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Being Indirect – a Viable Way to Assess Legal Responsibility for Corporations' Human Rights Violations Abroad?

Home States' *Due Diligence* Responsibility under the ICCPR and
the ECHR for Extraterritorial Activities Performed by Their
Transnational Corporations

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For Roger

For Ami and Linn

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Summary

This thesis investigates the issue whether States have a responsibility to regulate domestic companies, when those companies are violating human rights abroad. The assessment concerns the rights contained in the European Convention of Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

The first sub-issue of the thesis is whether these treaties can have extraterritorial application. The answer here presented is affirmative and concludes that both the ECHR and the ICCPR can apply extraterritorially. This derives partly from jurisprudence, where researched case law contains at least two exceptions to the more general rule of territorial application of these treaties. However, the conclusion is mainly based on an independent analysis of the term 'jurisdiction' according to the rules in the Vienna Convention on the Law of Treaties. This analysis was necessary since both treaties required the victim of a violation to be 'within the jurisdiction' of the responsible State.

The interpretation focused on the requirement of the Vienna Convention to follow the 'object and purpose' of a treaty when interpreting a term. According to this, the thesis concludes that case law interpreting 'jurisdiction' is only relevant when 'jurisdiction' is used to determine responsibility. Case law that determines State jurisdiction, or domestic or international court jurisdiction, is therefore distinguished. Moreover, the 'object and purpose' of human rights treaties, requires the interpretation to be as beneficial as possible for the individual. According to this, the thesis presents the idea that there is a broader general exception to territorial jurisdiction, which confers responsibility to a State for everything it can control when the State is acting directly abroad. This theory is presented as the 'control entails responsibility' theory.

The second sub-issue of the thesis is to determine whether this conclusion can be applied also on situations when the State is not acting directly abroad; e.g. when a company incorporated in the State is acting abroad and by those actions violating human rights. The possible responsibility to invoke in this situation would be a *due diligence* responsibility; i.e. a positive obligation to ensure rights. This thesis presents both a brief survey of what such *due diligence* responsibility entails domestically, and a more detailed investigation of what it could entail when applied extraterritorially.

The investigation showed that the 'control entails responsibility' theory needed to be modified to be applied extraterritorially. Having a positive obligation in regard of all the conduct a State could possibly control extraterritorially was found unrealistic. Instead, positive obligations could only be implied when there was a direct and immediate link between the extraterritorial act and the alleged violation of an individual's rights.

Besides this, the degree of control in the ‘control entails responsibility’ proposition was qualified so that no impossible or disproportionate burden should be imposed on the responsible State.

This modified theory was then applied on the specific situation of home State responsibility of when a company, incorporated in that State, is violating human rights abroad. The requirement of a direct and immediate link was met due to the ‘duty of care’ that a State has for the acts of its corporation. Regarding the impossible burden, the measures that a State possible could be asked to take consist of legislating, monitoring and allowing litigation. The appreciation of what could be an impossible burden excludes the control mechanism, but went to consider legislating and allowing litigation. Although this assessment should be performed on a case-by- case basis, the thesis concludes that it is possible that a State can be asked to legislate for, and allow litigation against its corporations violating human rights abroad. This would clearly be the most beneficial for the individual and also be consistent with the idea that exceptions to human rights must be provided for explicitly.

Finally, there was a need to see whether home States could also be responsible when subsidiaries of a company, incorporated in that State, is violating human rights abroad. Again, it was necessary to assess which possibilities the home State has to control the behaviour of the subsidiary. Only where the State had sufficient control, the victim of the violation could benefit from the human rights protection of that State.

The conclusion was that a State could control subsidiaries in possibly three ways. The first way, which could be applied under all circumstances, was to oblige the parent company to impose a ‘code a conduct’ and a control mechanism towards its subsidiary. The second way was to regulate the subsidiary directly, but that could only be the case when the subsidiary was seen to be the same entity as the parent company due to the principle of ‘breaching the corporate veil’. The third way could only be applied when the violations abroad could be seen as a direct result of the action of the parent company in the home State. Then the State has the possibility of controlling that act of the company directly.

Regarding control of subsidiaries, the obligation is still of *due diligence* quality. Therefore, the qualified degree of control should be assessed in the same case-by-case basis as when a company was directly violating human rights abroad. It would then also only entail imposing legislation and allowing litigation in that State. As presented above, the thesis thus concludes that responsibility possibly could also be assessed with help of one of the three ways of linking a subsidiary to the home State of its parent company. Regarding the first way it could however be questioned whether there was a direct and immediate link present, and therefore one of the two other options might be a more viable way.

Preface

This thesis is my final work for a law degree at Lund University, Sweden. For the specialized part of this degree I have studied international human rights law together with the master students at the Raoul Wallenberg Institute. This specialization has taken me two years to complete and those years have been rewarding in every sense of the word. I am so grateful for having had the possibility to study for such inspiring teachers as for example Ineta Ziemele and Katarina Tomasevski, and together with the committed and professional human rights lawyers at the masters program. I am likewise immensely grateful for the way my two daughters and me have been welcomed and cherished for by all colleges, teachers and librarians!

The termination of my studies and this thesis could however, due to the arrival of Ami and Linn, been quite some time acoming. Fortunately, my daughters also provided inspiration to finish the thesis quickly, and this, together with the understanding and help from many good friends and colleges, made it possible to now present this paper. Therefore I here want to thank everyone that has helped and supported me during my studies and in writing this. Dina, Dis and Ira for all the patience shown in my study group and elsewhere, Mia and Andrea for the great work of reading and commenting this thesis, my friends at Magistratsvägen for all nice dinners and experiences and my supervisor Dr Radu Mares for all help, patience and good advice.

Finally, this work is dedicated to my wonderful daughters Ami and Linn for being the greatest inspiration for everything. It is also dedicated to Roger, my wonderful husband, for always, always being there for me. Without his immense love, support and care, the writing of this during pregnancy and nursing would have been totally impossible...

Tove Gladh, 24 May 2006

Abbreviations

ACHR	American Convention on Human Rights
ACTA	Alien Tort Claim Act
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSR	Corporate Social Responsibility
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
GNP	Gross National Product
HRC	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organisation
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
UK	United Kingdom
UN	United Nations
UN Norms	Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNTS	United Nations Treaty Series
US	United States
VCLT	Vienna Convention on the Law of Treaties

Introduction

Human rights violations by transnational corporations are today of great importance and growing concern for the international community, manifested by e.g. situations as the oil extraction by Shell in Nigeria. In this case it went so far as to the well-known assassination of Ken Saro Wiwa and eight of his compatriots, who had struggled to defend the human rights of the Ogoni people.¹ In other parts of the world, corporations have been accused of similar abuses of environmental rights,² the right to free association,³ and most currently the debate whether Google and others are violating the right to free speech in China when self-censoring their search-machines.⁴

Bearing in mind these situations it is easy to feel despair; especially considering the size and the complicity of the corporations and structures involved. However, this multitude of problems could hopefully also bring about many solutions. Therefore, my quest is to search for specific ways of assessing responsibility for these violations and thereby providing at least one piece to the puzzle of accountability for the abuses.

1.1 Objective

My specific objective is to examine how legal arguments can be used for assessing responsibility for these violations. My hope is that victims of such abuses one day could use this research in their efforts to stop the violations and find remedy. However, I do not want to go so far as presenting a manual on how to proceed in a real case. Instead my intention is to provide a legal background concerning the responsibility of States, which hopefully could help arguing cases like this. The issues concerning State responsibility for human rights violations committed by corporations are new and untried. Because of this I found it wise to focus on the more broad approach of possible responsibility for these crimes instead of the enforcement of responsibility. The possible ways of enforcement have instead been helpful in choosing the kind of responsibility I am investigating here, and thereby useful tools in making necessary delimitations.

¹ I. Okonta and Oronto Douglas, *Where Vultures Feast* (Verso, New York, 2003) p.3.

² M. Andersson and Ö. Bartholdson, *Swedish Pulp in Brazil: The case of Veracel*, report published by Swedwatch, 2004
http://www.swedwatch.org/swedwatch/referenser/swedish_pulp_in_brazil_the_case_of_veracel last visited 21 May 2006.

³ M. Wingborg, *Ekonomiska frizoner – och kampen för fackliga rättigheter*, (LO-TCO Biståndsnämnd, Sjuhäradsbygdens Tryckeri 2005) p. 15.

⁴ For information about Google in China see e.g. Reporters Without Borders' website at http://www.rsf.org/article.php3?id_article=16262 last visited May 21 2006

1.2 Delimitations

As my title states I will examine whether it is possible to assess legal responsibility for home States of transnational corporations for human rights violations carried out by such corporations abroad, i.e. the indirect responsibility of home States. I have also decided to delimit the search for States' responsibility for these violations to obligations under two specific human rights treaties; i.e. the International Covenant on Civil and Political Rights, (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

1.2.1 Indirect Responsibility

The background for investigating indirect responsibility instead of direct responsibility is provided in the next chapter. With the conclusions made there I found it quite difficult to argue *for* an existing binding legal responsibility of corporations under international law. Therefore I chose to investigate indirect responsibilities. I also found that approach largely untried since most emphasis and research so far has been focused on assessing direct legal responsibility. Hence, I found that my paper would be contributing more when choosing the angle of indirect responsibility.

1.2.2 Home State Responsibility

The idea of contributing to an area where research really was needed I found more than ever true when deciding to focus on home State instead of host State responsibility. It would then include a totally new assessment of extraterritorial responsibility including States' *due diligence* responsibility for acts of corporations. Since research on this issue has been focused on direct actions of States this choice of course made my task more difficult. I had to draw conclusions from case law on the direct action of States extraterritorially and apply it analogously on problems concerning the *due diligence* responsibility of States for acts of their corporations abroad. This also provided another good reason to enter into the issue since such analogies, by my knowledge, never have been drawn before.

1.2.3 The ICCPR and the ECHR

The limitation to consider home States possible responsibility under the ICCPR and the ECHR is made both due to scientific and practical reasons. Firstly, these treaties include numerous rights and are not as specific as e.g. the Genocide convention⁵ or the Torture convention.⁶ This I found useful

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, New York http://www.unhchr.ch/html/menu3/b/p_genoci.htm last visited 21 May 2006

since my purpose is to address violations of different nature and not only the worst violations. Even if the UN Special Representative, Professor John Ruggie, has focused on liability under international criminal or humanitarian law, i.e. the worst violations,⁷ I think research is needed also outside that area. The mentioned example of Google in China and the right to free speech certainly attests that not only the worst violations need to be addressed.

Secondly, it is an advantage to focus on these treaties because they have an enforcement mechanism, and although it is voluntary for the ICCPR it is still a good proof of the undisputed justiciability of these rights compared with the much more disputed Covenant on Economic, Social and Cultural Rights. I have therefore left aside application of that treaty. Although it contains important rights, often violated by transnational corporations, the lack of an enforcement mechanism and the disputed justiciability would still hamper any attempt to enforcement at this moment in time. Furthermore, violations of economic and social rights often result in violations of civil and political rights.⁸ Investigation of civil and political rights is thus interesting for impeding also such abuses.

Thirdly, these treaties are compared to i.e. the African Charter⁹ and the American Convention,¹⁰ working in the legal space where the absolute majority of the powerful corporations are incorporated. Although the African Charter is a great instrument,¹¹ it can only be applied to assess responsibility for host States, because parent companies are almost never incorporated in Africa or South America.

Finally, I have avoided the legal reasoning on the subject of possible customary law. Due to the fact that the area is so new, an existing State practise or *opinio juris* would be hard to find. Likewise the discussion about

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York

http://www.unhchr.ch/html/menu3/b/h_cat39.htm last visited 21 May 2006

⁷ Remarks by John G. Ruggie, Business & Human Rights Seminar, Old Billingsgate, London, December 8, 2005, <http://www.bhrseminar.org/John%20Ruggie%20Remarks.doc> last visited 21 May 2006.

⁸ E.g., the jurisprudence from the ICCPR about the Dutch cases, Broeks and Zwaan-de Vries, about gender-specific distinctions in unemployment law where the non-discrimination clause had to be respected even in a case where there was no human rights entitlement to the economic right itself. I.e. when the non-compulsory law is there, it has to follow the ICCPR art 26. From M. Novak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, (N.P.Engel Verlag, Kehl, 2005) p. 605.

⁹ African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul <http://www1.umn.edu/humanrts/instree/z1afchar.htm> last visited 21 May 2006.

¹⁰ American Convention on Human Rights "Pact of San José, Costa Rica", 22 November 1969, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

¹¹ Among other thing because it contains an enforceable right to a clean environment. See African Commission on Human and Peoples' Rights: Decision regarding communication No.155/96.Social and Economic Action Centre v. Nigeria, 27 October 2001 and art 24 African Charter of Human and Peoples' Rights (1981) + *supra* note 9

possible binding implication of a possible *jus cogens* rule is avoided, since it would be based on customary law and is in itself a quite disputed subject.¹²

I therefore chose to focus merely on the treaties mentioned, since I expect that this choice will provide a more direct road to accountability. All these other angles however deserve further study and would probably be of great help in providing a complete picture of possible responsibility for these abuses.

1.3 Structure

This thesis has six chapters of which the first one is this introductory chapter. In the chapter following this, I will present the different possibilities of assessing legal responsibility for alleged human rights violations by corporations. This will provide further information of how I have chosen my topic and this special way of assessing indirect responsibility for home States.

In chapter three I will discuss States' responsibility for direct extraterritorial acts and see if that can teach us something for the kind of responsibility I am writing about here. In the fourth chapter I will give a brief presentation of the *due diligence* responsibility States have for human rights violations by private parties. After that follows a discussion on the specific issue of responsibility for extraterritorial acts of companies.

The problem of human rights violations by subsidiaries is discussed in chapter five, where different solutions to create the necessary link between the home State and the subsidiary are analysed. Finally in my last chapter I will answer the question the title of this thesis poses and conclude how this answer was achieved.

¹² J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties, A Critical Appraisal*, (Springer-Verlag, Wien, Austria, 1974) p. 101-102.

2 The Different Ways to Assess *Binding* Responsibility for Transnational Corporations' Violations of Human Rights

Looking for possible solutions and mechanisms to reveal and stop human rights violations by corporations, there are plenty of choices to make. Although I have made my choice clear by the introductory chapter I anyway want to present how the other options could appear. It also provides a deeper analysis of how I reasoned when I chosen the indirect responsibility of home States.

First I had to decide whether to study a voluntary or a binding regulation of these violations. The last decade's flourishing of voluntary initiatives, often called CSR, Corporate Social Responsibility, does indeed show the corporations' own preference for those alternatives. After the first euphoria from the human rights world concerning such voluntary initiatives, the human rights organisations today realize the failures and are increasingly calling for binding regulation.¹³ The main reason is the lack of results; more beautiful words than real action have come out of these programmes. However, the CSR regime could still contribute to create a "new protective mechanism" and could be a viable option when the political will to establish binding rules is missing.¹⁴ However, since my point of departure for this paper has been to search for binding rules, the voluntary initiatives will not be discussed further. I will mention them only when they possibly have become binding, as the discussion on the UN Norms¹⁵ presented below.

This study is conclusively only dealing with binding regulation. In this there are still two more choices to make. The first one is to choose between direct and indirect regulation and the second to choose between home State or host State responsibility. 'Directly binding rules' here implies the regulation of the companies themselves directly under international law, while indirect regulation obliges States to regulate companies.¹⁶ 'Host State responsibility' implies attributing responsibility to the State where the violations took

¹³ A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006) p. 195.

¹⁴ R. Mares, *Institutionalisation of Corporate Social Responsibilities: Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy* (Lund, Juridiska institutionen, Lunds universitet, 2006) p. 355.

¹⁵ Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

¹⁶ International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix, 2002) p.45. Available at http://www.ichrp.org/paper_files/107_p_02.pdf Last visited 21 May 2006

place, while ‘home State responsibility’ attributes responsibility to the State where the company working overseas is incorporated.

In this chapter I will present these different ways to assess responsibility as a base for my choice to focus on assessing responsibility in the home State of the violating corporation. I will research the pros and cons of each alternative and see how they could be realized.

2.1 Direct Responsibility of Companies

Entering the world of business and human rights we would probably like to assess responsibility onto the company themselves. We would like to claim that they have an independent responsibility for their acts considering their size and their ability to function all over the world, moving fast from one jurisdiction to another. Should they then not follow the same rules concerning human rights as other actors on the international scene? Is it in fact not so that we are all under an obligation to respect human rights and that a company, as the judicial form of a person, also has such an obligation?

2.1.1 Legal Personality of Companies?

However, assessing direct responsibility of companies we encounter the problem that States are traditionally seen as the only subject of international law.¹⁷ International law consists of rules that apply in the relations between States, and States are the ones to create that law.¹⁸ International law is created by treaties between States, by customary behaviour of States or general principles of law taken from States’ domestic law systems.¹⁹ International law has traditionally also been seen as to create rights and duties for States and States only. The background is the States’ absolute sovereignty, based on the thought that States are meant to function well *beside* each other’s and should not care about how another State is behaving *inside* its territory.²⁰ According to this doctrine, international law consists of the necessary rules regulating the interaction when States exceptionally are acting outside their territory.

A well-known claim for being a subject under international law is the ability to have rights, duties and take legal action in the international level.²¹ In the

¹⁷ P.K. Menon, ‘The Subjects of Modern International Law’, *Hague Yearbook of International Law*, vol. 3 (Dordrecht, Nijhoff, 1990) p. 30.

¹⁸ M. Akehurst, *Akehurst's Modern Introduction to International Law* (Routledge, London, 1997) p. 35.

¹⁹ Statute of the International Court of Justice, 26 June 1945, 15 U.N.C.I.O. 335, art 38 and *ibid* p. 36.

²⁰ L. Henkin, ‘International Law: Politics, Values and Functions’, in H. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals : Text and Materials* (Oxford, Oxford University Press, 2000) p 127

²¹ See Menon, *supra* note 17, p 31.

last criteria I would include both the possibility to raise claims based on your rights, and answer to claims based on your duties. The question to be answered is thus whether only the traditional subjects of international law, i.e. States, fulfil these criteria or if transnational corporations also could be subjects under international law.

Concerning the first criteria - the ability to have rights, I claim that the idea that only States have rights, dramatically changed by the introduction of human rights. As stated by the Human Rights Committee: “The beneficiaries of the rights recognized by the Covenant are individuals”.²² Human rights treaties give rights to individuals or persons and not only to States, and thereby make it an international concern how States are treating their citizens domestically. Where a human rights treaty is mentioning ‘persons’ as a bearer of rights it applies also to companies since ‘persons’ include companies as confirmed by e.g. ECtHR.²³

Furthermore, it is also argued that the human rights regime does not only give non-state actors rights but also imposes duties on such actors. The most cited source of this is the Universal Declaration on Human Rights, whose preamble states:

... the General Assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.²⁴

The reference to “every organ of society” is crucial and actually seems to include the ones we are looking for; i.e. the transnational corporations. However, it is important to note that the Universal Declaration was adopted as a non-binding instrument and even if parts of it have become customary international law, it is unclear which parts.²⁵ Furthermore, also concerning binding treaties, the preamble of a treaty is never binding, which further gives doubts about the status of this reference.²⁶ Other binding treaties on

²² Human Rights Committee, *General Comment 31*, HRI/GEN/1/Rev.7, para.9 from [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) last visited 21 May 2006.

²³ *Autronic AG v. Switzerland*, 22 May 1990, no 12726/87, ECtHR, para 47. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Autronic%20%7C%20AG%20%7C%20v.%20%7C%20Switzerland&sessionid=7109128&skin=hudoc-en> visited 21 May 2006.

²⁴ Universal Declaration on Human Rights, New York, 10 Dec 1948. preamble, <http://www.un.org/Overview/rights.html> visited 21 May 2006.

²⁵ See *Beyond Voluntarism*, *supra* note 16, pp. 59-60.

²⁶ See *Beyond Voluntarism*, *supra* note 16, p 60.

human rights also impose duties onto individuals,²⁷ but there it is unclear whether the specific reference to individuals also includes legal persons.

Regarding what some scholars claim to be the third criteria for being a subject of international law, i.e. being able to take legal action, the difference between legal persons and natural persons has been more pronounced. The ability to claim rights in front of a court has been granted e.g. by the European Court, at least regarding some of the rights in the Convention.²⁸ The remaining problem, and the more important issue for this paper, is however the possibility of having corporations as defendants in a court case regarding their duties. Litigation against corporations, for violating international law, has taken place domestically regarding e.g. situations after the 2nd World War.²⁹ However, legal persons were excluded from the Rome Statute³⁰ when assessing international criminal responsibility of individuals.³¹ Although the Rome Statute can be amended to include legal persons,³² it cannot be used as a proof of corporations having legal personality already today, since the signatory States explicitly avoided giving them that status.

That the lawmakers of the international community are States is important when assessing if companies are subjects of international law. If States, as they have shown with the Rome Statute, do not want to grant corporations the status as subjects under international law, there will be no such status. As Professor Carlos. M. Vasquez points out, States have good reasons for not granting corporations more power than they already have.³³ Today States are able to escape their human rights obligations, because State sovereignty still prevails over possible transnational enforcement of human rights. Such “avoidance” of responsibility is unfortunately often occurring, since States benefit from human rights abuses and often want them to continue. This would however not be the case if corporations were regulated directly. That is the true advantage of direct regulation, but also the point when it turns unrealistic. States that are unwilling to transform the international obligations into national law would be as unwilling to grant

²⁷ African Charter art 27-29, *supra* note 9 and American Declaration of the Rights and Duties of Man, O.A.S. Bogotá, Colombia, 1948, art 32.

²⁸ See *Autronic AG v. Switzerland*, *supra* note 23, para 47.

²⁹ See J.J. Paust, ‘Human Rights Responsibilities of Private Corporations’, vol 35, *Vanderbilt Journal of Transnational Law.*, p. 803 at <http://law.vanderbilt.edu/journal/35-03/PAUST7.pdf> visited 21 May 2006, who is citing among others the *Weissshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litigation)*, 225 F.3d 191 (2d Cir. 2000)

³⁰ Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 <http://www.un.org/law/icc/statute/romefra.htm> visited 21 May 2006

³¹ A. Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’ in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International law* (Kluwer Law International, The Hague, 2000) p. 139.

³² *Ibid* p 159

³³ C. M. Vasquez, ‘Direct vs. Indirect Obligations of Corporations under International Law’, 43 *Colum. J. Transnat'l L.* p. 927 at footnote 90-92 <http://www.ilsa.org/jessup/jessup06/basicmats2/vasquez.doc> visited 21 May 2006

corporations a standing so the same abuses would be stopped in another way. Making a binding treaty regulating companies directly would still need those States signatures and is therefore not likely to happen.

My conclusion is thus that even if individuals and also possibly companies have a legal personality under international law, it would be very different from the one of States. First of all it would include a much more limited number of rights and duties than States. More important is however the notion that it would not be possible to enforce any such rights or duties against legal persons as no international mechanism are is currently accepting legal persons as respondents. Also the most far-reaching attempt to regulate corporations directly, the UN Norms,³⁴ has stated that it is non-binding, although the authors claim the standards to be an authoritative restatement of international law.³⁵ So are the three other instruments regulating companies, the OECD guidelines,³⁶ the ILO Tripartite Declaration³⁷ as well as the ten principles of the UN Global Compact.³⁸ It might be possible to argue that some provisions of these declarations have achieved or maybe later at least will achieve the status of customary law. At least concerning the worst violations,³⁹ which the litigations made after the 2nd world war could be said to bear proof of,⁴⁰ it is possible to claim that customary law has evolved. However there is today still the problem of implementation, when we today lack any sign of an emerging tribunal for corporations. Since States are the lawmakers, also concerning customary law, State sovereignty itself will prevent any attempt to limit the same troublesome State sovereignty that allows States to unpunished violate their human rights obligations. Making corporations directly responsible is certainly such an attempt and I thereby cannot see it happening in the near future.

³⁴ See Draft Norms at *supra* note 15

³⁵ D. Weissbrodt and M. Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in P. Alston (ed), *Non-State Actors and Human Rights*, (Oxford : Oxford University Press, 2005) p. 324.

³⁶ OECD Guidelines for Multinational Enterprises: DAFNE/IME/WPG(2000)15/FINAL, 31 October 2001, [http://www.oilis.oecd.org/oilis/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.oilis.oecd.org/oilis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final) visited 6 April 2006

³⁷ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Declaration adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977, at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> last visited 6 April 2006

³⁸ The ten principles of the Global Compact can be found at <http://www.un.org/depts/ptd/global.htm> visited 21 May 2006

³⁹ S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart publishing, Portland, 2004) p. 11.

⁴⁰ See J.J. Paust *supra* note 29

2.2 Indirect Responsibilities via States

States have indirect responsibility for corporations committing human rights violations. When a State takes on responsibilities by becoming a signatory to a human rights treaty, it does not only take on obligations to abstain from harmful action, but also to *protect* individuals from harmful behaviour from others. This applies for most treaties, and more specifically concerning my paper, it applies for both for the ICCPR⁴¹ and the ECHR.⁴²

The responsibility in question includes the implementation of the material human rights into legislation, as specifically pointed out by the ICCPR.⁴³ It is called the *due diligence* responsibility of States and translates a violation of a private party to a violation of the State if sufficient measures have not been taken to stop the violation. The Human Rights Committee has presented its view on this subject in its General Comment 31:

“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁴⁴

In this way a failure of a private party, in our case a company, should be in the first place avoided because there is a law prohibiting the behaviour that violates a human rights norm. Secondly, there ought to be a system of control, making it difficult to breach the laws without detection. Finally there should be a complaints procedure in court and the possibility to have the persecutor reimbursing the victim. Consequently not every violation of a human right by a private party is automatically a human rights violation of the State. If the State has taken sufficient measures to “prevent, punish, investigate or redress the harm”⁴⁵ the abuse of the private party cannot be attributed to the State.

An important requirement for invoking responsibility of the State, e.g. in front of an international tribunal, is therefore that the victim of the violation has tried all possible roads to redress the harm. This requirement also constitutes one of the most important admissibility criteria for access to international control mechanisms concerning human rights. It is widely known as the “exhaustion of domestic remedies” criteria, and makes sure

⁴¹ E.g. see Human Rights Committee, *supra* note 22, para.8.

⁴² E.g. *Plattform Ärzte für das Leben v Austria*, 21 June 1988, no 10126/82 ECtHR, para.32 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%C4rzte&sessionId=7109477&skin=hudoc-en> visited 21 May 2006

⁴³ ICCPR, International Covenant on Civil and Political Rights, New York, 16 December 1966, art 2.2 http://www.unhchr.ch/html/menu3/b/a_ccpr.htm visited 21 may 2006

⁴⁴ E.g. see Human Rights Committee, *supra* note 22, para.8.

⁴⁵ *Ibid*

that the complainant has tried all possible avenues to seek redress in his own country.⁴⁶

By this transformation of a private abuse of human rights to a breach of the State's *due diligence* responsibility, enforcement is also secured. If a person files an application of discrimination and the court dismisses it, he/she can forward the case to the international level. There it will be determined whether the State was right, or if the dismissal was a breach of its *due diligence* responsibility to prevent discrimination. Regarding the ECHR it is nowadays compulsory to be a party to the control mechanism of the European Court.⁴⁷ For the ICCPR it is however still voluntary to be a party to the Optional Protocol, which makes it possible for a victim to send an individual petition to the Human Rights Committee.⁴⁸

The traditional way of attributing responsibility to States instead of companies might be a viable way to reach the violating companies indirectly. If States fear that they can be brought to an international tribunal for failing to regulate their companies, they will most probably start to impose regulation on companies incorporated in the State. Subsequently, a decreasing number of violations will most likely follow.

It is clear that also without the enforcement mechanism, States are not too eager to be criticised for not fulfilling their human rights obligation. Such scrutiny is unavoidable also regarding the ICCPR since the State Report mechanism of that treaty is not optional.⁴⁹ Furthermore, public pressure and reactions from other States bear significantly more weight if there is a legal argument behind the opinion that a State is failing in its human rights behaviour.

2.3 Home State or Host State – Where to Assess Responsibility?

The final issue to discuss regarding the choice I have made for this paper is whether to assess responsibility for the States where the company is incorporated or in the State where it is performing its business. It would clearly be easier to assess responsibility onto the host States, since the victims then are present within the territory of the violating State. Then, e.g. all the reasoning about extraterritorial jurisdiction in my next three chapters

⁴⁶ ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, CETS No.: 005, art 35 + the ICCPR, art 5.2.b, see *supra* note 43.

⁴⁷ ECHR, art 34, *ibid.*

⁴⁸ Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art 1 http://www.unhcr.ch/html/menu3/b/a_opt.htm visited 21 May 2006.

⁴⁹ ICCPR art 40, see *supra* note 43.

would be unnecessary. This is also following the traditional way to see State's responsibility in human rights law; i.e. assessing obligations to the host State.

Another practical reason *for* choosing the host State responsibility would be the much wider possibility States have regarding the control and investigation part of the *due diligence* responsibility. As I will argue later,⁵⁰ this will be quite limited regarding the home State's responsibility. Another advantage of litigation in the host State is that no question surrounding some "judicial imperialism" will be raised on the fact that a developed country interferes in the affairs of a developing country once again.⁵¹ Also the possible criticism of not really wanting to safeguard human rights but instead imposing trade protectionism, is met if host State litigation is chosen.⁵²

However, my choice to investigate home State responsibility is based on the assumption that it would be the more viable way for the victim to find redress. This is mainly due to the size and power of the transnational corporations.⁵³ An often-cited figure is that "the fifteen largest corporations now have greater revenue than all but thirteen nation-states, and that General Motors, for example, is larger than the national economies of all but seven states."⁵⁴

The choice for home State litigation is thus preferred when considering that the host States often are developing countries with small GNP and little power to negotiate. Sometimes merely the fact of threatening to leave the country would stop a host country from looking into the human rights behaviour of such a company.⁵⁵ The home State in turn is mostly a developed country with a working judiciary, a fact crucial to determine if effective redress could be sought.⁵⁶ Besides, the home State may have more technical expertise to properly monitor if there has been an abuse at all, i.e. for environmental matters.⁵⁷ The developed country might also be more sensitive to international criticism concerning human rights. Especially if those rights are "well-respected" in its own territory and the State in the international arena is praising itself for following such rights. Finally, the company and the assets available for redress are easier to reach in the home State. Litigation in the host State might instead be without a defendant, if

⁵⁰ See section 5.1 of this paper.

⁵¹ See Joseph, *supra* note 39, p 12.

⁵² *Ibid.*

⁵³ S. Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises", in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International law* (Kluwer Law International, The Hague, 2000) p 78.

⁵⁴ B. Stephens, "The Amoralism of Profit: Transnational Corporations and Human Rights", 20, *Berkeley J. Int'l L*, p. 57.

⁵⁵ See Joseph, *supra* note 53.

⁵⁶ See Joseph, *supra* note 39, p. 13.

⁵⁷ See Joseph, *supra* note 53.

the company has moved away from that country, or, in case of a subsidiary working there, totally without means to cover the costs of reparation.

A more far-fetched argument would be that all States have a duty to cooperate to fulfil the aim of universal respect for human rights in the UN Charter.⁵⁸ A developed State has a much superior economy and additional possibilities to stop an abuse without harming its principal income. Therefore it should have a responsibility for achieving this aim of promoting human rights.

Making the choice of assessing responsibility for home States it is however important to investigate whether international law really has the conceptual tools to assess responsibility for home States for acts of their corporations abroad. This will be dealt with in the coming chapter as mainly an issue of whether the victim can be said to be brought under the jurisdiction of the home State by the connection via the violating company. Whatever conclusion we might reach there, it is however a less attractive idea to totally forget about the possibility of assessing responsibility both onto a company directly and onto host States of those companies. Even if the legal and material reality today speaks in favour of attempting to litigate in the home States it does not have to be the case in the future. As well as if the obstacles turn out to be too high in overcoming the jurisdictional issue of home State litigation, the options of direct responsibilities and host State responsibility shall be retried.

⁵⁸ Charter of the United Nations, signed at San Francisco on 26 June 1945, art 55 and 56 <http://www.un.org/aboutun/charter/> visited 21 May 2006

3 Responsibility of States for Direct Extraterritorial Acts under the ICCPR and the ECHR

The purpose of this chapter is to study where, when and how extraterritorial responsibility of the ICCPR and the ECHR have been, and can be invoked. My main idea is to perform an independent analysis of what extraterritorial responsibilities these treaties have by interpreting the term “within their jurisdiction” as a condition for responsibility.⁵⁹ Both ICCPR and ECHR only offer protection for persons ‘within the jurisdiction’ or ‘subject to the jurisdiction’ of the contracting States. This limitation is formulated in the following provisions:

ICCPR. Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁰

ECHR. Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.⁶¹

Hence, it is not possible to escape an analysis of ‘jurisdiction’ although I want to assess responsibility. To be able to assess responsibility for acts allegedly in violation of binding human rights norms, the question is to see whether the victim of the violation is within the jurisdiction of the State. If the presumed victim is not “within the jurisdiction” of the State, then no human rights obligations of that State are present.

The analysis of the term ‘within the jurisdiction’ will follow the rules of interpretation in the Vienna Convention on the Law of Treaties.⁶² Doing this I will discuss some difficult assessments specifically since the whole analysis might depend on the choices made there. These include the question of State responsibility versus jurisdiction, and the issue of human rights as a special regime in the international law sphere. However, the

⁵⁹ O. de Schutter, *Globalization and Jurisdiction : Lessons from the European Convention on Human. Rights*, Centre for Human Rights and Global Justice Working Paper Number 9 <http://cridho.cpd.r.ucl.ac.be/Working%20papers/CRIDHO.WP.2005.04.pdf> visited 23 May 2006.

⁶⁰ ICCPR, see *supra* note 43

⁶¹ ECHR, see *supra* note 46

⁶² The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, vol 1155, p. 331.

study will start with a survey of practise by the European Court of Human Rights (ECtHR), the Human Rights Committee (HRC) and the International Court of Justice (ICJ) on the issue of extraterritorial jurisdiction and responsibilities concerning human rights. I start with this survey of practise to better introduce you to the cases that will be referred to later. I will also present how these bodies have reasoned when using the method of the Vienna Convention.

3.1 ‘Jurisdiction’ as Defined by the Different Human Rights Bodies

Starting our investigation of what the term ‘within its jurisdiction’ means, a good way is to study case law. More specifically how different human rights bodies have interpreted the term ‘jurisdiction’ when having to deal with cases with extraterritorial elements. This investigation of practise would also satisfy the Vienna Conventions requirement of investigating “subsequent practise”⁶³ when determining the meaning of a term and thus be of double use. Therefore, I will here go through some jurisprudence from the HRC and the ECtHR with extraterritorial elements. I will also look upon what the ICJ has concluded on the question when ruling on the construction of a wall in the occupied territories in Palestine. Important to note is that the majority of cases I will bring up concerns situations where the State itself has acted extraterritorially, i.e. acted directly. Nevertheless, this is a good start when investigating the issue of responsibility for acts performed by corporations abroad. As so far there have been no cases regarding this. The analysis in the next chapter will therefore be based on analogies to the conclusions drawn from practise where States’ direct action has been the case.

3.1.1 The ICCPR and the Human Rights Committee

Human Rights Committee has in its General Comment 31 stated that:

“ States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party.”⁶⁴

This statement shows that the Committee is much more focused on the relationship between the presumed victim and the State, instead of merely looking to whether the individual was within the territory of that State. This has also been the opinion of the Committee when rendering views on

⁶³ VCLT, para. 31.3b, see *supra* note 62.

⁶⁴ See Human Rights Committee, *supra* note 22 para. 10.

individual complaints under the Optional Protocol and when commenting State Reports as I will present to you below.

E.g. in the Lopez Burgos v. Uruguay Communication, the Committee discussed the issue of jurisdiction in relation to extraterritorial acts. Lopez Burgos was arrested on Argentinean soil by Uruguayan security and intelligence forces and thereafter detained and tortured in Argentina.⁶⁵ The victim was obviously outside the territory of the accused State Party, but nevertheless the violation could be subject to overview from the Commission. The victim was then brought into the jurisdiction by the acts performed by the State agents of Uruguay. The Committee stated, in the context of the provision of the Optional Protocol requiring the complainant to be “subject to the jurisdiction” of the violating State, that *it is not the place where the violation occurs but rather the relation between the individual and the State that determinates if the State had jurisdiction*. The Committee also referred to art. 5(1) of the Covenant, which states that nothing in the Covenant should be interpreted as giving anyone the right to violate this Covenant.⁶⁶ If Uruguay had no jurisdiction it would mean that a State could perpetrate violations on the territory of another State, which it could not perpetrate at home, and this would not be acceptable.⁶⁷

This line has been followed by the Committee in several State Reports when it considered extraterritorial application of the Covenant. In its concluding observations on Belgium it held that the Covenant applied also for violations performed by Belgium soldiers in Somalia, as Belgium had jurisdiction. This was said to be confirmed by the fact that some Belgian soldiers already have been tried and sentenced in Belgium.⁶⁸ The Committee has also held that Israel is responsible to make the Covenant applicable in the occupied Palestinian territories, since there is “the exercise of effective jurisdiction by Israeli security forces therein”.⁶⁹ The same conclusion is drawn about the Syrian jurisdiction over Lebanon when criticising the alleged acts of extrajudicial executions and disappearances performed by Syrian forces in Lebanon.⁷⁰ Worth to notice is also the

⁶⁵ Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176.
<http://www.law.wits.ac.za/humanrts/undocs/session36/12-52.htm> visited 22 May 2006.

⁶⁶ *Ibid*, para 2.2.

⁶⁷ *Ibid*, para 12.3.

⁶⁸ Summary Record of the 1707th Meeting :Belgium. 27/10/98.UN Doc. CCPR/C/SR.1707, para.22 at
<http://www.unhchr.ch/tbs/doc.nsf/0/0b3ce68ef6954a89802567a8004fe7b3?Opendocument> visited 22 May 2006.

⁶⁹ Concluding Observations of the Human Rights Committee : Israel. 18/08/98. UN Doc. CCPR/C/79/Add.93, para. 10 at
<http://www.unhchr.ch/tbs/doc.nsf/184758d9fcd7a2b1c12565a9004dc312/7ea14efe56ecd5ea8025665600391d1b?OpenDocument> visited 22 May 2006.

⁷⁰ Concluding observations of the Human Rights Committee: Syrian Arab Republic. 24/04/2001, UN Doc. CCPR/C/71/SYR para. 10 at
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.71.SYR.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.71.SYR.En?Opendocument) visited 22 May 2006.

Committee's concluding observations on Iran from 1993, where it condemned the death sentence pronounced regarding Salman Rushdie, a foreign writer living in England.⁷¹ Obviously the Committee found that Salman Rushdie by this death sentence could be brought under the jurisdiction of the Iranian State although he was not present in the territory of Iran. Important to note is the Committee's observation that even if the death sentence originated from a religious authority it did not exempt the State Party from its obligation to *protect* the victim from possible abuses.⁷²

3.1.2 The International Court of Justice

In the 2004 Palestinian Wall Advisory Opinion the ICJ had to deal with the interpretation of "subject to its jurisdiction" under the ICCPR when it had to determine the responsibility for Israel to respect the Covenant in the occupied territories. The ICJ then said that ICCPR has 'subject to its jurisdiction' as independent prerequisite and thus does not require the presumed victim of a violation to be *both* within territory and subject to its jurisdiction.⁷³ Thereby the Court confirmed that ICCPR can have extraterritorial application when a State is exercising its jurisdiction outside its territory⁷⁴. An interesting reference to *travaux préparatoire* stated that:

"The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their *obligations when they exercise jurisdiction outside their national territory*. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955))."⁷⁵

However, what the judgement also did was to confirm the two approaches of the Human Rights Committee regarding the content of 'subject to its jurisdiction'. The court gave examples both of how such jurisdiction could be established by effective control over territory – as in Israel's occupation of the occupied territories and when exercising jurisdiction via its agent as when arresting Lopez Burgos in Uruguay.

⁷¹ Concluding observations of the Human Rights Committee: Iran (Islamic Republic of) : 03/08/93.UN Doc CCPR/C/79/Add. 25, para. 9.
<http://www.unhchr.ch/tbs/doc.nsf/0/0a2ad0138084929041256324003c98c1?Opendocument> visited 22 May 2006.

⁷² See Human Rights Committee, *Supra* note 71.

⁷³ E.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 9 July 2004, ICJ, Advisory Opinion, para 109, at www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm visited 22 May 2006.

⁷⁴ *Ibid*, para. 111.

⁷⁵ *Ibid*, para. 109.

3.1.3 The European Court of Human Rights

The extraterritorial jurisdiction of the State Parties of the ECHR has been thoroughly examined by the Commission and Court mainly “thanks to” the Turkish invasion of Northern Cyprus in 1974 and Turkey’s continuing presence there. The Commission made its first statements as responses to three inter-state complaints against Turkey from Cyprus, filed immediately after the invasion.⁷⁶ The Commission then stated that jurisdiction is not limited to the territory of the State parties, but that the States are bound to secure the rights and freedoms to all persons subject to their ‘actual authority and control’. As an example of ‘actual authority and control’ the Commission mentioned acts of authorized agents of that State.⁷⁷ After the establishment of TRNC (the Turkish Republic of Northern Cyprus) in 1983 two more cases reached the European Court. Turkey then claimed that this new republic had jurisdiction there instead of Turkey itself. The Court did however not accept the proposal due to the still massive military presence of Turkey and the dependence of the new republic of Turkish support.

The first of these two cases after 1983 was the 1996 *Loizidou* Case, where a Greek Cypriot woman had lost, or at least was not able to access, her property in Northern Cyprus due to the Turkish military presence there. In that case, the Court confirmed the possibility of extraterritorial responsibilities under the convention by stating: “responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful – it exercises effective control of an area outside its national territory.”⁷⁸

Later, in 2000 the Court dealt with the broader inter-state case of *Cyprus v. Turkey* where the jurisdiction established in *Loizidou* was repeated and even clarified. Here the Court added that the authority did not have to be over specific acts and persons where an ‘effective overall control’ was established. The acts of the local administration were therefore also under Turkish jurisdiction. The Court also made a point of claiming that all rights under the Convention should be guaranteed in such cases of effective overall control.⁷⁹

⁷⁶ R. Lawson, ‘Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’ in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004) p. 92.

⁷⁷ See *Cyprus v. Turkey* appl. 6780 (1975) as cited by Lawson above, *ibid*.

⁷⁸ *Loizidou v. Turkey* (Preliminary objections) 23 February 1995, ECtHR, 40/1993/435/514, para 62

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=loizidou&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

⁷⁹ *Case of Cyprus v. Turkey*, 10 May 2001, ECtHR, no. 25781/94, art 77 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Cyprus%20v.%20Turkey&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

However, the most discussed case from the European Court came in 2001 when the Court ruled on the Bankovic Case.⁸⁰ It then declared the application from persons hurt and related to persons killed during the NATO bombings of a television centre in Belgrade 1999 inadmissible due to lack of jurisdiction. In this famous judgement, the ‘agent’ theory was strangely not discussed at all. Instead, the Court ruled the case inadmissible due to the fact that the respondent governments, the European NATO states, did not have effective overall control over the foreign territory they bombed. This ruling was based on the reasoning that airspace control was not the same as ground control and that the idea of jurisdiction corresponding to the amount of control was not acceptable.⁸¹

This judgement was however heavily criticized and some commentators meant that the European court modified some of the findings in three coming cases. The first of these cases was the Ilascu case where both Moldova and Russia were found to be responsible for violations of the European Convention taking place in the “Moldavian Republic of Transdnistria” (“the MRT”). The MRT is the Russian part of the territory that today forms Moldova. It has declared independence from Moldova but not been recognized by the international community.⁸² The issue of jurisdiction was in this case interestingly enough discussed as the *responsibility* of Russia and Moldova,⁸³ and not as in the Bankovic case only as an admissibility issue. Due to the same reasoning as in the later Northern Cyprus cases the applicants were found to come into the jurisdiction of the Russian federation due to the effective authority “or at least decisive influence” of the Russian federation on the Transdnistrian administration.⁸⁴ Being so, it did not matter that agents of Russia had not participated directly in the violating acts.⁸⁵ Consequently, the effective overall control makes the burden of proof less heavy for the applicant when showing that it was ‘within the jurisdiction of Russia.

Taking the easier road in Loizidou and “only” referring to overall effective control over territory did not however mean that the Court had given up on

⁸⁰ Grand Chamber Decision as to the Admissibility of Application no. 52207/99 by Vlastimir and Borka BANKOVIĆ, Živana STOJANOVIĆ, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIĆ and Dragan SUKOVIĆ against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, 12 December 2001, ECtHR, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=bankovic&sessionId=7119764&skin=hudoc-en> visited 22 May 2006.

⁸¹ *Ibid*, para. 75.

⁸² Case of Ilaşcu and Others v. Moldova and Russia, 8 July 2004, ECtHR, *Application no. 48787/99* para 30 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=CASE%20%7C%20OF%20%7C%20ILA%u015ECU&sessionId=7119764&skin=hudoc-en> visited 22 May 2006.

⁸³ *Ibid*, para. 352 and 394.

⁸⁴ *Ibid*, para. 392.

⁸⁵ *Ibid*, para. 393.

the idea of an agent under the authority and control of the governing State exercising jurisdiction. In the case of *Öcalan v. Turkey*, Turkish officials arrested the former PKK leader, Öcalan, in Kenya in cooperation with Kenyan local authorities. Although the arrest took place in Kenya the admissibility question was never questioned, since Turkey, as the respondent government, did not bring it up. The Court did however make a short statement on the issue, both in the first judgement in 2003 and in the appealed decision from 2005. The Court concluded that Öcalan was within the jurisdiction of Turkey even if Turkey in this case exercised its authority outside its own territory.⁸⁶ In the 2003 decision the Court distinguished this case from *Bankovic* and said that Öcalan was subject to the “authority and control” of the Turkish officials.⁸⁷

In the third judgement, i.e. the *Issa* judgement from 2004, Turkish forces allegedly killed seven Iraqi shepherds when operating in Northern Iraq. The case was finally decided against the applicant due to lack of evidence showing that the Turkish forces had been present in the very area where the killings took place. However, the Court here repeated the idea that either effective overall control or agents operating abroad could constitute a ground for jurisdiction.⁸⁸

Finally, I want to mention the *Soering* case,⁸⁹ which also had an extraterritorial element. In this case, United Kingdom was asked to extradite a German national, Mr Soering to the US, where he was facing a charge for homicide and the possibility of being sentenced to the death penalty. The European Court of Human Rights however stopped the extradition and said that such an act would be contrary to the Convention since the ‘death-row phenomenon’ would amount to an inhuman treatment and thus a breach of art. 3.⁹⁰ The Court said that an act giving an effect violating the Convention in a third country consequently created responsibility for the government concerned. The interesting part for us to note is that even if *Soering* was clearly within the territory when the decision to extradite took place, it was protecting him from a possible violation that would, if effectuated, happen to him when being outside the territory. These kinds of decisions therefore protect persons outside the territory from violations also occurring outside the territory. This precedent has been followed by numerous cases on the so called “non-refoulement” principle where States have been said to violate

⁸⁶ *Öcalan v. Turkey*, 12 May 2005, Application no. 46221/99, ECtHR, para.91.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%F6calan&sessionId=7119764&skin=hudoc-en> visited 22 May 2006.

⁸⁷ *Ibid*, para. 93.

⁸⁸ *Issa and Others v. Turkey*, 16 November 2004, ECtHR, Application no. 31821/96 paras. 69-71at

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=CASE%20%7C%20OF%20%7C%20ISSA%20%7C%20OTHERS%20%7C%20v.%20%7C%20TURKEY&sessionId=7119764&skin=hudoc-en> visited 22 May 2006.

⁸⁹ *Soering v. United Kingdom*, 07 July 1989, ECtHR, Application no. 14038/88 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%F6calan&sessionId=7119764&skin=hudoc-en> visited 22 May 2006.

⁹⁰ *Ibid*, para. 111.

the Convention if sending back refugees that risk persecution and/or torture in their home country.⁹¹

3.2 Conclusion and Comments on the Case Law

Going through the abovementioned decisions and rulings, in particular two questions are worth further discussions. First is the question relating to the courts' inconsistent use of separating or not separating court jurisdiction, state jurisdiction and state responsibility. For example, in both *Ilascu* and *Issa*, the European Court talks about responsibilities and not only admissibility, thus not separating the issues as they had done e.g. in the two *Loizidou* judgements.⁹² I will return to these different uses of jurisdiction later, when looking for the "right" human rights context in that analysis.

Secondly, the very conclusion in the abovementioned cases shows that all these institutions are making exceptions to the general territorial notion of jurisdiction. They have done so by either assessing that the alleged victim was within the effective overall control of the State or within the 'authority and control' of State agents operating abroad; or as in the case of *Salman Rushdie*, outside the territory but possibly affected by action from within the territory.

3.3 The Vienna Convention on the Law of Treaties

Starting my own analysis of what 'within the jurisdiction' actually means, I will use the rules of the Vienna Convention on the Law of Treaties,⁹³ which is the recognized way to conduct such interpretations. The Vienna Convention has 105 State Parties,⁹⁴ but has also acquired the force of customary international law⁹⁵ and can therefore be applied both on non-

⁹¹ E.g. the very recent example of case of *Bader and Others v. Sweden*, 8 November 2005, ECtHR, Application no. 13284/04, para 44-48 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=case%20of%20Bader%20Others%20v.%20Sweden&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

⁹² *Loizidou v. Turkey*, *supra* note 78, para. 64.

⁹³ VCLT, *Supra* note 62

⁹⁴ The number of State parties is found at:

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp> visited 22 May 2006.

⁹⁵ That the VCLT is of customary nature is, as Gondek writes confirmed in almost every recent decision of the ICJ. See M. Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review*, Volume 52, Issue 03, December 2005, doi: 10.1017/S0165070X05003499, Published online by Cambridge University Press 15 dec 2005, p. 361, and *supra* note 73, para. 94.

parties and on treaties signed before its conclusion. The relevant articles of that Convention are:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.⁹⁶

Following these articles paragraph by paragraph is accordingly the correct approach when interpreting a treaty. E.g. this is the approach chosen by the ECtHR when adjudicating the famous Bankovic case, where it considered the possible application of the ECHR on the NATO bombings in Belgrade 1999.⁹⁷ That the application of the VCLT is the correct approach is put forward also by scholars that are negative to the outcome of this decision, since the rules themselves are neutral.⁹⁸ Finally, it is not the rules of the VCLT itself that are criticised by Professor Scheinin when holding that human rights law is a special regime apart from general international law. Instead he focuses on the problem whether the ordinary meaning of

⁹⁶ *Supra* note 62, the VCLT art. 31 and 32.

⁹⁷ Bancovic decision, *supra* note 80, paras. 55-58.

⁹⁸ See M. Gondek at *supra* note 95, p. 358.

‘jurisdiction’ should be the one from general international law or the one from the special human rights regime.⁹⁹

Performing the analysis, I will only deal with the parts of these two provisions that are relevant. Thus I will focus on the context, the object and purpose and the *travaux préparatoire*. The reason for not mentioning art 2 (a and b), art 3a and art 4 anymore is consequently not because of lack of importance but merely because there has been no such agreements, instruments or meanings established.

3.4 The Difference between Human Rights Law and Public International Law

When analysing the term ‘within the jurisdiction’ it is essential to establish the context in which the term is used. Equally important is to establish in which context *we* want to do our analysis, since the same term may signify very different things in different circumstances. We have already made clear that we want to assess responsibility under human rights treaties, meaning that we are operating in the area of human rights law. That area of law is according to Professor Scheinin a “semi-autonomous discipline”, working as an objective normative order above States instead of the contractual nature of other international law.¹⁰⁰ Although the Vienna Convention mentions that “any relevant rules of international law applicable in the relations between the parties”¹⁰¹ should be considered, the contextual approach appears to me more important. As the article mentions “relevant”, my interpretation is that there is no problem of making a distinction between human rights law and public international law. A rule with a totally different purpose cannot be relevant when judging when and where human rights need to be respected. Or as presented by the ECtHR in *Loizidou* - the court has to be “mindful of the Convention's special character as a human rights treaty” when taking into account any other rules of international law.¹⁰² ‘Jurisdiction’ can have quite different meanings in international law depending on the context. Therefore, it is important to see when the object of the term ‘jurisdiction’ in general international law has a different purpose than it has in human rights law.¹⁰³ Recalling that what we want to assess is the responsibility and thus the meaning of jurisdiction in that very context we have to distinguish the meanings when jurisdiction might mean something else than responsibility.

⁹⁹ M. Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004) p. 78.

¹⁰⁰ *Ibid*, p. 79.

¹⁰¹ *Supra* note 62, the VCLT art. 31.3c.

¹⁰² *Loizidou v. Turkey*, 28 November 1996, no. 40/1993/435/514, ECtHR para 43 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Loizidou&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

¹⁰³ *See* Scheinin, *supra* note 99, p. 79.

My view is that the word jurisdiction have been used at least in four circumstances and then often treated interchangeably, although they answer very different questions. I will therefore here present my own idea of these four circumstances as well as a conclusion of which of these is the correct one for my initial issue.

3.4.1 State Jurisdiction

The first use of ‘jurisdiction’ that I have found is where ‘jurisdiction’ defines when a State legitimately can act outside its territory. It then answers the question if is lawful under international law to enter another States territory to capture a person, bombing or defending itself against terrorists. For example, Professor Scheinin claims that the ECtHR has used this definition of jurisdiction in the admissibility decision in Bankovic. He says that the decision essentially said that since the acts of bombing Belgrade was unlawful due to international law there could be no responsibility for the possible human rights abuses.¹⁰⁴ To use that concept of jurisdiction to determine what is permitted to do as a State outside your borders to determine where and when you are responsible for human rights is allegedly wrong.¹⁰⁵ It would lead to the absurd situation that a State would not be responsible for securing human rights when acting unlawfully outside its territory. Or, as presented by the words of the HRC, “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹⁰⁶

That the “legitimacy of title” cannot be the basis for establishing State responsibility is also confirmed by the judgement of the ICJ in its Namibia Case.¹⁰⁷ The court there established that it is physical control of the territory affected that is the determining factor.¹⁰⁸ Since ” legitimacy of title” is equivalent to ‘jurisdiction’ in this first definition, this provides further confirmation that the use of that definition in the human rights context is wrong. The very ECtHR itself presents further confirmation when in its Louizidou judgement assessed responsibility for Turkey for the acts on Cyprus although Turkey had no legitimate title there; just this very physical control was instead deciding that Turkey had jurisdiction.¹⁰⁹

¹⁰⁴ See Scheinin, *supra* note 99, p. 80.

¹⁰⁵ See Scheinin, *supra* note 99, p 79.

¹⁰⁶ See Lopez Burgos, *supra* note 65, para. 12.3.

¹⁰⁷ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ, 21 June 1971 at <http://www.icj-cij.org/icjwww/idecisions/isummaries/inamsummary710621.htm> visited 22 May 2006.

¹⁰⁸ *Ibid*, para. 118.

¹⁰⁹ *Loizidou v. Turkey*, *supra* note 78, art. 62.

In conclusion, this use of jurisdiction regulates when a state can act lawfully outside its territory and not what it is obliged to respect if acting outside its border - lawfully or not.¹¹⁰ Admittedly, this is a form of State jurisdiction, but not the sort we look for when wanting to assess responsibilities under human rights treaties.

3.4.2 Domestic Court Jurisdiction

The second use of 'jurisdiction' is when answering the question if a State and its courts have the rights to legislate and adjudicate for persons present outside its territory; i.e. domestic court jurisdiction. This use is also mentioned in the Bankovic case when the Court said that the exceptions to the general territorial application included "nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality."¹¹¹ The exceptions mentioned here are however regulating when a State may legislate and adjudicate for persons outside its borders – not what it is obliged to respect if legislating/adjudicating outside its border. Both the first and the second use of the term jurisdiction are very far from the human rights context. Neither the use of jurisdiction as equated with 'legitimacy of title' nor the use of determining a State's competence to adjudicate extraterritorial cases could be used when determining a State's extraterritorial human rights responsibility.

This is true even if a State has rules making it possible or obligatory to sue companies for human rights violations abroad in the home State.¹¹² That this also could entail State Responsibility as we are defining it is argued by the International Council for Human Rights Policy when claiming that the 1968 Brussels Convention¹¹³ can be used to make States responsible for not preventing their corporate citizens from violating human rights abroad.¹¹⁴ However, I find that a *domestic* jurisdictional possibility or obligation of adjudicating a case of corporation's violations of human rights abroad cannot be said to impose a human rights obligation to do so. Instead other facts must be considered to see whether such a law was adopted to possibly fulfil their responsibility in this regard. Similar to the American Alien Tort Claim Act, ACTA,¹¹⁵ it is possible to argue that it was adopted because the

¹¹⁰ See Schutter, *supra* note 59, p. 9.

¹¹¹ Bancovic Decision, *supra* note 80, para. 59.

¹¹² N.B. that not only States can impose such rules, but also a regional organisation like the EU could initiate this.

¹¹³ 18 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. 1998, C27, 1 (consolidated version after the 1996 Accession Convention) and the parallel 1988 Lugano Convention, O.J. 1988, L319, 9.

¹¹⁴ See *Beyond Voluntarism*, *supra* note 16, p. 51.

¹¹⁵ See Alien Tort Claim Act, 28 U.S. Code. Chapter 85, section 1350 (1994) Adopted in 1789 as part of the original Judiciary Act and read as follows: "Alien's action for tort. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. "

States recognized that there is a responsibility under international law to regulate its corporate citizens. It could then be used as a support for claiming this interpretation of the treaties. Since the Brussels Convention regulates where to litigate in cases where two countries within the EU were involved it can hardly be said to have the purpose of giving meaning to a human rights treaty. Neither could the ACTA, since it was adopted almost 200 years ago and possibly not could be a way to clarify how America took on their responsibilities under the ICCPR.

3.4.3 International Court Jurisdiction

The third use of jurisdiction is then when a human rights body is determining if they have the right to deal with a case due to its jurisdictional limitation- i.e. international court jurisdiction. This one is problematic because it is *determined in the same way as responsibility*; namely by interpreting the term ‘within the jurisdiction’ or ‘subject to its jurisdiction’. Analysing these terms meaning something else, i.e. here the courts’ right to deal with the case, can indeed give a different outcome. E.g. Dr Marius Emberland gives us three good examples of how the ECtHR has adopted different standards regarding admissibility and merits decisions in cases concerning human rights for companies.¹¹⁶ Regarding extraterritorial application in particular another example is the Bankovic case. There the Court decided that the case was outside the jurisdiction of the parties to the European Convention already on the admissibility level, and did not connect it with responsibility.

3.4.4 State Responsibility Requiring the Victim to Be ‘Within the Jurisdiction’

Finally, the fourth, and for my paper the only truly important, use of ‘jurisdiction’, is where jurisdiction determines the responsibilities for extraterritorial acts of the State Party to a human rights treaty. The human rights bodies often merge this use relating to responsibility with the third use where jurisdiction relates to admissibility. Maybe they rightly (?) feel that a good justification for having an extraterritorial responsibility is also a reason to have jurisdiction in the sense of being able to adjudicate on the issue. An example of this is the reasoning of the HRC in the Lopez-Burgos case. There the court turned over to talk about what is permitted to do as a state when justifying that it had jurisdiction.¹¹⁷

My claim here is however that also the third use of jurisdiction is not automatically valid when determining responsibility. It is not unfamiliar in international human rights law that there are differences between

¹¹⁶ M. Emberland, *Human Rights of Companies* (Oxford University Press, Oxford, 2006) p. 154.

¹¹⁷ See Lopez Burgos, *supra* note 65, paras. 12.1-12.3.

responsibilities and enforcement; i.e. ICESCR gives responsibilities but provides no forum to adjudicate possible violations of the rights. Under many of the human rights treaties with treaty monitoring bodies it is also optional to be scrutinized by those monitoring bodies.¹¹⁸

Therefore I claim that also the cases from the human rights bodies, when only determining the right to deal with the case, the admissibility, is the wrong context if we want to see what responsibilities States may have. To see the answer on the fourth question it is therefore essential to really look whether these bodies also discussed “*dictum*” the responsibility of the State, as most of them only determined the right to deal with the case. A lucid example of the contrary is however the Palestinian Wall Advisory Opinion where the ICJ did not discuss whether to deal with the case when discussing extraterritorial jurisdiction. Instead the court actually did investigate whether Israel had the responsibility of not violating human rights in its extraterritorial acts on the Palestinian territory due to its responsibilities under the different human rights treaties.

3.5 The Draft Articles on State Responsibility versus State Responsibility in this Case

My conclusion above regarding separation of admissibility and responsibility does anyhow not automatically make null and void any analysis where responsibility and admissibility are interlinked. As situations where responsibility is considered “the real issue” and any question surrounding admissibility would be totally dependent of that. Indeed it goes very well together with the idea that to analyse responsibility we should not primarily address admissibility. Valiant defenders of human rights do claim that if there is responsibility there should be liability and therefore an admissibility question should only depend on if responsibility is present.¹¹⁹ However, so far I do not want to stretch my own analysis. For me it is enough to say that when these uses of jurisdiction have been treated as separate issues it is only the responsibility issue that needs to be addressed – no matter if any admissibility issue would depend on or be independent from that decision.

In this context I also want to add that responsibility, as we analyse it here, does not entail the full State responsibility that is assessed according to the rules of State Responsibility codified in the Draft Articles on State Responsibility from the International Law Commission.¹²⁰ What we

¹¹⁸ Examples of such provisions can be found in CEDAW, Optional Protocol, art 1-2, ICERD, art. 14 and CAT art. 21. These make supervision by individual communications possible when agreed upon. The ICESCR has no such statute and cannot at all accept individual communications. These treaties can all be found at www.unhchr.ch.

¹¹⁹ See Scheinin, *supra* note 99, p. 73.

¹²⁰ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Rep. 53rd sess., GA OR, 56th sess., supplement no. 10 (A/56/10).

actually analyse, speaking in the language of those norms, is if there is an international wrongful act present; i.e. if a ‘first order rule’ of international law has been breached. In these circumstances it is of no interest to see whether State responsibility can be assessed for such an act by looking at requirements of attribution,¹²¹ or the right to make a claim as an injured State.¹²² These questions again only address issues of admissibility and these are not a condition for the kind of responsibility we are addressing – even if some say that the admissibility issue should be dependent on if a first order rule has been breached.¹²³

In relation to this I also want to clarify that the admissibility question depends on which body and which party is bringing the claim. In the case of ECtHR and the HRC it is an individual that brings the case as a result of an alleged human rights violation to that individual. In the ICJ it is another State that brings a case due to an alleged breach of human rights that in some way affects that State. In the first case, the admissibility issue is decided by the interpretation of the phrase “within its jurisdiction” and as such could be separated from the general responsibility issue. In the second case, the admissibility issue is decided by the secondary rules on State responsibility, which is separated from the determination of the existence of an international wrongful act by the first order rules. Thus, it is in both cases possible to separate the admissibility issue from the question we are to answer here; i.e. whether a State can be responsible under a human rights treaty for the acts of its corporate citizens abroad.

3.6 Ordinary Meaning and the Different Wordings in the Conventions

Being “within the jurisdiction” of the State is a necessary condition to fulfil in both the ECHR¹²⁴ and the ICCPR¹²⁵. In the latter one the wording might however give rise to an on-sight more restrictive view on jurisdiction since it is formulated “within its territory and subject to its jurisdiction”. This is however not the case since the HRC has interpreted that phrase as guaranteeing the convention rights to “all individuals within its territory *and* all individuals within its jurisdiction”.¹²⁶ Or differently presented; that *and* in “within its territory and subject to its jurisdiction” is disjunctive and

http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf visited 22 May 2006.

¹²¹ Ibid, art. 4-11.

¹²² Ibid, art. 42-48

¹²³ See Scheinin, *supra* note 99, p. 73.

¹²⁴ *Supra* note 46, ECHR art 1.

¹²⁵ *Supra* note 43, ICCPR art 2.1.

¹²⁶ See Scheinin, *supra* note 99, p. 74 and D. Mc Goldrick, ‘The International Covenant on Civil and Political Rights’ in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004) p. 48 and 55 + Human Rights Committee, *General Comment 31* at *supra* note 22.

could be replaced by *or*. The position of the HRC is also confirmed by the opinion of the ICJ in the Palestinian Wall Advisory Opinion. There the court referred to the case law of the Human Rights Committee and the *travaux préparatoire* of the Convention.¹²⁷ The court finally held that “In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹²⁸

3.7 Object and Purpose of Human Rights Treaties

The purpose of a human rights treaty is inherently to protect the individuals who are given certain rights by the treaty. The idea is to limit what the powerful State can impose on less powerful individuals. An interpretation of such a treaty must therefore always focus on the individual and choose a way to interpret the treaty that is as beneficial as possible for the potential victim. This approach has also been confirmed both by the European Court when stating that the European Convention should not as other treaties be interpreted as restrictively as possible, but instead prioritise the protection of the individual. This is shown both in the *Wemhoff* case,¹²⁹ and in the *travaux préparatoire*, which states that the aim is to “widen as far as possible the categories of persons who are to benefit from the guarantees contained in the Convention”.¹³⁰ One way of doing this has been to interpret the limitations to the rights as narrow as possible.¹³¹ For the purpose of giving extraterritorial responsibilities to a State Party to the Convention these reflections are important to bear in mind when interpreting “within their jurisdiction”. This signifies that throughout the analysis we should remember the aim of protection and look for an interpretation that as far as possible includes the victim of a human rights violation in the jurisdiction of a State. This point of departure has nothing to do with siding with, or being the lawyer of the victim, but simply follows the rules of the Vienna Convention that require us to take this approach.

¹²⁷ *Palestine Wall*, Advisory Opinion, *supra* note 73, para. 109.

¹²⁸ *Palestine Wall*, Advisory Opinion, *supra* note 73, para. 111.

¹²⁹ *Wemhoff v. Germany*, 27 June 1968, no. 2122/64, ECtHR, para 8 under “As to the Law”, where it reads “Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree” the obligations undertaken by the Parties.”

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Wemhoff%20%7C%20v.%20%7C%20Germany&sessionid=7122955&skin=hudoc-en>
last visited 22 May 2006.

¹³⁰ Collected Edition of the “Travaux Préparatoires”, part III, 5 February 1950, (Martinus Nijhoff, The Hague, 1976) p. 200.

¹³¹ *Klass and Others v. Germany*, 6 September 1978, ECtHR. No. 5029/71, para 42
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Klass%20%7C%20Others%20%7C%20v.%20%7C%20Germany&sessionid=7122955&skin=hudoc-en>
last visited 22 May 2006

The European Court has also evolved two principles that especially fit for protecting the individual in an encompassing way. Those are the ‘principles of dynamic interpretation’ and the ‘principle of effectiveness’. The first principle says that the Convention must be able to protect individuals from “dangers” that were unforeseen at the drafting time, but are urging in our present- day society.¹³² This principle could very well be used to argue that although the drafters did not foresee that transnational corporations could influence and breach human rights abroad to the extent happening today, the text of the convention must be interpreted to regulate also those human rights violations. The second principle about effectiveness states that in case a pure textual interpretation would hinder the protection of the individual a more effective interpretation shall be opted for. The Court has said: “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.¹³³ This principle can in our case be used to emphasize that we need to make a distinction between the different uses of jurisdiction and not take any court jurisdiction or the concept of State jurisdiction into account when we want to determine the extraterritorial human rights responsibilities of a State.

3.8 *Travaux Préparatoire*

Bearing in mind that the *travaux préparatoire* only are supplementary in its character, it is important to analyse what they said about the meaning of “within its jurisdiction”. As discussed above regarding the Palestinian Wall Advisory Opinion, the ICJ has made an interpretation of the ICCPR with help of the *travaux préparatoire*. This was necessary since the wording of the ICCPR, in contrast to the ECHR, especially mentions “within its territory”. The conclusion of both the ICJ and the HRC is however that this formulation did not intend to diminish extraterritorial responsibilities except in cases where the State in question had no possibilities of practically guaranteeing the rights. In particular, the formulation intended to avoid giving nationals the right to seek protection from their national State when in a situation outside its territory where the national State had no possibility to help.¹³⁴

Regarding the ECHR, it is worth noticing again that the practise of the European Court to interpret the Convention as a living instrument,¹³⁵ limits even more the value of the *travaux préparatoire*.¹³⁶ As many commentators

¹³² *Tyrer v. the United Kingdom*, 25 April 1978; ECtHR, no. 5856/72 para 32 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=7122955&skin=hudoc-en> last visited 22 May 2006.

¹³³ *Airey v. Ireland*, 9 October 1979, ECtHR, no. 6289/73 para.24 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=airey&sessionid=7122217&skin=hudoc-en> visited 22 May 2006.

¹³⁴ See M. Novak at *supra* note 8, p. 43.

¹³⁵ *Tyrer v. the United Kingdom*, *supra* note 132, para. 32

¹³⁶ C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights* (Oxford University Press, Oxford, 2002) p. 29

have noted, while the draft of the Convention first read that the Member States undertake to ensure to all persons “residing within their territories” it later changed to “within their jurisdiction”. The justification for this change was anyhow that they wanted to include people present in the territory but not necessarily residing there.¹³⁷ Thus, this was not an explicit extension to include extraterritorial acts. However, regarding extraterritorial acts the travaux remain silent, and the wish to include all persons within their territory by writing “within their jurisdiction” should not be interpreted as, at the same time, excluding persons outside their territory. I adhere to the idea that this was just not considered at the time being.¹³⁸ Instead the intention in the *travaux préparatoire* to “widen as far as possible the categories of persons who are to benefit from the guarantees contained in the Convention”,¹³⁹ very well opens up for an interpretation where extraterritorial application is possible.¹⁴⁰

3.9 Conclusion – the ‘Control Entails Responsibility’ Theory

Coming to a conclusion of whether an individual outside the territory of a State can be brought into the jurisdiction of that State by some kind of linkage, I want to start with the experiences drawn from practise. As we have already seen, there was a divergence between if the institutions only ruled on ‘admissibility’ or also on the issue on responsibility; even if the monitoring bodies often have interrelated and merged these considerations. However, when we want to separately deal with the issue of responsibility, it is only when the courts are discussing responsibility that we can adopt their interpretations of “within its jurisdiction”. This leads us to the possibility of distinguishing some of the cases, which only dealt with admissibility and not the idea of responsibility itself. An example of this could be the Bankovic case, which was dismissed on the admissibility stage. That is important because that decision could otherwise limit the further assessment of responsibility for extraterritorial acts, at least for the European Convention.

3.9.1 Legitimate Exceptions Do Exist

Instead, I take note of the convergent practise of the rest of the cases from the European Court and Commission, from the HRC and the ICJ in the Palestinian Wall Advisory Opinion. Here, responsibility for violations against persons outside the territory have been established e.g. when they are performed by agents of the State, or when the State exercised overall effective control over a foreign territory. Then the individual is found to be

¹³⁷ See Lawson, *supra* note 76, p. 89.

¹³⁸ See Lawson, *supra* note 76, p. 90.

¹³⁹ Travaux Préparatoires, *supra* note 130

¹⁴⁰ See section 3.7 of this paper.

within the jurisdiction of that State. The conclusion we can draw from this is that if the notion of jurisdiction indeed is territorial also in the human rights context, there exist legitimate exceptions to this principal rule. The ruling bodies have until now identified mainly two such exceptions, but nowhere in those cases have they told us that these exceptions are exhaustive. This is confirmed by related cases such as the pronouncements on Salman Rushdie and Iran, and the Soering case. There, persons outside the territory were seen to be brought under the jurisdiction of the State by the possibility that State has to control their suffering.

3.9.2 A Broader General Exception

Looking to what these exceptions may possibly have in common is a way to see how a court would judge if presented to another possible exception to the territorial idea. These exceptions are consequently not seen as part of an exhaustive list of independent exceptions but only as examples of a general exception to the territorial notion of jurisdiction. This is a logical conclusion since the ruling bodies should have had a good motivation for making these exceptions, and a broad general exception would provide exactly such motivation. Given that the object and purpose of a human rights treaty should be as beneficial for the individual as possible this broad approach also gives credit to the idea of a broader general exception to territoriality; including e.g. effective overall control and acts by agents. In this case it is hence not more beneficial for the individual to apply a restrictive interpretation to exceptions to human rights as it is concerning the material rights.¹⁴¹ Instead it is most beneficial for the individual to apply a broad interpretation to exceptions to the territorial limitation. Such an interpretation is then, according to the idea of following the object and purpose of the treaty, the appropriate one to choose. However, this exception cannot be too broad because it could paralyse further development of human rights law; e.g. that the signatory States of a treaty withdraw their signatures or no new States would enter any human rights treaty.

3.9.3 The Possibility to Control

My view is thus that this general exception to the territorial jurisdiction entails that States are extraterritorially responsible for everything that they have the possibility to control; at least when acting directly and regarding *respecting* rights. In short, where a State's army or agent is in the position to torture someone it is naturally also in position to refrain from torture and thus respecting the right to freedom from torture, also extraterritorially. This is moreover shown in both the Cyprus and the Transdnierstra case. Turkey and Russia respectively had an opportunity to respect human rights outside their territory due to its effective overall control. In the Lopez Burgos case, Uruguay had the possibility to control the acts of its agents, and in Soering;

¹⁴¹ See section 3.7 of this paper.

the UK government had the possibility to control the possible suffering of a victim in the death row in the US by a decision by its courts.

There are also several scholars in human rights law that promote the ‘control entails responsibility’ theory. Professor Rick Lawson says this theory is a well-accepted principle exemplified by cases such as the Namibia Case, the Nicaragua Case and the Genocide Case.¹⁴² Professor Scheinin presents the same idea under the label “facticity creates normativity”. His idea originates partly from the concurring individual opinion of Professor Tomuschat in the Lopez-Burgos case. Tomuschat there wrote that:

“It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, 'to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles.’¹⁴³

However, when discussing that a State has the obligation to *ensure* the rights to individuals within its jurisdiction, some qualification of the degree of control is needed to assess responsibility. Otherwise States could be asked to prevent almost any human rights violation happening anywhere in the world. This will be discussed further in the next chapter where this conclusion will be used to assess what responsibilities States have to regulate the human rights conduct of their corporations acting abroad. To do this in a proper way I will first present the general view on State parties’ positive obligations regarding human rights violations by private parties, i.e. their *due diligence* responsibility regarding private human rights violations.

¹⁴² See Lawson, *supra* note 76, pp. 86-87.

¹⁴³ See Lopez Burgos, *supra* note 65

4 Extraterritorial Application of the ICCPR and the ECHR for Transnational Corporations' Human Rights Violations

4.1 The *Due Diligence* Responsibility for Human Rights Violations by Private Actors

Before finally applying the 'control entails responsibility' theory to the specific situation of human rights violations by corporations abroad, I find it useful to study the "normal" *due diligence* responsibilities of States. That is the responsibility a State has when a private party *present* in the territory of the State is violating human rights in that territory. Starting with the wording of the treaties themselves; they provide respectively:

ICCPR. Article 2

"The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms..."¹⁴⁴

ECHR. Article 1 – Obligation to respect human rights

"Each State Party to the present Covenant undertakes to respect and to *ensure* to all individuals"¹⁴⁵

To see whether 'securing and ensuring' the rights in the ICCPR and the ECHR also entail a responsibility for private actors, is the key question here. Historically, less progressive scholars and governments have presented the thought that civil and political rights only entail the responsibility to respect the rights; i.e. directly refraining from violating the rights in the conventions. However, this has changed over time when confirmed that States have also positive obligations under the treaties, where the State has to protect the individual from abuse. In the words of the Human Rights Committee

"...the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by *private persons or entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."¹⁴⁶

This obligation includes "to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or

¹⁴⁴ ECHR art 1, see *supra* note 46

¹⁴⁵ ICCPR art 2.1, see *supra* note 43

¹⁴⁶ See Human Rights Committee, *supra* note 22, para. 8.

entities”¹⁴⁷ However, this responsibility does not make the State responsible for every human rights violation by a private party. The State is only required to have a sufficiently good administrative and judicial system of preventing and stopping violations as well as a system for providing remedies for victims of violations stemming from private parties.¹⁴⁸ This kind of obligation is different from the direct responsibility for its own acts where the State is responsible in its capacity of being the author.

For the European Convention, the same reasoning applies concerning positive obligations for acts of private parties.¹⁴⁹ That is confirmed in cases such as *X and Y v. the Netherlands*, where the Court stated that the right to privacy¹⁵⁰ not merely protected the individual from interference in his/hers private life. Instead the State is obliged to adopt “measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”¹⁵¹

In addition, there is also a direct link from this obligation to the right to an effective remedy. The ICCPR provides that every victim of a violation of a right in the Covenant should have access to an effective remedy and that should include having her/his rights “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”¹⁵² Also the ECHR guarantees the right to an effective remedy.¹⁵³ That article is even the most used right in the Convention, when coming to complaints that have been dealt with in the Strasbourg organs.¹⁵⁴

The importance of the right to an effective remedy is emphasized by the fact that none of the other rights would be as valuable if there was no legal way to assess responsibility in case of breaches. This thought indeed suggests that this right is the most important of them all. Nevertheless, the right to an effective remedy can only be invoked in connection with a breach of a substantive right.¹⁵⁵ There is also no separate qualification criterion in case of a breach of that article. A person, found to be within the jurisdiction of a State when adjudicating the material right, is thereby also entitled to the right to an effective remedy. Consequently, if the ‘control entails

¹⁴⁷ See Human Rights Committee, *supra* note 22, para. 8.

¹⁴⁸ See *Beyond Voluntarism*, *supra* note 16, p. 52.

¹⁴⁹ A. Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford, 1993) pp. 91-92.

¹⁵⁰ ECHR art 8, see *supra* note 46.

¹⁵¹ *X and Y v. the Netherlands*, ECtHR, 27 February 1985, no. 8978/80, para. 23

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=netherlands&sessionid=7122217&skin=hudoc-en> visited 22 May 2006.

¹⁵² ICCPR art 2.3.b, see *supra* note 43.

¹⁵³ ECHR art 13, see *supra* note 46.

¹⁵⁴ See statistics on the Council of Europe’s website: click on the box next to “Article”

<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> visited 22 May 2006.

¹⁵⁵ See *Klass and Others v. Germany*, *supra* note 131, para. 63.

responsibility' theory brings a person into the jurisdiction of a State, she/he has the right to an effective remedy in that State.

4.2 Is the *Due Diligence* Responsibility as Encompassing when Acting Abroad?

Concluding that States have positive obligations also under the human rights treaties of civil and political rights, the question is whether there is a difference on how such positive obligations apply extraterritorially compared to the negative obligations of respecting the rights. Both human rights scholars and numerous documents have stressed that human rights are "universal, indivisible, interdependent and interrelated".¹⁵⁶ Therefore, it is easy to sustain a view that extraterritorial obligations should be the same no matter if stemming from negative or positive obligations. However, as mentioned before, some qualification is necessary not to frighten States into abstaining from signing human rights treaties. If they can be responsible for everything also outside their borders as soon as they in some remote way could influence a violation; such 'deterrence' might be very likely.

4.2.1 Self-Restriction regarding Ensuring Rights

It is however not too difficult to find ways of how the 'control entails responsibility' theory can be modified to meet these requirements. E.g. this can be done with help of the reasoning by professor Tomuschat in the citation from the Lopez-Burgos case above.¹⁵⁷ Although that citation mainly confirms the idea that extraterritorial responsibility is possible, it also envisages a situation when there should be no such responsibility; thus helping us to qualify the concept of control in our general exception to territorial jurisdiction. According to Professor Tomuschat, this standard is relatively high, as "exceptional obstacles" are required to free a State Party from responsibility in an extraterritorial situation where it does have control. Regarding the same theory, Professor Lawson states that the case law of the ECtHR requires that no "impossible or disproportionate burden" should be imposed on the authorities when implementing the Convention.¹⁵⁸ He also points out that *travaux preparatoire* holds that the State cannot be held responsible for things it cannot change; actually some kind of *force majeure*.¹⁵⁹

¹⁵⁶ As stated among other places in the Vienna Declaration and Program of Action, 12 July 1993, A/CONF.157/23 part 1, para. 5, at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) visited 22 May 2006

¹⁵⁷ See section 3.9.3 of this paper.

¹⁵⁸ See Lawson, *supra* note 76, p. 106 and *Osman v UK*, 28 October 1998, EctHR, 29 EHRR 245, para 116

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=osman&sessionid=6535302&skin=hudoc-en> visited 22 may 2006

¹⁵⁹ See Lawson, *supra* note 76, p. 76.

What constitutes an impossible or disproportionate burden is however subject to the discretion of the courts and can only be assessed on case-by-case basis. In such assessments I find it important to bear in mind that interpretation of what constitutes an impossible burden is practically creating an exception to rights in the Conventions. If preventing a violation is imposing an impossible burden on a State, it is an exception to the right a person normally has. Therefore, I consider that any interpretation should take into account the limits for making exceptions to a right, according to the texts of the Statutes, and seek not to go beyond this.

4.2.2 A Direct and Immediate Link

Professor Rick Lawson similarly advocates the qualification of the degree of control when he discusses his theory of “the gradual approach to human rights responsibility”.¹⁶⁰ He accepts that States cannot be extraterritorially responsible for the whole range of positive obligations.¹⁶¹ According to him, assessing responsibility for all kinds of positive obligations only because the action or even inaction of a State affects that person would be to stretch the human rights framework too much. That would render States responsible even when e.g. development aid has been cut and thus contributed to violations of the right to life etc. He therefore finds that the ‘direct and immediate link test’ taken from the European Court case law would be a useful tool to distinguish whether the victim is within the jurisdiction of the State. This test requires that there is a ‘direct and immediate link’ between the extraterritorial act and the alleged violation of an individual’s rights. The source for this reasoning is the Botta case¹⁶² where the ECtHR stated that there should exist “a direct and immediate link between the measures sought by an applicant and the latter’s private and/or family life”¹⁶³ Although the test in this case was used in connection with the right to privacy, it could well be a useful test also concerning other Convention rights.

However, this test must not make null and void the concern about the individual, as we are required to take into account according to the ‘object and purpose’ provision in the Vienna Convention. Neither should it nullify the important principle stating that all human rights are universal, interdependent and indivisible. Considering these two facts I believe that a judgement very well could establish the victim of a human rights violation

¹⁶⁰ See Lawson, *supra* note 76, pp. 103-104.

¹⁶¹ See Lawson, *supra* note 76, p. 104.

¹⁶² *Botta v. Italy*, 24 February 1998, ECtHR, no.153/1996/772/973
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Botta%20%7C%20v.%20%7C%20Italy&sessionid=7122328&skin=hudoc-en> visited 22 May 2006.

¹⁶³ *Ibid*, art 34.

committed by a corporation abroad to have a direct and immediate link to the State measure asked for.

Furthermore, the strongest argument for the existence of a direct and immediate link comes from the ‘duty of care’ a State has towards individuals that are harmed by a corporation incorporated in that State. This ‘duty of care’, or as also called, this ‘duty to prevent harm’, will be discussed more thoroughly in the next paragraph.

4.2.3 The ‘Duty of Care’ for Corporations Acting Abroad

More support for a standing that home States have a responsibility for acts of their corporations abroad comes from Professor Sornarajah, when he considers the duty not to harm other States and the concomitant duty to prevent harm. He compares the State responsibility a State has for its own acts abroad with the responsibility to prevent harm if a corporation is causing harm abroad.¹⁶⁴ Additional arguments are presented consisting of that the home State’s right to protect a national abroad through the institute of diplomatic protection, as well should give rise to a corresponding duty to control that national.¹⁶⁵ Such a duty is also found in older case law where a State was seen as responsible for not being diligent enough in controlling the acts of their citizen abroad.¹⁶⁶ That diplomatic protection can be exercised also on behalf of a company abroad is confirmed by the facts of the Barcelona Traction case, where Canada as the home State of Barcelona Traction could and did exercise diplomatic protection.¹⁶⁷ Yet another argument is made that since the home State is benefiting from the profit of the violation by tax revenues from their citizen, they are as well responsible to control that this revenue is not illegally created. Professor William B. Schabbas from Ireland presents similar reasoning by stating that home States should have the obligation to control their corporate citizens since they allow it to be created and exist. The State should so to say be responsible to control its own creation.¹⁶⁸

Professor Sornarajah adds that this responsibility is especially urgent in cases where States *knowingly* ignore to control the behaviour of their

¹⁶⁴ M. Sornarajah, ‘Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States’, in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights* (Hart, Oxford, 2000) p. 507.

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid*, p. 499.

¹⁶⁷ Barcelona Traction, Light and Power Co Ltd Case (Belgium v Spain), International Court of Justice, February 5 1970, para. 76

¹⁶⁸ William B. Schabbas, Professor of Law; Director, Irish Center for Human Rights, National University of Ireland, Galway; Former Dean, The University of Quebec, Faculty of Law (Canada) stated this during the Dissertation of R. Mares, *Institutionalisation of Corporate Social Responsibilities: Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy* (Lund, Juridiska institutionen, Lunds universitet, 2006) the 10th Feb 2006.

corporation abroad. He also finds that “once it is conceded that there is a duty to control nationals from causing harm to people in other States the obligation can be laid down as a matter of law.”¹⁶⁹ He emphasizes that States do have the ability to control the behaviour of their multinationals abroad. For example laws controlling nationals abroad are already in place in other areas of law such as tax and antitrust legislation¹⁷⁰ and environmental law.¹⁷¹

4.2.4 Conclusions

The problem of applying the conclusion made concerning direct action of States is by this reasoning of Sornarajah and Schabbas easily adapted to a situation where there is no agent or direct actor. Since the State has the duty of preventing harm and has the possibility to do so; nothing stops us from extending the *due diligence* responsibility to actions abroad. It is also advocated by Professor Andrew Clapham that this responsibility can be applied extraterritorially. He claims that the Soering case together with the X and Y v. the Netherlands could be the basis for responsibility under the ECHR for a home States failure to legislate for how its corporations should behave when acting abroad.¹⁷²

This view that the State has the same ‘control entails responsibility’ regarding controlling its corporations abroad as well as at home is shared by Dr Nicola Jägers, who states that since home states have the effective means to regulate the parent company it should exercise *due diligence* in controlling the parent company.¹⁷³ Also Professor Craig Scott adheres to this idea by stating that as the corporation is in some respect within the regulatory power of the State, it is a duty of the State to control the corporation.¹⁷⁴

4.3 The Qualified Degree of Control

My conclusion made from the considerations above is that, the ‘control entails responsibility’ theory can be applied also regarding the *due diligence* responsibility of States. Anyhow, since the theory originates from instances of direct acts of States extraterritorially it needed some modification. This modification consisted of imposing two additional requirements. The first requirement was that the control should be exercised via a ‘direct and immediate link’ between the State’s act or inaction and the alleged violation of an individual’s rights. The second requirement would be that the

¹⁶⁹ See Sornarajah, *supra* note 164, p. 511.

¹⁷⁰ See Sornarajah, *supra* note 164, p. 507.

¹⁷¹ See Sornarajah, *supra* note 164, p. 502.

¹⁷² See Clapham, *supra* note 149, p. 348.

¹⁷³ N. Jägers, *Corporate Human Rights Obligations* (Intersentia, Antwerpen, 2002) p. 171.

¹⁷⁴ C. Scott, ‘Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights’, in A. Eide, C. Krause and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001) p.587

concomitant responsibility that arises should not impose an impossible or disproportionate burden on the State.

Since there is a ‘duty of care’ as discussed above I found that the requirement of a direct and immediate link could be met quite easily. Therefore I will elaborate further on the second requirement about not imposing an impossible burden on the State. I will discuss what State conduct does not constitute ‘an impossible burden’ and consequently what the modified ‘control entails responsibility’ theory requires of a State. This is necessary since our main issue is to discuss whether a State can be responsible under a human rights treaty for acts of its corporations abroad. According to the theory a victim can be brought into the jurisdiction of a State if the State has sufficient control. A State has sufficient control if the State conduct required does not impose an impossible burden on that State. Therefore, I will here try what State conduct will fall within the requirement of not constituting an impossible burden.

4.3.1 Possibilities to Legislate and Litigate

Given that the State has fewer possibilities to act outside its own territory, the *due diligence* responsibility for victims outside its territory and victims inside its territory is quite different. However, there are certainly things the State can, and has an obligation to do. Legislating and initiating judicial proceedings are certainly within its power,¹⁷⁵ but as mentioned before, the courts should in these cases perform a case-by-case determination of whether this would impose an impossible burden on the State. The workload and adjacent costs on the judiciary should be taken into account, as well as the real possibility of making a just appreciation of incidents happening very far from the court. In addition, the possibility for the plaintiff to seek legal aid could add to the burden a State would have encountering such a responsibility.

However, economic considerations are not always accepted as excuses for human rights violations. To constitute a legitimate exception it need to be prescribed for explicitly in connection with the right.¹⁷⁶ Therefore I find that in a case like this, where a court is indirectly speaking of an exception to a right by judging on what is an impossible burden, the court should be careful to consider if the right in question allows these kinds of “economic limitations”. Although it is not a formal requirement it is worth drawing analogies from cases where legitimate exceptions are discussed. In this way, the case-by-case appreciation will have some legal foundation, which is always helpful when such discretion is left to the court.

¹⁷⁵ See Jägers, *supra* note 173, p. 172.

¹⁷⁶ One example of where such an exception is made is in ECHR, art. 8, see *supra* note 46, regarding the right to privacy.

Clear is however that one important part of the *due diligence* responsibility a State has domestically, must be excluded concerning extraterritorial jurisdiction. Normally, States should have a surveillance or control mechanism, e.g. to *ex officio* check that the laws imposed are followed. This survey would in my view be out of question concerning extraterritorial conduct; it would indeed encounter these exceptional obstacles, which Professor Tomaschat talked about. The survey of all countries in the world to detect corporations of yours committing human rights violations would certainly impose “an impossible or disproportionate burden” on the State party.

4.3.2 The Right to an Effective Remedy

As stated before, a victim has the right to an effective remedy if any of the rights as laid down in the conventions are breached. Not providing a remedy when being in the position to do so would certainly not only be a breach of a subsequent positive obligation to protect against private parties abuses; but likewise a direct breach of a directly imposed positive obligation of providing an effective remedy. Providing a remedy would first of all be to give this victim access to its courts. Important here is though to note that the connection between the victim and the State goes via the violation. If the perpetrator is a national of that State, the State does indeed have a possibility to control that national. Therefore, the victim of the violation is under the jurisdiction of that State and thus has the right to an effective remedy in that State. This connection with the violation itself effectively stops the fear of having all kind of victims claiming the right to an effective remedy in whatever State. *Again, it is the possibility to control the behaviour of the perpetrator that gives the base for jurisdiction and thus creates a responsibility for States to regulate their corporate citizens also when acting abroad.*

4.4 Concluding Comments

Due to the discretion of the courts in these matters, it is here impossible to predict what a court assessment would be in a real case. However, I find it very well possible that mere legislating will be considered to be within the State’s power. Regarding allowing litigation it would be unsure because of the mentioned considerations, but still not at all impossible. It would certainly be in the line of the Vienna Convention’s requirement of looking at the object and purpose of a human rights treaty to allow litigation. Encompassing and protecting individuals by, as far as possible, controlling the State’s corporation when acting abroad has certainly achieved the aim to protect the individual against the State.

Unfortunately there is no case so far, neither in the ECtHR nor in the HRC, that has ruled upon a similar issue. Hopefully it is coming up, both for the

benefit of the victims of violations of human rights repeatedly committed by multinational corporations, and for setting a precedent how those institutions would do this analysis.

Yet another problematic issue could be to determine *which* State has responsibility because, as we have concluded earlier, there is both a responsibility on the host State and the home State. Responsibility on the home State is however complementary in its character and would only come into play if host States fail to implement the norms or are not even parties to the treaties in question. So in reality such problems would be hardly likely to appear even though a regime on shared responsibility between the host and the home State would be a good contribution to the human rights idea.

5 Human Rights Violations performed by Subsidiaries and Subcontractors

In the previous chapters I have concluded that the home State of a transnational company can have a *due diligence* responsibility for human rights violations performed by that company acting abroad. The real world however presents us with the problem that almost none of these companies are working directly in other countries. Instead they work via subsidiaries registered in those countries. The possibility for a State to regulate the subsidiary in question is therefore not as easy as regulating a national company acting directly in another country. Due to State sovereignty a State can normally not legislate or litigate against a foreign national for acts committed outside the territory of that State. However, in my view there are three ways a State could regulate the behaviour of a subsidiary, even if that subsidiary is a foreign national working abroad.

The first way concerns the situation where the State only has the possibility to control the subsidiary via its ability to regulate the parent company. This situation creates a need of a new assessment of what possibility the State has to control the subsidiary, since I concluded earlier that a State's human rights obligations depend on its possibility to control a given situation. Then again a victim of that subsidiary's human rights violations can be brought under the jurisdiction of the home State by that link of control by the 'control entails responsibility' theory.

The second possible way for the home State to control the subsidiary is to see the subsidiary and the parent company as one entity and then assessing the same responsibilities for the home State towards the subsidiary as towards the parent company. This can be achieved if the rules for breaching the corporate veil are seen as a general principle of international law. Such a principle could be present were the subsidiary is seen as the alter ego or the agent of the parent company. This way of reasoning would enable the home State to legislate for and accept civil suits against a foreign corporation that otherwise would be out of its reach. Finally, there can be an indirect way of controlling the subsidiary when direct actions of the parent company force the subsidiary to commit human rights violations.

When a home State regulates a subsidiary in either of these two last mentioned ways there is no need to make a new assessment of the jurisdictional link. In these cases the same *due diligence* responsibility as discussed in the previous chapter will be invoked, and the reasoning already made there is likewise applicable. This is because the home State here is responsible to regulate the acts of the parent company and not the acts of the subsidiary. Or as in the case of 'breaching the corporate veil', the

subsidiary is seen as the same entity as the parent company. The parent company is, like the company who is acting directly abroad but regulated in the home State, incorporated in the State where we are assessing responsibility. No further considerations regarding how to legislate etc. need to be taken compared to the previous discussion.¹⁷⁷

However, all these options are trying what possibilities the home State of a parent company has to stop human rights violations performed by a subsidiary or a subcontractor abroad. If the home State is found to have sufficient control, the 'control entails responsibility theory' could provide a basis for having an obligation to stop also a subsidiary's violation of human rights.

5.1 Imposing a *Due Diligence* Responsibility on the Parent Company

The first thing the home State can do, is imposing regulation on the parent company, e.g. by requiring the parent company to exercise a *due diligence responsibility* towards its subsidiary or its subcontractors. The parent company should thus be required to make sure that all subsidiaries or subcontractors adopt the 'code of conduct' the home State has developed. This code of conduct would be determined by the State and include all the human rights instrument that State adheres to. Moreover, the parent company should oversee the activities of the subsidiary and provide sufficient control mechanisms to check that the imposed so called 'codes of conduct' are respected.

The question is, in this case, whether the kind of link between the possible victim of an abuse and the home State of the company, owning the violating subsidiary, is strong enough to bring the victim into the jurisdiction of that State. It would require two instances of fault. Firstly it would require the subsidiary to breach a substantive right of the treaty in question and secondly it would require that the State has failed in its *due diligence* responsibility towards the parent company consisting of forcing the parent company to have a *due diligence* responsibility towards the subsidiary. Therefore, the possible link will be two instances of *due diligence* responsibility, something that of course will be weaker than a direct responsibility when coming to the implementation. Worth noticing is anyhow that this *due diligence* responsibility, thus imposed on a parent company, is mandatory and created with the aim of protecting stakeholders. This *due diligence* responsibility is therefore different from the kind of 'duty of care' that can be derived from the managerial 'duty of care' to the company. Even if the managerial 'duty of care' is mandatory, it is a duty towards the company and not towards the stakeholders.¹⁷⁸ Therefore a

¹⁷⁷ See my discussion under section 4.3

¹⁷⁸ The idea that the 'duty of care' to the stakeholders is derived from the managerial 'duty of care' to the company is presented by R. Mares. See *supra* note 14, p 267.

protection initiated from the home State and imposed onto the subsidiary via the parent company would be stronger than a ‘duty of care’ derived from the managerial ‘duty of care’ to the company.

However, the fact that the implementation will be more difficult due to the quality of the *due diligence* responsibility, does not exclude a possible link between the victim and the home State of the company owning the violating subsidiary. The link is there since the victim can claim that the State has the possibility of forcing the parent company to exercise *due diligence* towards their subsidiary and that such a restriction could have prevented the subsidiary from violating the rights as it now did. If the State did not impose such regulations it did not comply with its positive obligation to do all in its power to secure and protect the rights in the Conventions. Although that chain might have been broken elsewhere on its way to the victim, e.g. by the parent company not imposing rules onto the subsidiary, that cannot be a valid excuse to avoid responsibility. A State not living up to its obligations cannot hide behind the fact that there was a possibility that the abuse could have happened anyway.

Regarding the qualified degree of control, a case-by-case appreciation of whether this requirement is imposing an impossible burden on the home State, is required also in this case. As it regards the same issues; i.e. legislating and opening up its courts for civil litigation against the parent company, the assessment shall be similar to the ones discussed before.¹⁷⁹

Nevertheless, clarifying the weak points of the implementation is important when choosing how to proceed concerning violations in real life. Therefore I want to highlight some problematic areas. In my view, the first weak point concerns the situation when the parent company does comply with the law imposed on them to regulate their subsidiary. However, the problem arises when the subsidiary anyhow is breaching the regulation from its parent company. The victim will in this situation not be able to claim an abuse if the State can be proved to have done everything in its power to regulate that parent company and the parent company everything what the State required regarding regulating the subsidiary. Since neither the State nor the private body, within the control of that State, has failed in its *due diligence* responsibility, not even the right to an effective remedy could be invoked. In this case there is thus no State responsibilities.

The second situation to discuss is when the State has been proved to do everything within its power to impose restriction on the parent company, but that the parent company does not follow the law. Because of the *due diligence* nature of the obligation, the only right that possibly applies is the right to an effective remedy. In that case the individual cannot have any claim against that State directly, but instead only against the possible denial of access to an effective remedy. The jurisdictional link is anyhow still there, and it might be sufficient to have compensation for that failure instead

¹⁷⁹ See my discussion under section 4.3.

as for the real violation. This is in fact the same reasoning that applies if the parent company would have performed a human rights violation directly without the State failing in regulating it. Then, the right to an effective remedy would also be the correct right to claim and hopefully sufficient attention to the case would also mean an end to the initial violation.

5.2 'Breaching the Corporate Veil' as a General Principle of International Law

If the link presented as sufficient above however would be too indirect to establish jurisdiction of the home State over the victim of the subsidiary's abuse, then there could be another viable way to argue. The second way for the home State to regulate a subsidiary is when the subsidiary is seen as the same legal entity as the parent company. The basis for this is a general principle of international law, holding that in some instances the protection from responsibility of the shareholders is not total, but that the 'corporate veil' must be breached to achieve justice. In this case, that could make the parent company responsible for the acts of the subsidiary. The two are seen as one legal entity, provided that the conditions for a breach of the corporate veil are fulfilled. As stated in the Barcelona Traction Case:

...The law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of *fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.*¹⁸⁰

This case thus provides us with some ground where the corporate veil should be removed, such as fraud and evasion of legal obligations. The case also confirms that although this principle is mainly found in domestic legal systems it could be used also on the international plane.

In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is *equally admissible to play a similar role in international law.* It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.¹⁸¹

Looking at the ICJ statute it states that "the general principles of law recognized by civilized nations"¹⁸² shall be a source of international law. I therefore find no difficulty in applying the principles of lifting the corporate veil as an obligation on a State, as it has an obligation to follow international law. Provided that the requirements for lifting the veil is

¹⁸⁰ See Barcelona Traction, *supra* note 167, para. 56.

¹⁸¹ See Barcelona Traction, *supra* note 167, para. 58.

¹⁸² ICJ Statute art 38c, *see supra* note 19.

fulfilled, the state should be obliged to make the parent company responsible for the acts of the subsidiary.

This is an additional element in the assessment according to the rules of the Vienna Convention. As mentioned before, in the interpretation of a treaty it is necessary to include “(c) any relevant rules of international law applicable in the relations between the parties.”¹⁸³ Finding that we have a general principle of international law requiring that the parent company and the subsidiary should be seen as one entity under certain circumstances certainly needs to be taken into account when judging whether the victim of a violation is within the jurisdiction of a State. To assess that the victim is as much ‘within the jurisdiction’ in that case as when the parent company would directly be abusing the rights, is a logical reasoning. As well it would meet the requirements of interpreting a human rights treaty as beneficial as possible for the victim.

To sum up this argument, the general idea would be as follows: When applicable rules of international law require that the corporate veil shall be lifted, victims of the subsidiary’s human rights violations are automatically brought under the jurisdiction of the home State. Then the subsidiary must follow the same national law as the parent company. Thereby one line of insecurity compared with the first approach is removed, as there is only one *due diligence* responsibility from the State to the company left. Between the subsidiary and the parent company there is no longer any difference. The State is thus able to regulate the subsidiary directly; and, according to the ‘control entails responsibility’ theory, also responsible to do so.

To finally elaborate a bit further regarding when the exceptions to the general principle of limited liability should be applied, I will present some national case law on the subject. There has in recent years been a development of such ‘breach of the corporate veil’ in courts in home State countries that can help defining the requirements needed to lift the veil. I find that those cases roughly can be divided into two categories. The first category consists of situations where the subsidiary is argued to be the same entity as the parent company, i.e. the ‘alter ego theory’. The second category of cases instead regards the subsidiary as the agent of the parent company.

5.2.1 Subsidiaries Working as Alter Egos for the Parent Company

One of the reasons for piercing the veil is when the level of control is so extensive that the subsidiary company is seen as an alter ego for the parent company.¹⁸⁴ Instances where this has been argued is e.g. in the Bhopal Case

¹⁸³ VCLT art 31.3.c, *see supra* note 62.

¹⁸⁴ *See Joseph, supra* note 39, p.130.

in India¹⁸⁵, in US in the on-going case against the Shell subsidiary in Nigeria,¹⁸⁶ and in the Mehta judgement in India.¹⁸⁷ In the Mehta case it was further discussed that for establishing ‘control’ it is important not only to consider the percentage of shareholding, but that all ways of controlling a company should be investigated. Additional arguments are provided by Professor Olivier de Schutter; holding that it would be possible to presume a parent liability as soon as the parent company owns more than 50 % of the shares in the subsidiary.¹⁸⁸ Such a presumption would be further strengthened when the parent company in other ways influences the subsidiary.¹⁸⁹ This he exemplifies with a case from the European Union where a subsidiary of a European Union company, incorporated outside the EU, was asked to follow the competition law of the European union.¹⁹⁰ As it was a fully owned subsidiary there was a presumption that the parent company exercised sufficient control to make it responsible for the subsidiary’s activities. Some of the same reasoning was applied in the Metha judgement in India where the parent company was found to exercise sufficient control when owning 50,9% of the shares and holding a majority position in the board.¹⁹¹

Regarding the assessment whether the parent company exercised sufficient control over its subsidiary, I also find it important to consider facts as who is the expert party in the project and therefore the most probable to lead and control the subsidiary’s doings. This is in line with the reasoning of the renowned human rights lawyer Richard Meeran.¹⁹² He states sufficient control is found when the function of the parent company is to provide expertise, technology, supervision and finance.¹⁹³ Thus, if the parent company is the expert party that is clearly another way of influencing the subsidiary that should be taken into account.

Finally, the ‘nature of the act’ is another circumstance to consider when discussing whether or not breaching the veil. This is confirmed by the principle in the Unocal Case where Burmese villagers were forced to work

¹⁸⁵ Union of India v. Union Carbide Corporation, Civil Revision No. 26 of 1988 4 April 1988, Seth J..

¹⁸⁶ Wiwa v. Royal Dutch Petroleum CO, F.Supp.2d, 2002 WL 319887 (S.D.N.Y.), RICO Bus.Disp.Guide 10,216.

¹⁸⁷ M. C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.

¹⁸⁸ O. de Schutter, ‘Multinationals in European Law’ in P. Alston, *Non State Actors and Human Rights* (Oxford University Press, Oxford, 2005) p. 279.

¹⁸⁹ *Ibid*, p 279-280.

¹⁹⁰ Stora Bergslags AB, European Court of Justice, Case C-286/98 P, 16 November 2000.

¹⁹¹ P.Muchlinski, *Multinational enterprises and the Law* (Blackwell, Oxford, 1995) p. 325.

¹⁹² Richard Meeran, Leigh Day & Co. was awarded “Human Rights Lawyer of the Year” 2002 by UK Justice “For his commitment to protection of workers’ rights to decent working conditions and a safe environment, through ensuring access to justice for workers injured by UK multinational corporations abroad.

<http://www.justice.org.uk/trainingevents/libertyhumanrights/main.html> visited 22 May 2006

¹⁹³ R. Meeran, ‘The Unveiling of Transnational Corporations’, in M. K. Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague, 1999) p. 170.

in the Burmese subsidiary of Unocal, where e.g. forced labour was said to be of such magnitude that it required a breach of the corporate veil.¹⁹⁴

The requirements to fulfil for being regarded as an alter ego of the parent company is unfortunately nowhere too detailed outspoken. Concluding from the above it is at least necessary to consider the percentage of shareholding, the control exercised over the subsidiary and the nature of the act allegedly violating human rights. Moreover, for assessing when breaching the corporate veil, it could be useful to reconsider the requirement of “fraud and evasion of legal requirements” from the Barcelona Traction Case. E.g. a subsidiary located in a country where no right to free association exists could very well have chosen that location to avoid that very legal requirement of the right to free association of its home State. Some developing countries have even advertised in Financial Times about the ban of trade unions in their country with the purpose to attract investment.¹⁹⁵ This shows that there is a reality behind the rule regarding evasion of legal requirement, since these governments know that corporations can be attracted by e.g. the lack of the right to free association.

5.2.2 Subsidiaries Working as Agents for the Parent Company

Joint responsibility, also called “the multinational group liability”, presents to us the idea that the subsidiary is seen as the agent of the parent company instead of being the alter ego.¹⁹⁶ E.g. in the *Bowoto v. Chevron Texaco* Case the court discussed whether Chevron was made responsible for its Nigerian subsidiary. Chevron was there alleged of exercising more than the usual degree of control over its subsidiary and benefiting directly from its oil production.¹⁹⁷ In this case the control was not required to be so extensive as in the ‘alter ego theory’ and may not even require a parent–subsidiary relationship. Instead, simple liability for another company within the multinational group, e.g. as a subcontractor, could be the case.

One case where this was successfully argued was in the *Amoco Cadiz* Case¹⁹⁸, where a “parent company” was made responsible for its ‘instrumentalities’ and not only for its subsidiaries.¹⁹⁹ The test for this agent relationship is however not clear and these two cases do not provide many answers neither. The agent theory could however be worth trying since it can be used also without a formal ownership between the principal and the agent.

¹⁹⁴ *Doe v. Unocal*, 110 F. Supp. 2d. p. 1309

¹⁹⁵ *See* Wingborg, *supra* note 3, p. 29.

¹⁹⁶ *See* Joseph, *supra* note 39, p. 132.

¹⁹⁷ *Bowoto v. Chevron Texaco*, 312 F.Supp 2d 1229

¹⁹⁸ *The Amoco Cadiz* [1984] 2 Lloyds Rep. 304, (ND Ill 1984) US District Court for the Northern District of Illinois

¹⁹⁹ *See* Joseph, *supra* note 39, p 141

5.3 Violation as a Result of Parent Companies' Direct Actions

Another way to possibly assess responsibility, for home States of transnational companies having subsidiaries violating human rights, is to see how the direct actions of the parent company influence the subsidiary. The focus in this situation lies on the direct acts by the parent company in the home State, that allegedly causes a human rights abuse in another country. Decisions in boardrooms of the parent company can be such acts as well as managing orders given from the head office in the home State. An example is the recent discussion whether a parent company could be responsible for a human rights violation resulting from the parent company's demands to deliver in such a shortage of time that human rights violation would inevitably follow the delivery. E.g. this has been the case with the toy companies' massive orders in China just before Christmas, where illegal overtime and too low wages are a result from the order itself, since the factories in question otherwise would not be able to deliver.²⁰⁰

As Dr Sarah Joseph states, this view provides a benefit compared with the 'breaching of the corporate veil' theory. Although the parameters concern 'control' also in this context, the control test here regards the very act that gave rise to the violation instead of the general control over the subsidiary.²⁰¹ In the above mentioned Amoco Cadiz judgement this was a second basis for the assessed responsibility for Standard, as Standard was seen to be a joint tortfeasor with its subsidiary. Citing the judgement, Standard was "initially involved in and controlled the design, construction and operation and management of Amoco Cadiz and treated that vessel as if it were its own."²⁰²

The jurisdictional link is clear because the victim is directly affected by the acts of the parent company. Therefore the victim can be brought into the jurisdiction of the home State as the home State has the traditional territorial *due diligence* responsibility to control the parent company. The extra *due diligence* link as required by the reasoning earlier,²⁰³ is also not here needed to establish home State responsibility.

²⁰⁰ Tomtens verkstad i Kina, TV Documentary, broadcasted the 28th Nov 2005 in Swedish Television channel 1, also available to order at <http://dmb.ur.se/mb/main?uri=http://www.ur.se/mb/13f991106fe1deb49&static=true&cmd=viewdetails> last visited 22 May 2006

²⁰¹ See Joseph, *supra* note 39, p. 136.

²⁰² Amoco Cadiz, *supra* note 198

²⁰³ See my reasoning under 5.1

6 Being Indirect – Was it a Viable Way?

The question this paper intended to answer is whether being indirect, i.e. assessing responsibility for corporate abuses onto States, is a *viable* way to tackle the problem of transnational corporations' human rights violations. More specifically I wanted to investigate whether the home States of the corporations have such an indirect responsibility for the extraterritorial activities of these corporations. It is thus not a comparative assessment whether this is a better way than direct liability or host State liability. I merely wanted to see whether it was possible to choose this indirect way at all; i.e. if there were legal arguments to support such an assessment.

Starting with this thus defined legal problem I found out that the key question for assessing such responsibility turned out to be whether a victim of an abuse could be brought into the jurisdiction of a State by actions performed by that State's corporation abroad. This was not at all the issue I first thought would be my focus when entering the subject, but as the core problem this needed an answer. Very far from human rights violations by corporations, I therefore found myself analysing case after case concerning direct State military action abroad. I found this necessary for at least finding a start of how to deal with this specific extraterritorial conduct of corporations.

Aware of that scholars and others have searched for such responsibilities before and indeed claimed that there was such a responsibility, I still found that this new analysis was necessary to make. Especially if assessing responsibility under the ICCPR and the ECHR that so explicitly mentions that the victim needs to be "within the jurisdiction" and "subject to the jurisdiction" respectively. If not, a State defending itself against such abuses, would argue that the victim is not 'within its jurisdiction'. Without the investigation I have performed here, such argument would very easily stop any possible claim; how materially well based the case might otherwise be.

6.1.1 The 'Control Entails Responsibility' Theory

Fortunately, there was a way out of this and I found that the test for assessing whether the victim of a violation was 'within the jurisdiction' of a State was the 'control entails responsibility' theory. This theory I analogously developed from that "more military" area of law, via the thought that the exceptions made to the territorial notion of jurisdiction had a more general exception as a common denominator. Strongly based on the Vienna Conventions requirement of interpreting a treaty according to the object and purpose of the treaty, I found that the State had responsibility to

take all measures within its power to stop an abuse. This was also supported by the idea that the term jurisdiction should be assessed in the right context of international law. I concluded that the contexts where jurisdiction was defined as State jurisdiction, domestic court jurisdiction or international court jurisdiction were not applicable to our assessment. Then some difficulties in divergent case law be avoided and the remaining case law supported the notion of a “control entails responsibility” theory.

6.1.2 The *Due Diligence* Responsibility Applied Extraterritorially

The next thing to answer was whether States had an as extensive responsibility for activities abroad performed by their corporations. To answer this I started with investigating the general *due diligence* responsibility a State has for the acts of private persons and the State’s responsibility to protect. Mainly according to the notion that all human rights are universal, indivisible, interdependent and interrelated I found that the State’s *due diligence* responsibility for controlling their citizens and protecting individuals from human rights abuse also could be applied extraterritorially. Again, an interpretation concurrent with the purpose of a human rights treaty, i.e. to protect the individual, supported the notion that the ‘control entails responsibility’ theory as well should be applied in those situations. Regarding *due diligence* responsibility for acts of corporations abroad it was however important to qualify the degree of control. This was done both by not requiring the State to do the impossible, ‘no impossible or disproportionate burden’ should be imposed and by requiring that there would be a ‘direct and immediate link’ between the extraterritorial act and the alleged violation of an individual’s rights.

According to the theory, everything within the power of the State should be done to stop such abuses; provided that there is a direct link present and the measure sought would not impose an impossible burden on the State. Although this assessment should be performed on a case-by-case basis, I find it possible that a court would conclude that neither legislating nor letting victims having access to courts would be such impossible burden. The direct link is even easier to establish; mainly thanks to the ‘duty of care’ a State had concerning the acts of its corporations abroad. Therefore I think that home States thus have such responsibilities under the mentioned treaties.

Concerning having the right control mechanisms, the responsibility of the home State is weaker than for abuses performed domestically. The aforementioned responsibilities are however sufficient to establish that States are breaching against its obligations under the treaties and will hopefully suffice to bring attention to the case and put an end to the violation.

6.1.3 Subcontractors and Subsidiaries

Turning to the problem of subsidiaries and subcontractors committing the same kind of abuses the problem is that a State cannot normally control a foreign national working outside its territory. I however found three ways of how a State possibly could regulate a subsidiary of a parent company incorporated in that State.

The first way was by using the “second” *due diligence* responsibility a parent company can have towards its subsidiary. This second *due diligence* responsibility derives from the possibility the home State has to regulate how the parent company shall regulate the behaviour of the subsidiary. This in turn affects the possible abuse of the subsidiary and so brings the victim into the jurisdiction of the home State. The rights the victim would have in such case would however be very limited since there could be different ways when the State – parent regulation were in place but still abuses performed. However, the advantage of this approach was that it could be used also on subcontractors and on cases where no direct action by the parent company in the home State was taken.

The weakness of the material rights stemming from this reasoning, made me look for other ways to link the home State to the subsidiaries’ abuses. Those ways were more direct because they concerned the parents companies’ actions in the home State, or took a stand that the subsidiary and the parent company was the same corporate entity and thus made the subsidiary directly responsible under the home State. As well in these cases, the ‘control entails responsibility’ theory was needed to establish the link between the victim of the abuse, still located extraterritorially, and the home State. However, there was no need to make a new assessment of the jurisdictional link, since it would be assessed in the same way as the *due diligence* responsibility the State has for the company that is acting directly abroad.

The weakness of this choice is that finding direct action of the parent company might not always be possible. Likewise it could be problematic to fulfil the criteria for breaching the corporate veil as required by the unfortunately still unclear “alter ego” or “agent” theories.

6.1.4 Conclusion

My conclusion is thus that it is possible to say that the home State of a transnational corporation is responsible under these treaties according to the ‘control entails responsibility’ theory. The responsibility is however more limited due to its *due diligence* nature and the power a State has to act extraterritorially. The possible use a victim can have of this right is also limited due to the construction that in most cases the abuse is carried out by a subsidiary or a subcontractor abroad. This paper has however showed that also in such cases there is a responsibility, since the home State has the

possibility to act and affect the situation of the victim. Thus a claim can always take that possibility as a base for responsibility and hopefully making it a viable way to assess responsibility for these abuses.

Bibliography

Books

M. K. Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague, 1999)

M. Akehurst, *Akehurst's Modern Introduction to International Law* (Routledge, London, 1997)

P. Alston (ed), *Non-State Actors and Human Rights*, (Oxford : Oxford University Press, 2005)

A. Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford, 1993)

A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006)

F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004)

A. Eide, C. Krause and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001)

M. Emberland, *Human Rights of Companies* (Oxford University Press, Oxford, 2006)

International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, Versoix, 2002)

S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart publishing, Portland, 2004)

N. Jägers, *Corporate Human Rights Obligations* (Intersentia, Antwerpen, 2002)

M. T. Kamminga and S. Zia-Zarifi(eds), *Liability of Multinational Corporations under International law* (Kluwer Law International, The Hague, 2000)

R. Mares, *Institutionalisation of Corporate Social Responsibilities: Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy* (Lund, Juridiska institutionen, Lunds universitet, 2006)

- P. Muchlinski, *Multinational enterprises and the Law* (Blackwell, Oxford, 1995)
- M. Novak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, (N.P.Engel Verlag, Kehl, 2005)
- I. Okonta and O. Douglas, *Where Vultures Feast* (Verso, New York, 2003)
- C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights* (Oxford University Press, Oxford, 2002)
- C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights* (Hart, Oxford, 2000)
- H. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals : Text and Materials* (Oxford, Oxford University Press, 2000)
- J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties, A Critical Appraisal*, (Springer-Verlag, Wien, Austria, 1974)
- M. Wingborg, *Ekonomiska frizoner – och kampen för fackliga rättigheter*, (LO-TCO Biståndsämnd, Sjuhäradsbygdens Tryckeri 2005)

Articles in Books

- A. Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’ in M. T. Kamminga and S. Zia-Zarifi(eds), *Liability of Multinational Corporations under International law* (Kluwer Law International, The Hague, 2000)
- D. Mc Goldrick, ‘The International Covenant on Civil and Political Rights’ in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004)
- L. Henkin, ‘International Law: Politics, Values and Functions’, in H. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals : Text and Materials* (Oxford, Oxford University Press, 2000)
- S. Joseph, “An Overview of the Human Rights Accountability of Multinational Enterprises”, in M. T. Kamminga and S. Zia-Zarifi(eds), *Liability of Multinational Corporations under International law* (Kluwer Law International, The Hague, 2000)
- R. Lawson, ‘Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’ in F. Coomans and M. T.

Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004)

R. Meeran, 'The Unveiling of Transnational Corporations', in M. K. Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague, 1999)

M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, Oxford, 2004)

O. de Schutter, 'Multinationals in European Law' in P. Alston, *Non State Actors and Human Rights* (Oxford University Press, Oxford, 2005)

C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights', in A. Eide, C. Krause and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, Dordrecht, 2001)

M. Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', in C. Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights* (Hart, Oxford, 2000)

D. Weissbrodt and M. Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in P. Alston (ed), *Non-State Actors and Human Rights*, (Oxford : Oxford University Press, 2005)

Articles

M. Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review*, Volume 52, Issue 03, December 2005

P.K. Menon, 'The Subjects of Modern International Law', *Hague Yearbook of International Law*, vol. 3 (Dordrecht, Nijhoff, 1990)

J.J. Paust, 'Human Rights Responsibilities of Private Corporations', vol 35, *Vanderbilt Journal of Transnational Law*
<http://law.vanderbilt.edu/journal/35-03/PAUST7.pdf> visited 21 May 2006

O. de Schutter, *Globalization and Jurisdiction : Lessons from the European Convention on Human. Rights*, Centre for Human Rights and Global Justice Working Paper Number 9
<http://cridho.cpd.r.ucl.ac.be/Working%20papers/CRIDHO.WP.2005.04.pdf> visited 23 May 2006

B. Stephens, 'The Amoralism of Profit: Transnational Corporations and Human Rights', 20, *Berkeley J. Int'l L*

C. M. Vasquez, 'Direct vs. Indirect Obligations of Corporations under International Law', 43 *Colum. J. Transnat'l L.*
<http://www.ilsa.org/jessup/jessup06/basicmats2/vasquez.doc> visited 21 May 2006

Legal Documents

African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul <http://www1.umn.edu/humanrts/instree/z1afchar.htm> last visited 21 May 2006.

Alien Tort Claim Act, 28 U.S. Code. Chapter 85, section 1350 (1994)
Adopted in 1789

American Convention on Human Rights "Pact of San José, Costa Rica", 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

18 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. 1998, C27, 1 (consolidated version after the 1996 Accession Convention) and the parallel 1988 Lugano Convention, O.J. 1988, L319, 9

Charter of the United Nations, signed at San Francisco on 26 June 1945
<http://www.un.org/aboutun/charter/> visited 21 May 2006 ILC

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *New York, 10 December 1984*, United Nations, *Treaty Series*, vol. 1465, p. 85.
http://www.unhchr.ch/html/menu3/b/h_cat39.htm last visited 21 May 2006

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocol No. 11, Rome, 4.XI.1950,
<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, CETS No.: 005

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, New York
http://www.unhchr.ch/html/menu3/b/p_genoci.htm last visited 21 May 2006

Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Rep. 53rd see., GA OR, 56th sess., supplement no. 10 (A/56/10).
http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf visited 22 May 2006.

International Convention on the Elimination of All Forms of Racial Discrimination, ICERD, 21 December 1965, United Nations, *Treaty Series*, vol. 660, p. 195.

International Covenant on Civil and Political Rights, (ICCPR) New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm visited 21 May 2006

International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_ceschr.htm visited 21 May 2006

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999 (CEDAW) A/RES/54/4

Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_opt.htm visited 21 May 2006.

Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 <http://www.un.org/law/icc/statute/romefra.htm> visited 21 May 2006

Statute of the International Court of Justice, 26 June 1945, 15 U.N.C.I.O. 335

Travaux preparatoire for the ECHR in Collected Edition of the “Travaux Preparatoires”, part III, 5 February 1950, (Martinus Nijhoff, The Hague, 1976)

Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, vol 1155, p. 331.

Non-Binding Instruments

American Declaration of the Rights and Duties of Man, O.A.S. Bogotá, Colombia, 1948

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Declaration adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November

1977, at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>
last visited 6 April 2006

OECD Guidelines for Multinational Enterprises:
DAFFE/IME/WPG(2000)15/FINAL, 31 October 2001,
[http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final)

Universal Declaration on Human Rights, New York, 10 Dec 1948.
preamble, <http://www.un.org/Overview/rights.html> visited 21 May 2006.

UN Documents and Material

Concluding observations of the Human Rights Committee: Iran (Islamic Republic of): 03/08/93.UN Doc CCPR/C/79/Add. 25,
<http://www.unhchr.ch/tbs/doc.nsf/0/0a2ad0138084929041256324003c98c1?Opendocument> visited 22 May 2006.

Concluding observations of the Human Rights Committee : Israel. 18/08/98.
UN Doc. CCPR/C/79/Add.93, at
<http://www.unhchr.ch/tbs/doc.nsf/184758d9fcd7a2b1c12565a9004dc312/7ea14efe56ecd5ea8025665600391d1b?OpenDocument> visited 22 May 2006.

Concluding observations of the Human Rights Committee: Syrian Arab Republic. 24/04/2001, UN Doc. CCPR/C/71/SYR at
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.71.SYR.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.71.SYR.En?Opendocument) visited 22 May 2006.

Global Compact. The ten principles can was found at
<http://www.un.org/depts/ptd/global.htm> visited 21 May 2006

Human Rights Committee, *General Comment 31*, HRI/GEN/1/Rev.7, from
[http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) last visited 21 May 2006.

Summary Record of the 1707th Meeting :Belgium. 27/10/98.UN Doc.
CCPR/C/SR.1707, at
<http://www.unhchr.ch/tbs/doc.nsf/0/0b3ce68ef6954a89802567a8004fe7b3?Opendocument> visited 22 May 2006.

Vienna Declaration and Program of Action, 12 July 1993, A/CONF.157/23
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) visited 22 May 2006. Figures for how many signatures the Vienna Convention has were found at
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>

NGO Material

M. Andersson and Ö. Bartholdson, *Swedish Pulp in Brazil: The case of Veracel*, report published by Swedwatch, 2004
http://www.swedwatch.org/swedwatch/referenser/swedish_pulp_in_brazil_the_case_of_veracel last visited 21 May 2006.

Information on the human rights lawyer Richard Meeran was found at:
<http://www.justice.org.uk/trainingevents/libertyhumanrights/main.html>
visited 22 May 2006

Reporters Without Borders' website at
http://www.rsf.org/article.php3?id_article=16262 last visited May 21 2006

Other

Oral statement of William B. Schabbas, Professor of Law; Director, Irish Center for Human Rights, National University of Ireland, Galway; Former Dean, The University of Quebec, Faculty of Law (Canada) during the Dissertation of R. Mares, *Institutionalisation of Corporate Social Responsibilities: Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy* (Lund, Juridiska institutionen, Lunds universitet, 2006) the 10th Feb 2006.

Remarks by John G. Ruggie, Business & Human Rights Seminar, Old Billingsgate, London, December 8, 2005,
<http://www.bhrseminar.org/John%20Ruggie%20Remarks.doc> last visited 21 May 2006.

Statistics about the frequency the different articles in the ECHR are used on was found on the Council of Europe's website: (click on the box next to "Article") <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>
visited 22 May 2006.

Tomtens verkstad i Kina, TV Documentary, broadcasted the 28th Nov 2005 in Swedish Television channel 1, also available to order at
<http://dmb.ur.se/mb/main?uri=http://www.ur.se/mb/13f991106fe1deb49&static=true&cmd=viewdetails> last visited 22 May 2006

Table of Cases

International

International Court of Justice:

Barcelona Traction, Light and Power Co Ltd Case (Belgium v Spain), International Court of Justice, February 5 1970

Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 9 July 2004, ICJ, Advisory Opinion, at www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm visited 22 May 2006.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ, 21 June 1971 at <http://www.icj-cij.org/icjwww/idocuments/summaries/inamsummary710621.htm> visited 22 May 2006.

Human Rights Committee:

Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) <http://www.law.wits.ac.za/humanrts/undocs/session36/12-52.htm> visited 22 May 2006.

Regional

African Commission on Human and Peoples' Rights:

Decision regarding communication No.155/96.Social and Economic Action Centre v. Nigeria, 27 October 2001

European Court of Human Rights:

Airey v. Ireland, 9 October 1979, ECtHR, no. 6289/73 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=airey&sessionid=7122217&skin=hudoc-en> visited 22 May 2006.

Autronic AG v. Switzerland, 22 May 1990, no 12726/87, ECtHR, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Autronic%20AG%20v.%20Switzerland&sessionid=7109128&skin=hudoc-en> visited 21 May 2006.

Bader and Others v. Sweden, 8 November 2005, ECtHR, Application no. 13284/04,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=case%20%7C%20of%20%7C%20Bader%20%7C%20Other%20%7C%20v.%20%7C%20Sweden&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Bancovic Decision. Grand Chamber Decision as to the Admissibility of Application no. 52207/99 by Vlastimir and Borka BANKOVIĆ, Živana STOJANOVIĆ, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIĆ and Dragan SUKOVIĆ against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, 12 December 2001, ECtHR, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=bankovic&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Botta v. Italy, 24 February 1998, ECtHR, no.153/1996/772/973 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Botta%20%7C%20v.%20%7C%20Italy&sessionid=7122328&skin=hudoc-en> visited 22 May 2006.

Cyprus v. Turkey, 10 May 2001, ECtHR, no. 25781/94, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Cyprus%20%7C%20v.%20%7C%20Turkey&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Ilaşcu and Others v. Moldova and Russia, 8 July 2004, ECtHR, *Application no. 48787/99* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=CASE%20%7C%20OF%20%7C%20ILA%u0152ECU&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Issa and Others v. Turkey, 16 November 2004, ECtHR, Application no. 31821/96 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=CASE%20%7C%20OF%20%7C%20ISSA%20%7C%20OTHERS%20%7C%20v.%20%7C%20TURKEY&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Klass and Others v. Germany, 6 September 1978, ECtHR. No. 5029/71, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Klass%20%7C%20Others%20%7C%20v.%20%7C%20Germany&sessionid=7122955&skin=hudoc-en> last visited 22 May 2006

Loizidou v. Turkey (Preliminary objections) 23 February 1995, ECtHR, 40/1993/435/514, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=loizidou&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Osman v UK, 28 October 1998, ECtHR, 29 EHRR 245,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=osman&sessionid=6535302&skin=hudoc-en> visited 22 May 2006

Plattform Ärzte für das Leben v Austria, 21 June 1988, no 10126/82 ECtHR,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%C4rzte&sessionid=7109477&skin=hudoc-en> visited 21 May 2006

Soering v. United Kingdom, 07 July 1989, ECtHR, Application no. 14038/88 at
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%F6calan&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

Tyrer v. the United Kingdom, 25 April 1978; ECtHR, no. 5856/72 at
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=7122955&skin=hudoc-en> last visited 22 May 2006.

Wemhoff v. Germany, 27 June 1968, no. 2122/64, ECtHR,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Wemhoff%20%7C%20v.%20%7C%20Germany&sessionid=7122955&skin=hudoc-en> last visited 22 May 2006.

X and Y v. the Netherlands, ECtHR, 27 February 1985, no. 8978/80
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=netherlands&sessionid=7122217&skin=hudoc-en> visited 22 May 2006.

Öcalan v. Turkey, 12 May 2005, Application no. 46221/99, ECtHR,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%F6calan&sessionid=7119764&skin=hudoc-en> visited 22 May 2006.

European Court of Justice:

Stora Bergslags AB, European Court of Justice, Case C-286/98 P, 16 November 2000

National

U.S:

Amoco Cadiz [1984] 2 Lloyds Rep. 304, (ND Ill 1984) US District Court for the Northern District of Illinois

Bowoto v. Chevron Texaco, 312 F.Supp 2d 1229

Doe v. Unocal, 110 F, Supp. 2d. p. 1309

Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litigation), 225 F.3d 191 (2d Cir. 2000)

Wiwa v. Royal Dutch Petroleum CO, F.Supp.2d, 2002 WL 319887 (S.D.N.Y.), RICO Bus.Disp.Guide 10,216.

India:

M. C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.

Union of India v. Union Carbide Corporation, Civil Revision No. 26 of 1988 4 April 1988, Seth J