



HUMAN RIGHTS  
AND BUSINESS  
CENTRE

# THE OBLIGATIONS OF HOME STATES

## THEIR EXTRATERRITORIAL OBLIGATIONS ON HUMAN RIGHTS VIOLATIONS BY TNCS

COORDINATION: **MANOELA CARNEIRO ROLAND**  
SUPERVISION: **PAOLA DURSO ANGELUCCI**

RESEARCHERS:  
**ARINDO AUGUSTO DUQUE NETO**  
**LAÍSSA DAU CARVALHO**  
**LETÍCIA VIEIRA BARBOSA**  
**MARIA FERNANDA CAMPOS GORETTI DE CARVALHO**

TRANSLATION  
**RAFAEL JORDAN DE ANDRADE CAMPOS**

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## INTRODUCTION

In a number of occasions, victims of human rights violations committed by transnational corporations all around the globe perceived how their countries were incapable, and sometimes even unwilling to provide an effective response for the abuses perpetrated. This scenario is a direct consequence of some of the negative effects brought by economic globalization.

The vast majority of the proposed solutions to this issue until now - including the Guiding Principles proposed by professor John Ruggie - have failed dramatically to address the growing asymmetries of our time in a deeper level, for example, the predominantly territorial human rights law vs. a complex web of transnational business operations or the enormous political-economic power of transnational corporations vs. developing countries' dependence on foreign investment<sup>1</sup>.

In an effort to centralize the discussion around the victims, it is necessary to seek alternative regulatory measures to provide an effective remedy, surpassing the accountability obstacles usually faced in the field of human rights. In that sense, one of the best instruments available to improve accountability for violations committed

overseas is the exercise of extraterritorial jurisdiction by the home States of these corporations. This paper aims to briefly analyze under which circumstances should States extend their powers beyond their own territory and how they should fulfill their obligations in this field.

## UNDER WHICH CIRCUMSTANCES SHOULD THE STATES EXERCISE EXTRATERRITORIAL JURISDICTION?

In the current state of affairs of the International legal framework, there are only a handful of exceptional situations where international law imposes an obligation to a State to exercise extraterritorial jurisdiction. This is the case of some international crimes, when committed by natural persons.<sup>2</sup> For example, the Convention Against Torture (CAT) establishes that States must take measures to enact their jurisdiction over certain offences, including when the victim or the offender is a national of the State. In cases where the alleged offender is present in any territory - even if it's not a national -, State parties are obliged to establish jurisdiction if they do not extradite him (Article 5).

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<sup>1</sup> DEVA, SURYA. Regulatory initiatives on business & human rights: Where are the victims? Available in: <<http://business-humanrights.org/en/regulatory-initiatives-on-business-human-rights-where-are-the-victims>> Access in May 18, 2016.

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<sup>2</sup> SCHUTTER, OLIVIER. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations. Available in: <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> Access in May 18, 2016.

However, International Law does not impose any impeditive obstacle to the use of extraterritorial jurisdiction as a tool to make transnational corporations comply with internationally recognized human rights in all spheres of action, including operations abroad.<sup>3</sup> In this matter, the UN Committee on the Rights of the Child emphasizes that States have the obligation to respect and ensure children's rights within their jurisdiction, this one not being limited to "territory". This includes taking measures to address the conduct of non-State actors like global business enterprises registered, domiciled, headquartered or engaged in substantial activities in a State's territory that may negatively impact children's rights in other countries.<sup>4</sup>

There is an extensive list of protections afforded to foreign investors under both general public international law and conventional international law. As a logical counterpart of these "privileges", developed States have a duty to control the conduct of their transnational corporations abroad.<sup>5</sup> That being said, one can argue that the state should also have an obliga-

tion to exercise extraterritorial jurisdiction in the case of human rights violations committed by transnational corporations domiciled in their territory on a basis of active personal jurisdiction (where the perpetrator is a national of the State), especially when the State hosting the activities of the corporation is unable or unwilling to effectively protect the human rights of the peoples living inside its territory.

Using the active personality as a basis of jurisdiction seems especially fit in the case of human rights violations committed by business. Indeed, it seems reasonable to extend the international public law principle of *aut dedere aut judicare*<sup>6</sup> - combined with the principle of solidarity - to transnational corporations as well, in order to prevent that violations remain unpunished. When applied to natural persons, the solidarity principle serves as the basis for the extradition of the perpetrator of crimes or violations. Since corporations can not be extradited, the solidarity principle would take the form of either cooperating in the execution of any decisions reached by the national courts of the host State (that would be exercising extraterritorial jurisdiction over the home State) or of holding

<sup>3</sup> SCHUTTER, OLIVIER. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations. Available in: <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> Access in May 18, 2016.

<sup>4</sup> Committee on the Rights of the Child, General Comment no. 6 (2005). UN Doc. CRC/GC/2005/6, 1 September 2005.

<sup>5</sup> SCHUTTER, OLIVIER. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations. Available in: <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> Access in May 18, 2016

<sup>6</sup> Latin for "either extradite or prosecute". Refers to the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. The obligation arises regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator and victim may be of alien nationality. Hall, Stephen, *International Law* (2006) 2nd ed., Butterworths Tutorial Series, LexisNexis Butterworths.

the company liable in the State of its nationality by the violations committed in the host State.

## DETERMINING THE “NATIONALITY” OF A COMPANY<sup>7</sup>

There is still some debate about what defines the "nationality" of a corporation. In the majority of contexts, the "nationality" will be a direct consequence of the place where that company was incorporated. In other contexts, a "control" test is used to determine the nationality, based on the nationality of the owners, shareholders, managers or any person deemed to be in control of that operation. This is especially the case when deciding if a company is subject to Bilateral Investment Treaties (BITs) - and consequently is qualified to make use of an arbitral court established by such treaties -, where the simple incorporation criterion is not sufficient by itself.

This discussion leads to another more complicated one: in the case of the establishment of a subsidiary company abroad, due to the principle of limited liability, the parent company and the subsidiary are two completely separate legal entities. This mechanism is often used as a shield to protect the parent company from any liability for the actions of subsidiaries abroad.

<sup>7</sup> Professor Olivier De Schutter wrote a paper discussing this topic in a deeper level, called "Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations".

To tackle both of these issues it is necessary to take a different approach to the relationships between parent companies, subsidiaries and business partners abroad. Transnational corporations are nothing more than a group of separate legal entities, interconnected in such a way that it is justified to consider any action taken by a subsidiary as an action taken by the parent company itself. Establishing this presumption is core to impose direct liability to the parent company, reducing the possibility of the home State declaring itself as *forum non conveniens*<sup>8</sup>.

## FORUM NECESSITATIS

In order to keep all possibilities open for those stripped from their most basic human rights, one could also argue the need for a "forum of necessity" rule in a binding instrument regarding Business and Human Rights. The *Forum Necessitatis* doctrine is a basis of universal jurisdiction that can be used as an option in circumstances of absolute denial of justice<sup>9</sup>, allowing a court to declare itself capable of hearing a case when there is no other available forum. As defined by one scholar:

<sup>8</sup> *Forum non conveniens* is a discretionary power that allows courts to dismiss a case when another court, or forum, is much better suited to hear the case. This doctrine is commonly used in cases involving human rights violations in common law jurisdictions.

<sup>9</sup> ASCENSIO, H. Extraterritoriality as an instrument. Available in: <<http://business-human-rights.org/sites/default/files/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf>>. Access in May 18, 2016.

The forum of necessity doctrine allows a court to hear a claim, even when the standard tests for jurisdiction are not fully satisfied, if there is no other forum where the plaintiff could reasonably seek relief. It is thus the mirror image of *forum non conveniens*, which allows defendants to establish that a court should not hear a claim, despite the tests for jurisdiction being met, based on a range of discretionary factors. While the doctrines operate on similar principles, *forum non conveniens* gives defendants an extra chance “to kill” a case, whereas forum of necessity gives plaintiffs an extra chance to save it.<sup>10</sup>

## CONCLUSIONS AND RECOMMENDATIONS

The development of a new instrument to provide strong regulation in the field of human rights violations perpetrated by transnational corporations has the potential to solve a myriad of problems and open issues that make it extremely difficult to provide compensation for those in need: the victims of those violations. The exercise of extraterritorial jurisdiction is a complex subject and a treaty that defines clearly what are the State's obligations and determines rules for cooperation between States is the most effective way to prevent

the legal uncertainty that comes from States unilaterally expanding its powers beyond their territorial lines, one of the complains commonly posed by business organizations.

The advent of a binding instrument would also provide a common framework for deciding how to solve conflicts of jurisdiction, establishing rules of cooperation between several competent States. As pointed out by professor Hervé Ascensio, “the principle of cooperation requires countries to settle conflicts relating to extraterritorial jurisdiction peacefully and in good faith. This obligation has led to the conclusion of many treaties spelling out the normative jurisdiction authorized or prescribed by international law in a given field”<sup>11</sup>. This also facilitates the use of the doctrine of *forum non conveniens* in a more adequate way.

With that in mind, a legally binding instrument regarding Business and Human Rights should explicitly state that transnational corporations' home States are obligated to establish liability of legal persons for violations of human rights whenever the host State is unable or unwilling to act to protect these rights or the victims do not have access to effective redress in that State.

<sup>10</sup> GOLDHABER, MICHAEL. Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, 3 U.C. IRVINE L.REV. 127, 137 (2013).

<sup>11</sup> ASCENSIO, H. Extraterritoriality as an instrument. Available in: <<http://business-human-rights.org/sites/default/files/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf>>. Access in May 18, 2016.

Home States must also impose a due diligence obligation on transnational companies domiciled in its territories, making sure that these companies will be held accountable whenever it appears that the subsidiary, affiliate or business partner - even when the business relation is not that of ownership, but purely contractual - has committed or has been complicit in human rights abuses in operations abroad and the parent company has not taken all measures to prevent that kind of conduct. This due diligence obligation of corporations should comply with the highest level of human rights protections, taking into account the rights contained in all international treaties the home State is a part of.

As suggested by professor Olivier de Schutter<sup>12</sup>, the instrument should also provide provisions for the State where the violations took place to request the home State of the parent company to file proceedings against this company, as well as possibly containing a *forum necessitatis* rule, allowing victims to seek redress in any State where the company responsible for the abuses have a substantial level of operations, in the case of neither the host nor the home State being capable of providing effective remedies.

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<sup>12</sup> SCHUTTER, OLIVIER. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations. Available in: <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> Access in May 18, 2016

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