Regulatory obligations in a complex world: States' extraterritorial obligations related to business and human rights

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1 Introduction

The discourse on business and human rights has developed over the past two to three decades with changing emphases: from no link between the two at all, through the concepts of corporate social responsibility with voluntary standards and processes, to calls for direct responsibility for human rights violations by businesses themselves, and states' obligations to protect individuals from infringement by private entities such as corporations. Throughout these debates, there are a number of recurring themes in terms of the role of the state and their obligations. The traditional human rights approaches negate a direct role of business in human rights violations, as per definition, as only states are obligation holders. Furthermore, this tradition also focuses on a one-dimensional approach to human rights obligations where the *domestic* state is the only possible human rights obligations holder within its territory. Consequently, this tradition has hampered a more nuanced approach to obligations in a complex, globalised world.

In recent years, there has been increased debate about the limitations of this one-dimensional approach to human rights obligations, and it should be emphasised that this debate has not come about as a result of the 2014 UN Human Rights Council's resolution to start the drafting process of a legally binding international treaty on business and human rights.[1] Over the past few decades, human rights lawyers, practitioners, international institutions and non-governmental organisations (NGOs)

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[1] Human Rights Council, A/HRC/RES/26/9 (25 June 2014).

have repeatedly argued for more diverse approaches to human rights obligations, and the time may now have come to find ways to address this through binding international law provisions.

This diverse attention to the content of human rights obligations has addressed several different aspects, such as whether non-state actors may have human rights obligations, and how this relates to state obligations; whether human rights obligations are exclusive to one state at the time, or whether they can be combined in some concept of shared or joint obligations with other actors (including other states); whether state obligations are restricted to its domestic territory or they go beyond this geographical sphere; and finally whether states can be complicit in human rights violations committed by other states or other non-state actors.

Amongst these varied approaches to the subjects and the content of obligations, a strong and growing recognition that human rights obligations are not necessarily confined to a state's territory has emerged.[2] This work has challenged the notion of territorial confinement of obligations, and is commonly labelled as extraterritorial human rights obligations.[3] A major milestone in this work was the adoption of the Maastricht Principles on States' Extraterritorial Obligations in the Area of Economic, Social and

[2] There is a rapidly growing literature in this field, but some of the central contributions can be mentioned: M, Gibney; K. Tomasevski; J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights", (1999) 12 *Harvard Human Rights Journal* 267; Coomans, F and M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties*, (Antwerp, Intersentia, 2004); Skogly, Sigrun I., *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, (Antwerp, Intersentia, 2006) Wilde, Ralph, Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, (2005) 26 *Michigan Journal of International Law*, 739; Salomon, M. *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007); McCorquodale, R. and P. Simons "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 40 *Modern Law Review*, 598, M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2009); M. Gibney and S. Skogly (eds.) *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010); M. Langford; W. Vandenhole; M. Scheinin, and W. van Genugten *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013).

[3] For a critical analysis of the terminology used in debates regarding extraterritorial human rights obligations, see M. Gibney 'On Terminology: Extraterritorial Obligations", in Langford et.al, *Global Justice*, n 2.

Cultural Rights (Maastricht Principles) in September 2011.[4] However, while the concept of extraterritorial obligations (ETOs) is gaining increasing interest and acceptance in regional human rights courts[5] and the UN human rights mechanisms,[6] the general recognition of such human rights obligations among states is still missing. In other areas of international law, the right and obligation to regulate the conduct of agents of the state (and also private actors), when they act extraterritorially is often recognised. For example, according to Section 72 of the Sexual Offences Act (2003), the United Kingdom makes it a criminal offence to engage in sexual activity with a person under the age of 16 within and outside the borders of England, Wales and Northern Ireland.[7] Furthermore, in compliance with the United Nations Convention for the Suppression of Financing of Terrorism, many countries have passed legislation to enable a pursuit of individuals and institutions that fund terrorism. For instance, the United States has,

> in conjunction with other initiatives, enacted a substantial body of post 9/11 laws and regulations that define new crimes, create new civil causes of action, expand the jurisdictional reach of U.S. laws, and enhance the authority of U.S. prosecutors to target, investigate, and prosecute domestic and foreign individuals, financial institutions, and other entities.[8]

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[4] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* adopted by a group of experts meeting in Maastricht in September 201. http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23. (last accessed 4 August 2016). The relevance of these Principles will be discussed in detail below.

[5] There is a rapidly growing body of case-law that concerns extraterritorial obligations in regional human rights courts. Some of the key cases are: *Georgia* v. *Russian Federation* [2008] ICJ 140; *Loizidou* v. *Turkey* [1995] ECHR 10; *Bankovic and others* v. *Belgium and others* [2001] ECHR 890; Case 9903 *Rafael Ferrer-Mazorra et al.* v. *United States* [2001] IACHR 51/01; *Al-Skeini and Others* v. *The United Kingdom*, Application no. 55721/07 [2011] ECHR 1093 (7 July 2011); *Armando Alejandre Jr. and Others* v. *Cuba ("Brothers to the Rescue")*Inter-American Commission of Human Rights, report No. 86/99, case no. 11.589, 29 September 1999

[6] The Global Initiative for Economic, Social and Cultural Rights *Working Paper Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations Concluding Observations General Comments and Recommendations Special Procedures UPR Recommendations November 2015.* Available at: http://globalinitiative-escr.org/wp-content/uploads/2015/11/151027-Human-Rights-Law-Sources-ETOs.pdf (last accessed 15 July 2016).

[7] Section 72 of the Sexual Offences Act (England and Wales (2003), http://www.legislation.gov.uk/ukpga/2003/42/pdfs/ukpga_20030042_en.pdf (last accessed 8 August 2016).

[8] A. Lakatos and J. Blöchliger 'The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws', GesKR 3 (2009), *www.swlegal.ch/CMSPages/GetFile.aspx?disposition=attachment&guid...d91e*... (last accessed 8 August 2016)

Similarly, in environmental law, it is now generally accepted that the obligation to cause 'no-harm' in territories of another state has gained the status of customary international law and that states consequently need to ensure that activities within their territories do not have damaging effect outside their borders.[9]

Consequently, the application of extraterritorial obligations within the sphere of human rights law is nothing new in international law, but rather an extension of practices currently being undertaken in other areas.

Following the Human Rights Council's resolution to start the work on the drafting of a potential treaty on business and human rights, the debates on the content and subjects of obligations have moved one step forward, and international human rights lawyers now find themselves in a situation where they have to respond to the challenges to the traditional approach to human rights obligations, and accept that the world has changed rapidly since the drafting of the international covenants on human rights in the 1950s and 60s. But this is not only a challenge; it is also an opportunity to move international human rights law forward. Many human rights lawyers have been frustrated by the narrow approach in traditional human rights law, and there has been a concern that developments in the international community and international relations are changing the reality within which human rights are being enjoyed or violated, and without changes to our understanding of obligations, human rights law may become less relevant for the victims of human rights. In her important contribution to the human rights obligations discourse, Margot Salomon argues that 'the proper regulation of non-state actors, notably transnational corporations (TNCs), […] requires revisiting international standards and mechanisms to ensure that their activities are consistent with human rights',[10] and that doing so is necessary 'if human rights law is to remain relevant'.[11]

[9] M. Jervan, 'The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm' Rule', (2014) PluriCourts Research Paper No. 14-17, http://ssrn.com/abstract=2486421 (last accessed 8 August 2016)
[10] Salomon, *Global Responsibility*, n 2, p. 11
[11] *Ibid.*, p.12

Regarding business and human rights, and in particular about the role of the TNCs 'home' state,[12] there has been much debate as to the current state of obligations. Those supporting a broader approach to human rights obligations reflecting the globalised world in the twenty-first century argue that current international human rights law already contain existing ETOs in this field.[13] However, others have firmly argued that 'at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.[14] The opportunity now being presented to the international community is not only to deal with the direct responsibility of businesses with regard to international human rights standards, but equally to clarify the role of the state as an obligation holder when regulating business activities within and beyond their borders.

In this chapter, I will address the new initiative of negotiating a binding treaty on business and human rights from the perspective of states' ETOs. I will start in Part 2 with a consideration as to why states' ETOs are relevant for the treaty initiative, and how they manifest themselves in relationship to business or corporations. Part 3 will then address where the debate on ETOs stands today and some of the major oppositions to such state obligations in the sphere of human rights. The chapter will explore in Part 4 the content of the obligation to regulate extraterritorially, and then deal with some of the difficulties that may be encountered when attempting to get acceptance for the obligation to regulate.

2 Why State Regulation of Transnational Corporations?

[12] The term 'home state' will be used to indicate the state where the TNC 'or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities;" (Text taken from Maastricht Principles, n 4, Principle 25).

[13] See for instance Maastricht Principles, Principles 24 which states: "All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights."

[14] *Guiding Principles on Business and Human Rights* (UNGP), endorsed by the UN Human Rights Council, Res. 17/4, 16 June 2011.
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; quote from page 3-4.

In June 2014, the Human Rights Council adopted two resolutions concerning business and human rights: Resolution 26/9 established an open-ended intergovernmental working group to negotiate a legally binding international instrument on business and human rights, while Resolution 26/22 extended the mandate of the Working Group on Business and Human Rights. However, neither of these resolutions refers to ETOs of states to regulate the conduct of business outside their borders. It is worth noting though the preamble to Resolution 26/9 emphasised that '…. *the obligations and primary responsibility* to promote and protect human rights and fundamental freedoms *lie with the State,* and that States must protect against human rights abuse *within their territory and/or jurisdiction by third parties,* including transnational corporations'.[15] Furthermore, the Preamble to Resolution 26/22 confirmed that:

> *policies and proper regulation*, including through national legislation, of transnational corporations and other business enterprises and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms.[16]

What these two quotes show is the recognition that states have obligations to promote human rights and protect against violations by third parties, within their territory and/or jurisdiction, and that one way in which this can be done is through proper regulation. It is clear that Resolution 26/9 confirms that the concepts of 'territory' and 'jurisdiction' are not considered synonymous or necessarily to be fully overlapping. This is essential in a discussion on ETOs. Resolution 26/22 confirms the role of regulation to address the human rights impacts of TNCs activities.

However, why do we need regulation beyond borders and compliance with ETOs in this context? The International Chamber of Commerce has rightly pointed out that 'a "fundamental problem" in establishing accountability for corporate abuses is the state's

[15] Emphasis added
[16] Emphasis added

failure to meet obligations under current international human rights law, and lack of enforcement of domestic laws.'[17] The sentiment in this quote is true: if all states managed to meet their obligations under current international human rights law, we would not be discussing this issue at all. In other words, international human rights law requires states to regulate the conduct of public and private entities within their territory to the extent that all human rights for all individuals are protected. This is the essence of the obligation to protect, which is generally accepted in the human rights community.[18] However, the reality is that many states are unwilling or unable to implement the standards to which they have agreed by ratifying international human rights treaties. Those unable tend to be the states that struggle with lack of resources to carry out the implementation; those unwilling are the states that have the opportunity to protect human rights, but fail to do so, either because of domestic structural opposition or because priorities other than human rights take precedence in the domestic political struggle. Yet, while the tripartite classification of obligations (the obligation to protect being the 'middle' one) is now generally accepted in the domestic setting, there is still opposition to this typology of obligations being applied to activities over which states have influence, but which take place outside their territory. Thus, the concept of 'unwillingness' may also extend to states that are home states to TNCs engaging in business practices abroad, but who fail to regulate the conduct of these TNCs for practices which would not be acceptable at home. For instance, the home state of a TNC producing garments regulate against employing children under the age of 16 when they operate within the home state, but the same state tacitly (due to lack of regulation)

[17] Joint IOE-ICC-BIAC Comments on the Draft Guiding Principles (January 26, 2011) quoted in Tuttle, Nicole R. "Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?" (2015) 19 *ASIL insights*, Issue 20, 3 September 2015; https://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate (last accessed 4 August 2016)

[18] Both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights confirm this obligation. The Human Rights Committee's General Comment no. 31 provides that "the positive obligations on States 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." (para. 8) UN Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 May 2004, para. 8. The Committee on Economic, Social and Cultural Rights holds that "The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. […] The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food." UN Committee on Economic, Social and Cultural Rights, *General Comment no. 12 Right to Adequate Food as a Human Right,* E/C.12/1999/5 12 May 1999, para. 15.

accepts that the same company employ 11 year olds abroad. Thus, it is the failure of states to implement the agreed human rights standards that necessitates further attention to regulation of business operations in abroad.

3 Extraterritorial Obligations and Regulation of Business

The question of states' extraterritorial human rights obligations has received considerable attention in recent years, and this reflects a growing practical concern over the effects of activities of states and of actors over which states exercise jurisdiction and/or control outside their own borders. It also reflects a philosophical return to the concept of *universal* human rights, and recognition that such universal human rights are an illusion if obligations are considered to be only territorial.[19] In the words of Mark Gibney, 'Universality means, quite simply, [….] that while states are responsible for the human rights violations they carry out within their own domestic borders, they can also be responsible for violating human rights outside their own borders.'[20] However, while the attention has been growing regarding states' ETOs for their own conduct,[21] and indeed to regulate the conduct of TNCs, no explicit international human rights law exists which imposes direct liability on TNCs for human rights violations.[22] The developments that have come about in the last few years include significant attention to and a growing recognition of extraterritorial human rights obligations on the part of states by academics, NGOs, the regional and UN human rights systems, and also states themselves. [23]

[19] S. Skogly "Extraterritoriality: Universal human rights without universal obligations" In S. Joseph and A. McBeth (eds.) *Research Handbook on International Human Rights Law*. (Cheltenham, Edward Elgar, 2010); Gibney, Mark *International Human Rights Law: Returning to Universal Principles*, 2nd edn. (Lanham, Rowman and Littlefield, 2015) p. 2

[20] Gibney, *Universal Principles*, n 19 , p. 2

[21] While the case-law on extraterritorial obligations of states is growing, most of the cases relate to states' behaviour in other states' territory either through military occupation, military or police activity, or through their own agents. For a review of case-law and this predominance of attention to these kinds of operations, see G. O Cuinn, G and S. Skogly "Understanding Human Rights Obligations of States Engaged in Public Activity Overseas: the Case of Transnational Education", 20 *International Human Rights Journal* 761.

[22] McCorquodale and Simons *Responsibility beyond Borders*, n 2, p. 599.

[23] In Germany and the Netherlands, an Independent Complaint Mechanism has been set up to address environmental, social and related issues arising from business activities by German and Dutch companies requiring them to establish and administer appropriate mechanisms to address project-related complaints

Regional courts, most notably the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights are increasingly hearing cases that relate to states' activities internationally, including control of their agents when acting abroad. These decisions tend to focus on civil and political human rights due to the conventional mandates of these Courts. Furthermore, the Maastricht Principles – which according to the preamble are 'drawn from international law and aim to clarify the content of extraterritorial States' obligations to realise economic, social and cultural rights' – are increasingly being used by international human rights bodies, such as the UN human rights committees and special rapporteurs.[24] While focused on economic, social and cultural rights, the Maastricht Principles emphasise that 'All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially'.[25]

Before moving into the specific discussion as to what states ETOs are or should be in terms of regulation of TNCs, the debate on the existence of extraterritorial human rights obligations should be visited to address some of the concerns of those that are opposed to this idea. These concerns relate to the concepts of sovereignty, jurisdiction and universalism/neo-colonialism.

Sovereignty

The concept of sovereignty is fundamental in international relations and in international law. In its basic content, sovereignty implies political independence and territorial integrity as recognised in Article 2 of the United Nations Charter (UN Charter).[26] In

from affected communities. For further information, see: https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/DEG_Complaints-Mechanism_2014_05.pdf (last accessed 4 August 2016).

[24] For a compilation of references to the Maastricht Principles and extraterritorial obligations by UN institutions, see The Global Initiative for Economic, Social and Cultural Rights *Human Rights Law Sources*, n6.

[25] Maastricht Principles, n 4, Principle 3

[26] Article 2(7) of the UN Charter provides "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or

terms of the functioning of international law, the principle confirms that states are able to freely accept international law obligations through ratification of treaties or tacit acceptance of customary law, and that agreements or membership in international organisations that may reduce a state's sovereignty, shall be entered into on a voluntary basis. However, as the purpose of international law is to regulate the conduct between and among states, the content and functioning of international law will inevitably have an effect on a state's ability to exercise its sovereignty with respect to the substantive content of the treaties entered into and customary law accepted and the obligations contained therein.

International human rights law in its early days following the adoption of the UN Charter challenged traditional notions of sovereignty. States had by that time become accustomed to cooperating with each other through treaties to carry out their international affairs. However, the way in which each state treated its citizens and residents domestically was, before the Second World War, considered to be the sole domain for the domestic authorities. The adoption of the UN Charter, the Universal Declaration on Human Rights and subsequent human rights treaties eroded the full sovereignty in this regard, and it has become accepted that human rights law sets limits for a state's legitimate treatment of its own population. In essence, the way in which states treat their own population is now an issue of legitimate international concern.[27]

The challenge to sovereignty on the basis of ETOs is different though. What is being considered here is the effects on human rights enjoyment of individuals of one state's action or omission within the territory of another state, and arguments are put forward that this may infringe upon the other state's ('host state') sovereignty. If state A regulates the conduct of a corporation (corporation Z) under its jurisdiction when that corporation operates in state B, the concern is that this will infringe upon the sovereignty of state B. The argument is that state B should be able to accept whatever behaviour of

shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

[27] W. M. Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *The American Journal of International Law*, 866 at 869.

corporation Z no matter how it treats its employees for instance, and that this is a consequence of state B's sovereignty. Thus, while it is now generally accepted that the international community (and indeed foreign states) has a legitimate interest in the way in which a state treats its own citizens, requiring certain behaviour by TNCs to ensure that they do not breach international human rights standards when operating in other states is still seen to be a threat to the sovereignty of that foreign state. Writing about ETOs generally, Gibney posits that 'now it is more likely that countries will be able to hide behind the sovereignty of another state in order to remove themselves from any and all responsibility in assisting an outlaw state'.[28] Translated into the topic of concern for this chapter, it would imply that states 'hide behind the sovereignty of another state' in order to remove themselves from any and all responsibility regarding the human rights effect of the actions or omissions by TNCs over which they have regulatory power. States are concerned that by regulating the conduct of private parties (whether individuals or corporations) when they act within the territory of another state, they somehow breach the sovereignty of that state. While a legitimate consideration, the conclusion that states should not regulate the conduct of such actors fails to take into account several aspects of these relationships.

First, the home state of the TNC is not asked to direct the host state as to how to legislate or carry out policies. The home state only deals with the conduct of the entity over which it has regulatory control. Thus, it is the effect of the conduct of the TNC that is in question,[29] rather than the conduct of the host state. Indirectly, it could be seen as a criticism of the host state as such regulation by the home state could be considered to be an implicit criticism of the way the host state fails to control the conduct within their territory.

[28] Gibney, *Universal Principles*, n 19, p. 2

[29] O. D Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, and I. Seiderman "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", (Maastricht Commentary) (2012) *Human Rights Quarterly* 1084. The Maastricht Commentary holds that an 'approach to regulating the conduct of transitional corporations consists of a state imposing on a parent corporation domiciled in that state an obligation to comply with certain norms wherever they operate (i.e., even if they operate in other countries). Or an obligation to impose compliance with such norms on the different entities they control (their subsidiaries, or even in certain cases their business partners)', 1141.

However, this leads to the second point: if the way in which a state treats its own citizens is now a legitimate human rights concern for other states and the international community generally, then it would surely be a legitimate concern for any state to regulate the behaviour of the TNCs under its control, whether it operates within or outside its borders. At the end of the day, the concern is for the welfare and indeed the rights of individuals in that other state – a legitimate concern – and not breaching sovereignty.

Third, in a number of other areas of international law, states accept that treaties and agreements contain significant clauses concerning domestic regulation and conduct. This is clearly the case for international trade agreements, international agreements in the area of the environment, and treaties concerning terrorism. As detailed above,[30] a number of areas of international concern now regularly accept that regulation of conduct by private parties and agents of the state across borders is necessary to comply with international law obligations. Somehow, there seems to be more resistance to introducing international standards regarding human rights regulation into bilateral and multilateral agreements than is the case for other areas of international cooperation.[31]

The question of jurisdiction

In much of the debates on ETOs, attention is given to the concept of jurisdiction. The question of jurisdiction has often produced a 'doctrinal bar' against the acceptance of extraterritorial human rights obligations; while at the same time jurisdiction has on occasion been the catalyst for 'permissive or even prescriptive exercise of extraterritorial conduct'.[32] This discussion has its origins in the questions of sovereignty as indicated above, but also in the wording in some international human rights treaties

[30] See Introduction

[31] Ming Du discusses in an interesting article how the WTO accepts limitations to trade based on 'public morals', when the same is not the case for concerns for human rights. See, M. Du "Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization", (2015) draft article, p. 3; on file with author

[32] Maastricht Commentary, n 29, 1105.

that refer to jurisdiction as one of the qualifications for the reach of obligations. For example, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that 'Each 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 recognized in the present Covenant'; Article 1 of the European Convention on Human Rights prescribes that 'The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention'; and Article 1 of the American Convention on Human Rights provides that 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms'.[33]

We see that in these three significant human rights treaties, the reference to jurisdiction has been used in all of them, while the reference to territory can only be found in the ICCPR. The African Charter on Human and Peoples' Rights does not contain any reference to territory or jurisdiction, and this is also the case for the International Covenant on Economic, Social and Cultural Rights (ICESCR).[34]

It is outside the scope of this chapter to give a thorough account of the debates that have taken place regarding the understanding of jurisdiction related to extraterritorial human rights obligations; this has been thoroughly done elsewhere.[35] However, it should be noted that the ECtHR has dealt with these issues in a number of prominent cases,[36] and this is also the case for the Inter-American Commission and Court on Human Rights,[37]

[33] Emphasis added in all quotes.
[34] It is worth noting that the International Covenant on Economic, Social and Cultural Rights specifically refers to states parties' obligations to 'take steps, individually and through international assistance and co-operation …. to achieving progressively the full realization of the rights recognized in the present Covenant ….'. ICESCR, Article 2(1).
[35] See in particular section II 'Jurisdiction' in Langford, et.al *Global Justice*, n 2.
[36] See *inter alia Georgia* v. *Russian Federation* [2008] ICJ 140; *Loizidou* v. *Turkey* [1995] ECHR 10; *Bankovic and others* v. *Belgium and others* [2001] ECHR 890; *Issa* v. *Turkey* App No 31821/96 [2004] ECHR 629 Case 9903 *Rafael Ferrer-Mazorra et al.* v. *United States* [2001] IACHR 51/01
[37] For instance, Case 9903 *Rafael Ferrer-Mazorra et al.* v. *United States* [2001] IACHR 51/01; *Armando Alejandre Jr. and Others* v. *Cuba ("Brothers to the Rescue")* Inter-American Commission of Human Rights, report No. 86/99, case no. 11.589, 29 September 1999

and the UN Human Rights Committee.[38] Based on this jurisprudence, it is submitted that concepts of 'territory' and 'jurisdiction' are now recognised to be different and not necessarily overlapping. The ECtHR has determined that in exceptional circumstances the reach of the European Convention can go beyond the geographic area covered by the territories of the Contracting States.[39] This is also the case for the other judicial bodies mentioned.[40] The perceived change in the approach to what is covered by jurisdiction is a reflection of the more complex world within which we live, and where states' actions and omissions may have further ramifications outside their territorial borders than what has traditionally been the case in international law. An understanding of jurisdiction that includes control not only over territory but also of persons (natural as well as legal) is now gaining recognition.[41]

Part of the complexity related to jurisdiction that has hampered the acceptance of ETOs is the division between domestic jurisdiction which is compulsory for governments and permissible extraterritorial jurisdiction (e.g., where states may choose to adopt extraterritorial legislation, such as extending criminal responsibility).[42] In terms of the case-law on ETOs, the Courts have generally accepted that, apart from exceptional circumstances, states jurisdiction is mainly territorial: when acting outside their borders

[38] One of the first cases before the UN Human Rights Committee where the territoriality of jurisdiction was rejected was *Lopez Burgos* v. *Uruguay (52/79)* A/36/40, 184

[39] *Bankovic* n5, para 71

[40] In the *Coard case* the Inter-American Commission on human rights held that "under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- "without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Coard et al.* v. *United States*, Case 10.951, Report Nº 109/99, September 29, 1999, Inter-Am.C.H.R; para. 37

[41] In *Al-Skeini* the Court distinguished between 'state agent and control' over persons on the one hand, and 'effective control over an area' on the other. *Al-Skeini and Others* v. *The United Kingdom*, Application no. 55721/07 [2011] ECHR 1093 (7 July 2011); paras 133 and 138 respectively. For a thorough discussion on the changes in approach to jurisdiction through the case-law of the European Court of Human Rights, see O Cuinn and Skogly, *Understanding Human Rights Obligations*, n 21.

[42] Lagoutte, Stéphanie "New Challenges Facing States within the Field of Human Rights and Business", (2015) 33 *Nordic Journal of Human Rights* 176

(either directly or indirectly), they are not within the jurisdiction as defined by the various treaties (this has in particular been the stance taken by the ECtHR), and the Court loses its jurisdiction to hear such cases. The critics of this approach argue that once states actions have effect outside their territory, these actions (or indeed omissions) represent an exercise of the state's jurisdiction. This reflects what Gondek refers to as the 'most common meaning of jurisdiction by states [which] concerns the scope of competence of a state, delimited by international law, to regulate the conduct of physical and legal persons, and to enforce such regulation.'[43]

The Maastricht Principles contain the following definition of the 'scope of jurisdiction' in the context of extraterritorial human rights obligations:

> A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
>
> a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
> b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
> c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially in accordance with international law.[44]

This passage from the Maastricht Principles emphasizes that jurisdiction relates to a state's authority or effective control, where the state's acts or omissions bring about foreseeable effects, and situations where the state may exercise decisive influence.

[43] Gondek, *The Reach of Human Rights in a Globalising World*, n 2, 47. Emphasis in original.
[44] Maastricht Principles, n 4, Principle 9. Please note that the Principles focus on economic, social and cultural rights, hence the reference in the principle.

Referring to the work of the Human Rights Committee in its interpretation of the ICCPR, the commentary to the Maastricht Principles notes:

> For the purpose of defining applicability of the Covenant, the notion of jurisdiction refers to the relationship between the individual and the state in connection with a violation of human rights, wherever it occurred, so that acts of states that take place or produce effects outside of the national territory may be deemed to fall within the jurisdiction of the state concerned.[45]

Thus, practice shows that there is now a far more nuanced approach to jurisdiction than a straight overlap between a state's territory and its jurisdiction. Indeed, in his individual opinion submitted in the *Lopez Burgos v Uruguay* case,[46] Mr Tomuchat held:

> To construe the words 'within its territory' pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. […] Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad.[47]

This observation refers to a state's obligation to its citizens abroad, as this was the focus in the relevant case (a Uruguayan citizen being kidnapped by Uruguayan security forces in Argentina and subsequently brought back to Uruguay and tortured). However, almost 40 years after this individual opinion was delivered, it would be reasonable to hold that the approach to jurisdiction as expressed by Tomuchat would not only relate to the treatment of a state's citizens living abroad, but indeed also the citizens of other states.

[45] Maastricht Commentary, n 29, 1106
[46] *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981)
[47] *Ibid.*, Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure; Communication No. R.12/52; Appendix

It is important to emphasise the part of the quote that relates to the practical difficulties of implementing the ICCPR abroad, and that this was seen as the main reason for the limitation in the Covenant. It is submitted that when a state is in a position to exercise jurisdiction outside its own borders (without breaching the sovereignty of another state), there is no jurisdictional bar against doing so.[48]

Neo-colonialism and universalism

The final areas of concern for those that are hesitant to the concept of ETOs moves us out of the sphere of international law and into international relations, namely, the concern that a regulation of TNCs behaviour when operating outside of industrialised countries can be conceived of as imperialism or neo-colonialism. More specifically, the argument is that Western states (or other industrialised states) will impose their standards for treatment of individuals onto other states. This represents a dictation of moral/ethical standards reflecting a Western individualistic ideology which may be different or alien to other cultures. The objection to ETOs on this ground represents more of an ideological opposition than the question of sovereignty. However, both objections fail to recognise the fundamental aspect of human rights which is not the interests of states, but rather a standard of treatment of individual human beings no matter where or who they are.[49] They fail to recognise the original understanding of universalism and of non-discrimination. Human rights standards are not aimed at dictating to any government their policy choices or direction of society, as long as

[48] The Inter-American Commission has taken a similar view in several cases. For instance, in the *Armando Alejandre Jr. and Others* v. *Cuba*, n 5, where the Cuban military had shot down two civilian aircrafts in international territory, the Commission held: "It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is *not only consistent with but required* by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and non-discrimination, "without distinction as to race, nationality, creed, or sex." Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control." Para. 22; emphasis added.

[49] Gibney, *Universal Principles*, n 19, 3

human rights standards as recognised, adopted and committed to by the international community and all individual states are adhered to.[50] Put differently, human rights recognise that torture, censorship, and lack of access to potable drinking water and basic health care, affect all human beings equally no matter where they live. This is the fundamental understanding of universal human rights. However, the universal concept has only been recognised in half – and this is what possibly fuels the argument of neo-colonialism. If universal human rights mean that all individuals are supposed to be able to enjoy human rights no matter where they live, but only the domestic state has obligations, then human rights protection becomes limited to what the home state is able or willing to do. Furthermore, it becomes a political and ideological game to criticise and shame foreign states for their human rights violations, while ignoring the human rights violations that could have been prevented if non-state actors such as TNCs over which a foreign state has jurisdiction are not considered.

Another aspect of neo-colonialism that is often voiced in this context is the problem of conditionality. Countries that have traditionally received assistance from industrialised states or from international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF) are wary of what they consider to be conditions for assistance or investment. From the experience of conditionality linked to loans and 'bail-outs' from the IFIs (the gatekeeper role that these institutions have traditionally held in terms of access to international financial resources),[51] these recipient countries are concerned that industrialised countries where most of the TNCs have their headquarters will use regulations of the corporations as another form of conditions regarding their domestic policies. From the historic discourse on human rights where industrialised states have been very vocal (although not necessarily consistent) in terms of how other states behave regarding human rights, such a reaction is understandable. This partly relates back to the policies of the United States under President Carter in the

[50] Council of Europe, Commissioner for Human Rights *Safeguarding Human Rights in Times of Economic Crisis*, November 2013, 8; https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2664103&SecMode=1&DocId=2215366&Usage=2 (last accessed 4 August 2016).

[51] Skogly, Sigrun *The Human Rights Obligations of the World Bank and the International Monetary Fund*, (London, Cavendish Publishing, 2001),10.

late 1970s whereby the Unites States introduced rules to prevent financial support for countries where massive human rights violations took place.[52] Similarly, this became a policy for the IFIs as well, as a result of the influence of the United States within these institutions.

While probably introduced with good intentions, these policies have skewed the debate, and not least because such policies were:

- seen to represent interference within the internal affairs of states (which could potentially be legitimate, given the discussion about the legitimacy of international attention to human rights violations as reflected upon above);
- the policies were not implemented consistently, and therefore smaller and less strategically important states often felt as 'victims' of these policies, rather than as a consistent and systematic attempt to improve the human rights situation worldwide; and
- when the conditionality concerning the domestic human rights situation was the only focus (i.e., how the 'recipient' state performed) and attention with respect to other actors' influence on the human rights situation (for instance TNCs), the neo-colonial or neo-imperialist conclusion was fairly easy to draw. However, similar to the question of sovereignty, if the attention is on the activities of TNCs, and not what the host state is doing, the question of conditionality is not really relevant in this context.

4 Content of the obligation to regulate

Having now considered some of the controversies regarding extraterritorial human rights obligations generally, and those pertaining to the regulation of TNCs activities abroad more specifically, this chapter will now move to the key questions regarding the role of the state in regulating the conduct of TNCs when they operate beyond the home state's national borders, and how these could be framed in a future business and human rights treaty. As stated by Lagoutte 'it is so far unclear what this instrument will focus

[52] *Ibid.,* 6

on',[53] and thus the extent of the emphasis on the state is as of yet uncertain. However, it is submitted that leaving the state out of the equation when drafting the treaty, would be counter-productive. The problem with leaving the state out of a treaty that aims at regulating the relationship between business and human rights is the danger that this may remove the state's position as the primary obligation holder for the protection and promotion of human rights, as clearly laid down in the UN Charter and subsequent international human rights law. There is now a growing recognition that human rights obligations are complex, and that the focus on 'one violator and one violation' is not sufficient. However, while the obligations debate has become more sophisticated, it is clear that the state still has the focal position in complying with human rights obligations. The articulation of shared or joint obligations (combined with an increased attention to complicity in violations[54]) entails that more than one state may be responsible for human rights violations, and indeed that obligations can be shared between states and non-state actors.[55] Yet, the obligation to regulate the conduct of third parties to ensure individuals' enjoyment of human rights is an essential part of a state's role, and therefore the treaty should ensure that this element is given a strong position.[56]

While the Maastricht Principles were drafted by a group of experts, and is not per se a legally binding document, it is reflective of current international human rights law.[57] On that basis, the text of the Maastricht Principles could well be used as an inspiration for the drafting of relevant parts of the proposed treaty on business and human rights. There is certainly a strong case for using the commonly accepted tripartite classification of human rights obligations (*respect, protect* and *fulfil*). De Schutter contends that the duty of the state 'to protect human rights by regulating the behaviour of private (non-state) actors […] belong to the acquis of international human rights law'.[58] This

[53] Lagoutte, *New Challenges*, n 42, 179
[54] J. G. Stewart, James G., "Complicity in Business and Human Rights" *ASIL Proceedings*, 2015. http://ssrn.com/abstract=2676192 (last accessed 4 August 2016)
[55] Salomon, *Global Responsibility*, n 2; A. Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law Procedures and Principles*, (Antwerp, Intersentia, 2016); B.A. Andreassen and V. K. Vinh (eds.) *Duties Across Borders*: *Advancing Human Rights in Transnational Business*, (Antwerp, Intersentia, 2016)
[56] O. De Schutter, "Towards a New Treaty on Business and Human Rights", (2016) 1 *Business and Human Rights Journal*, 45
[57] Maastricht Principles, n 4, Preamble.
[58] De Schutter, *Towards a New Treaty*, n 56 p. 44

expression of the obligation to protect is also relevant for ETOs.[59] While states may be responsible for violations of the obligation to respect human rights beyond their own borders, for instance through belligerent occupation, other control over foreign territory and/or persons, etc., for the purpose of the present chapter, the focus is on the obligation to *protect*. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,[60] the obligation to protect 'requires States to prevent violations of [economic, social and cultural rights] by third parties'.[61] This has been confirmed for ETOs in the Maastricht Principles, and the discussion below will apply the relevant provisions of these Principles to analyse how the regulation of TNCs could work in a future treaty on business and human rights.

Section IV of the Maastricht Principles concerns the obligation to protect, and stipulates clearly in Principle 23 that 'all states must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially'. The subsequent principles detail how the obligation to protect should be understood and implemented. Notably, Principle 24 entitled 'Obligation to regulate' provides that:

> All States must take necessary measures to ensure that non-State actors which they are in a positon to regulate […], such as private individuals and organisations, and transnational corporation and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of the obligation to protect.

Thus, this Principle deals directly with the obligation to regulate TNCs, and Principle 25 gives the bases for protection and specifies in terms of TNCs that states must adopt

[59] Maastricht Principles, n 4, Principle no. 9
[60] *Maastricht Guidelines on Violations on Economic, Social and Cultural Rights* (Maastricht Guidelines), adopted by a group of expert meeting in Maastricht January 1997. https://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (last visited 30 October 2015)
[61] *Ibid.*, guideline 6.

and enforce measures to protect economic, social and cultural rights *inter alia* where 'a) the harm or threat of harm originates or occurs on its territory; b) where the non-state actor has the nationality of the State concerned; and c) regarding business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned. […]'.[62] The obligation to regulate the conduct of non-state actors, including TNCs, comes from a state's general international law obligation to 'control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state'.[63] This approach has been confirmed by a number of UN human rights committees, including the Committee on Economic, Social and Cultural Rights, which, among others, in its concluding observation on a report from Austria observed that:

> The Committee is concerned at the lack of oversight over Austrian companies operating abroad with regard to the negative impact of their activities on enjoyment of economic, social and cultural rights in host countries (art.2).
>
> The Committee urges the State party to ensure that all economic, social and cultural rights are fully respected and rights holders adequately protected in the context of corporate activities, including by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations, as underlined in the Committee's statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights.[64]

[62] Maastricht Principles, n 4, Principle 25.
[63] Brownlie, Ian (1983) *System of the Law of Nations: State Responsibility*, (part 1), at 165; as quoted in Maastricht Commentary, n 29, 1136.
[64] UN Committee on Economic, Social and Cultural Rights Concluding Observations – Austria, E/CN.12/2011/1; para. 12. The Committee now regularly point to the lack of regulation by States of the TNCs over which they have regulatory control, and this also goes further to include international investments. In the concluding observations on the report from Norway in 2013, the Committee commented on Norway's sovereign fund: '6. The Committee is concerned that the various steps taken by the State party in the context of the social responsibility of the Government Pension Fund Global have not included the institutionalization of systematic human rights impact assessments of its investments. The Committee recommends that the State party ensure that investments by the Norges Bank Investment Management in foreign companies operating in third countries are subject to a comprehensive human rights impact assessment (prior to and during the investment). The Committee also recommends that the State party adopt policies and other measures to prevent human rights contraventions abroad by corporations that

It is not merely the Committee on Economic, Social and Cultural Rights that is now including recommendations to states to regulate the activities of TNCs over which they exert control. This is now also common practice for the Human Rights Committee, which for instance in its discussion of the German report noted that 'The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations.'[65] Furthermore, the Committee on Elimination of all Forms of Discrimination against Women,[66] the Committee on the Rights of the Child,[67] and the Committee on Elimination of Racial Discrimination,[68] all question, when examining state reports, the lack of regulation for extraterritorial activities on part of TNCs that may impact upon the enjoyment of human rights.

In terms of the basis for regulation, the Commentary to the Maastricht Principles notes that what is reflected in Principle 25 is the active personality principle whereby a state may regulate the conduct of its nationals abroad.[69] However, as it is at times hard to determine the actual nationality of some business enterprises, Principle 25 provides that such regulation by a state may be carried out if that TNC has its 'centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned'. This rationale will allow states to regulate the conduct of companies that use the separation of legal personality to avoid or limit the scope of their legal liability.[70]

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have their main offices under the jurisdiction of the State party, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant. The Committee draws the attention of the State party to its statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights'. (E/2012/22, annex VI, section A).

[65] UN Human Rights Committee, *Concluding Observations, Germany*, CCPR/C/DEU/CO/6 (12 November 2012), para. 16.

[66] Committee on the Elimination of Discrimination against Women, *Concluding Observations: India*. CEDAW/C/IND/CO 4 - 5 (24 July 2014), para. 15

[67] Committee on the Rights of the Child, *Concluding Observations: Australia*, CRC/C/AUS/CO/4 (28 August 2012), para. 27

[68] Committee on the Elimination of all forms of Racial Discrimination, *Concluding Observations: United Kingdom*; CERD/C/GBR/CO/18-20 (14 September 2011); para 29.

[69] Maastricht Commentary, n 29, 1139

[70] *Ibid.*, 1140

An issue related to this was raised in the Commentary to Principle 2 of the UNGP,[71] where it was argued that 'there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support those businesses'.[72] From an obligation to protect human rights as part of the tri-partite classification of human rights obligations, and the clear acceptance that this level of obligation relate to a state's duty to ensure that third parties, such as private TNCs, do not infringe the enjoyment of human rights of individuals, the distinction between enterprises that are fully private, or partially 'state involved or supported' does not make much difference. The focus is on the state's obligation to regulate the conduct of private entities as well as their own behaviour. Therefore, in terms of regulation, both fully private and partially state-owned companies should be included.

In addition to situations where states are in a position to regulate the conduct of TNCs when operating abroad, the Maastricht Principles also contain reference to situations where this is not directly the case, but where they are in a 'position to influence'. By this, the Principles refers to situation where a state can influence the conduct of a non-state actor (including TNCs), for instance, through their public procurement system or through international diplomacy.[73]

5 Overcoming Problems of Extraterritorial Regulation

It is essential to also deal with some of the predictable problems that will occur in the drafting process of the treaty, and also in terms of the arguments that will be used to oppose the obligations of states to regulate the activities of 'their' businesses abroad. Going from permissible regulation based on principles of prescriptive jurisdiction that

[71] Principle 2 reads: "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.", UNGP, n 14.
[72] *Ibid.*, commentary to Principle 2, p. 4.
[73] This has been suggested by the UN Guidelines on Business and Human Rights. See *inter alia* commentary to Principle 6. UNGP, n 14. See also UN Human Rights Committee's 2013 Concluding Observations Norway UN Doc. E/C.12/NOR/CO/5 (13 December 2013), as quoted in n 64 above.

clearly have no territorial limitations[74], what an obligation on state regulation of TNCs activities abroad would in essence do would be to make such regulation not only 'permissible' but rather 'mandatory'. It would remove the discretion of whether or not to regulate from states, but at the same time it would enhance the global human rights protection and ensure that those standards that states have accepted through the international bill of human rights become truly universal.

However, difficulties will arise, and a few of those will be addressed briefly here. First, states will be hesitant to accept responsibility to regulate for 'predicted effect'. Principle 13 of the Maastricht Principles articulates states obligation to avoid causing harm as follows:

> States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.[75]

Invoking this principle in relation to state regulation of TNCs, it will be a breach of obligation if the state failed to regulate conduct by these actors that might predictably create risk of nullifying or impairing the enjoyment of human rights. This implies that the state needs to be pro-active and consider what the content of regulation may bring about in terms of human rights respect or violations; as the lack of regulation (omission) which leads to human rights violations would indeed be a breach of their obligations.[76] Case-law confirms that while acts cannot be attributed to a state just by the fact that they took place on their territory, they nevertheless may be expected to 'give an

[74] According to Dixon and McCorquedale 'As a general rule, a State's prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs (even if in the territory of another State) or the nationality of persons involved. [….] Enforcement jurisdiction is, on the other hand, generally considered to be territorial. ' M. Dixon and R. McCorquedale *Cases and Materials on International Law*, 3rd ed. (Oxford, Blackstone Press, 2000), p. 281

[75] Maastricht Principles, n 4, Principle 13

[76] The Maastricht Principles reflects this through an 'obligation to avoid causing harm': 'States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.' Maastricht Principles, n 4, Principle 13.

explanation' if the state knew or should have known that 'activities unlawful under international law' were perpetrated on its territory and caused damage to another state.[77] Thus, in such situations, a state's obligation to exercise due diligence will be triggered. For example, in a report by the Council of Europe on the allegations of European state's involvement in extraordinary rendition of terrorist suspects by the United States, the following was critically noted:

> It has to be said that most governments did not seem particularly eager to establish the alleged facts. The body of information gathered makes it unlikely that European states were completely unaware of what was happening, in the context of the fight against international terrorism, in some of their airports, in their airspace or at American bases located on their territory. Insofar as they did not know, they did not want to know. It is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services. If this were the case, one would be justified in seriously questioning the effectiveness, and therefore the legitimacy, of such services.[78]

Consequently, there is now acceptance that there is a duty upon states reasonably to ensure that activities originating or taking place within their jurisdiction will not be breaching international law provisions, including human rights enjoyment in the territory of another state.[79] The acceptance of the precautionary principle (particularly in international environmental law) also demonstrates that uncertainty about the full effect of planned measures is not an acceptable defence against taking mitigating action if future harm may ensue.[80]

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[77] The Corfu Channel Case, 1949 I.C.J. 4, 22, at 18

[78] Council of Europe, Committee on Legal Affairs and Human Rights 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states', AS/Jur (2006) 16 Part II; http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf (last accessed 9 August 2016) , para 230

[79] The UN Committee on Economic, Social and Cultural Rights affirms that states parties should, 'prevent third parties from violating the right[s protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.' General Comment no. 14 'The Right to the Highest Attainable Standard of Health (Art. 12)', E/C.12/2000/4, para. 39

[80] Marr makes a distinction between the 'preventive principle' and the 'precautionary principle' in the following manner: 'the preventive principle provides for an obligation of state to prevent known or foreseeable harm outside their territory', while 'the precautionary principle [….] requires environmental action at an earlier step: It provides a tool for dealing with situations where there is a potential hazard, but

Another problem that may come to the fore in discussion on the proposed treaty is the problem of joint or shared obligations. Will states be willing to accept the entire responsibility for violations of international human rights standards on the part of TNCs just because they did not regulate the relevant conduct? Since traditional human rights law has focused uniquely on violations by the domestic state in situations where the legal relationship between the victim of the violation and the state has been fairly straight forward, it will be a rather new step to introduce concepts of shared or joint obligations in the treaty. Depending on how the treaty will be framed, and in particular how the concept of obligations subjects will be conceptualised, such an introduction of shared or joint obligations may be necessary. It may be that two states (the home and the host) may be jointly responsible, and indeed part of the responsibility may also lie with a particular company. This is a complex situation, but one that may well need to be tackled, including by evolution or clarification subsequently by a treaty body looking at concrete circumstances.

6 Concluding remarks

The analysis made in this chapter has attempted to bring the role of the state back into the discussion on TNCs and human rights. It has been demonstrated that a rejection of states' ETOs is contrary to the fundamental principle of universality of human rights. The objections to ETOs have been addressed, and proposals for how future regulation by states for the behaviour of TNCs over which they exert control have been made.

The environment within which international human rights law is now operating is far more complex in terms of international interaction and the actors involved on a global scale than was the case immediately after the Second World War. As stated at the outset, unless international human rights law manages to make necessary changes in its structures and modes of operation, it is in danger of becoming irrelevant for thousands of victims in life conditions that would be considered serious human rights violations

scientific uncertainty as to the impact of the environmentally sensitive activity does not allow a clear prediction of the degree of the hazards to the environment.' S. Marr *The Precautionary Principle in the Law of the Sea*, (The Hague, Martinus Nijhoff Publishers, 2003), p. 9.

by non-lawyers. It is, therefore, particularly important that a business and human rights treaty drafted at the current point in time takes this challenge on board and ensures that the provisions of the treaty contribute to this renewed relevance of international human rights law. In this sense, the proposal for the treaty represents a real constructive opportunity for the international human rights community.

Building on the Maastricht Principles, I propose below how the international human rights community could use the BHR treaty as a real opportunity to get a positive codification of states' obligations to protect human rights extraterritorially. What ETOs do in this context is to emphasise that the state has obligations both domestically and abroad when they affect human rights enjoyment, or when they can influence human rights enjoyment through regulation for instance. The recognition of ETOs thus removes the argument that certain actors' behaviour is 'beyond the control' of a state when that state clearly has a regulatory opportunity to improve human rights enjoyment.

States' regulation of corporation activities to be in compliance with international human rights standards both when they operate at 'home' and in another country, will have a positive impact on universal human rights enjoyment. Moreover, it will create a level playing field for companies and thus the 'race to the bottom' in terms of human rights and environmental protection for those affected by the activities of TNCs and other business practices will lose much of its energy.

The problem with opposition to ETOs is that states hesitate to accept the responsibility that comes with acting within their jurisdiction, while wishing to retain the liberty to act internationally. This is where we return to the early days of international human rights law development as mentioned in the introduction: states had initially rejected the idea of human rights being a matter of legitimate international concern on the ground that these issues were for domestic sovereignty and jurisdiction. Yet, that objection was not accepted, and states now (reluctantly) recognise that the international community has a legitimate interest in the way in which individuals are treated by their own government. The task at the present juncture in international human rights law development is to achieve a similar acceptance for extraterritorial activities: that the international human

rights standards set limits for what states can legitimately do in their international relations as well as domestically.

Annex – proposal for treaty provision on states' obligation to regulate

Obligation to regulate[81]

1. In compliance with the obligation to protect, all States must take necessary measures to ensure that transnational corporations and other business enterprises which they are in a position to regulate, do not nullify or impair the enjoyment of human rights within their territories and extraterritorially. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.

2. States must adopt and enforce measures to protect human rights through legal and other means, including diplomatic means, in each of the following circumstances:

   a) when the harm or threat of harm originates or occurs on its territory;
   b) where the transnational corporation or another business enterprise, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned

3. States that are in a position to influence the conduct of transnational corporations and other business enterprises even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.

[81] The proposed text is adapted from the Maastricht Principles, n 4, Principles 23 through 26.