

# *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*

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## **Abstract**

*Scholars have suggested that 'home' states of transnational corporations (TNCs) have a legal duty to protect against human rights abuses occurring in 'host' states that may be breached by failure to regulate TNCs' extraterritorial activities. This article challenges the claim that such a duty of home states to regulate TNCs' extraterritorial human rights impacts can be said currently to exist as a matter of law. The article first summarizes the general structure of arguments made in favour of such a 'home state duty to regulate'. It then considers the foundations and meanings of extraterritorial jurisdiction in public international law and international human rights law; requirements and conditions of attribution and state responsibility for the conduct of non-state actors; and the scope and limits of 'positive obligations' to ensure the effective enjoyment of human rights, domestically and extraterritorially, as they relate to prevention of human rights abuses by TNCs.*

**Keywords:** extraterritoriality, transnational corporations, positive obligations, state duty to protect, Guiding Principles on Business and Human Rights

## I. INTRODUCTION

The question of whether home states have a legal duty to regulate the human rights impacts of transnational corporations (TNCs) abroad is an important and topical one. Amongst a broader literature considering whether human rights do or should apply extraterritorially in the context of globalization,<sup>1</sup> a number of scholarly works have considered the issue. Most of these have concluded, in particular, that such a duty already exists as a matter of human rights law.<sup>2</sup> Albeit a minority, certain

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<sup>1</sup> See, e.g., Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004); Sigrun Skogly and Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007) 267; Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010); Malcolm Langford *et al* (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013); Nehal Buhta (ed), *The Frontiers of Human Rights. Extraterritoriality and its Challenges* (Oxford: Oxford University Press, 2016). See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) (accessed 7 October 2017).

<sup>2</sup> See, e.g., Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2004); Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70:4 *Modern Law Review* 598; Daniel Augenstein and David Kinley, 'When human rights "responsibilities" become "duties": the extraterritorial obligations of states that bind corporations', Ch. 11 in Surya Deva and David

human rights treaty bodies have also suggested there to be such a duty,<sup>3</sup> or have implied this.<sup>4</sup>

If this view is correct, the approach taken by the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>5</sup> on this point is not. Adopted by the UN Human Rights Council in 2011, the UNGPs maintain that, although human rights treaties permit states to regulate corporate conduct extraterritorially, they do not require this.<sup>6</sup> Such a flaw in the UNGPs, if it is indeed a flaw, could be seen as weighing in favour of the enactment of a business and human rights treaty, to clarify or reinforce the legal basis of a home state duty to regulate TNC impacts abroad. Indeed, various actors have taken this view.<sup>7</sup> Given the United Nations' ongoing process relating to the prospect of such a treaty,<sup>8</sup> the importance of establishing definitively whether such a duty does now exist in human rights law, or not, is then of obvious importance.

This article critically examines some of the legal arguments recently advanced by scholars in favour of the existence of a general duty, and corresponding potential liability, arising under human rights treaties of 'home' states of TNCs in relation to abuses occurring on the territory of a 'host' state, that may be breached by the home state's failure adequately to control or regulate TNCs' extraterritorial activities. Rather than evaluating all possible arguments that might be made, whether legal, moral, or otherwise, in favour of such a specific duty, or indeed of extraterritoriality of state human

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(Footnote continued)

Bilchitz (eds), *Human Rights Obligations of Business: Beyond the corporate responsibility to respect?* (Cambridge: Cambridge University Press, 2013) 271 ('Augenstein and Kinley'); Smita Narula, 'International financial institutions, transnational corporations and duties of states', Ch. 4, in Malcolm Langford *et al* (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2014) 114; Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016), 1:1 *Business and Human Rights Journal* 41 ('De Schutter 2016'). Seck reaches the same conclusion, although based on norms of environmental law rather than human rights laws *per se*: Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining', 11:1 *Yale Human Rights and Development Law Journal* (2008) 177; see also Sara L Seck, 'Conceptualizing the Home State Duty to Protect' in Karin Buhmann, Lynn Roseberry and Mette Morsing (eds), *Corporate Social and Human Rights Responsibilities. Global, Legal and Management Perspectives* (Basingstoke: Palgrave Macmillan, 2011) 25. Cf Coomans who, in 2011, found there to be 'no explicit extraterritorial obligation to protect laid down by international human rights law' but 'strong arguments for an implicit legal basis for such obligations' (Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11:1 *Human Rights Law Review* 1). In 2013, Bernaz reached similar conclusions: Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013), 117 *Journal of Business Ethics* 493, 506–508.

<sup>3</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017), paras 30–35.

<sup>4</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, 62nd session, UN Doc CRC/C/GC/16 (17 April 2013), para 43.

<sup>5</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises,' UN Doc. A/HRC/Res. 17/4 (16 June 2011), endorsing 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc. A/HRC/17/31 (21 March 2011, 'UNGPs').

<sup>6</sup> UNGPs, note 5, UN Guiding Principle 2, Commentary.

<sup>7</sup> e.g., International Commission of Jurists, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014), available at: [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst\\_ICJReportFinaleleccvers.compressed.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinaleleccvers.compressed.pdf) (accessed 8 October 2017), 29–31.

<sup>8</sup> UN Human Rights Council, A/HRC/RES/26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9) (accessed 1 October 2016).

rights obligations in general or in other specific contexts, its intended contribution is to evaluate the cogency of the case that has been made by scholars to date, in their own terms, through close analysis of the legal authorities they have sought to rely on.

Section II summarizes the general approach and structure of argumentation adopted by scholarly works that assert the existence of a home state duty to regulate TNCs arising under human rights treaties. Section III considers the distinct meanings and foundations of extraterritorial jurisdiction: firstly, in public international law, and secondly, in the norms and decisions of international and regional human rights regimes. Section IV addresses principles of attribution and state responsibility in relation to the conduct of non-state actors. Section V considers the scope and limits of ‘positive obligations’ to ensure the effective enjoyment of human rights, domestically and in the extraterritorial context, and as they may relate to the prevention of human rights abuses by transnational corporate actors. Section VI concludes.

## II. ARGUMENTS FOR AN EXTRATERRITORIAL DUTY TO REGULATE TNCs

One important proponent of home state obligations to prevent human rights abuses abroad in which TNCs are involved has been Olivier De Schutter. Writing in 2010, he proposed an ‘International Convention on Combating Human Rights Violations by TNCs’, which could provide, he suggested, that a ‘home State is obliged to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for certain serious violations of human rights, unless the host State has acted in order to protect these rights under its jurisdiction and effective remedies are available in that State to victims’. The ‘value of such an instrument’, he suggested, ‘... would consist in establishing a clear division of responsibilities between the host State and the home State in the regulation of TNCs’: the latter would retain ‘primary responsibility’, but the former would bear a ‘subsidiary responsibility to exercise control on the TNC over which it may have jurisdiction...’.<sup>9</sup>

As regards the legal basis for such a treaty, at that time, De Schutter acknowledged that such measures by home states as he depicted were not as such required, as the activities of non-state actors did not generally engage the state’s responsibility under human rights treaties.<sup>10</sup> Nevertheless, prompted *inter alia* by material emanating from the UN Committee on Economic, Social and Cultural Rights, De Schutter predicted that with respect to this ‘classical’ position, change was afoot: triggered by globalization’s ‘interdependencies’, there was already a ‘strong tendency within legal doctrine to insist on the need to impose on States an obligation to seek to influence extraterritorial situations, to the extent they may influence in fact’ and so ‘... to align the scope of their international responsibility on the degree of their effective power to control’.<sup>11</sup> Public

<sup>9</sup> Olivier De Schutter, ‘Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations’, CRIDHO Working Paper 2010/5, <http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2010-5-ODESchutter-SovereigntyPlus.pdf> (accessed 1 August 2016), 21.

<sup>10</sup> *Ibid.*, 19.

<sup>11</sup> *Ibid.*, 20, with reference to Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (art 12 of the International Covenant on Economic, Social and Cultural Rights)’, E/C.12/2000/4, para 39; CESCR, ‘General Comment No. 15 (2002): The Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’, E/C.12/2002/11 para 31, for

international law, it was moreover maintained, did not preclude states' exercise of extraterritorial jurisdiction on grounds of non-intervention in the affairs of other states, at least where the purpose of extraterritorial measures was to promote human rights, since the latter countenanced the abridgement of state sovereignty from the outset.<sup>12</sup>

By 2016, according to De Schutter, the anticipated change had taken place. In his view, 'the extraterritorial human rights obligations of states including, in particular, the duty of states to control the corporations they are in a position to influence, wherever such corporations operate', had reached such a state of solidity that it was now possible to say that the UNGPs<sup>13</sup> had 'set the bar clearly below the current state of international human rights law'.<sup>14</sup>

The UNGPs, as noted above, maintain that while human rights treaties permit states to regulate corporate conduct extraterritorially, they do not require this.<sup>15</sup> To the contrary, De Schutter stated, UN treaty bodies had repeatedly expressed the view that 'states should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, or that have their main seat or their main place of business under their jurisdiction'.<sup>16</sup> So certain was the law by now on this point, that the UNGPs' 'weak formulation' could even be criticized for 'encouraging states reluctant to accept such obligations to challenge the interpretation of human rights treaty bodies, despite support that the position of these bodies received both from legal doctrine and civil society, and from the International Court of Justice itself'.<sup>17</sup>

Analysing the legal basis for such positions, De Schutter turned to the doctrine of 'positive obligations'. A duty to protect by regulating 'the behaviour' of non-state actors was now 'well understood'; regional human rights bodies had 'routinely affirmed that the responsibility of the state may be engaged as a result of its failure to appropriately regulate the conduct of private persons'.<sup>18</sup> Thus an international instrument 'imposing on the state concerned a duty to protect human rights by regulating the corporations over which the state may exercise influence [in other words, companies 'that are registered under its laws, that have their principal place of business under the state's jurisdiction, or

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(*F*'note continued)

the state 'obligation to protect the rights that would be threatened by the activities of private actors whose behaviour a state may decisively influence, even outside the national territory', *ibid.*, 20. Mention is also made at this point of art 2(1) CESC, establishing *inter alia* the state duty to 'take steps ... through international assistance and co-operation' progressively to realize the Covenant rights and of art 23 CESC, addressing different forms of 'international action' by states for their achievement, 20.

<sup>12</sup> De Schutter, note 2, 7.

<sup>13</sup> UNGPs, note 5.

<sup>14</sup> De Schutter 2016, 45.

<sup>15</sup> UNGPs, note 5, UN Guiding Principle 2, Commentary.

<sup>16</sup> De Schutter 2016, 45, with reference to CESCR's General Comment No. 14 and General Comment No. 15, above note 11, as well as the Committee's 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights' E/C.12/2011/1 (20 May 2011), para 5.

<sup>17</sup> De Schutter 2016, 45–46, omitting footnotes including references to the *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (adopted on 28 September 2011, above note 1) as a supportive source of legal doctrine and civil society opinion (fn 24, 46) and to the International Court of Justice's Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004 and its judgement *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 19 December 2005, suggested by De Schutter as supporting the 'extraterritorial reach of human rights instruments' (fn 25, 46).

<sup>18</sup> De Schutter 2016, 44, footnote omitted.

have located their central place of administration on the state's territory'] by any means compatible with international law' would merely render explicit an existing duty and 'dispel any such confusion as might have been created' by the UNGPs.<sup>19</sup>

Published between De Schutter's two works mentioned above, a contribution by Daniel Augenstein and David Kinley follows a somewhat similar structure. They, too, maintain that the 'problem of extra-territorial state obligations ... was effectively sidestepped' by the UNGPs. Intended to correct this, their approach 'builds on three major propositions': first, that states currently have obligations to protect individuals from corporate violations within their territory; second, that businesses can be 'legally bound to respect human rights in their global operations via the medium of state regulation and control'; and third, a conclusion drawn from the foregoing premises that 'In so far as states are under extraterritorial obligations to protect human rights, such obligations extend to the extraterritorial regulation and control of corporate actors'.<sup>20</sup> Thus both states' 'direct (vertical) obligations as regards their own actions and indirect (horizontal) obligations to protect individuals within their jurisdiction' apply 'both inside and outside their territory, against corporate violations'.<sup>21</sup>

Thus it appears that the case advanced in favour of the home state duty to regulate TNCs abroad in summary, is as follows: (i) public international law raises no objection to extraterritorial regulation of TNCs, especially where its aim is to promote respect for human rights; (ii) human rights treaties in fact oblige states to undertake such regulation, a consequence flowing from: (iii) two implied rules arising under human rights treaties: first, that the state's duty to protect extends to preventing abuses, through regulation, by non-state actors at home, and second, that the same duty applies to any extraterritorial scenarios where states may have influence.

Yet, it is argued below, at each step in this argument, the true position in existing international law is subtly misinterpreted or misrepresented. Whereas it is claimed that a state duty to regulate TNCs' human rights impacts abroad either follows syllogistically from other human rights principles or, at the most involves their merely incremental evolution, this final conclusion in fact departs substantially from what can be fairly said to be international human rights law's *status quo*.

### III. JURISDICTION

As observed above, scholars have claimed that states have a duty to regulate TNCs beyond their territorial 'jurisdiction', a duty that is said to stem from their responsibility to ensure that human rights are effective within their legal 'jurisdiction' and which, they say, is not precluded by limits on state 'jurisdiction' under international law. In addition, the UNGPs' 'permitted-not-required' approach has been criticized for curtailing the

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<sup>19</sup> De Schutter 2016, 46. De Schutter at this point rejects a second, 'more radical' formulation of the state duty to regulate, namely the duty of states to 'control corporations over which they can exercise jurisdiction, including corporations established under the laws of another (host) state that are managed, controlled or owned, by legal or natural persons considered to have the "nationality" of the state concerned, because they are incorporated under the jurisdiction of that state, or have their principal place of business or central administration on the territory of that state' (46–47, emphasis added).

<sup>20</sup> Augenstein and Kinley, 275.

<sup>21</sup> *Ibid.*

scope of extraterritorial 'jurisdiction', on grounds that human rights law already interprets state 'jurisdiction' as extending to extraterritorial affairs.

This indicates that 'jurisdiction' is a word with a multiplicity of senses. Its two key variants, in the current context, refer to the general notion of jurisdiction under public international law, and state jurisdiction *qua* the realm of state obligation under human rights treaties, respectively. Whereas the two do share some common characteristics, and although they have, on some important occasions, been confused or conflated, they are conceptually and legally distinct.<sup>22</sup>

### A. Jurisdiction in Public International Law

The former refers to 'the authority of the state, based in and limited by international law to regulate the conduct of persons, both natural and legal, by means of its own domestic law',<sup>23</sup> each state's 'right to regulate its own public order',<sup>24</sup> as an emanation of its sovereign power, a right thus 'limited by the equal rights and sovereignty of other states'.<sup>25</sup> One state may not exercise jurisdiction on the territory of another without consent, invitation or acquiescence, bar the circumstance of occupation.

Accordingly, each state's general jurisdiction is primarily territorial: the extraterritorial exercise of jurisdiction is the exception that makes the norm. This canonical rule may be observed in operation across general public international law jurisdiction's three dimensions, legislative (or 'prescriptive'), executive (or 'enforcement') and judicial ('adjudicatory').

As regards prescriptive jurisdiction, even if the 'overlap' of municipal laws is today no rare occurrence, the right to make laws remains in principle territorially bounded, 'in the sense that a state by definition has the prerogative to legislate for persons present in its own territory' and, by implication, not for others who, after all, lack formal and also usually substantive opportunities to influence its government.

Yet states may enact rules affecting the rights and duties of parties beyond their borders without consent from other states, where there is some 'connecting factor' between the state and the target of its regulatory efforts. Such a link may be provided, for example, by nationality, whereby a state is allowed to attempt to control the conduct of its nationals ('active personality') or to protect them ('passive personality') even when abroad; by damage to the vital interests of the state ('protective principle'); or by damage to the international community as a whole, implicitly affecting the state as one of its members ('universality').<sup>26</sup> Beyond these permitted scenarios, extraterritorial legislation

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<sup>22</sup> Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8:3 *Human Rights Law Review* 411.

<sup>23</sup> *Ibid*, 420, citing Vaughan Lowe, 'Jurisdiction' in Malcolm Evans (ed) *International Law*, 2nd edn (Oxford: Oxford University Press, 2006), 335; Malcolm Shaw, *International Law*, 5th edn (Cambridge: Cambridge University Press, 2003), 572; and Michael Akehurst, 'Jurisdiction in International Law' (1972–1973) 46 *British Yearbook of International Law* 145.

<sup>24</sup> Milanovic, note 22, with reference *inter alia* to Ian Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003), 297 and Antonio Cassese, *International Law*, 2nd edn (Oxford: Oxford University Press, 2005), 49.

<sup>25</sup> Milanovic, note 22, 422, citing Frederick A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984-III) 186 *Recueil des Cours* 9, 20.

<sup>26</sup> Milanovic note 22, 421.

is likely to draw controversy as an interference with other states' economic, social and other interests.

## B. Jurisdiction Under International Human Rights Treaties

Besides this meaning, in human rights treaties, 'jurisdiction' is employed with a range of different connotations. While in such treaties it may, for instance, variously refer to the competence of human rights complaint-handling bodies or courts, or to general jurisdiction in the public law sense explained above, for present purposes its relevant sense is as the operator defining the scope of a state party's obligations arising under the treaty in question. Often, when fulfilling this function, the word can be found in a 'jurisdictional clause': Article 1 of the European Convention on Human Rights (ECHR), for example, provides that 'The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention'.<sup>27</sup>

Jurisdiction, as Milanovic points out, in this context functions as '... a threshold criterion, which must be satisfied in order for treaty obligations to arise in the first place...'.<sup>28</sup> Without it, an oversight body will lack competence over the subject matter of a complaint, just as it would lose personal jurisdiction, 'if it found that the wrongful act complained of was not attributable to the defendant state'. Such bodies will be deprived of competence to interpret and apply a human rights treaty, or adjudicate in relation to state obligations under it, where the treaty itself does not apply.

But if 'jurisdiction' sets the scope of state obligations under human rights instruments, what *is* the scope? Based on a review of the jurisdictional clauses of human rights treaties, an exploration of their origins and their interpretation, with a focus on the case law of the European Court of Human Rights (ECtHR), Milanovic in his analysis reaches the following conclusions.

Jurisdiction in human rights treaties has a meaning that is distinct from general jurisdiction under public international law. Like that jurisdiction, human rights jurisdiction is not completely co-extensive with the state's territorial jurisdiction, but largely so. This is because it '... denotes a certain kind of power that a state exercises over a territory and its inhabitants'.<sup>29</sup> It is this factual power or control that is a necessary condition, a prerequisite, to human rights jurisdiction and any obligations on the part of the state. Under human rights law it is a fixed (if occasionally rebuttable) assumption that such control exists within the boundaries of its sovereign territory, but it can also be proven to exist, exceptionally, in other circumstances. Hence, for some early drafters of human rights treaties, defining jurisdiction as attaching exclusively to those persons *resident* in a state's territory was not adequate because this might be understood to exclude visiting non-nationals or foreigners without permanent residency<sup>30</sup>; by the same

<sup>27</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) ETS 5, 213 UNTS 222, entered into force 3 September 1953.

<sup>28</sup> Milanovic, note 22, 416.

<sup>29</sup> *Ibid.*, 429.

<sup>30</sup> As originally drafted, the ECHR extended protection to all persons 'residing within the states parties' territories'. It was, however, thought that this was too restrictive, and that protection should be extended to 'all persons in the territories of the signatory states, even those who could not be considered as residing there in the legal sense of the word', triggering the change to the current 'within their jurisdiction': A H Robertson (ed), *Collected Edition of the*

logic, for others, it was necessary to register an explicit distinction, in the jurisdictional clause, between territory and jurisdiction, and to include both, so as to avoid a state's colonies, 'protectorates' or similar types of territories falling through the net.<sup>31</sup>

This position is reflected, with more or less explicit precision, across the various forms of jurisdictional clauses exhibited by human rights treaties.<sup>32</sup> The text of Article 1 ECHR has been noted above. Under Article 2 (1) of the International Covenant on Civil and Political Rights, '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present Covenant',<sup>33</sup> and under Article 2 (1) of the Convention against Torture, '[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*'.<sup>34</sup> The typical conjunction of territory and jurisdiction in the text of these clauses of course mirrors their typical conjunction in the real world. Clauses establishing the jurisdiction of treaty bodies over communications, unsurprisingly, tend to follow suit.<sup>35</sup> The one clause identified by Milanovic which treats territory and jurisdiction disjunctively, found in the Migrant Workers Convention, under which 'State parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families *within their territory or subject to their jurisdiction* the rights provided for the present Convention', affirms rather than contradicts the point.<sup>36</sup>

### C. Extraterritorial Human Rights Jurisdiction

Although human rights jurisdiction, and the power to order events and relations that underlie it, typically map to a state's territory, they can protrude beyond it. Indeed, decisions of human rights courts and expert bodies have extended jurisdiction beyond state borders in a range of situations that has gradually increased over time, as considered further below. However, before examining the exact scope and limits of states' extraterritorial human rights

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*(Footnote continued)*

*'Travaux Préparatoires' of the European Convention on Human Rights* vol III (The Hague: Martinus Nijhoff, 1976), at 260, cited by Milanovic, note 22, 433.

<sup>31</sup> Milanovic, note 22, 431, with reference to the 1926 Slavery Convention according to which 'The High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage...' their various obligations arising under the Convention: Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention 60 LNTS 253 (adopted 25 September 1926, entered into force 9 March 1927), art 2.

<sup>32</sup> Although they do all include multiple references to jurisdiction, a number of human rights treaties do not feature dedicated jurisdictional clauses, this group including the International Covenant on Economic, Social and Cultural Rights, UN Doc. 2200A UNTS 389 (adopted on 19 December 1966, entered into force on 3 January 1976); the Convention on the Elimination of Racial Discrimination, UNTS, vol 660, 195 (adopted on 21 December 1965, entered into force on 4 January 1969); the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. 34/180 (adopted on 18 December 1979, entered into force on 3 September 1981); and the Convention on the Rights of Persons with Disabilities UN Doc. 61/106 (adopted on 13 December 2006, entered into force on 3 May 2008).

<sup>33</sup> International Covenant on Civil and Political Rights UNTS vol 999, 171 (adopted 16 December 1966, entered into force 23 March 1976), emphasis added.

<sup>34</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS vol 1465, 85 (adopted 10 December 1984, entered into force 26 June 1987), emphasis added.

<sup>35</sup> e.g., art 2 of the Optional Protocol to the Convention on the Elimination of Discrimination Against Women 2131 UNTS 97 (adopted on 6 October 1999, entered into force on 22 December 2000) provides for communications by or on behalf of individuals 'under the jurisdiction of a State Party'.

<sup>36</sup> International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. 2220 UNTS 93 (adopted on 18 December 1990, entered into force on 1 July 2003), art 7.



obligations, and what inferences may be drawn from such cases for a putative extraterritorial duty to regulate TNCs, a few words on their general character are warranted.

Scenarios to date in which extraterritorial human rights jurisdiction has been claimed by victims and affirmed by human rights bodies have typically related to situations of occupation; operational activities of military, police or security personnel or agents; abduction or rendition by state agents; and the offshore detention of suspected terrorists, for example at Guantanamo Bay, or of asylum seekers.

As Wilde observes,<sup>37</sup> state activities in these contexts ‘by their nature’ put individuals in situations where they are extremely vulnerable.<sup>38</sup> On one hand, they are potentially exposed to risks of torture, unlawful death, the unlawful deprivation of liberty and excessive force, all of which, obviously, carry potentially ‘far more serious’ consequences than most other state actions.<sup>39</sup> On the other hand, the state’s exercise of coercive power in such situations is likely to be subject to only limited scrutiny.<sup>40</sup> Under occupation, power is more centralized than under stable peace-time civilian administrations, while accompanying insecurity and deprivation generally ‘means that there may be a few if any third parties – journalists, civil society monitors, international organisations, and less-directly-interested States – on the ground monitoring the treatment of individuals’.<sup>41</sup> Secrecy often surrounds the detention and interrogation of suspected terrorists, which may take place at undisclosed or offshore locations<sup>42</sup> selected, for security or other reasons,<sup>43</sup> specifically for their isolated character and their exclusion from normal review regimes, leading to fears that those affected may find themselves in a ‘legal black hole’.<sup>44</sup>

Taken together, such factors imply a risk of human rights violations in these kinds of extraterritorial situations that ‘may well be higher ... than in the States’ own territories’,<sup>45</sup> in turn entailing a ‘compelling’ case for extending jurisdiction, and thus scrutiny, in spite of the presumption that state obligations under human rights treaties, as seen above, are territorially delimited, to actions that would otherwise subsist in a legal vacuum.<sup>46</sup>

This strikes a marked contrast with the scenarios with which extraterritoriality in the human rights and business context is concerned. Here, violations do not occur in a

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<sup>37</sup> Ralph Wilde, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2005) 26 *Michigan Journal of International Law* 739.

<sup>38</sup> *Ibid.*, 754.

<sup>39</sup> *Ibid.*, 756.

<sup>40</sup> *Ibid.*, 763.

<sup>41</sup> *Ibid.*, 754–5.

<sup>42</sup> *Ibid.*, 755.

<sup>43</sup> For example, the US government maintains that the ICCPR does not apply outside the US or its special maritime and territorial jurisdiction or to military operations during armed conflict. Steyn thus speculates that ‘[t]he purpose of holding the prisoners at Guantanamo bay was ... to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors’, Johan Steyn, ‘Guantanamo Bay: the Legal Black Hole,’ 27th F A Mann Lecture, 27 November 2003, 53 *International and Comparative Law Quarterly* 1, 14 (2004).

<sup>44</sup> Wilde, note 37, 775.

<sup>45</sup> *Ibid.*, 756.

<sup>46</sup> *Ibid.*, 770. In the *Abbasi* case, it was held by the UK Court of Appeal to be objectionable that the applicant ‘... should be subject to indefinite detention in territory over which the US has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal’: *Abbasi and another v Secretary of State for Foreign and Commonwealth Affairs and Others* 2002 EWCA Civ 159, para 66.

jurisdictional ‘black hole’<sup>47</sup> but in another state, which has laws, courts, regulators, a civil society and human rights obligations of its own, even if these may appear imperfect from the point of view of advocates of extraterritoriality, or from the perspective of victims.

By no means marginal, this contextual difference is one rarely remarked on despite the fact that considerations of context weigh heavily in human rights courts, interpretation of norms and adjudication of claims, and are therefore highly material in assessing the prospects of any extension of human rights principles beyond their current extent. This dimension, it is suggested, is accordingly one that should be borne in mind in reviewing the cases on extraterritoriality that follow, and their manner of deployment by scholarly advocacy of a home state duty to regulate TNCs abroad.

### *1. Extraterritorial human rights jurisdiction: spatial model*

In the last section the view was advanced that jurisdiction under human rights treaties follows the kind of ‘power that a state exercises over a territory and its inhabitants’.<sup>48</sup> While positions along these lines now seem to reflect the beginnings of a consensus, the basis for identifying extraterritorial human rights jurisdiction was less clear, with previously diverging views expressed within as well as between human rights bodies.

One division often identified in relevant cases is between a first, ‘spatial’ model of extraterritorial jurisdiction, based on a state’s ‘effective overall control’ of some geographical area beyond its borders; and a second approach whereby jurisdiction is triggered whenever a state ‘exercises authority or control over an individual’ outside its territory, the ‘personal’ or ‘state agent authority and control’ model.<sup>49</sup>

An example of the former is found in the European Court of Human Rights case of *Loizidou*, which arose from expropriation affecting the Greek Cypriot population following the Turkish military invasion of Northern Cyprus in 1974, and the subsequent efforts of one inhabitant to regain her home. At the preliminary objections stage, in addressing the question of ‘whether the matters complained of by the applicant are capable of falling within the “jurisdiction” of Turkey even though they occur outside her national territory’, and in reasoning that was later adopted by the Court at the merits stage, it was held that: ‘Although Article 1 sets limits on the reach of the Convention, the concept of “jurisdiction” is not restricted to the national territory of the High Contracting Parties...’.

Highlighting that state responsibility could be engaged in cases of extradition and expulsion (see ‘Extradition and expulsion cases are not material’ section below), the Court continued that:

‘Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention,

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<sup>47</sup> Excluding, of course, corporate abuses in some conflict zones. However, these do not represent the main target of the arguments made by the scholars advocating extraterritoriality here; indeed, the conflict scenario is rarely if at all mentioned in the works discussed.

<sup>48</sup> Milanovic, note 22, 429.

<sup>49</sup> Marko Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’, (2012) 23:1 *European Journal of International Law* 121, 122.

derives from the fact of such control whether it be exercised directly, though its armed forces, or through a subordinate local administration.<sup>50</sup>

Affirming this point at the merits stage, the Court further held that control of an area via large numbers of Turkish troops engaged in active duties was sufficient to ground a finding that Turkey exercised ‘effective overall control’ of Northern Cyprus, regardless of any particular control Turkey might have over the ‘Turkish Republic of Northern Cyprus’ (TNRC) in relation to specific actions or policies. Consequently, those affected were within Turkey’s ‘jurisdiction’.<sup>51</sup>

This approach was further applied in *Cyprus v Turkey*, where the Court held:

‘77. ...Having effective overall control over northern Cyprus, [Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.

78. In the above connection, the Court must have regard to the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, “to ensure the observance of the engagements undertaken by the High Contracting Parties ... Having regard to the applicant Government’s continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.”<sup>52</sup>

The spatial basis of extraterritoriality was applied more recently in the case of *Medvedyev and others v France*.<sup>53</sup> Here, the applicants were members of the crew, of mixed nationality, of a Cambodian-flagged ship captured by the French navy on the high seas as part of an anti-drug trafficking operation, who alleged *inter alia* that their detention on board their vessel between the time of their capture and their arrival on land breached the right to liberty and security of person. The Court held that, because France, through its navy, had ‘full and exclusive control...at least *de facto*’ over the applicants’ ship and crew, the claims were held to be within its jurisdiction.<sup>54</sup>

Another recent case, *Al-Saadoon and Mufdhi v UK* (dec.)<sup>55</sup> was raised by Iraqi applicants detained by UK forces in Iraq to challenge their transfer to the custody of the Iraqi authorities on grounds that this would expose them to a serious risk of the death penalty and hence a breach of their rights under ECHR Article 2. On the point of

<sup>50</sup> *Loizidou v Turkey*, App No 15318/89, Judgement (Preliminary Objections), 23 March 1995, para 62.

<sup>51</sup> *Loizidou v Turkey*, App No 15318/89, Judgement (merits), 28 November 1996, para 52.

<sup>52</sup> *Cyprus v Turkey* [GC], App No 25781/94, Judgement, 26 June 1992, paras 77, 78, emphasis added.

<sup>53</sup> *Medvedyev and others v France* [GC] App No 3394/03, Judgement, 29 March 2010.

<sup>54</sup> Albeit some find the reasoning offered, or rather the lack of it, for displacing Cambodia’s jurisdiction of the applicants’ vessel, as the flag state, to be unconvincing: Douglas Gilfoyle, ‘ECHR Rights at Sea: *Medvedyev and others v France*’, EJIL: Talk! Blog (19 April 2010), <http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/> (accessed 15 August 2016).

<sup>55</sup> App N. 61498/08, 30 June 2009.

jurisdiction, the ECtHR referred to the facts that the UK was an occupying power in Iraq; that the applicants had been detained in ‘British-run detention facilities ... established on Iraqi territory through the exercise of military force’, so that the UK ‘exercised control and authority over the individuals detained in them initially solely as a result of the use or threat of military force’,<sup>56</sup> and had ‘total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction ...’.<sup>57</sup> The Court further found that the applicants remained in the UK’s jurisdiction ‘until their physical transfer to the custody of the Iraqi authorities’.<sup>58</sup>

As a final and somewhat controversial authority from the European context, in *Bankovic*, the *absence* of effective overall control, indicated as generally requiring troops on the ground, was held to preclude extraterritorial jurisdiction under ECHR Article 1. Even control over airspace and the capacity to deploy lethal military power was insufficient to establish jurisdiction, the Court concluded, particularly since the regime of human rights provided for under the ECHR could not be ‘divided and tailored’: all would apply or none.<sup>59</sup>

Beyond the ECtHR, the territorial model of human rights jurisdiction has also been adopted by the International Court of Justice (ICJ). In the *Advisory Opinion on the Legality of the Wall in the Occupied Palestinian Territory*, the Court took the view that Israel had obligations to persons in the occupied territories under the ICCPR and ICESCR. While these areas were not part of the territory of the Israeli state, nonetheless, the Court observed, they ‘...ha[d] for over 37 years been subject to its territorial jurisdiction as the occupying Power’.<sup>60</sup>

In reaching its conclusion, the Court specifically examined the issue of jurisdictional clauses with regard to both of the human rights treaties mentioned. In the case of the ICCPR, the ICJ noted, *travaux préparatoires* indicated that its jurisdictional clause’s conjunctive reference to both territory and jurisdiction was intended not to exclude state obligations when the state exercised jurisdiction outside its territory, but rather to ‘... prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence’.<sup>61</sup>

Regarding ICESCR, which lacks a jurisdictional clause, the ICJ identified two possibilities. Either the Covenant guaranteed rights that were ‘essentially territorial’, or alternatively, it applied ‘both to territories over which a State party has sovereignty and

<sup>56</sup> Ibid, para 87.

<sup>57</sup> Ibid, paras 88–89, citing *Hess v UK*, App No 6231/73, Commission decision, 28 May 1975.

<sup>58</sup> Ibid.

<sup>59</sup> *Bankovic and Others v Belgium and Others* [GC] (dec.), App No 52207/99, Judgement, 12 December 2001, para 75 cf. *Armando Alejandro Jr and Others v Cuba* (‘*Brothers to the Rescue*’), Case no. 11.589, Report no. 86/99, 29 September 1999, para 25, where the Inter-American Commission of Human Rights found the applicants were brought within Cuba’s jurisdiction when its Air Force shot down civilian planes in international airspace killing four people, however, on the basis of personal control by state agents acting beyond national borders, discussed in the next section.

<sup>60</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* (9 July 2004), 136, paras 107–112.

<sup>61</sup> Ibid, para 109, with reference to the discussion of the preliminary draft of the ICCPR in the Commission on Human Rights, UN Doc. E/CN.4/SR.194, para 46, and United Nations, Official Record of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Ch. V, para 4 (195).

to those over which that State exercises *territorial* jurisdiction'.<sup>62</sup> Preferring the latter interpretation, the ICJ concluded that Israel was bound by ICESCR, 'In the exercise of the powers available to it on this basis'.<sup>63</sup> Citing its opinion on *the Wall*, the Court held in the *Congo v Uganda* case, that Uganda was responsible 'to secure respect for the applicable rules of international human rights law', as well as for 'any lack of vigilance in preventing violations of human rights ... by other actors present' in relevant parts of Congolese territory, based on a finding that it was 'an occupying power' with respect to those at the relevant time.<sup>64</sup>

## 2. Extraterritorial jurisdiction: personal model

Additionally, human rights bodies have found states to have extraterritorial jurisdiction, and hence human rights obligations, where a person is brought under the control of a state, most frequently, by the actions abroad of state agents. Exemplary in this respect is *Lopez Burgos v Uruguay*,<sup>65</sup> a communication brought before the Human Rights Committee alleging abduction and detention of a Uruguayan national by Uruguayan agents in Argentina. According to the Committee, the test of jurisdiction that conditioned the applicability of ICCPR Article 2 '...[did] not imply that the State...cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State', with or without government acquiescence.<sup>66</sup>

Similarly, the application in *Öcalan v Turkey* was brought by the leader of the PKK (Kurdish Workers' Party), who was arrested by Turkish agents in an aircraft located in the international zone of Nairobi airport, flown by them to Turkey, where he was then detained, tried, convicted and the death penalty imposed. Here the ECtHR noted that, 'Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State... even though in this instance Turkey exercised its authority outside its territory'.<sup>67</sup>

By now, though, the leading case in this area in Europe is *Al-Skeini & others v UK*.<sup>68</sup> This concerned five persons allegedly killed by British troops on patrol in Iraq, and one person who was arrested, detained, mistreated and killed at a UK detention facility in

<sup>62</sup> Ibid, para 112, emphasis added.

<sup>63</sup> Ibid.

<sup>64</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgement 19 December 2005, paras 178–180. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Report 1971, 16, para 118, where the ICJ assessed South Africa to be accountable for any violations of rights of the people of Namibia based on the principle that 'Physical control of a territory, and not sovereignty or legitimacy of title, is the basis for State liability for acts effecting other States'.

<sup>65</sup> *Lopez Burgos v Uruguay* (1981) 68 ILR 29, Communication No. R12/52, UN Doc. Supp. No. 40 (A/36/40) at 176; *Celiberti de Casariego v Uruguay*, Communication No. R 13/57, UN Doc. Supp. No. 40 (A/37/40) at 157 (1981).

<sup>66</sup> *Lopez Burgos v Uruguay*, note 65, para 12.3, a conclusion the Committee reached with reference to Art 5(1) ICCPR providing that, 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any rights ...', so that, it found, it would be 'unconscionable' to interpret Art 2 so as 'to permit a State party to perpetrate violations of the Covenant upon the territory of another State, which violations it could not perpetrate on its own territory'.

<sup>67</sup> A point that was common ground between the parties: *Öcalan v Turkey*, App No 46221/99, Judgement, 12 March 2003, para 93, *Öcalan v Turkey* [GC] App No 46221/99, Judgement, 12 May 2005. See further *Pad and others v Turkey* (dec.), App No 60167/00, Judgement, 28 June 2007; *Issa v Turkey* App No 31821/96, Judgement, 30 March 2005.

<sup>68</sup> *Al-Skeini and others v UK* [GC], App No 55721/07 7, Judgement, 7 July 2011.

Iraq. In each case relatives of the deceased alleged that the procedural requirements of ECHR Article 2 had been breached by the lack of a full, effective and independent investigation into their deaths. In its judgement, the ECtHR distinguished and described firstly, state agent authority and control,<sup>69</sup> and secondly, effective control over an area,<sup>70</sup> as exceptional bases of extraterritorial jurisdiction. Addressing the facts of the instant case it then held that, given that it had assumed authority and responsibility for the maintenance of security in the relevant part of Iraq, and that it had ‘through its soldiers engaged in security operations in Basra during the period in question’, the UK ‘exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention’.<sup>71</sup>

As Milanovic suggests, this passage to an extent seems to run together the personal and spatial models, raising the possibility that the difference between the two may in some cases become vanishingly small. Nevertheless, while confirming that extraterritorial human rights jurisdiction can exist, the judgement equally affirms that it remains exceptional, and requires a ‘jurisdictional link’, going beyond an ‘instantaneous act’. Consequently, on the basis of current law, states’ duties under the ECHR would not be engaged, for example, in cases of military action without territorial control, such as aerial bombardment or drone strikes. In sum, causation is neither a sufficient nor a necessary condition of state jurisdiction under human rights treaties, on the basis of current law.<sup>72</sup>

#### D. Jurisdiction: Implications for a Home State Duty to Regulate TNCs

The implications of the foregoing for the human rights and business scenario appear significant. Besides additional obstacles posed, for instance, by the ‘corporate veil’, the principles, rules and precedents of extraterritorial human rights jurisdiction do not justify a claim that the obligations of home states arising under human rights treaties extend to the acts or impacts of the TNCs in other states, with one possible, and potentially significant *caveat*, concerning certain scenarios where the TNC is a state-owned or controlled enterprise.<sup>73</sup>

Besides this particular case, neither of the required standards, of ‘effective control’, applicable in the case of the spatial model, or a relationship of ‘physical power and

<sup>69</sup> Ibid, paras 133–137, citing *inter alia* *Öcalan* (note 67), *Al-Saadoon* (note 55) and *Medvedyev* (note 53). *Al-Saadoon* however appears wrongly cited in the judgement as authority for the personal model. For further discussion of the case see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles, Policy* (Oxford: OUP, 2011), 132–133.

<sup>70</sup> *Al-Skeini and others v UK*, note 68, paras 138–140, citing *inter alia* *Loizidou* (note 50) and *Bankovic* (note 59).

<sup>71</sup> Ibid, para 149.

<sup>72</sup> See further Peter Vedel Kessing, ‘Transnational operations carried out from a State’s own territory. Armed drones and the extraterritorial effect of international human rights conventions’, in Thomas Gammeltoft Hansen and Jens Vested-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Oxford: Routledge, 2016). Kessing observes that while some commentators have argued that the Human Rights Committee takes a ‘cause and effect’ approach to jurisdiction, such an approach is ‘clearly not generally accepted by human rights bodies’, 84.

<sup>73</sup> See generally International Commission of Jurists Danish Section (Camilla Wee), *Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* (October 2008), <https://business-humanrights.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf> (accessed 1 August 2016).

control', in the case of the personal model, are ever likely to be met as between a 'home' State and victims of abuses in which TNCs are implicated abroad. Hence, any home state duty to regulate TNCs, which can only be based on home state jurisdiction, appears to lack a basis in current law.<sup>74</sup>

Moreover, even where their contributions explicitly recognize the distinction between the two extraterritorial 'jurisdictions' described above, advocates of a home state duty to regulate TNCs abroad appear to apply them almost interchangeably.<sup>75</sup> Another persisting yet, it is suggested, mistaken view is that because states are not precluded under general international law from enacting legislating with extraterritorial scope, they have an obligation, under human rights law, to do this. To understand the mechanics of this misapprehension, it is necessary to turn to two further issues, attribution and positive obligations.

#### IV. ATTRIBUTION AND RESPONSIBILITY

In the present context it is worth recalling that state jurisdiction is not the same as state responsibility. As captured in Article 2 of the *International Law Commission Articles on State Responsibility*, 'There is an internationally wrongful act of a State when conduct consisting of an act or an omission: a) Is attributable to the State under international law and b) Constitutes a breach of an international obligation of the State'.<sup>76</sup> Jurisdiction, as seen above, is a condition of the existence of an international obligation, and thus prerequisite to any breach. However, a specific act or omission that confounds an obligation and which can be traced back to the state is also needed.

Attribution of acts by state agents such as uniformed military personnel is not normally problematic; other cases may be more complicated.<sup>77</sup> As regards non-state actors, in the *Nicaragua* case,<sup>78</sup> the ICJ defined two tests of state responsibility. A first

<sup>74</sup> This point is further highlighted by the fact that, if a degree of uncertainty remains concerning the exact relationship between 'the belligerent occupation threshold of effective control' and the 'human rights jurisdiction threshold of effective overall control', and in particular, on the question of whether the latter is a higher or equivalent standard (Milanovic, n. 69, 131–133), neither is close to being met in the TNC scenario.

<sup>75</sup> cf. De Schutter 2016: 'Given the weak formulation chosen in the GPs as regards the extraterritorial implications of the duty to protect, a legally-binding instrument that would clarify the content of the state's duty to protect human rights could be explicit about the extraterritorial reach of this duty ... This would essentially consist in imposing on the state concerned a duty to protect human rights by regulating the corporations over which the state may exercise influence...', note 1, 46; and Augenstein and Kinley who state that, 'The case law of the ECtHR in particular provides various examples extraterritorial obligations to protect human rights against violations by non-state actors, akin to the SRSG's category of "direct extraterritorial jurisdiction"', 286.

<sup>76</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, supplement no. 10 (A/56/10), Ch. IV.E.1, available at: [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (accessed 12 October 2016). See further, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, extract from the Report of the ILC on the work of its fifty-third session, [http://legal.un.org/docs/?path=..ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf&lang=EF](http://legal.un.org/docs/?path=..ilc/texts/instruments/english/commentaries/9_6_2001.pdf&lang=EF) (accessed 12 October 2016), Ch. II, *Attribution of Conduct to a State*.

<sup>77</sup> For instance, a combination of criteria is applied by the ECtHR to determine whether a corporation, on a given occasion, acted as an agent of the State, including the form of its legal establishment in public or private law; whether the corporation enjoys rights normally reserved to public authorities; whether it is institutionally or operationally independent, with reference, to *de jure* or *de facto* State supervision and control; whether the corporation performs activities that would normally be considered a 'public function': Jörg Polakiewicz, 'Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan', *CALE Discussion Paper No. 9* (2012), [http://cale.law.nagoya-u.ac.jp/\\_src/sc618/CALE20DP20No.209-121010.pdf](http://cale.law.nagoya-u.ac.jp/_src/sc618/CALE20DP20No.209-121010.pdf) (accessed 8 August 2016), 16.

<sup>78</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Judgement (merits), 27 June 1986, 14.

test considers whether the relationship between a state and non-state actor is so much of control on one side, and of dependence on the other, that the non-state actor is rendered equivalent in law to an organ of the controlling state, the so-called test of ‘complete dependence or control’. If it is, all the non-state actor’s acts become acts of the state.<sup>79</sup> If it is not, a second test is activated, that of ‘effective control’, which determines if a specific operation of an organ which is neither *de jure* nor *de facto* organ under state control, was nonetheless directed by, and attributable to, the state in question.<sup>80</sup>

Accordingly, jurisdiction and attribution are readily distinguishable. ‘Ultimately’, as Milanovic puts it, ‘the latter is an issue of state control over the *perpetrators* of human rights violations, while the former is a question of a state’s control over the victims of such violations through its agents, or, more generally, control over the territory in which they are located’.<sup>81</sup> Yet, on this point, the ECtHR’s *Preliminary Objections* judgement in *Loizidou* historically gave rise to a degree of confusion.

As mentioned above, the *Preliminary Objections* stage in *Loizidou* concerned the question of jurisdiction, in relation to which the Court reasoned that: ‘The obligation to secure ... the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration’.<sup>82</sup>

However, in reprising this reasoning at the merits stage, the ECtHR stated that control of the relevant area via a large number of troops entailed the responsibility of Turkey for the actions of the local TRNC administration, so that those affected by TRNC policies and actions fell within Turkey’s ‘jurisdiction’.<sup>83</sup>

This formulation may seem to imply that effective territorial control of a given extraterritorial zone entails the attributability, to the controlling State, of all acts in the area in question. Indeed, such a short-cut to state responsibility was subsequently taken by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.<sup>84</sup> Here the ICTY ruled that ‘overall control’ was the proper standard for attribution to a state of acts committed by an organized armed group, even without the exercise of control by the relevant State over a specific operation.

This interpretation was, however, rejected by the ICJ in its *Genocide* judgement,<sup>85</sup> where it distinguished the complete and overall control tests,<sup>86</sup> holding as follows in an important passage which, given present concerns, is worth quoting in full:

‘It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of *acts carried*

<sup>79</sup> Ibid, para 109.

<sup>80</sup> Ibid, para 115.

<sup>81</sup> Milanovic, note 22, 446, emphasis in original.

<sup>82</sup> *Loizidou v Turkey*, App. No. 15318/89, Judgement (Preliminary Objections), 23 March 1995, para 62.

<sup>83</sup> *Loizidou v Turkey*, App. No. 15318/89, Judgement (merits), 28 November 1996, para 56. The Court took a similar approach in *Cyprus v Turkey*, note 52, paras 69–81.

<sup>84</sup> *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Judgement 15 July 1999.

<sup>85</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement 26 February 2007.

<sup>86</sup> Ibid, respectively at paras 391–3 and 396–400.



out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 [of the ILC Articles on State Responsibility<sup>87</sup>].... This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.<sup>88</sup>

In similar vein, in *Al-Skeini*, the ECtHR held that:

‘...where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out *executive or judicial functions* on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.’<sup>89</sup>

Once more, decided cases and authoritative materials are categorical: there is no basis on which to claim that the acts of TNCs abroad might be generally attributable to their home states, even before approaching other potential obstacles, such as the corporate veil, that are likely to stand in the way of home state responsibility in the vast majority of cases. On top of this, as seen in Section III, neither do home states generally have jurisdiction in such cases, bar scenarios involving occupation or state-owned enterprises, so that neither limb of the ICJ's two-stage test for state responsibility is satisfied. With this route to a home state human rights duty to control TNCs' acts abroad blocked, advocates of a home state duty to regulate TNCs abroad have turned their attention to a final potential basis of responsibility, that of positive obligations.

## V. POSITIVE OBLIGATIONS

Whereas states' negative obligations under human rights treaties require their abstention from actions breaching human rights, deriving from the principle of effectiveness or ‘effective enjoyment’, positive obligations emerged to tackle the harmful consequences to human rights that might flow from states' omissions. On one hand, measures required under the doctrine may relate, for instance, to laws, policies or practices required of states to give rights meaningful application as against the state.<sup>90</sup> On the other hand, they may be directed to averting interference with human rights by non-state actors.

<sup>87</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, n. 72, Article 8, *Conduct directed or controlled by a State*, provides that: ‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’. See further, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, extract from the Report of the ILC on the work of its fifty-third session, [http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_6_2001.pdf&lang=EF) (accessed 12 October 2016), 47–49.

<sup>88</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, note 85, para 406, emphasis added.

<sup>89</sup> *Al-Skeini and others v UK*, note 68, para 135, citations omitted.

<sup>90</sup> See, e.g., *Airey v Ireland*, App. No. 6289/73, Judgement, 9 October 1979.

Thus, according to the UN Human Rights Committee, ‘the positive obligations of state parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities’.<sup>91</sup>

Likewise, based on the obligation on States under ECHR Article 1 ‘... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention’, positive obligations in the jurisprudence of the ECtHR entail that states may be required to adopt protective and preventive measures, ‘even in the sphere of the relations of individuals between themselves’,<sup>92</sup> where this is necessary to protect human rights and provide remedies for abuses perpetrated by private individuals.<sup>93</sup> Depending on the specific circumstances, effective deterrence may, for instance, require a State to criminalize private actors’ conduct, or adopt other legislation or policies; alternatively, it may warrant operational measures. Additionally, under the ECHR, complicity or acquiescence with the acts of individuals breaching protected rights can, by virtue of positive obligations, engage state responsibility.<sup>94</sup> Regional bodies in the Americas and Africa have similarly recognized a state duty to ensure human rights against third party human rights abuses.<sup>95</sup>

Still, like their negative counterparts, positive obligations first require jurisdiction, that is, human rights jurisdiction which, as seen above, is the gateway condition for state human rights obligations. Yet its advocates have routinely turned to positive obligations to get the home state duty to regulate TNCs abroad off the ground. How can they surmount this dilemma? The first step is to highlight the role of positive obligations in controlling corporate harms to human rights *within* the domestic jurisdiction. This much is uncontroversial: although they rank relatively few in number, there are certainly cases where human rights bodies have held states responsible for harms to human rights arising from the acts of corporations at home.<sup>96</sup> The next step, however, has been to extrapolate

<sup>91</sup> Human Rights Committee, ‘General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004), CCPR/C/21/Rev.1/Add. 1326, para 8.

<sup>92</sup> *X and Y v Netherlands*, App. No. 8978/80, Judgement, 26 March 1985, para 23.

<sup>93</sup> See further *Osman v UK* [GC], App. No. 23452/94, Judgement, 28 October 1998 (relating to Art 2 ECHR); *Ireland v UK*, App. No. 5310/71, Judgement, 18 January 1978 (Art 3 ECHR); *Siliadin v France*, App. No. 73316/01, Judgement, 26 July 2005 (Art 4 ECHR); *Storck v Germany*, App. No. 61603/00, Judgement, 16 June 2005 (Art 5 ECHR); *Wilson, National Union of Journalists and Others v UK*, App. Nos 30668/96, 30671/96 and 30678/96, Judgement, 2 July 2002 (Art 11 ECHR).

<sup>94</sup> *Ireland v UK*, App. No. 5310/71, Judgement, 18 January 1978, para 159.

<sup>95</sup> See, e.g., *Velasquez Rodriguez Case*, Judgement 29 July 1988, Inter-Am.Ct.H.R. (Ser.c), No. 4 (1988), holding that the state’s obligation to ‘ensure’ rights under Art 1 of the American Convention on Human Rights entailed a ‘duty to prevent’ human rights abuses, via the organization of ‘governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights’ (para 166); 55/96 *SERAC and CESR v Nigeria* 15th Annual Activity Report of the ACPHR (2002), where the African Commission on Human and Peoples’ Rights held: ‘At a secondary level, the State is obliged to protect rights-holders against other subjects by legislation and provision of effective remedies ... Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms’ (para 46).

<sup>96</sup> See, e.g., *Lopez Ostra v Spain*, App. No. 16798/90, Judgement, 9 December 1994, where Spain was held liable for failing to protect residents from environmental and health problems at a nearby waste treatment facility. The plant was built on State property and funded by state subsidies. The ECtHR found the interference with the rights protected by

from this bounded duty to one with a potentially unlimited extraterritorial reach. Yet the attempt to bridge this gap cannot succeed, on the basis of current law, for reasons discussed in the following sections.

### A. Lack of Authority for ‘Jurisdiction-Free’ Positive Obligations

One approach followed by advocates of a home state duty to regulate TNCs abroad is directly to assert the existence of positive obligations where jurisdiction is absent. Hence, Augenstein and Kinley identify the following as their ‘main contention’:

‘...the (*non*-)regulation or control of corporate actors by the state establishes a relationship of *de facto* power between the state and the individual constitutive of extraterritorial human rights obligations. A state’s *de jure* authority to exercise extraterritorial jurisdiction under public international law not only delimits the state’s lawful competence to regulate and control business entities as perpetrators of extraterritorial human rights violations, but also constitutes a *de facto* relation of power of the state over the individual that brings the individual under the state’s human rights jurisdiction and triggers corresponding extraterritorial obligations.’<sup>97</sup>

A number of problems are embodied by this reasoning. Two, namely the requirement for jurisdiction as the *sine qua non* of any kind of human rights obligation, and the unlikelihood that the home state–TNC relationship is capable of triggering extraterritorial jurisdiction, have been addressed already.

Contrary to their intention, the authorities adduced by Augenstein and Kinley to support their argument in this context in fact serve this point. *Cyprus v Turkey*, discussed above in relation to its reasoning on extraterritorial jurisdiction, also applied the ‘overall control’ test of attribution based on *Loizidou* and applied in *Tadić* but subsequently disavowed by the ICJ *Genocide* judgement. Augenstein and Kinley highlight, from this case, the ECtHR’s *dictum* that the ‘... acquiescence or connivance of the authorities ... in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that States responsibility under the Convention ...’.<sup>98</sup> Yet, as they acknowledge, the basis of Turkey’s jurisdiction in the case was its role as an occupying military power, satisfying the spatial test of ‘effective overall control’. Consequently, the principles articulated in relation to positive obligations and non-state actors are no different from those applicable in the territorial context.

Augenstein and Kinley then turn to *Isaak v Turkey*,<sup>99</sup> where the applicants were the relatives of a person beaten to death by a group of people in the narrow UN buffer zone separating the Turkish-occupied North from the southern part of Cyprus. In its judgement, the ECtHR held that Turkey had jurisdiction in relation to the events in

(Footnote continued)

Article 8 was disproportionate and hence unlawful; *Taşkın and Others v Turkey*, App. No. 46117/99, Judgement, 10 November 2004, where the respondent state failed to prevent environmental damage by a private gold mining company, breaching the rights of local residents; and *Guerra and Others v Italy*, App. No. 14967/89, Judgement, 19 February 1998, where Italy was held liable for having failed to inform the local population about the potential for accidents at a chemical factory. See also *Fadeyeva v the Russian Federation*, App. No. 55273/00, Judgement, 30 November 2005.

<sup>97</sup> Augenstein and Kinley, 285–6.

<sup>98</sup> *Ibid.*, 286; *Cyprus v Turkey*, note 52, para 81.

<sup>99</sup> *Isaak and others v Turkey* (dec.), App. No. 44587/98, Judgement, 24 September 2008.

question, reiterating the above *dictum* from *Cyprus v Turkey*. From this, Augenstein and Kinley conclude that extraterritorial obligations under the ECHR are ‘not confined to situations in which the state, as an occupying power, exercises effective control over foreign territory’,<sup>100</sup> but may be ‘grounded in the state’s acquiescence in ... human rights violations committed by private actors outside the state’s territory’,<sup>101</sup> hence opening the way for its use in the TNC scenario.

Yet the facts of *Isaak* are salutary. One of the applicants’ central allegations, backed up by video footage, was that the group responsible for the specific violent acts leading to the victim’s death included TRNC policemen, on top of which the incident took place in circumstances of public disorder triggered by large demonstrations and counter-demonstrations by groups consisting of predominantly Greek and Turkish Cypriots, respectively, about which both sets of authorities were well informed in advance and where, as established by earlier cases, Turkey already had extraterritorial jurisdiction over the Turkish-occupied part of Cyprus, a literal stone’s throw away from the southern side.

In its merits decision, the ECtHR held that the applicant was indeed ‘killed by, and/or with the tacit agreement of, agents of the respondent State’<sup>102</sup> and by a group including agents of the Turkish government.<sup>103</sup> Accordingly, Milanovic suggests that the ECtHR in *Isaak* found Turkey to have jurisdiction for the purposes of the incident in question based on the personal model.<sup>104</sup> In any event, had the group of assailants consisted exclusively of civilians, it does not seem cogent to draw conclusions concerning the extension of extraterritorial jurisdiction into a fully functioning (host) state from a case responding to the absence of protection in the legal vacuum of an official no-man’s land.

Other authorities cited by Augenstein and Kinley fare no better. In *Kovačič*,<sup>105</sup> it was held by the ECtHR in an admissibility decision that Slovenia had jurisdiction in relation to the threatened expropriation of Croatian clients of a bank which, though now Slovenian, was originally established in the former Socialist Federal Republic of Yugoslavia. Augenstein and Kinley again deduce from this support for the proposition that a state’s ‘acts or omissions’ in relation to corporate actors constitute *de facto* power over individuals sufficient to bring them within state jurisdiction. Yet there is an evident world of difference, not least in terms of causation, between specific legislation relating to the property of foreign nationals (more so where the protection of such property was guaranteed by especially enacted Slovenian constitutional legislation) and a ‘failure to regulate’ of unspecified content. In any event, the case never proceeded to the merits stage, and the decision conflicts with subsequent decisions. Denying admissibility, in the case of *Ben El Mahi and Others v Denmark*, for example, the ECtHR held that there was ‘no jurisdictional link’ between the Moroccan applicants and the respondent state deriving from its failure to intervene in the publication of caricatures in a newspaper: neither the territorial nor personal exceptions to the general principal of territorial

<sup>100</sup> Augenstein and Kinley, 286.

<sup>101</sup> *Ibid.*, 287.

<sup>102</sup> *Isaak and others v Turkey* (dec.), n. 95, para 120.

<sup>103</sup> *Ibid.*, para 114.

<sup>104</sup> Milanovic, note 49, 124.

<sup>105</sup> *Kovačič and others v Slovenia*, App. Nos 44574/98, 45133/98 and 48316/99, Admissibility Decision, 9 October 2003.

jurisdiction was in play, nor could they ‘come within the jurisdiction of Denmark on account of any extraterritorial act’.<sup>106</sup>

*Ilaşcu and others v Moldova and Russia*<sup>107</sup> concerned abuses occurring in the breakaway ‘Moldavian Republic of Transdnistria’ (the ‘MRT’), an area under *de facto* Russian control on account of Russian troops and military equipment stationed there and support allegedly given to the separatist regime by the Russian Federation. Augenstein and Kinley cite one of four different partly dissenting opinions for the principle that jurisdiction should follow any act resulting from the exercise of the state’s authority.<sup>108</sup> However, the majority judgement upheld the territorial basis of jurisdiction, and hence of positive obligations,<sup>109</sup> while other dissenting minority judgements emphasize the need for both formal and ‘effective’ state control over territory as their precondition.<sup>110</sup>

Finally, while Augenstein and Kinley cite a single-judge opinion from *Al-Skeini* for the plain proposition that ‘... jurisdiction arises from the mere fact of having assumed ... obligations *and from having the capability to fulfil them...*’,<sup>111</sup> as already seen above, the *ratio* of that decision presumed that extraterritorial jurisdiction is exceptional and requires effective control, either spatial or personal, as well as a specific ‘jurisdictional link’.

Equally telling are discrepancies between the suggested and real weight of authority for jurisdiction-free extraterritorial positive obligations in works authored by De Schutter. As will be recalled, in 2010 De Schutter conceded that a ‘clear obligation for States to control private actors such as corporations, operating outside their national territory, in order to ensure that these actors will not violate the human rights of others, ha [d] not crystallised yet’.<sup>112</sup> Positive obligations assumed state jurisdiction,<sup>113</sup> he acknowledged, so that, even if a state duty to regulate might be ‘desirable’ it could not be said that it was legally required. By 2016, however, he was prepared to assert the existence of an extraterritorial duty to regulate,<sup>17</sup> based on ‘international human rights law’,<sup>114</sup> the *Maastricht Principles*,<sup>115</sup> and decisions of the ICJ.<sup>116</sup>

Given that the authorities cited in 2016 were substantially the same as those which, in 2010, were assessed inadequate to substantiate such a duty, this would appear to raise an

<sup>106</sup> *Ben El Mahi and Others v Denmark* App. No. 5853/06, Admissibility Decision, 11 December 2006.

<sup>107</sup> *Ilaşcu and others v Moldova and Russia* [GC] App. No. 48787/99, Judgement, 8 July 2004.

<sup>108</sup> Augenstein and Kinley, 288; *Ilaşcu and others v Moldova and Russia* [GC] App. No. 48787/99, Judgement, 8 July 2004, partly dissenting opinion of Judge Loucaides 139, citing his own concurring opinion in *Assandize v Georgia* [GC] App. No. 71503/01, Judgement, 8 April 2004, *Concurring Opinion of Judge Loucaides*.

<sup>109</sup> *Ilaşcu and others v Moldova and Russia*, note 107, para 333.

<sup>110</sup> *Ilaşcu and others v Moldova and Russia* [GC] App. No. 48787/99, Judgement, 8 July 2004, partly dissenting opinion of Sir Nicolas Bratza joined by Judges Rozakis, Hedigan, Thomassen and Panfîru, para 8.

<sup>111</sup> Augenstein and Kinley, 289, citing *Al-Skeini and others v UK* [GC], App. No.55721/077, Judgement, 7 July 2011, *Concurring Opinion of Judge Bonello*, para 13 (emphasis added by Augenstein and Kinley).

<sup>112</sup> De Schutter 2010, 19–20.

<sup>113</sup> This was because, ‘In principle, the international responsibility of a State may ... not be engaged by the conduct of actors not belonging to the state apparatus unless they are in fact acting under the instructions of, or under the direction or control of that State in carrying out the conduct’, *ibid*, 19.

<sup>114</sup> De Schutter 2016, 45, with reference to CESCR General Comment No. 14 and General Comment No. 15 (2002), note 11.

<sup>115</sup> *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, in Olivier De Schutter *et al*, ‘Commentary to the Maastricht Principles on ETOs of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084, 110.

<sup>116</sup> Cited above.

issue of consistency. Putting that aside, let us consider whether the various materials in question support the claim made, taking them in reverse order.

The ICJ's opinion on the *Wall*, and its decision in *DRC v Uganda* applied the spatial model of extraterritorial jurisdiction (see above section, '*Extraterritorial human rights jurisdiction: spatial model*'). As regards the *Maastricht Principles*, these have been criticized *inter alia* for conflating state obligations relating to extraterritorial acts and omissions,<sup>117</sup> a critical point in the current context, just as their general salience in terms of authority and precedent has been questioned.<sup>118</sup>

Perhaps more damaging, however, is the lack of compelling authority in international human rights law as regards a home state duty to regulate. To the extent they do refer to the role of home states in regulating TNCs, UN treaty bodies use the language of 'should' rather than the obligatory 'must'. Besides this, as Bartels observes, the output of UN treaty bodies is not formally authoritative, does not qualify as subsequent state practice, and where they have expressed views on extraterritorial duties, these have been almost as 'routinely' contested by States as accepted.<sup>119</sup>

Going beyond the UN human rights system, evidence for positive obligations to protect economic, social and cultural rights against interference by non-state actors even in the domestic setting becomes scant, as a review of the approaches taken by regional human rights systems in this area demonstrates.<sup>120</sup> On close inspection, almost all cases cited concern either: (i) positive obligations in the context of civil and political rights;<sup>121</sup> (ii) positive obligations, but not non-state actors;<sup>122</sup> or (iii) protection of economic, social and cultural rights that is incidental to protection of civil and political rights,<sup>123</sup> while none of the cited cases concerns extraterritoriality. Also, as Nolan highlights, regional bodies diverge appreciably in their formulation of positive obligations and in defining their content and extent.<sup>124</sup> In this situation, it is hard to see the claim that there is a firm

<sup>117</sup> Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25:4 *European Journal of International Law* 1071, 1091–2, n. 2, with reference to a passage stating that '[f]or the purposes of these Principles, extraterritorial obligations encompass ... obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'.

<sup>118</sup> Jolyon Ford, 'The risk of regulatory ritualism: Proposals for a Treaty on Business and Human Rights', Global Economic Governance Programme Working Paper 118/2016, <http://www.globaleconomicgovernance.org/risk-regulatory-ritualism> (accessed 1 August 2016). See further Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law' Ch. 5 in Nehal Buhta (ed), *The Frontiers of Human Rights Extraterritoriality and its Challenges. Collected Courses of the Academy of European Law* (Oxford: Oxford University Press, 2016).

<sup>119</sup> Bartels, note 117, 1087.

<sup>120</sup> Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9:2 *Human Rights Law Review* 225.

<sup>121</sup> e.g., *Velasquez Rodriguez v Honduras*, note 95; *X & Y v Netherlands*, App. No. 8978/80, Judgement, 26 March 1985.

<sup>122</sup> e.g., *Airey v Ireland*, note 90, Case of *McCann & Others v UK*, App. No. 18984/91, Judgement, 27 September 1995.

<sup>123</sup> e.g., *Massacres of Ituango v Colombia*, *IACtHR Series C 148* (2006). Indeed, the SERAC case (note 95) appears to be the only *bona fide* example included in Nolan's review of positive obligations relating to economic and social rights and non-state actors.

<sup>124</sup> Nolan, for example, notes that the European Social Rights Committee 'has not employed the language of the obligation to protect or prevent. Nor has it developed a unified, reasoned doctrine relating to when, and in what circumstances, it will regard the state as being under a duty to take positive steps to address [economic and social rights] violations committed by [non-state actors]': Nolan, note 120, 251. Accordingly, she concludes, the most that can be said in terms of commonalities is that '... all of the bodies ... acknowledge that the human rights set out in the instruments against which they evaluate state performance do not simply require state non-interference', *ibid*.

legal basis for an extraterritorial duty of home states to regulate TNC impacts on human rights abroad as anything other than overstatement, even were one to contend such a duty as desirable, as De Schutter did in 2010.

## B. Positive Obligations Not Equivalent to a ‘Duty to Regulate’

A further subtle point emerges from paying close attention to extraterritoriality advocates’ choice and use of language in formulating the scope and content of positive human rights obligations. Under the heading ‘Strengthening the Duty of the State to Protect Human Rights’, De Schutter appropriately cites the Human Rights Committee’s General Comment Number 31 mentioned above, but opens the text immediately under this heading by saying that ‘The duty of the state to protect human rights *by regulating the behaviour of private (non-state) actors* is for the most part well understood, and it now belongs to the *acquis* of international human rights law’.<sup>125</sup> A page later, he refers to ‘the extraterritorial human rights *obligations* of states including, in particular, the *duty of states to control the corporations* they are in a position to influence, wherever such corporations operate’.<sup>126</sup>

Thus, through iterative reformulation, a general proposition that is uncontroversial (the state has a duty to ‘ensure’ or ‘protect’ human rights within its jurisdiction) gradually evolves into a more specific one (states have a duty to control *corporations* they are in a position to influence, wherever such corporations operate) that is, as demonstrated above, eminently contestable. In addition, it is only with reference to the latter version that it becomes possible to suggest, as De Schutter does, that the UNGPs ‘set the bar clearly below the current state of international human rights law’.<sup>127</sup>

As observed by the ECtHR in *Ilaşcu*, a reviewing court’s role, as regards positive obligations, ‘... is not ... to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court’s task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made.’<sup>128</sup>

Accordingly, the existence of a ‘duty to ensure’ or a ‘duty to protect’ is by no means tantamount to a ‘duty to regulate’ or a ‘duty to regulate by enacting legislation’ that applies across all individual human rights, absolute or qualified. Even if, then, extraterritorial positive obligations to protect human rights could be deduced, for example, from the references to international assistance in the ICESCR (which despite

<sup>125</sup> De Schutter 2016, 44, emphasis added.

<sup>126</sup> De Schutter 2016, 45, emphasis added.

<sup>127</sup> *Ibid.* While De Schutter further states that regional human rights bodies ‘... have routinely affirmed that the responsibility of the state may be engaged as a result of its *failure to appropriately regulate* the conduct of private persons’ (De Schutter 2016, 44, emphasis added), he offers as authority for this proposition only the *Marangopoulos* case, an admissibility decision of the European Committee of Social Rights (European Committee of Social Rights, complaint no. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 October 2005, para 14, according to which it was stated, ‘the state is responsible for enforcing the rights embodied in the Charter *within its jurisdiction*. The Committee is therefore competent to consider the ... allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator’ (emphasis added), and the SERAC case before the African Commission on Human and Peoples’ Rights (note 95).

<sup>128</sup> *Ilaşcu and others v Moldova and Russia*, note 107, para 334.

the direction taken by the *Maastricht Principles* seems a tenuous conclusion) or other sources, this would not automatically, as a matter of law, entail a duty to regulate in any specific form as a corollary, as proponents of the home state duty to regulate TNCs abroad have suggested.

### C. The Requirement of Sufficient Nexus

Another fundamental aspect of positive obligations that is flagged, for instance, in the passage just cited from *Ilaşcu*, is that they are obligations of means, not of result. In other words, states have the responsibility to take reasonable and appropriate measures to address foreseeable risks to human rights, but they will not be held responsible for abuses that do eventuate, where such measures have been taken. Of course, it is because of this that positive obligations give rise to the notion of ‘due diligence’.<sup>129</sup>

Besides this qualification, however, state responsibility based on positive obligations is also limited by reference to causation. The defaults of the state or specific public actors should have ‘sufficiently direct repercussions’<sup>130</sup> on human rights. Even if it may not always be required to show that the abuse in question would definitely have been prevented, had the state taken measures that could reasonably have been expected of it,<sup>131</sup> a ‘sufficient nexus’<sup>132</sup> must exist between the non-state actor’s harmful action and the State in question.

It is true that the ECtHR has held that a state’s responsibility in domestic environmental cases may arise from a ‘failure to regulate private industry’,<sup>133</sup> or from failing to fulfil the positive duty ‘to take reasonable and appropriate measures’ to secure rights.<sup>134</sup> But would this test be satisfied in the extraterritorial scenario, in light of the sufficient nexus requirement? Given the intervention, between the home state and offending TNC activities in the host state, of the host state, its laws and regulating authorities, as well, in most cases, as a corporate veil of some form or other, this seems unlikely, again perhaps except in the case of some activities of some kinds of

<sup>129</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement, 26 February 2007, para 430 (although the Court notably restricts the scope of its judgement to the specific obligation to prevent genocide arising under Art 1 of the Genocide Convention, holding: ‘The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law’ (para 429)).

<sup>130</sup> *Moldovan and Others v Romania*, App. Nos 41138/98 and 64320/01, Judgement, 30 November 2005, para 95, citing *Ilaşcu*, above note 107.

<sup>131</sup> In *E and Others v UK*, App. No. 33218/96, Judgement, 15 January 2003, it was for instance held that the test for a breach of positive obligations under Article 3 ECHR ‘... does not require it to be shown that “but for” the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State...’ (para 99); cf. the approach taken by the Court of Justice of the European Union in the *Zaoui* Case C-288/03 (reported in French), where the claimants sought damages in relation to harm resulting from a suicide bombing in Israel, which they alleged was connected to European Union aid to the Palestinian Authority. The Court required that there be a direct causal link between the wrongful act of the institution concerned and the harm pleaded, in respect of which the applicants bore the burden of proof: paras 13–15.

<sup>132</sup> *Fadeyeva v the Russian Federation*, App. No. 55273/00, Judgement, 30 November 2005, para 92.

<sup>133</sup> *Ibid.*, paras 124–134.

<sup>134</sup> e.g., *Hatton and Others v UK* [GC], App. No. 36022/97, Judgement, 8 July 2003.



state-owned enterprises. Furthermore, it must be considered that, were a sufficient nexus assessed to exist between home states and the foreign subsidiaries of TNCs, then why not between the home state and its *bona fide* nationals, or its non-corporate non-state actors? This would seem to be a conclusion that extraterritoriality advocates, states and human rights bodies would want to avoid.<sup>135</sup>

#### D. Extradition and Expulsion Cases are Not Material

One situation where state obligations are certainly owed is in relation to extradition and expulsion: states may not expose individuals to a serious risk of human rights violations abroad via this route.<sup>136</sup> Augenstein and Kinley see this rule as supporting their view that the only thing that matters in determining the existence of state obligations is *de facto* power and control, and that such power and control exists in the case of ‘domestic measures with extraterritorial effect’ as well as in cases of ‘direct extraterritorial jurisdiction’.<sup>137</sup>

However, extradition and expulsion cases are not extraterritorial precisely because of this designation. As the ECtHR stated in *Bankovic*, setting out reasons for distinguishing the facts of that case from those of expulsion and extradition cases, liability in scenarios of extradition or expulsion attaches to ‘action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and such cases do not concern the actual exercise of a States competence or jurisdiction abroad’.<sup>138</sup> Albeit Augenstein and Kinley curiously cite *Bankovic* to the opposite effect, other authors more persuasively support the *Bankovic* court on this particular conclusion.<sup>139</sup>

#### E. State Duty to Prevent Use of Territory to do Harm is Not Material

A final approach to controlling the conduct of non-state actors, as suggested by the *Maastricht Principles*, finds its basis in customary international law which, the *Commentary to the Principles* suggests, ‘[prohibits] a state from allowing its territory to be used to cause damage on the territory of another state’.<sup>140</sup>

Could this rule finally provide the home state duty to regulate TNCs’ human rights impacts with a legal basis? It is backed by venerable legal authority<sup>141</sup> as well as

<sup>135</sup> Cf. the high threshold set by the ILC Draft Articles on State Responsibility for positive obligations of the territorial state: the territorial state may be responsible for breaches of international law resulting from its provision of ‘aid or assistance’ to another state’s breach, if the territorial state invites, consents or acquiesces to attacks, but ‘assistance must be given with a view to facilitating the commission of a wrongful act, and must actually do so’: International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, extract from the Report of the ILC on the work of its fifty-third session, note 76, 66.

<sup>136</sup> See, e.g., *Soering v UK*, App. No. 14038/88, Judgement, 7 July 1989; *HLR v France* [GC], App. No. 24573/94, Judgement, 22 April 1997.

<sup>137</sup> Augenstein and Kinley, 284.

<sup>138</sup> *Bankovic*, note 59, para 68. In the earlier *Loizidou* judgement, however, the Court did mistakenly run together actions with extraterritorial effect with extraterritorial jurisdiction, an error probably associated with the judgement’s difficulties over attributability, as discussed above, text at notes 82–89; *Loizidou*, notes 50 and 51.

<sup>139</sup> Bartels, note 117, 1072, n. 7; Kessing, note 72.

<sup>140</sup> *Commentary to the Maastricht Principles on ETOs of States in the Area of Economic, Social and Cultural Rights*, note 115, with reference to the *Trail Smelter Case (US v Can.)*, 3 R.I.A.A. 1905 (1941), and the dissenting opinion of Judge Weeramantry to the ICJ’s Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226.

<sup>141</sup> Besides the *Trail Smelter* case see, for example, ICJ, *Corfu Channel (UK v Albania)*, Judgement (merits), 9 April 1949, 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para 29; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgement, 20 April 2010.

high-level statements of policy in relevant fields,<sup>142</sup> while it is a fundamental tenet of international trade law.<sup>143</sup> The *Maastricht Principles* so conclude, finding that this rule of customary law ‘... results in a duty for the state to respect and protect human rights extraterritorially’.<sup>144</sup>

Again, the true situation is more complicated. Firstly, the customary law rule, as distinct from rules established under specific regimes such as the World Trade Organization (WTO), relates only to harm caused by physical agents, as the facts of the cited authorities intimate, and thus the rule ‘does not apply to harm caused by a mere policy decision (by a state or a private actor) taken within the territory of an allegedly responsible state’.<sup>145</sup> Secondly, a more abstract but crucial point is that even though the rule countenances non-physical damage, this does not ‘*ipso facto* mean that such injury can be described in terms of the human rights of the injured persons’.<sup>146</sup> In other words, it must have been the case that the erring State already owed an extraterritorial obligation to the offended States to protect its nationals’ human rights – the very point in question – precluding extraterritoriality advocates from drawing support from this bootstrapping line of argument in the present circumstances.

## VI. CONCLUSION

This article has examined the legal basis for recent claims by scholars that the responsibility of home states under human rights treaties extends to the prevention of abuses by TNCs beyond national borders. Despite such assertions, it has demonstrated on the weight of evidence that, at present, there cannot be said to exist any positive legal basis for such a duty. In consequence, the position articulated by the UNGPs, that states may be entitled, but are not obliged as a matter of human rights law, or indeed public international law, generally to regulate their companies’ extraterritorial activities or human rights impacts, remains a correct one.

On the other hand, this article has not sought to evaluate whether the establishment of a ‘home state duty to regulate TNCs’ would be desirable, legally viable, readily enforceable, or optimal, as compared with other available regulatory approaches, in securing the prevention of corporate-related human rights abuses and access to effective remedies for victims where prevention fails. Nor has it reflected on whether, in today’s world of integrated markets, ascendant corporate power, concentrated wealth and deepening inequality, such a duty might be seen as an ethical, social or political

<sup>142</sup> Such as the Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, UN Doc. A/CONF. 48/14) and the Rio Declaration (*The Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol I); 31 ILM 874 (1992)), Principle 2 of which provides that: ‘States have in accordance with the Charter of the UN and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility 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 their national jurisdiction’.

<sup>143</sup> Bartels, note 117, 1072 with reference to Arts 5 and 6 (3), WTO Agreement on Subsidies and Countervailing Measures and Art 22(4), WTO Dispute Settlement Understanding.

<sup>144</sup> *Commentary to the Maastricht Principles on ETOs of States in the Area of Economic, Social and Cultural Rights*, note 115, *Commentary* to Principle 3, para 9.

<sup>145</sup> Bartels, note 117, 1082.

<sup>146</sup> *Ibid.*

imperative. Although important questions, these are, however, distinct from the former, legal one. Each, it is suggested, requires careful reflection according to relevant parameters, rather than conflation as a result of which boundaries between what is, and what might be, law is obscured. Only informed by a clear, honest and fully articulated assessment of the issues can efforts to advance towards greater control and accountability over business impacts on human rights, and any initiative to advance beyond the UNGPs, via a new human rights and business treaty,<sup>147</sup> or otherwise, have the chance of success which they deserve.

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<sup>147</sup> Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 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 (29 September 2017), available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf) (visited 8 October 2017).