament study (n 15) 14; Zerk (n 4).

Two more practical and procedural barriers can be drawn from the UNGP Commentary to Principle 26. Those are: (9) 'inadequate options for aggregating claims or enabling representative proceedings',[100] and (10) 'State prosecutors lacking adequate resources and expertise to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes'.[101] In addition to those barriers comes the fact that the relationship between the parties in business-related human rights cases frequently exhibits grave imbalances, and that vulnerable groups, who are often located in host (third) countries, are facing multiple and intersecting forms of discrimination in accessing legal remedies.[102]

All of these barriers contribute to a depressing reality for victims seeking effective legal remedies for corporate-related human rights harms suffered in a transnational context. This has been shown numerically: the Commission-funded study refers to a mapping of legal proceedings brought before Member State courts against EU-domiciled companies for corporate-related adverse human rights and environmental impacts in third countries over the last decade (2007 to 2019).[103] Of 38 cases, 14 cases had been dismissed, 19 were still ongoing, 4 had been settled by reaching an agreement out of court, and in 1 case, the claimants obtained a successful judicial outcome at the merits stage of the case'.[104] These findings are corroborated by a comparative study that identified and analysed 35 civil and criminal proceedings that were brought before EU Member State courts on similar grounds between 1990 and 2015: of the 20 civil proceedings that were identified, plaintiffs received compensation in 2 cases; and of 15 criminal proceedings, 1 led to a successful judicial outcome for the plaintiffs.[105] Especially jurisdictional barriers and lack of evidence were identified as grounds for dismissal of those cases at an early stage.[106]

In aggregating its findings with respect to the lack of access to effective remedy for victims of adverse human rights and environmental impacts of EU-domiciled companies, the study commissioned by the European Commission highlights specifically constraints posed by traditional notions of territorial jurisdiction,[107] and separate corporate personality.[108] Important

[100] UNGPs (n 7) Principle 26 (Commentary); European Parliament study (n 15) 16.
[101] *ibid.*; European Parliament study (n 15) 17.
[102] UNGPs (n 7) Principle 26, (Commentary); For example in the context of gender and migration status see: Augenstein & Macchi (n 91) iv; European Parliament study (n 15) 16.
[103] European Commission study (n 14), 176.
[104] European Parliament study (n 15); See also UNGPs (n 7) Principle 12 (Commentary) and the reference points cited.
[105] *ibid*. 13-14.
[106] *ibid*. and the source cited.
[107] D'Aspremont et al. (n 3); For an overview: UN Survey of Liability Regimes (n 26), paras. 321-322.
[108] European Commission study (n 14) 207; European Parliament study (n 15) 103.

underlying issues have been located in the governing private international law framework in the EU.[109] These three will be outlined with respect to their bearing on access to effective remedy.

1.3.1. Jurisdictional barriers

In light of the *Braskem SA* case, the potentially far reaching arm of EU Member State courts international jurisdiction, or adjudicative jurisdiction, can be recalled here. While it has been presented as a positive precedent and cue towards analysing the implications of the EU initiative, it does not displace the legal and practical barriers inhibiting access to remedy for victims in cases of an extraterritorial nature.[110] One such obstacle in the form of a legal objection by the defendant relates to the applicants' choice of forum being 'inconvenient' (*forum non conveniens*) in that it is allegedly the wrong choice, lacking a sufficient connection to the legal sphere of the forum-state.[111] While this doctrine can generally no longer be relied upon before the national courts of EU Member States since the CJEU ruling in *Owusu v Jackson*,[112] it was actually relied upon by the defendants in the *Braskem SA* case and does play a role in other contexts.[113] Likewise, and relatedly, it has been pointed out that victims often face obstacles to access effective remedy in host States, where the damage frequently occurred. In the worst case, this leaves victims without access to effective remedy both on the side of the host and the home State.[114] Even where claimants manage to succeed in obtaining a judicial outcome in their favour, before an EU Member State court for example, the victims are dependent on the effective enforcement thereof in the host State.[115]

As to the different jurisdictional concepts attached to international private law, public international law, and international human rights law, jurisdictional barriers have been criticised to varying degrees with respect to each area of law, and acutely with respect to

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[109] European Commission study (n 14) 228-229.
[110] European Commission study (n 14) 228.
[111] *Braskem SA* (n 21), para 6.23; Smit, Lise. (5 April 2022). Business and Human Rights: Forum non conveniens and the mystery of the assumed host state jurisdiction.
British Institute of International and Comparative Law Available at: https://www.biicl.org/blog/38/business-and-human-rights-forum-non-conveniens-and-the-mystery-of-the-assumed-host-state-jurisdiction.
[112] C-281/02 *Owusu v Jackson* [2005] ECLI:EU:C:2005:120; See also: Augenstein & Jägers (18) 18.
[113] Braskem SA (n 21) para 6.23.; UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, available at: https://www.refworld.org/docid/5beaecba4.html [accessed 14 July 2023], para. 43.
[114] Smit (n 111).
[115] *ibid.*

international law.[116] While Chapter 3 turns full attention to the notion of jurisdiction in international human rights law, and the ECHR in particular, it is highlighted here that the territorialisation of human rights protection based on the traditional concept of jurisdiction in international law has been described as intersecting with the separate legal personality owned by companies in barring victims' access to remedy.[117] As such, Augenstein refers to both a 'domestic-foreign' divide and a 'public-private' divide as structuring questions for extraterritorial jurisdiction.[118] Accordingly, the territorialisation of competencies and obligations of States is said to condition both the exercise of jurisdiction under international private law by national courts, for example, as well as the scope of human rights enforcement beyond the sovereign borders of a State (domestic-foreign divide).[119] On top of this, the public-private divide manifests in that large companies are considered legal nationals of a State, similar to private individuals, which poses difficulties with transferring legal responsibility between legal entities even where they are ostensibly linked through a parent-subsidiary or other form of ownership relationship. This problem, and its particular relevance in the context of the EU international private law framework, will be illustrated in the following two sections.[120]

1.3.2. Separate corporate personality - *Suez Group S.A.S.*

On 1 June 2023, the Paris Court of first Instance (*Tribunal judiciaire de Paris*) rendered a judgement in the *Suez* case[121] The claimants on behalf of members of the community living in Osorno, Chile are four organisations: the International Federation for Human Rights, the Chilean associations Observatorio Ciudadano and Red Ambiental Ciudadana de Osorno, and the Ligue des droits de l'Homme. They brought proceedings against Vigie Group, formerly known as Suez Group S.A.S,[122] a company active in the sector of water distribution, which is registered and domiciled in Paris, France. The Suez Group is headed by France-domiciled Suez

[116] Augenstein & Kinley (n 15) 828-838.
[117] The problem of territorialisation and different legal identity has often been framed with respect to the artificiality of the binary public and private divide between state actors and non-state actors: see Mende (n 4); Augenstein (n 51); Augenstein & Kinley (n 15) 831.
[118] Augenstein (n 51) 36.
[119] Augenstein & Jägers (n 18) 12.
[120] European Commission study (n 14) 230; UN HRC (n 94), 9.
[121] *Tribunal Judiciaire De Paris* (No. RG 22/07100) 01 June 2023, pp. 1, 3. ('*Suez*')
[122] While the obligations and liability of Suez Group S.A.S. have presumably been transferred to Vigie Group, I refer to Suez Group S.A.S (henceforth "Suez Group") as the defendant in the case who allegedly bore duties at the time of the incident. This could lead to confusion if considering the second ground on which the Paris Court declared the claims to be inadmissible, namely that the plaintiffs failed to put Suez Group S.A.S. on formal notice by sending the relevant letter to a different yet related entity called "Suez Group".

SA, who at the relevant time had a stake in the Chilean company Essal, the operator of a water treatment plant serving freshwater to the residents of Osorno, a city lying center-south in Chile. The complaint concerns events that occurred between 11 and 21 of July 2019 in Osorno, when hydrocarbonic spillages contaminated the plant's facilities, leading to water cuts for the inhabitants of Osorno after the declaration of a health emergency. The case was declared inadmissible for lack of standing of the defendants and the plaintiffs under the French Duty of Vigilance Law of 2017, one part of the Court's reasoning being the focus here.

The claimants relied on Article L225-102-4 of the French Commercial Code, which was inserted pursuant to Article 1 of the French Duty of Vigilance Law, and is the central mechanism articulated by the latter.[123] Accordingly, companies shall draw up and effectively implement a due diligence plan. That plan shall set out reasonable measures to be taken by the company to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of the company and those of the companies it controls, directly or indirectly, as well as from the activities of subcontractors or suppliers with which it has an established commercial relationship, when these activities are linked to this relationship.[124]

The proceedings are brought in relation to a vigilance plan from 2021 that was drawn by one of the companies in the Suez Group. In essence, the claimants seek enforcement of the responsibilities of Suez Group under the French Duty of Vigilance law.[125] Part of the court's reasoning addressed that, as the due diligence plan of 2021 lacked a signature that would allow identification of the authoring company in the Suez Group, it could not be ascribed to either Suez Group or Suez SA, thus rendering the summoned defendant without standing. In response to the plaintiff's argument that Suez Group had not contested being the author before, the Paris Court finds that Article 122 and specifically Article 123 Code of Civil Procedure on inadmissibility criteria provide for the right of the defendant in any case to invoke lack of standing.[126] Consequently, Viegie Group as the successor of Suez Group was held to lack standing to defend, and the case inadmissible.

The case exemplifies common procedural obstacles faced by victims of corporate-related human rights and environmental abuses in transnational civil litigation cases, and it is

[123] See, respectively, the updated Article L225-102-4, Available at: https://www.legifrance.gouv.fr/codes/id/LEGIARTI000035181820/2017-07-14; and the French 'Duty of Vigilance' Law, Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (2017).
[124] *ibid*.
[125] *Suez* (n 121) 3.
[126] *Suez* (n 121) 5.

one in a series of proceedings that have failed to gain access to a French court and thus an effective remedy under the French Duty of Vigilance Law from 2017.[127]

1.3.3. Brussels Ia Regulation & Rome II Regulation

As was highlighted before, the Brussels Ia Regulation grants EU Member States compulsory jurisdiction over EU-domiciled defendants, even where the victim of corporate human rights and environmental abuse is located in a third country. In accordance with Article 63(1) Brussels Ia Regulation, a company's 'domicile' is being determined on the basis of its statutory seat, its central administration, or its principal place of business.[128] In contrast, the scope of the Brussels Ia Regulation excludes a basis on which victims could bring proceedings against non-EU-domiciled defendants, including subsidiaries, suppliers, and partners of EU-based companies.[129] Claims falling into the latter category of transnational litigation against corporate-related human rights and environmental harm fall under the domestic private international law provisions of EU Member States.[130]

One explicit exception to the general rule under Article 4(1) Brussels I Regulation 'are claims for non-contractual damages by consumers, which can be brought in the Member State where the consumer is domiciled irrespective of the (foreign) domicile of the defendant' (Article 18(1)).

A separate obstacle to third country-based claimants has been pinpointed to lie in the narrow applicability of Article 8(1) Brussel Ia Regulation, by which claims against a EU-domiciled defendants can be brought on the basis that they are so closely connected with the claims in another legal forum 'that it is expedient that they are heard are determined together to avoid the risk of irreconcilable judgments'. While that Article grounds the basis for 'a person domiciled in a Member State to be sued', the *Braskem* case shows that in light of that provision, 'hearing and determining the claims against different defendants together' may and potentially should be interpreted as allowing for a scenario in which a non-EU-domiciled company in the

[127] Fundamental Rights Agency of the EU, '*Business* and *human rights – access* to *remedy*' by the *European Union*. *Agency* for *Fundamental Rights* (*FRA*) (2020), 87; Sherpa, Climate change trial against TotalEnergies: action brought by associations and local authorities deemed inadmissible, a worrying ruling (6 July 2023), Available at: https://www.asso-sherpa.org/climate-change-trial-against-totalenergies-action-brought-by-associations-and-local-authorities-deemed-inadmissible-a-worrying-ruling.

[128] Brussels Ia Regulation (n 19), one explicit exception to the general rule under Article 4(1) being 'claims for non-contractual damages by consumers, which can be brought in the Member State where the consumer is domiciled irrespective of the (foreign) domicile of the defendant (Article 18(1)).; No full harmonisation and deference / subsidiarity apply, see Article 63(2)

[129] European Parliament study (n 15) 82.

[130] European Parliament study (n 15) 35.

same group as the EU-domiciled defendant falls under a national court's jurisdiction and can thus be tried.[131]

To address the resulting barriers in terms of access to effective remedy, a study commissioned by the European Parliament proposes as a revision of the Brussels Ia Regulation to include an explicit jurisdictional basis for national courts to consider claims against foreign subsidiaries or business partners of the defendant EU-domiciled parent company where it would be, similar to the ground in Article 8(1), efficient for the administration of justice to join the proceedings.[132]

In addition, the authors propose the inclusion of a provision laying ground for jurisdiction of domestic courts on the basis of necessity (*forum necessitatis*). Accordingly, domestic courts in the EU could hear cases involving a 'foreign' defendant where the (i) necessity condition is fulfilled, and (ii) a sufficiently close link exists, in law and/or in fact, between the dispute and the EU Member State of the court exercising jurisdiction.[133]

Moving to the obstacles associated with the EU regulatory framework on conflict of laws with respect to non-contractual obligations in civil and commercial matters, the focus lies on Rome II Regulation.[134]

Article 4(1) of the Rome II Regulation lays down the general rule to determine the applicable law governing tortious liability claims, including in the transnational context.[135] Accordingly, the national law of the place where the damage occurred is generally the applicable law (*lex loci damni*). This has been found to potentially cause a significant obstacle for victims who are seeking access to effective remedy after corporate-related human rights abuse by foreign subsidiaries, suppliers, and partners of EU-domiciled companies.[136]

In response, the Parliament report highlights two possibilities for enhancing access to effective remedy by applying the law of the home state in line with Rome II Regulation. First, enabling domestic courts to apply their own law rather than the law of the host (third) state by making use of provisions of 'overriding mandatory application' to ensure effective implementation of civil liability provisions under national law, in line with Article 16 Rome II Regulation.[137] Second, exceptions based on public policy could enable national courts to

[131] *Braskem SA* (n 21).
[132] European Parliament study (n 15) 111.
[133] *ibid*., 111-112 ; *Braskem S.A.* (n 21) para. 6.23.
[134] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).
[135] Note the universal application of the Rome II Regulation pursuant to Article 3.
[136] European Parliament study (n 15) 112-115.
[137] *ibid.*, 7.

enforce important minimum guarantees inscribed in international and/or domestic law.[138] In parallel to the exception in environmental damage cases under Article 7, the authors of the study suggest adding a further choice of law provision to Rome II Regulation to better address the vulnerable situation of victims in corporate-related human rights claims vis-à-vis the companies, specifically in light of the power imbalance that is often characterising such proceedings. Concordantly, claimants would be enabled to choose between the place where the damage occurred (*lex loci damni*), the law of the place where the events giving rise to the damage took place (*lex loci delicti commissi*), and the law of the place where the defendant company is domiciled or is operative, in case that it lacks an EU Member State domicile.[139]

Those recommendations can be kept in mind for the analysis of the Commission Proposal, which will follow next.

Part 2: Towards an EU Directive on corporate sustainability due diligence

The case study is structured into two: Part I gives an overview with respect to the process around and the substance of the Commission Proposal, including the focus on 1) the Proposal's overall scope; 2) the remediation mechanism contained therein; Part II takes up the first research question, dwelling on the outwards focus of the Proposal. Thereafter it takes a comparative turn by drawing on the respective mandate of the Parliament and Council.

2.1. The Commission Proposal

(i) The process

To look at the law-making procedure that the Commission Proposal underwent, it is noteworthy that the European Commission proceeded with the publication despite two negative opinions by the internal Regulatory Scrutiny Board.[140] The latter had pointed to (i) insufficient justification for the measure, in particular with respect to small and medium sized companies; and (ii) alternative policy options; as well as (iii) lack of certainty if, when, and where benefits of the measures will accrue; and (iv) issues of proportionality.[141] To justify going through with the initiative, the European Commission underlined (a) the political importance of the envisaged legislation; (b) the urgency to take legislative action in light of increasing

[138] *ibid.*, 113.
[139] European Parliament study (n 15) 67; On the concepts see also Zerk (n 4) 160.
[140] Commission Proposal (n 1), Explanatory Memorandum, 20.
[141] *ibid.*

fragmentation of national policies in the internal market, including "existing and upcoming national legislation on human rights and environmental due diligence";[142] and (c) additional amendments, clarification, and evidence accompanying the publication of the Proposal.[143] Indeed, enjoined with the draft Directive, the Commission published a staff working document in response to the second opinion of the Regulatory Scrutiny Board. The latter document is ascribed a complementary value with respect to the Explanatory Memorandum accompanying the Proposal, and similarly underlies the following overview. As the interinstitutional trialogue commenced on 8 June 2023 in accordance with the ordinary legislative procedure, the negotiations are underway. As it is typical, Member States will have two years from the entry into force of the future Directive to adopt and publish incorporating legislation.[144]

2.1.1. Directions on the scope

(i) The substance

The proposed Directive is based on Article 50 and Article 114 of the Treaty on the Functioning of the EU (TFEU). In accordance with Article 50(1) TFEU, the designated aim is the attainment of freedom of establishment, which the European Parliament and the Council, after consulting the European Economic and Social Committee (EESC), shall ensure by means of enacting directives. Article 50(2)(g) demands 'coordination of the safeguards by which Member States seek the protection of "the interests of members and others" through requirements towards companies or firms,[145] with a view to making such safeguards equivalent throughout the Union'.

Article 114 TFEU is the general legal basis in EU law to adopt legislation geared at the approximation of Member States' laws aimed at the establishment and functioning of the internal market. Pursuant to Article 26(2) TFEU, the internal market means "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

[142] Commission Proposal (n 1) Explanatory Memo, 1; For analysis of the relatively recently adopted national legislation in France (2017), The Netherlands (2019), Germany (2021), Norway (2021) see European Commission study (n 14); Augenstein (n 51).
[143] Commission Proposal (n 1) Explanatory Memo, 20-21; After the second negative opinion by the Regulatory Scrutiny Board, the European Commission proceeded with the publication based on the alternative but less common way of authorisation via permission of the Vice President for Inter-Institutional Relations and Foresight.
[144] Article 30.
[145] Cf. Article 54(2) TFEU for the definition of companies.

In accordance with the legal bases, the Proposal contains three complementary, substantive elements: (i) civil liability for companies, (ii) directors' duties, and (iii) remediation. The focus here lies on the first and the last.[146]

Pursuant to Article 1, the subject matter of the Proposal is defined as follows:

> 1. This Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and (b) on liability for violations of the obligations mentioned above.

In turn, what constitutes 'adverse environmental impacts' and 'adverse human rights impacts' is defined, respectively, in Article 3(b) and (c) in relation to the Annex. Thereby, the notion of 'adverse impacts' is circumscribed by specific rights and prohibitions included in international human rights agreements (Annex, Part I Section 1); legal interests protected in human rights and fundamental freedoms conventions (Annex, Part I Section 2); and specific violations of internationally recognised objectives and prohibitions included in environmental conventions (Annex, Part II). While the Annex will briefly be reflected upon with respect to the explicit jurisdictional clauses contained therein, it goes beyond the scope of this thesis to examine it in detail, therefore providing a path for further research that can be stated already here.

In the pursuit of its Article 1, the Proposal puts in place due diligence rules for companies, which they should observe in their own operations, with respect to their subsidiaries, as well as "established direct and indirect business relationships throughout their value chains".[147]

2.1.2. Personal scope

Under Article 2, the Proposal sets out four categories of companies that come within its personal scope. To contextualise that scoping in advance: less than 1 percent of the companies

[146] Commission Proposal (n 1) Explanatory Memorandum.
[147] Recital 15.

active in the EU internal market fall under the Proposal but through the coverage of companies' value chain, estimates consider that 80 percent of global trade would be covered.[148]

Importantly, both EU-domiciled companies and companies that are domiciled in a third country come under the Proposal in accordance with the understanding of their 'activity in the internal market'. Indeed, recital 24 justifies that on the basis of turnover "a territorial connection between the third-country companies and the Union territory" can be established, in accordance with international law.[149]

EU companies falling within the Proposal's personal scope are defined with respect to their (i) number of employees, (ii) turnover, and (iii) the sectors in which they operate. Accordingly, Article 2(1)(a) covers companies with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared. Different thresholds apply under Article 2(1)(b): an average of 250 employees or more and higher net turnover than EUR 40 million, provided that at least 50 percent was generated in one or more of the sectors defined as 'high-impact' sectors pursuant to Article 2(b)(i) to (iii).[150]

Companies that are incorporated into the law of a third state are classified only by their (i) turnover, and (ii) sector.[151] First, companies with a net turnover of more that EUR 150 million in the Union fall under Article 2(2)(a). Second, companies that generated a turnover between EUR 40 million and 150 million in the Union are covered under Article 2(2)(b) if at least 50 percent of its net worldwide turnover was generated in one or more of the 'high-impact' sectors.

Finally, Article 30 of the proposed Directive foresees different entrance points for the category of large companies and the relatively smaller companies. Member States should apply the national provisions transposing this Directive to larger companies, i.e., those falling under Articles 2(1)(a) and 2(2)(a), immediately after the end of the transposition period of two years, whereas relatively smaller companies, those falling under Article 2(1)(b) and 2(2)(b) are given two more years, four years in total, to adopt and implement relevant changes to their policies and operations.[152]

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[148] Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020 (13512/20), recital 16.
[149] Commission Proposal (n 1) recital 24.
[150] In brief, Article 2(b) covers (i) textiles; (ii) agriculture; and (iii) the extractive industry.
[151] The criterion respective number of employees is not applied to non-EU companies to avoid conflict of norms, i.e., for the EU labour laws cannot be applied to non-EU companies in the same way (Cf. recital 24 of the Proposal).
[152] Article 30; However, as the Council Proposal purports yet another, longer implementation period with a range between 3 and 4 or 5 years, this remains a contentious yet undetermined issue as of now.

In light of the research questions, it is of special relevance that the Proposal seemingly relies on both a market and a territorial connection to justify the extension of its personal scope to companies that have their domicile in a third country. Likewise, the global reach of rules imposed throughout those companies' value chains has been noted, which makes it particularly interesting how the personal and the material scope interact.

2.1.3. Material scope

2.1.4. Due diligence obligations of companies

The Proposal establishes a due diligence regime subject to civil liability and sanctions to be determined by Member States. In doing so, the proposed due diligence process and rules largely follow the existing guidance of the UNGPs and the OECD Due Diligence Guidance for Responsible Business Conduct.[153] Article 4(1)(a) to (f) mirrors the due diligence process that is laid down in Articles 5 to 11.[154] The corresponding rules comprise the following:

> (a) integration of due diligence into policies and management systems in accordance with Article 5;
> (b) identification of actual or potential adverse impacts in accordance with Article 6;
> (c) prevention and mitigation of potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8;
> (d) establishing and maintaining a complaints procedure in accordance with Article 9;
> (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; and
> (f) publicly communicating on due diligence in accordance with Article 11.

As those obligations apply with respect to adverse impacts 'throughout the life-cycle of production and use and disposal of products or provision of services, at the level of companies' own operations, subsidiaries and in value chains, the material scope has, at least potentially,

[153] Commission Proposal (n 1) recitals 5, 16, 26, 27-29, and 46.
[154] *ibid.*, recitals 27, 28, and 29.

considerable breadth.[155] The definition of 'value chain' adds to that by covering pursuant to Article 3(g):

> Activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company[156]

In turn, the criterion of 'established business relationship' is introduced as a limiting condition, referring to such relationships that are, or at least are expected to be (i) lasting with respect to their "intensity" and "duration"; and (ii) no negligible or ancillary part of the value chain.[157]

In relation to adverse environmental impacts and 'internationally recognised objectives and prohibitions included in environmental conventions', a final substantive due diligence obligation stems from Article 15. Thereunder, Member State are tasked to ensure that the companies falling under Article 2(1)(a) and 2(2)(a), which are the biggest EU and third country companies, render their business model and strategy compatible with the objectives of the Paris Agreement, and specifically the 1.5 °C reduction target. That this provision aims at the transition to a sustainable economy more broadly, as well as contributing to global emission reduction targets is interesting to highlight with respect to the extraterritorial dimension of the proposed Directive. However, for reasons of space limitations, this thesis has to defer to avenues for future research to engage with the potential linkage scenarios related to environmental litigation cases, as well as proceedings seeking environmental justice and effective remedy where adverse human rights and environmental impacts are concerned.[158]

In line with the focus on access to effective remedy, the internal complaints procedure to be provided for by companies will briefly be looked at in isolation from the rest of the due diligence obligations.

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[155] *ibid.,* recital 17.
[156] *ibid.*, recital 18.
[157] *ibid.*, recital 20.
[158] The Hague Court of Appeal, The State of The Netherlands v. Urgenda Foundation, 9 October 2018; In English: ClientEarth. (2021). Legal Briefing: The Polish Climate Case. Available at: https://www.clientearth.org/media/ilnjfico/clientearth-legal-briefing-on-polish-climate-case.pdf (accessed 24 June 2023); Cases brought on the basis of companies' individual contributions to climate change and its consequences see European Commission study (n 14) 177.

2.1.4.1. Complaints procedure as private remediation

Under Article 9(1), Member States shall ensure that companies provide for a complaints mechanism for persons and organisations where they have legitimate concerns about actual or potential adverse human rights and environmental impacts arising from their own operations, the operations of their subsidiaries, and their value chains. Furthermore, under Article 9(2), standing to submit a complaint shall be ensured for:

a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact,
b) trade unions and other workers' representatives representing individuals working in the value chain concerned,
c) civil society organisations active in the areas related to the value chain concerned.

The absence of specified effectiveness criteria for private grievance mechanisms oriented after the UNGPs has been highlighted,[159] as well as the lack of explicating the complementary balance between private and public-sponsored remediation.[160] Structurally, however, the prominent role that remediation has as a third substantive area of the Proposal arises from the public enforcement and remedy mechanisms provided for. By proceeding from public judicial to non-judicial enforcement and remedy mechanisms, the provisions on civil liability, sanctions, and administrative enforcement and remediation will be set out.

2.1.5. Civil liability as public judicial remediation

By the first mechanism introduced here, civil liability can be incurred by all companies within the personal scope of the Proposal, including companies that are domiciled in a third country. Indeed, Article 22 directs Member States to ensure that companies are liable for damages if (a) they failed to comply with the obligations laid down in Articles 7 and 8; and (b) as a result of this failure an adverse impact that should have been addressed through the appropriate measures specified in those Articles occurred and led to damage.[161]

[159] OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (2022), 11.
[160] European Coalition for Corporate Justice (ECCJ) European Commission's Proposal for a directive on Corporate Sustainability Due Diligence – A Comprehensive Analysis (2022), 15.
[161] Commission Proposal (n 1) Article 3(q) for a definition of 'appropriate measures'.

In accordance with recital 15, companies are subject to obligations of means rather than obligations of result, and they are not required "to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped". Accordingly, the appropriate measures to be required of companies should be reasonable. As regards indirect relationships with business partners, and if companies have discharged their obligations prescribed under Article 7(2)(b) and (4), as well as Article 8(3)(c) and (5), they shall not be liable to pay damages unless the measures taken could not have been reasonably expected to achieve the defined objectives.[162]

Importantly, with respect to adverse human rights and environmental impacts in third countries, Article 22(5) requires Member States to ensure that the provisions under national law implementing civil liability of companies are of 'overriding mandatory application in cases where the law applicable to claims is that of a third country'.

To take a step back already here, the envisaged scope of Article 22 by itself remains unclear, considering the absence of key specifications to its substance and potential procedural guarantees. In fact, it emerges rather indirectly through the recitals 56 to 61 that a mechanism should be established by which victims, which is a category that is not further defined or specified in the Proposal,[163] can access EU Member States courts.

As such, recital 61 clarifies the scope of Article 22(5). Accordingly, 'to ensure that victims can bring an action for damages and claim compensation for damages arising from a company's failure to comply with the due diligence obligations provided for in this Directive, the national laws that implement civil liability should be of overriding mandatory application, even where normally the law of a third country would be applicable, as could be the case in accordance with international private law rules when the damage occurs in a third country'.[164]

Similarly, recital 60 posits that persons who suffer damage from adverse environmental impacts can claim compensation under this Directive.

In terms of access to effective remedy, financial compensatory damages can thus be expected as the primary remedy that will be available for victims through civil liability proceedings. However, the European Commission Staff Working document issued in response

[162] *ibid.,* Article 22(2); Note the different types of 'indirect partners' of companies falling under the scope of the Proposal and the requirements attached: Articles 7(2)(b) and 8(3)(c) requires companies (A) to seek contractual assurances from their business partners (B) for them to pass on obligations to their own partners (C), to the extent that the activities of the last are related to the value chain of the first (contractual cascading). In contrast, Articles 7(3) and 8(4) concern the possibility for companies (A) to conclude a contract with an indirect partner (C) directly.
[163] *ibid.,* Article 3(n).
[164] European Commission Staff Working Document, Follow-up to the second opinion of the Regulatory Scrutiny Board SWD (2022) 39 final, 15.

to the second opinion by the Regulatory Scrutiny Board adds that "victims could ask for other remedial orders before the court, such as clean-up orders, and restitution of land".[165]

While this gives more substance to the civil liability mechanism, clarifying to some extent the intention of the proposal, the deference to Member States with respect to 'who bears the burden of proof' and to the applicable standard is noteworthy,[166] and has been much criticised.[167] Likewise, the absence of conditions or guarantees as to who has standing to bring proceedings before a court is apparent, as well as the lack of assistance to victims seeking access to EU Member States courts.[168]

In accordance with the European Commission reply to the second opinion by the Regulatory Scrutiny Board at least, the Proposal appears to spell out a legal standard of care that is oriented after the negligence principle, together with a due diligence defence.[169] Further drawing on that document, and important in the context of the research questions' inquiry into potential grounds for extraterritorial jurisdiction of EU Member States, the European Commission reply includes a relevant footnote, stating:

> The provision on civil liability in the proposal will not give stakeholders the right to sue competent authorities if they find that enforcement is not sufficiently strict. It aims at establishing liability of the companies within the scope of the proposal.[170]

In accordance with Article 3(n) of the Proposal,

> 'stakeholders' means the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships.

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[165] *ibid*., 15
[166] Commission Proposal (n 1) recital 58.
[167] The Danish Institute for Human Rights (DIHR), Legislating for Impact – Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive (2022) page 23; Baldi, Emma, Redressing Business-Related Human Rights and Environmental Harm, and Doing it the Right Way, *NOVA* (February 16, 2023). Available at: https://novabhre.novalaw.unl.pt/redressing-business-related-human-rights-and-environmental-harm-and-doing-it-the-right-way/.
[168] European Commission Staff Working Document (n 164) 16.
[169] European Commission study (n 14) 250; See also: European Commission Staff Working Document (n 164) 15.
[170] European Commission Staff Working Document (n 164) fn 35.

Next to underlining the subsumption of 'victims' under 'stakeholders', it provides a reference for the analysis of what the scope might be of remedies accessible to victims pursuant to that provision, as well as what corresponding duties on the States' side are purported.[171] Now, the attention turns to the Proposal's focus to the supplementary sanctions mechanism, as well as the foreseen public non-judicial mechanisms.

2.1.6. Sanctions as enforcement and remediation

Under Article 20(1), Member States shall lay down rules on sanctions applicable if companies fail to comply with the national provisions implementing the Directive, and shall take *all* measures necessary to ensure implementation. The scope of this provision is connected to the civil liability mechanism outlined before, as well as powers of the national supervisory authorities providing administrative enforcement and remedy in relation to the rights of victims of adverse human rights and environmental impacts.[172]

2.1.7. Supervisory authorities as public non-judicial enforcement and remediation

By Article 17(1), Member States are required to designate one or more supervisory authority to ensure compliance with the obligations laid down in national provisions transposing the proposed Directive. Such supervisory authorities shall be independent.[173]

With respect to third country-based companies, the competent supervisory authority is determined either with respect to the Member State of the EU in which the company has a branch, or where it generated most of its net turnover.[174]

The powers of supervisory authorities should, pursuant to Article 18, enable them to fulfil their functions, i.e., the supervision of compliance with due diligence rules. Such supervisory authorities are thus entitled to, among others, request information and carry out investigations related to compliance.[175] Pursuant to Article 18(5), the powers of supervisory authorities at least include the following:

> (a) order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant

[171] Article 18(7).
[172] Articles 18(4) and 19(3).
[173] Article 17(8).
[174] Article 17(3).
[175] Article 18(1).

conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end;
(b) impose pecuniary sanctions in accordance with Article 20;
(c) adopt interim measures to avoid the risk of severe and irreparable harm.

Pursuant to Article 18(2), a supervisory authority may initiate an investigation on its own motion or on the basis of substantiated concerns received through the grievance mechanism under Article 19.[176] Where a supervisory authority identifies a failure to comply with the mandated due diligence obligations, it shall grant the company concerned an appropriate period of time to take remedial action, if such action is possible. However, supervisory authorities retain the power to, during that period, impose administrative sanctions or trigger civil liability, in accordance with Articles 20 and 22, respectively.[177] Importantly, Article 18(7) requires that Member States ensure that each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them.

2.1.8. Substantiated concerns as remediation

Following on from this, Article 19 on 'substantiated concerns' provides for all natural and legal persons the possibility to "submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive".

It can be noted that it is being left open to persons who are not the direct victims, such as representatives, or civil society organisations, to submit a substantiated concern.

By Article 19(4), supervisory authorities are obliged to inform the persons concerned of the result of the assessment of their substantiated concern and shall provide the reasoning for it, in accordance with national law and in compliance with Union law. Finally, Article 19(5) requires Member States to ensure judicial remedies and in particular access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority' under two conditions: (i) that the persons submitted a substantiated concern, which is not attached to any standing requirements; and (ii) that the persons have 'a legitimate interest in the matter' pursuant to national law.

[176] Article 19(3).
[177] Article 17(4).

To briefly sum up: The Proposal comprises public judicial and non-judicial mechanisms: (i) enforcement and remediation via courts (Article 22); and (ii) administrative bodies, the national supervisory authorities (Articles 17 to 19). Moreover, (iii) sanctions supplement the powers of those State authorities, courts and public bodies (Article 20). Finally, (iv) private complaints mechanisms are to be made available through the internal procedures of companies (Article 9).

We are now well prepared to dive into the question of jurisdictional clauses, potential implications in terms of extraterritorial jurisdiction, if there are any, and the larger comparative effort with respect to the Parliament and Council Mandates in Part II.

2.2. Jurisdictional clauses in the Proposal and the Annex

It serves as a starting point that the Proposal, in its substantive part and Annex, contains a single mentioning of the term 'jurisdiction' in one of the prohibitions listed in Part II of the Annex. Specifically, the violation of the prohibition of the handling, collection, storage and disposal of waste in a manner that is not environmentally sound in accordance with the regulations in force in the applicable jurisdiction under the provisions of Article 6(1)(d)(i) and (ii) of the Stockholm Convention of 22 May 2001 on Persistent Organic Pollutants (POPs Convention). It is interesting to note that in paragraph 10 of the Preamble of that Convention, the responsibility of States is stressed "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". In essence, Article 6(1)(d)(ii) requires each party to the Convention to dispose of chemical waste in an environmentally sound manner and in accordance with "international rules, standards, and guidelines, (..), and relevant global and regional regimes governing the management of hazardous wastes". Insofar as the POPs Convention is legally binding only on States, and transposed through Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants,[178] the obligation to perform is passed on to companies through Article 7 of that Regulation. This serves as an example how the Commission Proposal directs Member States to transpose national legislation to ensure that the specific rights and prohibitions, as well as the legal interests and internationally recognised objectives covered under the Annex are observed by companies. However, this approach cannot strictly be followed with respect to all provisions listed in the Annex, and in particular

[178] Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants OJ L 169 of 25 June 2019, 45-77.

not in relation to the human rights agreements that are listed in their entirety in its Part I, Section 2.[179] Thus, while many questions remain as to the role of the Annex, specifically with respect to its composition and selectiveness, its meaning for companies, as well as in relation to the obligations of States' thereunder, as the addresses of the international instruments that are listed, and the role of national courts in assessing and enforcing the relevant rights and obligations, it supports the distinct outwards focus of the Commission Proposal, which is also mirrored in its provisions.[180] The absence of explicit jurisdictional clauses is instructive to the extent that no *prima facie* territoriality principle applies to the Proposal's material scope but that its substantive provisions are intended to apply outside of the EU territory, and specifically to open pathways to access effective remedies for victims of adverse human rights and environmental impacts worldwide.[181]

In contrast, the Proposal's personal scope is justified with respect to both a market and territory-based rationale, in line with the legal bases. In turn, the relationship between the substantive rights of victims and the obligations of companies, as well as of EU Member States' structures the question of jurisdiction, offering different starting points.

To rest with one of them for the time being, the *Braskem* case was introduced earlier as a cue towards exploring potential implications of the Commission Proposal in terms of extraterritorial jurisdiction. In relation to the corresponding civil notion of that term and the international private law concept of international jurisdiction that was relied upon by the Dutch District Court to establish that it could hear the case in *Braskem,* it is interesting to draw again on the recommendations for revising the Brussels Ia Regulation issued in the Parliament study. Specifically, because the recommendations revive proposals for reform that were first issued during the recasting process of the Brussels Ia Regulation, including the attempt to integrate a provision to extend jurisdiction of EU Member State courts to third country defendants, the rationale and objective being to facilitate more equal access to justice.[182] Likewise, the proposal had been to align the Brussels regime with the Rome I and II Regulations, which both are subject to universal application.[183] As the amendment proposed would have subsequently barred, or at least constrained, national courts' reliance on domestic private international law

[179] Commission Proposal (n 1) Annex, para. 21 of Part I Section 1 of the Annex.
[180] *ibid.,* recital 71; European Commission Staff Working Document (n 164) 15, 20.
[181] *ibid.,* recitals 20 and 71; By analogy: ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) – Order – Request for the Indication of Provisional Measures, 15 October 2008, ICJ Reports 2008, at 109.
[182] Augenstein & Jägers (n 18) 20.
[183] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199 Art. 3.

rules,[184] two further grounds for EU Member State courts to take jurisdiction were foreseen. Namely, (ii) a *forum necessitatis* clause with respect to cases in which the claimant faced impossible or unreasonable obstacles to bring proceedings elsewhere, typically the state of his or her residence; and (ii) asset-based jurisdiction, if the defendant owns property in the State where the court is seized, provided a proportional relationship exists between the asset owned and the claim.[185] It has been highlighted that all of these grounds would have facilitated tortious liability proceedings to be brought before EU Member State courts for extraterritorial corporate-related human rights abuses.[186] While these proposals have been dropped back then, the European Parliament study, as well as a draft resolution by the Parliament preceding the publication of the Commission Proposal, and the academic discussion have returned to the proposals made during the recasting process of Brussels Ia Regulation with respect to better address the difficulties of victims to access effective remedy in EU Member States courts.[187]

Turning now back to the Commission Proposal, it appears that it is establishing a legal basis on which victims of corporate-related human rights and environmental damages, wherever located, can gain access EU Member States courts and address national supervisory authorities insofar as they can substantiate their claims vis-à-vis EU-domiciled and non-EU-domiciled defendants. In fact, not explicitly in relation to the Brussels Ia Regulation but the Commission Proposal arguably posits an exception by which proceedings that do not fall under the general rule and scope of the Brussels Ia Regulation in the specific area of corporate-related human rights and environmental harms and damages suffered by individual persons. Therefore, the suggestion raised in the academic discussion to include such an exception in a way that is similar to the carve out for consumers under Article 18(1) Brussels Ia Regulation, does not seem far-fetched.[188]

As much depends on the substance of the rights and obligations arising from the future Directive, and the Commission Proposal constitutes a work in progress, Part II of this Chapter takes a comparative approach to the scoping.

[184] Commission Proposal (n 1) Article 6(1); Brussels Ia (n 19).
[185] Augenstein & Jägers (n 18)
[186] *ibid*.
[187] European Parliament study (n 15); Augenstein & Macchi (n 91).
[188] *ibid.* 67.

2.3. A funnel of legal claims against the State: access to effective remedy

This part compares the Commission Proposal with the European Parliament and Council Mandates.[189] Specifically, it is analysed in how far the respective Proposals outline a different scope, which in turn could translate into different prospects for victims of adverse human rights and environmental impacts to access effective remedies through the enforcement and remediation mechanisms envisaged. In doing so, the provisions on access to remedy foreseen in the Proposal will be matched with (hypothetical) scenarios and considered through the lens of jurisdiction, linked to the State duty to protect.

In mapping the mechanisms that extend from the Commission Proposal, as well as the Parliament and Council Mandates, I adapt the structure by Liliana Rodriguez, organising the overview from the perspective of the victims with respect to who are the duty bearers.[190] Four categories will be differentiated.

First, Article 22 on civil liability as providing a judicial remedy mechanism that is applicable between private parties. While Article 22 is not intended to provide recourse against national authorities, it arguably constitutes a civil right that entails corresponding obligations, and may be subject to procedures of appeal.

Second, Article 20 will only briefly be considered as a mechanism that underscores the enforcement and remediation functions of both the judicial and non-judicial/administrative State authorities.

Third, Article 18 and 19 offer non-judicial administrative mechanisms that serve both enforcement and remediation functions, comprising both means of recourse against private parties, as well as the right of victims to a judicial review of the legally binding decisions against them, turning against the State.

Finally, and in succession to the former, the fourth category is made up of scenarios in which victims seek enforcement of their rights and remedy before the European courts.

In motivating this approach, the shift in perspective towards the potential duty-bearing role of States under the selected provisions of the Directive is related to and seeks to answer the first research question.[191]

[189] Council of the EU (b) (n 1).
[190] Rodriguez (n 47).
[191] Rodriguez (n 47).

	Against companies	Against companies & state	Against state
Judicial Remedy	Article 22 compensation *EP Mandate*	Appeal procedures *direct / indirect effect of EU law*	ECtHR / CJEU Enforcement
Judicial / Non-juidicial Remedy	Article 20 Sanctions *EP Mandate*	No judicial review	
Non-judicial / administrat ive Remedy	Article 18 & 19 substantiated concern *EP Mandate*	Judicial Review Article 18 (7) Article 19 (5)	ECtHR / CJEU Enforcement
Private grievance mechanism	Article 9 complaints procedure		

Table 2: Access to effective remedy by Article, duty bearer, and mandate beneficial to victims' access to effective remedy

2.3.1. Article 22 on civil liability

(i) The applicable standard to establish liability

First, the civil liability mechanism under Article 22, following which Member States shall ensure that companies are liable for damages if a) they failed their due diligence obligations, in particular to take the actions prescribed under Article 7 and Article 8, i.e, the obligation to take appropriate measures as specified in those Articles 'to prevent, or if that is not possible, adequately mitigate potential adverse human rights and environmental impacts', and 'to bring actual adverse impacts to an end, and minimising such impact if that is not possible'.

Importantly, both the Parliament and the Council introduce specifications under what conditions companies incur liability under Article 22.[192] In brief, they differentiate between a company (i) causing, (ii) contributing, or (iii) being directly linked to adverse impacts, which in turn require them to take 'appropriate measures'.

The Council Mandate diverts more from the Commission Proposal by introducing the specific notion of "causality" to denote the requirements of tort law for companies to be held liable. Those comprise: damage, breach of a duty, and a causal connection between the two in

[192] Council of the EU (b) (n 1) Parliament Mandate, recital 28c; Council Mandate, recital 33.

terms of intention or negligence, act or omission, as requirements to establish a company liable. Under Article 22(a), the Council Mandate introduces as a standard to determine the liability of companies the 'intentional' or 'negligent' failure to comply with obligations laid down in Articles 7 and 8, if a right, prohibition, or obligation listed in Annex I is applicable, and if damage to the natural or legal person concerned with respect to the legal interest protected under national law occurred.[193]

In relation to limiting the scope of that Article, and consequently the right to access effective remedy, Article 22(1) of the Council Mandate posits that: "[a] company cannot be held liable if the damage was caused only by its business partners in its chain of activities".

It can be noted that the Parliament's mandate contains a similar reference by stating that "a direct linkage should not imply that the responsibility shifts from the business relationship causing an adverse impact to the company with which it has a linkage".[194] However, whereas the Parliament Mandate contains under recital 29a specification of what 'appropriate measures' a company should take when they, actually or potentially, are causing, contributing, or directly linked to adverse impacts, the Council Mandate under recital 28c adds an exculpatory consideration where companies face 'factual or legal obstacles because a business partner refuses to provide information and there are no legal grounds to enforce this'. Hence, while companies are obliged under both mandates to use their influence to prevent or mitigate adverse impacts that they are directly linked to, the standard when companies incur liability is higher in the Council Mandate.

(ii) Standing requirements and the burden of proof:

In turn, the Council Mandate reduces the scope of application of the Directive, and thus the possibility for victims to access the civil liability mechanism. In accordance with recital 58 and, Member States are free to determine which natural or legal persons should have standing to bring a claim under the civil liability mechanism and how the right to access should be balanced against Member States' public policy considerations of a political, social, and economic nature.[195] Specifically, recital 58 of the Council Mandate adds:

> This Directive does not regulate who can bring a claim before national courts and under which conditions the civil proceeding can be initiated, therefore this question is left to national law. For example, Member States

[193] Council of the EU (b) (n 1) Council Mandate, Article 22(a), 300.
[194] Council of the EU (b) (n 1) Parliament Mandate, Article 28c, p. 53.
[195] Council of the EU (b) (n 1) Council Mandate, recitals 61-62.

> can decide that it is only the victim who can bring the claim before national courts or that a civil society organisation, trade union or other legal entity can bring the claim on behalf of the victim.

Likewise, under recital 61, and similar to the Proposals of the Commission and the Parliament, the Council Mandate refers to the overriding mandatory applicability of provisions of national law that are transposing the civil liability regime under Article 22, specifically in relation to situations in which the law of a third state would be applicable.[196] However, the Council Proposal adds that Member States, in "choosing the methods to achieve such result, can also take into account all related national rules including the requirements as regards which natural or legal person can bring the claim, the statute of limitations, objections and defences, and calculation of compensation, to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States' public interests, such as its political, social or economic organisation".[197]As such, the conditions of who has standing under civil liability mechanism could be reduced significantly to the detriment of victims' access to effective remedy.

The Parliament Mandate goes furthest in setting out which measures to ensure access to effective remedy should be taken by Member States.[198] First, it provides for a broader standing in front of national courts, including for "mandated trade unions, civil society organisations or other relevant actors acting in the public interest".[199] The mandate establishes that limitation periods for bringing civil liability claims for damages should be at least 10 years, alongside specifications on how Member States should determine the starting point of that.[200] Also in terms of the substance of what remedies are provided for, besides compensation, the Parliament specifies in relation to Article 22 that claimants should be able to seek injunctive measures, including summary proceedings.

With respect to the burden of proof, neither of the three Proposals provides for a shifting burden that would be in the claimants' favour, leaving it up to the Member States to regulate. While the previous Parliament Draft posited in recital 58 that the burden of proof should shift to the company to prove that it complied with the Directive, if claimants had substantiated the its potential liability, this provision was scrapped during the final voting on its mandate.[201] This

[196] Council of the EU (b) (n 1), compare the three mandates on recital 61, p. 127.
[197] Council of the EU (b) (n 1) Council Mandate, Article 22.
[198] Council of the EU (b) (n 1) Parliament Mandate, see also Table 2.
[199] *ibid.,* Article 59b, p. 126.
[200] *ibid*., Article 59c, p. 126-127
[201] European Parliament (n 1).

is regrettable from the perspective of victims seeking access to effective remedy, considering that they will often lack the necessary access to evidence and information that would be necessary to obtain a successful judicial outcome.

(iii) Considerations in terms of jurisdiction

Looking at the civil liability provision, it functions on the basis of a relationship between a company, the adverse human rights and environmental impact concerned, and damage to the victim. The duty bearing parties are, first, companies to discharge their due diligence obligations in accordance with Articles 7 and 8, or "the obligations laid down in this Directive" more generally.[202] With respect to the jurisdiction of EU Member State courts, it was highlighted before that the proposed Directive would allow national courts to establish jurisdiction in cases that are brought against both EU and third-country-domiciled defendants in civil matters that concern their operations, their subsidiaries, direct and indirect business partners, and value chains. In light of the *Braskem* case, the form of 'jurisdiction' concerned could be construed as akin to courts' international jurisdiction under domestic private international law but now flowing from EU law. While not necessarily and surely in practice not universal, claimants and victims would be able to proceed against companies falling within the personal scope of the Proposal insofar as these are sufficiently 'involved' in the adverse human rights or environmental impact inside or outside the EU. In fact, the courts concerned with such cases will have to apply the national provisions transposed in pursuance of implementing the Directive, as they are of 'overriding mandatory application'.[203] This was criticised as falling short with respect to enabling victims to choose the law under which to bring a case.[204] In light of this, the extraterritorial dimension of national jurisdictional competences are apparent in their prescriptive, enforcement, and adjudicating forms. When considering the distinction made in the UNGPs between 'direct extraterritorial enforcement' and 'domestic measures with extraterritorial implications', arguments can be imagined that place the envisaged civil liability mechanism closer to either side. As such, the Proposal's regulatory approach is conditioned on the existence of a territorial connection between the company concerned with the internal market and in extension the territory of the Union, placing it within the category, or row,[205] of 'domestic measures with extraterritorial implications'. In

[202] Council of the EU (b) (n 1), Art. 22(a), p. 300.
[203] Commission Proposal (n 1) Article 22(5)
[204] OHCHR (159).
[205] Cf. p. 14.

contrast, as has been argued before,[206] the Proposal sets out to strengthen Member States courts jurisdictional competences to adjudicate and enforce the rights and obligations included in the Directive in relation to companies, EU and non-EU domiciled, which links to the understanding of jurisdiction under international private law.[207] While no undertone of 'direct extraterritorial legislation and enforcement' can be discerned from the Directive, it supports that also this distinction is not a binary.[208] A very brief reference to Article 20 will be made, which supports both the civil liability mechanism and the administrative enforcement and remediation functions of national supervisory authorities.

2.3.2. Article 20: Sanctions[209]

Further on the improvements that the Parliament Mandate contains with respect to remedies available to victims in comparison with the other two drafts, it adds under Article 20 that at least the following should be provided for by Member States: (a) pecuniary sanctions; (b) a public statement indicating that a company is responsible and the nature of the infringement; (c) the obligation to perform an action, including to cease the conduct constituting the infringement and to desist from any repetition of that conduct; and (d) the suspension of products from free circulation or export.[210] Thereby, specific remedies next to financial compensation through the civil liability mechanism are considered, which moves closer in the direction of the non-exhaustive list of remedies provided for under Principle 26 of the UNGPs that was set out before.[211] The remedies stated therein include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (..), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition".[212] The guidance of Principle 26 with respect to the importance of impartiality, protection from corruption, and freedom from any attempts of undue influence with respect to public non-judicial mechanisms to ensure access to effective remedy links to the enforcement and remediation roles of national supervisory authorities under Article 18 and 19, respectively, which are supported by the sanctions mechanism.

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[206] Commission Proposal (n 1)
[207] Commission Proposal (n 1) Principle 2 (Commentary)
[208] Commission Proposal (n 1) internal
[209] 'Penalties' in the Council Mandate.
[210] Article 20(2a), Council of the EU (b) (n 1) 292.
[211] UNGPs (n 7), Principle 25 (Commentary).
[212] *ibid.*

2.3.3. Articles 18 and 19 - supervisory authorities and substantiated concerns

The substantiated concerns procedure under Article 19, which sets out the public non-judicial remedy mechanism under the Proposal. By requiring member States to establish national supervisory authorities with the status of public bodies, subject to judicial review, natural and legal persons shall be entitled 'to submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with' its due diligence obligations.[213] Further, by submitting a substantiated concern, natural and legal persons can trigger the use of enforcement powers by the supervisory authorities with respect to the company accused.[214] By Article 18(1), those include the power to request information and carry out investigations related to compliance with the obligations set out in this Directive. Thereby, the private operational-level grievance mechanisms are monitored and enforced.[215] Any such remedial action on the side of companies does not prevent national supervisory authorities from imposing on their own motion, pursuant to Article 18(4), administrative sanctions and trigger civil liability in case of damages. Accordingly, those powers of supervisory authorities are enshrined again in Article 18(5), by which they shall at least be empowered to: (a) order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end; (b) impose pecuniary sanctions in accordance with Article 20; (c) adopt interim measures to avoid the risk of severe and irreparable harm. From the perspective of victims, those constitute important remedies. However, the Proposal says little about the procedural safeguards to render the mechanism accessible and effective.

The Parliament Mandate again stands out as giving more substance to the right to access effective remedy. To the powers of national supervisory authorities it adds under Article 18(5)(ca) that they should be competent to assess the validity and/or coherence of companies' prioritisation strategies, and order a review where appropriate. While to some extent implicit in the Commission Proposal, the Parliament Mandate lists in Article 18(1) effectiveness criteria for the national supervisory authorities, paralleling those specified under Principle 31 of the UNGPs. Citing from Principle 31, those criteria are: (i) legitimacy, including accountability "for the fair conduct of the grievance processes"; (ii) accessibility, in that they are known to the relevant groups of stakeholders and victims, and in that those seeking access are being

[213] Article 19(1)
[214] Article 19(3); See also Art. 18(2)
[215] Commission Proposal (n 1) Art. 9.

assisted where they face particular barriers; (iii) predictability; (iv) equality, which concerns reasonable access to information, as well as advice and expertise; (v) transparency; (vi) being rights-compatible in light of international human rights standards; and (vii) self-learning through processes of reflection and adaptation.[216] Without explicit reference, those criteria can be identified in the Parliament Mandate and less so in the other two.[217]

On the procedural requirements to be observed by national supervisory authorities / with respect to natural and legal persons seeking redress through the substantiated concerns procedure, the Parliament posits that Member States shall ensure that the following are complied with : (i) adequate identity protection of the persons concerned;[218] (ii) duties to inform the persons submitting a concern with respect to which supervisory authority takes action;[219] and (iii) communication of any decision taken and the reasoning to it.[220] Furthermore, Article 19(4a) of the Parliament Mandate spells out that the substantiated concerns mechanisms should be 'easily accessible, and that procedures to submit substantiated concerns must be fair, equitable, timely and free of charge'.[221] Similar standards specified include that supervisory authorities should issue a reply within a reasonable time.[222] Without the requirements specified in the Parliament Mandate, the public non-judicial grievance mechanism appears to risk diventing less accessible, effective, and robust.

The duty bearing parties and considerations in terms of jurisdiction

In relation to the duty bearing parties, Article 18 and 19 specify the public powers to be exercised by the national supervisory authorities. Both in their relations with natural and legal persons, including victims, under the substantiated concerns procedure, and towards companies. What comes in here are scenarios in which victims can rely on a provision of the Directive against the State in its exercise of State authority (*acta iure imperii*). Specifically, Article 19(5) contains the right of natural and legal persons submitting a substantiated concern to a review of "the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority" before a court or other independent and impartial public body, under the condition that "they have a legitimate interest in the matter in accordance with national law".

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[216] Principle 31 (Commentary)
[217] Cf. Graph 2.
[218] Council of the EU (b) (n 1) Parliament Mandate, Article 19, p. 287.
[219] *ibid.,* Article 19(2).
[220] *ibid.,* Article 19(4), p. 288; See also the Commission Proposal (n 1) Article 14.
[221] *ibid.,* Article 19(4a),
[222] Council of the EU (b) (n 1) Parliament Mandate, Article 19(3), p. 287.

In contrast to the Commission Proposal and Council Mandate, the Parliament Mandate under Article 19(5) does not condition the individual access to judicial review upon the existence of 'a legitimate interest in the matter, in accordance with national law'.[223] Also, the Committee Draft preceding the final mandate added a new provision to that subparagraph, requiring particular attention to reducing barriers to accessibility, including by demanding from Member States to ensure that any such judicial procedures are 'not prohibitively expensive and that practical information is made available to the public on access to administrative and judicial review procedures'.[224]

As such, this third set of scenarios falls within the state duty to protect.[225] It allows to observe that it was left rather implicit in the language of the Proposal that Member States owe such a duty. In contrast, however, both the European Parliament and the EESC in its opinion that was published as part of the ordinary legislative procedure underline that States are the primary holders of the responsibility to protect.[226] Indeed, the EESC emphasises States' duty to protect "against human rights abuse within their territory and jurisdiction by taking appropriate steps to prevent, investigate, punish and redress human rights abuses through effective policies, legislation, regulations and adjudication".[227] The accompanying shift in language and lens towards the State duty to protect human rights and ensure effective remedy is important. In fact, this bears on the characterisation of 'jurisdiction' in turn, the meaning of the term in the human rights law being less attached to the criterion of a territorial connection as the factor by which to establish extraterritorial jurisdiction. Rather, the location of the victim becomes central in the characterisation of a situation as extraterritorial or not, which in accordance with the scope of Article 19 allows to imagine situations that would charge a State's extraterritorial jurisdiction. Indeed, the next section first posits the last set of scenarios and last instance proceedings summarised in Graph 2, transitioning to the closer engagement with this notion of extraterritorial jurisdiction in Part 3.

2.3.4. Art. 288 TFEU: Direct and indirect effect of the provisions of the future Proposal

The last hypothetical scenario concerns claims by victims of adverse human rights and environmental impacts against the State, which, after exhausting domestic remedies in most

[223] Council of the EU (b) (n 1) Parliament Mandate, p. 112.
[224] *ibid.*
[225] Cf. Graphic 1.
[226] Art. 50(1) and 114(1) TFEU; Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability, Due Diligence and amending Directive (EU) 2019/1937 (4.4.2022); See also European Parliament resolution (n 93).
[227] *ibid.,* paras. 1.4., 3.3., 3.4..

cases, could reach the European Courts. Indeed, this concerns the role of the CJEU and ECtHR as the enforcers of, respectively, EU law and the ECHR, including their respective guarantees of the right to an effective remedy.

Still at the national level, the potential direct and indirect effect of the provisions of the Proposal might provide a separate way for victims to seek an effective remedy against the State before national courts, as well as before the CJEU.

Importantly, Article 47 enshrines the right to an effective remedy and to a fair trial, which pursuant to Article 51 needs to be observed by Member States, including authorities of the State, "when they are implementing Union law". In addition, under Article 288 TFEU, directives are directly applicable and of binding nature in relation to the Member States addressed therein.[228] As such, directives can be relied upon by claimants against the State directly where the latter has failed to transpose certain provisions correctly or in due time. Two conditions normally apply: the provision concerned needs to be "unconditional" and "sufficiently precise" to be relied upon before domestic courts against the Member State concerned.[229] The first condition circumscribes that no further measures should be required by EU institutions or the Member States concerned. The second condition has been defined by the CJEU as meaning a provision sufficiently precise for both individual claimants and the application by a court, meaning that the obligation is spelled out "in unequivocal terms".[230] Hence, while directives cannot be relied upon by a natural or legal person horizontally against a company, claimants could identify a right, or "a standard for legal review",[231] against the State.[232] To come back to the Commission Proposal and Article 19(5) thereof as an example, it is not certain whether that provision is spelled out in unconditional and sufficiently precise terms. With respect to whether or not victims can benefit from this provision in the first place, where they cannot rely on any other connection with Union law, it appears to be relevant that 'a legitimate interest in the matter in accordance with national law' is added as condition to the right to review by a competent authority in that Article. While this constitutes a hurdle in the

[228] Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECLI:EU:C:1974:133; Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECLI:EU:C:1986:84
[229] McDonnell, Alison. "Application and Enforcement of EU Law in the Member States." *i The Law of the European Union, Peter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin (red.) mfl* 5 (2018): 413-469, 431-436.
[230] Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia and others* [1994] ECLI:EU:C:1994:60.
[231] S. Prechal, Directives in EC Law, 2nf ed. (2005), 181 as cited by McDonnell, Alison. "Application and Enforcement of EU Law in the Member States." *i The Law of the European Union, Peter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin (red.) mfl* 5 (2018): paras. 413-469, 431.
[232] Case C-413/15, *Elaine Farell v. Minister for the Environment, and Motor Insurers' Bureau of Ireland (MIBI).* [2017] ECLI:EU:C:2017:745.

Commission Proposal, of which the effect is not yet known, the Parliament Mandate deleted the condition, and also the jurisprudence indicates tolerance towards reliance on provisions that require discretionary measures, where those are circumscribed with sufficient precision.[233]

Finally, as to the indirect effect that directive might have, national courts are obliged to take account of EU law as far as possible, in line with the duty of consistent interpretation of EU Member State courts. Accordingly, authorities of Member States in general and national courts in particular, for matters falling within their jurisdiction, are under an obligation to take all measures available to them, including using interpretative methods recognised under the national law in question, as close as possible to the wording and purpose of a directive to the effect of realising the aim inscribed in Article 288(3) TFEU.[234] This may have an influence on the scope of the right to access effective remedies, especially in situations when a case comes before the CJEU.

The way is now open to consider the role of the ECtHR as a court of last instance before which effective remedy can be sought against the High Contracting Parties to the Convention, to which all EU Member States belong.

Part 3: Extraterritorial jurisdiction under the ECHR

3.1. Standards on extraterritorial jurisdiction

In accordance with the third research question, the analysis of the case law of the ECtHR under Article 1 ECHR focuses on (i) conditions for when a situation that takes place outside of the territory of a High Contracting Party[235] falls within the jurisdiction of that State, and (ii) the substantive and procedural obligations, including positive obligations, on High Contracting Parties with respect to the right of access to a court under Article 6(1) and the right to an effective remedy under Article 13.[236]

By way of introducing Article 1 with respect to its scope, the meaning of 'jurisdiction' therein, the ECtHR has differentiated (i) its own jurisdiction in accordance with Article 19 and Article 32, denoting its competence "to receive an application and determine it"; and (ii) the jurisdiction of the Contracting States, placing them under the obligation to secure the

[233] McDonnell (n 229), paras. 435-436.
[234] *ibid.*
[235] Henceforth: "Contracting State" or "State"
[236] Note that in this chapter, "Article" refers to Articles laid down in the Convention (ECHR) if not otherwise specified.

Convention rights and freedoms "to everyone within their jurisdiction" in accordance with Article 1.[237] In defining the relation between the two meanings, the ECtHR underlined that first it had to be shown that a complaint referred to it falls within the Article 1 jurisdiction of a Contracting State, rendering it a 'threshold criterion' for the complaint to pass and for the Court to exercise its own jurisdiction.[238]

The Court's approach to jurisdiction under Article 1 rests on two presumptions, either or both of them being rebuttable: first, that 'a State normally exercises jurisdiction throughout its territory', and second, that 'it does not exercise jurisdiction outside its territory'.[239] Consequently, it is in exceptional cases that a State exercises jurisdiction extraterritorially.[240]

Of relevance for the present comparative purpose is the recognition of extraterritorial jurisdiction of Contracting States as arising from 'acts of the Contracting States performed, or producing effects, outside their territories".[241] In relation to that, the test applied by the ECtHR refers to (i) the spatial concept of jurisdiction, understood in relation to whether or not a State exercised effective control over an area outside its territorial boundaries (jurisdiction *ratione loci*); and (ii) the personal model of jurisdiction, when the argument is that the victim fell under State authority and control in territory that is not effectively controlled by the State (jurisdiction *ratione personae*).[242] In addition, when a State's jurisdiction *ratione loci* has been determined, a State's jurisdiction *ratione personae* becomes an additional requirement to hold that State responsible.[243]

In relation to the recognition by the Court that Convention rights and freedoms can be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question",[244] three grounds that were found by the Court to establish a jurisdictional link in cases of an extraterritorial nature will be outlined. Those are 1) provisions in domestic law guaranteeing access to a court under Article 6 in civil disputes;[245] 2) the institution of an

[237] ECtHR, 30 November 2022, *Ukraine and the Netherlands v. Russia* (nos. 8019/16, 43800/14 and 28525/20), para. 505.
[238] *ibid.,* para. 506.
[239] *ibid.,* para. 553.
[240] *ibid.*
[241] *ibid.* para. 555, See also: ECtHR, 5 May 2020, *M.N. and Others v. Belgium* (no. 3599/18), para. 101.
[242] *Ukraine and the Netherlands* (n 237), paras. 555, 559.
[243] *ibid.,* paras. 549, 564; *M.N.* (n 241), paras. 96-97.
[244] *Bankovic* (n 53), para. 75; ECtHR, 14 September 2022, *H.F. and Others v. Belgium and Others* (nos. 24384/19 44234/20), para. 186.
[245] ECtHR, 14 December 2006, *Markovic and Others v. Italy* (no. 1398/03).

investigation or proceedings by public authorities at the national level;[246] and 3) 'special features' that bring a free-standing procedural obligation of a State into effect.[247]

3.1.1. Institution of domestic civil investigations or proceedings

In *Markovic*, the Court dealt with the complaints of ten nationals of Serbia and Montenegro, including Mr Dusan Markovic and Mr Zoran Markovic, under Article 6 in conjunction with Article 1. The applicants objected to the declaration of inadmissibility of their case at the domestic level for lack of jurisdiction, which concerned claims for compensation in relation to damages sustained during an air strike led by Nato forces in the former Federal Republic of Yugoslavia.[248]

Based on the territorial jurisdiction principle that was established in *Banković*, the Court found that the complaints by the applicants under Articles 2, 10, 13, and 17 were inadmissible.[249] However, the Court found under Article 6, taken in conjunction with Article 1, that where the domestic law provides for a right to bring an action and a case is brought on that basis, "the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6".[250] The Court goes on to state that "once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a "jurisdictional link" for the purposes of Article 1".[251] On the merits of the case, the Court found no violation of Article 6, as the government's negative decision did not amount to an immunity as such but specifically concerned its limited capacity to review the applicant's claim for damages, and, connected to that, Article 6 does not guarantee any particular content of civil rights and obligations under the substantive law at the national level.[252]

3.1.2. Institution of domestic criminal investigations or proceedings

Different precedents exist in the case law of the ECtHR with respect to the role that the institution of domestic investigations or proceedings play for the establishment of a jurisdictional link.[253] In *Güzelyurtlu*, seven applicants of Cypriot nationality, including Mr and

[246] ECtHR, 29 January 2019, *Güzelyurtlu and Others v. Cyprus and Turkey* (no. 36925/07).
[247] ECtHR, 21 February 2021, *Hanan v. Germany* (no. 4871/16).
[248] *Marković* (n 245), para. 54.
[249] *ibid.*, para. 51.
[250] *ibid.,* para. 54.
[251] *ibid.*
[252] *ibid.,* para. 113.
[253] *Güzelyurtlu* (n 246); *Hanan* (n 247).

Ms Güzelyurtlu, complained under the procedural limb of Article 2, in conjunction with Article 13, about the lack of an effective remedy arising from the failure of the Turkish national authorities to effectively investigate the killing of their relatives, who had been found dead in the Cypriot Government-controlled area of Cyprus.[254] In that case, the Court considered that the institution of a domestic criminal investigation had, by virtue of applying domestic law, been sufficient to establish a jurisdictional link for the purpose of Article 1. The Court found differently when faced with the situation in *Hanan*, and refined its approach with reference to *special features* as the basis of extraterritorial jurisdiction.[255]

3.1.3. Special features and procedural obligations of States

The *Hanan* case concerned the complaint by Mr Abdul Hanan about a violation of the procedural limb of Article 2 in conjunction with Article 13 ECHR. The complaint arose with respect to criminal investigations that had been carried out by the German Federal Prosecutor General Public and the domestic proceedings after the two sons of the applicant, who had both been minors at that point, had been killed by air strikes ordered by a Colonel of the German armed forces on 4 September 2009. The factual context of the case is the deployment of German armed forces to the area of Kunduz, Afghanistan, as part of the UN-mandated International Security Assistance Force employed to the country in 2001.

At the admissibility stage of the proceedings, and in light of the respondent governments challenge of the applications compatibility with the Convention *ratione personae* and *ratione loci*, the ECtHR draws on the principles developed in *Güzelyurtlu* and finds, in contrast to its conclusion in that case, that the institution of an investigation and proceedings on the basis of national law are not sufficient for giving rise to a jurisdictional link. Concurring with the argument of the defence, the Court agrees that upholding such an approach could have a chilling effect where extraterritorial military operations and national-level investigations in relation to them are concerned.[256] Indeed, the scope of application of the Convention would thereby be broadened excessively.[257]

However, the Court makes a different finding by its approach in *Güzelyurtlu*, drawing similarly on its ruling in *Markovic*. Namely, that the 'procedural obligation to carry out an effective investigation' under Article 2 has evolved into a 'separate and autonomous

[254] *Güzelyurtlu* (n 246), paras. 2-3, 188.
[255] *Hanan* (n 247).
[256] *ibid.,* para. 125; See also *H.F.* (n 262), para. 194.
[257] *ibid*., para. 135.

obligation' that is binding on Contracting States where criminal proceedings had been instituted in front of national courts.[258] In doing so, the Court develops its interpretation of *special features* as the basis for a jurisdictional link under the procedural limb of Article 2.[259] Conversely, the Court asserts that a jurisdictional link arising in connection with the procedural obligations of a Contracting States does not imply that the substantive act, which occurred extraterritorially, falls within that State's jurisdiction, or that the act can be attributed to it.[260]

With respect to how the Court considers *special features* to apply, it asserts that no abstract or general definition of the 'special features' that would be sufficient for establishing a jurisdictional link for the purpose of the procedural obligation under Article 2 exists but that those need to be determined in each case and vary considerably from one case to another.[261] In *Hanan*, such features were found in: (1) Germany's obligation under customary international humanitarian law to investigate the airstrike at issue with respect to the potential individual criminal liability of members of Germany's armed forces ensuing from it, (2) Germany's sole jurisdiction pursuant to the agreement under which the International Security Assistance Force operated and hence that Afghan authorities were prevented from instituting their own investigation or proceedings, and (3) the obligation on German persecution authorities under domestic law to institute criminal proceedings with respect to the conduct of German nationals, members of Germany's armed forces present in Afghanistan.[262]

In brief, the Court found no violation of the applicant's procedural Article 2 rights, deeming that the investigations conducted by the domestic authorities had been adequate, conducted with reasonable expedition, independent, involved the next of kin and had a sufficient element of public scrutiny.[263]

In contrast to the Court's reasoning with respect to the effects of criminal investigations or proceedings being instituted by national authorities, a different approach can be observed in cases in which administrative proceedings at the national level were concerned.[264] The most

[258] *Güzelyurtlu* (n 246), para. 188.
[259] *Hanan* (n 247), paras. 136 -142; The potential relevance of 'special features' was first mentioned in passing in ECtHR, 7 January 2010, *Rantsev v. Cyprus and Russia* (no. 25965/04), paras. 243-244.
[260] *Hanan* (n 247) para. 115.
[261] *Ukraine and the Netherlands* (n 237), para. 575; *Hanan* (n 247), para. 132; *M.N. and Others* (n 241), paras. 98-102; ECtHR, 14 September 2022, *H.F. and Others v. Belgium and Others* (nos. 24384/19 44234/20), para 185, 190, 212.
[262] *Hanan* (n 247) paras. 137-139; While in *Güzelyurtlu* the Court had established the existence of special features, they were not deemed necessary for the jurisdictional link to arise (paras. 191-197).
[263] *ibid,.* paras. 211-236.
[264] *M.N.* (n 241), para. 12; *H.F.* (n 261) paras. 195-196.

recent use of *special features* as a basis for a jurisdictional link in the case of administrative proceedings instituted at the national level will now be turned to.[265]

3.1.4. Institution of domestic administrative investigations or proceedings

In *H.F. and Others v. France*, the applicants lodged a complaint with the Court on behalf of their daughters, L. and M., French nationals, and their grandchildren about a refusal by the French authorities to repatriate them from Kurdish-controlled camps in Syria, where they were held. Indeed, on the basis of Article 3, the prohibition of degrading treatment, and Article 3(2) of Protocol No. 4, concerning the right of each national to enter the country where one is a national, the applicants challenge the French public authorities' decision not to exercise their diplomatic and consular jurisdiction with respect to their family members, after they had brought proceedings before an urgent application judge. While the Court engages with the French authorities' institution of criminal proceedings against the applicants' daughters, it is the Court's examination in respect of the French State's denial of the repatriation requests in relation to adequate safeguards against arbitrariness that is in focus here.[266]

In the Court's precedent investigation under Article 3 of P. 4., it included the following *special features* as triggers for France's jurisdiction under Article 3(2) of Protocol No. 4: (1) The applicants had made several official repatriation and assistance requests to the French authorities; (2) those requests have to be seen in light of the fundamental values of the democratic societies that make up the Council of Europe, as well as that the applicants' family members were facing a real and immediate threat to their lives and physical well-being, and especially the extreme vulnerability of the children; and (3) having regard to the form and length of the detention, which renders it impossible for the individuals concerned to leave the camp to return to France without the assistance by the French authorities, among others.[267]

At the merits stage, the Court pays attention to the positive obligations that States incur under Article 3(2) of Protocol No. 4, pointing out the potentially severe effect that hindrance stemming from omission in relation to a negative obligation can have.[268] However, the Court emphasises that the interpretation of such obligations must not 'impose an impossible or disproportionate burden on the authorities'.[269] In the particular case at hand, the Court

[265] *H.F.* (n 261).
[266] *ibid*., para. 271-274.
[267] *ibid.* para. 205-214.
[268] *ibid.* para. 250-251.
[269] *ibid.* para. 252.

delineates that the interpretation to such an effect must be narrow and 'will be binding on the State only in exceptional circumstances', which may be if the life and physical well-being of a child is directly threatened by extraterritorial factors. In any case, review of the decisions taken by national authorities will be limited to "ensuring effective protection against arbitrariness in the State's discharge of its positive obligation".[270]

In applying those standards to the facts of the case, the Court in a last step examines whether the French State's denial of the repatriation requests exhibited adequate safeguards against arbitrariness.[271] In doing so, the Court highlights "that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence".[272] Such safeguards should include, in principle, (i) that "an appropriate individual examination of fact and of other evidence, by an independent body, separate from the executive authorities of the State, but not necessarily by a judicial authority", is provided for where a decision to reject a request for repatriation, in the present case, is made.[273] Furthermore required are the capacity of the independent body to review the lawfulness of the decision concerned, and in the course of such review, informing the applicant on what grounds a decision has been taken.[274]

In applying the general principles to the facts of the case, the Court found that the applicants did not receive information on the negative decision;[275] and that the failure to ensure that the applicants could access a form of independent review was not remedied before the domestic courts, which had declined to hear the case on the basis of a lack of jurisdiction.[276] In light of this, the Court found that the State had failed to ensure that the domestic proceedings included appropriate safeguards against arbitrariness,[277] and thus the State failed to discharge its positive obligations arising under Article 3(2) of P. 4 in the exceptional circumstances at hand.

Moving somewhat more in the direction of the scenarios that were spelled out in Part 2, a final case before the ECtHR concerning the role of administrative proceedings by national authorities for the establishment of a jurisdiction link will be considered. As the CJEU was first

[270] *ibid.* para. 261.
[271] *ibid.* paras. 271- 274.
[272] *ibid.* para. 275.
[273] *ibid.* para. 276
[274] *ibid.* para. 276
[275] *ibid.* paras. 279-281.
[276] *ibid.* para. 281.
[277] *ibid.* para. 282.

addressed with a request for a preliminary ruling in respect of the same applicants and the same set of facts, a brief interlude is included.

In *M.N. and Others v. Belgium*,[278] the Court was faced with a complaint under Articles 1, 3, 6(1), and 13 ECHR. The applicants, a couple of Syrian nationality and their children, had applied for a short-stay visa on humanitarian grounds at the Belgian embassy in Beirut, Lebanon. After refusal of their application by the Belgian Aliens Office,[279] the applicants complain about the incompatibility of the situation with Article 3, including that they had been left with no possibility to obtain effective remedy under Article 13, as well as about a violation of Article 6(1) for lack of enforcement of judgments at the national level.[280]

During the domestic proceedings, which concerned the application of EU law, in particular Article 25 of the Visa Code, the applicants raised the question 'whether the implementation of the visa policy by national authorities could be regarded as the exercise of 'jurisdiction' within the meaning of Article 1 ECHR'.[281] In reply to the questions referred by the Belgian Council for asylum and immigration proceedings pursuant to Article 267 TFEU, the CJEU found, in brief, that the intention of the applicants to apply for asylum upon arrival did not correspond to the intention of the short-term visa for humanitarian purposes as provided for in the Visa Code. It concluded that therefore neither the Visa Code, nor the Charter were applicable and that the case was entirely within the ambit of national law.[282]

Returning to the case before the ECtHR, the domestic proceedings concern 1) the administrative procedure and the referrals back and forth of the refusal decision by the Belgian Aliens Office and the orders for stay of execution by the Aliens Appeals Board;[283] and 2) subsequent cases before the Belgian civil courts in relation to the applicants' subjective right to seek enforcement of legally binding judgments, and the refusal by the State authorities to execute those.[284] Ultimately, the judgments concerned were held to be no longer operative, the refusal decisions becoming final.[285]

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[278] *M.N. and Others* (n 241).
[279] Note that the EU case speaks of Office des Étrangers (Immigration Office).
[280] *M.N.* (n 241) para. 74.
[281] X and X v. État belge, C-638/16 PPU, judgement 8.3.2017 (Grand Chamber).
[282] *ibid.,* paras. 44-45, 51; The referred questions included: 'whether a Member State to which an application for visas with limited territorial validity has been made is required to issue the visa where a risk of infringement of Article 4 (the prohibition of torture) and/or Article 18 of the Charter (the right to asylum) or another international obligation by which it is bound is established; and what role existing links between the applicant and the Member State have therein'.
[283] *M.N.* (n 241) paras. 20-21.
[284] *ibid.,* paras. 30-34.
[285] *ibid.,* para. 40.

Turning now to the findings of the ECtHR in relation to the complaints under Article 3 and 13, the Court first observed that while the Belgian authorities had public powers this was insufficient to give rise to a "territorial" jurisdictional link for the purpose of Article 1 ECHR.[286] The Court emphasised that "the mere fact that decisions taken at national level had had an impact on the situation of persons resident abroad was not such as to establish the jurisdiction of the State concerned over those persons outside its territory".[287] The Court noted that no exceptional circumstances were present that would give rise to the respondent State's extraterritorial jurisdiction in respect of the applicants.[288] The distinct absence of aspects concerned that (i) any territorial link was missing; (ii) no pre-existing connecting ties existed, such as through family or private life; and (iii) control over the territory concerned had not been claimed.[289]

In relation to the proceedings at the national level, the Court found that they did not pose 'exceptional circumstances sufficient to trigger, unilaterally, a jurisdictional link between the applicants and the respondent state'.[290] By referring to its rulings in *Markovic* and in *Güzelyurtlu*, the Court emphasises the different nature of administrative proceedings where they are brought 'at the initiative of private individuals without any prior connection with the State concerned except for proceedings which they themselves freely initiated'.[291] The Court highlights 'that the complaint thus did not correspond to an action by a Contracting State in the context of its procedural obligations under Article 2'.[292]

To find otherwise would, in the Court's view, effectively ground a near-universal application of the Convention "on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves".[293] On those grounds, the Court finds inadmissible the complaints under Article 3 and Article 13.[294]

With respect to the second complaint, which concerns the right to enforcement of judicial decisions,[295] the Court's assessment does not focus on whether the complaint falls within the jurisdiction of the Belgian State but first on the applicability of Article 6(1). In

[286] *ibid.,* para. 112.
[287] *ibid.* para. 11.; Cf. *Banković* (n 53).
[288] *ibid.,* paras. 112-113, 120.
[289] *ibid.,* paras. 115-117.
[290] *ibid*., para. 121.
[291] *ibid.*, para. 122.
[292] *ibid.*
[293] *ibid.*, para. 123.
[294] *ibid.*, para. 125.
[295] *ibid.*, para. 129.

determining whether civil rights and obligations are actually at stake.[296] The claimants argued that it is a subjective civil right, namely the enforcement of a legally binding decision and to have damage resulting from non-execution thereof ended. The respondent State argued, however, that a substantive right was concerned, i.e. issuance of visas, and granting entry to the State's territory.[297]

After setting out the condition for Article 6(1) to apply, namely whether 'the advantage or privilege that would be granted gives rise to a civil right',[298] the Court asserts that entry to Belgian territory does not underpin a legal right within the ambit of Article 6(1),[299] finding therefore Article 6(1) not applicable, and the application inadmissible.[300]

We are now put on the way to digest the case law of the ECtHR under Article 1, and, in the light of the ECHR standards on extraterritorial jurisdiction, return to the potential scenarios occurring under the Commission Proposal's judicial and non-judicial remediation mechanisms that were highlighted in Part 2.

3.2. How access to remedy and forms of extraterritoriality relate to each other

This last section uses the exceptional grounds identified under the case law of the ECtHR in relation to Articles 1, 6, and 13 to bridge back to the analysis of the Commission Proposal and potential forms in which it could implicate extraterritorial jurisdiction.[301] The use of these grounds here is of suggestive purpose, and to allow reflection about what meanings of extraterritorial jurisdiction exist in parallel. In correspondence with the movement towards the State duty to protect human rights as an important part for the language and lens to view the rights and obligations foreseen in the Draft Directive in Part 2, a final, synthesising layer of analysis is added and visualised.

3.2.1. Concepts of extraterritorial jurisdiction

In a frame of what 'forms of extraterritorial jurisdiction' might follow from the provisions contained in the Commission Proposal, the different meanings of the term 'jurisdiction' find place. Attached to the public international meaning of the term, the typology that was stated at

[296] *ibid.*, para. 134.
[297] *ibid.*, paras. 132-133.
[298] *ibid.*, para. 136.
[299] *ibid.*, para. 137.
[300] *ibid.*, paras. 140-141.
[301] In this context: ECtHR, 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (no. 45036/98).

the outset comprised prescriptive, executive, and adjudicative jurisdiction. In relation to the latter, the analysis in Part 2 foregrounded that the Commission Proposal takes a step towards enlarging the jurisdiction of national courts with respect to non-EU-domiciled defendants, as well as the reach into companies' value chains. By drawing on the *Braskem* case, however, as well as in light of the obstacles to access effective remedy before EU Member States courts stemming from the EU jurisdictional framework, potential implications of the civil liability mechanism under Article 22 of the Proposal have been suggested in a form related to the international jurisdiction of national courts, in the exercise of domestic private international law.[302]

Again in another direction, and in line with the UNGPs distinction between the forms that regulation of companies conduct abroad takes, the Commission Proposal, and specifically the obligations addressed to Member States to implement the provisions contained therein, appears to fall closer to the category of 'domestic measures with extraterritorial implications'. The self-understanding of the Commission Proposal confirms this.[303]

In contrast, Part 3 introduced the recognition of extraterritorial jurisdiction of Contracting States under the ECHR as arising from 'acts of the Contracting States performed, or producing effects, outside their territories",[304] which on a superficial level exemplifies that extraterritorial jurisdiction is understood differently, entailing as a corollary different standards and tests, depending on the part of the law concerned. To move to a more specific level, two of the categories by which the ECtHR case law has been approached will be looked at: first, the institution of civil proceedings by national authorities, and the existence of a civil right in the national law concerned; and second, administrative proceedings and the corresponding presence of a civil right enshrined in the domestic legal system (see Graph 2 below).

3.2.2. Civil liability and/or a civil right in administrative and civil investigations or proceedings

Despite the shortcomings that have been pointed to in relation to a lack of clarity and substance of Article 22 of the Commission Proposal, a civil liability provision is provided for in its basic form, and it requires implementation by Member States to realise the objectives set out in that Article.

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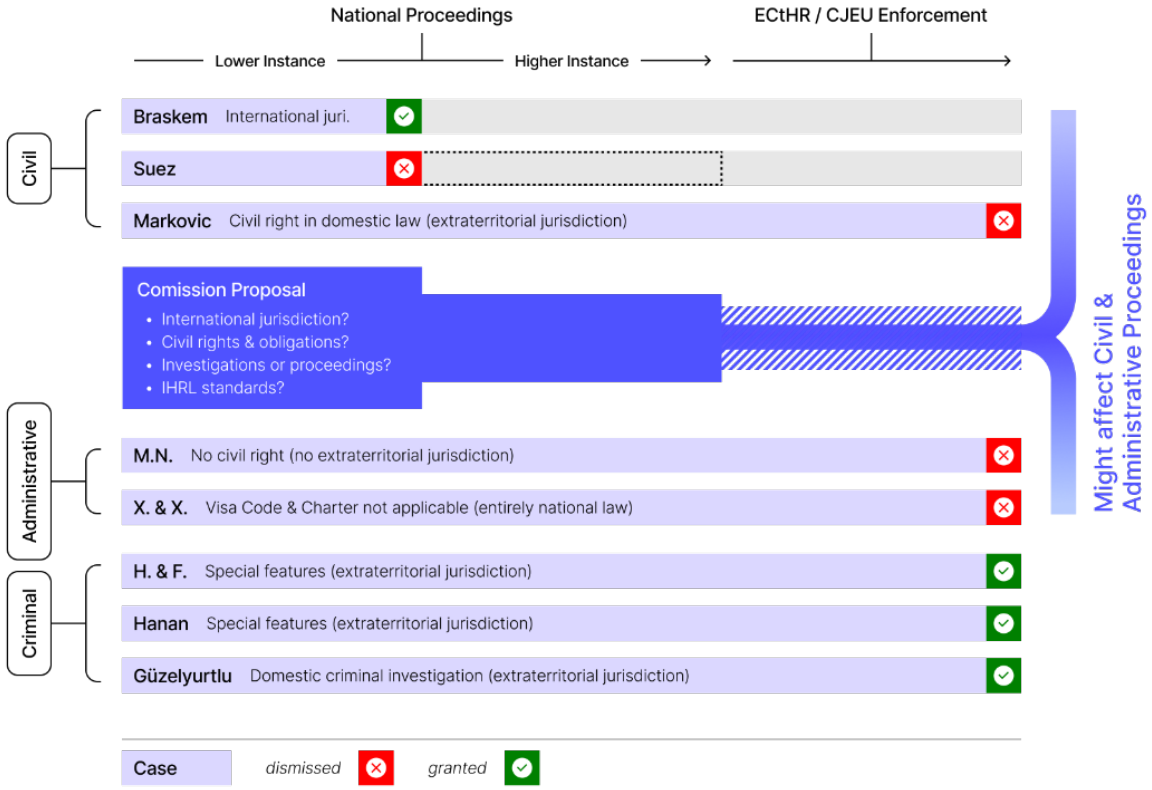
[302] *Braskem SA* (n 21).
[303] Commission Proposal (n 1), recital 24.
[304] *Ukraine and the Netherlands* (n 237), para. 555; *M.N.* (n 241), para. 101.

In light of this, it can be recalled that the ECtHR has differentiated between civil, criminal, and administrative proceedings being initiated at the national level, by the respective national authorities or courts on their own motion, or, in contrast to that, through unilateral requests issued by an individual without a clear connection to the State concerned.[305]

The fact of a civil right being available in national law, and civil proceedings being brought on that basis before domestic courts, brought the State's extraterritorial jurisdiction into the picture. Drawing again on the ruling by the ECtHR in *Markovic,* "if civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6".[306]

In its review under Article 1 and 6(1), the ECtHR found it relevant to both civil and administrative proceedings whether a civil right and obligations were at stake. In *Markovic*, there was no violation because the right concerned had been granted but not as fully with respect to the remedy that had been claimed, which in turn was not guaranteed under Article 6(1). In *M.N.*, the Court held that the grievance concerned, not admitting entry to the State's territory, and the right claimed did not posit a civil right within the meaning of Article 6(1).[307] To return to the Commission Proposal, the right corresponding to companies' civil liability as introduced in Article 22, as well as the more concrete safeguards contained in the Parliament Mandate, arguably do merit the protection of Article 6(1) ECHR. In an overview of the cases reviewed (see Graph 2), this renders the scenarios envisaged in Part 2, which shifted the focus to the State duty to protect, somewhere closer to the right to access to a court as present in *Markovic* than the right to have a binding judgement enforced to the effect that it allows entry to the territory of a State, which falls outside the scope of Article 6(1) according to the ruling of the ECtHR in *M.N.* Finally, and in contrast to the preliminary ruling by the CJEU in *X and X*, the guarantees of rights and freedoms under the Charter of the EU are more likely to come into action in scenarios in which the Proposal is relied upon against the State, as Member States are implementing EU Law where they have transposed into national law the provisions of the Directive under analysis, or potentially have failed to do so.

[305] *M.N.* (n 241), para. 123.
[306] *Markovic* (n 245), para. 54.
[307] *M.N.* (n 241), paras. 136-139.



Graph 2: Grounds of extraterritorial jurisdiction in the cases discussed

Turning to the administrative mechanisms in the Proposal, the public non-judicial enforcement and remediation mechanisms under the supervision of national authorities, it is possible for all natural and legal persons to submit substantiated concerns to such an authority. Arguably, those mechanisms invite both positive and procedural obligations on the side of the supervisory authorities pursuant to Article 18(5). In a second step that was illustrated in Part 2, the provisions laying down the right of individuals to an official review of a legally binding decision against them under Article 18(7) and 19(5), the discretion in implementing this Article of the Proposal is noteworthy, making the right to review subject to a ‘legitimate interest in the matter’ in accordance with national law. The Council Mandate has limited this mechanism explicitly through deferring to the Member States’ discretion to provide for limitation periods, standing requirements, as well as grounds of public policy conditioning the right to access judicial review.

Moving back to the ruling in H.F. and Others by the ECtHR is instructive to the extent that against serious grounds of public policy raised by the State, in particular counter-terrorism policy, the review of the national Courts decision, checking for arbitrariness, led the Court to find a violation with the State’s procedural obligations.

Conclusion: The many faces of extraterritorial jurisdiction

Returning to the well-established lack of apt mechanisms to provide for access to effective remedy in EU Member States, the Commission Proposal for a Directive on corporate sustainability due diligence takes new steps: both in setting out red line rules, as the title of the directive suggests; and in tying in substantive provisions to ensure access to effective remedy and the dignity of rights-holders who have suffered harm from adverse human rights and environmental impacts, both inside and outside the EU.

This thesis has taken as a cue to engaging with the Commission Proposal the *Braskem* case, exploring if and to what extent the Proposal's focus on remediation extends the competencies of the Member States to do so, and what State obligations come with that.

The research mapped in Part 1 highlighted the scope and relevance of States' jurisdictional competencies, linking to the State duty to protect, and tailored to the right of access to effective remedy. Further, it underlined the many obstacles that victims face in actually accessing effective remedies in the EU, establishing the necessity of action at both the EU level and national, including extraterritorially.

The assessment of the Proposal's scope in Part 2 suggested that countervailing dynamics are at play, within the scheme of the Commission Proposal and in relation to the mandates of the Parliament and Council. In one direction, the opposing trends limit the personal scope of the Proposal through the market and territory-based justification,[308] the applicable standard to find companies liable is narrowed, and the provisions on access to effective remedy for victims restricted. In the other direction, the material scope is substantiated, thereby enhancing and extending the envisaged enforcement and remediation mechanisms for victims outside of the EU. In relation to the first research question, to what extent extraterritorial jurisdiction could ensue from the Proposal, two considerations followed: first, that the provision on a civil liability mechanism extends further than the common rules under the EU jurisdictional framework at present, in particular Article 4(1) and 63(1) Brussels Ia Regulation, falling in line with suggestions raised in the academic discussion to provide for an exception that would allow victims of adverse human rights and environmental impacts to bring proceedings against non-EU-based parent, subsidiary, and partner companies; and second, that relative to how substantive the remediation mechanisms are, the more explicit the State duty to protect

[308] Commission Proposal (n 1), recital 24.

becomes, engendering scenarios of proceedings of an extraterritorial nature that could be brought under the provisions of the Proposal.

The review of the ECtHR case-law under Articles 1, 6(1), and 13 added a further layer to the conceptual shift towards the State duty to protect, including positive and procedural obligations thereunder, highlighting specific grounds on which the Court determined a State's extraterritorial jurisdiction. The Court's differentiated approach with respect to administrative, civil, and criminal proceedings at the national level as grounds to potentially establish States' extraterritorial jurisdiction was discerned and placed nearby the scenarios described in Part 2.

Several limitations arise from the presented research. First, the comparative approach taken compromised the legal conceptualisation of the individual parts, and the link between the State duty to protect when exercising jurisdictional competencies extraterritorially would merit further conceptual attention. Second, the Eurocentrism of the research necessarily limits the findings, leaving both the integration into the international architecture, including the wider context in which regional human rights courts and the UN Treaty bodies play a strong role, and especially the critical discussion of the legitimacy and desirability of the EU initiative, in light of democratic norms, and its legal and social effects outside of the EU, as important avenues for further research.

The future Directive will form the EU position in relation to the ongoing UN Treaty process on a legally binding international instrument.[309] At the heart of the draft lies a broad understanding of jurisdiction, aiming to ensure victims' access to justice and the possibility to obtain remediation.[310] The EU should consider this.

[309] Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, September 29, 2017; Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Zero Draft, July 16, 2018.
[310] *ibid.*, 11.

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