

4-30-2019

Justifying Extraterritorial Regulations of Home Country on Business And Human Rights

Patricia Rinwigati Waagstein

Faculty of Law, Universitas Indonesia, prwaagstein@gmail.com

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Waagstein, Patricia Rinwigati (2019) "Justifying Extraterritorial Regulations of Home Country on Business And Human Rights," *Indonesian Journal of International Law*. Vol. 16 : No. 3 , Article 4.

DOI: 10.17304/ijil.vol16.3.771

Available at: <https://scholarhub.ui.ac.id/ijil/vol16/iss3/4>

This Article is brought to you for free and open access by UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

JUSTIFYING EXTRATERRITORIAL REGULATIONS OF HOME COUNTRY ON BUSINESS AND HUMAN RIGHTS

* Patricia Rinwigati Waagstein

* Faculty of Law, Universitas Indonesia
Correspondence: prwaagstein@gmail.com

Abstract

The regulation of home country to govern business and human rights has been commonly debated. It is argued that home states regulations have a potential role to play in the regulation of multinationals on business and human rights. It particularly can fill the gap due to the extraterritorial nature of MNC operations which requires an integrated regulatory approach and it can also provide alternative forum for victims to human rights violation by corporation to seek justice. The question is in what sense home states should be responsible for violations of human rights by subsidiaries in host countries. What are the justifications and what are the limitations? This article tries to answer those questions by highlighting the debates over the duty bearer, a right or obligations of home countries to impose extraterritorial regulations to other countries.

Keywords: *extraterritoriality, business and human rights, MNC*

Submitted : 11 January 2019 | Revised : 30 February 2019 | Accepted : 1 March 2019

I. INTRODUCTION

One of the problematic and major issues in the context of business and human rights is the regulatory framework. There are a number of regulations that international businesses need to respect, and these are both national and international in nature. First, a corporation should respect national legislation in which it is operating in various fields such as taxation, labour protection, environmental standards, etc. However, there are several problems facing such regulation: who should regulate multinationals as a whole considering its multi-national business operations? Is it the obligation of home or host countries? Some countries have attempted to propose and apply a law which could regulate their companies overseas.¹ Even so, the extent to which

¹ European Union, *Resolution on EU Standards for European Enterprises Operating in Developing Countries, Towards a European Code of Conduct*, C 104/180, 14 January 1999; Deva, Surya, "Acting Extraterritorial to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?" *Melbourne Journal of International Law* 5 (2004), pp. 52 - 54.

such extraterritorial jurisdiction can be exercised remains unclear. Civil society and academics have gathered and developed Maastricht Principles on the Extraterritorial Obligation of States in the Area of Economic, Social, and Cultural Rights calling for all states to meet its extraterritorial obligations. Nevertheless, the question is whether such obligations have a legal foundation supported by state practices. This is the question which is further developed in this article.

For the purpose of this article, there are several clarifications which have to be made. First, the wording ‘human rights’ refers to the human rights articulated in the Universal Declaration on Human Rights and other human rights instruments. This article will only focus on the economic, social, and cultural rights as articulated in the International Covenant on Economic, Social, and Cultural Rights. Second, bearing in mind the varieties of definitions of Multinational Corporations or (MNC),² this research will focus on MNC in which the parent companies or home companies are normally established in a developed state and their subsidiaries in developing states. This definition thus reflects both the corporate body as a whole and its separate entities, which might operate either individually or collectively, by embracing the realities of complex structure, control, and operation. Last, the analysis applies the construction of law as found in international law which is viewed broadly as a dynamic decision-making process involving various bodies of law and policies resulted from interactions between different participants.³ Here, it is assumed that international law is binding states — and to some extent, individuals — including legal entities within a state.

II. THE IMPORTANCE OF HOME COUNTRY

Why is home state regulation important in the context of corporate human rights responsibility? The answer is more pragmatic than theoretical. Placing a regulatory burden exclusively on host countries is quite problematic and inefficient, due to the extraterritorial nature

² Patricia Rinwigati Waagstein, *Corporate Human Rights Responsibility: Continuous Search for A Regulatory Framework* (Uppsala: Uppsala University, 2009), 22–27.

³ Waagstein, *Corporate Human Rights Responsibility: Continuous Search for A Regulatory Framework*, 31–37.

of MNC operations which requires an integrated regulatory approach. Many cases reveal that subsidiaries may easily close down their operations and move to different countries, all the while leaving the home state untouched. In this case, the main concern is the victims to human rights violation whose access to justice may be limited.

A second functional difficulty is that many host countries are also developing countries, which often face economic and political difficulties. The conflict of interest between economic and human rights, limited natural resources, or simply pressure from other institutions has hindered the application and protection of human rights in host countries. It is argued in this article that home state regulation can provide a partial solution to the loopholes created by such a regulatory vacuum.

Third, from the victim's perspective, the possibility of adjudication against a parent corporation in its home country has opened a window to seeking justice that may not be readily available in one's own country. Thus, extending regulation to home states strengthens the relative position of those victims.

III. DEFINING HOME COUNTRY

What is home country? The term 'home country' is always associated with the nationality of a corporation. Some commentators have argued that nationality of MNC should be irrelevant, since the former is inherently obscure⁴ and fails to reflect the complicated structure of MNC.⁵ However, in the normative sense of the segregation of state authority, this concept remains important. In international law, knowing which state a particular entity belongs to is a condition for entitlement of state responsibility, diplomatic protection and judicial proceedings, jurisdiction,⁶ and enemy status in time of war. Moreover, this nationality

⁴ Nigh, Douglas, "Who's on First? Nation-States, National Identity and Multinational Corporations," *International Business: Institutions and the Dissemination of Knowledge*, eds. Brian Toyne and Douglas William Nigh (South Carolina: University of South Carolina Press, 1999), p. 263.

⁵ Ibid.

⁶ Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, 1923*, PCIJ, Ser. B., No. 4.

is also important when determining the law to be applied, restrictions on MNC, and jurisdiction over companies abroad.

Unlike individual nationality, where state practices provide consistent criteria, determining the nationality of a corporation is far more complicated. Three basic considerations are commonly used to determine the linkage between state and corporation: place of incorporation,⁷ place of management,⁸ and place of control/shareholder location.⁹

A. THE PLACE OF INCORPORATION

The state of incorporation refers to the place where the corporation was created as a legal entity. The conferring of legal status – which expresses the juridical link with the country – indicates that the law of the country is also the abiding law of the company.¹⁰ This practice is common in common law countries and with some international instruments. It makes sense that the corporation, logically speaking, would be a ‘legal entity’ or ‘citizen’ only of the state whose laws created it. This is also easily ascertainable, as it requires no further examination of the place of management, internal corporate organisation, and procedure. As such, it offers a measure of legal certainty and predictability in choice of law matters for both state administrators and regulated firms.¹¹ Nevertheless, there are criticisms. Today, this model does not necessarily reflect the

⁷ Lowe, Vaughan, “Jurisdiction,” *International Law*, ed. Malcolm D. Evans, Second ed. (Oxford: Oxford University Press, 2006), pp. 345 & 346; Kokkini-Iatridou, D. and Waart, P.J.I.M de, “Foreign Investment in Developing Countries - Legal Personality of Multinational Corporations in International Law,” *Netherlands Yearbook of International Law* 14 (1993), pp. 96 & 97.

⁸ Wallace, Cynthia Day, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague, Martinus Nijhoff Publisher, 2002), p. 134.

⁹ International Court of Justice, *The Barcelona Traction, Light, and Power Company, Limited (Belgium V. Spain)*, Judgment, 1962, I.C.J. Report 19.

¹⁰ Kokkini-Iatridou, D. and Waart, P.J.I.M de, “Foreign Investment in Developing Countries - Legal Personality of Multinational Corporations in International Law,” *Netherlands Yearbook of International Law* 14 (1993), pp. 96 & 97.

¹¹ Rammeloo, Stephann, *Corporation in Private International Law; a European Perspective* (Oxford, Oxford University Press, 2001), p. 17; Mabry, Linda A., “Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality,” *Georgetown Law Journal* 87 (1998 - 1999), p. 584.

day-to-day dynamics of a corporation. Many corporations are completely inactive in the particular place of incorporation, effectively making it a fiction construction (albeit, not necessarily unlawful). Therefore, it is argued, using the place of incorporation as the sole determinant of a corporation's nationality is not sufficient. As the *lex societatis* or place of management has become more important, it is increasingly argued that there should be other ways of defining this status.

B. THE PLACE OF MANAGEMENT OR REAL SEAT

This approach argues that the decisive factor for determining corporate nationality should be based on the place where the effective connection between corporation and the claiming state has been established; namely, the place of corporate management or the real seat. One interpretation of this defines the 'seat' as the location of central management or administration, from which control is effectively exercised.¹² Another regards it as the site of production facilities.¹³ However, in both cases there is a question of whether this would mean a corporation's headquarters, or the meeting place of directors and/or shareholders. Here, there is no agreement. Although most European countries have come to regard the place of central administration as a decisive determinant,¹⁴ their ultimate definition is unclear. Even assuming that a semantic consensus is possible, it is convincingly argued that in the globalized business world it is often difficult to determine the actual location of a company's real seat. Business undertakings cannot be expected to operate in solely one market over time.

C. THE PLACE OF SHAREHOLDERS & CONTROL

The concept of shareholders/control as a criterion for determining the nationality of corporations is an exception to the principle of the corporate veil, that separates the corporation from its members and endows it with rights and duties of its own. This approach was developed with the goal of protecting national security and economic interests from hostile foreign armies, and was applied in the context of

¹² Wallace, Cynthia Day, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague, Martinus Nijhoff Publisher, 2002), p. 134.

¹³ Ibid.

¹⁴ Ibid.

wartime to control enemy trade and property ownership. There are some practical difficulties with this conception, however. Discerning the identity and nationality of individual shareholders, as well as directors with the power to influence key decisions, is becoming increasingly difficult. The growing number of corporations, and the extensive networks of interrelated companies whose shares are traded daily among stockholders around the globe or held by institutional investors, can make this a complicated task.

D. MULTIPLE APPROACHES

While the tests above constitute some criteria for determining corporate nationality in state practice, in practice, each approach must be applied in combination with others. Civil law countries which commonly apply the real seat normally require incorporation in the same state, making the ultimate ‘test’ for either approach virtually identical.¹⁵ This is also the case with common law countries.¹⁶ In the case of international claims for compensation, the Iran-United States Tribunal requires that the claimant be a national of the United States (against Iran) or a national of Iran (against the United States) based on all tests: the place of incorporation, the place of management and the nationality of shareholder.¹⁷ In the context of diplomatic protection, the International Court of Justice (ICJ) case of *Barcelona Traction* establishes that international law ‘attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it

¹⁵ Wallace, Cynthia Day, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague, Martinus Nijhoff Publisher, 2002), p. 134.

¹⁶ *Restatement of the Third Law: The Foreign Relations Law of the United States* Restatement of the Law, ed. The American Law Institute, vol. 1 (St Paul, American Law Institute Publishers, 1986), Section 213 on Nationality of Corporation.

¹⁷ Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran article II paragraph 1 and article VII paragraph 1 and 2. Also see: Aldrich, George H., *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 44 - 54; Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Seventh Revised ed. (London, Routledge, 1997), pp. 266 & 267.

is incorporated and in whose territory has its registered office.¹⁸ The basic premises of the *Barcelona Traction* case have been consistently applied by the International Law Commission (ILC), on its Draft [of] Diplomatic Protection (2006). While this Draft law applied those three tests, the state of incorporation should be applied first.¹⁹ However, when the corporation is controlled by nationals of other states and has no substantial business activities in the state of incorporation, and the site of management and financial control is located in another state, the place of management test should be applied.²⁰ Finally, the place of shareholders test can only be applied in exceptional cases; namely, when a corporation ceases to exist or there is direct injury toward shareholders.²¹

These elaborations signify that in international law, there is no common regulation regarding the approaches used to determine corporate nationality. The factors considered depend upon the context of the particular rules of law involved.²² Consequently, it is difficult to pinpoint which state is a corporation's home state, since this could be represented by the state of incorporation, state of management, or state of shareholders. This flexibility approach enables victims to redress claims against MNCs in different places.

IV. JUSTIFYING EXTRATERRITORIAL OBLIGATION OF HUMAN RIGHTS

A. THE CONCEPT OF JURISDICTION UNDER HUMAN RIGHTS

It should be kept in mind here that the jurisdictional question on human rights, while overlapping, ultimately differs from the doctrine of jurisdiction, which allows states to prescribe regulation extraterritorially

¹⁸ International Court of Justice, *The Barcelona Traction, Light, and Power Company, Limited (Belgium V. Spain)*, Judgment, 1962, I.C.J. Report 19, para. 70.

¹⁹ International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, fifty-eight session sess., UN GA A/61/10, 2006, Draft Article 9.

²⁰ Ibid.

²¹ Ibid., Draft Article 11.

²² Brownlie, Ian, *Principles of Public International Law*, Fourth ed. (Oxford, Clarendon Express, 1990), p. 422.

based on nationality, protection, and universal principles. In the latter case, the doctrine describes the limits of legal competence of a state to regulate conduct or the consequences of events,²³ and jurisdiction is its authority to effect legal interests over certain conduct. In the context of human rights, this is quite different. Here, the jurisdictional question refers to the web of protection of individuals by various states, in which one state's protection ends where another state's begins.²⁴ Accordingly, jurisdiction is aimed to 'delineate as appropriately as possible the pool of persons to which a state ought to secure human rights.'²⁵ In other words, jurisdiction in human rights regimes is perceived as an opportunity, rather than limitation, to extend individual protection.

When, then, do states have the obligation to regulate MNC operating abroad? The Maastricht Principles, although initiated by civil society, provide a guideline on the scope of extraterritorial regulations:

1. Jurisdiction based on effective control over territory

It has been recognised under international law that under certain circumstances, a state can be found to have obligations outside its territory toward non-national entities in instances where it exercises 'effective control.' Occupation and control of military or paramilitary forces are often cited as the clearest examples of states exercising effective control. In the 1971 ICJ case on *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* involving the illegal occupation of Namibia by South Africa, the ICJ confirms that the 'physical control of a territory and not sovereignty or legitimacy of title, is the basis for

²³ The term 'jurisdiction' is also commonly used in international law to describe the scope of the rights of an international tribunal, such as the International Court of Justice of the International Criminal Court, to adjudicate on cases and to make orders in respect of the parties to them. See : Lowe, Vaughan, "Jurisdiction," *International Law*, ed. Malcolm D. Evans, Second ed. (Oxford: Oxford University Press, 2006), pp. 335 & 336.

²⁴ Skogly, Sigrun I., *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen, Intersentia, 2006), p. 45.

²⁵ Heijer, Maarten den and Lawson, Rick, "Transnational Human Rights and the Concept of 'Jurisdiction'," *ESF Exploratory Workshop on Transnational Human Rights Obligation in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008), pp. 11 & 12.

State liability for acts affecting other states. ²⁶ The Court also stated that South Africa remained accountable for any violations of the rights of the people of Namibia.²⁷

In human rights regimes, several forms of jurisprudence from different organs apply the same principle of state's effective control to establish extraterritorial human rights obligations. In the 1981 case of *Lopez Burgos v. Uruguay*, the Human Rights Committee (HRC) expanded the interpretation of Article 2 of the ICCPR to include any 'violations of rights under the Covenant which its [state] agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.'²⁸ In the case of the West Bank and Gaza, the Human Rights Committee applied the same approach, concluding that Israel was responsible for all conduct of its authorities or agents in those territories under its control that affected the enjoyment of rights under the Covenant.²⁹

In the context of the European Court of Human Rights, the concept of extraterritorial obligation based on state control has been consistently applied in various cases. In the case of *Loizidou v. Turkey*, involving the confiscation of property in Turkish-occupied areas of Northern Cyprus, the European Court of Human Rights held that responsibility for one's own acts can reach outside one's territory, provided that it has **effective control** over the territory where the act occurred regardless of the legality of such control.³⁰ The same position has been confirmed in the more recent case of *Cyprus v. Turkey*.³¹ In the well-known *Bankovic*

²⁶ International Court of Justice *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Reports of Judgments, Advisory Opinions and Orders, 1971, para. 118.

²⁷ *Ibid.*, paras. 109 & 112.

²⁸ 052/1979, Delia Saldias de Lopez (alleged victim's wife) on behalf of Sergio Ruben Lopez Burgos v. Uruguay, 29 July 1981, para. 12.1. and 12.30.

²⁹ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant; Concluding Observation of the Human Rights Committee, Israel*, Seventy-eight sess., CCPR/CO/78/ISR, 21 August 2003, para. 11.

³⁰ Clarkson, Max B.E., "A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance," *Academy of Management Review* 20.1 (1995), p. 62.

³¹ European Court of Human Rights, *Cyprus V. Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001, 2001, p. 77. Emphasis added.

case, involving victims' complaints relating to the NATO attack in the Federal Republic of Yugoslavia, the European Court of Human Rights went further by allowing

*[...]its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercise all or some of the public powers normally to be exercised by that Government.*³²

Despite the criticism of *Bankovic per se*,³³ this case highlights three important issues. First, it confirmed that an extraterritorial obligation exists as a general exception. This decision opens the possibility for future complaints relating to peacekeeping operations where the armed forces of a Contracting party exercise all or some of the public power in a specific region.³⁴ Apparently, the *Bankovic* case has been referenced by Saddam Hussein to seek claims for human rights violations under the protection of the European Convention on Human Rights (ECHR), and on the basis of effective *de facto* control over Iraq by European countries. The Court concluded that due to the lack of clarity on the division of responsibility and power among the United States of America (USA) and European countries involved in peacekeeping operations there, it was not clear whether there was a jurisdictional link for European

³² European Court of Human Rights, *Bankovic A.O. V. Belgium and 16 Other Contracting States*, Appl. no. 52207/99; adc.dec., judgment of 12 December 2001, 2001, para. 71.

³³ Heijer, Maarten den and Lawson, Rick, "Transnational Human Rights and the Concept of 'Jurisdiction'," *ESF Exploratory Workshop on Transnational Human Rights Obligation in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008), discussion paper - unpublished; Scheinin, Martin, "Comments on 'Jurisdiction,'" *ESF Exploratory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg, the Netherlands: 2008), discussion paper - unpublished.

³⁴ Lawson, Rick A., "The Concept of Jurisdiction in the European Convention on Human Rights," *Globalisation and Jurisdiction*, eds. Piet Jan Slot and Mielle Bulterman (Leiden: Kluwer Law International, 2004), p. 209. See also: European Court of Human Rights, *Markovic and Others V. Italy*, Application No. 1398/03, judgment on 14 December 2006, 2006.

countries in this case under Article 1,³⁵ and therefore, the application was dismissed. Second, unlike earlier cases such as *Loizidou vs. Turkey* and *Cyprus v. Turkey*, where both the applicant state and respondent state were parties to the Convention, the *Bankovic* case involved two European counterparties before the Court, only one of whom was a signatory to the Convention. The case challenged the territorial concept upon which the ECHR was based, under Art. 1(2) of the ECHR, and questioned the scope of the Convention's application to a third party.

Can the doctrine of effective control over territory be applied in the context of ESC rights? The answer is yes. Although there is no clear reference for the ICESCR's scope of application, the fact cannot be denied that this instrument guarantees rights which are essentially territorial. Based on several pieces of evidence, it can be confirmed that the ICESCR applies both to territories over which a state has sovereignty, and those over which that state exercises territorial jurisdiction. Article 14 of the ICESCR gives transitional directions in the case of any state which 'at the time of becoming a party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge.'³⁶ Further confirmation can be found in the Maastricht Guidelines, which state that 'under circumstances of alien domination, deprivation of economic, social, and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question.'³⁷ However, the application is limited to the contexts of 'colonialism, other forms of alien domination and military occupation.'³⁸ Moreover, the ICESCR, observing Israel's periodic reports, clearly adopts effective control in reconfirming its view that : 'the state party's obligation

³⁵ European Court of Human Rights *Saddam Hussein V. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine, and the United Kingdom*, Fourth Section Decision as to the Admissibility of Application no. 23276/04 on 14 March 2006, 2006.

³⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, Reports of Judgment, Advisory Opinion and Order of 9 July 2004, para. 112.

³⁷ *The Maastricht Guidelines on Violation of Economic, Social, and Cultural Rights*, 1997, para. 17.

³⁸ *Ibid.*

under the ICESCR apply to all territories and populations under its effective control.³⁹ This concluding observation was reiterated by the International Court of Justice (ICJ), when giving an advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In this case, which involved the question of whether international human rights law, particularly the ICCPR, ICESCR, and the CRC, applied extraterritorially in the West Bank and the Gaza Strip, the ICJ concluded that ‘the protection offered by human rights conventions does not cease in the case of armed conflict’ and that ‘the territories occupied by Israel have for over 37 years been subjected to its territorial jurisdiction as the occupying power.’⁴⁰ Consequently, Israel was responsible under the ICCPR, ICESCR, and CRC regarding the human rights consequences of the Wall’s construction. Although the Court specifies certain rights that impacted the occupation, it is not clear exactly what type of obligations the occupying state held. The Court only states that Israel is ‘under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.’⁴¹ The assumption here is that the Court merely imposes the negative obligation namely the obligation to respect and protect human rights.⁴²

Likewise, in the case of the *Armed Activities on the Territory of the Congo*, although the Court was not specifically dealing with the ICESCR, the applicability of effective control in human rights regime was reconfirmed:

178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in

³⁹ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant; Concluding Observation of the Human Rights Committee, Israel*, Seventy-eight sess., CCPR/CO/78/ISR, 21 August 2003, paras. 15 & 31.

⁴⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, Reports of Judgment, Advisory Opinion and Order of 9 July 2004, para. 112.

⁴¹ *Ibid.*

⁴² Narula, Smita, “The Right to Food: Holding Global Actors Accountable under International Law,” *Columbia Journal of Transnational Law* 44 (2005 - 2007), p. 734.

*the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.*⁴³

This case highlights two points. First, it is reconfirmed that the meaning of ‘territory’ has been extended to include the occupying territory. Consequently, the occupying power should also be responsible for any occurrence and subject within its ‘extra’ territory. Second, the ICJ clearly establishes that states have multiple obligations, both positive and negative, toward non-nationals outside their territory.⁴⁴ With regard to business actors, paragraph 178 can be interpreted further as imposing obligations to states to regulate business actors operating in such outside territory and to adjudicate any cases involving violations by business actors.

Though international human rights jurisprudence tells us that a state can exercise ‘effective control’ over territory in the case of occupation or armed conflict, its utility is very limited in the context of corporate responsibility and ESC rights, since the majority of extraterritorial regulations do not involve these limited scenarios, but rather concern economic issues. For the effective control doctrine to be more useful in the case of ESC rights protection, then, it would need to include situations in which states exercise effective economic control over policies or markets outside their territory.⁴⁵ Here, applying an economic control standard to define the jurisdictional scope of human rights regulations could fill the gap resulting from extraterritorial economic

⁴³ United Nations High Commissioner for Human Rights, *Report of the United Nation High Commissioner for Human Rights on the Sectoral Consultation Entitled ‘Human Rights and the Extractive Industry’*, pt. E/CN.4/2006/92, U.N.Doc.E/CN.4/2006/92, 19 December 2005.

⁴⁴ Clapham, Andrew, “Rights and Responsibility : A Legal Perspective,” *From Rights to Responsibilities: Rethinking Intervention for Humanitarian Purposes*, eds. O. Jutersonke and K. Krause, vol. PSIS Special Study 7 (Geneva: Programme for Strategic and International Security Studies, 2006), p. 66.

⁴⁵ Narula, Smita, “The Right to Food: Holding Global Actors Accountable under International Law,” *Columbia Journal of Transnational Law* 44 (2005 - 2007), pp. 734 & 735.

impacts.⁴⁶ Moreover, using effective economic control as a basis for state's obligation to regulate and adjudicate would partly resolve the conflict of jurisdiction.

2. Jurisdiction based on 'effective control' or 'foreseeable consequence' over persons

There are two references already made to state responsibility which need to be mentioned again in this context: the ICJ case of *Nicaragua v. United States* and the ICTY case of *Tadic*. Although the latter case provides 'looser standards' by relying on overall control rather than effective control, both cases demand *direct participation* by the relevant party in order to invoke responsibility. Can either be applied to help determine the connection between a corporation and home country? Despite the difference between these two cases – one determining state responsibility and the other individual responsibility – neither one can be easily applied to this particular scenario, since in most cases corporations enjoy the autonomy to arrange management and operation. Even if home states intervene to regulate corporate behaviour, their involvement is limited. Although one can argue for corporations' occasional control by government where that government is the main shareholder, and other situations in which states are controlled by corporate interests; these serve as exceptions to the rule.

The state's control over a person has also been applied to various degrees by the European Court on Human Rights and Human Rights Committee. In the case of *Soering*,⁴⁷ the European Court on Human Rights held that the extradition of a German national by the United

⁴⁶ Narula, Smita, "The Jurisdictional Scope of the International Covenant on Economic, Social, and Cultural Rights," *ESF Exploratory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg, Netherland: 2008); Narula, Smita, "The Right to Food: Holding Global Actors Accountable under International Law," *Columbia Journal of Transnational Law* 44 (2005 - 2007), p. 734.

⁴⁷ The case is about a German national detained in the UK, who could not be extradited to Virginia in the United States in order to stand trial for murder, and possibly be sentenced to death. The question remains as to whether the extradition of a fugitive to another State where he would be subjected or likely be subjected to torture, inhuman and degrading treatment, or punishment, would engage the responsibility of a Contracting State under Article 3 ECHR. Judgment of 7 July 1989, Series A, Vol. 161.

Kingdom's government to Virginia constituted a violation of Article 3 of the European Convention on Human Right. This case carries two important implications. First, the decision of this case is based on physical control over a legal person,⁴⁸ meaning that the UK is responsible for a German national due to his physical presence in the United Kingdom. Second, the case is based on the foreseeable consequence argument, according to which the UK's action to extradite will endanger the applicant. It implies that the UK is also responsible for any foreseeable consequences which occur within another jurisdiction.⁴⁹ In the case of *Ng v. Canada*, the HRC held that Canada's extradition of the defendant to the US to stand trial in California, where he was likely to face the death penalty, constitutes a breach of Article 7 of the ICCPR. From these two cases, it can be assumed that the state in which an individual is physically present is obliged not only to respect the rights of that individual, but also provide protection by not extraditing the person to a known situation of endangerment. Here, 'effective' control or 'foreseeable' consequence over a person refers to the physical presence of an entity in a particular country.

Control over a person as a basis of extraterritorial obligation has also prevailed in the case of issuing visas. The cases of *Vida Martin v. Uruguay*, *Linctenztein v. Uruguay*, and *Nunex v. Uruguay*, all presented before the Human Rights Committee, ended in the opinion that the Uruguayan government's refusal to renew the passports of its citizens living abroad clearly is a violation of human rights.⁵⁰ Therefore, Uruguay is responsible for human rights protections over its nationals who live abroad. It is clear, then, that states issuing visas or passports are still responsible for human rights protections over nationals or aliens living abroad.

There has also been a recognition of states' responsibility to control criminals and terrorists located in their territory, who may cause harm

⁴⁸ Brownlie, *System of the Law of Nations, State Responsibility*, Clarendon Press, Oxford, 1083, p. 165.

⁴⁹ Judgment of 7 July 1989, Series A, Vol. 161, para. 91.

⁵⁰ Heijer, Maarten den and Lawson, Rick, "Transnational Human Rights and the Concept of 'Jurisdiction'," *ESF Exploratory Workshop on Transnational Human Rights Obligation in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008), at 21 & 22.

to other states. This was confirmed in *Lawless v. Ireland* and *McCann v. The United Kingdom*. In *McCann*, the Court held that governments are ‘required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel.’⁵¹

States may also operate abroad on the basis of *ad hoc* agreements or informal arrangements of cooperation between two states. Here, the cases of *Xhavara v. Italy* and *Öcalan v. Turkey* serve as two examples. In the *Xhavara* case, involving Albanian citizens who had been trying to enter Italy illegally when their boat sank following a collision with an Italian warship, the ECtHR held that since Italy was a party to the bilateral agreement with Albania authorising the Italian Navy to board and search Albanian boats in order to encourage illegal immigrants, this triggered Italy’s responsibility in the incident.⁵² In the *Öcalan* case, the Court concluded that the arrest of the PKK leader by members of Turkish security forces at the Nairobi airport effectively brought Mr Öcalan within Turkish authority, due to the informal arrangements that already existed between Turkey and Kenya.⁵³

These illustrations signify that the degree involved in ‘control over a person’ or ‘foreseeable’ consequence is less than that for cases requiring ‘effective’ control over individuals. The former is applied differently, based on the physical and legal links of control which may not be permanent. Here, the pivotal issue is the degree of control and how it should be implemented. This implies a question about the exact nature of the relationship between control and jurisdiction. What kind of control triggers jurisdiction and state responsibility? Is it all types? Moreover, control over what? No answer remains. Despite these remaining ambiguities, the cases described provide some basis for invoking the extraterritorial responsibility of home states.

3. Jurisdiction based on Decisive Influence Standards

In addition to effective control, extraterritorial human rights obligations can also be based on looser criteria – namely, the decisive

⁵¹ *McCann and Other Judgements*, 27 Sept. 1995, Series, A. No. 324.

⁵² European Court of Human Rights, *Xhavara and Others V. Italy and Albania*, Application No. 39473/98, 2001, Decision.

⁵³ European Court of Human Rights, *Öcalan V. Turkey*, Application no. 46221/99, 2005, Judgment, paras. 16, 90 - 99.

influence standard. One interesting related case is *Ilascu and others v. Moldova and Russia*, before the European Court of Human Rights. In this case, the Court had to determine whether detainees in the breakaway region of Transnistria, Moldova lay within the jurisdiction of Russia, by virtue of Russia's support for rebel forces there, yet, conversely, had to determine whether the detainees could fall within the jurisdiction of Moldova. Here, the Court stated that the fact of Moldova's loss of effective control over the separatist regime did not discharge the country from its positive obligations to take all diplomatic, economic, judicial or other measures in its power to secure release of the applicants.⁵⁴ In other words, the reduction of the actual power to act did not discharge its positive obligations. However, since the Moldavian Republic of Transnistria (MRT) forces were under the 'effective control, or at the very least decisive influence' of Russia, as the forces survived 'by virtue of the military, economic, financial, and political support' given by that country,⁵⁵ the ECtHR found that Russia was responsible for harm caused by authorities to the applicants in the breakaway region of the MRT.⁵⁶ The Court also attributed responsibility to Russia for not having taken foreseeable action to prevent the abuses in question.⁵⁷

Applying the *Ilascu* reasoning of decisive influence, one can argue that home states are responsible for MNC operating abroad, provided that it gives them economic, financial, or political support.⁵⁸ Narula

⁵⁴ Heijer, Maarten den and Lawson, Rick, "Transnational Human Rights and the Concept of 'Jurisdiction'," *ESF Exploratory Workshop on Transnational Human Rights Obligation in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008).

⁵⁵ European Court of Human Rights, *Ilascu V. Russia & Moldova*, Appl. 48787/99, 2004, para. 392.

⁵⁶ The Russia refused of exercising control over MRT as it had only a peacekeeping mission (military deployment) to preserve peace and stability in the region and its presence is approved by Moldova. *Ibid.*, paras. 356, 357, 393 & 441.

⁵⁷ *Ibid*; Narula, Smita, "The Jurisdictional Scope of the International Covenant on Economic, Social, and Cultural Rights," *ESF Exploratory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg, Netherland: 2008), p. 23.

⁵⁸ Narula, Smita, "The Jurisdictional Scope of the International Covenant on Economic, Social, and Cultural Rights," *ESF Exploratory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg, Netherland: 2008), p. 24.

lists several other possible influences by the home state, including the negotiation, drafting, ratification and enforcement of various bilateral or multilateral investment treaties on the legal rights of MNC, as well as government guarantee or insurance for various risky projects.⁵⁹ The government's supportive role is also apparent when acting as a loan guarantor for MNC before international financial institutions, providing diplomatic immunity, and representing them at international dispute settlements. It is clear that in many cases, home state support is vital to an MNC's survival in the host country.

4. Jurisdiction based on the capacity to influence

Another 'loose' criterion for establishing state's responsibility is provided in the 2007 Genocide case, under the category of due diligence standards:

The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result - averting the commission of genocide - which the efforts of only one State were insufficient to produce.⁶⁰

To apply this case to the current issue under discussion, the home state should have the capacity to effectively influence actions of MNC that are

⁵⁹ Ibid., pp. 23 & 24.

⁶⁰ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 430.

likely to commit human rights violations. The determination of capacity to influence is conducted deductively depending on the geographical proximity of the state concerned, relevant events, and the strength of political and other bonds. Here, the principle of reasonableness, which is commonly applied in the US in the context of antitrust law, in section 403 (2) of the Restatement (third) of the Foreign Relations Law of the United States, applies when determining the strongest connection.⁶¹ If the event has taken place far from the home state's territory, the exercise of jurisdiction will be considered unreasonable.⁶² This does not mean that human rights violations occurring in other countries will not trigger home state responsibility, but rather, that this determination is based on the location of the MNC's action or omission. One way of filling the legal gap resulting from geographical distance is through a parent company, which resides in the home country and has subsidiaries in other countries. Through territorial jurisdiction exercised over the parent company, the home state may exercise *de facto* 'control' or 'influence' over foreign subsidiaries whose conduct in some respect depends on the parent company's corporate decisions. Consequently, the home country is capable of extending the material reach of their influence over foreign activities of MNCs.⁶³ In this case, the parameters for determining home state responsibility become intertwined with those determining the responsibility of home corporations,⁶⁴ due to the economic-legal medium of corporate management. Then, in order to avoid state responsibility, home states should prevent violations from occurring or, if such violation occurs, it should hold the MNC accountable.

⁶¹ *Restatement of the Third Law: The Foreign Relations Law of the United States* Restatement of the Law, ed. The American Law Institute, vol. 1 (St Paul, American Law Institute Publishers, 1986), section 403 (2).

⁶² Ryngaert, Cedric, "Discussion Paper " *ESF Explanatory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008).

⁶³ Francioni, Francesco, "Exporting Environment Hazard through Multinational Enterprise: Can a State of Origin Be Held Responsible?," *International Responsibility for Environmental Harm*, eds. Francesco Francioni and Tullio Scovazzi (London: Graham & Trotman, 1991), p. 284.

⁶⁴ Ryngaert, Cedric, "Discussion Paper " *ESF Explanatory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008).

Apart from geographical proximity, the determination of the capacity to influence should also be based on legal criteria, determined by international law. Here, all connections provided in the doctrine of jurisdiction as permissible,⁶⁵ as well as obligatory connections mentioned earlier, can be applied. The principles of nationality abroad, substantial or intended substantial effect, and universal jurisdiction can be used to assess states' capacity to influence and thus, its international responsibility. In this case, states may be held responsible for violations by MNC, provided that these MNCs carry the home state's nationality, the corporation's activity abroad has a substantial effect on home states, or the violation constitutes an international crime with universal jurisdiction. Another scenario, as mentioned earlier, is the application of obligatory connection. Through effective control of MNC, or economically and politically supporting them through loan guarantees, investments and other channels, home states may have the capacity to influence MNC's behaviour. Then, the failure of the former to set proper conditions by which that corporation may receive support, or its failure to redress violations by the entity, can trigger state's responsibility of due diligence. Here, individuals whose ESC rights are violated by MNC abroad also fall under home state jurisdiction.

This capacity of home states to influence may serve as a means of establishing jurisdiction leading to state responsibility, by providing flexible standards for interpreting the meaning of 'jurisdiction' over non-state actors and imposing obligations to home countries; in contrast, the other criteria discussed above cannot. The difficulty arises in establishing the necessary connection and applying the principle of reasonableness, which requires close relationships between the states, individuals or activities to be regulated.⁶⁶ If that link between the state and the entity/activity is strong, and if other states' sovereign interests are not intruded upon, bringing an individual or entity under a certain state responsibility is reasonable.⁶⁷ This also implies that despite the

⁶⁵ Ibid.

⁶⁶ *Restatement of the Third Law: The Foreign Relations Law of the United States* Restatement of the Law, ed. The American Law Institute, vol. 1 (St Paul, American Law Institute Publishers, 1986), section 403 (2).

⁶⁷ Ryngaert, Cedric, "Discussion Paper" *ESF Explanatory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social, and Cultural Rights* (Tilburg: 2008).

strong linkage between individuals and their home state, the latter should not be obliged to protect individual human rights if this would violate the principle of non-intervention. Here, sovereignty limits the practice of jurisdiction.

This construction does not mean that a state is not entitled to regulate and protect individuals in other countries; only that it is not obliged to do so.⁶⁸ Here, the concept of jurisdiction is perceived as a continuum.⁶⁹ On one side, states are obliged under human rights treaties to protect individuals under their jurisdiction, if a link exists between the individual and that state. At the other extreme, states cannot protect individuals not falling under its jurisdiction, if the aforementioned connection is weak, or other states have an overriding interest.⁷⁰

B. THE CONCEPT OF INTERNATIONAL ASSISTANCE AND COOPERATION

In the context of economy, social, and cultural rights, Articles 2 (1), 11, 15, 22, and 23 of the ICESCR concerning international assistance and cooperation represent examples of how the extraterritorial obligation to protect can be created. But, what is meant by international assistance or cooperation? Who should give assistance? The ICESCR in its General Comments no. 14, 15, 17, and 18, clearly states that ‘states parties and other actors are in a position to assist’, should provide ‘international assistance and cooperation, especially economic and technical which enable developing countries to fulfil their core obligations.’ Here, the ICESCR is clearly distinguishing obligations to assist that rest on developed countries or any entities having the capacity to assist others; as a consequence, developing countries that are unable to fulfil their obligations under the Covenant should seek assistance, and use it to comply with the core content of the rights.⁷¹

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ See further discussion on obligation of assistance recipient in meeting the conditions imposed to receive such assistance in Sepúlveda, Magdalena, “Obligations of ‘International Assistance and Cooperation’ in an Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights,” *Netherlands Quarterly of Human Rights* 24.2 (2006), p. 291.

The CESCR does not specifically elaborate which fields can receive assistance, and the type of assistance that can be given. This depends on the particular needs of the recipient, and the state of cooperation between that recipient and assistant provider. However, several General Comments highlight the importance of financial, technical, relief and emergency assistance fulfilling ESC rights such as health,⁷² water,⁷³ and food,⁷⁴ as well as the prohibition of embargo or similar measures that could negatively affect enjoyment of ESC rights.⁷⁵ Moreover, the use of legal and political assistance to influence third parties to respect these rights is allowed, as long as this is in accordance with the Charter of the United Nations and applicable law.⁷⁶ This implies that the meaning of international assistance or cooperation includes regulatory frameworks, or any legal assistance. Cooperation and assistance may be exercised on a collective as well as individual basis through international or regional organisations, as well as bilaterally.

In short, the duty to cooperate is a general duty which incorporates other layers of obligation, and in fact, serves as the basis for applying extraterritorial obligations. This cooperation may take a direct form, or indirectly by not objecting to extraterritorial measures by other states. With respect to extraterritorial regulation of corporate human rights responsibility, home state regulation and adjudication of corporate human rights responsibility should be viewed in terms of such

⁷² Committee on Economic, Social, and Cultural Rights, *General Comment 14, the Right to the Highest Attainable Standard of Health*, Twenty-second session, 2000 sess., U.N. Doc. E/C.12/2000/4, 2000.

⁷³ Committee on Economic, Social, and Cultural Rights, *General Comment 15, the Right to Water*, Twenty-ninth Session, 2003 sess., U.N. Doc. E/C.12/2002/11, 2002, para. 34.

⁷⁴ Committee on Economic, Social, and Cultural Rights, *General Comment 12, Right to Adequate Food*, Twentieth session, 1999 sess., U.N. Doc. E/C.12/1999/5, 1999, para. 36.

⁷⁵ *Ibid.*, para. 37; Committee on Economic, Social, and Cultural Rights, *General Comment 15, the Right to Water*, Twenty-ninth Session, 2003 sess., U.N. Doc. E/C.12/2002/11, 2002, para. 32.

⁷⁶ Committee on Economic, Social, and Cultural Rights, *General Comment 14, the Right to the Highest Attainable Standard of Health*, Twenty-second session, 2000 sess., U.N. Doc. E/C.12/2000/4, 2000, para. 39; Committee on Economic, Social, and Cultural Rights, *General Comment 15, the Right to Water*, Twenty-ninth Session, 2003 sess., U.N. Doc. E/C.12/2002/11, 2002, para. 39.

cooperation. In this respect, home state regulation can be considered a part of human rights obligation.

V. SOME LIMITATIONS

Although the extraterritorial regulation was justified, some limitations should be applied.

A. EXTRATERRITORIAL REGULATION VERSUS PRINCIPLE OF NON-INTERFERENCE

As mentioned, the principle of non-intervention delimits the application of extraterritorial obligations. In international law, this important principle is simply defined as the prohibition against the use of political, economic, and other coercive means, by a state or group of states, for any reason, to either directly or indirectly force another state to behave in a certain way, where that state enjoys autonomy and freedom.⁷⁷ This principle is embodied in various international instruments and jurisprudence, as well as established and substantial state practice, indicating the existence of *opinio juris* of states.⁷⁸ It is also important to note that non-intervention emphasizes the competition between the various interests of states.

The development of human rights under international law since 1945 has challenged this non-intervention doctrine. A closer examination of the relationship between the two priorities reveals two different purposes. The field of human rights developed to protect the interest

⁷⁷ Franz Xaver Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (The Hague: Kluwer Law International, 2000), p. 150; Jr Charles W. Kegley, Gregory A. Raymond and Margaret G. Hermann, "The Rise and Fall of the Nonintervention Norm: Some Correlates and Potential Consequences," *Fletcher Forum World Affairs* 22 (1998).

⁷⁸ Article 8 of the 1933 Montevideo Convention on the Rights and Duties of States, Article 15 of the 1948 Charter of the Organization of American States, Article 8 of the 1945 Charter of the League of Arab States, and Article 3 of the 1963 Charter of the Organization of African Unity, Article 32 of the Charter of Economic Rights and Duties of States, General Assembly Resolution 2131 (XX) 1965 on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, the General Assembly Resolution 2131 para 1, the Final Act of the Conference on Security and Co-operation.

of individuals and groups, while non-intervention developed to protect states from involvement by other states in their affairs. However, what if the state interest fails to coincide with the individual interest; where does one concept end and the other begin? States, with an interest in attracting investors, may provide privileges and protection to business actors at the expense of individuals, or refuse to provide extraterritorial protection when the absence of ratification frees the home country from extraterritorial obligation. As a result, there is the risk of individual interests being overridden by state interests. If such a situation arises, can human rights clauses be used as justification to override the principle of non-intervention?

There are two ways of approaching this issue: by stressing the dichotomy between internal and international jurisdiction; and through deeper understanding of the notion of non-intervention. As state practices change, so do these two elements.

The example can be found in the context of humanitarian intervention. The right to intervene for humanitarian purposes has been reformulated in the context of ‘responsibility to protect’, where the intervention is no longer perceived as a right but rather an obligation of states, when other states are unwilling and unable to protect their own citizens from avoidable catastrophes - including the violation of human rights. In this case, the protection of the victim may be seen as an overriding justification that trumps the principle of non-intervention. This does not mean that any case involving violations or threats to human rights automatically leads to the ‘obligation to intervene’; only that such an obligation, based on the scale of need, be invoked as a last resort when the concerned state fails to protect the victim.⁷⁹ It should be construed in the broad and positive sense interpreted by the International Commission on Intervention and State Sovereignty.⁸⁰

While this interpretation of intervention has been used in a military context for humanitarian intervention, it is questioned whether state practice supports this argument in a non-military, extraterritorial, regulatory framework. Some proposals have been made to include

⁷⁹ *The Responsibility to Protect*, (The International Commission on Intervention and State Sovereignty, December 2001), p. vii.

⁸⁰ *Ibid.*

human rights protection as one criterion to be used in balancing state interest. The classical example is crimes against humanity or other international crimes in which there is universal jurisdiction, where all states have interest and are obliged to prevent such crimes and prosecute the perpetrator. Another such attempt has been made regarding sex tourism. The UK government, for example, proposes various factors to be used in balancing the state interest and the victim's need, such as the seriousness of offence, degree of danger, vulnerability of victims, existence of international obligations, form of violence, and the reputation of the UK before international community. The G8 has articulated a similar proposal regarding sex tourism, whereby in order to combat child exploitation effectively, extraterritorial jurisdiction by the home country over foreign costumers should be allowed. The reasoning behind such a policy is premised on the inability or unwillingness of the destination country to deal with sex tourism and the mobility of foreign customers.⁸¹ While such proposals are usually based on the nationality principle, the protection of victims has also been a consideration in cases of potential conflict of interests between states. No objections have been raised.

Meanwhile, several draft regulations providing for the extraterritorial regulation of MNC abroad have been issued by several countries, such as the US Draft Corporate Code of Conduct Act 2000, Australian Draft Corporate Code of Conduct Bill 2000, and UK 2003 Corporate Responsibility Bill; however, since none of these passed, there is no way of testing their challenge to the non-intervention principle. Interestingly, one of the considerations for the failure of the Australian Code in 2000 was not due to the possible objection of the host country, but rather the fear that the home state's extraterritorial regulation would be perceived by other countries – especially developing ones – as

⁸¹ Because many destination countries lack the resources to investigate and prosecute all reports of child exploitation, including by foreigners who may well have left their country before the abuse is even reported, or do not have legislation concerning child exploitation, the extraterritorial reach of these laws prevents destination countries from becoming zones where those who sexually exploit children can act with impunity. See: *G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes against Children*, (18 April 2007).

‘arrogant, patronising, paternalistic and racist.’⁸² This highlights how sovereignty can be a sensitive question for both home and host states.

To conclude, redefining the concept of sovereignty to include human rights protection has opened the door to an expansive understanding of extraterritorial jurisdiction. Theoretically, the principle of non-intervention can be violated if the foreign state has an overriding interest pursued on the basis of human rights. Still, this practice is in embryonic form, and needs to be developed further.

B. ARE HUMAN RIGHTS A DOMESTIC OR INTERNATIONAL ISSUE?

Are human rights as applied to corporate responsibility, a domestic matter? Many states have argued that social affairs, human rights, and the environment are domestic in nature. The US Restatement clearly defines industrial and labour relations, health and safety practices, or conduct related to the preservation or control of the local environment to conclusively fall under the discretion of each country; therefore, any extraterritorial regulation of such issues is not permissible.⁸³ The basis for this conclusion is not only conceptual but practical; such issues are highly dependent on local circumstances, and thus, diversity should be maintained.⁸⁴ However, the inclusions of human rights in the United Nations Charter that are binding upon all members, and the establishment of *jus cogens* as well as treaties, customs and other means of international obligation, demonstrate that the human rights are no longer exclusively domestic. Moreover, the existence of an international human rights monitoring system to deal with breaches of international law serves as further evidence that human rights no longer fall only under domestic jurisdiction. Today, states cannot claim domestic jurisdiction to justify the violation of human rights; how states

⁸² *Report on the Corporate Code of Conduct Bill 2000*, (Parliamentary Joint Statutory Committee on Corporations and Securities, the Parliament of the Commonwealth of Australia, June 2001), p. 45.

⁸³ American Law Institute, *Restatement of the Law, Third, Foreign Relation*, 1987, 213.

⁸⁴ Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006), pp. 136 - 137; Thierry Berthet, Philippe Cuntigh and Christophe Guitton, “Employment Policy and Territories,” *Training & Employment* 46 Jan-Mar (2000).

treat their own citizens is no longer perceived as their own business. This is not to say that the international arena is always the best context for addressing these matters, but simply to point to how much the scope of domestic jurisdiction has diminished as international law continues to develop in this area.⁸⁵ If the line drawn for human rights represents that marking the permissible intervention in states,⁸⁶ this line is not fixed, but varies both temporally and geographically depending on other developments in international relations.

This shift in thought from a domestic to an international paradigm has implications for the current discussion. While many business issues are still domestic concerns, many others have gained international attention. This is due to the interdependent and transnational nature of MNC, and the complicating factor of the relationship between home and host country, as well as a general increase in the attention focused worldwide on human rights issue. This, in turn, has complicated the field of corporate human rights responsibility as it applies to both domestic and international arenas.

VI. CONCLUSION

In the context of regulatory framework, the regulation of MNC is actually far less extraterritorial in nature than the term suggests. Principally, such regulation affects only the corporation which is incorporated or has central management within the territory of a state, but operates abroad through its corporate branches. In this case, the closeness of contact is mostly a function of two factors: the nationality principle, and managerial control. Extraterritorial regulation by one state with respect to the activity of a corporate parent, subsidiary or other member of a multinational, is enforced directly toward members of the group established in the territory of the regulating state, which may be considered to have the 'nationality' of that state.⁸⁷ This signifies

⁸⁵ Dominic McGoldrick, "The Principle of Non-Intervention: Human Rights," *The United Nations and the Principles of International Law: Essays in Memory of Micael Akehurst*, eds. Vaughan Lowe and Colin Warbrick (Routledge, 1994), p. 86.

⁸⁶ *Ibid.*, pp. 86 & 87.

⁸⁷ Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford: Clarendon Press, 1996), p. 106.

that the regulation is a national one, and therefore meets the minimum contact requirement.

However, the national regulation of a multinational enterprise may be multinational in effect; extraterritorially, therefore, state are required to consider the potential or actual effect of their exercise of jurisdiction on other states.⁸⁸ For example, if home state legislation imposed a specific labour or environmental standard which differed from the environmental standard imposed in the host state (and for which there is no existing international standard), a conflict may exist between the home state and host state law. Nevertheless, not all apparent conflicts are really conflicts. The general rule is that a conflict exists where compliance with the law of one forum results in a violation of the law of another. In other words, there is a conflict if it is impossible to comply with both laws at the same time. Thus, the general rule is to try to balance state interests. Here, it is proposed that human rights argument be brought into play. The question is no longer the one of which state interest deserves protection, but rather, whether a need exists for human rights protection. Therefore, initiatives designed to give effect to established principles of human rights should not automatically be regarded as interference, even where an initiative has gone beyond that which is strictly necessary to give effect to human rights. As pointed out, this extraterritorial regulation would not usually be considered 'unjustified' where a significant degree of international consensus exists on an issue.

Moreover, the divisions between domestic and international affairs, competing of state and individual interests against the background of emerging human rights protection, and the variety of legal techniques for exerting pressure, signify changes in the principle of non-intervention, whose direction will be determined by state practice. The boundary between national and international affairs has not been bridged or erased, but circumvented. Such a distinction may thus no longer be necessary or helpful, since it becomes a potential source of confusion. To conclude, it is argued here that in the context of jurisdiction, extraterritorial regulation is not about the right of a State to govern its own interest within its jurisdiction and/or other jurisdiction but it is also about obligation to State to do so in the context of human rights.

⁸⁸ Ibid.

REFERENCES

Books & Book Chapters

- Aldrich, George H., *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996)
- Brownlie, Ian, *Principles of Public International Law*, Fourth ed. (Oxford, Clarendon Express, 1990)
- Clapham, Andrew, "Rights and Responsibility : A Legal Perspective," *From Rights to Responsibilities: Rethinking Intervention for Humanitarian Purposes*, eds. O. Jutersonke and K. Krause, vol. PSIS Special Study 7 (Geneva: Programme for Strategic and International Security Studies, 2006)
- Francioni, Francesco, "Exporting Environment Hazard through Multinational Enterprise: Can a State of Origin Be Held Responsible?," *International Responsibility for Environmental Harm*, eds. Francesco Francioni and Tullio Scovazzi (London: Graham & Trotman, 1991)
- International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, fifty-eight session sess., UN GA A/61/10, 2006
- Lawson, Rick A., "The Concept of Jurisdiction in the European Convention on Human Rights," *Globalisation and Jurisdiction*, eds. Piet jan Slot and Mielle Bulterman (Leiden: Kluwer Law International, 2004)
- Lowe, Vaughan, "Jurisdiction," *International Law*, ed. Malcolm D. Evans, Second ed. (Oxford: Oxford University Press, 2006)
- Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Seventh Revised ed. (London, Rautledge, 1997)
- Nigh, Douglas, "Who's on First? Nation-States, National Identity and Multinational Corporations," *International Business: Institutions and the Dissemination of Knowledge*, eds. Brian Toyne and Douglas William Nigh (South Carolina: University of South Carolina Press, 1999)
- Rammeloo, Stephann, *Corporation in Private International Law; a European Perspective* (Oxford, Oxford University Press, 2001)
- Skogly, Sigrun I., *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen, Intersentia, 2006)
- Waagstein, Patricia Rinwigati, *Corporate Human Rights Responsibility: Continuous Search for A Regulatory Framework* (Uppsala: Uppsala University, 2009)
- Wallace, Cynthia Day, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague, Martinus Nijhoff Publisher, 2002)

Journal, Index, Periodic

- Kokkini-Iatridou, D. and Waart, P.J.I.M de, "Foreign Investment in Developing Countries - Legal Personality of Multinational Corporations in International Law," *Netherland Yearbook of International Law* 14 (1993)
- Restatement of the Third Law: The Foreign Relations Law of the United States* Restatement of the Law, ed. The American Law Institute, vol. 1 (St Paul, American Law Institute Publishers, 1986), Section 213 on Nationality of Corporation.

Law, Regulations, Instruments

- Committee on Economic, Social, and Cultural Rights, *General Comment 14, the Right*

to the Highest Attainable Standard of Health, Twenty-second session, 2000 sess., U.N. Doc. E/C.12/2000/4, 2000.

Committee on Economic, Social, and Cultural Rights, *General Comment 15, the Right to Water*, Twenty-ninth Session, 2003 sess., U.N. Doc. E/C.12/2002/11, 2002, para. 34.

Committee on Economic, Social, and Cultural Rights, *General Comment 12, Right to Adequate Food*, Twentieth session, 1999 sess., U.N. Doc. E/C.12/1999/5, 1999, para. 36. *The Maastricht Guidelines on Violation of Economic, Social, and Cultural Rights*, 1997

United Nations High Commissioner for Human Rights, *Report of the United Nation High Commissioner for Human Rights on the Sectoral Consultation Entitled 'Human Rights and the Extractive Industry'*, pt. E/CN.4/2006/92, U.N.Doc.E/CN.4/2006/92, 19 December 2005

Cases

European Court of Human Rights, *Cyprus V. Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001

European Court of Human Rights, *Bankovic A.O. V. Belgium and 16 Other Contracting States*, Appl. no. 52207/99; adc.dec., judgment of 12 December 2001

European Court of Human Rights *Saddam Hussein V. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine, and the United Kingdom*, Fourth Section Decision as to the Admissibility of Application no. 23276/04 on 14 March 2006

European Court of Human Rights, *Markovic and Others V. Italy*, Application No. 1398/03, judgment on 14 December 2006

European Court of Human Rights, *Bankovic A.O. V. Belgium and 16 Other Contracting States*, Appl. no. 52207/99; adc.dec., judgment of 12 December 2001

European Court of Human Rights, *Khavara and Others V. Italy and Albania*, Application No. 39473/98, 2001

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 430.

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, Reports of Judgment, Advisory Opinion and Order of 9 July 2004

International Court of Justice, *The Barcelona Traction, Light, and Power Company, Limited (Belgium V. Spain)*, Judgment, 1962, I.C.J. Report 19.

International Court of Justice *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*

Human Rights Committee, *Consideration of Resports Submitted by States Parties under Article 40 of the Covenant; Concluding Observation of the Human Rights Committee, Israel*, Seventy-eight sess., CCPR/CO/78/ISR, 21 August 2003

Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, 1923*, PCIJ, Ser. B., No. 4.