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Jurisdiction

Towards a Reasonableness Test

Cedric Ryngaert*

1. INTRODUCTION

In navigating the jurisdictional scope of human rights treaties, particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR), this chapter approaches the topic from the perspective of general international law, rather human rights law in particular. To begin with, the chapter identifies the conceptual tools that could be most appropriate in delimiting the jurisdictional scope of human rights treaties. To that effect, I argue that the general public international law doctrines and concepts of subjective territoriality and reasonableness may better guarantee the appropriateness of a finding of jurisdiction than may such traditional concepts as 'control' or 'authority'. It is proposed, in particular, to refine the jurisdictional reasonableness test along the lines of the rule of reason as proposed by the US Restatement of Foreign Relations Law.

The chapter proceeds as follows. Section 2 explores how reasonableness could inform the jurisdictional scope of economic, social and cultural (ESC) rights. Upon observing that extraterritorial ESC rights abuses are typically committed by multinational corporations (MNCs), the question arises as to the circumstances under which it is reasonable for individuals to fall within the ESC rights jurisdiction of a State having a connection to these MNCs (ordinarily the home State of the MNCs). Arguably, this will be the case when that State has failed to exercise due diligence over the MNC's activities. Relevant criteria for the application of the due diligence standard in a transnational human rights context will be drawn from the judgment of the International Court of Justice (ICJ) in the *Genocide* case (2007).[1] Geographical proximity of the events, all sorts of connections with the home State and other States'

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[1] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007.

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sovereign interests will all play a role in applying the due diligence standard at a practical level. Sovereignty concerns are then the subject of Section 3.

Drawing upon the previous sections, Section 4 argues that jurisdiction over ESC rights violations is in fact a continuum. (Home) States may sometimes be *required* to protect individuals located abroad if these individuals fall within their jurisdiction. Sometimes they may be *prohibited* from protecting these individuals, in particular when the host State has an overriding interest in (non-)protection. Often, however, they may be *authorised* to protect these individuals, without being obliged to. The obligatory concept of jurisdiction, in other words, the concept of States being required to protect individuals falling within their jurisdiction, as enunciated in human rights treaties, may thus in fact represent too narrow an understanding of the jurisdictional possibilities to transnationally protect human rights.

2. JURISDICTION AND THE SCOPE OF HUMAN RIGHTS PROTECTION

In the central section of their chapter in this volume, Maarten den Heijer and Rick Lawson trace the circumstances under which individuals can be said to fall within the jurisdiction of a foreign State under human rights treaties, particularly the European Convention on Human Rights (ECHR), a convention that mainly deals with civil and political rights, as opposed to ESC rights. They conclude that, as far as jurisdiction resulting from a State's control over territory is concerned, applicable standards are relatively clear. Roughly speaking, individuals located outside the territory of a State party to the ECHR are brought within the jurisdiction of that State if it exercises 'overall control' (as opposed to 'effective control') over the territory where the individuals are located. As far as 'jurisdiction' resulting from control over persons is concerned, however, they point out that applicable standards are far less clear, and even outright confusing. They observe that not everyone who suffers from an act by a State with extraterritorial effects can reasonably fall within the jurisdiction of that State, and thus be entitled to protection based on that State's human rights obligations. Deeming the international human rights courts' 'control' or 'authority' tests unsatisfactory, they propose to draw on the 'effects doctrine' as a conceptually sound test for mitigating States' extraterritorial human rights obligations. It is indeed one thing to state that individuals suffering torture at the hands of British security personnel in a British-run prison in Iraq are under the control of British agents and that, accordingly, these individuals fall within the jurisdiction of the United Kingdom,[2] yet it is quite another to posit that individuals killed by a bomb dropped by a State's fighter plane on foreign territory are under that State's control.[3] In addition, it is rarely the case that a State has effective control over the economic

[2] Cf. *R. (on the application of Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26.

[3] Cf. ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

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situation in another State where corporations of the former commit violations of ESC rights, although a State could have control or at least influence over a corporation (rather than the territory on which the latter operates).

2.1 *Effects- and Conduct-Based Jurisdiction*

Under the effects doctrine, as developed in international criminal and antitrust law, a State can exercise jurisdiction over an act if the effects of the act could be felt in its territory. Because effects-based jurisdiction is based on a territorial link, it is *territorial* rather than extraterritorial jurisdiction (indeed, the effects principle is used interchangeably with the objective territoriality principle). Arguably, the effects doctrine, which was developed to give States more leeway to unilaterally stretch the arm of their domestic laws in order to clamp down on harmful acts arising beyond their borders, could be helpful in bringing individuals within the State's jurisdiction under human rights treaties.

At the outset, it is useful to remind ourselves that jurisdiction in general international law, for example, jurisdiction based on the effects principle, differs from jurisdiction in human rights law.[4] The former is concerned with delimiting State competences, whereas the function of the latter is "delineating as appropriately as possible the pool of persons to which a State ought to secure human rights".[5] Although both concepts of jurisdiction serve different functions, could conceptual solutions developed in the field of general international law be transposed to the field of human rights law? In answering this question, it should be kept in mind that jurisdictional solutions in general international law have borrowed heavily from domestic criminal law and conflict of laws. The antitrust effects doctrine, for instance, which is now widely accepted internationally, draws on nineteenth-century interstate US criminal law.[6] Thus, there are precedents for transpositions of jurisdictional concepts from one field of the law to another. Obviously the transposition of a concept aimed at limiting jurisdiction to a field where jurisdiction may be obligatory is not without its dangers.

If the effects doctrine is relied upon, irrespective of the said dangers of transposition, it should be realised that it is a modality of the objective territoriality principle. As such, it does not confer jurisdiction on the State where the harmful act is initiated, but, on the contrary, on the State where the effects of the harmful act are felt. If the effects doctrine is resorted to so as to clarify the concept 'within the jurisdiction' under human rights treaties, it would mandate human rights protection by the State where the effects of the harmful act are felt. In a transnational context, this is the

[4] See also discussion in den Heijer and Lawson in this book in Section 2.

[5] Ibid. See also M. Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', *Human Rights Law Review*, Vol. 8, No. 3 (2008), pp. 411–88.

[6] C. Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Antwerpen: Intersentia, 2008), pp. 15–16 and 195–216.

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State where the individual suffers the adverse consequences of another State's act or omission. Reliance on the effects doctrine may thus be misguided. To illustrate, individuals in Morocco claiming to be discriminated against by the publication of cartoons in a Danish newspaper move against Denmark (the place of the conduct), not against Morocco (the place of the effects); or individuals in an host State in the global South affected by an energy project developed by a Western MNC controlled or influenced by a Western 'home' State move against the latter State, not the former.

The general international law doctrine on which it is appropriate to rely in a jurisdictional human rights context is not the effects doctrine, but the conduct doctrine. *Conduct*-based jurisdiction is jurisdiction based on territorial conduct producing adverse effects abroad. This grounds of jurisdiction confers authority on the State where the harmful act is initiated (also known as the subjective territoriality principle). In a transnational human rights context, it would not only confer permissible jurisdiction, but it would also *mandate* the exercise of jurisdiction by the State where the act was initiated or the State which initiated the act. Put differently, individuals outside the State fall within its jurisdiction when certain acts or omissions of that State adversely impact on them.

In passing, it is noted that, in antitrust law, the exercise of conduct-based jurisdiction is considered to be off-limits.[7] Reasons for the repudiation of conduct-based jurisdiction range from lack of enforcement resources to concerns over unjustifiable interference in foreign economic policy.[8] In general, outside of antitrust law, conduct-based jurisdiction is not always considered to be inappropriate. It is an uncontroversial modality of territorial jurisdiction in criminal law (if at least the territorial conduct could be identified with a constitutive element of the crime),[9] and it has been widely relied upon in US securities law.[10]

The conduct test in US securities law is in fact a most useful test for our purpose of determining the extraterritorial obligations of States in a transnational human rights context. Whereas the classical law of jurisdiction is based on *permissive* principles – States being authorised, but not required to exercise jurisdiction – US courts seem to take the view that, for transnational securities cases, as one commentator put it,

[7] M. Akehurst, 'Jurisdiction in International Law', *British Year Book of International Law*, Vol. 46 (1972–1973), pp. 145–217, at 193; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 582 (1986) (US Supreme Court holding that US laws "do not regulate the competitive conditions of other nations' economies"); Finnish Act on Competition Restrictions, Act No. 480/1992 ("Unless otherwise prescribed by the State Council, this Act shall not be applied to a competition restriction which restraints competition outside of Finland insofar as it is not directed against Finnish customers; Section 6(2) of the Austrian Cartel Act of 1988 (stating that the Act "shall not be applied to any situation insofar as it affects the foreign market"); European Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the [EC] Treaty, [2004] OJ C 101/81 (*a contrario*).

[8] Ryngaert, *Jurisdiction over Antitrust Violations* (n. 6 above), Section 10.1.

[9] C. Ryngaert, 'Territorial Jurisdiction over Cross-Border Offences: Revisiting a Classic Problem of International Criminal Law', *International Criminal Law Review*, Vol. 9, No. 1 (2009), pp. 187–209.

[10] *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975), *Leasco Data Processing Equipment Corporation v. Maxwell*, 468 F.2d 1326 (2nd Cir. 1972).

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the conduct test is justified "on the ground that fraud is essentially a universal evil that the US States, as the leader of the global securities market, has a *duty* to stamp out".[11] One could likewise argue that all States have a *duty* to protect human rights outside their territory, and to bring individuals located there 'within their jurisdiction' if their rights are violated as a result of an act initiated in those States' territory,[12] in line with the *Trail Smelter* principle.[13]

2.2 *Reasonableness*

The conduct doctrine, like the effects doctrine for that matter, is not a doctrine of mitigation, but rather a doctrine of jurisdictional expansion, as it allows States to exercise jurisdiction over any domestic act that causes effects abroad (or, as far as the effects doctrine is concerned, over any foreign act that produces a domestic effect on their territory).[14] As such, it is a doctrine that will undeniably be well received

[11] J. D. Kelly, 'Let There Be Fraud (Abroad): A Proposal for a New US Jurisprudence ~~With~~ Regard to the Extraterritorial Application of the Anti-~~Fraud~~ Provisions of the 1933 and 1934 Securities Acts', *Law and Policy in International Business*, Vol. 28, No. 1 (1997), at 491 (emphasis added). Also, *Bersch v. Drexel Firestone* (n. 10 above), 519 F.2d 987 ("Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners . . . .").

[12] It should be noted that this is merely an *a fortiori* argument, based on the sort of US exceptionalism that underlies the conduct test in the field of securities law. This is not to say that non-Western States may not incur extraterritorial human rights duties. They may, because these States have also repeatedly confirmed their support for human rights (or at least paid lip service to the cause of human rights), and have widely ratified basic human rights conventions. In fact, as far as ESC rights are concerned, Latin American states have been the most consistent champions of *enforceable* ESC rights. See discussion of the development of an Optional Protocol to the ICESCR in the 1950s and 1960s, in M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on ~~its~~ Development* (Oxford: Clarendon Press, 1995). Some European States (e.g. France, Lebanon) were supportive. It is only from the 1980s and particularly in the ~~post Cold~~ War period that many but not all European States have championed enforceable ESC rights. Note that African States have also been supportive, and since the late 1980s have supported transnational enforceability, particularly in the context of international aid, whereas Europeans have been quite sceptical on this point. See M. Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Nordic Journal of Human Rights*, Vol. 27, No. 1 (2009).

[13] Ad Hoc International Arbitral Tribunal, 11 March 1941, *Trail Smelter Arbitration (United States v. Canada)*, III *United Nations Reports of International Arbitral Awards* 1911, 1938 (1941), pp. 1905–1982; reprinted in the *American Journal of International Law*, Vol. 35, No. 4 (1941), pp. 684–736. (Arbitral Tribunal finding that Canada incurred State responsibility *vis-à-vis* the United States because a smelter in Canada caused transboundary pollution and did damage to land along the Columbia River in the United States.)

[14] If, indeed, as the US Court of Appeals for the Second Circuit held in the seminal *Alcoa* case, "it is settled law [. . .] that any state may impose liabilities [may exercise jurisdiction over], even upon persons not within its allegiance [foreigners], for conduct outside its borders that has consequences [effects] within its borders which the state reprehends, and these liabilities other states will ordinarily recognize", almost any act producing some, albeit the smallest, effects abroad could in theory be amenable to effects-based jurisdiction. *United States v. Aluminium Corp. of America*, 148 F.2d 416, 443 (2d Cir. 1945). It may be noted that, before 1945, the effects doctrine was *not* accepted in antitrust

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by activist human rights lawyers favouring a broad interpretation of the concept of jurisdiction in human rights treaties.

Nonetheless, the conduct and effects doctrines have traditionally not been perceived as *unqualified* doctrines, but rather as doctrines that are mitigated by a number of contact- and interest-based factors. The requirement of a nexus to the matter to be regulated has served as a device to restrain the possibly unreasonable exercise of jurisdiction. By the same token, a transposed conduct doctrine may mitigate a possibly unreasonable scope of the jurisdictional provisions of human rights treaties. This doctrine may then do justice to both human rights and the interests of States.

It is important to highlight in this context that, in 1987, the drafters of the Restatement (Third) Foreign Relations Law of the United States *generalised* the antitrust rule of reason. They believed that *all* assertions of jurisdiction were subject to a reasonableness analysis based on a number of connecting factors listed in Section 403(2) of the Restatement, which purportedly restates customary international law.[15] Although that customary law claim is controversial, given the dearth of State practice and *opinio juris* regarding the existence of a rule of reason governing the international law of jurisdiction,[16] application of the detailed criteria which Section 403(2) sets out is on its face attractive for our purpose of determining the desirable jurisdictional scope of human rights treaties. I consider them worth reprinting here:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, i.e. the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal or economic system;
> (f) the extent to which regulation is consistent with the traditions of the international system;

matters. *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909). See *supra* on the rather expansive interpretation of the conduct test in US securities law (although not in US antitrust law).

[15] Restatement (Third) of Foreign Relations Law of the United States, Section 403, comment a (1987).

[16] C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 142–84.

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(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

These 'reasonableness' criteria appear to be partly inspired by the principle of reasonableness as developed in the US law of tort, where reasonableness serves as a liability (and not jurisdictional) standard. In the law of tort, a person has the duty to take reasonable care, and he or she will be held liable for failing to recognise reasonably foreseeable risks.[17] In the English law of negligence, this standard of reasonable care is – interestingly for our purposes – informed by a 'proximity' or 'remoteness' test, pursuant to which liability will be found only if there is sufficient proximity between the plaintiff and the defendant who caused the accident.[18]

When applied to unilateral jurisdictional assertions, the criteria have in common that they aim to identify the State with the closest connection to the matter to be regulated. When applied to the jurisdictional scope of human rights treaties, a common thread is that they ascertain whether an individual living abroad has *a sufficiently close connection* with the State whose actions purportedly have effects on him or her.

The rule of reason as enunciated in Section 403(2) of the US Restatement has the advantage of being applicable across the board (i.e. to all exercises of jurisdiction). In contrast, application of the conduct or effects doctrines, even qualified ones, is dependent on a territorial link. For our purposes, establishing such a territorial link may prove burdensome and even outright undesirable. Whereas the territorial link with Denmark in the cartoon example is clear – the cartoons having been published in Denmark – there may be no clear territorial link with the United Kingdom in the case of British soldiers mistreating Iraqi prisoners in Iraq.[19] A reasonable person would more readily submit that the Iraqi prisoners fall within the jurisdiction of the United Kingdom more than individuals in Morocco would fall within the

[17] US Restatement (Second) of Torts, para. 289 (1965). See for a discussion of the duty of care in US tort law: D. W. Barnes and R. McCool, 'Reasonable Care in Tort Law: ~~the~~ Duty to Take Corrective Precautions', *Arizona Law Review*, Vol. 36 (1994), pp. 357–406.

[18] Cf. *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd* or *The Wagon Mound (No 1)* [1961] UKPC 1 (Privy Council introducing principle of remoteness in the law of negligence); *Jaensch v. Coffee* (1984) 155 CLR 578 (Australian court finding that there was sufficient causal proximity between the wife of a policeman suffering a nervous shock injury upon learning of the accident her husband had and the person causing the accident); *Palsgraf v. Long Island Rail Road Co.* (1928) 162 NE 99 (holding that a railway company was not liable for injuries suffered by a distant bystander hit by scales following an explosion on a departing train).

[19] A territorial link may be stronger in cases where agents of the British secret service MI5 located in the United Kingdom ask the authorities in Afghanistan and Pakistan via electronic communication to interrogate prisoners, during which torture is practiced. See for allegations of the United Kingdom condoning torture in such a case: 'Tony Blair knew of secret policy on terror interrogations', *The Guardian*, 18 June 2009.

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jurisdiction of Denmark.[20] Not so much a territorial link, but rather the fact that the individual living outside a State is harmed *by an act of that State* (e.g. by an organ of that State[21]) should be the salient preliminary test. Like with respect to the conduct or effects test, a second-level *reasonableness* test should subsequently be performed: If an individual may appear to be harmed by an act of the State, would it also be reasonable to bring that individual within the human rights jurisdiction of that State?

Conceptually, the author concurs with Martin Scheinin, who points out in his contribution to this volume that jurisdiction merely "serves as a shorthand expression for the required factual link between a state and an individual (human rights accountability), or between a state's conduct and certain grievances (state responsibility)."[22] If there is a sufficiently proximate link between the individual and the act of a State, that individual will fall within the jurisdiction of that State, and the State will incur State responsibility for its act *vis-à-vis* the individual, provided of course that the act amounts to a violation of a legal obligation (in our case, a human rights obligation). As Scheinin also implies, finding 'sufficient proximity' between an act and an individual, for jurisdictional and State responsibility purposes, amounts to attributing the act to the State. Admittedly, in *Behrami* and *Saramati* (2007), the European Court of Human Rights (ECtHR) distinguished the question of extraterritorial jurisdiction from the question of attributability of conduct (to either States or an international organization).[23] In the author's view, however, this decision was conceptually misguided: If the impugned acts were indeed attributable to the UN Mission in Kosovo (UNMIK), as opposed to the troop-contributing UN member States, on the basis of UNMIK having control, then quite clearly the act affecting the individuals had the strongest link with UNMIK and thus fell within the jurisdiction (i.e. within the field of responsibility) of UNMIK. Put differently, there was no need to distinguish between jurisdiction and attribution in the admissibility stage[24] and to additionally

[20] This is to assume that to such a reasonable person, also in the case of the cartoons, a violation appears self-evident, for example, because the cartoonist apparently engaged in hate speech in violation of the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination (CERD). Hate speech would be more readily apparent, of course, were a Danish politician to call for the extermination or subjugation of particular minorities in Morocco.

[21] In the sense of Article 4 of the International Law Commission (ILC), 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of its Fifty-third Session* (Fifty-third Session, 2001), UN GAOR, Supp. No. 10 at 43, UN Doc. A/56/10 (2001) ('ILC Articles on State Responsibility').

[22] From Section 6 in Martin Scheinin's chapter in this volume.

[23] ECtHR, joint cases *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, 2 May 2007, 45 EHRR SE10, at para. 71. (The Court stated that "the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.")

[24] This distinction was, however, supported by Sari, who nonetheless believed that the Court tackled the questions of jurisdiction and attributability inadequately. Cf. A. Sari, 'Jurisdiction and International

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muddy the legal field by setting forth two different control standards for jurisdiction and attribution.[25]

That said, the fact that an act had established a link between the State and an individual does not suffice for the individual to be brought within the jurisdiction of the State: The principle of reasonableness demands a sufficiently close connection between a State act and the individual. In addition, it remains important to clearly distinguish between the question of jurisdiction/attribution and the question of liability. In (quasi-)judicial proceedings, the latter question is tackled only in the merits phase, when a human rights body or court ascertains whether an international obligation was actually breached. Additionally, the International Law Commission (ILC) draft articles on State responsibility make a fundamental distinction between attribution and liability on the basis of a breach.[26] Somewhat confusingly perhaps, the principle of reasonableness may play a role both at the level of jurisdiction *and* at the level of liability, however. As was noted earlier in text, in the common law, the principle of reasonableness was developed in the law of tort as a *liability* principle, and it was, in the United States at least, only later picked up as a *jurisdictional* principle. Notably, in cases of due omissions, negligence or due diligence failures on the part of a State acting 'extraterritorially', application of the principle of reasonableness may be called for in both the admissibility (jurisdictional) and merits (liability) phases. It is noted that this double application will be the rule rather than the exception in the case of ESC rights, where violations are typically found on the basis of a State's failure to act.

The question then arises as to whether it is still useful to make a distinction between reasonableness as a guiding principle of both attribution/jurisdiction and liability, because in both instances reasonableness demands the identification of a sufficiently close or proximate connection between a tortfeasor (the State) and a victim. The author believes it is not, and believes that in the field of ESC rights the standard of due diligence – which is a liability standard – may inform answers to the question of jurisdiction. Therefore, let us now consider under what circumstances it is reasonable for an individual located outside a State, whose ESC rights are violated, to be brought within the jurisdiction of the State; that is, under what circumstances such an individual has a sufficiently close connection with the State.

Responsibility in Peace Support Operations: the *Behrami* and *Saramati* Cases', *Human Rights Law Review*, Vol. 8, No. 1 (2008), pp. 151–70.

[25] Contrast *Behrami* and *Saramati* (n. 23 above), para. 133 (stating that the 'attributability' question was "whether the Security Council retained ultimate authority and control such that operational command was only delegated") with ECtHR, *Loizidou v. Turkey*, (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, para. 56 (stating that the jurisdictional question was whether Turkey had 'effective overall control' over northern Cyprus).

[26] Article 2, ILC Articles on State Responsibility (n. 21 above). Elements of an internationally wrongful act of a State: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

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3. JURISDICTION OVER VIOLATIONS OF ESC RIGHTS

States do not often violate the ESC rights of individuals living abroad in a *direct* manner. Instead, the rights may be violated, notably in developing countries, by MNCs which have some link to Western States or by international financial organizations in which Western States play a decisive role. The question then arises as to whether those States could *indirectly* violate ESC rights, and incur State responsibility on that basis, for the actions of these corporations and organizations (or, put differently, whether individuals could indirectly fall within the jurisdiction of foreign States). This section traces the circumstances under which it is reasonable for an individual whose ESC rights are violated by an MNC to fall within the jurisdiction of a foreign State.

The reasonableness factors set out in Section 403 of the US Restatement are all based on a close connection between the State and the person or activity to be regulated. Accordingly, an individual who suffers at the hands of an MNC could reasonably be brought within the jurisdiction of a State only if that State entertains a sufficiently close connection with the MNC. Three tests of 'close connection' could be distinguished: (1) effective or overall control by a State over the MNC; (2) decisive influence of a State over the MNC; and (3) the mere fact of incorporation in the home State.

The first two tests, which have been developed in the context of civil and political rights and the law of armed conflict, may not always be useful in an ESC rights context. With respect to the control test, it is submitted that MNCs will only rarely be controlled by States. Still, even after the wave of privatization of the economy, there are quite a number of MNCs that are controlled and even fully owned by States. For instance, the Chinese government retains control over 30 per cent of all Chinese assets, although this share is shrinking.[27] States often retain a controlling stake in oil companies, notably in Organisation of the Petroleum Exporting Countries (OPEC).[28] State control and influence has even strengthened since the 2008 financial crisis, during which such major US corporations as Citigroup, General Motors and AIG were bailed out by the US government. In addition, there are sovereign wealth funds – State-owned investment funds[29] – whose decisions

[27] See National Bureau of Statistics of China, 25 December 2009, Communiqué on Major Data of the Second National Economic Census.

[28] Saudi Aramco, the world's largest oil corporation, has been fully owned by the government of Saudi Arabia since 1980, although before 1973 it was fully owned by US companies. (See for a corporate history: http://www.saudiaramco.com/irj/portal/anonymous?favlnk=%2FSaudiAramcoPublic%2Fdocs%2FAt+A+Glance%2FOur+Story&ln=en , accessed 7 August 2011.) The Norwegian government still retains a majority ownership in the Norwegian oil company Statoil, the world's largest offshore oil and gas corporation, which was established by law and fully owned by Norway between 1972 and 2001. See for a corporate history of Statoil: http://www.statoil.com/en/about/history/oilnorway40years/pages/default.aspx, accessed 7 August 2011.

[29] The two largest such funds are the Abu Dhabi Investment Authority and the Government Pension Fund of Norway, which manage, respectively, USD$627 billion and USD$445 billion. See for the

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can have considerable effects through capital investments in corporations in other States.[30]

In spite of these examples, most corporations are controlled by private investors. Such corporations may however develop a symbiotic relationship with States, as is the case with the 'military-industrial complex' – one can even go as far as stating that the military industry controls the government, rather than vice versa[31] – or at least be dependent on States, as is illustrated by the latter's negotiating of bilateral investment treaties and regional trade agreements with other States.[32] Such agreements typically grant rights to corporations (in the case of bilateral investment treaties, even directly enforceable rights) and States alike.

Therefore, in many cases home state support is vital to the survival of transnational corporations in host [redacted].[33] This may trigger the applicability of the State 'decisive influence standard'. Two interrelated problems arise here. One relates to the substantive truth of that statement, and the other to the applicability of the decisive influence standard. This standard is borrowed from the *Ilascu* case before the ECtHR, in which the Court juxtaposed it to the effective control standard.[34] In spite of its name, the decisive influence standard is in fact a relaxed version of the control standard: It denotes 'overall control' or 'ultimate authority' rather than detailed or effective control. If the decisive influence standard is coterminous with the overall control standard, one fails to see how it could be that States may not have overall control over MNCs' operations abroad, while nevertheless having decisive influence over their operations.[35]

A more promising avenue is focusing on the incorporation of an MNC in a State (home State). Arguably, because of the incorporation of the MNC, the home State incurs a number of human rights duties which are not territorially limited. The home State would not only be required to exercise due diligence over the local operations of corporations that are domestically registered, but also over the latter's

Norwegian Fund: http://www.ftf.no/en/home.aspx, accessed 7 August 2011, and for the Abu Dhabi Fund: http://www.adia.ae/, accessed 7 August 2011.

[30] See for an overview of issues raised by sovereign wealth funds' investments: B. De Meester, 'Need for a Multilateral Approach to Sovereign Wealth Funds', GGS Policy Brief No. 4 (May 2008), available at http://www.ggs.kuleuven.be/nieuw/publications/policy%20briefs/pb04.pdf, accessed 7 August 2011.

[31] Cf. US President D. Eisenhower's Farewell Address to the Nation, 17 January 1961 (stating that "we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."). See for an audio recording: http://www.archive.org/details/dde_1961_0117, accessed 7 August 2011.

[32] See also the forerunners of the bilateral investment treaties, the so-called unequal treaties imposed in the nineteenth century on, amongst others, China, in whose parts Western businesses enjoyed privileges that were enforceable by 'extraterritorial' courts established by Western States in China or other 'host States'. Cf. D. Wang, *China's Unequal Treaties. Narrating National History* (Lanham: Lexington Books, 2005).

[33] See Chapter 4 by Narula in this volume at Section 3.3

[34] ECtHR, *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, at para. 392.

[35] See Chapter 4 by Narula in this volume.

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overseas operations (even if the home State does not have effective control or decisive influence over the operations).

The due-diligence obligation is firmly anchored in general international law. As early as 1949, in a dispute over a State's failure to remove mines, the ICJ held that no State "[may] knowingly allow its territory to be used for acts contrary to the rights of other States".[36] As recently as 2007, the ICJ explicitly referred in its *Genocide* judgment to the due-diligence standard in the context of a State's duty to prevent genocide, also outside its territory.[37] The ILC's draft articles on State responsibility, for their part, make clear that a State could incur responsibility not only if conduct attributable to it consists of an act, but also if it consists of an omission.[38] Due-diligence failures typically qualify as omissions: States did not do something which they should have done.

The guidance on the due-diligence standard given by the ICJ in the 2007 *Genocide* judgment might prove particularly useful for the purpose of determining under what circumstances a State has specifically failed to exercise due diligence in protecting individuals outside the State from ESC rights violations committed by MNCs. Although the judgment is concerned with due diligence in respect of preventing genocide abroad, the principles set out by the ICJ could readily be extrapolated to preventing ESC rights violations abroad.[39] There is in fact a striking parallel between the *Genocide* judgment and the object of this study. Both are concerned with human rights violations in a transnational (extraterritorial) context. The relevant principles enunciated by the ICJ, applied to ESC rights instead of to genocide, are as follows:

> A State will only violate its due diligence obligations when it manifestly failed to take all measures to prevent a violation of [ESCR] which are within its power,

[36] ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949 (Merits), ICJ Reports 1949.

[37] ICJ, *Application of the Genocide Convention* (n. 1 above), at para. 430.

[38] Article 2, ILC Articles on State Responsibility (n. 21 above).

[39] Without using the term, the ICJ made some interesting non-definitive statements on due diligence in relation to the CERD: ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008. In this case, the Court ordered both parties to "(1) refrain from any act of racial discrimination against persons, groups of persons or institutions; (2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations, (3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin (i) security of persons; (ii) the right of persons to freedom of movement and residence within the border of the State; (iii) the protection of the property of displaced persons and of refugees; (4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions." The Court notes in para. 126 that "Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein", but considers it not appropriate, in the phase of interim measures, "to pronounce on the issue of whether Articles 2 and 5 of CERD imply a duty to prevent racial discrimination by other [non-State] actors". Accordingly, this Order is relevant precedent for a due-diligence-based duty to prevent extraterritorial human rights violations committed by State actors, but not for such a duty in relation to *non-State* actors. It is precisely the latter who are the main focus of the study in this chapter.

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> and which might have contributed to preventing the violation. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, [ESCR violations]. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of [ESCR violations].[40]

A first prong of the due-diligence standard in the context of ESC rights violations committed by MNCs is, accordingly, the State's 'capacity to influence' the action of the MNC committing the ESC rights violation abroad. Although it is not required that the State have control over the MNC, or that the MNC survive by virtue of the State's support (decisive influence standard),[41] it is required that the State be in a position to somehow influence specific actions of the MNC that violate ESC rights. As the ICJ has noted, this 'capacity to influence' cannot be assessed in the abstract: It depends on 'the geographical distance of the State concerned from the scene of the events' and on the strength of 'links of all kinds'.

The parameters proposed by the ICJ are in fact similar to the connection-based rule of reason discussed in the previous section. The reasonableness of the exercise of jurisdiction by a State over a person or activity, whether the exercise is seen from a permissive perspective (the classical unilateral exercise of jurisdiction by States) or from an obligatory perspective (individuals and situations falling 'within the jurisdiction' of States pursuant to human rights treaties), depends on the strength of that person's or that activity's connections with the State.

[40] Drawing on ICJ, *Application of the Genocide Convention* (n. 1 above), at para. 430.

[41] See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 62, para. 109 (Court stating that it had to "determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government") and p. 65, para. 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."). See for more relaxed standards after the Court rendered its judgment in the *Nicaragua* case: ECtHR, *Loizidou* (n. 25 above), para. 56 (effective overall control); ECtHR, *Ilascu* (n. 34 above), para. 392 (decisive influence); ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of 15 July 1999, para. 137 (overall control).

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The strength of such connections depends on such elements as influence, proximity and foreseeability discussed earlier. For instance, if the scene of events is far from the home State, the exercise of jurisdiction over these events might be considered to be unreasonable. However, the fact that the individuals' ESC rights are violated overseas does not in itself mean that these individuals cannot fall within the jurisdiction of the home State of the MNC deemed responsible for the violation. Physical proximity is not necessarily decisive; after all, the concept of 'space' has collapsed due to globalization. In practice, for MNCs, much will depend on the precise contacts of the MNC with a State and on the locus of the MNC's actions or omissions. If the corporate decisions (actions or negligence) at issue could be traced back to the corporate headquarters in the home State, State responsibility may more readily be found than if the decision is taken by a subsidiary enjoying substantial decision-making autonomy, let alone if it is taken by one of the MNC's local suppliers in the host State. In practice, parameters used for assessing a State's responsibility for ESC rights violations committed abroad may often coincide with those used for assessing the responsibility of the MNC's parent corporation for ESC rights violations committed by its subsidiaries or suppliers abroad (in the event that the parent corporation is incorporated in that State).

If it is established that the process of overseas ESC rights violations was set in motion in the MNC's home State, the victims of these violations may fall within the jurisdiction of that State.[42] This implies that the home State, in order to avoid State responsibility, should commit itself to preventing such violations from occurring. If the violations do occur, the home State should hold the MNC accountable through criminal prosecution or by providing civil redress for the victims.[43]

Apart from geographical proximity, as the ICJ held in the *Genocide* judgment, the strength of other relevant links between the State and the MNC committing the international law violation might be taken into account to assess the State's capacity to influence, and thus its international responsibility. For one, States may, through investment insurance, cover the political risks of MNCs' operations overseas. By insuring investments, they might have the 'capacity to influence' the MNC's behaviour. Accompanying conditions imposed by the State could relate to respect for ESC rights, and MNCs that violate the conditions may be amenable to sanctions. Thus, it could be argued that, in case States offer investment insurance to MNCs, their international responsibility is engaged if they fail to attach ESC rights-related

[42] See at length J. Wouters and C. Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: the Challenge of Jurisdiction', *George Washington University International Law Review*, Vol. 40, No. 4 (2009), pp. 939–75, discussing home-State liability cases arisen in the United Kingdom, for example, *Lubbe and Ors v. Cape Plc* [2000] UKHL 41, and the practice of the Organisation for Economic Co-operation and Development contact points, which provide a home State complaint forum for victims of corporate misconduct, also if it occurred overseas.

[43] See on redress through domestic tort litigation: C. Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations', *Netherlands Yearbook of International Law 2007* (2008), pp. 42–56.

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conditions, or if they fail to take appropriate measures if such conditions are violated. Put differently, individuals whose ESC rights are violated overseas by an MNC may fall 'within the jurisdiction' of the MNC's home State if that State offers investment insurance to the MNC without attaching ESC rights-related conditions.[44]

Not only through investment insurance schemes, but also through financial investments in corporations may States have a link with MNCs and have the capacity to influence their activities overseas. State pension funds, for instance, are investment heavyweights. Their investment behaviour, signalling approval or disapproval of corporate conduct, could significantly influence MNCs' activities. The threat of divestment by such an important institutional investor as a State may often cause these MNCs to steer in the direction desired by the State. Precisely because States have the capacity to considerably influence the conduct of MNCs through investment schemes, it could be argued that they violate their due-diligence obligations when they fail to make their investments in MNCs dependent on these corporations conducting their overseas investments in accordance with human rights obligations, including those stemming from ESC rights treaties. Individuals whose ESC rights are violated by an MNC could therefore fall within the jurisdiction of the MNC's home State if the latter invests in, or fails to divest from, corporations that violate basic labour standards, the right to water, the right to food or other human rights.[45]

Beyond investment and investment insurance, States could have a link with MNCs through other mechanisms such as tax deductions, subsidies for export, technical assistance and assistance by trade bureaus or embassies in making deals, similarly allowing home States to influence MNCs and the ESC rights impact of their overseas

[44] Some States already attach ~~human rights-related~~ conditions to investment insurance schemes. A limited study commissioned by the International Labor Organisation shows that the United States, the United Kingdom and Japan, amongst others, indeed require corporations to respect fundamental labour rights if the risks of their overseas operations are insured by the government. Cf. B. Penfold, 'Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities', 10–22, available at http://www.ilo.org/public/english/employment/multi/download/wp95.pdf, accessed 7 August 2011. Belgium and the Netherlands currently also make investment insurance dependent on respect for certain ESC rights. Cf. for Belgium: http://www.ondd.be/webondd/Website.nsf/webnl/Who+are+we_Ethics?OpenDocument, accessed 7 August 2011. Cf. for the Netherlands: http://www.atradius.com/nl/dutchstatebusiness/overheid/overheidsfaciliteiten/310exportkredietverzekeringsfaciliteit.jsp, accessed 7 August 2011.

[45] Norway is currently pioneering such ethical investment. Note however that, in the Norwegian case, there is no clear obligation to invest in companies that actively respect human rights. The procedure, through recommendations of the Ethics Council, acts to exclude only those that are considered to have seriously violated human rights or engaged in corruption. See for detailed information on the Norwegian pension fund's ethical investment scheme: Norwegian Ministry of Finance, report no. 24 (2006–2007) of the Storting (Norwegian Parliament) on the management of the State pension fund in 2006, pp. 68–81 (English translation available). See for an interesting discussion of this investment scheme: S. Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations – The Case of Norway's Sovereign Wealth Fund', *American University International Law Review*, Vol. 23, No. 3 (2007), pp. 577–615.

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operations. There is no bright-line rule for assessing the reasonableness of bringing individuals within the jurisdiction of home States. In every instance, one should ascertain the strength of the links between the State and the MNC, apart from the causal relationship between the operations of the MNC and the ESC rights harm suffered by victims.

Consequently, one could state that if the State becomes a market participant, for example, by providing investment insurance or export credits or by financially investing in corporations, inevitably, it has a link with other market participants, and it accordingly has the capacity to influence these participants' activities that (may) violate human rights.[46] When, having this capacity, the State fails to influence such activities, it may violate its due-diligence obligations and incur State responsibility. Linking this up with the concepts of 'jurisdiction' and 'reasonableness', it may be considered as reasonable that individuals suffering ESC rights violations at the hands of MNCs fall within the jurisdiction of the State, which has the capacity to influence the MNCs' behaviour.

4. SOVEREIGNTY ISSUES

It is clear by now that bringing individuals within a State's jurisdiction is unreasonable if the link between the individual and the State (or rather the latter's acts) is only tenuous. This prong of the reasonableness test is aimed at preventing any person anywhere in the world anyhow affected by an act of a State, or a non-State actor which has a connection to a State, from automatically falling within the jurisdiction of the State. Bringing individuals within a State's jurisdiction is, however, also unreasonable if other States' sovereign interests are unjustifiably encroached upon. It may be difficult to fathom how the interests of Serbia could be encroached upon in case some of their citizens fall within the jurisdiction of NATO member States as a result of NATO bombardments on Belgrade, or how the interests of Morocco could be encroached upon when Moroccans, feeling offended by cartoons published in a Danish newspaper, fall within the jurisdiction of Denmark. As far as violations of ESC rights by MNCs operating overseas are concerned, sovereignty issues are more likely to arise, however, because host-State governments may have an interest in the violation, or because there is no violation under host-State law in the first place. Developing States typically woo foreign direct investment with seductive lower regulatory standards relating to the protection of certain socio-economic rights, labour rights in particular (no minimum wages, no regulation of working hours, no right

[46] See also B. Demeyere, 'States' Innovative Mechanisms to Prevent Corporate Human Rights Violations Abroad: Using "Due Diligence" to Complement International Criminal Law's Regulatory Leverage', in Willem van Genugten, Michael P. Scharf and Sasha E. Radin (eds.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference* (The Hague: T.M.C. Asser Press and distributed by Cambridge University Press, 2009), pp. 175–83.

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to strike, no occupational safety rules, no unions, no labour inspections . . .).[47] ESC rights violations committed by foreign investors may thus be facilitated by the developing host State, which may not even have ratified relevant ESC rights conventions, and thus strictly speaking may not have committed a violation. When the MNC's home State starts regulating the overseas conduct of its corporations on the ground that individuals located overseas fall within its jurisdiction (and that the home State's international responsibility may arguably be engaged if it fails to regulate its MNCs' conduct), a normative competency conflict with the host State may easily arise.[48]

It should be recalled that, when setting out the reach and the limits of the due-diligence standard in a transnational context in its *Genocide* judgment (2007), the ICJ emphasised that "every State may only act within the limits permitted by international law".[49] This means that, even if it were reasonable to bring individuals within the jurisdiction of a State under the due-diligence standard, in view of the closeness of these individuals' contacts with the State, a State should not be obliged, and even more should not be authorised, to protect individuals located in a foreign State from ESC rights violations, if, through such protection, it violates the principle of non-intervention. This principle could be violated if the foreign host State has an overriding interest in the regulation, or non-regulation, of the individuals' rights.[50] Alternatively, however, one could argue that precisely because the host State shares some of the responsibility for an ESC rights violation as a result of a regulatory race to the bottom, there is no causal link between the home State and the victimised individuals in the first place. Application of the principle of reasonableness would then not arise, and its effect on the non-intervention principle would be obviated.

[47] See on host State competition, amongst others, Z. Elkins, A. T. Guzman and B. A. Simmons, 'Competing for Capital: ~~the~~ Diffusion of Bilateral Investment Treaties, 1960–2000', *International Organization*, Vol. 60, No. 4 (2006), pp. 811–46.

[48] See C. Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in C. Scott (ed.), *Torture as Tort*: ~~Comparative Perspectives on the Development of Transnational Human Rights Litigation~~ (Oxford: Hart Publishing, 2001), at 54 (submitting that "~~It~~ is also the case that economic policy can vary significantly from one jurisdiction to another, such that extraterritorial regulation of corporate conduct abroad is much more likely to interfere with, or pre-empt, policy choices the host state has made or has chosen *not* to make."). Developing States' opposition to a General Agreement on Tariffs and Trade (GATT) social clause, which could allow (notably Western) States to prohibit the import of goods during the production process of which social rights are violated, may in fact be seen against the same background. Cf. A. Vandaele, *International Labor Rights and the Social Clause: Friends or Foes?* (London: Cameron May, 2005).

[49] ICJ, *Application of the Genocide Convention* (n. 1 above), at para. 430.

[50] For example, J. Kaffanke, 'Nationales Wirtschaftsrecht und internationaler Sachverhalt', *Archiv des Völkerrechts*, Vol. 27 (1989), at 153; and the following criteria to determine the reasonableness of the exercise of jurisdiction proposed by Section 403(2) of the Restatement (Third) of Foreign Relations Law of the United States: (f) the extent to which regulation is consistent with the traditions of the international system; (g) the extent to which another State may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another State.

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Either way, the individuals would not fall within the jurisdiction of the home State.

Sovereignty concerns add a new dimension to the delimitation of the concept 'within the jurisdiction' in the context of home-State responsibility for ESC rights violations by MNCs. They make clear that 'within the jurisdiction' could ~~only reasonably be~~ delimited if the interests ~~of not only~~ the individuals and the home State are heeded, but also ~~those~~ of the host State. They also make clear that, under certain circumstances, the home State might even be prohibited from regulating the overseas conduct of its MNCs when such regulation collides with the sovereign interests of the host State. While such international law- and sovereignty-informed limits have so far hardly played a role in human rights jurisprudence relating to the definition of the concept 'within the jurisdiction', it is submitted here that, at least for ESC rights violations, such a role is desirable. Home States should therefore refrain from regulating the activities of their MNCs ~~abroad,~~ that is, they should not provide a domestic forum to victims claiming redress in tort proceedings, if regulation or a finding of jurisdiction would unduly encroach on the interests of host States.

That said, the non-intervention principle in this area is arguably under severe strain, as is for instance evidenced by the rejection of the *forum non conveniens* defence in transnational law cases before European courts under the Brussels Convention and Regulation.[51] There are also a number of cases where foreign governments have consented or supported cases against an MNC operating in their State being heard in the courts of the home State.[52] Finally, one should not fail to note that providing a forum may be viewed as one way of a home State fulfilling its obligations to make corporations responsible for human rights violations; therefore, the forum's courts should not dismiss the jurisdiction of the forum too easily. In particular, when gross human rights violations are at issue – for instance, the use of forced labour,

[51] ECJ, Case C-281/02, *Owusu v. Jackson*, 2005 ECR I-1383, para. 46. See also Wouters and Ryngaert (n. 42 above), at 959–62.

[52] For instance, there is no evidence of Nigeria protesting the legal action taken by four Nigerian victims of Shell oil leaks, in conjunction with Milieudefensie, started at the court in The Hague against Shell on 3 December 2009. Cf. http://www1.milieudefensie.nl/english/shell/the-people-of-nigeria-versus-shell, accessed 7 August 2011. The Court established its jurisdiction over the case in its judgment on a motion contesting jurisdiction of 30 December 2009, District Court The Hague, Civil law section, Case number / docket number: 330891 / HA ZA 09–579. Also, in many cases arising under the US Alien Tort Claims Act (ATCA), no sovereignty issues arose. See for an overview of ATCA corporate cases: http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/AlienTortClaimsActUSA, accessed 7 August 2011. In one important ATCA case, however, relating to the apartheid era in South Africa, both the South African and US governments intervened to point out the negative repercussions on foreign investment and national reconciliation of a finding of jurisdiction over US corporations that invested in South Africa during apartheid. Brief of Amicus Curiae Republic of South Africa in Support of Affirmance, *Khulumani v. Barclay Nat'l Bank*, No. ~~05–2141~~ (2d Cir. 2005); Brief for the United States as Amicus Curiae in Support of Affirmance, *Khulumani v. Barclay Nat'l Bank Ltd.*, Nos. ~~05–2141~~-cv, ~~05–2326~~-cv (2d Cir. 2005).

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as opposed to paying just under the minimum wage – a host State's objections to jurisdiction should not be allowed to carry much weight.

5. JURISDICTION OVER ESC RIGHTS VIOLATIONS AS A CONTINUUM

In this chapter, it has been submitted that the due-diligence standard is the appropriate standard in determining a State's jurisdiction over ESC rights violations committed abroad, typically by MNCs registered in that State. Whether a State has lived up to its due-diligence obligations depends in turn on its capacity to influence these corporations, and this capacity to influence depends on the strength of connections that the State maintains with the corporations and their activities and on the interests of other States. The notions of 'capacity to influence', 'connection' and 'interests' are flexible ones. As the ICJ held in a similar context in the *Genocide* judgment, these notions call for an "assessment *in concreto*", and may "vary depending on [the State's] particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality" of human rights violations.[53] Because of the flexibility of these criteria, the notion of jurisdiction in human rights treaties will inevitably be a flexible one as well.

When individuals located in State Y have a strong connection with State X, they may fall within the jurisdiction of State X under human rights treaties if State Y has no qualms about this. In a normal understanding of jurisdiction under human rights treaties, this means that State X will be *obliged* to protect the individuals' rights, even if the individuals are located abroad.[54] When the cumulative requirements – strong connections of State X with the individual and weak interests of State Y – are not met, the individuals will not fall within the jurisdiction over State X. This is not to say, however, that State X is not *entitled* to regulate the position of these individuals. When individuals do not fall within the mandatory jurisdiction of a State, this only means that the State is *not under the obligation* to secure human rights to these individuals. Although a State may not be obliged to secure human rights to individuals not falling within its jurisdiction, it may well decide to go beyond its obligations and protect these individuals' human rights all the same. Only when the individual has weak connections with the State, and another State strongly objects to extraterritorial regulation by the former State (namely, when none of the cumulative requirements are met), will it exceed its authority to protect, and violate the principle of non-interference.

Consequently, the concept of jurisdiction over ESC rights violations may be broader than the concept of jurisdiction set out or implied in human rights treaties. Jurisdiction over ESC rights violations is, in fact, a continuum. At one extreme of the continuum, States are required to secure ESC rights to individuals because they

[53] ICJ, *Application of the Genocide Convention* (above n. 1), para. 430.

[54] For example, Article 2 ECHR: "The High Contracting Parties *shall secure* to everyone *within their jurisdiction* the rights and freedoms . . . " (emphasis added).

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fall within their jurisdiction, whether these individuals find themselves in or outside of the territory (compulsory regulation). At the other extreme of the continuum, States are prohibited from securing ESC rights to individuals because the former have no or only weak connections with the latter or because other States can assert overriding interests (prohibition of regulation). Along the continuum, States are entitled to exercise their jurisdiction and regulate, without being required to do so under international law (permitted regulation). Also along this continuum, and along the lines of the Permanent Court of International Justice's holding in the *Lotus* case (1927), States have "a wide measure of discretion . . . to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory", and "every State remains free to adopt the principles which it regards as best and most suitable"[55] to protect individuals from ESC rights violations abroad.

[55] Permanent Court of International Justice (PCIJ), *S.S. 'Lotus' (France v. Turkey)*, PCIJ Reports, Series A, No. 10 (1927).