

**Jurisdiction - a barrier to compliance with extraterritorial obligations to protect against human rights abuses by non-state actors?**

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**ABSTRACT**

**KEYWORDS:** Human rights, jurisdiction, business enterprises, obligation to protect, extraterritorial obligations

The obligation to protect individuals against human rights abuses by private and other ‘third’ parties is an accepted part of the tripartite human rights obligations’ classification. Ways of complying with this obligation are, however, not always clear, and some opposition has been voiced to it having reach beyond a state’s territorial border. This opposition is largely based on the reluctance of states to exercise their jurisdiction outside their territory. In this article, we address the content and reach of the human rights obligation to protect and how this relates to the exercise of jurisdiction to prevent human rights violations committed by private entities both within and beyond their home state’s territory. While the obligation to protect generally relates to the state’s obligation to regulate the conduct of any non-state actor, in this article we will use business enterprises as the actors in focus. The obligation to protect does not per se have a territorial limitation. The territorial limitation is brought in when the question of jurisdiction is added to the complexity. By addressing prescriptive jurisdiction, the article challenges the notion that jurisdiction in international human rights law is almost exclusively territorial, and argues that this is a misconception which results in many abuses of human rights that could have been addressed through regulation of conduct beyond a state’s border. Not tackling this misconception results in such conduct now being carried out with impunity.

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Consequently, the article argues that a restricted approach to jurisdiction is a barrier to full compliance with human rights obligations and questions whether this narrow approach is necessary and in line with other areas of regulation through international treaties.

## 1. INTRODUCTION

The obligation to protect was first articulated by the moral philosopher, Henry Shue, in his influential book *Basic Rights*,<sup>1</sup> in which he argued that every basic right has three types of correlative duty: to avoid depriving, to protect from deprivation, and to aid the deprived.<sup>2</sup> This was later followed up in the first substantial elaboration of the content of any of the economic, social and cultural rights, in the report by Asbjørn Eide on the right to adequate food as a human right, in which he articulated the three levels of obligations as the obligations to *respect*, to *protect* and to *fulfil*.<sup>3</sup> This was further developed in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, which stated that

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. [...] The obligation to protect requires States to prevent violations of such rights by third parties. [...] The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.<sup>4</sup>

These levels of obligations have since been used consistently by the UN Committee on Economic, Social and Cultural Rights (UNCESCR) in its General Comments when elaborating the content of obligations stemming from the International Covenant on Economic, Social and Cultural Rights

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<sup>1</sup> H. Shue, (1980) *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press.

<sup>2</sup> *Ibid*, p. 52.

<sup>3</sup> UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (1987) *The New International Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, Submitted by Asbjørn Eide, Special Rapporteur. UN Doc. E/CN.4Sub.2/1987/23

<sup>4</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), para. 6; available at: <http://hrlibrary.umn.edu/instree/Maastrichtguidelines.html> [last accessed 11 June 2018]

(ICESCR) and when examining states' periodic reports. As an example, in the context of the human right to adequate food, the *obligation to protect* has been clarified by the UNCESCR as requiring states to take measures 'to ensure that enterprises or individuals do not deprive individuals of their access to adequate food'.<sup>5</sup>

In all subsequent General Comments elaborating the substantive content of rights and of obligations arising from specific rights in the ICESCR, the Committee has confirmed this level of obligation.<sup>6</sup> However, it is not only in relation to economic, social and cultural rights that this obligation has been recognised. In its General Comment no. 31, the Human Rights Committee holds 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.<sup>7</sup>

As will be discussed in section 2 below, other UN Committees systematically apply the obligation to protect against human rights abuses by third parties as well. Thus, there is now a general acceptance that states have obligations to protect individuals from human rights abuse by private parties, including individuals and business enterprises. What is less certain is how far the content of this obligation reaches, and in particular whether the principles of jurisdiction as understood in international law represent a barrier to full compliance with the obligation to protect. While these questions can be considered in a general manner, the current article will address them in light of the activities of business enterprises and with particular attention to the proposed treaty on transnational

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<sup>5</sup> UNCESCR, *General Comment no. 12 'Right to adequate food (art.11)'*, UN Doc. E/C.12/1999/5, para. 15

<sup>6</sup> See for instance General comment No. 24 (2017) on *State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC.24, para. 10; General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC.23, para. 58; General Comment No. 19 (2008) on the right to social security (art. 9), UN Doc. E/C.12/GC/19, para. 43.

<sup>7</sup> UN Human Rights Committee (2004), General Comment no. 31 *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 8.

corporations (TNCs) and other business enterprises (OBEs) related to human rights, which is currently being drafted and negotiated.<sup>8</sup>

In this article, we will consider whether the obligation to protect and approaches to jurisdiction create tensions by first analysing the content of the obligation to protect and in particular its geographic reach beyond a state's territory (Section 2). The potential for complying with this obligation will then be addressed in light of principles of jurisdiction in international human rights law (Section 3), while Section 4 will focus on other areas of international treaty law where there is a clear obligation upon states to exercise their prescriptive jurisdiction beyond their own territory, and how those areas may serve as inspiration for the future treaty on business and human rights. In the conclusion, we aim to respond to the questions raised about compliance with the obligation to protect within the current approach to jurisdiction.

## 2. OBLIGATION TO PROTECT

The purpose of the obligation to protect is that states should take all reasonable measures to ensure that the behaviour of private entities, including business enterprises, does not lead to violations of

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<sup>8</sup> In June 2014, the Human Rights Council adopted resolution 26/9, in which it decided to 'establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (A/HRC/RES/26/9, para. 1). In accordance with the resolution, the intergovernmental working group has held three sessions. The first two were 'dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument' (para. 2). The third, held in October 2017, discussed the 'elements for the draft legally binding instrument for substantive negotiations' (para 3), based on an Elements Document prepared by the Chairperson/Rapporteur of the open-ended intergovernmental working group. The fourth session, held in October 2018, deliberated on a Zero Draft of the potential legally binding instrument. At the time of writing, the fifth session has been concluded. It took place from 14-18 October 2019. This session discussed the most recent draft of the potential 'Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', hereinafter referred to as the 'Draft LBI'. Available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf)

human rights.<sup>9</sup> This is an obligation grounded in international law and should be executed in compliance with international law principles.<sup>10</sup>

Thus, the obligation to protect requires states to regulate the conduct of private individuals and entities that may influence other individuals' enjoyment of their human rights. Such regulation of conduct is often done through the legislative process, whereby entities other than state authorities are required to behave in a manner consistent with the human rights standards that the state has agreed to through its ratification of human rights treaties. In this way, the human rights standards are relevant not only for public authorities but indeed also for other entities, including business enterprises, in their horizontal relationships with private individuals. The way in which this is operationalised will vary depending on the rights involved (for instance, engaging in torture would likely be made a criminal offence, while engaging in discriminatory employment practices would be considered a tortious offence).

As the purpose of the obligation to protect is to ensure that the behaviour of private entities does not lead to human rights violations, primarily it has a preventative function. To comply with such obligations, states should consider which actions or omissions might predictably result in human rights abuses and then require private entities to operate in a manner that minimises the likelihood of such future violations taking place.<sup>11</sup> The obligation to protect can therefore be seen as covering two separate stages of obligations for states: a) to ensure regulation to prevent individuals from suffering human rights abuses by the actions or omissions of other private parties (individuals or private entities); and b) to establish effective remedies that are available to individuals who have suffered

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<sup>9</sup> O. De Schutter, 'Towards a New Treaty on Business and Human Rights' 1 (1) *Business and Human Rights Journal* 41 - 67 at 44 (2016).

<sup>10</sup> O. De Schutter et.al, 'Commentary to the Maastricht Principles on States Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights' 34(4) *Human Rights Quarterly* 1084 - 1169 at 1134 (2012) (Hereafter 'the Maastricht Commentary').

<sup>11</sup> For instance, in the Maastricht Principles on States' Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, Principles no. 9 on Jurisdiction, it is held that '[a] State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: [...] 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' (emphasis added).

from abuse by third parties.<sup>12</sup> The first stage is *prevention*, whereby states are required to ensure, through regulation, that private entities, including business enterprises, act with due diligence with regard to internationally recognised human rights standards. The second stage is *accountability*, which will not be addressed specifically in this article.

#### A. *The due diligence component of the obligation to protect*

The UN Human Rights Committee, in interpreting the International Covenant on Civil and Political Rights (ICCPR), defined the standard of conduct expected of a state in preventing and remedying human rights harm caused by private persons or entities as a standard of ‘due diligence’:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>13</sup>

This due diligence concept, as a standard for the execution of the state’s duty to protect individuals against third party infringement of human rights, was first developed by the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras*.<sup>14</sup> In that case, the court held that an illegal act

which violates human rights and which is initially not directly imputable to a state can lead to international responsibility of the state, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it.<sup>15</sup>

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<sup>12</sup> M. Nowak and Januszewski ‘Non-State Actors and Human Rights’, in M. Noortmann, Reinisch and Ryngaert (eds) *Non-State Actors in International Law* (Oxford; Hart Publishing, 2015) at 142.

<sup>13</sup> *Supra* note 8, at para. 8.

<sup>14</sup> [1988] Inter-Am.Ct.H.R. (Ser. C) No. 4.

<sup>15</sup> *Ibid*, at para. 172. This language and legal framework provided the foundation for the due diligence standard, which spread beyond the Inter-American system and is now applied to acts of private persons. See *Ilascu v Moldova and Russia* [2004] ECtHR; *Kilic v Turkey* [2000] 75 ECtHR; *Lubicon Lake Band v Canada*, Communication No. 167/1984 (26 March 1990).

In other words, where rights are guaranteed, the state is obligated to exercise due diligence to ensure their protection. In *Ilascu v Moldova and Russia*, the European Court of Human Rights (ECtHR) stated that ‘the undertakings given by a contracting State under Article 1 of the European Convention include... the positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory’.<sup>16</sup> In explaining the standard of protection required of States Parties with respect to the right to life as contained in the European Convention on Human Rights, the ECtHR stated that the obligation to protect the right to life included the states’ duty to ‘to take appropriate steps to safeguard the lives of those within its jurisdiction’. This, according to the court, involves ‘a primary duty on the State to secure the rights to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions’.<sup>17</sup>

An illustrative example is the decision in *Social and Economic Rights Action Centre v Nigeria*.<sup>18</sup> Here, the African Commission on Human and People’s Rights decided that the Nigerian government had breached human rights obligations both by its direct acts and through the activities of the relevant oil companies. The decision of the Commission was based on the state’s failure to require basic health and environmental impact studies, the failure to require oil companies to consult affected communities, and the failure to investigate attacks on communities and campaigners or to punish the perpetrators of the attacks.<sup>19</sup>

The cases referred to above confirm the states’ positive obligation to take preventive measures to reduce or eliminate human rights harm resulting from the activities of third parties. Some human rights treaty bodies provide states with a discretion to choose the preventive measures that should be undertaken in discharging their obligation to protect. In its general comment No. 31, the HRC suggests that ‘states parties to the ICCPR adopt legislative, judicial, administrative, educative and

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<sup>16</sup> *Ilascu v Moldova and Russia* (ibid), at para. 263.

<sup>17</sup> *Kilic v Turkey* [2000] 75 ECtHR, at para. 96.

<sup>18</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR).

<sup>19</sup> *Ibid*, paras 5-7, 41, 53 and 61.

other appropriate measures in order to fulfil their legal obligations'.<sup>20</sup> However, the HRC expresses a preference for 'legislative measures' in saying that 'legislative measures are an important means for punishing, preventing and deterring human rights abuse by private persons and third parties'.<sup>21</sup> Confirming the preference for legislation, Article 2(1) ICESCR requires all member states to use 'all appropriate means [in discharging their human rights obligations], *including particularly* the adoption of legislative measures'.<sup>22</sup> The UNCESCR has also expressed the fact that legislation is 'highly desirable and in some cases indispensable' in discharging the obligation to protect.<sup>23</sup> The importance of legislation in discharging the obligation to protect is also recognised in the ongoing process of establishing a treaty on business and human rights. The recent draft of the Legally Binding Instrument (LBI), which specifically focuses on states' obligations and access to justice for victims of corporate abuse, proposes, *inter alia*, that 'States shall ensure that their **domestic legislation** requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses'.<sup>24</sup>

Thus, through the use of legislation or whatever necessary means, the goal under the obligation to protect is to prevent human rights abuse by third parties. However, the mere existence of human rights harm caused by third parties does not mean that the state has failed in discharging its obligation.<sup>25</sup> This is because the obligation to protect is an obligation of conduct and not of result.<sup>26</sup> Obligations of result require states to ensure the attainment of a particular situation – a specified

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<sup>20</sup> *Supra* note 8, at para. 7.

<sup>21</sup> *Ibid*, at para. 8.

<sup>22</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, UNTS 993, at 3. See also, Article 2(3)(b) of the International Convention on Civil and Political Rights, 16 December 1966, UNTS 999, at 171; UN Committee on Economic Social and Cultural Rights (CESCR), 'Statement on The Obligations of State Parties Regarding The Corporate Sector and Economic, Social and Cultural Rights' 20 May 2011, E/C.12/1011/1, para. 5; UN CESCR, *General Comment No.5; Persons with Disabilities* 9 December 1994, E/1995/22, para. 16, and UN CESCR, *General Comment no. 7; The right to adequate housing (Art. 11.1) forced evictions*, 20 May 1997, E/1998/22, at paras 8-9.

<sup>23</sup> UN CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant). 14 December 1990, E/1991/23, at para. 3.

<sup>24</sup> LBI, draft article 5.1 (emphasis added).

<sup>25</sup> *Supra* note 14, at para. 174.

<sup>26</sup> See *Yearbook of the International Law Commission*, 1977, Vol. II Part one, Documents of the Twenty-Ninth session, UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 1), Articles 20 and 21.



result (in this case, human rights protection) in accordance with the norms that obligate them to act or refrain from acting in the first place.<sup>27</sup> Conversely, the obligation of conduct merely requires that states ‘employ every possible means’ to achieve the desired result – the prevention of human rights abuse.<sup>28</sup> The obligation, however, does not end there. Although states have the discretion to choose the means of preventing human rights abuse, how they use their chosen means is a matter of ‘due diligence’.

The International Law Association (ILA) Study Group on Due Diligence describes the term as being ‘concerned with supplying a standard of care against which fault can be assessed’.<sup>29</sup> According to the ILA, a ‘golden thread’ in determining whether states have applied this standard of care in preventing human rights abuses is ‘reasonableness’.<sup>30</sup> Indeed, the obligation to protect has been described as an obligation for the state to take all ‘reasonable’ measures in preventing third party abuse.<sup>31</sup> It is difficult to define reasonableness in absolute terms; however, in its study of case law in the different fields of international law, the ILA identifies certain criteria for determining its content. They include the degree of influence a state has over the third party and knowledge of an activity or potential risk.<sup>32</sup> The report explains that where a state has ‘knowledge of the situation which requires action’, it must use the necessary means at its disposal to prevent or remedy the situation as long as it has the capacity to influence it.<sup>33</sup> Thus, in order to discharge its obligation to protect, where a state is in a position to influence third-party behaviour, it is required to use this influence in adopting the appropriate measures to prevent the third party from negatively impacting on human rights.

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<sup>27</sup> *Ibid*, article 21.

<sup>28</sup> *Ibid*, article 20.

<sup>29</sup> International Law Association, ILA Study Group on Due Diligence in International Law, Duncan French (Chair) Tim Stephens (Rapporteur) (Second 2016), p. 2.

<sup>30</sup> *Ibid*, Second Report, p. 8.

<sup>31</sup> In *Velasquez Rodriguez v Honduras*, the ACtHR stated that ‘due diligence requires the state to take *reasonable* steps to prevent human rights violations’. *Supra* n 15, para. 174 (emphasis added).

<sup>32</sup> *Supra* note 29, pp. 8-13. Other criteria stated by the ILA include good government, international minimum standard and national treatment, and degree of risk. See also *Osman v The United Kingdom* [1998] VII ECHR; 29 EHRR 245.

<sup>33</sup> *Ibid*.

### B. *The geographic reach of the obligation to protect*

The obligation to adopt measures to protect human rights is generally accepted in domestic legal systems. Few states would argue that they have no obligation to protect individuals against arbitrary killing, contamination of drinking water, or racial discrimination in health care – even if these acts are committed by private entities such as individual criminals, private water companies, or private health care providers. The obligation follows from ratification of international human rights treaties and from states' obligation to comply with international customary human rights law. By ratifying or accepting to be bound by international human rights law, states agree that these standards shall be complied with and implemented for individuals over which the state exercises jurisdiction (prescriptive, enforcement and adjudicative jurisdiction).<sup>34</sup>

However, the arguments become more complex and open to challenge when the question is whether states also need to regulate the conduct of private entities, such as business enterprises, when these operate outside the territory of their home state. How far does the obligation to protect go? This has been a highly debated issue with some arguing that if there is no geographic limitation of the obligations, all states would have obligations for human rights enjoyment everywhere and that this would not be workable. In the development of the UN Guiding Principles on Business and Human Rights, Ruggie holds that there is no legal obligation on states to regulate the conduct of business enterprises when they operate beyond the state's border.<sup>35</sup> Others, such as De Schutter, take issue with this opinion and hold that the current state of international human rights law includes 'the extraterritorial human rights obligations of states, including, in particular, the duty of states to control the corporations they are in a position to influence, wherever such corporations operate'.<sup>36</sup> De

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<sup>34</sup> The question of jurisdiction will be dealt with in Section 3 below.

<sup>35</sup> Commentary to UN Guiding Principles on Business and Human Rights, Commentary to Principle 2. Available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [last accessed 11 June 2018]

<sup>36</sup> *Supra* note 10, p. 45.

Schutter builds his argument *inter alia* on the UNCESCR's Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights, in which it holds that

States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.<sup>37</sup>

This approach is also taken in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights<sup>38</sup> which defined extraterritorial obligations *inter alia* as the 'obligations relating to the acts of omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'.<sup>39</sup> This definition is then operationalised through the jurisdictional scope in Maastricht Principle 9,<sup>40</sup> which provides that

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

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.

As of yet, there is no specific human rights treaty law that explicitly provides for an extraterritorial obligation to protect. Therefore, the uncertainty relates to whether treaties that have not specifically provided for this reach of the obligation can still be considered to incorporate it. There is a growing recognition that in an interconnected world, territorial borders do not necessarily represent the most logical delimitation of human rights obligations. The Commentary to the Maastricht Principles

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<sup>37</sup> Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights (E/C.12/2011/1) (20 May 2011), para. 5.

<sup>38</sup> The Maastricht Principles on States' Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights were adopted by a group of experts in September 2011. For the full text of the Principles, please see [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) [last accessed 11 June 2018] (Hereinafter: Maastricht Principles)

<sup>39</sup> *Ibid*, Principle 8 (a)

<sup>40</sup> *Ibid*, Principle 9 (c)

confirms that '[i]nternational law imposes a prohibition on the state to allow the use of its territory to cause environmental damage in the territory of another state, but the obligation not to allow the national territory to be used to cause damage in another state is of a general nature: it is not limited to cases of transboundary pollution'.<sup>41</sup>

However, the Maastricht Principles are not *per se* legally binding. They represent principles 'drawn from international law'<sup>42</sup> that were adopted by a group of international experts in 2011. They have been endorsed by a number of institutions and extensively referred to by UN bodies.<sup>43</sup> Yet, they do not as such serve as a source of legal obligations. There is, however, a clear development towards recognition of the extraterritorial reach of the obligation to protect through a number of soft law instruments and statements by international human rights institutions.<sup>44</sup>

For instance, in their General Comment no. 24 the UNCESCR confirmed that

[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.<sup>45</sup>

Similarly, the Committee on the Rights of the Child has come to the same conclusion in their General Comment no. 16, holding that

[h]ome States [...] have obligations, arising under the Convention [on the Rights of the Child] and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when

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<sup>41</sup> The Maastricht Commentary, *supra* note 10, at 1135 (footnote omitted).

<sup>42</sup> *Supra* note 38, Preamble.

<sup>43</sup> See for instance UNCESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, paras 27 and 31 and accompanying text; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to China, UN Doc. A/HRC/31/Add.1, 1 March 2016, para. 15; Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/26/28, 22 May 2014, paras 6 and 31 and accompanying footnotes.

<sup>44</sup> On the legal status of the general comments and other statements by UN Treaty bodies, see S. Wheatley Introduction to Human Rights Institutions: Legitimacy and Authority, in G. Oberleitner (ed.) *Human Rights Institutions, Tribunals, and Courts*, 11-16 (Springer, 2018).

<sup>45</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 23 June 2017, E/C.12/GC/24, at para. 28.

a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.<sup>46</sup>

UN Committees also confirm this approach in their discussion of state reports and their concluding observations. For instance, in the concluding observations on the most recent report by Canada, the UNCESCR held that it was

concerned that the conduct of corporations registered or domiciled in the State party and operating abroad are, on occasions, negatively impacting on the enjoyment of Covenant rights by local populations. [...] The Committee recommends that the State party strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in their activities abroad, including by requiring these corporations to conduct human rights impact assessments prior to making investment decisions. It also recommends that the State party introduce effective mechanisms to investigate complaints filed against these corporations, and adopt the necessary legislative measures so as to facilitate access to justice before domestic courts by victims of these corporations' conduct.<sup>47</sup>

We see here that the UNCESCR clearly confirms the importance of due diligence to comply with obligations as detailed above.

On their part, the UN Human Rights Committee has expressed its satisfaction that Germany has established the opportunity for remedies against German companies acting abroad when they are in contravention of relevant human rights standards. However, the Committee noted that the standards may not always be sufficient. The State Party was therefore asked 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'.<sup>48</sup>

Thus, as shown in the examples above, the various UN human rights treaty bodies recognise that a) business activities abroad may have a negative impact, and b) that states that have an opportunity to influence the behaviour of such businesses should regulate their behaviour. The various committees

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<sup>46</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, at para. 43.

<sup>47</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada*, 23 March 2016, UN Doc E/C.12/CAN/CO/6, at paras 15-16.

<sup>48</sup> UN Human Rights Committee, *Concluding Observations on the sixth periodic report of Germany*, 12 November 2012, UN Doc CCPR/C/DEU/CO/6, at para. 16.

articulate this in terms of soft law recommendations to State Parties to use their influence and regulate the conduct of the corporate actors, and the views of the committees represent authoritative interpretations of obligations.<sup>49</sup>

A more legally significant opinion was given by The Inter-American Court on Human Rights when it delivered an Advisory Opinion in 2017 on the environment and human rights, where the question of transborder environmental effects was raised. In this Advisory Opinion, the Inter-American Court on Human Rights held that

[f]or the purposes of the American Convention, it is understood that the person whose rights have been breached fall within the jurisdiction of the State of origin if there is a causal link between the facts occurring in its territory and the violation of the human rights of person outside its territory.<sup>50</sup>

This opinion relates to the understanding of states' obligations in the context of the environment and the right to life and personal integrity. However, the general principle of the causal link between the facts occurring within its territory and human rights violations outside its territory will have implications for a state's obligations to regulate the conduct of a TNC if it is 'in its [the State's] territory or is in any way under its authority, responsibility or control'.<sup>51</sup>

The Draft LBI also appears to endorse the extraterritorial reach of states' obligation to protect. It proposes that states have an obligation to use their domestic legislation to prevent business entities

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<sup>49</sup> T. Buergenthal, The UN Human Rights Committee, in J.A. Frowein and R. Wolfrum (eds) *Max Planck Yearbook of United Nations Law and International Law*, Vol. 5, p. 351 (2001).

<sup>50</sup> I/A Court H.R. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 101 (Note that there is currently no official English language version of the Advisory Opinion. This translation was found in EJIL: Talk! Article by G. Vega-Barbosa, and L. Aboagye, Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights, 26 February 2018, available at: <https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/> [last accessed 11 June 2018]

<sup>51</sup> *Ibid*, para. 73. See also M. Ferial-Tinta and Simon Milnes, The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights, *EJIL Talk!*, 26 February 2018, available at: <https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/> [last accessed 11 June 2018]

within their 'territory or jurisdiction' from causing human rights harm.<sup>52</sup> In Article 5, the Draft LBI clarifies that this obligation is not limited to the states within whose territory the human rights abuse occurs. It provides that jurisdiction shall also vest in states where the corporate entity 'has its place of incorporation, statutory seat, or central administration, or substantial business interests'.<sup>53</sup> According to the Draft LBI, states must ensure that any corporate entity which falls under these prescribed parameters must exercise due diligence in all its operations to the extent that it 'sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place'.<sup>54</sup>

Based on the above discussion, it can be concluded that the obligation to protect contains a strong element of preventative obligations that states need to comply with through regulation and the requirements of due diligence procedures on the part of TNCs and other business enterprises. It can further be concluded that the movement within soft law statements and declarations indicates that the obligation should go beyond the domestic setting for a state; it carries through to activities engaged in by the enterprises over which the state exercises control or influence when these enterprises operate outside the territory of the state.<sup>55</sup> The question of whether this wider geographic reach can be considered an obligation based on treaties without such explicit provisions remains and will be addressed in the next section of the article.

### 3. JURISDICTION

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<sup>52</sup> *Supra* note 9, draft article 5.1.

<sup>53</sup> *Ibid*, draft article 7.

<sup>54</sup> *Ibid*, draft article 6.6.

<sup>55</sup> D. Augenstein and D. Kinley, When human rights "responsibilities" become "duties": the extra-territorial obligations of states that bind corporations, in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, (Cambridge: Cambridge University Press, 2017) at 275.

The above conclusions then raise the question of the reach of jurisdiction. In general, the link between human rights standards and jurisdiction lies in states' obligations to perform the legal requirements of international human rights law. Or in other words, international human rights law sets the substantive standards and the content of the obligations that states are under a legal requirement to comply with, while the principles of jurisdiction provide the authority for states to carry out the necessary acts to comply with these legal obligations. The question becomes whether there is a conflict between human rights obligations on the one hand and the principles of jurisdiction on the other. Or more specifically, do the principles of jurisdiction prevent states from performing their human rights obligations to protect individuals in other countries against human rights abuses perpetrated by business enterprises over which the state exercises authority?

Many, but not all, human rights treaties refer to states' jurisdiction in their general obligations provisions.<sup>56</sup> In this manner, the treaties make a clear connection between the human rights obligations and the state's exercise of jurisdiction. For instance, in the European Convention on Human Rights, Article 1 provides that

[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The question of jurisdiction related to the possible limitation of human rights obligations has engaged courts, UN human rights bodies and academics for a considerable amount of time. It is not necessary in this article to revisit all the arguments that have been put forward in case law and academic

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<sup>56</sup> Of the major international and regional human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) refers both to 'jurisdiction' and 'territory' in its main obligation article. The International Convention against Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the Arab Charter on Human Rights all refer to jurisdiction. This leaves the following major conventions that do not refer to either jurisdiction or territory: The International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all forms of Racial Discrimination (CERD); The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); The Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); and the African Charter on Human and People's Rights (ACHPR).



contributions.<sup>57</sup> However, there is one recurring argument that is advanced to object to human rights obligations reaching beyond a state's territory, and this relates to the territoriality of jurisdiction. There is a general presumption that jurisdiction is territorial and in several cases, the ECtHR has held that jurisdiction is primarily territorial and that only in exceptional circumstances can it reach beyond the territory of the state.<sup>58</sup> In its case law, the ECtHR has generally found that the exceptional circumstances in which extraterritorial jurisdiction has been accepted mainly (but not uniquely) related to situations of armed conflict or occupation, and these cases have therefore often concerned the conduct of armed forces outside the territory of the State Party to the Convention.<sup>59</sup>

The objection to the extraterritorial application of jurisdiction is *inter alia* an expression of the concern that such application would infringe upon the sovereignty of other states. However, such objections are generally voiced through a sweeping statement of 'jurisdiction' without much regard for nuances concerning the various aspects of jurisdiction and how it is being exercised. These nuances will be further addressed in the next sub-section of this article.

The other aspect of sovereignty that is brought forward in this context is the perceived danger that regulation of conduct outside a state's border may infringe on other states' jurisdiction. It is beyond

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<sup>57</sup> C. Ryngaert, *Cedric Jurisdiction in International Law*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2015); W. Vandenhoe (ed.) *Challenging Territoriality in Human Rights Law* (London: Routledge, 2015); M. Milanovic, *Extraterritorial application of human rights treaties law, principles and policy* (Oxford monographs in international law) (Oxford: Oxford University Press, 2011); T. Altwicker *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, *European Journal of International Law* (2018); E. Roxstrom and M. Gibney, *Human Rights and State Jurisdiction*, 18(2) *Human Rights Review* (2017); L. Raible, *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, 31 *Leiden Journal of International Law*, 315–334 (2018); V.P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility* 36 *Mich J Int'l L* 129 (2014). For relevant case law, see footnote 58.

<sup>58</sup> See *inter alia*, *Banković and Others v Belgium and Others*, ECtHR Grand Chamber, Admissibility, Decision, No. [52207/99](#), 12 December 2001; *Issa v Turkey*, ECtHR Second Section, Judgement, No. 31821/96, 16 November 2004; *Al-Skeini and Others v The United Kingdom*, ECtHR Grand Chamber, Judgement, No. 55721/07, 7 July 2011. For an assessment of case law by the ECtHR where the question of extraterritorial application of the Convention has been raised in situations other than those relating to occupation or the conduct of policy/security forces, see O Cuinn and Skogly, *Understanding human rights obligations of states engaged in public activity overseas: the case of transnational education* (6) *International Journal of Human Rights* 6 at 761-784 (2016).

<sup>59</sup> This was the case in *Issa v. Turkey*; and *Al-Skeini and others v. UK*, *ibid*.

the scope of this article to discuss the question of sovereignty in detail.<sup>60</sup> However, one aspect of exercising sovereignty is that states may engage in international cooperation through interaction with other states. This is done through diplomatic relations and through legally binding connections, such as entering into bi- and multilateral treaties. However, that does not mean that once they have entered into treaty relationships, or are part of relationships built on customary international law, they may choose whether to participate fully in the operation of those treaties or in customary international law. The principle of *pacta sunt servanda* confirms that once a state has exercised its external sovereignty and accepted being bound by a treaty, it is then under a legal duty to perform the obligations in that treaty in good faith.<sup>61</sup> If the content of international law that a state is bound by contains obligations to regulate the conduct of actors over which they have regulatory authority, to comply with these obligations would be in accordance with international law principles.

To enable us to make a clear assessment of the juncture at which human rights obligations meet the state's jurisdictional concerns, we will in this section address some of these areas, in particular the requirement of prescriptive jurisdiction, and the discretionary nature of jurisdiction. These two questions have particular significance for implementing the obligation to protect against human rights violations in a highly globalised world.

#### **A. Prescriptive jurisdiction**

The starting point for this discussion is the basic understanding that jurisdiction is about the authority or competence to act.<sup>62</sup> This authority has a number of layers and involves different actors.

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<sup>60</sup> An interesting article in this regard is R. Chambers, An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct. Jurisdictional dilemma raised/created by the use of the extraterritorial technique 14(2) *Utrecht Law Review* (2018).

<sup>61</sup> UN, Vienna Convention on the Law of Treaties, 23 May 1969 1155 UNTS 331, article 26.

<sup>62</sup> R. Higgins, *Problems and Process: International Law and How We Use it*, (Oxford: Oxford University Press, 1994) at 56.

Jurisdiction is commonly divided into three sub-categories: prescriptive jurisdiction; adjudicative jurisdiction; and enforcement jurisdiction.<sup>63</sup>

In this article we focus attention on the first aspect: prescriptive jurisdiction. As indicated above, few would take issue with the argument that states have a domestic obligation to protect human rights and that they have the jurisdiction to comply with that obligation through regulation of the activities of private parties that operate within their territories.<sup>64</sup> In our globalised world, many activities by business enterprises result in harmful effects outside the territory of their home state, and the question becomes how far the reach of the prescriptive jurisdiction extends for states to comply with the obligations stemming from international human rights law to protect individuals. Brownlie has remarked that ‘the state is under a duty 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’.<sup>65</sup> Based on this view, to what extent may a state regulate the conduct of business enterprises when they operate abroad?

It should be noted here that the jurisdictional question asked in many of the cases heard by the regional human rights courts, such as the ECtHR, relate to whether the state as an actor had control over the person(s) who suffered the human rights harm.<sup>66</sup> In our focus on the obligation to protect, and the role of the state as regulator of the conduct of private entities such as business enterprises, the question is different. In this situation, it is a matter of having authority or control over entities that are established within the state’s territorial border, but which may – through their actions or omissions – affect the human rights of individuals abroad. As stated above, this is an obligation of conduct rather than an obligation of result. The jurisdictional question is therefore whether the state

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<sup>63</sup> C. M. O’Brian, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 (1) *Business and Human Rights Journal*, (2018) at 53.

<sup>64</sup> *Ibid*, at 64.

<sup>65</sup> I. Brownlie, *System of the Law of Nations: State Responsibility (Part 1)* (1983) at 16, as quoted in *Commentary to Maastricht Principles*, *supra* note 10, at 1136.

<sup>66</sup> See for instance *Banković and Others v Belgium and Others*; and *Al-Skeini and Others v The United Kingdom*.

has the authority to regulate the conduct of these private entities and if so, whether this is a right or an obligation on part of the state.<sup>67</sup>

In his seminal book on jurisdiction in international law, Ryngaert questions whether the concept of prescriptive jurisdiction as enunciated by the Permanent Court of International Justice in the *Lotus* case<sup>68</sup> can be considered customary international law.<sup>69</sup> In this case, the Court held that states could freely regulate conduct beyond their borders as long as the content of the regulations did not contradict principles or obligations in international law. Through careful consideration of practice, Ryngaert concludes that this significant freedom to regulate does not represent current customary international law. Rather, he turns the tables and holds that 'States are not authorized to exercise their jurisdiction unless they could rely on such permissive principles as the territoriality, personality, protective, and universality principles'.<sup>70</sup> Of these permissive principles, the territoriality principle is in our context not controversial as states are clearly under an obligation to regulate within their territory. The protective and universality principles relate more to enforcement and/or adjudicative jurisdiction.<sup>71</sup> For the present discussion on prescriptive jurisdiction, therefore, the important aspect becomes what Ryngaert refers to as jurisdiction based on 'personality', something others refer to as the 'nationality principle'.<sup>72</sup>

According to prescriptive jurisdictional principles, a state has the authority to regulate the conduct of private entities beyond its border if they are a national of the state. If a national has perpetrated an act abroad that the home state has made a criminal offence, the state has jurisdiction to hold this person/entity to account on the basis of the 'active personality' ('nationality') principle.<sup>73</sup>

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<sup>67</sup> Raible, *supra* note 57, p. 320.

<sup>68</sup> *The Lotus case, (France v. Turkey) (1927) P.C.I.J., Ser. A, No. 10.*

<sup>69</sup> Ryngaert, *supra* note 57, at 30.

<sup>70</sup> *Ibid.*

<sup>71</sup> Yet, the requirement in the Convention against Torture and Other Inhuman, Cruel or Degrading Treatment of Punishment (1984), article 5 (2), which requires that States establish universal jurisdiction over acts covered by the convention, is a requirement that States engage their prescriptive jurisdiction.

<sup>72</sup> R. Gardiner, *International Law* (London: Pearson/Longman, 2003) at 268.

<sup>73</sup> M. Dixon and R. McCorquodale, *Cases and Materials on International Law*, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2000) at 295.

There are, in fact, many examples where states have applied the nationality principle and have legislated for activities that take place abroad. For instance, in cases of serious offences against other people (such as murder, war crimes, terrorism and sexual offences against children) it is not unusual for states to assert extraterritorial prescriptive jurisdiction.<sup>74</sup>

Commonly, such regulation by states is aimed at activities undertaken by individuals when they act abroad. However, there is no legal bar to applying such regulatory powers also to legal persons, such as corporations over which a state exercises regulatory authority. A recent example in this regard is the requirement by the UK government that all its sub-contractors in disaster zones and developing countries must report any sexual abuse allegations against their employees.<sup>75</sup> In essence, the concern here is that sub-contractors' employees in developing countries may be engaging in sexual abuse, which is clearly a human rights violation against individuals in the relevant developing country. The areas where we commonly see regulation of conduct abroad by states are areas that fall well within the protection of human rights, such as sexual offences against children or terrorist activities. These examples show that states make certain conduct abroad a criminal offence, but there is no reason why this should be limited to criminal law. Health and safety regulation could equally apply to companies' operations domestically as well as abroad. The nationality principle is 'generally recognized as a basis for jurisdiction over extra-territorial acts'<sup>76</sup> and enables a state to provide regulation of conduct in specific areas. If these regulations are breached, the state – through its court system – will have the authority to hold the alleged perpetrator(s) accountable for failure to comply with them.

In bringing this reasoning to the regulation of business enterprises and their activities beyond the state in which they are legally incorporated, we are considering the effects, on individuals, of activities abroad by these entities. To comply with their human rights obligation to protect, states must exercise

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<sup>74</sup> See for instance England and Wales, Sexual Offences Act 2003 c.42, s. 72.

<sup>75</sup> *The Observer*, 4 March 2018, at 5.

<sup>76</sup> J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) at 459.

their prescriptive jurisdiction related to the nationality of the business entity, to ensure that the activities of these entities do not have the effect of violating the human rights of individuals in other states. Essentially, the state requires that entities within their territories whose actions may impact on the human rights enjoyment of individuals abroad comply with due diligence requirements. In this way, it is not the state's direct actions or omissions that affect the human rights enjoyment, but the indirect regulation of the conduct of private entities. Commenting on the recent Advisory Opinion of the Inter-American Court of Human Rights,<sup>77</sup> *Feria-Tinta and Milnes* hold that

[u]nder existing international law, it is at least arguable that a State may be obliged to regulate domestically in order to require multinationals domiciled in its territory to adopt, at the headquarters level, policies and frameworks aimed at ensuring that subsidiaries, subcontractors or supply chain partners in the global South do not infringe human rights in their places of operation. The reasoning in the AO would be supportive of such arguments, at a general level [...].<sup>78</sup>

It is, however, recognised that the legal structures of many transnational corporations are so complex that it may at times be difficult to assert a clear nationality. This is now increasingly reflected in international law discourse, and the grounds for jurisdiction over an entity are expressed in terms of a state's ability to influence the conduct of the company. The Inter-American Court holds that 'an individual is under a State's jurisdiction, in respect of conduct undertaken outside the territory of the said State (extraterritorial conduct) or with effects outside its territory, if that State is exercising its authority over that person or when that person is under its effective control [...]'.<sup>79</sup> Another formulation is found in the Maastricht Principles, Principle 9 c), as quoted above.<sup>80</sup>

Thus, according to the nationality principle, states have the right to exercise their prescriptive jurisdiction to regulate the conduct of business enterprises so as to prevent these entities from engaging in conduct that may lead to human rights abuses. This is a right states have to enable them to comply with their obligations to protect under international human rights law.

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<sup>77</sup> See *supra* note 50.

<sup>78</sup> *Supra* note 51.

<sup>79</sup> Inter-American Court of Human Rights, Advisory Opinion (2017), *supra* note 50, para. 81.

<sup>80</sup> See *supra* note 41 and accompanying text.

## B. Voluntary nature of jurisdiction

The exercise of jurisdiction is often considered to be voluntary in nature, i.e. it is an expression of a state's sovereignty and a *right* that states have.<sup>81</sup> Referring back to the understanding that jurisdiction reflects the capacity to act,<sup>82</sup> the question becomes whether at times there may be a requirement to act, when such capacity exists. If we are concerned with the fulfilment of human rights obligations to protect individuals against violations committed by actors over whom a foreign state exercises control, the question is not whether a state *may* exercise jurisdiction, but rather whether they are under a *legal obligation* to do so. In other words, does the obligation to protect *require* a state to regulate the conduct of private actors' operations both domestically and also beyond the border of the state? This is where, in the view of several authors, international human rights law differs in its approach to jurisdiction from that of general public international law.<sup>83</sup> The Commentary to the UN Guiding Principles on Business and Human Rights holds that '[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.'<sup>84</sup> In this sense, the UNGP accept that states are free to engage in such prescriptive jurisdiction. Challenging some of the opposition to compulsory exercise of jurisdiction, Ryngaert accepts that there are underlying values in the international community that need to be protected and holds that '[i]t may be argued that States do at times have responsibility, or even a duty, to exercise jurisdiction: they may have a responsibility or duty to protect either other States or fundamental values of the international community'.<sup>85</sup> If we take this approach, it becomes

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<sup>81</sup> Raible, *supra* note 57, p. 230

<sup>82</sup> Higgins, *supra* note 62, at 56.

<sup>83</sup> Raible, *supra* note 57, p. 334; Milanovic, *supra* note 57, p. 33.

<sup>84</sup> UN Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in 2011, UN Publication HR/PUB/11/04, Commentary to principle 2 (hereinafter 'UNGP'). Available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>85</sup> *Supra* note 57, at 161.

important to consider whether the international human rights law obligations of states now represent such an interest or values for the international community. It has been argued that due to the nature of international human rights law, which is to protect individuals from abuses carried out by states or actors under state control (jurisdiction), the voluntary nature of the exercise of jurisdiction does not work. 'Basing the meaning of jurisdiction in human rights law on general international law is problematic, in that both concepts of jurisdiction serve different purposes. Whereas the former essentially aims to limit expansive assertions of State jurisdiction, the latter aims to cast the jurisdictional net of State human rights guarantees widely.'<sup>86</sup> Indeed, Ryngaert holds further that

[r]ather than delimiting spheres of jurisdiction (i.e. the classic goal of the law of jurisdiction in public international law) [human rights law] is concerned with defining the group of persons to whom States are required to extend human rights protection. [...] Using principles of general international law to construe the jurisdictional clause in human rights treaties is bound to limit the categories of persons protected by the treaties.<sup>87</sup>

In this statement, Ryngaert questions whether jurisdiction in international human rights law should be approached in the same manner as jurisdiction in public international law generally.

The ECtHR has been conscious of this limitation of jurisdiction to the strict territorial application. In a number of cases, the Court has confirmed that State Party obligations reach beyond the territory in situations where they exercise control over an area or persons in another state.<sup>88</sup> This latter point was a key finding in *Al Skeini and others v. United Kingdom*. This case concerned the UK's violation of Convention rights for Iraqi individuals in Basra in Iraq, where a number of detainees had died in custody and others had been killed by UK soldiers in the streets of Basra. Assessing whether the ECHR's human rights guarantees were relevant in this situation, the ECtHR held that

[i]t is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure

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<sup>86</sup> *Ibid*, at 22.

<sup>87</sup> *Ibid*, at 24.

<sup>88</sup> *Bankovic and ors v Belgium and ors* [2001] ECHR 890; *Issa v. Turkey* App No 31821/96 [2004] ECHR 629; *Jaloud v. The Netherlands*[2014], Application no. 47708/08.



to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.<sup>89</sup>

This view of the Court confirms that the obligations of State Parties to the ECHR extend beyond their territorial borders in certain circumstances and that when the state chooses to act outside its territory, the obligations under Article 1 ECHR apply. In this way, the exercise of jurisdiction is *de facto* a result of the choice to undertake actions or operations abroad. More generally, In *Issa v. Turkey*, which related to the killing of Iraqi civilians in Iraq by Turkish soldiers, the ECtHR held that ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.<sup>90</sup>

These views of the Court seem to indicate that it considers that when a state acts outside its border and influences human rights enjoyment, these actions fall within the state’s jurisdiction, and consequently also the Court’s adjudicative jurisdiction. It should be noted that both of the cited cases relate to situations where the state has engaged in military activities outside its territorial borders. The Court has, however, expressed similar views in cases that do not concern military activity. In *Manoilescu and Dobrescu v Romania and Russia*,<sup>91</sup> which concerned property transfers, the Court held that

even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.<sup>92</sup>

The Court also added that in this case, it had broadened its earlier position that the exceptional circumstances only referred to situations of effective control through ‘military occupation or through the consent, invitation or acquiescence of the government of that territory’.<sup>93</sup>

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<sup>89</sup> *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para. 137.

<sup>90</sup> *Issa v. Turkey* App No 31821/96 [2004] ECHR 629, para. 71.

<sup>91</sup> *Manoilescu and Dobrescu v Romania and Russia*, ECtHR Third Section, Decision, No. 60861/00, 3 March 2005.

<sup>92</sup> *Ibid*, para. 101.

<sup>93</sup> *Ibid*.

While the Court has not directly addressed situations related to the regulation of business enterprises' activities abroad, it is proposed that in terms of human rights obligations the exercise of jurisdiction should not be considered optional, but rather compulsory. In other words, when states act abroad, or have authority over other entities acting abroad, they should be under a duty to use their authority to prevent such entities from negatively impacting on the human rights of individuals abroad, using the appropriate means within their capacity. Such means would necessarily include the exercise of prescriptive jurisdiction by states, through the enactment of regulations, to ensure that the extraterritorial activities of their corporate nationals do not negatively affect human rights.

The cases referred to in section 3 deal with the human rights effects of activities carried out, or influenced by, the state abroad, and this is in spite of a lack of explicit reference to extraterritorial obligations in the ECHR. Currently, there are no explicit provisions confirming the extraterritorial reach of the obligation to protect in a treaty. Yet, as has been detailed in section 2 above, several of the UN treaty bodies and regional human rights courts have confirmed this obligation. The essential aspect is the ability of a state to control the actors that impact on the human rights enjoyment of individuals. The authors recognise that business enterprises are not agents of the state as understood in human rights law, but based on developments in international human rights law through the opinions of courts and strong soft law initiatives, the obligation to protect requires regulation of these actors to avoid human rights abuses when the state is in a position to regulate conduct that results in human rights violations. This requirement will necessarily oblige the state to exercise its jurisdiction; it is not an option.

To conclude this section, it has been established that prescriptive jurisdiction is not limited by territory, but rather is permissible as long as it is applied in accordance with the nationality principle. It has also been shown that ECtHR case law confirms that when a state acts abroad and those actions negatively affect individuals, the state has exercised its jurisdiction in the meaning of the ECHR. In

terms of the obligation to protect, the relationship between the state and the individual that suffers human rights abuses is less direct. However, prescriptive jurisdiction gives the state the opportunity to regulate the conduct of its corporate nationals which impacts on the human rights situation for the individual. It is held that because the state has the capacity to influence the human rights of individuals abroad through the regulation of its corporate nationals' extraterritorial activities by virtue of prescriptive jurisdiction, the state should consequently have an obligation to protect, to the extent that it can exercise such prescriptive jurisdiction. Confirming this in a treaty text is one way of assuring the recognition of this compulsory nature of exercising jurisdiction. If the proposed treaty on business and human rights were to include explicit obligations to regulate the conduct of enterprises wherever they operate, this would not be a new development in international law. It would, however, make such obligations more specific and would follow developments which have already taken place in other areas of international agreements. Such developments will be addressed in the final section of the article.

#### **4. OTHER AREAS WHERE STATES HAVE COMMITTED TO EXTRATERRITORIAL OBLIGATIONS**

Under certain international legal regimes, states have committed to obligations that require the use of necessary means and mechanisms to regulate the extraterritorial activities of private actors.<sup>94</sup> These international legal instruments employ broad interpretations of the accepted jurisdictional principles to regulate extraterritorial acts, even when those acts are executed by foreign persons. This is used by the different legal regimes to overcome the apparent obstacles to effective regulation posed by the transnationalisation of international activities. Through the extended interpretation of the

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<sup>94</sup> There are no set rules on which mechanism(s) a state can use in implementing its international obligations. However, as the examples discussed in this section demonstrate, where the behaviour or activity at issue is considered a 'serious offence against other people' or where the acts have the potential to cause harm in other states, states sometimes lean towards the use of their criminal law mechanisms in proscribing such acts and behaviour. See A. Zerk, *Extraterritorial jurisdiction: Lessons for the business and Human Rights Sphere from six regulatory areas, A Report for the Harvard Corporate Social Responsibility initiative to help the mandate of the UNSG's Special Representative on Business and Human Rights* (Working Paper No. 59, 2010), at 115-143.

territoriality and nationality principles in particular, the legal regimes have extended their reach to prescribe regulations to govern activities and relationships that escape the jurisdiction of any one state.

One example of these international legal regimes is the International Framework Convention on Tobacco Control (FCTC).<sup>95</sup> The FCTC was set up following the outcry against the lethal effects of tobacco smoking and the tobacco industry's move to developing regions, which have been ill-equipped to prevent or cope with the major health consequences that arise from the consumption of tobacco products.<sup>96</sup> The FCTC requires state parties to 'adopt and implement effective legislative, executive and administrative and/or other measures and develop appropriate policies for preventing and reducing tobacco consumption...'.<sup>97</sup> Specifically relating to advertising, Article 13 provides that state parties are required to enact 'comprehensive bans', which must necessarily extend to 'cross-border advertising, promotion and sponsorship that originates from the territory of the state party'.<sup>98</sup> The Guidelines for the implementation of Article 13 explain that a comprehensive ban on advertising, promotion and sponsorship originating from a party's territory includes an obligation to ensure that a party's nationals – natural or legal persons – do not engage in advertising, promotion or sponsorship in the territory of another state, irrespective of whether it is imported back to their state of origin.<sup>99</sup> According to the Guidelines, responsibility for the advertisement or sponsorship of tobacco products in relation to legal persons extends to the entire market chain from the tobacco manufacturers, wholesale distributors and importers to the retailers and their agents and associates, provided they were aware of, or are in a position to become aware of the advertising and promotion.<sup>100</sup> This element is recognised as a necessary requirement for the prevention of transnational tobacco advertising,

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<sup>95</sup> World Health Organisation Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC).

<sup>96</sup> O. A. Cabrera and L. O. Gostin, Global tobacco control: a vital component of the right to health, in J. M. Zeniga et al. (eds), *Advancing the Human Right to Health* (Oxford: Oxford University Press, 2013), at 261.

<sup>97</sup> *Supra* note 95, article 5(1) (b).

<sup>98</sup> *Ibid*, article 13.

<sup>99</sup> Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control on 'Tobacco advertising, promotion and sponsorship (decision FCTC/COP3 (12)), November 2008, at para. 50.

<sup>100</sup> *Ibid*, paras 53-55.

promotion and sponsorship and for ensuring that the right to health, as affected by tobacco consumption, is protected internationally.<sup>101</sup>

Further strengthening its resolve to prevent the tobacco epidemic, the FCTC expressly prohibits any form of reservations to the obligations contained in its provisions.<sup>102</sup> As at July 2017, the Convention has a total of 181 ratifications (180 states and the European Union), representing more than 90 per cent of the world's population.<sup>103</sup> This shows that virtually all states in the international community have accepted the obligations in the Convention, including those that require the extraterritorial application of their national regulations to prevent the advertisement, promotion and sponsorship of tobacco products by both natural and legal entities.<sup>104</sup>

Another area where a broad interpretation of jurisdictional principles has been applied is anti-bribery. The current legal structure prohibiting bribery of foreign government officials can be traced to the 1970s with the adoption of the US Foreign Corrupt Practices Act (FCPA), which was established as a result of the public outcry against the widespread pattern of corrupt payments made by US companies to foreign government officials.<sup>105</sup> The FCPA criminalises bribery of foreign public officials by US corporate multinationals, whether directly or through intermediaries as long as the parent company authorised, directed or participated in the illegal acts.<sup>106</sup> As the US was the only state at the time to have adopted legislation prohibiting private actors from engaging in corrupt activity, its companies faced an uneven playing field for foreign business if they were bidding for government contracts

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<sup>101</sup> *Supra* note 95, at V.

<sup>102</sup> *Ibid*, article 30.

<sup>103</sup> Framework Convention Alliance, available at: <http://www.fctc.org/about-fca/tobacco-control-treaty/latest-ratifications/parties-ratifications-accessions#ratifications> [last accessed 30 January 2018].

<sup>104</sup> Although an FCTC signatory, the US joins Cuba, Argentina and a handful of other countries as one of the few signatories yet to ratify the treaty. However, the US has passed the Family Smoking Prevention and Control Act (FSPCA), an Act that complies with the provisions of the FCTC. For the list of parties to the FCTC, see WHO, Parties to the WHO Framework Convention on Tobacco Control, available at: [http://www.who.int/fctc/signatories\\_parties/en/](http://www.who.int/fctc/signatories_parties/en/) [last accessed 28 April 2018].

<sup>105</sup> Foreign Corrupt Practices Act of 1977, 15 USC Section 78dd-1.

<sup>106</sup> *Ibid*.

against firms who were not constrained from offering bribes.<sup>107</sup> Thus, they sought to level the playing field by pushing for an internationalised anti-corruption legislative regime.<sup>108</sup> However, it was not until the 1990s, when European states witnessed their own set of corruption scandals, that a consensus for an international regime for combating bribery emerged.<sup>109</sup> This consensus resulted in the adoption of the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).<sup>110</sup> Article 4 (1) of the OECD Convention provides that 'each party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory'.<sup>111</sup> The Commentary accompanying the text states that this provision 'should be interpreted broadly so that an extensive physical connection to the bribery act is not required'.<sup>112</sup> In relation to the nationality principle, Article 4(2) FCPA requires member states to establish, according to their own municipal laws, the legal grounds for prosecuting their own nationals 'for offences committed abroad'.<sup>113</sup> The OECD's 'Good Practice Guideline', annexed to a 2009 OECD Recommendation on the implementation of the Convention, directs state parties to ascertain that 'a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf'.<sup>114</sup> These

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<sup>107</sup> United States General Accounting Office, Impact of the Foreign Corrupt Practices Act on U.S. Companies, Report by the Comptroller General to the Congress of the United States AFMD-81-34.

<sup>108</sup> Zerk, *supra* note 95, at 40.

<sup>109</sup> R. Brewster, The Domestic and International Enforcement of the OECD Anti-Bribery Convention 15(1) *Chicago Journal of International Law* (2014), at 100.

<sup>110</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997, S. Treaty Doc. No. 105-43.

<sup>111</sup> *Ibid*, article 4 (1) (emphasis added).

<sup>112</sup> OECD, Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference, 21 November 1997, para. 25, available at: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/35242371.pdf> [last accessed 28 April 2018].

<sup>113</sup> *Supra* note 105, article 4(2).

<sup>114</sup> OECD Working Group on Bribery in International Business Transactions, Recommendations for further combating bribery of foreign officials in international business transactions, 26 November 2009. Annex I, paragraph c (emphasis added), available at: <http://www.oecd.org/daf/anti-bribery/44176910.pdf> [last accessed 28 April 2018].

provisions are potentially relevant to situations where foreign subsidiaries or agents are primarily responsible for bribery.

Following this development, the US amended the FCPA by adding a new provision extending US jurisdiction to ‘any act in furtherance [of bribery by] any person’ committed in the territory of the US.<sup>115</sup> The territorial connection appears to be quite expansively interpreted. In fact, the US had declared in a submission to the OECD that this new jurisdictional basis extends to any act beyond ‘merely [conceiving] the idea of paying a bribe without undertaking to do so’.<sup>116</sup> In relation to the nationality jurisdiction provided in Article 4(2) of the OECD Convention, the FCPA’s implementing amendments expanded the scope of the Act beyond ‘issuers’ and ‘domestic concerns’ to any ‘United States corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship’ that is ‘organised under the laws of the United States or any State’.<sup>117</sup> These persons may be held liable for acts committed in any part of the world, even in the absence of any US territorial connection and even where the entire act occurs in a foreign state.<sup>118</sup> Thus, a foreign subsidiary may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign subsidiary itself takes any action in the United States.

Like the US, all the other OECD states have ratified the OECD Convention and implemented its provisions in their domestic legislation.<sup>119</sup> They have also, though in varying degrees, adopted expansive interpretations of jurisdictional principles to permit extraterritorial action. In 2010, the UK introduced the Bribery Act to update and enhance the UK law on bribery, including foreign bribery in

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<sup>115</sup> *Supra* note 105, 78dd-3(a).

<sup>116</sup> OECD, United States: Review of the Implementation of the Convention and 1997 Recommendation, at para. 1.1.3 (1999), available at: <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf> [last accessed 30 April 2018]. US prosecutors have used a broad interpretation of this jurisdictional provision, see *US v Willbros Group inc.*, No. 4:08-cr-0287 (S.D. Tex. 2008).

<sup>117</sup> *Supra* note 112, 78dd-2(i)2.

<sup>118</sup> *Ibid*, 78dd-2(i)2.

<sup>119</sup> All OECD Countries plus eight non-OECD states have ratified the Convention. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status at: <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> [last accessed 28 April 2018].

order to address better the requirements of the 1997 OECD Convention.<sup>120</sup> Notably, it introduces a broad extraterritorial application for companies and partnerships failing to prevent bribery. Section 7 of the Bribery Act provides that ‘a relevant commercial organisation is guilty of an offence... if a person associated with the commercial organisation’ bribes another person intending to obtain or retain business for the organisation or any advantage thereof.<sup>121</sup> This provision, first, applies to ‘relevant commercial organisations’, which are defined in section 7(5) Bribery Act to include both entities incorporated in the UK and entities incorporated in any other state, provided that such an entity ‘carries on a business, or part of a business, in any part of the United Kingdom’.<sup>122</sup> Second, such a relevant commercial organisation can be exposed under section 7 for failing to prevent bribery ‘irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere’.<sup>123</sup> Third, the offences for which an organisation may be held criminally liable under section 7 are triggered by the acts and omissions of a person ‘associated with’ the relevant commercial organisation. Section 8 of the Bribery Act defines an ‘associated person’ as a person who performs services for or on behalf of the organisation.<sup>124</sup> This includes employees, agents and subsidiaries, and the capacity in which the associated person performs services does not matter.<sup>125</sup> These three concepts work to create a very broad basis for the statute’s application.

Following pressure from the OECD, the Canadian Corruption of Foreign Officials Act (CFPOA) was amended in 2013 to include jurisdiction based on nationality, no matter where the CFPOA offence is committed. This new approach is consistent with its obligations under Article 4.2 of the OECD Convention.<sup>126</sup> The Canadian authorities have not shied away from making attempts to enforce the CFPOA against foreign nationals. In *Chowdhury v H.M.Q.*, Chowdhury, a Bangladeshi citizen and

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<sup>120</sup> UK Bribery Act 2010, available at: <http://www.legislation.gov.uk/ukpga/2010/23/contents> [last accessed 28 April 2018].

<sup>121</sup> *Ibid*, section 7.

<sup>122</sup> *Ibid*, section 7(5).

<sup>123</sup> *Ibid*. section 7.

<sup>124</sup> *Ibid*. section 8.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Supra* note 111, article 4(2).



resident, allegedly acted as agent for a Canadian company in offering bribes to Bangladeshi government officials.<sup>127</sup> The Ontario Superior Court ruled that Canada had jurisdiction over the extraterritorial offence that was in issue.<sup>128</sup>

Though varying in degree, the US, UK and Canada are examples of states that have given expansive interpretation to territorial and nationality jurisdiction as bases for the implementation of their obligations under the OECD Convention.

The OECD Convention is not the only international instrument that lays the foundation for the extraterritorial reach of state regulations in respect of bribery and other forms of corruption. The Council of Europe Criminal Law Convention, the European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States, and the African Union Convention on Preventing and Combating Corruption, all require state parties to exercise jurisdiction on the basis of expansive interpretations of the principles of jurisdiction.<sup>129</sup>

As well as the anti-tobacco and anti-bribery international legal regimes, another area that has achieved some level of international consensus on the extraterritorial application of state regulation is anti-terrorism. Terrorism is one of the main contemporary threats to international peace and security.<sup>130</sup> This is especially so due to the transnational nature of terrorist offences and their threat to democracy and human rights.<sup>131</sup> The international community has long recognised the importance

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<sup>127</sup> *Chowdhury v H.M.Q.*, 2014 ONSC 2635.

<sup>128</sup> Although the court agreed that Canada had prescriptive jurisdiction over the extraterritorial acts, it decided that because Chowdhury was neither a citizen nor resident of Canada and the stated acts of bribery had occurred entirely in Bangladesh, Canada did not have jurisdiction to prosecute him unless he is physically present in Canada or Bangladesh offers to surrender him to Canada. It is noteworthy, however, that the court did not exclude the fact that Canada could subsequently exercise jurisdiction in the event that Canada was able to 'lay hands' on Mr Chowdhury. *Ibid.*

<sup>129</sup> For a summary of the jurisdictional provisions of the major international agreements on bribery and other forms of corruption, see Zerk, *supra* note 95, at 30-60.

<sup>130</sup> Security Council Briefing, Threats to International Peace and Security caused by terrorist acts. Statement by H E Lise Gregoire-van Haaren, Deputy Permanent Representative of the Kingdom of the Netherlands to the United Nations. 8 February 2018, available at: <https://www.permanentrepresentations.nl/latest/news/2018/02/08/security-council-briefing-threats-to-international-peace-and-security-caused-by-terrorist-acts> [last accessed 28 April 2018].

<sup>131</sup> OHCHR, Fact Sheet No. 32, *Human Rights, Terrorism and Counter Terrorism*, July 2008 No. 32, available at: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> [last accessed 28 April 2018].

of concerted efforts to combat terrorism. Following the 9/11 attacks in the US, there has been an increase in national, regional and international legislative activity with a view to combating terrorism. The UN Security Council issued Resolution 1368, which calls on all states to 'work together urgently to bring to justice the perpetrators, organisers and sponsors of these terrorist attacks' and also 'to redouble their efforts to prevent and suppress terrorist attack', including the implementation of existing terrorism conventions.<sup>132</sup> Following this, the US immediately passed the PATRIOT Act, which focuses on improving access to information regarding terrorism and related activities.<sup>133</sup> Among its many provisions, the PATRIOT Act imposes a due diligence requirement on US banks which have correspondent accounts for foreign banks, and conferred new extraterritorial powers on US authorities, including the right to subpoena information held by foreign banks and the right to seize funds of foreign banks held in US inter-bank accounts.

The EU adopted its own 'Action Plan', which was realigned in 2004 after the Madrid train bombings. The plan addresses seven main objectives, including reducing terrorists' access to financial and economic resources and increasing the capacity of the European institutions and member states to investigate and prosecute. Elements of the action plan have been included in some EU legislation, including the EU Framework Decision of 13 June 2002 on combating terrorism. This Framework Decision requires members to exercise extraterritorial jurisdiction based on extended territoriality or nationality over a whole range of terrorist and terrorist-related offences, regardless of where they occur.<sup>134</sup>

In relation to the environment, states initially regarded control over environmental quality as a matter over which each state should have sovereignty within its own territory.<sup>135</sup> However, facing the stark

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<sup>132</sup> UN SC, Security Council Resolution 1368 (2001) *Threats to international peace and security caused by terrorist acts*, 12 September 2001, S/RES/1368 (2001), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> [last accessed 6 June 2018].

<sup>133</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

<sup>134</sup> Council Framework Decision of 13 June 2002/584/JHA OJ 2002, L.

<sup>135</sup> *Ibid*, at 176.

reality that environmental problems do not respect territorial boundaries, states began to impose requirements on actors within their territories where the activities of these actors would potentially have cross-border impact.<sup>136</sup> These requirements are usually placed pursuant to international treaty regimes requiring state parties to adopt specific regulatory measures in relation to activities within their own territories that may have extraterritorial impact.<sup>137</sup> International regimes relating to the export of hazardous wastes exemplify how these regulations are applied.

In response to the public outcry following the dumping of toxic waste by industrialised states on the territory of less developed states where environmental awareness was lacking and regulations and enforcement mechanisms were underdeveloped, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted.<sup>138</sup> The Basel Convention obliges waste-exporting states to adopt appropriate measures at the national level to ensure that exports do not take place if there is reason to believe that 'the wastes in question will not be dealt with in an environmentally sound manner'.<sup>139</sup> This provision is based on the principle of 'prior informed consent' (PIC), a principle at the foundation of other international agreements on the subject.<sup>140</sup> The PIC principle implies that the export of waste is only permitted upon the consent of the receiving state, which must first be informed of the nature of the waste and the risks it poses to human health and the environment.<sup>141</sup> These requirements have been proven to have an effect on corporate

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<sup>136</sup> Report of the Special Representative of the Secretary General on the issue of human Rights and Transnational Enterprises and other businesses, para. 50.

<sup>137</sup> Zerk, *supra* note 95, at 178.

<sup>138</sup> UNEP, History of the development of the Basel Convention, available at <http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx> [last accessed 11 January 2018].

<sup>139</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 126; 28 ILM 657 (1989), article 4(2).

<sup>140</sup> The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10 September 1998, entered into force 24 February 2004) 2244 UNTS 337; Convention on Biological Diversity (adopted, came into force 29 December 1993) 1760 UNTS 79.

<sup>141</sup> J. Krueger, Regulating Transboundary Movements of Hazardous Wastes: The Basel Convention and the Effectiveness of the Prior Informed Consent (PIC) Procedure (1996) International Institute for Applied Systems Analysis working paper WP-96-113, at 7, available at: <http://pure.iiasa.ac.at/id/eprint/4914/1/WP-96-113.pdf> [last accessed 6 June 2018].

accountability for extraterritorial environmental breaches. A particular incident that exemplifies this effect is the 2006 '*Probo Koala* incident'.<sup>142</sup>

In 2006, a cargo which allegedly contained toxic waste was carried by the *Probo Koala* from Amsterdam to Abidjan, Côte d'Ivoire. Upon reaching Abidjan, the cargo was illegally dumped at different locations. The *Probo Koala* had been chartered by Trafigura Limited, a UK subsidiary of Trafigura BV, which is incorporated in the Netherlands. The cargo had initially been taken to Amsterdam for processing; however, the Dutch authorities reportedly allowed the waste processing company (Amsterdam port services) to load the cargo back onto the *Probo Koala*, allegedly due to concerns about the level of hazard posed by the waste. In 2008, Dutch prosecutors began proceedings against Trafigura BV and some of its senior officials, while a class action suit was instituted in the UK against Trafigura Ltd.<sup>143</sup> The list of charges included alleged breaches of the Lomé IV Convention, an agreement negotiated following the Basel Convention between some 68 less industrialised states from Africa, the Caribbean and the Pacific (ACP) and the European Community (EC).<sup>144</sup> The agreement bans all shipment of hazardous or radioactive waste from EC states to ACP states. It was based on this instrument that the actions against Trafigura were brought for knowingly allowing hazardous waste to be transported to Côte d'Ivoire, even though the physical act was conducted by a foreign company in a foreign region.<sup>145</sup>

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<sup>142</sup> UN OHCHR, Ten Years on, the survivors of illegal toxic waste dumping in Cote d'Ivoire remain in the dark: 10<sup>th</sup> anniversary of the "Probo Koala incident", (19 August 2016).

<sup>143</sup> For a comprehensive account of the entire incident, see K. van Wingerde, The limits of environmental regulation in a globalised economy. Lessons from the Probo Koala case, in J. van Erp, W. Huisman and G. Vande Walle, *Routledge handbook on White-Collar and Corporate Crime in Europe* (Oxford: Routledge, 2015), at 260-275.

<sup>144</sup> African, Caribbean and Pacific Group of States, ACP Group, 1995. Agreement Amending the Fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995. ACP-CE 2163/95, available at: [https://ec.europa.eu/europeaid/sites/devco/files/revised-lome4convention-1998\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/revised-lome4convention-1998_en.pdf) [last accessed 30 April 2018].

<sup>145</sup> The *Probo Koala* incident has, however, attracted much criticism as the series of actions were ultimately settled with Trafigura. Home state responsibility was also lacking as many questions arose around the Netherlands' enforcement mechanisms. In several cases, prosecutions were halted and/or persons were released from detention following the payment of 'settlements'. For a summary of the series of cases following the incident, see 'Trafigura: The dumping of toxic waste in Cote d'Ivoire', available at: <https://cdn2.hubspot.net/hubfs/2617486/Greenpeace/Desarrollador%20CMA/Responsabilidad%20Corp/20%20Cases/Trafigura.pdf?t=1516397935167> [accessed 28 April 2018].

The stated examples indicate that the duty of the state to regulate the activities of third parties does not end at its territorial boundary. The rationale in defining the reach of these regulations in this way is to protect against situations in which respect for legal standards related to environmental protection, anti-tobacco and anti-corruption may be undermined due to the transnational nature of the relevant actors in the different fields. These fields are either analogous to or directly relevant to human rights. The FCTC was adopted in response to the serious effects of tobacco consumption on the right to health – a right recognised by the major international human rights instruments.<sup>146</sup> When a state is involved in bribery, the political and administrative decisions of the government authorities are bought rather than made lawfully and by formal procedures. It ‘follows the unofficial laws of the market thereby circumventing the rule of law’.<sup>147</sup> Because the rule of law is essential for the respect of human rights, bribery impinges on the idea of human rights.<sup>148</sup> The threat that terrorism poses to the right to life, liberty and security of the person, amongst others, has been the subject of much discussion.<sup>149</sup> And in relation to the environment, there is no controversy in the fact that a decent physical environment is a precondition for living a life of health, dignity and worth. Just as the international and national legal instruments in these areas suggest, environmental problems, terrorism and bribery, like human rights problems, do not respect the boundaries of any single state, especially in this era of increased transnational activity.

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<sup>146</sup> Article 12, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; The 1948 Universal Declaration of Human Rights (UDHR) mentioned the right to health as part of the right to an adequate standard of living (Article 25); article 12 of the Convention on the Elimination of Discrimination against Women 1979 (CEDAW); Article 3 of the Convention of the Rights of the Child, 1989 (CRC); Article 25 on the Convention of the Rights of People with Disabilities, 2006 (CRPD).

<sup>147</sup> A. Peters, Corruption and Human Rights, Basel Institute on Governance, Working Paper series No. 20, (2015) at 9, available at: [http://www.mpil.de/files/pdf4/Peters\\_Corruption\\_and\\_Human\\_Rights20151.pdf](http://www.mpil.de/files/pdf4/Peters_Corruption_and_Human_Rights20151.pdf) [last accessed 30 April 2018].

<sup>148</sup> *Ibid.*

<sup>149</sup> E. Ochab and K. Zorzi, Effects of Terrorism on Enjoyment of Human Rights: ISIS/Daesh and Boko Haram (OHCHR.org 23 September 2016) available at: <http://www.ohchr.org/Documents/Issues/RuleOfLaw/NegativeEffectsTerrorism/ADF.pdf> [last accessed 6 June 2018].

## 5. CONCLUSION

At the beginning of this article we asked whether current approaches to jurisdiction are a bar to compliance with the obligation to protect in terms of regulating the conduct of business enterprises when they operate beyond a state's border. We further asked whether this potential barrier is necessary, acceptable and in line with other areas of international regulation.

Having examined the content of the obligation to protect as a measure to prevent human rights violations committed by private actors, including TNCs and OBEs, and located it within a nuanced context of prescriptive jurisdiction, we have found that there is nothing in the principles of international law that prevents states from regulating the conduct of these private actors. This is also in line with the UNGP, as referred to above. However, our arguments go further. Building on the practice of human rights bodies within the UN and regionally, there is now a clear understanding that the obligation to protect does not stop at a state's border, but extends to those activities abroad over which the state has regulatory influence and can carry out its prescriptive jurisdiction. Indeed, the exercise of such prescriptive jurisdiction is in compliance with the requirement of states' obligations of due diligence. The fact that this is a requirement is an expression of the difference between general public international law understanding of jurisdiction on the one hand, where the state *may* exercise its jurisdiction extraterritorially, and international human rights law jurisdiction on the other, where extraterritorial obligations *require* the exercise of such jurisdiction.

We have demonstrated that in areas that are not commonly considered to be 'international human rights law' (but which have a strong alignment), international agreements regularly require states to exercise their prescriptive jurisdiction extraterritorially to comply with the obligations arising from these agreements.

However, these areas represent only a fraction of the entire fabric of human rights that is affected in transnational processes. The current initiative to establish a treaty on Business and Human Rights is an opportunity to tackle areas where significant human rights impact results from trans-border and

international activities. The forthcoming treaty should make the obligation to protect explicit and consequently become a vital tool in the prevention of human rights violations. Compliance with this obligation would create a level playing field for TNCs and OBEs, on a par with the motivation for the international regulation of bribery, as argued by the United States in the 1970s and 1980s.

Consequently, jurisdiction is not a necessary or acceptable barrier to compliance with the obligation to protect. It is indeed time that the international human rights regime is given the same tools as that of regulation in the fields of tobacco, the environment, anti-terrorism and anti-corruption.