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Regulating transnational corporations

The role of the home state

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“For to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others.”

- Nelson Mandela
Abstract

In the last few decades transnational corporations (TNCs) have become very influential stakeholders on the international arena as well as in the states where they are based (the home state) and in the states where they operate (the host state). With operations stretching over multiple state jurisdictions, and often with several layers of ownership between the parent corporation in the home state and the subsidiary corporation in the host state, the activities of transnational corporations are difficult to regulate. Host states often lack either in will or capacity to effectively protect human rights and despite several attempts the international community has not been able to agree on any set of binding international human rights obligations for corporations. Due to this situation, the role of home states has received increased attention over the years.

In 2011 the UN Human Rights Council adopted the “Guiding Principles on Business of Human Rights”, developed by the Special Representative of the UN Secretary-General on Business and Human Rights, professor John Ruggie. The Guiding Principles, which are not binding, constitute a platform for others to base their initiatives on and they have already inspired a wide range of corporate responsibility initiatives from governments, corporations, trade unions, non-governmental organisations (NGOs) and interstate organisations. The role of the home state is however very vaguely drafted in the Guiding Principles, which is a reflection of current state of international law. States have extremely few extraterritorial obligations and states’ ability to act extraterritorially for the protection of human rights is constricted by the principle of non-intervention as well as by international trade agreements. Furthermore, as long as the role of the home state is not clear, there will be no conformity among the different home state regulations. This could result in a situation where the human rights conditions vary between subsidiary companies in a host state, depending on which home state regulates their parent companies.

To ensure a uniform regulation of TNCs and to remove some of the restrictions on the regulatory capacity of the home state, it appears necessary for the international community to return to the drafting table and formulate the responsibility of the home state to regulate its TNCs.
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Introduction

For a world order built upon the sovereignty of the territorial states, cross-border activities always cause some amount of regulatory difficulties. For example, pollution and the Internet are two phenomena that are difficult to regulate satisfactorily by each state alone. Another such phenomenon is the transnational corporation. With offices and operations in multiple states a transnational corporation as a whole is not under the jurisdiction of any single state. Therefore, a regulation aiming beyond regulating the constituent companies of a transnational corporation (TNC) must have certain extraterritorial features. This raises the question of who should regulate – The state where the transnational corporation is based (the home state)? The state where they operate (the host states)? Or perhaps the international community?

In 2011 the United Nations Human Rights Council could finally agree on the adoption of a comprehensive multilateral instrument on the issue of business and human rights. The “Guiding Principles on Business of Human Rights” (hereinafter: the Guiding Principles) were adopted by the Council with unanimity.¹ The Guiding Principles are not binding and not intended to create any new rights or obligations for either states or companies, but rather to clarify and elaborate the existing obligations and responsibilities of host states, the home states and corporations. They have already inspired a wide range of initiatives from governments, corporations, trade unions and non-governmental organisations, aiming to prevent companies from negatively affecting the enjoyment of human rights.²

In this thesis I seek to define the role of the home state in the regulation of TNCs. To do so I will analyse whether the home state is in any way obliged under international law to regulate TNCs. I will also examine to what extent a home state is allowed to regulate the activities of TNCs in host states. Finally I will discuss the disadvantages with the current regulatory system. Because of the broad support for the Framework and the Guiding Principles they are a likely foundation for future national and international initiatives on business and human rights. Therefore, the analysis of the role of the home state in the regulation of transnational corporations will start out with the Guiding Principles.

² J. Ruggie, Progress in corporate accountability, Institute for Human Rights and Business, 4 February
Purpose
The purpose of this thesis is to define the role of the home state in the prevention and remediation of human rights violations caused by transnational corporations, through the lens of the Guiding Principles, and to identify the limitations of the current system.

Delimitations
The potential existence of corporate human rights obligations under international law is outside the scope of this thesis. “Corporate human rights violations” does not in this thesis refer to the breach of corporate human rights obligations but to a situation where corporate activities or omissions have prevented individuals or communities from fully enjoying their human rights. The obligations discussed are those of the home states.

The analysis of the role of the home state will not touch upon corporate involvement in war crimes, as its relevance is limited for the overall impact of companies on human rights. Corporations taking part in hostilities are surely capable of having devastating effects on the human rights situation where they operate, but the absolute majority of corporations are not involved in armed conflict. Furthermore, the analysis will not include aspects of state responsibility for internationally wrongful acts.

Structure
Part I gives a general introduction to the topic. It explains why transnational corporations are surrounded by regulatory difficulties; why the lack of regulation can have serious consequences for the human rights situation in the host states; why regulatory initiatives up until now have been unsatisfactory; and why the home state has an important role to play.

Part II introduces the Guiding Principles and analyses the obligations and limitations of extraterritorial regulation. The first part of Chapter 4 identifies the baseline, the few instances when states are obliged under international law to protect human rights extraterritorially. The second part of Chapter 4 then discusses in what way the freedom of the home state to regulate extraterritorially regulations is restricted.

The final part discusses the risks and limitations of the current regulatory system before concluding.
Part I

1. Historic background

This first chapter gives a basic understanding of why corporations, unlike natural persons, have no obligations directly under international law, which is why the ability and the willingness of the states to regulate corporate behaviour is of such great importance. It also explains the evolution of the transnational corporation.

1.1 Rights and obligations under international law

From the time of the foundation of modern international law and well into the 20th century, states were the only conceivable subjects of international law. Individuals and other non-state actors could at the most be its objects. Diplomatic law protects diplomats; under certain circumstances, the acts of individuals can be attributed to their home state in accordance with the principles of state responsibility; and under the principle of diplomatic protection a state can adopt and protect the interest of a national who has been mistreated abroad. However, under these rules the rights and responsibilities still belong to the state. Thus, when a diplomat has been assaulted or when the business of a national living abroad has been confiscated, the act is an infringement upon the rights of the home state; and the home state, not the individual, should receive compensation from the host state. Similarly, when internationally wrongful acts were committed, the home state, not the individual, was held responsible towards the injured state. Under these areas of law the individual would only be compensated, or punished, if the home state chose to do so. International humanitarian law, which grew in importance from the mid 19th century, follows the same model. It places no obligations on the individual directly under international law but obliges the states to criminalize war crimes in its national legislation so that war criminals can be tried before state courts.

In the wake of the atrocities of the two World Wars the international community came to realise the need to recognize that individuals, in their own capacity, have both rights and obligations under international law. In the newly founded UN the international community agreed that a human being has certain inalienable rights, which must be protected everywhere at all times. It was also agreed that the most appalling human rights violations must not go

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4 Article 146, the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949
unpunished when the home state of the violator was unable or unwilling to prosecute them. So began the development of modern international human rights law and international criminal law.\textsuperscript{5} When the first human rights treaties were signed in the mid 20\textsuperscript{th} century, states were still the most likely perpetrators of human rights violations. This is reflected in the way the international human rights treaties were formulated, as rights of the individuals towards the states. They do acknowledge that third parties, such as corporations and organisations, can have an impact on the human rights situation but obliges the states to protect against such human rights infringements rather than placing any duties on non-state entities. Thus the states alone were obliged by the treaties to refrain from infringing on human rights and to make sure human rights were protected from infringements by others on its territory. With the development of international human rights law natural persons became direct subjects of international law as rights-holders.

In a parallel process they became subjects of internal law also as duty bearers. With the development of international criminal law individuals could be held responsible for the most serious violations of human rights directly under international law. The first well-known example is the Nuremberg and Tokyo trials where agents of Nazi regime and the Japanese Empire were tried for war crimes, but also for crimes against humanity, by courts set up by the allied powers.\textsuperscript{6} The next big development took place in 1993 with the International Criminal Tribunal for the former Yugoslavia, which was set up to deal with the war crimes committed during the conflicts in Balkan in the 1990’s,\textsuperscript{7} followed by the International Criminal Tribunal for Rwanda in 1994 after the genocide.\textsuperscript{8} Finally, in 2002 the Rome Statute establishing the International Criminal Court entered into force, providing a permanent court with jurisdiction to try war crimes and crimes against humanity among the participating states.\textsuperscript{9}

For legal persons the development has been very different. In the same period that saw the development of international human rights law and international criminal law another world altering process took place: Globalization. Faster and better means of transportation enabled the movement of people and products in a way unprecedented in human history.\textsuperscript{10} At the same time new international regimes, focused on the facilitation and promotion of inter-

\textsuperscript{5} Shaw 2003, see fn. 1, p. 253
\textsuperscript{6} Shaw 2003, see fn. 1, p. 45
\textsuperscript{7} ICTY About the ICTY [website], http://www.icty.org/sections/AbouttheICTY (accessed 14 April 2013)
\textsuperscript{8} ICTR, About ICTR [website], http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx, (accessed 14 April 2013)
\textsuperscript{9} ICC, About the court [website], http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx, (accessed 14 April 2013)
\textsuperscript{10} J. Zerk, Extraterritorial Jurisdiction: Lessons for the business and human rights sphere from six regulatory areas, Corporate Social Responsibility Initiative Working Paper 59, 2010, p. 5 and 10
national trade and investment, were introduced. International agreements such as the General Agreement on Tariffs and Trade from 1947 (GATT), regional free trade agreements, and the flurry of international investment agreements, all aim to remove obstacles to free trade and/or to protect corporations when operating or investing abroad. As with human rights treaties the parties to the agreements are states but corporations sometimes have rights directly under them. For example, under most international investment agreements the corporation can take the host state to arbitration if it has failed to guarantee the rights protected by the international agreement.¹¹

While companies do not have rights under the international human rights treaties, international agreements still offer them considerable support and protection when they are not operating exclusively in one state. Unlike for natural persons there has so far been no general agreement among states on international responsibilities for companies. While individual treaties might place certain obligations directly on legal persons, they still have no general legal obligations under international law.

1.2 Separate legal personality and limited liability
The idea of separate legal personality was first introduced in 17th century English corporate law. The purpose of this law was to regulate municipal corporations¹² and church institutions, both entities with little commercial significance. Two centuries years later the idea was picked up by the English judge William Blackstone and in the USA by Chief Justice Marshall and became what remains the prevailing model for business corporations. According to this doctrine the shareholders rights and liabilities are separate from the rights and liabilities of the corporation. At the outset this did not equate limited liability but meant that a corporation as such could be the bearer of rights and obligations separate from those of the natural person or persons behind the corporation.¹³

The limited liability doctrine evolved in the 19th century in Europe and North America in support and promotion of entrepreneurship. According to the doctrine the economic responsibility of an owner is limited to the value of their investment in the corporation. Simply explained it means that the economic responsibility of a sole owner of a corporation does not

¹² A local governing body, including cities, counties, towns, townships, charter townships, villages, and boroughs.
exceed the value of equity of that corporation. Originally this allowed entrepreneurs to start a business without jeopardizing all their belongings in the event that the business failed or fell into debt because of contractual or tort claims. It also protected shareholders, as their economic responsibility for the corporation will never exceed the value of their shares, and so enabled companies to raise capital.\(^{14}\) By the end of the 19\textsuperscript{th} century in the USA it became legal for companies to own other companies. This opened up for the possibility of forming corporate groups. Unlike traditional investors, the parent corporation investor was involved in the business enterprise along the subsidiary under its control. Naively, one may think, the principle of limited liability was directly transferred from the relationship between investors and companies to the relationship between the parent companies and their subsidiaries.\(^{15}\) While the parent corporation might exercise considerable influence over the operations of a fully owned subsidiary, for example through steering documents or common board members, the principle of limited liability isolates it from the liabilities of the subsidiary.

1.3 The transnational corporation

Technological developments and international liberalisation of trade was added to separate legal personality and limited liability, and the modern transnational corporation could be born. Limited liability enables the individual units of a TNC to operate in very close cooperation while isolating the consequences of high-risk activities to a subsidiary, and separate legal personality means that the corporate structure of TNCs can become very complex arrangements of subsidiaries and joint ventures of several different nationalities, operating in multiple states. An illustrating example is the corporate structure of the Cape Asbestos Company Ltd.\(^{16}\), a British corporation, which in addition to the head office in London was constituted by no less than 46 entities in Europe, the US and South Africa:

\(^{14}\) Blumberg, see fn. 13, p. 301
\(^{15}\) Blumberg, see fn. 13, p. 302
\(^{16}\) Cape Asbestos Company Ltd. had mining and milling operations in South Africa. The workers as well as people living in the vicinity of the plant were exposed to levels of asbestos dust that were considerably higher than what was allowed under British law. After the House of Lords had concluded that the South African courts were not a viable alternative forum as legal aid was not available, 7500 claimants suffering from asbestos-related health issues took the case to the English High Court. The dispute was however settled out of court. A settlement agreement was reached in 2003 between the claimants, Cape and a South African corporation that had taken over some of the asbestos operations from Cape in 1979, Gencor Ltd.
There is no universal definition of a TNC but according to the definition of UNCTAD\textsuperscript{17} they are "incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake."\textsuperscript{18} UNCTAD mentions 10% as the threshold for control of assets but this figure is not fixed in any multilateral instrument.

Transnational corporations have gone through an explosive development over the last few decades. The number of TNCs is estimated to exceed 80,000 parent companies with close to 800,000 foreign affiliates today, compared to around 7000 parent companies in 1970.\textsuperscript{19} The World Trade Organisation, as well as the organisation CorpWatch, provides the following statistics on transnational corporations: Between 1980 and 1995 the top 100 TNCs increased their

\textsuperscript{17} The United Nations Conference on Trade and Development. It promotes the integration of developing countries into the world economy.


assets with almost 700 percent; by 1999, 51 out of the 100 biggest economies in the world were corporations (which means that the economies of many TNCs are bigger than the economies of the states in which they operate); and the 500 biggest TNCs account for nearly 70 percent of world trade.\textsuperscript{20} From the statistics of the UNCTAD we can tell that between 1963 and 1990 the percentage of British manufacturing TNCs with affiliates in more than 20 countries increased from 20 percent to 72 percent.\textsuperscript{21} Almost needless to say, with this enormous economic growth has followed both political influence and the power to have a considerable impact on the environment as well as on the enjoyment of human rights in the host states.

2. Regulating transnational corporations

The new technology in combination with trade liberalisation completely changed the conditions for doing business and allowed for the development of the transnational corporation. This chapter explains how in turn the development of the TNC created new challenges for the protection of human rights.

2.1 Corporations and human rights

Corporations have been reported to have an impact on the full spectrum of human rights. A survey shows that, although some rights are more frequently abused, corporations have been reported to directly or indirectly infringe upon civil, political, economical, social and cultural rights, as well as more traditional workers rights.\textsuperscript{22} To take an example, it is obvious that child labour might infringe upon right to education but it might not be the only right in danger. In cases where the children are not allowed to leave the factory the corporation violates their right to freedom of movement. Depending on working conditions and tasks, the corporation might also be violating their right to just working conditions, to freedom from slavery, to freedom from torture and inhumane treatment, to health and even the right to life. The survey further showed that workers and communities are equally affected by corporate human rights violations.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{20} WTO, Trade liberalisation statistics [website], http://www.gatt.org/trastat_e.html (accessed 14 April 2013); CorpWatch, Corporate Globalization Fact Sheet [website], http://www.corpwatch.org/article.php?id=378 (accessed 14 April 2013)
  \item \textsuperscript{21} G. Ietto-Gillies, Different conceptual frameworks for the assessment of the degree of internationalization: an empirical analysis of various indices for the top 100 transnational corporations, UNCTAD Transnational Corporations, vol. 7, no. 1, April 1998, p. 26
  \item \textsuperscript{22} UN Human Rights Council, 8\textsuperscript{th} session, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse (A/HRC/8/5/Add.2), 23 May 2008
  \item \textsuperscript{23} ibid
\end{itemize}
One of the first incidents that opened the eyes of the public to the inadequacy of both national and international law to deal with corporate human rights abuse was the gas leak accident in Bhopal, India. Union Carbide India Ltd (UCIL), subsidiary of Union Carbide Corporation (UCC), operated a pesticide plant in the town Bhopal. In December 1984 a gas leak from the plant exposed half a million people to toxic gas. The accident left 3000 dead and 50,000 permanently disabled and subsequently some 15,000 people have died from exposition to the gas. After the accident the Government of India sued UCC in the United States (US) and argued that UCC should be held responsible for the accident because of its involvement in the design and construction of the plant. UCC on the other hand held that it had no responsibility for the acts of UCIL as it was a separate legal entity. The court did not resolve the matter; the claims were dismissed as the US court considered the Indian courts to be the more appropriate forum for the parties. In 1989 the Indian Supreme Court approved an out of court settlement of the claims against UCIL and UCC for USD 470 million; 15 years after the accident more than half of this amount was still to be distributed. Litigation was commenced again in US federal court in 1990, 1999 and 2004 but by 2012 all the claims had been dismissed, mainly based on lack of standing. The effects of the accident carries on into the present gas with related diseases and hundreds of children born with birth defects every year.

ExxonMobil operated a natural gas extraction facility and pipeline in the province Aceh in Indonesia. The corporation was accused of hiring the members of its security forces from the Indonesian military despite being aware of the army’s human rights violations against the people in the province where the corporation operated. The claimants alleged that they had suffered murder, torture and rape at the hands of the security forces. The claimants took the case to court in the US in 2005 and after nearly 8 years with many turns in the US District Court for the District of Columbia and US Court of Appeals for the DC Circuit, the case is expected to be ready for trial in the Supreme Court in 2013 or 2014.

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25 Zerk, see fn. 10, p. 167
Shell Petroleum Development Company of Nigeria (Shell Nigeria) was accused in 2005 of ruining farmlands and fishponds and thereby ruining the livelihood of three Nigerian villages by inadequate decontamination after an oil spill in Nigeria. The claimants took the case to the Hague District Court arguing that also the parent corporation should be held responsible for the acts of the subsidiary because of negligence. The court found that Shell Nigeria should pay damages to one of the claimants but dismissed the claims against the parent corporation.28

Bhopal, Ache and the Nigerian villages are just three examples out of many where corporations directly or indirectly cause immense suffering for their employees or the communities around their operations. Adding only these three cases together we see violations of the right to life, health, safe and healthy working conditions and adequate standards of living, as well as violation of the prohibition on torture. All three cases show importance of regulations obliging corporations to have reasonable standards of work place security in order to protect the right to life and health of both employers and nearby communities. They also show the difficulties that arise when the victims of corporate human rights abuse are not located in the same jurisdiction as the parent corporation that is ultimately in charge of the operations, when the subsidiary de facto responsible for the human rights violations is unable to meet the claims of the victims. The capacity of corporations in general to influence the enjoyment of human rights, in combination with the growing power and economic influence of TNCs shows the need for clear and effective regulation of corporate behaviour. Effective enforcement of human rights regulations as well as available, accessible and timely compensation to the victims is needed regardless of where the human rights violation has taken place.

2.2 The limited capacity of the host state
A state always has the primary responsibility for the protection and fulfilment of human rights within its territory. The primary responsibility to protect against corporate human rights violations therefore rests upon the host state, but in certain situations the host state might be unable or unwilling to protect human rights. Unwillingness means that the state could but choses not to fulfil its human rights obligations. The reasons for unwillingness can be many. In the area of business and human rights, two reasons are especially important: first, a state might be tempted use low standards of human rights protection as a way of making itself attractive for international investment, and secondly, high-level corruption may allow a powerful corpora-

28 Business and Human Rights Resource Centre, Case profile Shell lawsuit (re oil pollution in Nigeria) [website], http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreoilpollutioninNigeria (accessed 14 April 2013); I. Sekularac and A. Deutsch, Dutch court says Shell responsible for Nigeria spills, Reuters, 30 January 2013, http://uk.reuters.com/article/2013/01/30/uk-shell-nigeria-lawsuit-idUKBRE90T0DC20130130
tion to buy itself larger freedoms. Inability means that the territorial state is objectively incapable of fulfilling its human rights obligations for internal or external reasons. In areas under occupation or otherwise under foreign control the territorial state often has small or no possibilities to improve the human rights situation. Similarly, when a separatist or insurgent group has taken complete control over a portion of the territory the state might have no influence in the area. The territorial state is also unable to fulfil its human rights obligations when it lacks the necessary economic resources, or when functioning governmental structures are missing.

The ability of the host state to protect human rights can also be limited because of the special nature of TNCs. The judiciary of the host state might be fully capable of handling the claims of victims of corporate human rights violations but if the subsidiary in the host state has no or little assets, the victims will be left with no compensation. The national legislation of the host state might even allow for exceptions to the principle of limited liability, which could activate the liability of the owner in certain situations. But a judgement of a court in the host state can only be executed against the parent corporation in the home state if supported by the courts of the home state. Such assistance can be very difficult to obtain for several reasons. For example, the home state might not accept the nature of the sanctions imposed on the parent corporation; it might not acknowledge the type of liability as applicable to corporations; it might not consider the standards of the judiciary of the host state to be adequate.29

Because of the difficulties of effectively regulating TNCs through the national law of the host state there has been increasing demand for other solutions, including international regulations.

2.3 Regulatory initiatives
The response to the demands for corporate responsibility has come from the UN, from NGOs, international organisations and from business itself. This section will introduce a few examples from the wide range of suggestions and solutions from the different stakeholders. The purpose is to explain why most of these initiatives have had limited effect on the protection of human rights.

2.3.1 Self-regulation
Self-regulation takes mainly two shapes: internal codes of conduct, and corporate codes of conduct adopted by a group of companies operating in the same sector. A growing number of

29 O. De Shutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, Background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November 2006, p. 18
large corporations are committing themselves to respect human rights to some extent. As the corporations themselves design such internal codes they can have any scope, formulation, objective, applicability and enforcement possibility the corporations sees fit. This means that the quality and efficiency of such codes varies from clear and inclusive human rights commitments accompanied by staff trainings and helplines for difficult situations, to what Surya Deva calls “window dressings” - codes of conduct the only purpose of which is to make inhumane business activities look less questionable. Internal codes of conduct have been heavily criticized for lacking independent supervision and efficient enforcement mechanisms, allowing the corporations to benefit from the goodwill produced by the code but without any real obligations. Although a corporation might be held responsible for misleading marketing if it does not respect its own code, this will be of little avail to the victims of human rights violations. This is naturally not beneficial for the potential victims but it is also creates an uneven playfield for the corporations that genuinely work for respect of human rights in their operations.

2.3.2 Multi-stakeholder initiatives
One step towards independent supervision is taken with the multi-stakeholder initiatives. The codes are usually formulated by corporations from a certain sector in cooperation with NGOs, representatives from civil society and states, with the aim to create greater responsibility, accountability and transparency in the corporation’s activities. Two examples are the Kimberley Process and the Voluntary Principles. To fight mining and trade in so called conflict diamonds the Kimberley Process works through national legislation by certifying diamonds as “conflict free” if the state of origin fulfils certain legislative, institutional and transparency requirements. For the extractive industries the most well known initiative is the Voluntary Principles on Security and Human Rights under which the participating companies undertake to follow a number of principles in the areas of risk assessment, interactions between companies and public security, and interactions between companies and private security. While the initiative

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34 The voluntary principles on security and human rights, Interactions between companies and public security [website], http://www.voluntaryprinciples.org/principles/public_security (accessed 14 April 2013)
has no supervisory or enforcement mechanisms of its own, they are given effect for example by incorporation in contracts between corporations and host states.\textsuperscript{35}

\textbf{2.3.3 International initiatives}

One important international initiative is the \textit{OECD guidelines for multinational enterprises} from 1976 (the OECD guidelines). These are recommendations from the governments directed to all TNCs operating in or from a participating state.\textsuperscript{36} The current version of the OECD guidelines from 2011 make it clear that TNCs are expected to respect all internationally recognized human rights wherever they operate, regardless of the international obligations of the host state. In the event that the guidelines conflict with the national legislation of the host state the TNCs should respect the guidelines as far as possible without violating national law. TNCs are also expected to encourage all business partners to live up to the same standards.\textsuperscript{37} The OECD guidelines purports to protect a very broad set of human rights across all business sectors and so provide a comprehensive and coherent protection compared to self-regulations and multi-stakeholder initiatives. Unfortunately even the OECD guidelines fail to ensure efficient enforcement mechanisms. The 2011 update of the OECD guidelines aligned them with the Guiding Principles and unlike earlier versions they now acknowledge that the member states are obliged to implement the guidelines. However, the guidelines contain many open formulations such as “where appropriate”, which leave a wide margin of interpretation for their interpretation and implementation.\textsuperscript{38} All member states are also obliged to set up National Contact Points (NCPs) to receive complaints against corporations and resolve issues relating to the implementation of the OECD guidelines.\textsuperscript{39} Yet, the guidelines do not give the NCPs the power to make binding decisions and impose sanctions on corporations failing to respect the OECD guidelines, this is left for each state to decide. In addition, the absence of agreed minimum standards for the NCPs in their advisory, consultative, recommendatory, clarificatory and mediatory functions makes uniform application difficult.\textsuperscript{40} In practice much comes down to the commitment and ability of individual NCP to resolve disputes and help provide remedies. Finally, although a majority of all TNCs are operating in or from one of the 44 participating states, the OECD guidelines do not have global reach. It is especially problematic that in cases of a non-adherence to the OECD guidelines outside the OECD area no NCP is obliged to deal with

\begin{flushleft}
\textsuperscript{35} Ruggie 2007, see fn. 32, p. 835
\textsuperscript{36} Foreword of the OECD guidelines for multinational enterprises, 2011 ed., declaration I
\textsuperscript{37} OECD guidelines for multinational enterprises, 2011 ed., Chapter IV Human Rights
\textsuperscript{38} OECD Watch, \textit{Statement on the update of the OECD Guidelines for MNEs, 25 May 2011}
\textsuperscript{39} Implementation procedures of the OECD guidelines for multinational enterprises, Chapter I National Contact Points
\textsuperscript{40} OECD Watch, \textit{Statement on the update of the OECD Guidelines for MNEs, 25 May 2011}
\end{flushleft}
the issue, they are merely “encouraged to take steps in order to develop an understanding of the issues at stake, for instance through contacts with the management of the firm in the home country or with government officials in the non-Adhering country.”

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms) was an international initiative that never was adopted. The Sub-Commission on the Promotion and Protection of Human Rights, the expert advisory mechanism to the Human Rights Council, established the Working Group on Transnational corporations with the aim to formulate a global standard for corporate responsibility. In 2003 the Working Group presented the final draft of the Draft Norms. The Draft Norms aimed at addressing certain shortcomings of earlier corporate responsibility initiatives, especially the lack of enforcement and the limited set of rights given protection. The rationale behind the Draft Norms was that TNCs because of their great power to impact on human rights must have human rights responsibilities, and because many states are unable or unwilling to enforce such corporate responsibilities those must be regulated directly under international law. The Draft Norms establish in article 1 a general obligation relating to all internationally and nationally recognized human rights. The following articles formulate specific obligations relating to certain rights, which were considered as particularly relevant to business. The language used is that of binding legal obligations (shall instead of should) and suggestions for the national and international enforcement mechanisms are included in the Draft Norms articles 15 to 17. The Draft Norms have two main drawbacks. First, they oblige corporations to respect human rights that are still not generally recognized even among the states such as consumer protection and certain rights of indigenous people. This is likely to have limited the success of the Draft Norms among the states. Second, the Draft Norms acknowledge the primary responsibility of the state but at the same time establish that the corporate responsibility include the full range of obligations to respect, protect and fulfil within their “sphere of influence.” As there is no definition of this corporate “sphere of influence” it could be interpreted as a secondary human rights responsibility for corporations and that they have to carry the full human rights responsibility wherever they have the capacity to influence the

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42 UN Economic and Social Council, Commission on Human rights, 55th session, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2), 26 August 2003
43 Ruggie 2007, see fn. 31, p. 824
human rights situation and the state is unable or unwilling to fulfil its obligations.\footnote{Ruggie 2007, see fn. 32, p. 825} This would mean that in a situation where the governmental structures are very weak or absent the corporation might be the only actor left with the power to influence human rights and so be obliged to carry the full weight of respecting, protecting and fulfilling human rights. This could even become an incentive for governments not to fulfil their obligations, as the secondary corporate responsibility would then be activated. Because of this states and companies alike heavily criticized the Norms and the Commission on Human Rights never adopted them.\footnote{Augenstein, see fn. 32, p. 1}

The opposite approach was taken in the UN Global Compact, which was initiated in 1999 by then Secretary General Kofi Annan and launched in 2004. The Compact contains ten principles to which the participating corporations must align their operations and strategies. Over 7000 corporations in 145 countries take part in this voluntary project.\footnote{UN Global Compact, \textit{UN Global Compact Participants} [website], http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (accessed 14 April 2013)} Corporation can be expelled for failing to report on their progress and for systematically or egregiously violating the Compact but the Global Compact Office has no capacity to enforce compliance except for advising the parties to the dispute on which dispute resolutions mechanisms might be available to them.\footnote{UN Global Compact Policy on Communicating Progress of 1 March 2013, available at http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf}

None of these three initiatives are capable of satisfactorily regulating TNCs. The OECD guidelines reaches only certain states and have too weak enforcement mechanisms. The Draft Norms went too far in the regulation and was opposed by states and corporations alike. The Compact covers a very limited number of rights and is also lacking in the enforcement mechanisms. As we will see in the next chapter the latest international initiative returns to the responsibility of the state to approach the issue of business and human rights from a different angle.
Part II

3. The Framework and the Guiding Principles

After the failure with the Norms UN the Commission on Human Rights requested the Secretary-General Kofi Annan to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises. Kofi Annan appointed Harvard Professor John Ruggie as the UN Special Representative of the Secretary General on Business and Human Rights (hereinafter: SRSG). This chapter introduces the outcome of his mandate: the “Protect, Respect and Remedy Framework” and the “Guiding Principles on Business and Human Rights.”

3.1 Protect, Respect and Remedy

The original mandate was given for a period of two years and requested the SRSG to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights” and to “elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.” In April 2008 the SRSC presented his report “Protect, Respect and Remedy: a Framework for Business and Human Rights” (hereinafter: the Framework) to the Human Rights Council. The Framework is built on three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to efficient remedies by victims of corporate human rights abuse. This is an allusion to the state obligation under customary human rights law to “respect, protect and fulfil” human rights. Under human rights law the obligation to respect prohibits the state itself from infringing upon human rights by act or omission and the obligation to promote places on the state a duty to take positive measures to

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49 Human Rights Res. 2005/69, see fn. 48
facilitate the enjoyment of human rights. The obligation to *protect* requires the state to prevent human rights abuses by third parties, be it individuals, companies or other organisations but also to remedy such violations when they have occurred. Effective remedy is a necessary aspect of protection as regulations without enforcement are usually weak or even meaningless. It is upon this duty to protect that the SRSG based the Framework. The obligation to protect is essential as many human rights would be meaningless if states did not protect against and punish human rights from third party violations. It is a substantive obligation that will be breached if the state fails to act with due diligence to protect human rights.

The Human Rights Council welcomed the Framework and, recognizing the need for the Framework to be operationalized, extended the mandate with an additional three years. The extended mandate requested the SRSG to “provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation” and to “explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities.” The SRSG undertook an extensive research effort, including several studies of existing state and corporate human rights responsibilities, mapping of corporate human rights abuse as well as of corporate human rights protection initiatives, and workshops with representatives from the business community as well as governments and civil society. In 2011 he presented to the Human Right Council his report “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” (hereinafter: the Guiding Principles), which was welcomed with great enthusiasm and endorsed unanimously.

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53 Augenstein, see fn. 32 p. 19
54 A/HRC/4/35/Add. 1, see fn. 52, at para. 8
55 UN Human Rights Council, 28th meeting, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (UN Doc. A/HRC/RES/8/7), 18 June 2008
The Framework and the Guiding Principles have certain important differences from the Draft Norms. First of all, the Framework and the Guiding Principles do not aim to create any new legal obligations for either states or corporations but rather to elaborate on existing practices and legal standards to provide a structured and comprehensive guide for states and corporations in the area of business and human rights. The purpose of this is to clarify what measures states and corporations are already obliged or recommended to take and to identify the regulatory gaps in the current system.\(^{57}\) Furthermore, rather than creating corporate human rights obligations under international law, the SRSG wanted to build upon and strengthen the existing capacity of states to protect human rights. Given the right tools, the state systems for regulation and adjudication of corporate activities can be a much more efficient protection for human rights than any international enforcement mechanism.\(^{58}\) Secondly, instead of defining certain human rights as more relevant to the business community, they confirm the equal importance of all human rights and acknowledge that corporations can infringe upon the full scope of human rights.\(^{59}\) Thirdly, the SRSG considered there to be good reasons to clearly delimit the corporate responsibility from the state responsibility. Corporations are not states or organs of society intended to function as a back-up when the state fails to fulfil its human rights obligations, but specialized entities designed to perform specialized activities. Corporations need predictability and legal certainty in their operations and imposing on them what could turn out to be the full human rights obligations of a state, albeit in a limited area, could discourage business operations in states and areas where economic development may be much needed but where the human rights situation is precarious. Secondary human rights responsibility for corporations could also become a disincentive for states to protect and fulfil human rights in areas under corporate influence, as the responsibility would then pass on to the corporations. To avoid such uncertainties the corporate responsibility is limited to the respect for human rights and it is made clear that the corporate responsibility and the state obligations exist in parallel, unaffected by each other’s performance.\(^{60}\)

3.2 The Guiding Principles

The 31 principles relate to the state obligation to protect, the corporate responsibility to respect, and the access to remedy, following the structure of the Framework. The first ten prin-


\(^{58}\) Ruggie 2007, see fn. 32, p. 838-839

\(^{59}\) A/HRC/8/5, see fn. 19, at para. 6

\(^{60}\) Ruggie 2007, see fn. 32, p. 826
ciples are directed to the states; principles 11 through 24 concern the corporate duty to respect human rights; and the last seven principles concern remediation. Guiding Principle 1 reaffirms the obligation of every state under international human rights law to protect human rights from third party abuse:

“1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

The following eight principles advise the state on how it should act to meet this duty. Guiding Principles 2 and 3 contain general advice and Guiding Principles 4 to 8 address specific situations such as entering into commercial relationships with corporations, regulating state-owned companies, and how to encourage respect for human rights in conflict affected areas. Guiding Principles 9 and 10 apply to situations where the state enters into international agreements and acts within multilateral institutions.

Guiding Principle 25 states that, as a part of the state duty to protect, “States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” As with Guiding Principle 1, this reflects a binding obligation of the states, which the following principles attempt to concretize. According to the Guiding Principles the states should reduce legal, economical and practical barriers to access to remedy and ensure the impartiality and integrity of the judicial system. The states are also encouraged to expand or establish state-based non-judicial mechanisms, such as mediation, as a complement to the judicial system.

3.3 The home state
What is the importance of the role of the home state? We have already seen the problem of unwillingness or inability of host states to regulate corporate activities, and the difficulty to “reach” the parent corporation through a host state’s judiciary when the subsidiary cannot compensate the damage caused. We can also conclude from decades of failed attempts at subjecting corporation directly to international law that any such international agreement is currently not probable. The presence of the parent corporation on the territory of the home state gives the home state considerable advantages compared to the host state at regulation and remediation of the human rights impact of TNCs. This is acknowledged in the Guiding Prin-
ciples. The Guiding Principles suggest, for example, that the home state encourages and guides corporations to respect human rights “throughout their operations”; that they condition services and support from state agencies upon human rights impact reporting; and that they take the protection of human rights into account whenever legislating for or contracting with corporations. The comment to Guiding Principle 2 suggests that such measures, with direct or indirect extraterritorial effects, both serve to protect the reputation of the home state as well as to create predictability for the corporations. The comment to Guiding Principle 3 encourages the states to use a “smart mix of measures – national and international.” The support of the home state is especially important in conflict affected areas where both the TNCs and the host state may be in need of guidance to avoid corporate involvement in human rights abuses. In such situations the comment to Guiding Principle 7 suggests criminal, civil or administrative liability for corporations domiciled within the territory or jurisdiction of a state if engaged in human rights abuses abroad. Guiding Principle 9 with comment prompts the states to ensure that the international agreements they enter into allow them “adequate policy and regulatory ability to protect human rights”.

The principles on remedies are even more explicit. Among the examples of barriers to remedy is mentioned the way responsibility is attributed among the corporations in a corporate group. This clearly refers to the problem of the limited options for holding a parent corporation responsible for the acts of its subsidiaries. No access to the courts of the home state despite denial of justice in the host state is another barrier also mentioned in the comment to Guiding Principle 26. This might not only be due to restrictive exercise of extraterritorial jurisdiction, but the access to remedy for victims in host states would no doubt be greatly improved if the courts of the home states were given extended possibilities to assume jurisdiction over extraterritorial human rights violations.

Generally it can be said that the Guiding Principles encourage the states to actively make use of every judicial, administrative and legislative tool available to them in the extraterritorial protection of human rights. However, the Guiding Principles have been criticized for not using a strong enough language, for not setting out clear minimum standards and for the failure to clearly set out the obligations of the home state. To some extent the critics are criticising the Guiding Principles for not being something the SRSG did not intend them to be. The purpose of the Guiding Principles is “establishing a common global platform for action, on which cumula-

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61 See for example, R. Grabosch, SRSG John Ruggie’s Draft Guiding Principles for the implementation of the United Nations ‘protect, respect, and remedy framework’ - Position Paper of the European Center for Constitutional and Human Rights, 27 January 2011
tive progress can be built, step-by-step, without foreclosing any other promising longer-term developments.” The means of doing this is “elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.” The Guiding Principles are “not intended as a tool kit, simply to be taken off the shelf and plugged in”, because “when it comes to means for implementation [...] one size does not fit all.” As a non-binding instrument intended to be a guide to already existing obligations many very important considerations are necessarily left by the Guiding Principles for the states to decide upon. It is also impossible in a non-binding instrument to use a strong language indicating binding obligations where no such obligations exist. Regarding extraterritorial human rights protection the comment to Guiding Principle 2 merely states:

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

This leaves two very important questions for the home state to determine: If and to what extent is it obliged to protect and remedy corporate human rights violations in the host state? When is it prohibited from doing so?

4. Extraterritorial regulation

Chapter 4 aims to measure out the regulatory space where states are allowed, but not obliged, to protect human rights extraterritorially. To do so it will first identify the situations when states are obliged to exercise extraterritorial jurisdiction and then look at the limitations on the regulatory capacity of the states. First, an overview of the conditions for exercising jurisdiction:

4.1 Exercise of jurisdiction

International relations are governed by the principles of sovereign equality among the states and non-interference in the internal affairs of other states. This is reflected in the UN Charter article 2(1) and 2(4). These principles put limits on the freedom of action of states as they may

62 A/HRC/17/31, see fn. 57, at para. 15
not intrude on the sovereignty or interfere in the internal affairs of another state.\textsuperscript{63} The first that comes to mind when speaking of interference in the internal affairs of another state is probably military intervention, but also enacting national legislation that applies extraterritorially and exercising of jurisdiction over nationals of another state may constitute interference. Exercise of jurisdiction is a basic aspect of state sovereignty.\textsuperscript{64} From this point of view, imposing protection of human rights in another state is not unproblematic. Especially if that other state is not even a party to some of the international human rights treaties being enforced. However, the sovereignty of states is not absolute and extraterritorial jurisdiction is sometimes allowed under international law.

States can exercise three types of jurisdiction: Legislative, executive and judicial. The executive jurisdiction relates to the capacity of the state to carry out its state functions, for example arresting suspects. A state can be allowed to exercise this type of jurisdiction on the territory of another state only when that other state has entitled it to do so but any unauthorized exercise of executive jurisdiction is a violation of the territorial sovereignty of that other state and a breach of international law.\textsuperscript{65} Any exercise of extraterritorial jurisdiction therefore presupposes that the offender is either already present on the territory of the state, or that the state where the offender is present is willing to extradite him or her.

Legislative jurisdiction, the power of the state to make binding laws, and judicial jurisdiction, the power of the courts to try cases, are not as strictly limited to the territory of the state.\textsuperscript{66} The state might have both a right and a duty to exercise such jurisdiction extraterritorially under international law. It is improbable that a state would use its legislative jurisdiction to make law with extraterritorial application without permitting its courts to assume jurisdiction over cases relating to situations where the laws apply. Any right or obligation of a state to exercise extraterritorial jurisdiction is therefore very unlikely to be restricted to legislative jurisdiction. Courts, on the other hand, can be given the power to apply international or foreign law, why the use of judicial jurisdiction does not presuppose use of legislative jurisdiction.\textsuperscript{67} Therefore, the main focus of this chapter will be on the obligation of the state to exercise judicial jurisdiction extraterritorially.

There are important differences in the implications of extraterritorial judicial jurisdiction depending on whether it is exercised in civil or criminal matters. While criminal jurisdiction is

\begin{itemize}
\item \textsuperscript{63} Shaw, see fn. 1, p. 190-193
\item \textsuperscript{64} Shaw, see fn. 1, p. 572
\item \textsuperscript{65} Shaw, see fn. 1, p. 573, 577
\item \textsuperscript{66} Ibid, p. 576-578
\item \textsuperscript{67} De Schutter, see fn. 29, p. 8
\end{itemize}
strictly regulated by customary international law, the exercise of civil jurisdiction is left almost entirely to the regulating state. In civil matters the jurisdiction of the courts is usually limited by national law to situations where there is link between the state and the case, such as the state being the habitual residence of the defendant or property of the defendant being located in the state, but customary international law does not specify what kind of link is required. Potentially no link is required at all. There have been cases where a court has assumed civil jurisdiction merely on the ground that no other court was able or willing to exercise jurisdiction and any other decision would lead to a denial of justice.

In criminal matters the jurisdiction of the court should be based upon one of the internationally recognised bases of jurisdiction. The principles are related to territory, nationality, protection of state interests and universality. According to the territorial principle the state may exercise jurisdiction over all crimes that take place on its territory. This includes situations when only a part of the crime has taken place on the territory of the state. An example commonly used is that of a gun being fired across a border, killing someone there. In this case both states would have jurisdiction based on the territorial principle. This means that in the event that a crime is commenced on the territory of the home state and completed on the territory of the host state, the home state would not necessarily need to exercise extraterritorial jurisdiction at all.

When a crime takes place outside the territory of a state, the state should base its jurisdiction upon one of the other grounds. According to the internationally recognised principles of jurisdiction a state may exercise jurisdiction over a criminal act when the offender has the nationality of that state; when the victim or victims have the nationality of that state; and when the criminal act has implications for the security of that state. In addition to this, a state may also exercise jurisdiction over a crime under universal jurisdiction. This form of jurisdiction is a considerable step away from state sovereignty, and therefore strictly limited in its application. Two categories of crime, piracy and war crimes, are with certainty under universal jurisdiction but also crimes against humanity are more and more widely considered to fall in this category. Universal jurisdiction does not include a universal executive jurisdiction; in

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68 Shaw, see fn. 1, p. 578
69 See for example: Judgement of the French Cour de Cassation, First Civil Chamber, Rendered on 1 February 2005, in Case no. 01-13.742/02-15.237
70 Shaw, see fn. 1, p. 579
71 Shaw, see fn. 1, p. 579-584
72 Shaw, see fn. 1, pp. 584, 589, 591 and 592
practice it therefore means establishing jurisdiction when an offender of a crime under universal jurisdiction is present on the territory of the state.

4.2 What is the home state obliged to do?
Two of the international workshops held by the SRSG during 2006 concerned government regulation of corporate human rights issues, and the role of extraterritorial jurisdiction in improving the accountability of TNCs. The general conclusion was that, with a possible exception for certain crimes under universal jurisdiction, no clear obligation to regulate business activity extraterritorially could be deduced from international law. That position is, as we have seen, also reflected in the comment to Guiding Principle 2. This position has been criticised for being both too unclear and a too restrictive interpretation of international law. This part of Chapter 4 will go through the few instances where states are obliged to exercise jurisdiction over human rights violations occurring outside of their territory.

4.2.1 International criminal law
The most egregious violations of human rights are considered to be crimes against humanity, crimes under international law. State obligations under international criminal law to prevent and prosecute such crimes are therefore relevant to the state duty to protect human rights. It is still debated what exactly constitutes a crime against humanity but the list provided in article 7 of the Rome Statute of the International Criminal Court (Rome Statute) gives a good indication. It includes murder, extermination, slavery, torture, forced displacement, imprisonment, rape, forced disappearances, persecution and apartheid when such crimes are part of a systematic and widespread attack. Because of the severity of the crime, genocide is a separate crime in the Rome Statute but also constitutes a crime against humanity. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CAFD) oblige all state parties to investigate and prosecute or extradite suspected criminals found on their territory regardless of nationality and where the crime took place. This makes them two of very few global conventions obliging the state parties to assume universal jurisdiction over an international crime. A state party must either extradite or investigate and prosecute an act of torture or a forced disappearance if the suspected offender is found on its territory, regardless of where the crime took place, the nationality of the offender and the

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75 See CAT article 5(2) and CAFD article 9(2)
nationality of the victim. The *International Convention on the Suppression and Punishment of the Crime of Apartheid* allows the state to exercise universal jurisdiction.\(^{76}\) The *Convention on the Prevention and Punishment of the Crime of Genocide* only obliges the state parties to exercise territorial jurisdiction.\(^{77}\) The Rome Statute covers all these crimes and obliges the state parties to cooperate with the Court in its investigation and prosecution of suspected offenders that are nationals of a state party or with regards to acts committed on the territory of a state party.\(^{78}\) This does not compel the state parties to exercise jurisdiction over suspected offenders found on their territory but if they choose not to do so they must hand over the person to the court if it so requests. Thus, a state party can choose to establish and exercise jurisdiction over a national who has committed an international crime abroad or it can leave it to the Court, which means assuming such jurisdiction and then waiving it favour of the Court. In this sense the Rome Statute does oblige the state parties to, at least indirectly, establish extraterritorial jurisdiction.

The Rome Statute has strong international support with its 153 ratifications, but it is not so widely ratified as to leave a negligible number of states untouched by the its obligations. We must therefore look to customary law to find support for a general obligation. Crimes against humanity have been considered as a crime under universal jurisdiction in several instances. The *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal* from 1950 recognizes crimes against humanity as punishable under international law.\(^{79}\) The UN General Assembly later confirmed these principles.\(^{80}\) The UN General Assembly also adopted in 1968 the *Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity*, which obliges state parties to ensure that such crimes can be prosecuted and criminals extradited.\(^{81}\) This convention has not been widely ratified but indicates the attitude of the General Assembly. In 1996 the ILC adopted the *Draft code of crimes against the peace and security of mankind*, which again confirms crimes against humanity as crimes punishable under international law.\(^{82}\) While this convention

\(^{76}\) Articles 4(b) and 5
\(^{77}\) Article 6
\(^{78}\) Articles 5 and 86
\(^{79}\) Principle 6(1), the text is available at [http://www.icrc.org/ihr.nsf/full/390](http://www.icrc.org/ihr.nsf/full/390)
\(^{80}\) UN General Assembly resolution 3 (I) of 13 February 1946, and UN General Assembly resolution 95 (I) of 11 December 1946
\(^{81}\) Articles 3 and 4, the convention text is available at [http://www.icrc.org/ihr.nsf/FULL/4357OpenDocument](http://www.icrc.org/ihr.nsf/FULL/4357OpenDocument)
\(^{82}\) The text of the draft code is available in: Report of the International Law Commission Covering the Work of its Sixth Session, 3-28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9, p. 149
was never adopted by the UN General Assembly the principle it lays down is echoed in the preamble to the Rome Statute: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” It is therefore quite uncontroversial to say that universal jurisdiction applies to crimes against humanity in the sense that it allows all states to prosecute or extradite criminals on that basis, if found on their territory.

It is however a big step from concluding that all states are allowed to prosecute persons suspected of crimes against humanity based on universal jurisdiction, to arguing for a general obligation. De Schutter argues for a universal obligation to prosecute those international crimes that are also violations of jus cogens norms. These norms of international law, from which no derogation is allowed, imply an obligation for the state to contribute to the universal repression of their violation. This should at a minimum prevent them from allowing persons suspected of jus cogens violations a safe-haven on their territory. From this there could possibly be derived an obligation to extradite or prosecute such persons. His theory is support by Bassiouni who considers that jus cogens would not otherwise have the status of non-derogable norms. Randall sees this as conceivable but premature as there is no state practice yet to indicate the development of such principle. Brown and Randall are rather of the opinion that when international crimes are also violations of jus cogens this lends extra support to the state that wishes to exercise universal jurisdiction over those crimes.

4.2.2 International human rights law
The core human rights treaties explicitly oblige the states to protect human rights within their territory and jurisdiction. The fact that jurisdiction is mentioned in addition to territory suggests that the obligations of the state is not necessarily limited to territorial jurisdiction, but how far does the obligation stretch? To find guidance, the SRSG made a survey of the com-

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83 De Schutter, see fn. 29, p. 13
86 Brown, see fn. 73, p. 385
87 The core human rights treaty include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International 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 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance are also included among the core human rights treaties but here included among the international criminal law treaties as they fall into both categories and explicitly oblige the states to exercise criminal jurisdiction over third party violators.
ments from the treaty bodies of the core UN human rights treaties. According to the survey, none of the treaty bodies deal with the question of extraterritorial human rights protection in detail or with much clarity. They do not suggest that exercise of extraterritorial jurisdiction would be forbidden but also do not formulate any general obligation to exercise it.\(^88\) The Human Rights Committee, supervising body of the ICCPR\(^89\), suggests that states should cooperate to bring human rights violators to justice. Such obligation can be traced to the UN Charter article 1(3), which states as one of the purposes of the United Nations international cooperation in the promotion of respect for human rights.\(^90\) Unfortunately neither the ICCPR nor its supervising committee specifies the form or scope of such cooperation, which means that anything from respect for extradition treaties to exercise of extraterritorial jurisdiction could be implied. The committee supervising the ICESCR\(^91\) has expressed, regarding right to health, right to water and the right to social security, that the states should take steps to prevent violations by their citizens and companies in other countries.\(^92\) Again, the kind of steps to be taken have not been specified. Exercise of extraterritorial jurisdiction would perhaps be the most effective way to protect human rights abroad but it is surely not the only way. The broad language of the general comments does not suggest the existence of an obligation to exercise extraterritorial jurisdiction to protect human rights. Of the core human rights treaties only the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) explicitly obliges the state parties to establish extraterritorial jurisdiction.\(^93\) It requires a state party to criminalise the sale of children, child prostitution and child pornography, and to establish jurisdiction over crimes that take place on its territory and over any offender present on its territory.\(^94\) Apart from this exception, the international human rights treaties at the most lay down an obligation for the state to consider the exercise of ex-

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88 A/HRC/4/35/Add. 1, see fn. 52, at para. 84  
89 See fn. 87  
90 UN Human Rights Committee, 80th session, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13), 26 May 2004, at para. 18  
91 See fn. 87  
93 A/HRC/4/35/Add. 1, see fn. 52, at para. 89  
94 Article 4(3), the text of the protocol is available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx
traterritorial jurisdiction as one option amongst others when taking steps to prevent its corporations and citizens from committing human rights violations abroad.

It is generally accepted that the non-binding Universal Declaration is partially declaratory of customary international law and thus binding in those parts, but the exact scope remains contested. As expressed in the Statute of the International Court of Justice, the creation of CIL requires general practice that is accepted as law. The second requirement, opinio juris, presents no difficulties when looking at the overwhelming number of General Assembly resolutions confirming adherence to the protection of human rights, as well as reports and commentaries from other UN bodies with state representatives such as the Human Rights Council. One of the most important non-binding documents after the UDHR is the Vienna Declaration and Programme of Action, adopted with consensus by 171 states, which states that:

“[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

Considering the flagrant and widespread disregard for human rights it is on the other hand very difficult to argue that one can identify a state practice of respect for human rights that is sufficiently constant and uniform, to evidence the existence of customary norms. Different schools give different importance to state practice in the creation of customary norms, but to qualify a broad set of human rights norms as part of CIL the notion of state practice must either to be deprived of all but evidentiary weight or be redefined in a way that would essentially equate it with opinio juris by letting public statements represent state practice. However practical this would be for the purpose of strengthening the protection of human rights, it risks eroding the respect for custom as a source of law over all. Although the opinio juris is well established in favour of the universality of all human rights, CIL most likely only supports this

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notion with regards to a few core rights. To what extent customary international law (CIL) contains human rights obligations, and therefore can be said to support the universality of those rights, is under debate. So much uncertainty surrounds the content of non-treaty based human rights law that is it difficult to draw any practically useful conclusions regarding its potential extraterritorial obligations. At the most it would be safe to argue that a customary obligation to respect human rights would support a state that wishes to exercise extraterritorial jurisdiction based on an already existing jurisdictional basis.  

4.2.3 Jurisdiction over legal persons

After concluding that there are instances, albeit very few, in which states are obliged to exercise extraterritorial criminal jurisdiction it is necessary to consider to what extent such those obligations extend to exercising jurisdiction over legal persons. The Rome Statute expressly limits the jurisdiction of the ICC to “natural persons” in article 25. It is also almost certain that any customary obligation to exercise criminal jurisdiction does not as extend to legal persons. Although the idea is gaining ground, many national legal systems do not yet recognise criminal liability of corporations. Therefore it is very unlikely that corporate criminal liability could be considered either a general principle of law or a customary norm.

In the few instances where human rights treaties expressly require the states to action against corporate human rights abuse, the treaties allow the state to decide on the appropriate measures. The Convention on the Elimination of All Forms of Discrimination against Women require the state to “take all appropriate measures to eliminate discrimination against women by any […] enterprise”, see article 2(e). The OPSC even more clearly acknowledge the free choice of the state. Article 3(4) states that “[s]ubject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons […]. Subject to the legal principles of each State Party, such liability of legal persons may be criminal, civil or administrative. The SRS survey of treaty body commentaries indicates that the same applies to the other core human rights treaties: The states are clearly obliged to regulate corporate behaviour to prevent and remEDIATE corporate human rights abuse but how this is to done is for the state to decide. Mandatory extraterritorial jurisdiction does not extend to corporations and mandatory jurisdiction over corporations does not specify the type jurisdiction to be established. We can thus conclude that when states are obliged to establish extraterritorial jurisdiction the obligation only extends to natural persons.

98 Schutter, see fn. 29, p. 28-29
99 Ruggie 2007, see fn. 32, p. 831-832
100 A/HRC/4/35/Add. 1, see fn. 52, at para. 55
The state parties might also be obliged by the conventions to establish jurisdiction over complicity or participation in international crimes. Depending on the conditions for complicity and participation under laws of the home state, the obligation to exercise jurisdiction could extend to for example directors or board members of a corporation that has been involved in crimes against humanity. The existence of this type of criminal liability is dependant on the law of the home state and an analysis would require a deep dive into the corporate law of several countries. It is a complex question and unfortunately outside the scope of this thesis.

The obligation of a state to extraterritorially protect human rights from corporate abuse is extremely limited. The conclusion must therefore be that the Guiding Principles do reflect the current state of international law: Extraterritorial protection of human rights is entirely voluntary for the states.

4.3 What is the home state allowed to do?
As was explained in Chapter 4.1, states may not freely exercise extraterritorial jurisdiction. Criminal jurisdiction is limited by public international law but also exercise of civil jurisdiction might at some point draw protests from other states for being too far-reaching. In addition to this states may come across situations of conflicting treaty obligations where what it is obliged or encouraged to do under one treaty would constitute a breach of another. This part of Chapter 4 looks at the outer limits of extraterritorial jurisdiction and the potential conflicts between human rights law and other international agreements.

4.3.1 Criminal jurisdiction
As soon as a state establishes jurisdiction outside of its territory there will be conflicting jurisdictional claims. This means that even though a state may establish jurisdiction on the basis of any of these principles (except universality as it is limited to certain crimes) it might cause political tensions between states. Extraterritorial jurisdiction based upon the nationality principle is the least likely to cause frictions between states as the concept of nationality is very closely related to sovereignty. It provides the very link between the territory of the state and its population. What may cause problems, and this is particularly relevant regarding corporations, is the determination of nationality as there is no universal definition of nationality of either natural or legal persons. It would thus be questionable behaviour of a state to define a person as a national simply to be able to exercise jurisdiction over this person. The ICJ has noted that

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101 For example, article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
102 Shaw, see fn. 1, p. 584-589
state practice indicates that nationality presumes a legal bond as well as a genuine connection between the person and the state granting nationality.\textsuperscript{103}

More political friction might be expected from exercise of jurisdiction over nationals of other states based on the nationality of the victim or because the crime threatens the security of the state exercising jurisdiction. The passive personality principle is considered to be the weakest ground for jurisdiction when applied outside the framework of a treaty.\textsuperscript{104} The protective principle allows a state to exercise jurisdiction over a non-national for an act committed abroad if this act poses a threat to sovereign interest of that state. This is motivated by the possibility that acts harming vital interests of one state may not be criminalized in the state of residence of the offender.\textsuperscript{105} The boundaries of universal jurisdiction under treaty law as well as customary law have already been discussed earlier in this chapter. For a state aiming to prevent impunity for human rights violations committed by its TNCs abroad none of these three principles would be of much avail as the nationality principle provides a much firmer ground for exercising jurisdiction.

In addition to the recognised bases of jurisdiction there is a somewhat elusive requirement of reasonableness. Zerk argues that this is a generally accepted requirement that must be fulfilled in addition to recognised base of jurisdiction. According to Zerk this is a consequence of state sovereignty and the principle of non-interference.\textsuperscript{106} The SRSG expresses the same view but without reference to any source of the requirement for reasonableness.\textsuperscript{107} The fact that many states apply the principle of double criminality when establishing extraterritorial jurisdiction could be seen as support for their view. De Shutter sees three different interpretations of the requirement of reasonableness. The first interpretation is the one adopted by Zerk and the SRSG. A second interpretation rather sees the recognized bases of jurisdictions as examples of reasonableness. According to this view stats could establish jurisdiction also on other grounds as long as there is a reasonable connection between the state and the situation to be regulated. The third view sees reasonableness as equivalent to non-interference. The Restatement (Third) of Foreign Relations Law of the United States contributes with a fourth view according to which reasonableness is something the court has to determine in each case.

\textsuperscript{103} See for example, Nottebom Case (Lichtenstein v. Guatemala), ICJ Reports 1955, pp. 4, 23
\textsuperscript{104} Shaw, see fn. 1, p. 590
\textsuperscript{105} Shaw, see fn. 1, p. 591
\textsuperscript{106} Zerk, see fn. 10, p. 20
\textsuperscript{107} UN Human Rights Council, 11\textsuperscript{th} session, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/11/13), 22 April 2009, at para. 15
of conflicting jurisdictional claims. The third view is very close to the dicta of the Court in the *Lotus case*. In short, the Court considered the states free to exercise extraterritorial jurisdiction as long as there was no proof of a prohibitive rule of international law. This position has been criticised by legal scholars and the International Court of Justice has since moved towards the opposite view, that extraterritorial jurisdiction requires a permissive rule of international law. It is unclear whether any of the other three theories have general support under international law but the requirement for reasonableness appears to have some support. For the purpose of discussion we will adopt the view of Zerk and the SRSG, who defines it as a requirement in addition to a recognised basis of jurisdiction.

De Schutter suggests that when a state exercises extraterritorial jurisdiction with the purpose of protecting human rights it is acting in the interest of all states “in the name of international solidarity.” With such noble a motive no extraterritorial jurisdiction could possibly be a prohibited interference. He also suggests that this can be seen as facilitating compliance with human right obligations for the host state. The flaw in this reasoning is that is completely ignores the considerable liberty that has been given to the states in the human rights treaties regarding implementation. Anyone who has read the commentaries from the treaty bodies knows that there are several ways for a state to live up to its obligations under the treaties. It is also clear that there is no universal consensus on the exact meaning of each right. To argue that the motive of protecting of human rights would automatically give reasonableness to the exercise of extraterritorial jurisdiction is not viable. It denies the territorial state the measure of discretion left to it by treaty and customary law; and it disregards the risk that stronger states would impose their values on weaker states, not necessarily to the benefit of the people. When determining reasonableness the interest of the territorial state to regulate its domestic affairs in accordance with its international rights and obligations must be given due consideration. One way of ensuring non-interference in the domestic affairs of the host state is to require double criminality. Interestingly de Schutter has suggested also this method. This is however going too far in the other direction. One of the benefits of home state regulation of TNCs is that it can provide protection for human rights when the host state is unable or unwilling to do so. Double criminality would limit this protection to situations

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110 See for example *Anglo-Iranian Fisheries case*, ICJ Reports, 1951, p. 116; and *Nottebohm case*, ICJ Reports, 1955, p. 4
111 De Schutter, see fn. 29, p. 28
112 De Schutter, see fn. 29, p. 29
113 De Schutter, see fn 29, p. 25
where the host state legislation already provides protection against corporate human rights violations. Reasonableness in extraterritorial human rights protection would necessarily be an act of balance between the interest of the home state to protect human rights and the interest of the home state to regulate its internal affairs.

Finally, while there is no obligation to exercise criminal jurisdiction over legal persons on the same terms as natural persons, no treaty or customary norm appear to prevent a state from doing so. The treaties are quiet on the topic and no coherent state practice is yet discernable. The states must therefore be considered free to contribute to the development of customary law in either direction.

4.2.2 Civil jurisdiction
As already mentioned, states are at much more liberty to exercise civil jurisdiction extraterritorially. There are regional agreements such as the Brussels Convention and Brussels I Regulation, which together govern jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the European Union. There are also global conventions regulating civil jurisdiction on a certain topic, such as the Haag Convention on Civil Aspects of International Child Abduction. Although attempts have been made, most recently in 2001 with the Draft Hague Convention on Jurisdiction and Enforcement of Judgments, the states have not yet been able to conclude a global treaty regulating civil jurisdiction in general. Although many legal systems have common aspects in the regulation of civil jurisdiction it is not generally considered to be an expression of opinio juris indicating the crystallisation of customary law. Nevertheless, although not constrained by international law, disproportionate exercise of extraterritorial jurisdiction may cause political frictions with other states. It is therefore prudent to observe certain limitations. To establish jurisdictions the absolute majority of states require some connecting factor between the dispute and the state. The most widely recognized connecting factor is the domicile of the defendant and a corporation is usually considered domiciled in the place of incorporation or where it has its main business operation (French siège social, German sitz). Other strong connecting factors are the place where the event that led to the dispute took place, and the place where the effects of these events are

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114 De Schutter, see fn. 29, p. 12; Ruggie 2007, see fn. 32, p. 831
117 Zerk, see fn. 10, p. 149
118 Zerk, see fn. 10, p. 147
felt. The home state of a TNC can therefore quite safely establish civil jurisdiction over a dispute when the defendant is a corporation that is seated or has its main office on territory of that state, also when the claimant or claimants are neither nationals nor residents and when the dispute originated in another state. This is no guarantee that political frictions might not still arise. Important issues of public interest to the other state can be touched upon in private disputes; the other state might consider itself to have stronger connections to the dispute; or the other state might consider the exercise of extraterritorial jurisdiction to be a way of circumventing its own judiciary. It is therefore common for states to establish grounds on which the courts can refuse to exercise its territorial jurisdiction. For example, the principle of forum non conveniens allows a court not to exercise jurisdiction despite that the requirements are fulfilled, if it considers the courts of another jurisdiction to be the proper forum to hear the dispute.

4.2.3 Measures with extraterritorial implications
Extraterritorial jurisdiction is not the only means of influencing corporate behaviour abroad. Exercise of jurisdiction based on the territoriality principles can have considerable effects on events outside the territory of the state. This is sometimes referred to as indirect extraterritorial jurisdiction and is mentioned in the commentary to Guiding Principle 2 as one possible tool for extraterritorial regulation. Regulations requiring parent companies in the home state to implement certain standards throughout the corporate group is one type of measure with extraterritorial implications. Such regulation could establish criminal, civil or administrative liability for the corporations in the event that the parent corporation does not actively implement human rights standards throughout the TNC. Other examples of measures with extraterritorial implications is import bans on products not produced according to certain standards, and positive measures rewarding corporations operating according to certain standards.

As this kind of regulations are based on the territoriality principle they are usually considered as less intrusive than true extraterritorial regulation, but there are limits also to territorial jurisdiction. An instructive example is when the US Government ordered a US based parent corporation to halt all sales of vehicles to China throughout the corporate group. This led the French courts to appoint administrators who could run the French subsidiary and carry out the sale. Although the US was not forbidden by international law enact and enforce this

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119 Zerk, see fn. 10, p. 148
120 Zerk, see fn. 10, pp. 89 and 173
121 Augenstein, see fn. 32, p. 7; Zerk, see fn p. 13
122 Société Fruehauf v. Massardy, English translation in (1966) 4 ILM 476 12
piece of legislation, commonly known as the Trading with the Enemy Act, the result of this exercise of jurisdiction was a quite considerable intrusion in the domestic affairs of another state.

4.2.5 International agreements preventing human rights protection

A state might also be prevented from taking certain measures or implementing certain laws because of agreements it has entered into with other states. The agreements that most commonly come into conflict with human rights protection are international investment agreement and trade liberalisation agreements. The former presents most of a problem for a host state wishing to protect and promote human rights; the latter can, in addition, prevent a home state from protecting human rights extraterritorially. This is recognised in Guiding Principle 9, which calls on the states to “maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.” In addition Guiding Principle 10 reminds the states that they retain their human rights obligation when acting within multilateral institutions and that they should strive to make sure that such institutions do not limit the ability of the state parties to fulfil their human rights obligations. Similarly, the failure of a state to take its human rights obligations into account when entering into business related agreements constitutes treaty violation according to General Comments 15 and 18 to the ICESCR. It is very important that states, when entering into new international agreements, make sure that the agreement will not prevent the states from taking measures for the protection of human rights. As the SRSG says himself: “the first thing to do when you are stuck in a deep hole is to stop digging.” This does not however prevent business related agreements already entered into from constraining the capacity of the states to protect and promote human rights.

On the global level the main constraint for a home state wishing to protect human rights extraterritorially is the rules of the World Trade Organisation (WTO). The WTO is the only global organisation for trade liberalisation and it regulates the international trade in goods, services and intellectual property. The purpose of the WTO is to minimise the barriers on in-

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123 ACT OCT. 6, 1917, CH. 106, 40 STAT. 411
124 General Comment 15, see fn. 89, at para. 44; UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, 35th session, *The right to work - General Comment No. 18* (E/C.12/GC/18), 6 February 2006, at para. 33
ternational trade and to make sure that the state parties do not introduce any restrictions on trade that are not allowed under the WTO agreements.\textsuperscript{126} The WTO has 152 member states plus the European Union and another 24 states have started the process to join. With such wide reach the regulations of the WTO can have considerable impact on the protection of human rights.\textsuperscript{127}

The WTO prohibits trade restrictions and trade-distorting measures such as import bans, tariff rate quotas, tariff quotas and subsidies but for the purpose of protecting human health trade restrictions can be allowed if they fulfil certain, very strict, conditions. In line with this a state can be allowed to ban the import of a certain product that has been scientifically proven to be damaging to human health - if the import ban is strictly necessary to protect human health and it is non-discriminatory to similar products from different countries. The exceptions are however only applicable when a state wants to protect its own population. Trade restrictions for the purpose of regulating a certain conduct extraterritorially are prohibited, as one WTO member state would otherwise be allowed to set the standards for health and for working conditions in other member states and so deprive them of their rights under the WTO agreements.\textsuperscript{128} This means for example that an importing state cannot ban or put an extra tax on the import of a product because its production has caused human health problems in the state of origin. Furthermore, trade restrictions are not allowed when they target the production method, unless the method leaves a trace in the product.\textsuperscript{129} If the quality of the final product is equal to a comparable product from another state, no discriminatory treatment of the product is allowed based on the production method. The background is of course state sovereignty and the right of each state to regulate its internal affairs, in addition to the fear within the WTO that imposing higher working standards would make products more expensive.\textsuperscript{130}

Still, there are certain possibilities for states that wish to improve human rights standards abroad. The rules on product labelling are a little more flexible than the rules on other trade restrictions, especially if the labelling is voluntary.\textsuperscript{131} In this way the impact of a product

\textsuperscript{126} WTO, \textit{Understanding the WTO: Who we are} [website], http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (accessed 15 April 2013)
\textsuperscript{127} WTO, \textit{Members and Observers} [website], http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 15 April 2013)
\textsuperscript{129} Zagel, see fn. 126, p. 14
\textsuperscript{130} Zagel, see fn. 126, p. 16
or production method on the health and welfare of the producers can be communicated to the consumer who then can make an informed decision on which producers and manufacturers to support. States can also request an authorisation to introduce a trade restriction requested by another treaty or international agreement according to the WTO agreement\(^\text{132}\) article IX:3. The EU has received such authorisation to implement the Kimberley Process, the multilateral initiative to prevent the sale in conflict diamonds.\(^\text{133}\) A state could perhaps also argue that trade restrictions are not prohibited if the production method constitutes a crime under universal jurisdiction, as international law already allows this exception from state sovereignty. Seeing as the dispute settlement body of the WTO is only allowed to apply the WTO agreements, the state attempting this line of argument would certainly take a risk.\(^\text{134}\)

It is not possible to formulate general principles on what measures to protect human rights in another state would be considered as trade restrictions under WTO law. It is decided on a case-to-case basis when a dispute arises between two states over such a measure. What is sure is that if a dispute arises, the interpretation of the exceptions is very strict while the interpretation of what may constitute a restriction on trade is rather wide. Furthermore, the enforcement mechanism of the World Trade Organisation is considered to be one of the world’s most effective enforcement mechanisms of a multilateral organisation.


\(^{133}\) Augenstein, see fn. 32, p. 36-37

\(^{134}\) Article 3(4) and (5) of the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement
Final considerations

We have seen the need to ensure that TNC respect human rights and that the victims of corporate human rights violations have access to remedy. We have also seen that the home state has a very important role in this as host states are often unable or unwilling to provide sufficient protection against corporate human rights violations and as the international community has not yet been able to agree on any set of binding corporate human rights obligations under international law. Chapter 3 concluded that the Guiding Principles are not a clear set of rules ready for application but rather, as the SRSG said, “a global platform for action” for states and other actors to build upon. In Chapter 4 we saw that states have very few extraterritorial obligations and that none of them concern corporations. From this we can draw the conclusion that the Guiding Principles correctly reflects that there is no legally binding obligation for the home states to protect human rights in host states. The home state regulation of TNCs therefore depends entirely on the willingness of each home state to create and enforce such regulations. Before concluding this section discusses some of the main problems with the current system.

Problems of unilateral regulation

Apart from the goodwill coming from the protection of human rights there are few obvious advantages for a home state regulating TNCs. Inviting the victims of corporate human rights violations that took place in the host state to make use of the home state’s judicial system means extra costs, especially as those victims are likely to depend on legal aid. There is also a risk that by regulating the home state would be creating disadvantages for its TNCs. Imposing human rights standards on corporations might create considerable extra costs and create an unlevelled playfield if only some TNCs are touched by such requirements. It might also cause the TNCs to find new, less demanding, home states. As long as the home state is not obliged to regulate its TNCs, the lack of motivation for the home state to create any regulations at all will be an important obstacle on the way to regulation of TNCs.

A second obstacle arises from the fact that the national regulations will differ greatly and create legal uncertainty for both corporations and victims. A regulating home state must define how far the responsibility of the parent corporation reaches and the conditions for attributing responsibility. Should it reach only 100 percent owned subsidiary companies? Should

135 A/HRC/17/31, see fn. 57, at para. 15
it extend all the way to subcontractors? Should the parent corporation be held responsible only when it had encouraged the activities that caused a human rights violation, or is it enough that the parent corporation was not aware of the practices of the subsidiary and therefore failed to stop them? The answers to these questions decide if and when a parent corporation can be held responsible for the acts of a subsidiary corporation in a host state. Differently designed regulations in different home states might lead to the odd situation where the human rights conditions vary among subsidiary companies in a host state, depending on which home state regulates their parent companies. In the same way the access to remedy in the home state would depend on which TNC caused the human rights violation. In a host state that is unable or unwilling to protect human rights, this could potentially cause a situation where people’s enjoyment of human rights is greatly affected by which corporation they work for and which corporation operates where they live. For workers this could possibly be seen as a matter of choice of employer - if the workers are aware of which home state regulates the TNC they work for and of the contents of that regulation and so can make an informed decision. For communities living in the vicinity of corporate activities on the other hand, respect for human rights and access to remedy would be a complete stroke of luck.

Unilateral regulation may cause uncertainties and difficulties also for the TNC. Each state must decide under which conditions a corporation falls under its regulations. As was mentioned in Chapter 4, the place of incorporation and location of the siege social of the corporation are two commonly used grounds to determine the nationality of a corporation. For a TNC that is incorporated in state A but has its siege social in state B this will cause double regulations if the regulations of state A are based on incorporation and the regulations of state B is based on the location of the siege social. Potentially the opposite situation where neither state regulates the TNC could also arise. There is also a potential risk of having different regulations within one TNC, as the layered structure often seen in TNCs means that that some of the constituent corporations are both parents and subsidiaries at the same time. A fictional situation will illustrate such situation:
State A does not impose any responsibilities on parent corporations to influence the behaviour of the corporate group. State B imposes certain obligations on all parent corporations whether or not they are at the same time subsidiaries. State C on the other hand only imposes “parental” obligations if the parent corporation is not at the same time a subsidiary of another corporation. In this example parent/subsidiary 1 is treated as a parent corporation with certain responsibilities for its subsidiaries while parent/subsidiary 2 does not have any such obligations. The consequence is that the two branches of the TNC will be under different regulations because of how the three host states have chosen to formulate corporate responsibilities. What this example shows is that unilateral and incoherent regulation of TNCs might be an obstacle also for companies as it creates unpredictability and instability for their operations. It should therefore not be presumed that the TNCs prefer a situation of legal uncertainty.

“False” human rights concerns and power imbalance

Another important aspect to take into consideration is the risk that human rights protection is used as a cover for other ambitions. As already discussed in Chapter 4 extraterritorial regulation of TNCs could limit the margin of appreciation of the host state in the implementation of its human rights obligations and it might constitute an interference in its internal affairs. In addition it could be a method for the home state to protect its own market. If subsidiaries in the host states are obliged to improve the working conditions and limit their impact on surrounding communities it is likely that their production costs would increase and so limit the benefit for of importing goods from low-cost countries rather than using local producers in the home state.

This is also a risk when the home state follows the advice of Guiding Principle 9 and protects human rights when entering into business-related agreements with other states. When the EU is negotiating free trade agreements with small countries and when the US is concluding bilateral investment agreements with developing countries it is obvious who has the bargaining power. It is likely that in those agreements the stronger party will be able to include its human rights obligations of choice, whether or not the protection of human rights is the true motive.

Conclusion

Absent a binding international regulation of corporate human rights responsibilities the home state is the actor best equipped to ensure effective regulation of TNCs for the purpose of protecting worker and communities from corporate human rights violations. The home state indeed has a very important role to play. However, as we have seen, the lack of an obligation for the home state to regulate, along with the restrictions on home state regulation, makes this
role very problematic. The only possible conclusion is that the current system of voluntary initiatives cannot ensure effective and coherent regulation of TNCs and access to remedy for the victims.

An international agreement with clearly defined obligations for the home state regarding the regulation of TNCs would improve the situation considerably. It could provide reasonability in the use of extraterritorial jurisdiction both because the jurisdiction would then be based on an international agreement rather than the initiative of one state and also because it would no longer be up to the home state to balance its own interests against those of the host state. Instead, the balance of interests would already be taken into consideration by the international community in the formulation of the international agreement. This common balancing would also mitigate the risk of human rights protection being used to protect the local markets of the home state. An international agreement would further ensure that TNCs are coherently regulated regardless of in which state they are incorporated or have their siege social. Hopefully the measures taken to implement such an agreement could even be accepted as authorised restrictions on trade under the WTO Agreement like the measures taken for the implementation of the Kimberley Process.

Voluntary initiatives from the business community, civil society and international organisations are important complements to a global agreement on home state regulation. They can speed up the process of regulation by showing governments that there is broad support for regulation of TNCs. They might also be able to introduce higher standards than can be agreed upon among the states and so help to move the protection of human rights forward. They cannot however ensure a universally coherent regulation of TNCs that protects the basic human rights of workers and communities from corporate violation in all host states regardless of which corporation they happen to work for or live nearby. It therefore appears necessary for the international community to return to the drafting table and formulate an agreement on the responsibility of the home state to regulate TNCs.
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