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Conceptualizing the Home State Duty to Protect Human Rights

Sara L. Seck, *Dalhousie University Schulich School of Law*

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By Sara L Seck, Western Law sseck@uwo.ca

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1. Introduction

The Special Representative to the UN Secretary-General on Business and Human Rights (SRSG) has identified the State duty to protect against human rights abuses by non-State actors, including business, as one of the fundamental pillars of the Framework for Business and Human Rights [Framework].[1] The Framework "rests on differentiated but complementary responsibilities", and is comprised of three "core principles": the State duty to protect, the corporate responsibility to respect human rights, and the need for more effective access to remedies.[2] However, the jurisdictional scope of the State duty to protect is disputed. According to the SRSG, international law provides that States are required to protect against human rights abuses by businesses "affecting persons within their territory or jurisdiction".[3] With regard to home States:

> Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States. Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.[4]

This chapter will explore the scope of the home State duty to protect, and in the process will underscore the complementary nature of the responsibilities in the Framework. The SRSG has accepted a renewed three year mandate to "operationalize" the Framework by "providing "practical recommendations" and "concrete guidance" to

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[1] U.N. Hum. Rts. Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (*prepared by* John Ruggie) [hereinafter *Framework*].

[2] *Id.* ¶ 9.

[3] *Id* ¶ 18.

[4] *Id.* ¶ 19.

States, businesses and other social actors on its implementation."[5] In a recent keynote presentation at the EU Presidency Conference in Stockholm, the SRSG highlighted the importance of better understanding the jurisdictional aspects of the State duty to protect, and described "extraterritorial jurisdiction" as the "elephant in the room that polite people have preferred not to talk about".[6] Yet, in order to "achieve practical progress", the SRSG noted that it is necessary to "pierce the mystique of extraterritorial jurisdiction and sort out what is truly problematic from what is entirely permissible under international law and would be in the best interests of all concerned."[7] This chapter will seek to contribute to this project. Beyond this, however, the chapter will explore an even larger elephant in the room – whether, beyond permissibility, the home State duty to protect should be interpreted to mandate the exercise of home State jurisdiction over transnational corporate conduct in order to both prevent and remedy human rights harms. The chapter will then briefly examine some practical applications that might flow from this conclusion.

The chapter is structured as follows. First, the scope of the permissibility of home State regulation will be examined under the public international law of jurisdiction. In essence, the permissibility question asks when it is that the exercise of home State jurisdiction over transnational corporate conduct is or is not in violation of the jurisdictional rules of public international law. This analysis will then be evaluated from the perspective of Third World Approaches to International Law (TWAIL), an approach to international legal scholarship adopted by a diverse group of scholars who are committed to reforming the international legal system by taking seriously the experiences

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[5] U.N. Hum. Rts. Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (*prepared by* John Ruggie) [hereinafter *Operationalizing*].

[6] John G. Ruggie, UN SRSG for Business and Human Rights, *Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framework*, 2, *available at:* http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf (Stockhom, Nov. 10-11, 2009) [hereinafter, *Stockholm Keynote*].

[7] *Id.* at 6.

of those who self-identify as Third World.[8] Second, this chapter will explore whether, beyond permissibility, home States are obligated to comply with the State duty to protect human rights. The international law of state responsibility will be scrutinized here. If, as I conclude, home States should indeed be understood to be obligated to comply with the State duty to protect, then compliance with this duty must include structuring home State institutions so as to both facilitate corporate compliance with the responsibility to respect rights, and facilitate access to remedies by victims of human rights abuses. These home State institutions include export credit agencies, stock exchanges, financial institutions and even corporate laws themselves, which together create the structural conditions of the global economic order without which transnational corporations (TNCs) and other businesses would be unable to operate. Finally, the chapter will explore the practical implications of these conclusions by evaluating a single question: whether mandating that institutional investors adhere to the UN Principles of Responsible Investment would satisfy the State duty to protect human rights.[9]

2. The Permissibility of Home State Regulation

The State duty to protect "lies at the very core of the international human rights regime."[10] International human rights treaty bodies recommend that States take all necessary steps to protect against abuse by non-State actors, including prevention, investigation and punishment, and provision of access to redress.[11] The duty has both legal and policy dimensions, and while States have discretion as to how to implement the duty, both regulation and adjudication are considered appropriate measures.[12] However, according to the Framework, home States "may feel reluctant to regulate against overseas harms" because the "permissible scope of national regulation with extraterritorial effect

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[8] Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INT. COMMUNITY L. REV. 371, 376 (2008) [hereinafter Okafor ICLR].
[9] United Nations Principles for Responsible Investment, *available at:* http://www.unpri.org/principles/ [hereinafter, UNPRI].
[10] *Framework, supra* note 1, ¶ 9.
[11] *Id.* ¶ 18.
[12] *Id.*

remains poorly understood."[13] Alternately, this reluctance may be "out of concern that those firms might lose investment opportunities or relocate their headquarters."[14] As a consequence, the SRSG has recently stated that "we have the oddity of home states promoting investments abroad – extra-territorially, if you will – often in conflict affected regions where bad things are known to happen, but not requiring adequate due diligence from companies because doing so may be perceived as exercising extra-territorial jurisdiction".[15]

Many scholars analyse the permissible scope of home State jurisdiction by framing the problem as one relating to "extraterritorial" jurisdiction.[16] Yet, extraterritorial is not only notoriously difficult to define, but is often associated with notions of illegality.[17] Indeed, continued reference to extraterritoriality may undermine recognition of existing territorial links between home State institutional structures and the global economic activities of TNCs, unintentionally reinforcing home State reluctance to regulate in the first place.[18] Moreover, "extraterritorial jurisdiction" is not a recognized basis of jurisdiction under public international law.

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[13] *Id.* ¶ 14.
[14] *Id.*
[15] *Stocckholm Keynote*, *supra* note 6 at 6.
[16] *See, e.g.,* JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 133-142, 145-197 (2006); OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS, *available at* http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (report prepared as a background paper for the legal experts meeting with John Ruggie in Brussels, Nov. 3-4, 2006) [hereinafter DE SCHUTTER REPORT]; Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?*, 5 MELB. J. INT'L. L. 37 (2004); Christen L. Broecker, *"Better the Devil you Know": Home State Approaches to Transnational Corporate Accountability* 41 N.Y.U. J. INT'L L. & POL. 159 (2008).
[17] ANDREAS R. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 15 (1996); Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L. J. 177, 186 (2008) [hereinafter Seck in YHRDLJ].
[18] *But see* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009) (arguing that extraterritorial regulation is not a solution to global problems).

Despite this, not surprisingly, the SRSG's EU presidency address explicitly incorporates the language of extraterritoriality, in contrast with the Framework itself. The following section will examine the public international law of jurisdiction using the discussion of home State jurisdiction in the Framework as a starting point. The recent comments of the SRSG on extraterritorial jurisdiction will then be explored, followed by an assessment of the problem from a TWAIL perspective.

2.1 The Public International Law of Jurisdiction

The Framework proposes that an analysis of the scope of home State jurisdiction should begin by finding a recognised basis of jurisdiction under public international law, and then examining whether the exercise of home State jurisdiction meets an overall test of reasonableness.[19] The nationality principle is often assumed to be the most appropriate basis of jurisdiction upon which to ground a preliminary justification for the regulation of TNCs by home States.[20] However, State practice diverges in the determination of corporate nationality, and the factors that determine corporate nationality may differ even within a single State as the regulatory context changes.[21] Even where corporate nationality is clear, widespread acceptance of corporate entity theory, according to which each foreign affiliate is a separate legal entity from the parent corporation, restricts the ability of the home State of the parent company to directly regulate foreign subsidiary or associate companies.[22]

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[19] *Framework*, *supra* note 1, ¶ 19.

[20] *See, e.g.,* ZERK, *supra* note 16, at 106-109; DE SCHUTTER REPORT, *supra* note 16, at 29-34.

[21] Seck in YHRDLJ, *supra* note 17, at 187-188; DE SCHUTTER REPORT, *supra* note 16, at 30; CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 132-37 (2002).

[22] Corporate enterprise theory, a competing theory, is described as an emerging doctrine. LOWENFELD, *supra* note 17, at 85-86; Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 REC. DES COURS 297, 399-401 (1999). A home state may still regulate a parent company so that it exercises control over a foreign subsidiary without directly regulating that entity. F.A. MANN, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 REC. DES COURS 19, 60-63 (1984); ZERK, *supra* note 16, at 108.

While the definition of home State in essence depends upon the ability to identify the nationality of a TNC,[23] this is often done in the public international law context by reference to "the place of incorporation" or "the place from which control over the corporation's activities is primarily exercised."[24] The importance of "place" suggests that an examination of territorial links might serve equally well as a preliminary justification for the exercise of home State jurisdiction. Instinctively, a focus upon territoriality draws attention to the territory of the host State where the impact of the human rights violation is felt, and to any subsidiary or affiliate corporate entity based within host State territory. However, attention is equally due the territory of origin. The home State, as the State of origin of foreign direct investment, will necessarily have a strong territorial connection to conduct that takes place within home state territory. This conduct may take many forms, including decision-making at corporate headquarters, decision-making by a government body or private financial institution in relation to financing or insurance support, or decision-making by a stock exchange in relation to listing to obtain equity financing. While this conduct may not in and of itself directly cause the human rights violation, it does play an essential supporting role without which the human rights violation could not occur. Moreover, all of these home State institutional structures, whether conceived of as "public" or "private," are supported by a network of professionals, including underwriters, auditors, analysts and lawyers, who are primarily based in a city located within the territory of the home State.[25]

Once a recognised basis of jurisdiction is identified providing a preliminary justification for the exercise of home State jurisdiction, the question remains as to whether or not the exercise of jurisdiction is reasonable. In particular, does it constitute an unacceptable intervention into the internal affairs of the host State? Incidents of concurrent or overlapping jurisdiction are quite commonplace, indeed, they are inevitable

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[23] ZERK, *id.* at 146-151.

[24] *Id.* at 147. The "nationality of owners or those having substantial 'control' over the activities or operations of the corporation" may also serve to identify TNC nationality. *Id.*

[25] On the importance of global cities, *see especially* SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALISATION (1996); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

in a global economic order with both host and home States.[26] On the other hand, incidents of truly conflicting jurisdiction, where it would be impossible for a TNC to comply with the laws of both the home State and the host State, are likely to arise less frequently in the human rights context.[27] In most cases there is no true conflict between the laws of the home and host States, but the home State's exercise of concurrent jurisdiction is understood as intrusive by the host State, touching matters that are considered central to the "very idea" of state sovereignty.[28]

The reasonableness of an exercise of home State jurisdiction is often said to involve a balancing of State interests, including consideration of factors such as the links to the territory of the regulating state; the character of the activity being regulated; its importance to the regulating state; and the importance of the regulation to the international system.[29] An alternate approach to the resolution of jurisdictional conflicts recognises that home States may exercise jurisdiction not only to enforce their own policy goals, but also to enforce international policy goals such as those of international human rights law.[30] According to August Reinisch, where the exercise of home State jurisdiction could validly be described as an attempt to enforce international human rights norms through national legal systems, the substantive international law principles of

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[26] Seck in YHRDLJ, *supra* note 17, at 192; D.W. Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 555, 565 (R. St. J. Macdonald & Douglas Johnston eds., 1983).

[27] Seck in YHRDLJ, *id.* at 192-193. A true conflict would occur only where the host state mandates the TNC to violate human rights, not where the host state omits to regulate the TNC so as to prevent human rights violations.

[28] Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45, 53 (Craig Scott, ed., 2001) [hereinafter TORTURE AS TORT].

[29] Seck in YHRDLJ, *supra* note 17, at 195. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987); ZERK, *supra* note 16, at 136-139; Bowett, *supra* note 26, at 566-72; DE SCHUTTER REPORT, *supra* note 16, at 27.

[30] August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors, in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 58 (Philip Alston ed., 2005).

human rights should override the formal principles from the public international law of jurisdiction.[31] In these situations, "affected states will have a hard time justifying their disregard of human rights in rejecting the extraterritorial acts of others."[32]

The most recent statement by the SRSG on the permissibility of extraterritorial jurisdiction takes a slightly different approach. The SRSG explicitly distinguishes between what he describes as "true extraterritorial jurisdiction exercised directly in relation to overseas actors or activities", and "domestic measures that have extraterritorial implications".[33] In the case of direct extraterritorial jurisdiction, the SRSG notes that States "usually rely on a clear nationality link to the perpetrator". By contrast, domestic measures with extraterritorial implications "rely on territory as the jurisdictional basis, even though they may have extraterritorial implications."[34] Both, according to the SRSG, can be controversial, although domestic measures with extraterritorial implications are most common.[35] In general, "principles-based approaches" appear "less problematic than detailed rules-based approaches", due to "genuine legal, political and cultural differences among states".[36]

In recognition that extraterritorial jurisdiction "constitutes a range of measures", the SRSG ultimately proposes a matrix:

> It has two rows: direct extraterritorial jurisdiction over parties or activities abroad, and domestic measures with extraterritorial implications. And it has three columns: public policies, prescriptive regulations, and enforcement action. The combination yields six cells – six broad types of measures with differing extraterritorial reach – not all of which are equally controversial or as likely to trigger objections and resistance.

Yet, the SRSG concludes, "all cells" are "under-populated", "not only the most difficult and controversial".[37] While the SRSG clearly acknowledges the legitimacy of concerns expressed by home States, host States and corporations about extraterritorial jurisdiction,

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[31] *Id.*
[32] *Id. See also* Seck in YHRDLJ, *supra* note 17, at 195.
[33] *Stockholm Keynote, supra* note 6 at 3.
[34] *Id.* at 3.
[35] *Id.* at 4.
[36] *Id.* at 4.
[37] *Id.* at 5.

he is clear: "the debate [about extraterritorial jurisdiction] must be had because the business and human rights agenda ultimately is about closing governance gaps".[38]

2.2 Insights from Third World Approaches to International Law

As described above, August Reinisch proposes that where the exercise of home State jurisdiction could validly be described as an attempt to enforce international human rights norms through national legal systems, the substantive international law principles of human rights should override formal principles from the public international law of jurisdiction that might suggest the home State is acting in violation of international law. One of the difficulties with Reinisch's proposal, however, is determining whether a home State is in fact regulating in order to enforce an international norm, or whether its conduct is better described as serving its own national policy goals.[39] A related question is whether home State reluctance to regulate in relation to the State duty to protect is attributable to a lack of understanding of permissible jurisdictional scope, or whether it is more accurately described as arising "out of concern that those firms might lose investment opportunities or relocate their headquarters".[40] The SRSG's recent statement on extraterritorial jurisdiction appears premised upon the assumption that there is in fact misunderstanding over the permissible scope of home State jurisdiction. However, if in practice home States only exercise jurisdiction when it would serve to promote internal economic interests, then the reluctance to implement even domestic public policies with extraterritorial implications in the human rights realm as identified by the SRSG becomes easier to understand, although more difficult to justify.

A TWAIL assessment of the jurisdictional rules of public international law may be helpful here. TWAIL, or Third World Approaches to International Law, is an approach to international legal scholarship adopted by a diverse group of scholars who are:

> solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order … a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and

[38] *Id.* at 5.
[39] Reinisch, *supra* note 30. *See also* ZERK, *supra* note 16, at 136-138. Zerk notes that "the motives of the regulating state are rarely (if ever) pure." *Id.* at 137.
[40] *Framework*, *supra* note 1, ¶ 14.

> experiences of those who have self-identified as Third World much more seriously than has generally been the case.[41]

While TWAIL is not a unanimous, monolithic school of thought, TWAIL scholarship is united in its broad opposition to the unjust global order.[42] Historical TWAIL scholarship has highlighted the colonial origins of international law, revealing how despite international law's universal claims, it was used to justify, manage and legitimize the subjugation and oppression of Third World peoples.[43] Colonialism was central to the formation of international law, and neo-colonialism continues to be central to the structure of international law today through contemporary initiatives such as the discourse of development that presents Third World peoples as deficient and in need of international intervention.[44] According to Antony Anghie, the practices of powerful Western states following the establishment of the United Nations and continuing today may be best understood as the "continuation, consolidation, and elaboration of imperialism."[45] However, TWAIL scholars do not reject international law, but rather seek to make the people of the Third World the ultimate decision makers when identifying and interpreting international legal rules. As international law provides Third World peoples with no real voice, TWAIL scholars "themselves must imagine or somehow approximate the actual impact of specific rules or practices on their daily lives and define or interpret those rules accordingly."[46] TWAIL scholars have also asked how to define the Third World, with many concluding that a fixed geographic approach is

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[41] Okafor ICLR, *supra* note 8 at 376.
[42] Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L. J. 176 (2005) [hereinafter, Okafor *Newness*]. *See also* Makau Mutua, *What Is TWAIL* 94 AM. SOC'Y INT'L PROC. 31 (2000); Karen Mickelson, *Taking Stock of TWAIL Histories,* 10 INT'L COMMUNITY L. REV. 353 (2008).
[43] Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility for Internal Conflict,* 2 CHINESE J. INT'L L. 77 at 187 (2003).
[44] *Id.* at 193.
[45] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 11-12 (2005). *See also* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).
[46] Anne-Marie Slaughter & Steven R. Ratner, *The Method is the Message,* 36 STUD. TRANSNAT'L LEGAL POL'Y 239 at 248-249 (2004).

unhelpful; rather, the significance of Third World is tied to a sense of subordination within the global system shared by a group of States or societies that self-identify as Third World.[47]

The unilateral exercise of home State jurisdiction in the human rights realm creates a curious problem from a TWAIL perspective. On the one hand, if home States only exercise jurisdiction to promote internal economic goals, then unilateral home State regulation, even ostensibly addressing human rights concerns, appears innately problematic as an imperialistic infringement of host State sovereignty.[48] Moreover, if home State regulation designed to prevent and remedy human rights harms were to become routine State practice that contributed to the development of customary international law norms, it could unintentionally serve to reinforce the neo-colonialist tendencies of international law.[49] On the other hand, to the extent that neo-colonial tendencies are already embedded within the structure of international law, the public international law rules of jurisdiction which suggest that extraterritoriality in the business and human rights context is illicit and a violation of international law could themselves be neo-colonialist. The language of extraterritoriality thus shields home States from pressure to take action to ensure home State TNCs respect the rights of citizens in Third World host States. It also shields the home State from the fear that another home State might take action to protect the human rights of its own Third World peoples, including perhaps indigenous peoples.

Notably, many TWAIL scholars complain that home State courts have been reluctant to exercise "justice jurisdiction" over TNC conduct that has violated the human rights of communities within developing countries, while at the same time according

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[47] Okafor *Newness, supra* note 42 at 174-175. *See also* Balakrishnon Rajagopal, *Locating the Third World in Cultural Geography,* (1998-1999) THIRD WORLD LEGAL STUDIES 1.

[48] *See, e.g.,* B.S. Chimni, *An Outline of a Marxist Course on Public International Law,* 17 LEIDEN J. INT'L L. 1, 19-20 (2004).

[49] *See further* Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?* 46 OSGOODE HALL L. J. 565 (2008) [hereinafter Seck in OHLJ].

protection to developed State investors.[50] Moreover, according to Balakrishnan Rajagopal, despite the problematic reliance of human rights discourse upon the State as the primary duty-holder, human rights should not be dismissed.[51] The problem with human rights theory is that it is linked with the colonial origins of the doctrine of sovereignty, for the State is given a predominant role as the source and implementer of the normative framework.[52] Consequently, the "radical democratic potential in human rights" must be sought out, "by paying attention to the pluriverse of human rights, enacted in many counter-hegemonic frames."[53]

What might this mean? While TWAIL calls for justice jurisdiction have generally been made in relation to the exercise of adjudicative jurisdiction by courts, the SRSG has correctly noted that courts are reluctant to accept these cases without clear legislative or executive support.[54] This suggests that a TWAIL analysis of home State regulation necessitates a distinction between regulation that enables host State individuals and local communities to seek redress from harm (and to seek to prevent harm in the first place), and regulation that imposes home State values or standards on communities in other States without the participation, consultation or consent of those same communities.[55] It also suggests that asking what the permissible scope of home State extraterritorial jurisdiction is may serve to distract from the real elephant in the room: whether State-created institutional structures of the global economic order must regulate the TNC conduct that they facilitate so as to protect individuals and local communities from human rights violations, and to offer access to remedies in the event of harm.

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[50] Chimni, *supra* note 48, at 20. *See generally* Baxi, *supra* note 22; Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States, in* TORTURE AS TORT 491, *supra* note 28.

[51] RAJAGOPAL, *supra* note 45, at 186.

[52] *Id.* at 187. Thus, despite its "nominal anti-sovereignty posture", human rights remains a "state-centred" discourse, and protest or resistance movements inside societies are ignored. *Id.*

[53] Balakrishnan Rajagopal, *Counter-hegemonic International Law: rethinking human rights and development as a Third World Strategy*, 27 THIRD WORLD Q. 767 at 768 (2006).

[54] *Stockholm Keynote, supra* note 6, at 3.

[55] Seck in OHLJ, *supra* note 49.

3. Home State Obligations

3.1 Jurisdictional Scope and the *ILC Articles*

The extent of home State obligations depends upon the scope of jurisdictional clauses in international human rights treaties or as understood under customary international human rights law. According to the Framework, international law provides that States are required to protect against human rights abuses by business "affecting persons within their territory or jurisdiction."[56] Thus, while territoriality could serve as a preliminary justification for the exercise of home State jurisdiction under public international law, territoriality does not so easily ground an obligation to regulate where those affected by conduct supported by home State institutions are physically located in the host State. Moreover, although nationality jurisdiction has been invoked in relation to transnational corporate conduct in multilateral efforts to regulate transnational bribery,[57] human rights treaties do not make specific mention of the scope of State obligations in relation to TNCs.

The precise scope of obligations under international human rights law hinges upon the meaning of "jurisdiction."[58] Despite some controversial jurisprudence from the

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[56] *Framework*, *supra* note 1, ¶ 18. Some States claim the scope of the duty is limited to protecting those "both within their territory and jurisdiction". *Id.* at n.10.

[57] *See, e.g.,* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, Dec. 17, 1997, DAFFE/IME/BR(97)20, 37 I.L.M. 1, available at http://www.oecd.org/dataoecd/4/18/38028044.pdf (obliging State parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals).

[58] *See, e.g.,* U.N. Human Rights Comm., *General Comment No. 31*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (clarifying that while Article 2(1) of the ICCPR refers to both territory and jurisdiction, a state's obligations extend to individuals who are not within the state's territory but who are subject to its jurisdiction). *See* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70(4) MODERN LAW REVIEW 598, 602-605, n.25 (2007); EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (F. Coomans & M.T. Kamminga eds., 2004) [hereinafter EXTRATERRITORIAL APPLICATION]. *See also* Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUMBIA J. TRANSNAT'L L. 691, 728-737 (2006)

European Court of Human Rights (ECHR),[59] international human rights treaty bodies generally support a broad concept of jurisdiction that includes where the victim is within the "power, effective control or authority" of the State.[60] This approach has also found favour with the International Court of Justice.[61] Thus, even if home State conduct is understood as taking place on home State territory, the jurisdictional scope of the obligation must extend to the extraterritorial effect of this conduct. In essence, the problem rests on determining to whom a State owes obligations: merely the public within the State's territorial borders, or all those impacted by home State conduct? Sigrun Skogly and other scholars have persuasively argued that universal respect for international human rights must go hand-in-hand with universal human rights obligations.[62] Indeed, according to Skogly and Mark Gibney, "international human rights treaty law, by definition, is premised on the notion of extraterritorial obligations."[63] The same conclusion may be reached without resorting to the language of extraterritoriality, however. If the primary rules that specify the content of home State obligations include due diligence obligations of prevention and reparation of harm by non-State actor TNCs,

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(discussing the jurisdictional scope of the ICESCR as extending to jurisdiction exercised through "effective control" or international cooperation).

[59] Banković v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R., 41 I.L.M. 517. *Banković* has been criticised for mistakenly applying principles drawn from the public international law of jurisdiction, rather than following the ECHR's own jurisprudence and that of other international human rights bodies in relation to the extraterritorial scope of obligations. *See* M. Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights, in* EXTRATERRITORIAL APPLICATION, *id.* 73, 79-80.

[60] McCorquodale & Simons, *supra* note 58, at 605.

[61] *Id.* citing Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Advisory Op.), 2004 I.C.J. 136, ¶¶ 107-113 (July 9); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Merits), 2005 I.C.J. 1, ¶¶ 216-220 (Dec. 19).

[62] SIGRUN I. SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (2006) [hereinafter SKOGLY, BEYOND BORDERS]; Sigrun I. Skogly & Mark Gibney, *Transnational Human Rights Obligations,* 24 HUM. RTS. Q. 781 (2002); Mark Gibney, Katarina Tomaševski & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267 (1999).

[63] Sigrun I. Skogly & Mark Gibney, *Economic Rights and Extraterritorial Obligations, in* ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 267, 273 (Shareen Hertel & Lanse Minkler eds., 2007).

then the home State obligations must extend to the fullest possible exercise of legal authority by the State.[64]

There are no extraterritorial limitations under the secondary rules of the international law of State responsibility as provided by the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (*ILC Articles*).[65] Moreover, practical considerations commonly associated with an exercise of extraterritorial jurisdiction should also not create insurmountable obstacles, particularly as obligations of prevention under the *ILC Articles* are "usually construed as best efforts obligations, requiring the State to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[66] Nor are there any extraterritorial limitations inherent in the companion work of the ILC on the rules relating to the prevention and remediation of transboundary environmental harm (*Prevention Articles* and *Loss Allocation Principles*).[67] The scope of this second project extended in the early days to cover transnational harm associated with the export of hazardous

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[64] NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 172, generally at 166-167, 169-172 (2002) [hereinafter JÄGERS]. For an environmental perspective, see BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION 36, 41-43 (1988).

[65] Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission to the General Assembly, 56 U.N. GAOR, Supp. (No. 10), UN Doc. A/56/10 (2001) [hereinafter *ILC Articles*]. *See also* Rick Lawson, *Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights, in* EXTRATERRITORIAL APPLICATION, *supra* note 58, at 83, 85-86; JÄGERS, *id*. at 168-169; Robert McCorquodale, *Spreading the Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights By Corporate Nationals*, 100 AM. SOC. INT'L L. PROC. 95, 99, n.30 (2006). On the *ILC Articles* generally, *see Symposium: Assessing the Work of the International Law Commission on State Responsibility* 13 EUR. J. INT'L L. 1053-1255 (2002); D. Bodansky & J.R. Crook eds., *Symposium: The ILC's State Responsibility Articles*, 96 AM. J. INT'L. L. 773-890 (2002).

[66] *ILC Articles*, *id*. in Commentary to art. 14, ¶ 14.

[67] Int'l L. Comm'n, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, in Report of the International Law Commission to the General Assembly, 56 U.N. GAOR, Supp. (No. 10), U.N. Doc. A/56/10 (2001) [hereinafter *Prevention Articles*]; Int'l L. Comm'n, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities* 101-82, 58 U.N. GAOR, Supp. (No. 10), U.N. Doc. A/61/10 (2006) [hereinafter *Loss Allocation Principles*]. *But see* ZERK, *supra* note 16, at 160.

technology by TNCs.[68] While the final drafts of the *Prevention Articles* and the *Loss Allocation Principles* were clearly designed with transboundary environmental harm in the forefront (and as primary rather than secondary rules),[69] their scope may still be read as extending to transnational harm from a State of origin. Both thus provide for the possibility of concurrent home and host State obligations under primary rules addressing the problems of transnational harm.[70]

The fact that internationally wrongful conduct often results from the collaboration of several States is clearly recognized under the *ILC Articles*.[71] The wrongfulness of one State's actions may depend on the independent action of a second State, or a State may be required by its own international obligations to either prevent certain conduct by another State or to at least prevent harm flowing from such conduct.[72] As a general rule, each State is responsible for its own wrongful acts under the principle of independent responsibility.[73] Thus, both the home and host State may be independently responsible for violations of human rights norms committed by TNCs, although the precise nature of the responsibility may differ depending on the nature of their own obligations.[74]

The *ILC Articles* are concerned exclusively with the responsibility of States to one another,[75] and do not address the question of whether non-state actors hold international

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[68] Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 REC. DES COURS 287, 396-98 (1995).
[69] *Loss Allocation Principles*, *supra* note 67, in Commentary to Principle 1, ¶ 6.
[70] *See* Sara L. Seck, Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities 290-413 (Dec. 2007) (unpublished Ph.D. dissertation, Osgoode Hall Law School, York University) [hereinafter Seck PhD]. On what international human rights law can learn from international environmental law regarding the transnational scope of obligations, *see also* SKOGLY, BEYOND BORDERS, *supra* note 62, 49-54; John H. Knox, *Diagonal Environmental Rights*, *in* EXTRATERRITORIAL OBLIGATIONS IN HUMAN RIGHTS LAW (Mark Gibney & Sigrun Skogly eds., forthcoming 2009).
[71] *ILC Articles*, *supra* note 65, in Commentary to ch. 4.
[72] *Id.*
[73] *Id.*
[74] Where several States contribute to causing the same damage by separate internationally wrongful conduct, the responsibility of each "is determined individually on the basis of its own conduct and by reference to its own international obligations." The responsibility is not reduced nor precluded by reason of the concurrent responsibility of another State. *ILC Articles*, *supra* note 65, in Commentary to art. 47, ¶ 8.
[75] *Id.* arts. 57, 58.

rights and obligations.[76] As a result, their relevance to international human rights law is sometimes contested.[77] However, as the human rights treaty bodies themselves have applied the international law of State responsibility to matters before them, and the *ILC Articles* themselves make reference to human rights cases, the relevance of the *ILC Articles* to the business and human rights debate will be presumed.[78] The following section will examine the attribution rules of the *ILC Articles*, which are said to reflect existing international law, rather than being a progressive statement of what the law should be.[79] Accordingly, they may be regarded as a statement of how governments currently perceive the international law of State responsibility.

3.2 Direct Responsibility and Attribution by Agency

Under the *ILC Articles,* an internationally wrongful act that would give rise to State responsibility occurs where there is conduct consisting of an action or omission that is attributable to the State under international law and that constitutes a breach of an international obligation of the State.[80] Scholars who have explored the question of whether home State responsibility flows from the wrongful conduct of TNCs have often

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[76] Emmanuel Roucounas, *Non-State Actors: Areas of International Responsibility in Need of Further Exploration, in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 391, 398-399 (Maurizio Ragazzi ed., 2005) [hereinafter INTERNATIONAL RESPONSIBILITY TODAY]; and R. Pissolo Mazzzeschi, *The Marginal Role of the Individual in the ILC's Articles on State Responsibility* 14 ITALIAN Y. B. INT'L L. 39, 47 (2004).

[77] *Compare, e.g.,* Matthew Craven, *For the 'Common Good': Rights and Interests in the Law of State Responsibility, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 105 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) [hereinafter Fitzmaurice & Sarooshi], *with* Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm, in* Fitzmaurice & Sarooshi, *id.* 139, *with* Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights, in* Fitzmaurice & Sarooshi, *id.* 161. *See also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 317-318 (2006); TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 261-265 (2006).

[78] McCorquodale & Simons, *supra* note 58, at 601-602.

[79] James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT'L COMP. L. Q. 959, 968 (2005). *See also* David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857 (2002).

[80] *ILC Articles*, *supra* note 65, art. 2.

focused on asking whether it is possible to attribute the conduct of the TNC to the home State under the *Nicaragua* test of effective control,[81] reproduced in essence in Article 8 of the *ILC Articles*.[82] This test provides the nature of the link that must be established for private acts of a TNC to be transformed into the acts of *de facto* State agents.[83] According to Article 8, the conduct of a person or group who are "in fact acting on the instruction of, or under the direction or control of" the State in carrying out the conduct, will be considered an act of the State under international law.[84] Notably, the Commentaries to Article 8 explicitly exclude a State's initial establishment of a corporation by special law or otherwise as a sufficient basis for attribution to the State of the entity's subsequent conduct.[85] Aside from the case of private military contractors, it is rarely argued that TNCs are in fact acting on the instructions of the home State.[86] Moreover, it is frequently said that the effective control test from the *Nicaragua* case is extremely difficult if not impossible to meet in the TNC/home State context.[87] While some scholars had speculated that the effective control test had been replaced by a test of "overall control" in the *Tadić* case,[88] this was not accepted by the ICJ in *Bosnia*.[89]

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[81] Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶ 115 (June 27), cited with approval in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 2006 I.C.J. 91, ¶ 399 (Feb. 26).

[82] *See e.g.* JÄGERS, *supra* note 64, at 169-172; Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law, in* Alston, *supra* note 30, 227 at 235-237.

[83] BECKER, *supra* note 77, at 67; JÄGERS, *id.* at 169-172.

[84] *ILC Articles*, *supra* note 65, art. 8.

[85] *Id.* in Commentary to art. 8, ¶ 6.

[86] McCorquodale & Simons, *supra* note 58, at 610. According to Wolfrum, this test does not depend upon whether the non-state actor follows the instructions, but upon whether the authorities giving the instructions "exercise legislative, executive or judicial functions." Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance, in* INTERNATIONAL RESPONSIBILITY TODAY, *supra* note 76, 423 at 427-428.

[87] Narula, *supra* note 58, at 760-762; Gibney, Tomaševski & Vedsted-Hansen, *supra* note 62, at 286; McCorquodale & Simons, *supra* note 58, at 609-610. *But see* JÄGERS, *supra* note 64, at 171 (arguing that the effective control test may be met due to the "economic, legal and political connection between the corporation and the home State.").

[88] Narula, *supra* note 58, at 761-762; Wolfrum, *supra* note 86, at 428-429.

[89] *Bosnia* case, *supra* note 81, ¶ 403-407.

An alternative approach to establishing an agency relationship between a TNC and a home State is under Article 5 of the *ILC Articles,* according to which the conduct of an entity empowered by State law to exercise elements of governmental authority will be attributed to the State.[90] As the *ILC Articles* suggest that this attribution only occurs where the conduct concerns governmental activity, not private or commercial activity with which the entity may be engaged,[91] Article 5 appears of limited use for attributing TNC conduct directly to the home State. This is particularly the case as the entity must be specifically authorised by internal law to exercise public authority.[92] Having said this, Article 7 provides that conduct is attributable to the State where a State organ or entity is empowered to exercise elements of governmental authority and, while acting in its official capacity, acts in excess of authority or contrary to instructions.[93] It is therefore not strictly necessary for the State to have ordered the wrongful conduct itself. Article 11 is similarly of limited use, as it requires the State to have "acknowledged and adopted the conduct in question as its own".[94] Home States rarely, if ever, adopt human rights violating conduct by TNCs as their own.

While the above examples suggest that direct attribution of human rights-violating TNC conduct to the home State is difficult if not impossible under the *ILC Articles*, there is at least one possible exception. Article 9 of the *ILC Articles* could provide a basis for arguing that home States bear direct responsibility for harmful conduct by TNCs exercising elements of host State governmental authority in failed States or conflict zones.[95] Article 9 is designed for exceptional circumstances, such as "during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are

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[90] *ILC Articles*, *supra* note 65, art. 5.
[91] *Id*. in Commentary to art. 5, ¶ 5..
[92] *Id*. in Commentary to art. 5, ¶ 7. However, it is not obvious what is included in the ILC's definition of governmental authority, nor is governmental authority every easy to define. *See* Clapham, *supra* note 77, at 242-243, 460-499.
[93] *ILC Articles*, i*d*. art. 7.
[94] *Id*. art. 11. Article 11 is derived from the Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3. (May 24). According to Becker, Article 11 is concerned with explicit ratification and adoption of conduct by the State, not with implied State complicity arising out of a failure to prevent or prosecute the private offender as would be the case if it had cited older cases which supported the condonation theory. BECKER, *supra* note 77, at 72. *See further* below.
[95] *ILC Articles*, *id*. art. 9.

disintegrating, have been suppressed or are for the time being inoperative."[96] If an extractive company exercises police powers in order to protect its property in the absence of a functioning host State police force, and violates human rights in the process, then this conduct may be attributable to both the incapacitated host State and the home State under the principle of independent responsibility. The more that the home State is aware that the host State is unable to exercise its regulatory powers, the more onerous the responsibility might be for the home State.

Thus, generally speaking it is difficult to establish an agency relationship between a TNC and a home State. This is in part because an agency relationship presumes that the State is in the position of principal while the TNC is a subordinate.[97] Yet, home States are not "puppeteers" who direct the actions of TNC "marionettes." Instead, home State involvement is more about "acquiescence than direction and control, more about facilitation by quiet encouragement than specific instructions, more about omission than commission."[98] While the TNC is clearly the driving force behind its own conduct, the home State "may be a key facilitator" of the activity through "complex acts and omissions."[99] Thus, the use of agency as a standard for direct home State responsibility for private actor conduct by TNCs may be "not just impractical but also self-defeating."[100] Notably, the agency paradigm "not only neglects the subtle relationships between the private and public sphere … it encourages them," as States can pursue indirect support of activities without creating an agency relationship.[101]

The Framework indicates that implementation of the State duty to protect may be accomplished through regulation and adjudication of TNC conduct so as to protect rights.[102] The following section will explore an alternate route to establishing direct

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[96] *Id*. in Commentary to art. 9, ¶ 1.
[97] *See* BECKER, *supra* note 77, at 258-261, on the problems of the agency paradigm as applied to the power relationship between the State and the non-state actor terrorist. While there are many similarities between Becker's analysis of terrorism and the State and the relationship between home States and TNCs, there are also many differences. *See further* Seck PhD, *supra* note 70, at 258-266.
[98] BECKER, *id.* at 258.
[99] *Id.*
[100] *Id.* at 259.
[101] *Id.*
[102] *Framework*, *supra* note 1, ¶ 18.

home State responsibility for human rights violations by TNCs, by turning our attention to the conduct of State organs.

3.3 The Separate Delict Theory and the Conduct of State Organs

Under the principle of independent responsibility, a home State would be directly responsible for its own wrongful conduct in failing to regulate or adjudicate a TNC so as to prevent and remedy human rights violations – that is, failing to exercise due diligence. However, this does not mean that the State is directly responsible for the conduct of the TNC. This understanding of responsibility is described by some scholars as indirect responsibility for private actor conduct,[103] and by others as responsibility under the non-attribution and separate delict theory, with the term 'indirect responsibility' reserved for historical cases of complicity or condonation.[104] According to Tal Becker, as the difference between a finding of direct responsibility and responsibility under the separate delict theory makes no difference in terms of the remedy available under international human rights law, the different theories of responsibility are often not clearly distinguished.[105] Generally speaking, however, the current "prevailing perception" of State responsibility is that the State is:

> directly responsible only for the acts of those persons with whom it is in a relationship of agency. For this reason, the State will be responsible for the conduct of its own organs or officials, but not for the conduct of non-State actors that is wholly private in nature. The State can, however, be held responsible for its own violations of a separate duty to regulate the private conduct.[106]

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[103] Scott, *Translating Torture* in TORTURE AS TORT, *supra* note 28, at 47.
[104] BECKER, *supra* note 77, at 14-24, and ch.2 "State Responsibility for Private Acts: the Evolution of a Doctrine". Becker distinguishes between three theories of State responsibility for private actor conduct in historical context: (1) direct responsibility (the private conduct itself is directly attributable to the State through the historic theory of collective responsibility); (2) indirect responsibility (the private conduct is indirectly attributable to the State on the basis of the historic theories of complicity or condonation); and (3) the separate delict theory (State responsibility is engaged only for the State's own violation of a separate and distinct duty to exercise due diligence in preventing and punishing the private offence). *Id.* at 24. The condonation theory replaced the historic theory of complicity in the 1920s, which itself fell into disrepute in the early Twentieth Century, to be replaced by the separate delict theory. *Id.* at 19-42.
[105] *Id.* at 57, 62.
[106] *Id.* at 66.

The distinction between direct responsibility and responsibility under the separate delict theory is not specifically endorsed under the *ILC Articles*, which instead provides that a State is responsible for "all the consequences, not being too remote, of its wrongful conduct."[107] However, the distinction becomes evident if one focuses upon Article 4 of the *ILC Articles*, according to which:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[108]

The significance of Article 4 becomes clear if conduct is understood to include both actions and omissions, and if the home State is understood to be under a duty to exercise due diligence to prevent human rights violations by non-state actor TNCs, and to provide victims of human rights violations with access to justice through home State courts. The question then becomes: which State organs are implicated by the State duty to protect human rights – that is, which organs should be expected to engage in the regulation of private actor conduct? States regulate conduct in many ways, and regulation may involve many branches of government:[109]

> Thus, the Legislature may lay down rules by statute, or the Executive may do so by order. … States also regulate conduct by means of decisions of their courts, which may order litigating parties to do or to abstain from doing certain things. … So, too, may the State's administrative bodies, which may apply rules concerning, for example, the issuance of licences to export goods …[110]

The scope of the State duty to protect under Article 4 implicates any branch of government involved in creating and supporting the global economic order and consequently TNC conduct. The conduct of the executive branch of a home State is implicated when it engages in the negotiation of investment protection agreements and

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[107] *ILC Articles*, *supra* note 65, art.31, ¶ 10, 13.
[108] *Id*. art.4.
[109] Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 335, 335-336 (Malcolm D. Evans ed., 2006).
[110] *Id.*

bilateral investment treaties with host States without regard to home State obligations to protect human rights[111] or related obligations of international cooperation.[112] Government departments that provide services to support TNCs are also implicated, as are State-owned enterprises carrying out similar public mandates.[113] It follows that trade commissioner services, overseas development agencies, export credit agencies,[114] and even sovereign wealth funds, as executive organs, must exercise due diligence to ensure that the private actor conduct they support does not violate human rights, and that, in the event harm does occur, victims have access to a remedy.

The implementation of non-binding policies requiring environmental, social and human rights impact assessments, along with ombudsperson-type dispute resolution mechanisms might seem sufficient to discharge the obligation to exercise due diligence by executive organs. However, as the obligation to regulate also attaches to legislative organs, legislation governing these executive organs must arguably also comply with the duty to regulate. To the extent that governing legislation of executive organs could be amended to mandate the protection of human rights, non-binding policies may not be sufficient. For example, such legislation could open the door to judicial review of decisions made by government organs where a decision is not made in accordance with a designated procedure.[115]

As corporate law itself is the product of the conduct of legislative organs, it too should be subject to scrutiny. Facilitating legislation granting separate legal personality to a corporation must surely be in breach of the duty to protect human rights, if the grant of legal personality is made without ensuring that the corporation is given characteristics

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[111] *See, e.g.,* McCorquodale, *supra* note 65, at 100-101; Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization, in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 73 at 143 (Olivier De Schutter ed., 2006).

[112] *See* SKOGLY, BEYOND BORDERS*, supra* note 62.

[113] Depending on the structure of the agencies or enterprises, Article 5 of the *ILC Articles* may be more appropriate to ground attribution for the purposes of the duty to regulate.

[114] On the legal obligations of export credit agencies, *see* ÖZGÜR CAN & SARA L. SECK, THE LEGAL OBLIGATIONS WITH RESPECT TO HUMAN RIGHTS AND EXPORT CREDIT AGENCIES (2006); McCorquodale & Simons, *supra* note 58.

[115] *See, e.g.,* Sara L. Seck, *Strengthening Environmental Assessment of Canadian Supported Mining Ventures in Developing Countries* 11 J. ENVT'L L. & PRAC. 1 (2001).

that would enable it to respect rights. This observation highlights the complementary relationship between the State duty to protect and the corporate responsibility to respect, as within the State duty to protect is an obligation to enable or facilitate implementation of the corporate responsibility to respect.[116] Moreover, if legal personality is granted so as to enable TNCs to operate beyond the effective regulatory spheres of both home and host States as is often claimed, then this too suggests a failure to comply with the State duty to protect.[117]

Private financial institutions and stock exchanges are both creatures of and regulated by statute. Accordingly, legislative schemes that enable them to support the global economic activities of TNCs should also come under scrutiny. While legislation mandating sustainability reporting by companies that list on stock exchanges might be a sound first step in terms of policy, it may not be sufficient to discharge the duty to protect. As with corporate law, legislation that creates a private enterprise such as a stock exchange and enables it to raise global capital in support of TNC conduct may be in breach of an obligation to regulate and adjudicate TNC conduct if the legislation does not integrate mechanisms that could prevent and remedy human rights violations by the TNC that is to receive the equity financing.

Finally, the conduct of judicial organs is also identified in Article 4. National courts are instrumentalities of the State, as much a part of the State as the executive or legislative branches.[118] If the State duty to regulate and adjudicate includes a duty to provide access to justice for victims of human rights violations, then home State courts are under an obligation to facilitate this access. This could have implications for the interpretation of common law doctrines such as *forum non conveniens*, or for the

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[116] This is hinted at in the discussion of corporate cultures. *See Framework*, *supra* note 1, ¶ 30.

[117] For example, if corporate law does not mandate sufficient territorial links to the State granting legal personality for that State to effectively exercise enforcement jurisdiction over the corporation, then this could be viewed as a violation of the State duty to protect. *See* Seck PhD, *supra* note 70, at 227.

[118] *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in* Fitzmaurice & Sarooshi, *supra* note 77*,* at 55. State responsibility would only arise once all means of challenging a lower court decision within the national legal system were exhausted. *Id.* at 72-73.

availability of legal aid to foreign plaintiffs to ensure effective access to justice.[119] This analysis highlights the complementary relationship in the Framework between the State duty to protect and the need for effective access to remedies.

The above are all examples of home State separate delict responsibility, as opposed to direct responsibility. However, separate delict responsibility may give rise to direct responsibility in certain circumstances. One example is under Article 16 of the *ILC Articles*, which McCorquodale and Simons have convincingly argued could, under certain circumstances, make the home State of an export credit agency complicit in the wrongful conduct of the host State in relation to TNC projects, as well as complicit in violations of international criminal law by TNCs themselves.[120] Beyond Article 16, it is possible that direct home State responsibility may arise through separate delict responsibility if principles of "common sense causation" guide the analysis.[121] According to Becker, drawing upon the work of H.L.A. Hart and Tony Honoré, once separate delict responsibility is engaged, the State may be responsible for unattributable acts that are causally linked to the State's own wrongdoing. While detailed exploration of Becker's analysis is beyond the scope of this chapter, it is worth noting that causes are understood as "interventions in the existing or expected state of affairs."[122] Significantly, as the inquiry into what is a cause is "deeply connected to the context in which the inquiry takes place," and a "function of human habit, custom, convention or normative

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[119] *See, e.g.,* Sara L. Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law*, 37 CAN. Y.B. INT'L L. 139 (1999).

[120] McCorquodale & Simons, *supra* note 58, at 611-615; Gibney, Tomaševski & Vedsted-Hansen, *supra* note 62, at 293-294, referring to Article 27 of the 1979 version of the *ILC Articles*. *See* Article 16 and related Commentary, *ILC Articles, supra* note 65. Article 16 applies where one State aids or assists another State in wrongful conduct, including by knowingly providing financing for the activity in question.

[121] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW, (2nd ed. 1985), cited in BECKER, *supra* note 77, at 289-294.

[122] BECKER, *id.* at 293, citing HART & HONORÉ, *id.* at 29. Causes are distinguished from conditions which are "present as part of the usual state or mode of operation of the thing under inquiry." BECKER, *id*. at 293, citing HART & HONORÉ, *id*. at 35. For the full implications of Becker's analysis of causation for the understanding of home State obligations, see Seck PhD, *supra* note 70, at 274-287.

expectation," causation is revealed as a relative concept.[123] Thus, what a TNC or home State might view as a normal state of affairs (the provision of home State support to TNC conduct abroad) may appear to be a cause of a human rights violation to the individual victim or impacted local community within the host State. This provides a link to the TWAIL analysis earlier in this chapter. If the international law of State responsibility reflected host State local community perspectives on causation, then home States would be directly responsible for human rights violations associated with TNC conduct.[124] Moreover, as Becker carefully documents, the theories of attribution reflected in the international law of State responsibility have evolved over time to reflect the prevailing understanding of the power relationship between State and non-state actors.[125] The international legal order of the Twentieth Century emphasised the sovereignty of the State and a strict distinction between the State and the private conduct of non-State actors, a legal order that is reflected in the non-attribution principle and the separate delict theory.[126] A question for the 21st Century is whether the strict public/private divide reflected in the separate delict theory accurately reflects either the power relationship between home States and TNCs, or the normative principles that should guide the direction of international governance.[127] This is a particularly pertinent issue in light of the recent global economic crisis and the response of States. The line between the public and private sectors of the global economy does not appear to be so clearly drawn today as it did even in the very recent past.

4. The UN Principles of Responsible Investment

If the analysis above is correct, then what in practice is required of home States to comply with the duty to protect? The answer is not obvious. This Part will explore one

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[123] BECKER, *id.* at 293-294.
[124] *See further* Seck in OHLJ, *supra* note 49.
[125] BECKER, *supra* note 77, at 11-42, 361-362. *See also* J.A. Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & P. 265 (2003-2004).
[126] BECKER, *id.* at 19, 361.
[127] *Id.* at 361-362; Hessbruegge, *supra* note 125, at 306. *See also* Philip Alston, *Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435, 447-448 (1997).

idea: whether State regulation mandating that institutional investors adhere to the UN Principles of Responsible Investment (UNPRI) might be sufficient for compliance with the State duty to protect.

The UNPRI were developed in 2005 by a group of institutional investors from 12 countries (the Investor Group), and "supported by a 70 person multi-stakeholder group of experts from the investment industry, intergovernmental and governmental organizations, civil society and academia."[128] The United Nations Environment Programme Finance Initiative (UNEP FI)[129] and the UN Global Compact[130] coordinated the process, although "UNEP did not formally supervise the drafting."[131] The UNPRI is open to signatories from asset owners, including pension funds, investment managers, and professional service partners.[132] The UNPRI were launched in April 2006, and as of May 2009 there were 538 signatories and $US 18,087 trillion worth of assets under management.[133]

The UNPRI are specifically designed as voluntary and aspirational Principles that provide a "menu of possible actions for incorporating ESG (environmental, social and governance) issues into mainstream investment decision-making and ownership practices."[134] Indeed, application of the principles may be qualified by the fiduciary duties that institutional investors owe to act in the best long-term interests of their beneficiaries. The success of the UNPRI rests in part on the belief that "environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time)".[135]

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[128] UNPRI, *About*, *available at:* http://www.unpri.org/about/ [hereinafter, About UNPRI].
[129] United Nations Environment Programme Finance Initiative, *available at:* http://www.unepfi.org/
[130] United Nations Global Compact, *available at:* http://www.unglobalcompact.org/
[131] BENJAMIN J. RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW at 399 (2008).
[132] UNPRI, *Frequently Asked Questions, available at:* http://www.unpri.org/faqs/ [hereinafter, UNPRI FAQ].
[133] ANNUAL REPORT OF THE PRI INITIATIVE (2009) at 6, *available at*: http://www.unpri.org/files/PRI%20Annual%20Report%2009.pdf .
[134] About UNPRI, *supra* note 128.
[135] UNPRI, *supra* note 9.

The UNPRI consists of six core Principles, supported by "possible actions". The Principles are:

1. We will incorporate environmental, social and corporate governance (ESG) issues into investment analysis and decision-making processes.
2. We will be active owners and incorporate ESG issues into our ownership policies and practices.
3. We will seek appropriate disclosure on ESG issues by the entities in which we invest.
4. We will promote acceptance and implementation of the Principles within the investment industry.
5. We will work together to enhance our effectiveness in implementing the Principles.
6. We will report on our activities and progress towards implementing the Principles.[136]

State legislation mandating that institutional investors adopt the UNPRI could overcome reluctance among institutional investors to implement the Principles in situations where it might not be clear whether doing so would be in keeping with their fiduciary obligations. This would satisfy a key concern that ESG criteria should still be applied even if to do so were not clearly in the best financial interests of beneficiaries.[137] It would not, however, address the concern that the UNPRI as currently conceived do not in fact require signatories to actually incorporate ESG factors into their ultimate portfolio choices.[138] Nor would it address the question of whether ESG criteria fully incorporate human rights.[139]

Another concern from a human rights perspective relates to the possible actions proposed under Principle 2 on active ownership. Specifically, the proposed active ownership actions include the suggestions that institutional investors: exercise voting rights; develop an engagement capability with companies; file shareholder resolutions;

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[136] *Id.*

[137] Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Corporate Law Tools Project: Summary Report: Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations t Respect Human Rights* (Toronto, 5-6 November 2009), at 11, *available at: http://www.reports-and-materials.org/Corporate-law-tools-Toronto-meeting-report-5-6-Nov-2009.pdf* [hereinafter, Toronto Report].

[138] RICHARDSON, *supra* note 131 at 400.

[139] Toronto Report, *supra* note 137 at 11.

and engage with companies on ESG issues.[140] On its face, this sounds like exactly the kind of active shareholder engagement that is essential for the protection of human rights. However, recent experience has shown that shareholder proposals sometimes do not accurately express the concerns of the communities they purport to be advancing.[141] As socially responsible investment firms are themselves businesses that have a responsibility to respect rights, it may be that State regulation implementing the duty to protect should require shareholders to exercise their own due diligence and "recognize the agency of affected communities by consulting with them before devising human rights-focused shareholder proposals."[142] Related to this point is a concern that the UNPRI in its current form "suggests a policy of engagement with companies rather than screening or avoiding stocks based on ESG criteria" in part because the Principles "are generally designed for large investors that are highly diversified and have large stakes in companies, often making divestment or avoidance impractical."[143] Yet this may create a conflict between the financial interests of investors who hope to profit from the venture and the rights of communities opposed to the project continuing in any form, who might view a shareholder divestment strategy as essential to their struggle.

Thus, while States mandating that institutional investors comply with the UNPRI could lead to improvements in business compliance with the responsibility to respect human rights by exerting soft pressures on businesses to consider ESG issues, it would not alone be sufficient for compliance with the State duty to protect human rights as explored in this chapter. As the SRSG often states, there is "no single silver bullet".[144] Detailed study of additional measures is beyond the scope of this chapter, however, some possible suggestions might include statutorily expanding the types of claimants that can bring derivative actions against companies,[145] mandating the creation of company level

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[140] UNPRI, *supra* note 9.
[141] Toronto Report, *supra* note 137 at 12; Aaron A. Dhir, *Shareholder Enagement in the Embedded Business Corporation: Investment Activism, Human Rights and TWAIL Discourse, in* THE EMBEDDED FIRM: LABOUR, CORPORATE GOVERNANCE AND FINANCE CAPITALISM (Peer Zumbansen & Cynthia Williams, eds., 2010).
[142] Toronto Report, *id.* at 12.
[143] UNPRI FAQ, *supra* note 132.
[144] *Stockholm Keynote, supra* note 6 at 6.
[145] Toronto Report, *supra* note 137 at 8.

grievance mechanisms, and statutorily ensuring the possibility of private law claims brought by victims of human rights violations against home State TNCs in home State courts.

Conclusions

The State duty to protect is best understood as a duty that attaches to State organs, and requires all States, including home States, to exercise due diligence to prevent and remedy human rights abuses by all businesses that benefit from State organ conduct. Preoccupation with the extraterritorial reach of home State laws serves as a distraction from the central issue in the business and human rights debate: how to ensure that the institutional structures of the global economy which facilitate transnational corporate conduct are designed to demand that human rights be respected. Placing the duty to protect squarely on the shoulders of both home and host States acknowledges the difference in the capacity to regulate experienced by home and host States. Indeed, the work of TWAIL scholars suggests that such lack of capacity (or will) on the part of Third World host States is a direct result of the colonial tendencies of the international legal order. This appears to be implicitly acknowledged by the SRSG, for while the State duty to protect is identified as the most fundamental principle of the Framework, the discussion of the duty is never framed as a reprimand of host States. Instead, the State duty to protect includes a clear recognition of the importance of international cooperation and shared responsibility.

The analysis in this chapter has also underscored the complementary nature of the responsibilities in the Framework. If home States are indeed obligated to comply with the State duty to protect, then compliance must include structuring State institutions so as to both facilitate corporate compliance with the responsibility to respect rights, and facilitate access to remedies by victims of human rights abuses. This is not to suggest that without legal reforms the corporate responsibility to respect is meaningless or that non-legal remedies do not have a role to play. Rather, given the complementary nature of the responsibilities in the Framework, compliance by all States with the duty to protect is

essential if the root cause of the problem – the "governance gaps created by globalization"[146] – are ever to be fully filled.

[146] *Framework*, *supra* note 1, ¶ 3.