

Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*

I. Introduction

This paper examines under which conditions States may – or should – exercise extraterritorial jurisdiction in order to improve the accountability of transnational corporations domiciled under their jurisdiction for human rights abuses they commit overseas. The hypothesis is that, where the host State on the territory of which the transnational corporation has invested is unwilling or unable to react to such abuses, in particular by providing remedies to victims, the home State may have an important role to play in order to ensure that corporate abuses are not left unpunished. This report addresses whether, in such cases, the home State has an obligation to exercise extraterritorial jurisdiction, and whether, even in the absence of such an obligation, it may do so, and if so, under which conditions and according to which tools.

The report proceeds in five steps. First, a number of current developments are described, in which the exercise of such extraterritorial jurisdiction by the home States of transnational corporations has been exercised. This description aims at illustrating both the situations which the report has in mind when discussing the question of extraterritorial jurisdiction, and the variety of circumstances in which such extraterritorial jurisdiction may be exercised, as well as the different modalities which have been used in this regard (II.). Second, the different meanings of the notion of extraterritorial jurisdiction are reviewed. This typology is offered for the sake of analytical clarity : it serves to clarify the vocabulary used to describe the different instances of extraterritoriality (III.). Third, the regime of extraterritorial jurisdiction under international law is examined. Focusing on the situation where a State uses this tool in order to protect internationally recognized human rights, this section asks both whether there may exist an obligation, under international law, to exercise extraterritorial jurisdiction in certain situations, and, in the absence of such an obligation, which limits general public international law imposes on the exercise of extraterritorial jurisdiction (IV.). Fourth, the report examines three problems raised specifically in situations where extraterritorial jurisdiction is exercised in order to improve the human rights accountability of transnational corporations. A first problem is the determination of the ‘nationality’ of the corporation, in a sense which may justify the exercise of extraterritorial jurisdiction based on the active personality principle – a principle which, as we shall see, is at once the firmest basis for justifying extraterritoriality, and which presents clear advantages in the current international division of labor brought about by economic globalization. A second problem is to overcome the separation of legal personalities, in the typical situation where the corporation is composed of a myriad of distinct legal entities, creating what is generally referred to as the need to ‘pierce the corporate veil’. A third problem concerns the need to organize the coexistence between the prescriptions of the State having adopted a legislation which is intended to produce an extraterritorial effect, and those contained in the laws of the territorial State (V.). The paper then concludes on the need to consider the adoption of an international instrument aimed at clarifying, and where necessary at extending, the obligations of States to protect human rights against any violations of these rights originating in the activities of

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transnational corporations. This would constitute the most promising way to fulfill the potential of extraterritorial jurisdiction as a tool against the impunity of transnational corporations for human rights abuses they commit or participate in, while at the same time limiting the risks involved in an uncoordinated, and therefore possibly anarchical, deployment of extraterritorial jurisdiction (VI).

II. Extraterritorial jurisdiction as a tool to control transnational corporations : the precedents

This report is prepared against a background characterized by an increasingly frequent use by States of extraterritorial jurisdiction in order to control transnational corporations. Four factors may be put forward, which explain this development. In addition however, certain particularly remarkable examples of extraterritorial jurisdiction, while not intended initially in the instruments which have made it possible, have resulted from the inventive use of certain legislations by plaintiffs, in particular victims of certain forms of behavior of persons domiciled in another State that in the State where the damage occurred (1.). This brief review of instances of extraterritorial jurisdiction illustrates the variety of circumstances where it is used, and the diverse forms it may take (2.).

1. Explaining the use of extraterritorial jurisdiction

a) *Combating international crimes*

The development of extraterritorial jurisdiction may be attributed, first, to the spectacular progress of international criminal law. In order to comply with the requirements of international humanitarian law¹ or with those of the Convention against Torture,² or – more recently – in the acts they have adopted in order to implement the Rome Statute of the International Criminal Court,³ a number of States have included in their criminal legislation provisions allowing for the investigation and prosecution of international crimes, even when such crimes are committed outside their national territory, and whether or not the perpetrators or the victims are nationals of the State concerned. To a significant degree, these provisions may be applied to legal persons, under certain conditions, either because the national criminal law as a matter of principle considers that legal persons may commit the offences it defines,⁴ or because legal persons have been included, alongside natural persons, under the specific acts relating to international crimes.⁵

b) *Addressing transnational crimes*

¹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (U.N. GAOR, 39th Sess., Suppl. No. 51, U.N. Doc. A/39/51 (1985), entered into force on 26 June 1987).

³ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, reprinted in 37 I.L.M. 999 (1998), entered into force on 1 July 2002.

⁴ This is the case, for instance, in Belgium. See Jan Wouters and Leen De Smet, 'De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het light van de Belgische genocidewet', in Eva Brems and Pieter Vanden Heede (dir.), *Bedrijven en mensenrechten. Verantwoordelijkheid en aansprakelijkheid*, Maklu, Antwerpen-Apeldoorn, 2003, pp. 309-338.

⁵ For example, a recent study coordinated for the Fafo by Mark B. Taylor, Anita Ramasastry and Robert C. Thompson, covering 16 countries from different regions of the world (Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, the Ukraine, the United Kingdom and the United States), arrived at the conclusion that 11 of those countries applied criminal liability to legal persons, and that two more countries do so for certain important offences. It is thus particularly remarkable that, although the International Criminal Court itself does not have jurisdiction to try legal persons – as Article 25(1) of the Rome Statute limits its jurisdiction to natural persons –, most countries surveyed have implemented the Rome Statute without making such a distinction between legal persons and natural persons, and have thus provided for the criminal liability of legal persons for the crimes of genocide, crimes against humanity, and war crimes, as defined in the Rome Statute. See *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries*, Fafo-report 536, Oslo, 2006.

The need to address transnational crimes⁶ such as terrorism, trafficking of human beings, or sexual abuse of children overseas ('sexual tourism'), also explains the use of extraterritorial jurisdiction in a growing number of instances. For instance, in the tradition of a large number of instruments related to the combating of terrorism, our modern equivalent to piracy which all States have not only an interest in combating, but also an obligation to do so, the 2000 International Convention for the Suppression of the Financing of Terrorism⁷ provides in Article 5 that each State Party, 'in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence' as defined by the Convention by reference to the existing international treaties on combating terrorism.⁸ Such liability may be criminal, civil or administrative. Article 7 of the Convention imposes on all States parties to establish their jurisdiction over the offence of financing terrorist activities not only where the offence is committed in the territory of the State concerned or on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed, but also when the offence is committed by a national of that State.⁹ Moreover, the States parties may extend their jurisdiction to the funding of terrorist acts which are directed towards or have resulted in terrorist acts in the territory of or against a national of that State, or against a State or government facility of that State abroad, including diplomatic or consular premises of that State ; or which are committed in an attempt to compel that State to do or abstain from doing any act ; by a stateless person who has his or her habitual residence in the territory of that State ; or on board an aircraft which is operated by the Government of that State.¹⁰ This Convention also prescribes the principle *aut dedere, aut judicare*, imposing on each State party an obligation to establish its jurisdiction over the offences linked to the funding of terrorism where the alleged offender is present in the national territory and it does not extradite that person to any of the States Parties that have established their jurisdiction over the offence.¹¹

A number of recent instruments adopted within the European Union which also encourage the EU Member States to exercise extraterritorial jurisdiction by imposing certain liabilities on the legal persons domiciled on their territory, for activities conducted abroad, also are motivated by the need to combat effectively transnational crimes.¹² The Council Framework Decision of 13 June 2002 on

⁶ This expression is used here for convenience. It is not implied that such 'crimes' necessarily lead to the imposition of criminal sanctions on the legal person. Indeed, even where the liability of the natural person found to have committed the offence may be criminal, the liability of the legal person may be administrative or civil.

⁷ Adopted by UN General Assembly resolution 54/109 of 25 February 2000.

⁸ See Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism, referring to an Annex listing the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 ; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 ; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 ; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 ; Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980 ; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988 ; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 ; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988 ; and the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

⁹ Article 7(1)(c).

¹⁰ Article 7(2).

¹¹ Article 7(4).

¹² While the European Union has not been attributed a general competence in the field of criminal law, it may adopt certain measures aiming at combating crimes of a transnational nature. Article 29 EU states that the Union's objective in this area is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia, and that this shall be achieved 'by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud', through police cooperation, judicial cooperation in criminal matters, and approximation, where necessary, of rules on criminal matters in the Member States.

combating terrorism¹³ imposes an obligation on each Member State to establish its jurisdiction on terrorist offences as defined in this instrument, *inter alia*, where the offender is one of its nationals or residents, or the terrorist act has been committed for the benefit of a legal person established in its territory.¹⁴ The Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings,¹⁵ which provides that the Member States shall render punishable certain acts connected with trafficking in human beings, encourages the exercise of extra-territorial jurisdiction as regards offences committed either by a national of the State concerned, or for the benefit of a legal person established in the territory of that State. Although extraterritorial jurisdiction thus defined is not compulsory, the EU Member States have generally provided for this extension in their implementing legislation.¹⁶ A similar provision may be found in the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.¹⁷

c) Exerting pressure on the host State

A third explanatory factor of the increased use of extraterritorial jurisdiction, especially in order to control transnational corporations in their operations abroad, resides in the use of extraterritoriality in order to achieve political objectives, by putting pressure on the States in which such operations take place. A prime example are the measures adopted by the United States targeting persons doing business in Cuba. In 1996, as part of a broader campaign to seek international sanctions against the Castro government in Cuba, and to encourage a transition government leading to a democratically elected government in Cuba, the United States adopted the Cuban Liberty and Democratic Solidarity (Libertad) Act, better known as the Helms-Burton Act. One provision of the Act allows United States nationals who have been expropriated following the 1959 revolution to seek damages against any natural or legal person having ‘trafficked’ such ‘confiscated property’; another provision orders the Secretary of State to deny any visa to individuals found to have trafficked confiscated property, as well as to any ‘corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national’.¹⁸

¹³ OJ L 164 of 22.6.2002, p. 3.

¹⁴ Article 9(1), (c) and (d) of the Framework Decision on combating terrorism. Article 9(1)(d), which requires that each EU Member State establish its jurisdiction over terrorist acts committed for the benefit of a legal person established on its territory, has been only partially implemented: this provision, according to a 2004 European Commission report on the implementation of the Framework Decision (Report based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism (COM(2004)409 final, of 8.6.2004)), had at the time ‘only been expressly transposed in Austria and will be in Ireland, although it appears that Italy, Portugal and Finland would also be in line with this provision’.

¹⁵ OJ L 20 of 1/8/2002, p. 1.

¹⁶ Article 6(2) of the Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings. The Commission has reported ‘that the vast majority of the Member States establish jurisdiction over offences that are committed abroad by their own nationals according by article 6(1)(b). This is particularly important as trafficking in human beings often has a trans-national dimension’ (Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (SEC(2006) 525) (COM(2006)187 final of 2.5.2006)). According to this same report, the balance is less positive with regard to Article 6(1)(c) of the Council Framework Decision concerning jurisdiction over offences committed for the benefit of a legal person established in the territory of the Member State.

¹⁷ OJ L 13, 20.1.2004, p. 44. See Article 8(2) of the Framework Decision.

¹⁸ See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Codified in Title 22, Sections 6021-6091 of the U.S. Code) P.L. 104-114. Sect. 302 of the Act (Liability for trafficking in confiscated property claimed by United States nationals), which is located under Title III of the Act (Protection of Property Rights of United States Nationals), stipulates that ‘any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages (...)’. Title IV of the Act relates to the exclusion of certain aliens from the United States. The literature on the Helms-Burton Act is voluminous. The studies most closely related to the inquiry in this paper are Andreas F. Löwenfeld, ‘Congress and Cuba: The Helms-Burton Act’, *American Journal of International Law*, vol. 90 (1996), p. 419-434, and the rejoinder to this critique by Brice M. Clagett, ‘Title III of the Helms-Burton Act is consistent with international law’, *American Journal of International Law*, vol. 90 (1996), pp. 434-440; August Reinisch, ‘A Few Public International Law Comments on the ‘Cuban Liberty and Democratic Solidarity (Libertad) Act’ of 1996’, *E.J.I.L./J.E.D.I.*, 1996-4, vol. 7, p. 55; J. L. Snyder and S. Agostini, ‘New U.S. Legislation to Deter Investment in Cuba’, *Journal of World Trade*, 1996, vol. 30, No. 3, pp. 37-44; Brigitte Stern, ‘Vers la mondialisation juridique? Les lois Helms-Burton et D’Amato-Kennedy’, *Revue générale de droit international public*, 1996, pp. 979-1003; L. Weerts and Denis

d) Improving the ethics of globalization

A fourth factor leading to the use of extraterritorial jurisdiction is the perceived need to moralize the behavior of business in the context of economic globalization, in particular where States have been encouraged to exercise some form of extraterritorial jurisdiction in order to improve the accountability of corporations. When the Guidelines for Multinational Enterprises initially adopted on 21 June 1976 by the Organization for Economic Cooperation and Development (OECD)¹⁹ underwent their most recent revision in 2000, leading to a revitalization of the supervisory mechanism and to the introduction of a general obligation on multinational enterprises to ‘respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments’,²⁰ it was also made clear that the OECD Member States and the other countries adhering to the guidelines were to encourage their multinationals to observe these guidelines wherever they operate. In the introduction to the OECD Declaration on International Investment and Multinational Enterprises, the OECD Member States ‘jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines’. Para. 2 of the operative part, under the chapter of the Guidelines relating to the ‘Concepts and principles’, states :

Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.

The OECD Guidelines on Multinational Enterprises are not a legally binding instrument. But we find similar references to the extraterritorial jurisdiction which States may exercise in a number of treaties, some of which are closely related to situations of human rights abuses, and also motivated by the perceived need to moralize economic globalization. Article 4(2) of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions²¹ provides that ‘Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official’.²² The reference to the ‘nationals’ of the States parties includes both natural persons and legal persons.²³ The 2003 UN Convention against Corruption also provides that a State

Chaïbi, ‘Le Titre III de la législation Helms-Burton et le droit international’, *Revue belge de droit international*, 1997/1, pp. 99-132.

¹⁹ The Declaration was adopted by the Governments of the OECD Member countries in 1976. It has been adhered to by the 30 OECD Member countries, but has also been subscribed to, in addition, by Argentina (22 April 1997), Brazil (14 November 1997), Chile (3 October 1997), Estonia (20 September 2001), Israel (18 September 2002), Latvia (9 January 2004), Lithuania (20 September 2001), Romania (20 April 2005) and Slovenia (22 January 2002).

²⁰ See para. 2 of the Chapter on ‘General Policies’. On the context in which the OECD launched the revitalization of the Guidelines for Multinational Enterprises, see J. Murray, ‘A new phase in the regulation of multinational enterprises: the role of the OECD’, 30 *Industrial Law Journal* 255 (2001); Jan Huner, ‘The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises’, in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, at 197-205.

²¹ The OECD Bribery Convention was adopted on 21 November 1997 and entered into force on 15 February 1999. On the contribution of this instrument, see P. M. Nichols, ‘Regulating Transnational Bribery in Times of Globalisation and Fragmentation’, 24 *Yale J. Int’l L.* 257 (1999).

²² Moreover, Article 4(1) provides that ‘Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory’. Thus for instance, the home State, party to the Anti-Bribery Convention, must establish its jurisdiction when a decision is made in the headquarters of a transnational corporation located in that State to bribe a foreign public official in another State where the corporation seeks to develop its activities.

²³ See Article 2 of the Convention (‘Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official’). This does not impose an obligation to establish the *criminal* liability of legal persons, since such liability may be civil or administrative. See para. 20 of the Commentaries to the OECD Anti-Bribery Convention, adopted by the Negotiating Conference on 21 November 1997.

party may establish its jurisdiction over an offence as established under the Convention where it is committed by a national of that State party.²⁴

e) Extraterritorial jurisdiction as an unintended consequence

The increased reliance on extraterritorial jurisdiction, in sum, may result from States understanding that they should join their efforts in addressing certain collective problems such as international or transnational crimes or unethical behavior by businesses in their operations overseas. Or it may be developed because a State pursues an individual strategy in pursuit of a political objective. In other cases however, extraterritorial jurisdiction may develop without having been intended by the instruments which have made it possible, but rather, as a consequence of the inventive use by victims of certain legislations, whose primary aim was not necessarily to establish a form of extraterritorial jurisdiction. The most spectacular example is the revival since 1980 of the Alien Tort Claims Act in the United States, which has allowed foreign victims of serious human rights abuses committed by corporations having sufficiently close links to the U.S. to seek damages. The Alien Tort Claims Act, a part of the First Judiciary Act 1789, provides that '[t]he 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.'²⁵ The United States federal courts have agreed to read this provision as implying that they have jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, victims of violations of international law²⁶ wherever such violations have taken place, seek damages from enterprises which have committed those violations or are complicit in such violations as they may have been committed by State agents.²⁷

Similarly, under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁸ – which ensures the integration in European Community law of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters²⁹ –, the Member States of the European Union are obliged to recognize the jurisdiction of their national courts when civil claims are filed against persons (whether natural or legal persons) domiciled on their territory,³⁰ wherever the damage has occurred, and whatever the nationality or the place of residence of the claimants, including in situations where an alternative forum open to the claimants would appear to present closer links to the dispute or to be more appropriate³¹ : this rule may be used in the context of human rights litigation, for violations committed abroad, especially in developing countries where European multinationals operate, as has been explicitly envisaged by the European Parliament.³²

²⁴ See Art. 42(2), b). The Convention was adopted by the UN General Assembly by resolution 58/4 of 31 October 2003 and entered into force in December 2005, after the number of 30 ratifications was reached.

²⁵ 28 U.S.C. §1350.

²⁶ The United States Supreme Court considers that, when confronted with such suits, the U.S. federal courts should 'require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights of ambassadors, and piracy]' which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, No. 03-339, slip op. at 30-31 (US Sup Ct 2004)).

²⁷ See in particular *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (complicity of Unocal with human rights abuses committed by the Burmese military); and *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *2 (S.D.N.Y., 2002) (complicity of Shell Nigeria and its parent companies Shell UK and Royal Dutch in the human rights abuses committed by the Nigerian police).

²⁸ OJ L 12 of 16.01.2001, p. 1.

²⁹ OJ L 299, 31.12.1972, p. 32.

³⁰ Article 2 (1) of Regulation No 44/2001 imposes an obligation on all the national courts of EU Member States to accept jurisdiction over civil suits filed against defendant domiciled in the forum State. While an identical rule was already present in the 1968 Brussels Convention, Regulation No 44/2001 adds, for the sake of legal certainty, that for the purposes of the Regulation, 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business'.

³¹ See the judgment of the European Court of Justice of 1 March 2005 in Case C-281/02, *Owusu* [2005] ECR I-1383.

³² See European Parliament resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 – C5-0161/2002 – 2002/2069(COS)) (30 June 2002), where the European Parliament

2. The varieties of extraterritorial jurisdiction

What all these examples have in common is that States, acting either unilaterally or in order to implement international agreements, have established their jurisdiction over the activities of legal persons, including transnational corporations, in situations where such activities have taken place, in totality or in part, outside the national territory. The factors connecting such activities to the forum State have been varied. In most cases, the link has been the 'nationality' of the corporation, or the fact that it was domiciled on the territory of the forum State, thus justifying that extraterritorial jurisdiction be based on the principle of active personality. In other cases however, the principle of protection or the 'effects' doctrine have been invoked in order to justify the exercise of extraterritorial jurisdiction. Under the former principle, the existence of serious threats to the security of the State concerned, to its creditworthiness or to other important State interests may justify extraterritoriality : this principle may provide the best explanation for certain provisions of the Helms-Burton Act or of the UN Convention for the Suppression of the Financing of Terrorism. Under the latter principle, a State may react to situations which, although originating abroad, produce substantial effects on its territory ; again the UN Convention for the Suppression of the Financing of Terrorism offers an example.

In certain of these cases, the exercise of extraterritorial jurisdiction has consisted in providing that national courts will be competent to apply rules of international law (as implemented in the national legal system) to the activities of corporations abroad. In other cases, such a jurisdiction on national courts has been established without prejudice of the applicable law : thus for instance, the 'Brussels I' Regulation adopted within the European Union is a purely jurisdictional statute, and it will generally lead the national courts of the EU Member States, when deciding on civil claims brought against European multinationals having committed torts abroad, to apply the local rules of the State where the damage occurred, and not those of the forum. In yet other situations, the exercise of extraterritorial jurisdiction has led a State to extend the application of its own, municipal laws to situations having occurred abroad : this is the case, certainly, of the Helms-Burton Act, and arguably at least of the Alien Tort Claims Act ; moreover, in situations where the international law requirements remain vague and leave to the States to whom they are addressed a wide leeway as to how they should be implemented, it may be a matter of appreciation whether the State extends its national legislation to situations which have occurred outside its national territory, or whether it has acted as the agent of international law.

The reception of these developments has been mixed. Some have seen the growing use of extraterritorial jurisdiction as a tool to counterbalance certain of the most negative effects of economic globalization : they welcome the reassertion by the State of its regulatory capacity, which the rise of transnational economic actors was threatening to marginalize ; and they are encouraged in particular by the thought that, complementing in this respect the work performed by international tribunals and in particular that of the International Criminal Court, the fight against international crimes by extraterritorial criminal statutes might significantly help combat the impunity of corporations for international crimes which they commit or in which they share complicity. Others however, have feared the hegemonic implication of such extraterritorial statutes. Typically, such statutes have allowed the industrialized States to reach situations occurring on the territory of developing States, thus worsening further the imbalance of power characteristic of the current state of international relations.³³ Moreover, serious questions have been raised as to the compatibility of extraterritorial

'Draws attention to the fact that the 1968 Brussels Convention as consolidated in Regulation 44/2001 enables jurisdiction within the courts of EU Member States for cases against companies registered or domiciled in the EU in respect of damage sustained in third countries; calls on the Commission to compile a study of the application of this extraterritoriality principle by courts in the Member States of the Union; calls on the Member States to incorporate this extraterritoriality principle in legislation'.

³³ It has been noted for instance that the effectiveness of the sanctions provided in the Helms-Burton Act result from the importance of the United States market to companies : 'Given the doubtful prospects of business in Cuba (...), and the huge potential of the American market, the proponents of Helms-Burton are fairly confident that persons who contemplate investment in Cuba or transactions with Cuba will change their minds, and that those who have already made such deals will look ways to unload their investments or terminate their contracts' (Andreas F. Lowenfeld, 'Congress and Cuba: The Helms-Burton Act', cited above, at 429). The imbalance of power between the nations to effectively induce compliance with their

jurisdiction, in certain of the examples cited above, with the requirements of international law, and in particular with the principle of non-interference in the internal affairs of each State.

With the exception of the ‘Brussels’ Regulation adopted within the European Union, which moreover is an instance of adjudicative extraterritorial jurisdiction rather than of prescriptive extraterritorial jurisdiction,³⁴ all the instruments mentioned may be described as seeking to combat specific human rights abuses, or – as in the case of corruption – forms of behavior which are closely related to human rights abuses.³⁵ The question has now arisen whether this solution should be further extended, or even generalized. Especially where the territorial State hosting the activities of the corporation is unwilling or unable to effectively protect the human rights of populations under its jurisdiction against the activities of foreign corporations, do there exist sufficiently weighty reasons to impose on the home State of the corporations concerned an obligation to exercise extraterritorial jurisdiction over their activities? Even in the absence of such an obligation, should the home States at least be authorized to exercise such jurisdiction? The following section clarifies the use of terminology (III.). The questions of public international law raised by the exercise of extraterritorial jurisdiction are then discussed in more detail (IV.).

III. The meanings of extraterritorial jurisdiction

Extraterritorial jurisdiction may take a number of forms. What all these forms have in common is that a State seeks to influence the conduct of persons, acts or property outside its national territory.³⁶ But the means chosen are diverse, and the vocabulary used to describe these different notions has not been uniform in legal doctrine.³⁷ At the purely descriptive level – i.e., leaving aside for the moment the question of the admissibility of extraterritorial jurisdiction under international law –, the following typology may be proposed.

A first context in which the notion of extraterritorial jurisdiction is occasionally referred to may be easily disposed of. A State may seek to intervene on the national territory of another State, by deploying the activity of its organs on that territory (enforcement extraterritorial jurisdiction). However, organs of one State may not be physically present or perform their functions in the territory of another State without the consent of the latter State. This prohibition follows from the principles of the territorial integrity and the independence of States, now guaranteed under Article 2, para. 4 of the Charter of the United Nations, but which have their origin in the notion of territorial sovereignty itself. As was noted famously by Max Huber, the sole arbitrator in the *Island of Palmas Case*: ‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations’.³⁸ It is clear for instance that, whether or not the exercise of its extraterritorial adjudicative jurisdiction in that case was justified under the principle of universal jurisdiction, the forcible abduction of A. Eichmann from Argentina in order to ensure that he

laws implies that the acceptability of extraterritorial jurisdiction – rather than a stricter insistence on the principle of territorial jurisdiction – will benefit the most powerful States.

³⁴ On this distinction, see section III below.

³⁵ Even the Helms-Burton Act protrays itself as seeking to provide remedies to the U.S. citizens whose right to property has been violated following the confiscations by the Cuban regime after the 1959 revolution.

³⁶ It is understood that the national territory includes the land, internal waters, territorial sea and adjacent airspace.

³⁷ See, e.g., Bernard H. Oxman, ‘Jurisdiction of States’, in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 55-60, at p. 55; Frederick Mann, ‘The Doctrine of Jurisdiction in International Law’, *Recueil des cours de l’Académie de droit international*, t. 111, 1964-I, pp. 1-162, at p. 1; Derek W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, *B.Y.I.L.*, vol. 53, 1982, pp. 1-26, at p. 1; Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford Univ. Press, 2003, at p. 297.

³⁸ *Island of Palmas Case (Netherlands v. United States of America)*, Award of 4 April 1928, United Nations, *Reports of International Arbitral Awards*, vol. II, 1928, pp. 829-871, at p. 838.

would be tried in Israel under the Nazi Collaborators (Punishment) Law adopted by the State of Israel, was in violation of this prohibition under international law.³⁹

This first understanding of extraterritorial jurisdiction will not retain us further. Two other meanings are both more relevant to our purposes, and more delicate to manipulate. First, a State may attribute to its jurisdictions a power to adopt decisions which concern situations having arisen abroad (adjudicative extraterritorial jurisdiction). This occurs either where criminal procedures may lead to convictions for acts committed abroad ; or where civil courts declare themselves competent to adjudicate in proceedings which relate to extraterritorial situations. Where criminal proceedings are concerned, the national criminal law (the criminal law of the forum State) will necessarily be applied, although in certain cases it may be required, for that criminal law to apply to acts committed abroad, that the criminal law of the territorial State defines the same behaviour as an offence (requirement of double criminality).⁴⁰ In contrast, where civil proceedings concern extraterritorial situations, the applicable law will be either the law of the forum State, or the law of the territorial State, depending on the rules relating to conflicts of laws contained in the private international law of the forum State.

Second, a State may adopt legislation intending to have an extraterritorial effect, i.e., establishing norms governing persons, property or conduct outside the national territory (prescriptive extraterritorial jurisdiction). It may, for instance, provide that certain forms of behaviour will constitute offences, wherever they take place, and decide that it may seek to prosecute such offences, either if the person suspected of having committed such offences is found on the national territory, or by requesting the extradition of that person. Or, to take an example from the civil law, it may stipulate the conditions for a marriage involving one of its nationals to be considered valid, wherever the marriage is celebrated.

As both these examples illustrate, whether or not such extraterritorial legislations will have any efficacy depends on the ability of the State concerned to secure the collaboration of other States in giving effect to such legislations – by extraditing a suspect, for instance, or by applying the law of the first State to the marriage of that State’s national celebrated abroad –, unless the State having adopted extraterritorial legislations in fact has effective control over the persons or property concerned and provides that its jurisdictions are competent (for instance, the person suspected of the offence is on the national territory ; or the spouses seek to have their marriage recognized in the State concerned). In that sense, the exercise of prescriptive extraterritorial jurisdiction is the form of extraterritorial jurisdiction which is least threatening to the sovereignty of the other States, in particular the territorial State : its efficacy depends on whether the territorial State will allow the extraterritorial legislation of another State to have an effect on persons, acts or property on its national territory.⁴¹ For this reason,

³⁹ See *The Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (1961), reprinted in 36 ILR 18, at 26 (judgment of 11 December 1961); *Attorney General of Israel v. Eichmann*, Israel Supreme Court (1962), reprinted in 36 ILR 28. See the note by Covey Oliver, *American Journal of International Law*, Vol. 56, No. 3 (July 1962), pp. 805-845 ; and James Fawcett, ‘The Eichmann Case’, *B.Y.I.L.*, vol. 38, 1962, p. 181.

⁴⁰ See para. 31 of the Explanatory Report to the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters (E.C.T.S. n° 73), opened for signature on 15 May 1972 (‘Under criminal law, in contrast to private law, the applicable law is almost invariably that of the State which has competence and there are many good reasons to maintain this principle’); or *Extraterritorial Criminal Jurisdiction*, Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set up by the European Committee on Crime Problems (CDPC), Council of Europe, 1990, at p. 20 (‘Legislative jurisdiction and judicial jurisdiction coincide in the case of criminal law. The national courts apply, in principle, even with respect to offences which may have been committed outside national territory’).

⁴¹ Indeed, it follows from the principle of exclusivity of the sovereignty of the territorial State that foreign legislation may not have an effect on that State’s territory unless it agrees to such effect being produced. In their most recent revision of the treatise of Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet write : ‘...le principe de l’exclusivité de la souveraineté territoriale autorise un Etat à s’opposer aux activités concurrentes des autres Etats sur son territoire. Il lui est donc possible d’y interdire la mise en oeuvre de la législation étrangère ; et c’est en cela – et en cela seulement – que consiste le principe de l’interdiction de l’application extra-territoriale du droit. Le droit international reconnaît aux Etats une compétence normative extra-territoriale ; il exclut en revanche toute compétence d’exécution extra-territoriale forcée’ (P. Daillier and A. Pellet, *Droit international public*, Paris, L.G.D.J., 7ième éd., 2002, n°334, p. 506). The same distinction is clearly made in President Guillaume’s individual opinion appended to the judgment of 14 February 2002 delivered by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, where he notes that, under traditional international law, ‘the principle of territorial sovereignty did not permit of any exception in respect of

the fears of ‘judicial chaos’ expressed by those who believe that the order of international law – based on the cardinal idea that States are sovereign on their territory – would be threatened by the expansion of ‘universal jurisdiction’ over international crimes,⁴² and by the authorization given to each State to legislate about situations located outside the national territory, may be exaggerated. In his individual opinion appended to the judgment of the International Court of Justice in the ‘Yerodia’ case, President Guillaume states that ‘at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute [international] crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community’. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward’.⁴³ This underestimates the fact that, for the exercise of ‘universal jurisdiction’ to be effective at all, it necessarily requires the consent of the State where the person is found if, as is hypothesized, that person is not on the territory of the State seeking to exercise such extraterritorial jurisdiction.⁴⁴

However, while the exercise of prescriptive extraterritorial jurisdiction may, in theory, be detached from the exercise of adjudicative extraterritorial jurisdiction, in practice the latter is always implied by the former : it would hardly be conceivable for a State to seek to influence situations outside the national territory by the adoption of extraterritorial legislation, while at the same time denying to its courts the power to accept jurisdiction over cases relating to such situations, to which such legislation is applicable. There is, in that sense, an intimate connection between adjudicative and prescriptive extraterritorial jurisdiction. As a result, the choice for the forum State is really between three – not four – possibilities : it may deny its courts any competence over a dispute whose constitutive elements are located outside the national territory (in which case no extraterritorial jurisdiction is being exercised) ; it may accept that its courts will have jurisdiction over such disputes, without however extending its substantive law to such situations, and therefore allowing for the application of foreign law, as designated by the choice of law rules of the forum (adjudicative extraterritorial jurisdiction, but without prescriptive extraterritorial jurisdiction being exercised) ; finally, it may choose not only to recognize its courts such power, but also to apply its own, municipal law, to the dispute (thus combining adjudicative and prescriptive extraterritorial jurisdiction). A variant to this last option is the situation where, by the adoption of a national legislation to which an extraterritorial scope of application is recognized, a State seeks to implement a rule of international law. Whether international law obliges States to exercise extraterritorial jurisdiction in any of these meanings, and whether, in the absence of such an obligation, it allows States to use to tool of extraterritoriality, is the object of the following section.

IV. Extraterritorial jurisdiction under international law

In order to define the regime of extraterritorial jurisdiction under international law, this section relies on two further distinctions. We ought, first, to make a distinction between situations where international law imposes an obligation to exercise extraterritorial jurisdiction (both prescriptive and

coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State’s power in some cases to exercise its judicial jurisdiction over offences committed abroad’ (at para. 6). The term ‘coercive action’ refers to what is referred to in this paper as ‘enforcement (extraterritorial) jurisdiction’.

⁴² ‘Universal jurisdiction’ is defined here, in the narrowest sense of the expression, as the exercise of extraterritorial jurisdiction whereby a State adopts legislation, and provides that its jurisdictions will be competent to apply such legislation, without any connecting factor to that State, including the presence of the defendant. See hereunder, text corresponding to notes 63-67.

⁴³ At para. 15.

⁴⁴ Pierre Mayer draws the conclusion that the freedom of the State to exercise (prescriptive and adjudicative) jurisdiction is complete, since the effectiveness of such extraterritorial prescriptions remain dependent on the enforcement by the territorial sovereign. See Pierre Mayer, ‘Droit international privé et droit international public sous l’angle de la notion de compétence’, *Revue critique de droit international privé*, 1979, p. 546 : ‘C’est parce que les normes n’ont d’incidence sur la réalité que dans la mesure où elles conditionnent l’attitude des organes de contrainte que la sphère spatiale de compétence normative de chaque Etat ne comporte aucune limite’.

adjudicative) in order to ensure that certain international crimes or other violations of international law will not be left unpunished, and other situations, where – whether or not they are allowed to do so – States are not under such an obligation. Second, within this latter category, we should distinguish between situations where the competence of the State to exercise extraterritorial jurisdiction has been explicitly recognized and situations where, in the absence of such explicit recognition, it remains controversial whether the States may exercise such extraterritorial jurisdiction. In addressing these questions, this section will focus specifically on extraterritorial jurisdiction exercised over *corporations* for violations of *internationally recognized human rights norms*.⁴⁵ As we will see, both the fact that extraterritorial jurisdiction is asserted over legal persons and the fact that it is asserted for human rights abuses are potentially highly relevant to the status of such extraterritorial jurisdiction under international law.

1. The obligation to exercise extraterritorial jurisdiction

In order to combat impunity for the crimes of genocide, war crimes, crimes against humanity, torture and forced disappearances, certain international treaties imposes on all States parties to the relevant instruments – and, arguably, even on other States, on the basis of customary international law – an obligation to establish their jurisdiction over these crimes, even when they are committed abroad. However, this obligation concerns the prosecution for international crimes not of corporations, but of natural persons having committed or participated in such crimes. The implications as regards extraterritorial jurisdiction exercised over legal persons are unclear. While it could be argued that these instruments confirm that it is allowable to establish extraterritorial jurisdiction over such international crimes – indeed, this already is implied by the principle of universality as a basis for the exercise of extraterritorial criminal jurisdiction –, it is clear on the other hand that these instruments do not impose the exercise of such extraterritorial jurisdiction. This section argues, however, that international cooperation with the host State (the State *loci delicti*, in this case) may nevertheless be required (1.1.). In addition, certain indicia seem to indicate the emergence in international human rights law of an obligation of the home State of transnational corporations to adopt measures ensuring that these actors do not commit human rights abuses where they operate (1.2.).

1.1. Extraterritorial jurisdiction and international crimes

a) War crimes, torture and forced disappearances

The Geneva Conventions of 12 August 1949⁴⁶ impose on the Contracting Parties an obligation not only to ‘provide effective penal sanctions for persons committing, or ordering to be committed, (...) grave breaches’ of those conventions,⁴⁷ but also to ‘search for persons alleged to have committed, or to have ordered to be committed, such grave breaches’, and to either ‘bring such persons, regardless of their nationality, before its own courts’, or to ‘hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie

⁴⁵ Which international human rights norms deserve this qualification probably goes beyond the reach of this paper. The basic idea is that, since the Universal Declaration of Human Rights, arguably at least, has by now acquired the status of customary international law, it should be treated as binding on all States, and that the exercise of extraterritorial jurisdiction in order to contribute to the universal respect for the Declaration therefore may be allowable even where a similar exercise of extraterritorial jurisdiction, but for different purposes such as the protection of intellectual property rights, might not be authorized.

⁴⁶ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

⁴⁷ On the notion of ‘grave breaches’, see Article 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 ; Article 51 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 ; Article 130 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 ; and Article 147 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

case'.⁴⁸ Article 85(1) of the Additional Protocol of 8 June 1977⁴⁹ extends these obligations to the breaches defined in this protocol. While these obligations in principle are imposed only on the States parties to these instruments, they are now considered to form part of international customary law, applicable to all States whether or not they have ratified these conventions.⁵⁰ Therefore, in order to contribute to the universal prevention and repression of grave breaches of international humanitarian law as defined by the 1949 Geneva Conventions and the Additional Protocol of 8 June 1977, all States must allow their national jurisdictions to try persons, whatever their nationality and whatever the location where the offences were committed, accused of such crimes. Article 5(2) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁵¹ imposes a similar principle of 'prosecute or extradite' (*aut dedere aut prosequi*) where the person suspected of having committed the crime of torture is found to be present under the jurisdiction of a State party, implying that such State must establish its jurisdiction, both prescriptive and adjudicative, on such person, unless the accused will be tried by another State.⁵²

More recently, forced disappearances have been added to the list of international crimes which may impose on States an obligation either to prosecute the crime, or to extradite the suspected offender, in accordance with the principle *aut dedere, aut judicare*. Article 9(2) of the International Convention for the Protection of all Persons from Enforced Disappearance, which the Human Rights Council has approved and transmitted to the UN General Assembly at its first session,⁵³ provides that

Each State Party shall (...) take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

b) Crimes against humanity and genocide

In contrast to war crimes, torture, or forced disappearances, no international treaties impose on States an obligation to establish universal jurisdiction on the perpetrator of crimes against humanity and genocide who is found on the national territory. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide⁵⁴ provides that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which

⁴⁸ Article 49 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 ; Article 50 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 ; Article 129 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 ; and Article 146 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

⁴⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁰ See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986 (merits), at para. 220 : 'The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.

⁵¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force on 26 June 1987.

⁵² Article 5(2) of the Convention against Torture stipulates : 'Each State Party shall (...) take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States [having jurisdiction over the offence either because the offence has been committed on territory under its jurisdiction, or because the offender is a national of that State, or if appropriate because the victim is a national of that State]'.

⁵³ International Convention for the Protection of All Persons from Enforced Disappearance, Human Rights Council, Report to the General Assembly on the First Session of the Human Rights Council, at 32, U.N. Doc. A/HRC/1/L.10 (2006).

⁵⁴ Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, 78 UNTS 1021.

shall have accepted its jurisdiction' : while Article VII adds that acts of genocide 'shall not be considered as political crimes for the purpose of extradition' and that the States Parties 'pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force', the State where a person suspect of having committed genocide or of having participated in the crime of genocide is found is not under an obligation to prosecute that person, even in the presence of an extradition request which cannot be honored, for instance because this would put the person concerned at a risk of being subjected to torture or ill-treatment. These provisions intend to ensure a universal repression of the crime of genocide by an obligation imposed on all States to cooperate with the State *loci delicti*. They do not of course exclude the *possibility* that other States, for instance the State of the nationality of the alleged perpetrator, may prosecute him.⁵⁵ But neither they do not impose an *obligation* to prosecute on States other than the State on whose territory the crime has been committed.⁵⁶

It may be argued however that, since all States are imposed an obligation to cooperate in the repression of the crime of genocide, they should be considered obliged to provide in their internal legislation for a possibility to prosecute and try a person accused of genocide, either where no State requests the extradition of that person, or where, for whichever reason, the extradition request cannot be honored. This would seem to follow from the views adopted by the International Court of Justice about the specific nature of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, whose prescriptions should be understood in the light of the intention of the United Nations to 'condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations'.⁵⁷ Already in its Advisory Opinion of 28 May 1951 relating to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation', and that 'both (...) the condemnation of genocide and (...) the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)' have a 'universal character', i.e., are obligations imposed on all States of the international community.⁵⁸ In its judgment of 11 July 1996 delivered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, the International Court of Justice took the view that it followed from this that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention'.⁵⁹

Indeed, as regards both genocide and crimes against humanity, the *jus cogens* character of these prohibitions is generally considered to imply an obligation to contribute to their universal repression, which at a minimum requires that a State should not be allowed to lend refuge on its territory to a person who cannot be extradited or for whom no extradition request has been made.⁶⁰ The Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of

⁵⁵ In the Sixth Committee of the General Assembly, where the Convention was negotiated, the delegates agreed to append the following statement to their report : 'The first part of Article 6 contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State' (U.N. Doc. A/C. 6/SR. 134 p. 5). This is quoted in the case of *Attorney General of Israel vs. Eichmann*, Israel Supreme Court (1962), cited above, at para. 23.

⁵⁶ See Menno T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', *Human Rights Quarterly* 23 (2001), pp. 940-974, at p. 945.

⁵⁷ Advisory Opinion of 28 May 1951 relating to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Rep.*, 1951, p. 23.

⁵⁸ *ICJ Rep.*, 1951, p. 23.

⁵⁹ Judgment of 11 July 1996 delivered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary objections, *ICJ Rep.*, 1996, pp. 615-616, para. 31.

⁶⁰ See C. Bassiouni, 'Crimes against Humanity : The need for a specialized Convention', *Columbia Journal of Transnational Law*, 1994, pp. 480-481 ; K.C. Randall, 'Universal Jurisdiction Under International Law', 66 *Texas L. Rev.* 785, 1988, pp. 829-830.

war crimes and crimes against humanity adopted by the UN General Assembly resolution 3074 (XXVIII) of 3 December 1973,⁶¹ state as an objective of the international community that war crimes and crimes against humanity be effectively investigated and the perpetrators put to trial : ‘war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment’ (principle 1). These principles insist on the need for international co-operation in this regard. They even state (principle 5) that ‘persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, *as a general rule in the countries in which they committed those crimes*. In that connection, States shall co-operate on questions of extraditing such persons’. Thus, the primary responsibility for repression lies with the State where the crime was committed. It is clear however that, far from relieving the other States (in particular the State where the perpetrator is found) from their obligations to contribute to this repression where the State *loci delicti* remains passive – unwilling or unable to investigate and prosecute the crime –, such a passivity imposes on the States who may contribute to such repression to do so : any other understanding of these obligations would run counter to the overarching objective of the international community as expressed through these principles, which is to ensure adequate repression not only of war crimes – for which the Geneva Conventions, as we have seen, already provide for the principle *aut dedere, aut judicare* –, but also of crimes against humanity.

Indeed, this would correspond to the trend as illustrated in other soft law instruments, which provide at least indicia about the expectations of the international community concerning the contribution of each State to the repression of international crimes. For instance, when it adopted its Draft Code of Crimes against the Peace and Security of Mankind in 1996,⁶² the International Law Commission proposed (in Article 8 of the Draft Code, relating to the establishment of jurisdiction) that

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20 [genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [crime of aggression], shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Article 9 of the ILC’s Draft Code imposes an obligation to extradite or prosecute, similar to that provided for in Article 5 of the Convention against Torture :

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

What the Draft Code of Crimes against the Peace and Security of Mankind illustrates, therefore, is that genocide and crimes against humanity should be treated – as regards the obligation of States to establish their jurisdiction over such crimes in order to ensure that they are not left unpunished – just like war crimes and torture are treated, respectively under the 1949 Geneva Conventions and the 1977 Additional Protocol, and under the 1984 Convention against Torture. This, it will be noted, is perfectly in line with the Preamble of the Statute of the International Criminal Court, according to which the establishment of the ICC is based on the recognition that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’, and that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.

⁶¹ G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973).

⁶² *Yearbook of the ILC*, 1996, vol. II, Part Two, at 27.

We may conclude, then, that as regards this handful of international crimes – genocide, war crimes, crimes against humanity, torture and forced disappearances –, States are obliged to establish their jurisdiction over such crimes, wherever they are committed and whichever the nationality of the perpetrators or the victims, insofar as those accused of such crimes are found on their national territory. This is an obligation to exercise both prescriptive and adjudicative extraterritorial jurisdiction which, although stated in the relevant treaties only as regards war crimes, torture and forced disappearances, is widely considered to belong to customary international law. However, the instruments or customary norms mentioned above only impose on the States parties an obligation to provide in their legislation for the possibility of prosecuting a person for war crimes or torture committed outside their national territory, whatever the nationality of the victims or the author, and whether or not the State concerned has received an extradition request, *in the event the suspected perpetrator of an international crime is found on their territory*.⁶³ They do not require that the States parties assert a ‘pure universal jurisdiction’, i.e., that they establish their jurisdiction over these international crimes even where the suspected perpetrator is not present on the national territory. ‘Universal jurisdiction’ is defined here as a specific kind of extraterritorial jurisdiction whereby a State adopts legislation, and provides that its jurisdiction will be competent to apply such legislation, *without any connecting factor to that State*.⁶⁴ Understood in this narrow sense, ‘universal jurisdiction’ would require a State, for example, whose authorities receive credible information about international crimes committed abroad, to investigate such crimes, even if the alleged perpetrators are not nationals of that State and that State has none of its nationals among the victims ; and, if the results of the investigation justify this, to launch a prosecution against the authors, leading for example to a request for their extradition wherever they are found. No such obligation to exercise ‘universal jurisdiction’ exists in international law.⁶⁵ As noted by President G. Guillaume in his individual opinion appended to

⁶³ The question whether the obligation to prosecute a person suspected of torture should be recognized even where the State where that person is present has not received an extradition request emanating from another State has been debated during the negotiation of the 1984 Convention against Torture : the answer was clearly in the affirmative. See in particular J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture : A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Martinus Nijhoff Publ., 1988, at p. 133 ; Working Group on the Draft Convention, UN doc. Z/CN.4/1984/72, para. 26 ; and *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet*, [1999] 2 W.L.R. 827.

⁶⁴ The notion of ‘universal jurisdiction’ is generally understood less restrictively in legal doctrine, as referring to the competence of a national court to try a person even if neither the accused, nor the victims are nationals of the forum State, and the crime took place outside the country. See, e.g., Menno T. Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses’, cited above, at pp. 941-942 (‘Under the principle of universal jurisdiction a State is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim’); Cedric Ryngaert, ‘Universal Criminal Jurisdiction over Torture: A State of Affairs After 20 Years UN Torture Convention’, *Neth. Quarterly H.R.*, vol. 23/4 (2005), pp. 571-611, at p. 571 ; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford Univ. Press, 2003, p. 3; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, 2005, pp. 25-26. However, this broader definition of ‘universal jurisdiction’ creates a risk of confusion, since it includes both situations where the suspect is found on the territory of the forum State, and situations where the suspect is not present on the territory, despite the considerable differences which exist between these two instances under international law – as, indeed, implied by the instruments cited above. As noted by judges Higgins, Kooijmans and Burgenthal in their joint individual opinion appended to the judgment of the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the so-called ‘universal jurisdiction’ as exercised, for instance, according to the principle *aut dedere, aut judicare* stipulated in Article 5 of the 1984 Convention against Torture in reality is but a modality of the exercise by a State of its territorial jurisdiction : while ‘by the loose use of language [jurisdiction exercised over a person present on the State’s territory for crimes committed abroad] has come to be referred to as ‘universal jurisdiction’’, ‘this is really an obligatory universal jurisdiction over persons, albeit in relation to acts committed elsewhere’ (joint individual opinion of judges Higgins, Kooijmans and Burgenthal, to the judgment of 14 February 2002 in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, at para. 41).

⁶⁵ A more requiring interpretation has sometimes been given, however, to the terms of the 1949 Geneva Conventions. It has been remarked that Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention, ‘require States parties to *search* for perpetrators and bring them before their own courts wherever they are’, i.e., ‘even when they are outside the territories of States’ parties’ (Menno T. Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses’, cited above, at p. 949 and at p. 954 (emphasis added)). This view is shared by Marc Henzelin, *Le principe de l’universalité en droit international pénal. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, Bruxelles,

the judgment of the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, a review of the international texts establishing the principle *aut dedere, aut judicare* shows that ‘none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law’.⁶⁶ On the other hand, from the fact that international law does not contain an obligation to exercise universal jurisdiction, it cannot be deduced that it prohibits such exercise of extraterritorial jurisdiction. As has been well exemplified by the *Demjanjuk* case – where Israel sought from the United States the extradition of Demjanjuk in order to try him under the 1950 Nazis and Nazi Collaborators (Punishment) Act on which the Eichmann prosecution had already been based –,⁶⁷ the *jus cogens* character of these norms may justify universal jurisdiction being exercised, i.e., any State seeking to establish its jurisdiction over the perpetrators of such crimes wherever they may be found, in order to try them before that State’s courts, even in the absence of any connecting factor with the forum State.⁶⁸ This report returns to the question of the liberty of States to exercise extraterritorial jurisdiction in section IV.2.

Bruylant, 2000, at pp. 354-6. The opposite view has been taken by judge Guillaume in his individual opinion appended to the judgment of 14 February 2002 delivered by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* : see para. 17 of the opinion, according to which these provisions ‘do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction *in absentia*.’ In their joint separate opinion to the same judgment, judges Higgins, Kooijmans and Buergenthal acknowledge that the question is yet unsettled, however they note that the views of Henzelin and Kamminga are not shared by ‘the authoritative Pictet Commentary: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory’ (at para. 31 of the opinion).

⁶⁶ At para. 9. The preceding paragraphs of the opinion examine not only treaties which seek to ensure the universal repression of gross human rights abuses or international crimes, but also treaties relating, e.g., to terrorist acts or to drug trafficking. Adde, para. 12 of the opinion : ‘...international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law’.

⁶⁷ *In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp.544, 558 (N.D. Ohio 1985). See also *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986), and the casenote by Monroe Leigh, *American Journal of International Law*, Vol. 80, No. 3 (July, 1986), pp. 656-658. The 6th Circuit Court of Appeals ruled that, based on the right to exercise universal jurisdiction over offences against the law of nations and against humanity, the United States could extradite an alleged Nazi concentration camp guard to Israel or any other nation. The court recognized that the acts committed by Nazis and Nazi collaborators are ‘crimes universally recognised and condemned by the community of nations’ and that these ‘crimes are offences against the law of nations and against humanity and the prosecuting nation is acting for all nations.’ It did, nevertheless, verify whether the condition of double criminality was complied with, i.e., whether the crimes against humanity as defined in the Nazis and Nazi Collaborators (Punishment) Act adopted by Israel in 1950, corresponded in the case of Demjanjuk to a crime punished under United States law. It should be added however, that in this case, the United States courts cited not only the universal jurisdiction principle, but also the protective principle and the passive personality principle as a basis for the exercise by Israel of its extraterritorial jurisdiction. See Rena Hozore Reiss, ‘The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine’, 20 *Cornell Int’l L. J.* 281, 302-307 (1987). It is that which president Guillaume implicitly refers to, in his opinion delivered in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, where he mentions that ‘the only country whose legislation and jurisprudence appear clearly to [allow for universal jurisdiction exercised in absentia] is the State of Israel, which in this field obviously constitutes a very special case’ (para. 12).

⁶⁸ In support of this proposition, it has become classical to cite the Trial Chamber’s judgment of the International Criminal Tribunal for former Yugoslavia, in Case No. IT-95-17/1-T, *Prosecutor v. Anto Furundzija*, 10 December 1998, § 156, 38 ILM 346 (1999). However, this is not what the Trial Chamber says. It notes, rather, that ‘one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction’. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes’ (emphasis added). This statement does not relate to ‘universal jurisdiction’ in the pure sense of the expression, as it concerns only situations where the alleged torturer is found on the territory of the forum State. Moreover, the judgment affirms that each State is ‘entitled’ to prosecute the crime of torture

c) Legal persons and international crimes

What is the significance of the obligations imposed under the instruments cited above as regards international crimes committed by legal persons, or in which legal persons are complicit ? None of these instruments were drafted with legal persons in mind. It would therefore not be plausible to derive from them an obligation, for instance, for States where a company is incorporated, to launch an investigation against that company, leading possibly to the imposition of effective sanctions, if it appears on the basis of reliable information that the company has taken part in the commission of international crimes.⁶⁹ Moreover, not all States have accepted the concept of criminal liability of corporate bodies – although the international crimes discussed above call, per definition, for sanctions of a criminal nature. At most therefore, the *aut dedere aut judicare* principle – established in order to ensure that the natural persons who are authors of international crimes will not be allowed to seek impunity because of the obstacles facing their extradition – may imply that the imposition by a State of certain sanctions (for instance, the confiscation of assets or the imposition of financial penalties) against a corporation ‘present’ under that State’s jurisdiction, even when the corporation is not considered under the law of the forum State to have its ‘nationality’, should be considered allowable, if it is determined that the corporation has indeed committed or been complicit in an international crime : it should not matter that the crime was committed abroad and is not connected in any way to the forum State except by the ‘presence’ of the corporation on its territory. But this does not bring us any further than the principle of universality itself as a basis for the optional exercise of extraterritorial jurisdiction. It states a mere *possibility* which States may wish to exercise or not : it does not impose an obligation.

One proviso should be added, however. In imposing the principle *aut dedere, aut judicare*, the instruments cited in fact draw precise conclusions from a broader principle, which is the obligation of international cooperation in combating international crimes. The Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity referred to above⁷⁰ state explicitly that ‘States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose’ (para. 3); and that they shall ‘assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them’ (para. 4). Similar references to the obligation of international cooperation, as we have seen, are found in the Preamble to the Statute of the International Criminal Court.

What are the implications of this requirement of international cooperation, if we take into account the difficulties the host State may encounter where it seeks to engage the criminal liability of the corporation operating within its territory, when that corporation is a foreign corporation or belongs to a multinational group led by a parent corporation domiciled abroad ? Legal persons such as corporations cannot be extradited, when found to be present on one State’s territory, in order to face prosecution in another State. The risk is therefore high that they will be left unpunished even in cases where their criminal liability could be engaged under the laws of the host State. Even where the State in which the corporation has committed certain offences launches prosecutions against it, notwithstanding the fact

wherever it took place and whichever the nationality of the author or the victims : it does not state that there exists an ‘obligation’ to do so, and therefore cannot be seen as extending, to all States, the obligations imposed on the States parties to the UN Convention against Torture by Article 5(2) of this instrument.

⁶⁹ It would be tempting to say that, since legal persons are not as such subject to extradition, a State on the territory of which a corporation is ‘present’ through its assets or its business activities is under an obligation to prosecute that person if reliable indications exist that it may have taken part in the commission of international crimes. This temptation should be resisted, since it would stretch the reading of the treaties discussed above far beyond the intentions of their drafters. As argued immediately below, this is without prejudice, however, of the existence of an obligation to take certain measures vis-à-vis the corporation for its operations abroad, which may imply its criminal, civil or administrative liability, where the ability of the host State to effectively combat international crimes committed on its territory in which the corporation has been involved is limited due to the failures of international cooperation.

⁷⁰ See above, note 61.

that it is domiciled abroad, the execution of sanctions imposed on the corporation may require, in order to be effectively imposed, the cooperation of the home State. For instance, the imposition of financial penalties requires that assets of the corporation may be seized, and the assets present on the territory of the host State may not be sufficient ; a judicial winding-up order or the placement under judicial supervision will require the cooperation of the State of incorporation. While such cooperation of the home State will not always be required – the assets located in the host State may be sufficient ; the sanction may consist in the closure of establishments which have been used for committing the offence in the host State –, it will be necessary to obtain in many cases. But such cooperation is rendered extremely problematic by the fact that States have widely diverging approaches as regards not only the principle of criminal liability of corporations, but also the nature of the legal sanctions applicable to any offences they may have been found to have committed. Such divergences may constitute an obstacle to inter-State cooperation in this area. The exercise by the home State of extraterritorial jurisdiction may be seen to compensate, in this respect, for the obstacles facing the territorial (host) State in the effective imposition of criminal liability on the foreign corporation operating within its borders. Such exercise of extraterritorial jurisdiction is in the interest of international solidarity, rather than in the selfish interest of the State concerned : it is therefore a form of extraterritorial jurisdiction which is in principle easier to justify.⁷¹ And it may be seen as deriving from the obligation of international cooperation in the punishment of persons guilty of international crimes, at least in situations where the host State on the territory of which such crimes have been committed is unable to effectively engage the criminal liability of the corporation involved.

1.2. Extraterritorial jurisdiction and other human rights abuses

International crimes are a special case. There exists no general obligation imposed on States, under international human rights law, to exercise extraterritorial jurisdiction (understood here a combination of adjudicative and prescriptive jurisdiction) in order to contribute to the protection and promotion of internationally recognized human rights outside their national territory. In principle, the international responsibility of a State may not be engaged by the conduct of actors not belonging to the State apparatus unless they are in fact acting under the instructions of, or under the direction or control of, that State in carrying out the conduct.⁷² Although the private-public distinction on which this rule of attribution is based is mooted (though not contradicted) by the imposition under international human rights law of positive obligations on States – implying that the State must accept responsibility not only for the acts its organs have adopted, but also for the omissions of these organs, where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by the acts of other non-State actors –, this has been recognized only in situations falling under the ‘jurisdiction’ of the State, i.e., in situations on which the State exercises effective control : outside the national territory, it is not presumed that the State exercises such control, and only in exceptional circumstances will it be considered that the power its organs exercise on persons or property located abroad amounts to that state having ‘jurisdiction’ in a sense which would justify the extension of the positive obligations derived from any international human rights instruments binding upon the State.⁷³ Thus, in the current state of development of international law, a clear obligation for States to control

⁷¹ See below, section IV.2.2. of this report.

⁷² To paraphrase Art. 4 of the International Law Commission’s Articles on State Responsibility, which itself is of course directly inspired by the position adopted by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, [1986] I.C.J. Rep., p. 14. The Articles on State Responsibility for internationally wrongful acts were adopted by the ILC on 9 August 2001; the UN General Assembly has taken note of the Articles in Res. 56/83 adopted on 12 December 2001, ‘Responsibility of States for internationally wrongful acts’.

⁷³ On the extraterritorial application of human rights treaties, see, among many others, the essays collected in F. Coomans and M. Kamminga (eds), *Extraterritorial of Human Rights Treaties*, Intersentia, Antwerp-Oxford, 2004; and Michael J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, 99 *American Journal of International Law* (2005) p. 119; Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’, 89 *American Journal of International Law* (1995) p. 78. For a discussion of recent evolutions under the European Convention on Human Rights, see Olivier De Schutter, ‘Globalization and Jurisdiction : Lessons from the European Convention on Human Rights’, *Baltic Yearbook of International Law*, vol. 6 (2006), pp. 183-245.

private actors such as corporations, operating outside their national territory, in order to ensure that these actors will not violate the human rights of others, has not crystallized yet.

This classical view may be changing, however, especially as far as economic and social rights are concerned. There is a growing recognition that the fact of the interdependency of States should lead to impose an extended understanding of State obligations, or an obligation on all States to act jointly in face of collective action problems faced by the international community of States. In development theory, the concept of global public goods has taken the central place.⁷⁴ In international human rights law, the obligation of international cooperation is being revitalized. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant undertake to ‘take steps, individually *and through international assistance and co-operation*, especially economic and technical’, to the maximum of their available resources, ‘with a view to achieving progressively the full realization of the rights’ recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which ‘States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent’. Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which ‘may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant’. Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take : such international action ‘includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned’.

The preparatory works show that, in adopting these provisions relating to international assistance and co-operation, the drafters of the International Covenant on Economic, Social and Cultural Rights did not wish to impose an obligation on any State to provide such assistance or co-operation at any specified level.⁷⁵ However, this is not to say that no other obligations may be derived from the reference made in Article 2(1) of the Covenant to international assistance and co-operation – that, in other terms, ‘the relevant commitment [would be] meaningless’.⁷⁶ Taking as its departure point both Article 56 of the UN Charter, which imposes on all the Members of the United Nations to ‘take joint and separate action in co-operation with the Organization’, *inter alia*, in order to achieve universal respect for, and observance of, human rights and fundamental freedoms for all, and paragraph 34 of the Vienna Declaration and Programme of Action adopted at the Vienna World Conference on Human Rights of 14-25 June 1993,⁷⁷ the UN Committee on Economic, Social and Cultural Rights has

⁷⁴ See in particular W. D. Nordhaus, *Managing the Global Commons*, MIT Press, Cambridge, MA, 1994, and the contributions emanating from the United Nations Development Programme, in particular I. Kaul, I. Grundberg and M. A. Stern, *Global Public Goods: International Cooperation in the 21st Century*, Oxford Univ. Press, New York, 1999; Office of Development Studies, *Global Public Goods : Taking the Concept Forward*, Discussion Paper 17, UNDP, New York, 2001; and I. Kaul, P. Conceição, K. Le Goulven and R. U. Mendoza (eds), *Providing Global Public Goods : Managing Globalization*, Oxford Univ. Press, New York and Oxford, 2003.

⁷⁵ Ph. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, 9 (1987), pp. 156-229, at pp. 186-192 (see in particular p. 191 : ‘on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance’),

⁷⁶ Ph. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, cited above, at p. 191, who add that ‘In the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant’.

⁷⁷ This states : ‘Increased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms. Governments, the United Nations system as well as

identified certain obligations the States parties to the Covenant owe to populations under the jurisdiction of other States. Of particular interest for our purposes, are the obligations to protect the rights of such populations when they would be threatened by the activities of private actors whose behavior a State may decisively influence.⁷⁸ In the General Comment it devoted in 2000 to the right to the highest attainable standard of health, the Committee noted that

States parties have to respect the enjoyment of the right to health in other countries, and *prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means*, in accordance with the Charter of the United Nations and applicable international law.⁷⁹

A similar statement may be found in the General Comment adopted in 2002 on the right to water :

To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. *Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.*⁸⁰

There is a strong tendency within legal doctrine to insist on the need to impose on States an obligation to seek to influence extraterritorial situations, to the extent that they may exercise influence in fact – or, in other terms, to align the scope of their international responsibility on the degree of their effective power to control.⁸¹ M. Sornarajah has argued eloquently that ‘developed States owe a duty of control to the international community and do in fact have the means of legal control over the conduct abroad of multinational corporations’.⁸² He sees the imposition of such an obligation as the logical counterpart of the extensive protections afforded to foreign investors under both general public international law and conventional international law. While this statement would seem to refer to international law as it should be rather than as it is, this position is not isolated, even if we take it as a statement about the positive state of the law.⁸³ Whether or not, in the current state of international law, there exists an

other multilateral organizations are urged to increase considerably the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures which uphold the rule of law and democracy, electoral assistance, human rights awareness through training, teaching and education, popular participation and civil society’ (UN Doc. A/CONF.157/23, 12 July 1993).

⁷⁸ I have taken the view elsewhere that, whilst the obligation to fulfil the rights of the International Covenant on Economic, Social and Cultural Rights through the imposition of international obligations may not lend itself to precise quantification, and therefore should be considered as non-justiciable even in the event of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights being adopted in order to allow for individual and inter-State communications, the obligation to respect and to protect the rights of individuals situated on the territory of another State may be defined with the required precision for such obligations to be justiciable. See O. De Schutter, ‘Le Protocole facultatif au Pacte international relatif aux droits économiques, sociaux et culturels’, *Revue belge de droit international*, 2006, forthcoming. Other authors adopt a similar view : see Wouter Vandenhole, ‘Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step’, *Neth. Quar. of Human Rights*, vol. 21, n°3, 2003, pp. 423-462, at pp. 445-446; and Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights : A Perspective on Its Development*, Oxford Univ. Press, 1995, at pp. 147-150.

⁷⁹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 39.

⁸⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31.

⁸¹ See, e.g., Sigrun Skogly, *Beyond national borders: States' Human Rights Obligations in International Cooperation*, Intersentia, Antwerpen-Oxford, 2006, esp. chapter 3 (‘Extraterritorial human rights obligations’).

⁸² M. Sornarajah, *The International Law on Foreign Investment*, Cambridge Univ. Press, 2nd ed. 2004, chap. 4. The quote is from p. 169.

⁸³ Magdalena Sepúlveda writes, for instance, that ‘according to the Committee, developed States have an obligation to discourage practices which lead to violations of economic, social and cultural rights in third parties [*sic*; this should probably read as ‘in third countries’, although the correct expression would be ‘in foreign countries’; or perhaps the author meant ‘by third parties’], by penalising harmful behaviour and through the adoption of measures to prosecute perpetrators at the

obligation on each State to protect human rights (especially the rights of the International Covenant on Economic, Social and Cultural Rights) threatened by the activities of private actors which the State is in a position to control, at a minimum, the community of States cannot ignore the fact of the interdependencies created by the activities of such transnational actors, and the need to devise an adequate reaction to the problem of externalities thus posed. Mr El Hadji Guissé, a Special Rapporteur of the UN Commission on Human Rights, has expressed with particular clarity that

The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective.⁸⁴

It is in the spirit of this last quotation that the next section examines whether, even in the absence of an international obligation to exercise extraterritorial jurisdiction, a State may seek to contribute to the protection of human rights outside its national territory, by the adoption of legislation to which an extraterritorial scope of application is attached. Formulated at its most general level, the main question in this regard concerns the limits imposed to the use of extraterritorial legislation by the requirement to respect to sovereignty of the host State, on the territory of which the operations which are regulated through extraterritorial legislation have been taking place. Indeed, the discussion above of the obligation of international assistance and co-operation should not lead us to think that the exercise of extraterritorial jurisdiction will always be welcomed by the territorial States concerned, as if the control exercised from abroad on the activities of transnational corporations within their territory were to be assimilated to the control of transborder pollution or to actions being taken against other negative externalities by the States where such externalities originate. On the contrary : in general, it may be anticipated that control by the home States of the activities of transnational corporations will be resented as a limitation to the sovereign right of the territorial States concerned to regulate activities occurring on their territory, or as betraying a distrust of the ability of those States to effectively protect their own populations from the activities of foreign corporations ; such control by the home States may even – albeit in exceptional cases – be seen as depriving host States from a competitive advantage they have on the global markets, especially if such control results in imposing compliance with environmental or social standards, thus raising the costs of production and diminishing the attractiveness, in the international division of labor, of localizing production activities in States with lower regulatory standards. But do States hosting foreign investors have an argument grounded in international law, against the pretence of the home State that it may police transnational corporations in the activities they conduct outside its territory ?

2. The liberty to exercise extraterritorial jurisdiction

As we have seen in the preceding section, only in rather exceptional situations does international law impose an obligation to exercise extraterritorial jurisdiction : this is the case as regards certain international crimes, when these are committed by natural persons or, arguably at least, as regards legal persons, where this appears to be a condition for the State *loci delicti* to effectively combat international crimes committed on its territory ; it may be emerging as regards violations of economic, social and cultural rights which a State is capable of preventing, by controlling private actors

domestic level (e.g. in countries where the headquarters of transnational corporations are based)’ (Magdalena Sepúlveda, ‘Obligations of ‘International Assistance and Cooperation’ in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’, *Neth. Quarterly of H.R.*, vol. 24, No. 2 (June 2006), pp. 271-303, at p. 282). See also *The right to food*, Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2002/25, U.N. Doc. E/CN.4/2003/54 (10 January 2003), para. 29. An extensive discussion of these issues is by Smita Narula, ‘The Right to Food : Closing Accountability Gaps under International Law’, forthcoming in *Fordham Journal of International Law*.

⁸⁴ *The Realization of Economic, Social and Cultural Rights, Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, U.N. Doc. E/CN.4/Sub.2/1997/8, 27 June 1997, para. 131.

contributing to such violations outside its national borders. However, we may not reason *a contrario* on the basis of these existing, or emerging, obligations : from the fact that certain forms of extraterritorial jurisdiction are not obligatory under conventional or customary international law, it does not follow that they are prohibited. A distinct question therefore is whether, in situations where no such an obligation is recognized, States may under international law adopt legislations intended to apply outside the national territory, with a view to contributing to the protection of internationally recognized human rights abroad.⁸⁵

2.1. The classical bases for the exercise of extraterritorial jurisdiction

Four bases for the exercise of extraterritorial jurisdiction (combining prescriptive with adjudicative extraterritorial jurisdiction) are classical and widely agreed upon.⁸⁶ First, a State may seek to influence, by the adoption of legislation which has an extraterritorial reach, activities which have a substantial, direct and foreseeable effect upon or in its national territory. The *Restatement of Foreign Relations Law* prepared under the auspices of the American Law Institute⁸⁷ stipulates that a state ‘has jurisdiction to prescribe law with respect to (...) conduct outside its territory that has or is intended to have substantial effect within its territory’, although adding that ‘a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable’.⁸⁸ As noted famously in the ‘*Alcoa*’ case by the the U.S. Court of Appeals for the 2nd Circuit, ‘[...] it is settled law [...] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognize’.⁸⁹ Although the test has undergone a number of variations since that statement was made,⁹⁰ and although it has been criticized as much as it has been invoked,⁹¹ it has never been formally abandoned.⁹² Some authors have even considered that it has been revived when the European Court of Justice decided to rely on a similar reasoning, in particular in order to justify the application of European Community competition law to foreign companies, whose practices might impact the

⁸⁵ The scenario hypothesized here is that States exercise extraterritorial jurisdiction by combining prescriptive and adjudicative extraterritorial jurisdiction. As already noted (see above, note 40), the exercise of extraterritorial criminal jurisdiction always will imply such a combination, since national criminal jurisdictions exclusively apply the criminal law of the forum, although often applying that law to conduct outside the national territory only under the condition of double criminality. Where, as may happen in civil cases, national courts are authorized under the rules of private international law of the forum State to apply foreign legislation, when presented with cases arising from situations which have occurred abroad, this does not give rise to any difficulty : such an application of the foreign law fully respects the sovereignty of the territorial State, since it gives effect to the will of that State and even contributes to the full effectiveness of its municipal laws. Therefore it is only the combination of adjudicative extraterritorial jurisdiction with prescriptive extraterritorial jurisdiction that is under discussion here, as it is this combination which raises the problems international law has been struggling with.

⁸⁶ See, *inter alia*, paras. 11 and 12 of the Explanatory Report to the the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, opened for signature on 15 May 1972, and which entered into force on 30 March 1978 (C.E.T.S. n° 73).

⁸⁷ *Restatement (Third) of the Foreign Relations Law of the United States*, 2 vol., St Paul, American Law Institute (1987).

⁸⁸ Section 402(1)(c) and Section 403(1).

⁸⁹ *United States v. Aluminium Co. of America (Alcoa)*, 148 F.2d 416, 443 (2nd Cir. 1945).

⁹⁰ See Frederick A. Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’, *Recueil des cours de l’Académie du droit international*, 1984-III, vol. 186, pp. 30-31; Andreas F. Löwenfeld, *International Litigation and the Quest for Reasonableness*, Oxford, Clarendon Press, 1996, pp. 20-28. See, *inter alia*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (‘the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’); or *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S. Ct. 2359 (2004), commented upon below, notes 201-208.

⁹¹ The ‘effects’ doctrine was explicitly referred to by the United States Congress when it adopted the Helms-Burton Act in 1996. Among the findings on which Congress based its adoption of Title III of the Helms-Burton Act (see above, note 18) is that : ‘International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory’ (sect. 301(9)). This begs the question what such effect actually consists in, and whether it is substantial enough to justify such an exercise of extraterritorial jurisdiction. For strong critiques of this justification, see Andreas F. Lowenfeld, cited above, at 430-432 ; and Brigitte Stern, ‘Vers la mondialisation juridique ? Les lois Helms-Burton et D’Amato-Kennedy’, cited above, at 992-995.

⁹² See, for a comparaison between the positions of the United States and those adopted in Europe, Brigitte Stern, ‘L’extraterritorialité revisitée, où il est question des affaires Alvarez-Machain, Pâte de bois et de quelques autres’, *A.F.D.I.*, 1992, XXXVIII, pp. 251-252.

internal market.⁹³ This doctrine, alternatively called the ‘effects’ doctrine of the ‘objective territoriality’ principle, must be relied upon only with great care, at least when it is invoked to justify the extraterritorial application of legislation other than competition law where its use has become customary. As noted by P. M. Roth, ‘as economic effects can be remote and general, an unlimited acceptance of extraterritorial jurisdiction based on economic effects could clearly lead to extensive interference in the internal affairs of other States’.⁹⁴

Second, the nationality of both the author of the activity regulated (the offender) and the person directly affected (the victim) may form the basis for extraterritorial jurisdiction. Under the active personality principle, a State may enact legislations which will apply to its nationals even as regards their conduct abroad. Under the passive personality principle, a State may seek to protect its nationals abroad by the adoption of extraterritorial legislation. The former principle is much more widely recognized as the basis for the exercise of extraterritorial jurisdiction than the latter. The invocation of the principle of passive personality has sometimes been considered with suspicion, as it could serve as a means to circumvent the rules of the exercise of diplomatic protection, which constitutes the normal means through which a State may seek to protect its nationals situated under another State’s jurisdiction⁹⁵; it has, however, gained general acceptance, at least when the nationality link is genuine, and when combined with the principle of double criminality in order to respect the principle of legality where criminal extraterritorial jurisdiction is concerned.⁹⁶ The principle of active personality has always been widely recognized as legitimate basis for extraterritorial jurisdiction. Indeed, it has been extended, beyond nationality, to permanent residency, in certain recent statutes.⁹⁷

⁹³ Andreas Löwenfeld, *International Litigation and the Quest for Reasonableness*, cited above, pp. 33-41 ; Derek W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, cited above, p. 7. In their joint separate opinion to the judgment of 14 February 2002 delivered by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judges Higgins, Kooijmans, and Buergenthal seem to share this reading of developments in European Union law. *ICI* and the ‘*Wood Pulp Cartel*’ cases are generally considered to be leading in this area : see Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619 (judgment of the Court of Justice of the European Communities of 14 July 1972), paras. 125-130 (where the European Court of Justice agrees that the jurisdiction of the Commission to enforce European Community competition law may reach actions which are put into effect within the common market); and Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 128, 129 and 185/85, *Wood Pulp Cartel Case*, [1988] ECR 5193. However, the judgments in the cases of *Walrave* and in *Béguelin* had anticipated this extra-territorial application of European Community law. In *Walrave*, the Court considered that, due to the imperative character of the prohibition of discrimination on grounds of nationality then stipulated in Article 48 EEC Treaty (now Art. 39 EC), this rule ‘applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community’ (Case 36/74, *Walrave and Koch / Association Union Cycliste Internationale and others*, [1974] ECR 1405, para. 28 (judgment of 12 December 1974)). In *Béguelin*, the Court considered that Article 85 EEC (now Art. 81 EC), which prohibits anti-competitive agreements between undertakings, could be applied ‘notwithstanding the fact that one of the undertakings which are parties to the agreement is situated in a third country (...) since the agreement is operative on the territory of the common market’ (Case 22/71, *Béguelin Import / G.L. Import Export*, [1971] ECR 949, para. 11 (judgment of 25 November 1971)).

⁹⁴ P.M. Roth, ‘Reasonable Extraterritoriality : Correcting the ‘Balance of Interests’’, 41 *I.C.L.Q.* 267 (1992), at 285.

⁹⁵ See, for instance, the reaction of the Inter-American Juridical Committee to the United States Helms-Burton Act, which the U.S. Congress intended to justify, in part, by the need to protect the property rights of the U.S. citizens whose assets had been confiscated in Cuba after 1 January 1959 : ‘When a national of a foreign State is unable to obtain effective redress in accordance with international law, the State of which it is a national may espouse the claim through an official State-to-State claim. (...) The domestic courts of a claimant State are not the appropriate forum for the resolution of State-to-State claims’ (Organisation of American States, *Inter-American Juridical Committee opinion examining the U.S. Helms-Burton Act*, 27 August 1996, reproduced in 35 *I.L.M.* 1331 (1996)).

⁹⁶ See *Extraterritorial Criminal Jurisdiction*, cited above, at p. 12 (finding ‘an international trend towards the inclusion of provisions in conventions encouraging the Contracting States to establish jurisdiction based on the principle of the nationality of the victim with regard to certain offences, mainly terrorist activities’). In their joint separate opinion appended to the judgment delivered by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judges Higgins, Kooijmans and Buergenthal conclude that passive personality jurisdiction, ‘for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned’ (at para. 47).

⁹⁷ *Extraterritorial Criminal Jurisdiction*, Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set up by the European Committee on Crime Problems (CDPC), Council of Europe, 1990, p. 13.

Third, a State may exercise jurisdiction with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of the State. There is no clear consensus about what such fundamental interests may be,⁹⁸ although it may be asserted that, while they may include the security and creditworthiness of the State, they do not extend to the protection of its wider economic interests,⁹⁹ or to its foreign policy objectives.

Fourth, it is generally recognized that under the principle of universality, certain particularly heinous crimes may be prosecuted by any State, acting in the name of the international community, where the crime meets with universal reprobation. It is on this basis that, since times immemorial, piracy could be combated by all States : the pirate was seen as the *hostis humanis generis*, the enemy of the human race, which all States are considered to have a right to prosecute and punish. The international crimes mentioned above for which treaties impose the principle *aut dedere, aut judicare*, also belong to this list.¹⁰⁰ In prosecuting these crimes, States are not seen to act in their interest ; they act as agents of the international community.

It seems uncontested, then, that apart from the situations where States are under an obligation to exercise extraterritorial jurisdiction, they should be allowed to do so either in order to contribute to the universal repression of certain international crimes (principle of universality), or when they seek to regulate the activities of their nationals abroad, whether these are natural or legal persons (principle of active nationality). Grounding the exercise of extraterritorial jurisdiction on the principle of active personality would appear to be particularly justified in the case of corporations which have the 'nationality' of the forum State, especially where the prohibitions relate to human rights violations. Indeed, the two justifications traditionally offered for basing extraterritorial jurisdiction on this principle seem to converge in this case. A first justification has been, traditionally, that since nationals traditionally may not be extradited, the extraterritorial application of national legislation on the basis of the principle of active personality ensures that certain crimes would not remain unpunished : in this sense, the exercise of extraterritorial jurisdiction on that basis may be seen as a compensation for the refusal of a State to extradite its nationals to the State where the offence has been committed, as a gesture of solidarity with that State. Second, by exercising extraterritorial jurisdiction on the basis of the active personality principle, a State ensures that its nationals will not be acting in violation of certain fundamental values abroad, by adopting forms of behaviour which would be considered as offences in the forum State : what the nationals of a State may not do at home, they should not be allowed to do in another State, where the seriousness of the act justifies such an extension of the geographical reach of the prohibition. Both these rationales apply to human rights obligations imposed on corporations who are 'nationals' of the forum State. Corporations may not be extradited. Therefore, the solidarity of the State of which the corporation is a national with the State where that corporation has been acting in violation of certain human rights norms which the host State was unable to prevent, should take the form either of cooperating in the execution of a judgment adopted by the national courts of the host State on the basis of any extraterritorial jurisdiction they may have exercised, or of ensuring that, through the active personality principle, the corporation will be found liable in the State of its nationality. Just like the dimension of solidarity present in the exercise of extraterritorial jurisdiction on the basis of the active personality principle is especially visible where the State of which an individual is the national imposes a condition of double criminality (thus implying that the application of its criminal law really seeks to ensure that the violation of the criminal law of the State *loci delicti* will not be left unpunished), the liability of the corporation under the laws of its home State could depend on the question whether the act incurring liability would also be unlawful under the laws

⁹⁸ European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, cited above, at p. 13.

⁹⁹ See International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, para. 87 (rejecting the argument that, in the absence of a treaty between the States concerned, a State could exercise its right to diplomatic protection in order to protect investments by its nationals abroad, such investments being part of a State's national economic resources).

¹⁰⁰ See the joint separate opinion by judges Higgins, Kooijmans, and Buergenthal, appended to the judgment of the International Court of Justice in the *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, at para. 46 (citing Cherif Bassiouni, *International Criminal Law, Volume III: Enforcement*, 2nd Edition, (1999), p. 228; Theodor Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995), at 576.).

of the host State or, at least, whether it is not explicitly prescribed under these laws. Moreover, in imposing on its corporations acting abroad that they comply with certain requirements derived from the international law of human rights, the home State would be upholding certain values considered essential, and of importance to the whole international community.

2.2. Beyond the classical bases for the exercise of extraterritorial jurisdiction

May States go beyond this, and seek to regulate situations occurring abroad, where none of the principles listed above would justify the exercise of extraterritorial jurisdiction? The famous case of the *Lotus*, decided by the Permanent Court of International Justice on September 7th, 1927, provides a useful departure point.¹⁰¹ On August 2nd, 1926, a collision had occurred on the high seas between the French mail steamer S.S. *Lotus*, proceeding to Istanbul, and the Turkish collier S.S. *Boz-Kourt*. The *Boz-Kourt* was cut in two and sank, and eight Turkish nationals who were on board perished; ten other shipwrecked persons could be saved. The *Lotus* arrived in Istanbul on August 3rd. Two days later, the Turkish authorities put both Mr Demons, the officer of the watch on board the *Lotus* at the time of the collision, and the captain of the *Boz-Kourt* (one of those who were rescued from the shipwreck) under arrest, on a charge of involuntary manslaughter.¹⁰² The question submitted to the Permanent Court of International Justice was whether Turkey had violated any principle of international law in establishing its jurisdiction over the French officer of the *Lotus*. The Court stated, in accordance with 'the very nature and existing conditions of international law', 'it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings'. While not using this terminology, the Court noted that a distinction should be made between – on the one hand – enforcement extraterritorial jurisdiction, and – on the other hand – prescriptive and adjudicative extraterritorial jurisdiction. As to enforcement extraterritorial jurisdiction, the prohibition of international law is clear :

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

However, turning to prescriptive or adjudicative extraterritorial jurisdiction, the Court added immediately :

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in

¹⁰¹ The *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment No. 9 of 7 September 1927, *P.C.I.J. Reports* 1928, Series A, No. 10.

¹⁰² In the case of the French officer Demons, the application of the Turkish criminal law was justified under Article 6 of the Turkish Penal Code (Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926)), which provided in its relevant part that 'Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey'.

certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.¹⁰³

The *Lotus* case is a weak precedent to build upon, however. Despite the apparent clarity of the above statements – which, as Judge Van den Wyngaert has remarked, are well known to all students of international law –, they remain *obiter dicta*, since there were at least two factors clearly connecting the situation to Turkey¹⁰⁴ : not only were the eight victims of the collision Turkish nationals¹⁰⁵; but, moreover, the Boz-Kourt was flying the Turkish flag, and the collision – the effect of the criminal offence for which Mr Demons was prosecuted – thus was considered to have taken place on Turkish territory, in accordance with the fiction that the national territory of a State extends to vessels flying its flag.¹⁰⁶

Summarily stated, the question is whether, in the absence of a positive authorization of international law, States may exercise extraterritorial jurisdiction, or whether this should be considered a violation of the sovereignty of the territorial State, or an interference with its internal affairs. This question is unresolved.¹⁰⁷ The recent international conventions which establish the principle *aut dedere, aut judicare* – imposing on the States parties an obligation to allow for prosecutions to take place, on the basis of national law, before the national jurisdictions, where the person suspected of international crimes cannot be extradited, even in the absence of any factor connecting the crime to the concerned State other than the presence of the perpetrator on its national territory – are not conclusive. Such conventions may add that States may go beyond the specific form of extraterritorial jurisdiction they oblige the States parties to exercise. For instance, after having established the principle *aut dedere, aut judicare* when the offender is found on the national territory, Article 9 of the International Convention for the Protection of all Persons from Enforced Disappearance adds that the Convention ‘does not exclude any additional criminal jurisdiction exercised in accordance with national law’.¹⁰⁸ The wording is similar to that of Article 5(3) of the Convention against Torture. Other instruments however are more cautious. Thus, after having listed a number of cases where the States parties are either obligated or allowed to establish their jurisdiction over the offences which the convention seeks to combat, the 2000 International Convention for the Suppression of the Financing of Terrorism adds : ‘Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law’.¹⁰⁹ None of these wordings are truly decisive for the question posed.

¹⁰³ At pp. 18-19.

¹⁰⁴ A third connecting factor is, of course, that Mr Demons was arrested when found on Turkish territory. This connecting factor was required, under the terms of the Turkish criminal law (cited above, note 102), in order for this law to be applicable.

¹⁰⁵ See above, text corresponding to note 102.

¹⁰⁶ The Court notes in this regard that it is not necessary for it to consider the contention that ‘a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim’, since this is not the only criterion on which the criminal jurisdiction of Turkey is based : no rule of international law forbids Turkey to take into consideration, in any case, ‘the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners (...). [The] courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there’ (p. 23). The Court thus sees no reason why it should not ‘confine itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle’ (p. 24).

¹⁰⁷ The question has remained where Rosalyn Higgins had left in 1984, when she wrote : ‘...the underlying problem is still unresolved – namely, is it necessary to show a specific basis of jurisdiction, or may one assert jurisdiction without reference to a specific basis, so long as one is acting reasonably?’ (R. Higgins, ‘The Legal Basis of Jurisdiction’, in C.J. Olmstead, *Extra-territorial Application of Laws and Responses Thereto*, Oxford, I.L.A. & E.S.C. Publ. Ltd., 1984, at p. 14).

¹⁰⁸ Article 9(3).

¹⁰⁹ Article 7(6).

As to what limitations such norms of general international law impose on the exercise of extraterritorial jurisdiction, three positions might be contrasted. A first position is that, unless one of the abovementioned bases for the exercise of extraterritorial jurisdiction is present and has been used in accordance with the principle of reasonableness, such extraterritorial jurisdiction should be disallowed, as it would be in violation with the sovereignty of the other States, in particular the territorial State. A second position is that the cited bases for the exercise of extraterritorial jurisdiction should be seen as examples of a more general principle at work, which is that, for a State to assert jurisdiction over certain situations, there must be a reasonable link between the State and the situation concerned : in the absence of any factor connecting the situation to the State – and unless, of course, the State invokes the principle of universality as a basis for jurisdiction –, the assertion of extraterritorial jurisdiction would be unacceptable in a world of sovereign States where sovereignty implies exclusive enforcement powers on the national territory. Finally, a third position is that States are at liberty to exercise extraterritorial jurisdiction, unless this amounts to a kind of pressure the level of which would amount to interference with the internal affairs of the territorial State. Each of these positions, however, should be examined taking into account the specific character of extraterritorial jurisdiction when it is exercised *in order to ensure the protection of human rights beyond the national borders*.

This circumstance matters, first, in applying the criterion of reasonableness, either – as the first position would have it – in order to examine whether a State has relied in an acceptable fashion on one of the recognized basis for exercise extraterritorial jurisdiction, or even – in the second position – in order to evaluate the ‘reasonableness’ of other forms of extraterritorial jurisdiction not envisaged under those traditional criteria. Indeed, one potentially crucial factor to be weighed into the test of reasonableness is that the exercise of extraterritorial jurisdiction in order to contribute to the protection of human rights in the host State of the foreign investment does not fall under the category of forms of extraterritorial jurisdiction which primarily benefit the State thus extending the reach of its national laws. Rather, along with other instances of extraterritoriality such as universal jurisdiction and the exercise of extraterritorial jurisdiction on the basis of the principle of active personality when it is combined with the requirement of double criminality (which thus results in giving effect to the criminal law of the State *loci delicti*), extraterritorial jurisdiction exercised in order to contribute to the protection of internationally recognized human rights belongs to the category of forms of extraterritorial jurisdiction which may be justified in the name of international solidarity : whatever the reasons are for the territorial State not effectively protecting human rights, the exercise of extraterritorial jurisdiction by other States, in particular the home State of the multinational enterprise, in order to ensure such a protection, may be seen as a means to facilitate the compliance of the host State with its international obligations under the international law of human rights. This distinction between the two broadly defined justifications for extraterritorial jurisdiction is essential.¹¹⁰ In contrast with situations where States exercise extraterritorial jurisdiction in order to promote their own, sovereign interests,¹¹¹ where extraterritorial jurisdiction promotes solidarity between States, it should be considered as valid in principle, although as a matter of course any risks of conflict with the territorial State should be avoided to the fullest extent possible even in such cases.

Moreover, the preservation of human rights has occasionally been referred to as of interest to all States, even in the absence of any more specific link between the State and the situation where human rights are violated. Although the significance of this *dictum* in the *Barcelona Traction* judgment referring to this specific character of international norms relating to ‘the basic rights of the human

¹¹⁰ It is no exaggeration to say that this distinction is central to the work by the Select Committee of Experts on Extraterritorial Jurisdiction set up within the Council of Europe by the European Committee on Crime Problems, and which benefited, in particular, from the contribution of professor Rosalyn Higgins. See *Extraterritorial Criminal Jurisdiction*, cited above, pp. 25-30.

¹¹¹ On the basis, for instance, of the principle of protection of the fundamental interests of the State, of the passive personality principle, of the an unrestricted understanding of the active personality principle – i.e., an understanding not limited by the condition of double criminality –, or of the effects doctrine.

person¹¹² has been widely debated – and its consequences probably exaggerated by some commentators –, ¹¹³ the *erga omnes* character of at least a handful of internationally recognized human rights may justify allowing the exercise by States of extraterritorial jurisdiction, even in conditions which might otherwise not be permissible, where this seeks to promote such rights.

The specificity of extraterritorial jurisdiction exercised in order to protect human rights abroad matters even if we opt for the third of the positions delineated above. For even this last position, although it is the closest to the *dicta* enunciated in the *Lotus Case* of the International Court of Justice, stops short from affirming the existence of an unlimited freedom of States to exercise extraterritorial jurisdiction, since it recognizes that such jurisdiction may not be exercised in a way which amounts to interference within the internal affairs of the territorial State concerned. But where extraterritorial jurisdiction is exercised in the form of a legislation aiming at the protection of human rights beyond the national territory of the State, it can hardly be pleaded that such a form of extraterritorial jurisdiction constitutes an intervention in matters falling under the exclusive national jurisdiction of the territorial State. In the words of the International Court of Justice, the principle of non-intervention ‘forbids all States (...) to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. (...) Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones’.¹¹⁴ However, it has long been recognized that internationally recognized human rights – such as those included in the Universal Declaration on Human Rights – impose limits to State sovereignty, and that such matters therefore cannot be said to belong to the exclusive national jurisdiction of the territorial State. Moreover, it is doubtful that one may speak here of ‘coercion’, in the meaning attached to this term in international law. By seeking to regulate the activities of foreign investors in the host States through the adoption of extra-territorial legislation, other States are not imposing on the territorial State that it comply with these norms itself, or that it imposes compliance with these norms on the local corporations : without prejudice of its obligations under the international law of human rights, that States remains free to legislate upon activities on its national territory.¹¹⁵

3. Conclusion

The conclusion is that the limits which public international law is generally considered to impose on States in the exercise of prescriptive extraterritorial jurisdiction generally will not constitute an obstacle to the use of this tool in order to impose that transnational corporations comply with internationally recognized human rights in their operations abroad. Typically, the exercise of such extraterritorial jurisdiction will take the form of the State where the parent company is incorporated, and which therefore may be considered to have the ‘nationality’ of that State, seeking to regulate the behavior of that company or of other companies of the multinational group which the parent controls. In principle, such form of extraterritorial jurisdiction will be justified under the principle of active

¹¹² The International Court of Justice declared in the *Barcelona Traction* judgment that ‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. They are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character’. International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, para. 33-34.

¹¹³ For illuminating discussions, see Ian Seiderman, *Hierarchy in International Law. The Human Rights Dimension*, Hart-Intersentia, Antwerpen-Groningen-Oxford, 2001, chapter IV; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford Univ. Press, 2000.

¹¹⁴ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (merits), judgment of 27 June 1986, para. 205.

¹¹⁵ As explained in section V.3. below, solutions may have to be found in exceptional situations where obligations imposed by the home State on foreign investors are contradictory with those which would be imposed by other States, including the home States of the investors concerned.

personality, especially where it addresses the parent company, rather than its foreign subsidiaries directly.¹¹⁶ It does not matter that a State is not obliged, under international law, to thus control the companies whose behavior it may influence : the liberty of States to act goes beyond the limited range of situations where they are under such an obligation. In the circumstances described, the exercise by a State of extraterritorial jurisdiction is moreover reasonable – even if it goes beyond the parent company to seek to regulate foreign entities controlled by the parent¹¹⁷ –, since it aims at protecting internationally recognized human rights, which all States are in principle bound to comply with, and which it is in the interest of all States, arguably at least, to seek to ensure compliance with. This is not to say that such exercise of extraterritorial jurisdiction is without its difficulties, even if its general legitimacy is acknowledged. The next section examines some of these difficulties.

V. Specific problems in the use of extraterritorial jurisdiction as a means to improve the accountability of transnational corporations

While many of the problems discussed above in relation to the extraterritorial jurisdiction of States may concern both extraterritorial laws seeking to influence the behavior of natural persons and similar laws seeking to regulate corporations operating abroad, other problems are specific to this latter category of addressees. The following paragraphs of the paper examine three such problems. First, it considers how the ‘nationality’ of the corporation is determined, in a sense which may justify the exercise of extraterritorial jurisdiction based on the active personality principle (1.). Second, it considers the difficulties arising from the structure of the multinational corporation, organized as a network of corporate bodies which, while often closely integrated in fact, are legally separate entities (2.). Third, the paper examines how we may ensure a non-conflictual coexistence between the prescriptions of the State having adopted a legislation which is intended to produce an extraterritorial effect, and those contained in the laws of the territorial State (3.).

1. The nationality of the transnational corporation

1.1. The principles

It has been authoritatively stated that ‘no criteria seem to have been established to determine the circumstances under which a legal person can be deemed to possess the nationality of the state claiming jurisdiction’.¹¹⁸ This uncertainty is clearly disturbing, in the light of the importance of this question in solving international conflicts resulting from the exercise of extraterritorial jurisdiction. As regards criminal extraterritorial jurisdiction for instance, ‘problems arising out of the exercise of jurisdictional claims based on an unrestricted active personality principle [not limited by the condition of double criminality] frequently involve cases where states, whose criminal law provides that corporate bodies may have criminal responsibility, apply the principle to offences committed abroad and ascribed to corporate bodies which are considered as ‘their own’ national ones. The conflicts which thus arise involve deciding what criteria were applied by the state claiming jurisdiction in ascribing its nationality to the corporate body concerned, and whether these criteria are acceptable under international law’.¹¹⁹ These difficulties result from a situation where each municipal law has its own criteria for determining which legal persons will be considered to have its ‘nationality’,¹²⁰ and where, yet, international law requires a commonly agreed approach to the use of such criteria in order to delimit the outside boundaries of the extraterritorial jurisdiction a State intends to exercise on the basis of the active personality principle.

¹¹⁶ On this choice, see below, section VI.2. of this report.

¹¹⁷ The *Third Restatement on Foreign Relations Law* of the American Law Institute does not exclude the regulation of foreign corporations, i.e., corporations organized under the laws of a foreign State, ‘on the basis that they are owned or controlled by nationals of the regulating state’, however it states that in the exceptional cases where this may be justified in principle, ‘the burden of establishing reasonableness is heavier (...) than when [the direction] is issued to the parent corporation’ (*Restatement (Third) of the Foreign Relations of the United States* (1987), § 414).

¹¹⁸ *Extraterritorial Criminal Jurisdiction*, cited above, p. 13.

¹¹⁹ *Id.*, p. 28.

¹²⁰ A. Fatouros, ‘National Legal Persons in International Law’, in : R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, 5 vols., Amsterdam, North Holland, 1997, vol.III, p. 495.

These problems are not insuperable. The nationality of individual persons, too, is a matter for each State to determine, on the basis of criteria which are variable among the States, in the absence of any international harmonization. This has not resulted in an impossibility for international law to clarify the conditions under which – for instance, for the purposes of allowing a State to exercise its right to diplomatic protection of persons that State deems to be its ‘nationals’¹²¹ – such nationality ought to be recognized by the other States, or by the international community as a whole. The question is not whether international law has imposed one single criterion for the determination of the nationality of legal persons, for it has not : at most, it requires that, when establishing criminal jurisdiction over corporate bodies on the basis of the active personality principle, the legislature ‘unequivocally indicate the standards for considering such corporate bodies as its nationals’, as such a requirement follows from the principle of legality in criminal matters.¹²² The question is, rather, which consequences attach, in international law, to the choice by each State to consider certain corporations as its ‘nationals’, for the variety of purposes for which such a determination is made. In particular, which limits does international law impose on the right for each State to identify as its nationals certain corporations in order to justify the exercise of extraterritorial jurisdiction on the basis of the active personality principle ? And which obligations should be imposed on a State, as regards the regulation of the corporations it has considered as its nationals ?

Consider, for instance, the practice of the United States. This practice has generally been to determine the nationality of the corporation on the basis of the company’s place of incorporation.¹²³ One among many examples is provided by the Foreign Corrupt Practices Act. In providing that it shall be unlawful practice for any ‘United States person’ to engage into practices of corruption abroad, this Act defines the term ‘United States person’ as ‘a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship *organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof*’.¹²⁴ However, in certain contexts, a different test (the so-called ‘control’ test) has been used, which defines the nationality by reference to the nationality of its owners, managers, or other persons deemed to be in control of its affairs. This is the case, in particular, in the tax area.¹²⁵

As the coexistence in the United States of these two criteria illustrates, the choice of how a State determines the nationality of the corporation clearly has an impact on the issue of extraterritorial jurisdiction. Where the nationality is based on the place of incorporation, the multinational enterprise in principle will be treated as composed of a number of distinct entities which will be either national or

¹²¹ *Nottebohm Case (Liechtenstein v. Guatemala)*(second phase : merits), [1955] I.C.J. Rep. 4 (judgment of 6 April 1955) (requiring a ‘genuine link’ between the State seeking to exercise diplomatic protection and the natural person to whom that State has conferred its nationality).

¹²² *Extraterritorial Criminal Jurisdiction*, cited above, at p. 28.

¹²³ *Restatement (Third) of the Foreign Relations of the United States* (1987), cited above note 87, at 213, n. 5. On this question, see generally Linda A. Mabry, ‘Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality’, 87 *Geo. L. J.* 563 (1999). The author considers the traditional modes of determination of the nationality of corporations under United States law unsatisfactory, and she proposes their replacement by what she calls an ‘economic commitment’ test under which ‘a corporation’s national identity would be determined by reference to structural, organizational, and operational features of the firm (such as the nature and geographic location of its principal assets, the geographic source of its earnings, and its relationships with third-party contractors located outside of the United States) and its organizational structure’.

¹²⁴ 15 U.S.C. §§ 78dd-2 (g) (2) (1994) (emphasis added).

¹²⁵ As noted by L. Marby, this allows the aggregation of the different corporate entities integrated within the multinational group and treating them as one single enterprise whose benefits will be taxed on a consolidated basis, reflecting the operations of both domestic and foreign subsidiaries. She refers to *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). This decision upheld California’s unitary basis test, which consists in taking into account ‘the combined worldwide income of all of the corporate components of the enterprise’ (L. Marby, ‘Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality’, cited above note 123, at note 4). However, the two questions are not necessarily linked : the choice to treat on a consolidated basis the benefits of the multinational enterprise for taxation purposes does not follow necessarily from the choice to consider as ‘American’ the subsidiaries controlled by the American parent corporation.

foreign, depending on where they are incorporated. This may make it difficult to apply the law of the forum state to all the entities of the multinational group, as the principle of active personality may not furnish an appropriate justification for the extraterritorial reach of such legislation : in this case, it may be more appropriate, to overcome this problem, to impose on the ‘controlling’ parent corporation an obligation to monitor the behavior of the subsidiaries which it is in a position to influence (a form of extraterritorial jurisdiction which may be referred to as *parent-based extraterritorial regulation*), without directly imposing obligations on the foreign subsidiaries themselves (often referred to as *foreign direct liability*).¹²⁶ Where, on the other hand, the ‘nationality’ of the corporation is determined on the basis of the ‘control’ test, the very fact that the parent corporation is a national of the forum State will lead to consider its subsidiaries as nationals, which allows imposing on these subsidiaries obligations directly, on the basis of the principle of active personality. In that sense, the manipulation of the modes of determination of the nationality of the corporation may allow a State, relying on the principle of active personality, to extend its jurisdiction to extraterritorial situations – including acts adopted by companies incorporated abroad – it might otherwise be prohibited under international law to reach.¹²⁷

Of course, the acceptability under international law of the exercise of extraterritorial jurisdiction should not be allowed to depend on the choices made by the forum State, whatever these choices are. Therefore such choices as to the modes of determination of the nationality of legal persons should only be recognized by other States for the purposes of the exercise of extraterritorial jurisdiction to the extent that these choices are not arbitrary, and are based on one of the traditionally accepted grounds for the determination of nationality. These are, apart from the place of incorporation, where the corporation has its registered main office, or where it has its principal place of business. Following these principles, to the extent a State wishes to base its exercise of extraterritorial jurisdiction on any of these links, it should be allowed to invoke the principle of active personality. Conversely, it should not be authorized to invoke other factors, such as, in particular, the fact that the shareholders of the foreign corporation are its nationals, in order to justify such extraterritorial jurisdiction. Recent developments have raised certain doubts, however, on two aspects of these principles.

1.2. The admissibility of extraterritorial regulation addressed directly at foreign companies controlled by a parent domiciled in the forum State

Although international law does not impose any particular mode of determination of the ‘nationality’ of the corporation, the *Barcelona Traction* Case of the International Court of Justice did seem to exclude, at least as regards the determination of nationality for the purposes of the exercise by a State of its right to diplomatic protection, basing nationality on the nationality of the shareholders of the corporation.¹²⁸ The International Court of Justice based this view on the distinction to be made between the legal situation of the corporation and that of its shareholders :

¹²⁶ I am borrowing this terminology from Jennifer Zerk, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Univ. Press, 2006, chapter 3.

¹²⁷ Yitzhak Hadari, ‘The Choice of National Law Applicable to the Multinational Enterprises’, 1974 *Duke L.J.* 1, 16 (noting that the determination by the United States of the rules of the nationality of the corporation has occasionally been relied upon in order to allow for an extension of United States law to corporations whose main connections may be foreign countries).

¹²⁸ Case Concerning *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] I. C. J. Rep. 3. It will be recalled that in this case, the International Court of Justice followed the classical approach to corporate entity law and its consequence – that the piercing of the corporate veil should remain limited to exceptional cases. Following the adjudication in bankruptcy in Spain of *Barcelona Traction*, a company incorporated in Canada and having its head office, Belgium sought reparation for damage alleged to have been sustained by Belgian nationals, both natural and legal persons, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State. One of the preliminary objections of the Spanish Government was to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company even if the shareholders were Belgian. This objection was joined to the merits and, by fifteen votes to one, the Court agreed with this contention of the Spanish government. The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain. The Court based its reasoning on the finding that, in municipal law, a distinction is made between the rights of the company and those of the shareholders. Therefore, when an act is committed against a foreign company, in alleged violation of international law, it is for the national State of that company alone to file a claim to diplomatic protection (in this case, Canada) ; the shareholder’s national State (Belgium) has no right to do so.

...international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights.¹²⁹

Whether this position should be considered as determinative beyond the narrow field of diplomatic protection may be doubted, however.¹³⁰ Already in its judgment of 5 February 1970, the International Court of Justice explicitly acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:

Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: 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. (...) 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.¹³¹

In addition, aside from the question whether the nationality of a company can be made to follow from that of its shareholders (or controlling 'parent'), we are clearly witnessing an evolution towards an extension of the conditions under which a State may be authorized to exercise extraterritorial jurisdiction, where it seeks to influence the behavior of companies controlled by companies of its nationality.¹³² Through the conclusion during the 1990s of a large number of bilateral investment treaties, States have sought to protect their nationals as investors in foreign countries even in cases where they have set up subsidiaries under the laws of the host country. The 2004 of the Model U.S. Bilateral Investment Treaty for instance defines as an 'investor of a Party' protected under such a treaty 'a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party', the 'investment' meaning in turn 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. There is no doubt that, under these definitions, investments made by U.S. nationals in a State bound by a BIT concluded with the United States are protected under the treaty, even when (and, indeed, in particular when) their investment consists in a controlling participation in a corporation incorporated in the host country. Similarly, under the draft Multilateral Agreement on Investment negotiated within the framework of

¹²⁹ International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, 184.

¹³⁰ On the relevance of the *Barcelona Traction* case beyond the exercise of diplomatic protection, see already the doubts expressed by Stanley D. Metzger, 'Nationality of Corporate Investment Under Investment Guaranty Schemes-The Relevance of *Barcelona Traction*', 65 *American Journal of International Law* 532 (1971).

¹³¹ *Id.*, at 38-39.

¹³² See, in particular, § 414 of the *Restatement (Third) of the Foreign Relations of the United States* (1987), quoted above, at note 117.

the OECD between 1995 and 1998,¹³³ the investments made in each Contracting Party by investors from another Contracting Party comprised '[e]very kind of asset owned or controlled, directly or indirectly, by an investor', including, *inter alia* 'an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation)' and 'shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom'.

The question of the nationality of the legal person should of course be distinguished from that of the interest a State may have in protecting assets of another legal entity in which a corporation having its nationality has invested.¹³⁴ But these provisions suggest, at a minimum, that States may have an interest in protecting the assets invested by their nationals abroad, even where these assets consisted in shares owned in corporations of another nationality – whether that of the territorial State or, as in *Barcelona Traction*, of a third State. As this formulation of the question shows, it might be best in fact to narrow the doctrine of *Barcelona Traction* to the sole hypothesis of the exercise of diplomatic protection in circumstances where, moreover, the exercise of diplomatic protection by the national State of the corporation concerned (Canada) was facing no visible obstacle. And once we recognize the interest of a State in protecting the investments of its nationals abroad, it may be only a small step until we recognize the legitimacy of its attempts to regulate the foreign corporations which its nationals are controlling. We may not be there yet ; it is in this direction that we are moving.

1.3. The limits of the place of incorporation as a mode of determination of the nationality of legal persons

Questions have also been raised recently concerning the determination of the nationality through the place of incorporation, leading to attribute to the corporation the nationality of the State under the laws of which it has been created. This is the dominant mode of determination of the nationality of the corporation in a large number of countries, including the United States and the United Kingdom. It has increasingly been criticized as inadequate, however. The advantage of this mode of determination of the nationality of the corporation is that it contributes to legal certainty, since the results of applying this criteria are highly predictable.¹³⁵ On the other hand, the links of the corporation to the State under the laws of which it has been established may be extremely weak.¹³⁶ As explained by Linda Marby :

Incorporation has lost much its practical significance. In the past, most corporate operations and decisionmaking functions were highly localized, due largely to transportation and communications difficulties and corporate law requirements (such as prohibitions on noncitizen directors and requirements that shareholder and director meetings be held in the state of incorporation). The place of incorporation was indicative of a real and meaningful connection between the corporation and the authorizing state. Today, the fact that a corporation is organized under the laws of a particular jurisdiction does not indicate that the jurisdiction is the center of the corporation's economic activities or that the corporation is singularly or significantly identified with it.

The criterion of the place of incorporation is now mostly used in combination with other criteria. A generalization of the solution which would take as decisive for the purpose of determining the nationality of the legal person the criterion of the place of incorporation would, indeed, entail two risks. A first risk would be in the creation of what has been called the 'Delaware effect' in the

¹³³ Available from www.oecd.org (consulted on November 25th, 2006).

¹³⁴ The 2004 U.S. Model Bilateral Investment Treaty defines the 'enterprise of a Party' as 'an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there'. The Draft OECD Multilateral Agreement on Investment defines the investor as, *inter alia*, 'a legal person or any other entity constituted or organised under the applicable law of a Contracting Party' (II. Scope and Application, Definitions, 1, ii). Thus, these instruments treat the question of which legal persons shall be considered as 'of a party' (and benefiting, therefore, from the protection due to the investors of the other party) from the question of the nationality of these legal persons.

¹³⁵ Yitzhak Hadari, 'The Choice of National Law Applicable to the Multinational Enterprises', cited above, at 10.

¹³⁶ M. Tedeschi, 'The Determination of Corporate Nationality', 50 *Australian L.J.* 521 (1976).

economic analysis of federalism.¹³⁷ This is the equivalent to the phenomenon of ‘flags of convenience’ flown by vessels, who choose under which ‘flag’ to register on the basis, *inter alia*, of the regulatory framework they will be subjected to.¹³⁸ The danger is that States may register companies under their laws, perhaps for the purpose of taxing their benefits, but neglect a duty to regulate effectively those companies, as might be required under contemporary conceptions of international solidarity between States. In other terms, one question raised by the use of the place of incorporation as determinative of the nationality of the corporation, in a context where this might not correspond to the reality of the relationships of the corporation concerned with the different States with whom it interacts,¹³⁹ is that of an *obligation* imposed on States to regulate the activities of their nationals, going beyond their *liberty* to do so.¹⁴⁰ The question of whether, under international law, a State has an obligation to control the corporations whose behavior it is in a position to influence, has been addressed briefly above.¹⁴¹ We see now that there may be one supplementary argument in favor of the recognition of such an obligation : this might avoid the risk of ‘relocations of convenience’, which may be defined as situations where companies incorporate in States offering them the highest protection for their investments abroad, with lowest corresponding obligations in the way they operate.

The second risk implied in the reliance on the sole criterion of place of incorporation for the determination of the nationality of the corporation, without any requirement that there exists a genuine link to the State of incorporation, is the reverse of the first. It is that a State might exceed the boundaries of its legitimate jurisdiction under international law by seeking to regulate the activities of corporations with which it is in fact only weakly connected, in the absence of any such ‘genuine link’ between the State and the corporation created under its laws. This risk has been identified by S. Metzger in the immediate aftermath of the *Barcelona Traction* judgment, who noted that the criterion of nationality relied upon by the International Court of Justice in that case – the place of incorporation, rather than the nationality of the shareholders – might be ‘unworkable’ since, even in the rare occasions where the State under which the company is incorporated will seek to present an international claim in favor of that company against another State where the company has invested, this might not be considered acceptable by the host State, especially since an analysis of the criteria used in investment guarantee schemes shows that industrialized States are not willing to provide such guarantees on the mere basis of incorporation : ‘mere local incorporation is far too slender and neutral a connection to motivate capital-exporting countries to expend the extraordinary time, energy, and international political capital needed in pressing an international claim. The respondent developing country likewise cannot be expected to accept such a minor connection as constituting the ‘genuine link’ necessary to confer standing to present an international claim when capital-exporting countries, in putting their own money at risk, are unwilling to do so on the basis of so slight a connection’.¹⁴²

2. The structure of the transnational corporation

¹³⁷ See William L. Cary, ‘Federalism and Corporate Law. Reflections on Delaware’, 83 *Yale L.J.* 663 (1974). A rich literature has developed on this topic in recent years, some of which highlights the benevolent effects of such interjurisdictional competition. This is not the place to review the various positions on the subject.

¹³⁸ On this phenomenon, see in particular Emeka A. Duruigbo, *Multinational Corporations and International Law. Accountability and Compliance Issues in the Petroleum Industry*, Transnational Publ., Ardsley, 2003, at 28-40 ; and, closely related to the issues addressed in this report, R.T. Epstein, ‘Should the Fair Labor Standards Act Enjoy Extraterritorial Application? A Look at the Unique Case of Flags of Convenience’, 13 *U. Pa. J. Int’l Bus. L.* 653 (1993).

¹³⁹ It will be noted that, under Article 91(1) of the 1982 Convention on the Law of the Sea, there must exist a genuine link between the vessel and its flag State : ‘Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship’.

¹⁴⁰ On the duties of control imposed on the flag State under the 1982 Convention on the Law of the Sea, see Article 94 of the Convention. The general principle is that ‘Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’ (Art. 94(1)).

¹⁴¹ See above, section IV.1.

¹⁴² Stanley D. Metzger, ‘Nationality of Corporate Investment Under Investment Guaranty Schemes-The Relevance of *Barcelona Traction*’, cited above, at 541. A survey of the existing insurance schemes leads the author to arrive at the conclusion that the common denominator of these schemes is local incorporation combined with at least 51% of local ownership ; this, he suggests, might ‘appear in corporate cases to represent the current reality of the ‘genuine link’ of the *Nottebohm* case’.

2.1. Overcoming the separation of legal personalities in the multinational corporation

A frequently encountered problem in seeking to hold multinational corporations accountable for violations they are directly or indirectly responsible for in countries other than the country from which they operate, results from the way these entities organize the internationalisation of their activities. From a legal point of view, such internationalisation may operate through three mechanisms. First, the corporation may be directly present in the host country, by setting up a branch or an office in that country. Second, it may create a separate legal entity operating under the laws of the host country, but which it controls, for instance by holding a majority of shares or by choosing the directors of the subsidiary, or both. A parent-subsidiary relationship is thereby established, which may take a number of forms and may lead to a more or less strict control being exercised by the parent. Third, the corporation may develop contractual relationships with partners present in the country in which it seeks to develop its activities, for instance in order to market its products or to provide certain components of the products it manufactures. There exists in this case no investment nexus between the multinational corporation and the local partner, although, depending on the circumstances, the ability of the former corporation to exercise an influence on the latter may be equally significant.

In the first case (direct presence), no specific problem of imputability arises. The acts or omissions of the multinational corporation, whether they have occurred on the territory of the home State (typically, in its head offices or principal place of business) or on the territory of the State hosting its activities, are its own. The application of the legislation of the home State to such acts is unproblematic, moreover, since the active personality principle justifies the extraterritorial reach of the act. In addition, in criminal matters, this extraterritoriality can be based on the territoriality principle, in combination with the criminal law doctrine of ubiquity, according to which an offence is considered to have been committed within the territory of a State either if one of the physical acts constituting an element of the offence was perpetrated there, or if the effects of the offence became manifest there.¹⁴³

The second and third cases are more problematic. The following sections consider the question whether, when a multinational corporation is organized by a parent corporation having established subsidiary corporations in other States, the parent may be sued because of the acts committed by those subsidiaries. As we will see, the conclusions arrived at on this question may have implications for the situation where the relationship between two corporations is of a purely contractual nature, without any investment nexus between them.

The practical importance of the question cannot be overstated.¹⁴⁴ Due to the restrictions to the use of extraterritorial jurisdiction, the national jurisdictions of the home States of multinational corporations generally will be hesitant – or, in most cases, simply not competent – to try *foreign* corporations for activities committed abroad, exercising a form of jurisdiction which is generally referred to as foreign direct liability. Therefore, when the violations complained of are those of a foreign subsidiary, it will be required, in most cases, to identify the parent ‘behind’ the subsidiary, in order to sue the parent company before the national courts of the home State of the multinational corporation, and to establish either the derivative responsibility of the parent for the acts of the subsidiary, or the direct participation of the parent in the activity complained of.¹⁴⁵ This, moreover, will ensure that the victims of the

¹⁴³ *Extraterritorial Criminal Jurisdiction*, cited above, at p. 24.

¹⁴⁴ See, e.g., Mary Elliot Rollé, ‘Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases’, 15 *Geo. Int’l Envtl. L. Rev.* 135 (2003) ; Worth Loomis, ‘The Responsibility of Parent Corporations for the Human Rights Violations of their Subsidiaries’, in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague, Kluwer Law International, 1999, p. 145.

¹⁴⁵ Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, 24 *Hastings Int’l & Comp. L. Rev.* 297 (2001), at 299 ; Ph. I. Blumberg, ‘Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems’, 50 *Amer. J. Comp. L.* 493, 499 (2002).

violations can be compensated, in situations where the assets of the subsidiary would otherwise be insufficient to satisfy the damages award.¹⁴⁶

The problem, however, is that the parent corporation on the one hand, its subsidiary on the other, form two distinct legal entities, each with their own juridical personality. And the doctrine of limited liability, according to which the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment,¹⁴⁷ shields the parent company – even when it is the sole or majority shareholder in the subsidiary – from the debts of that subsidiary. The application of the limited liability doctrine to corporate groups is historically anomalous. The doctrine originated in a context where its purpose was to encourage individual investors to take certain risks, with the understanding that, should the company in which they have invested fail, the investors would not be liable beyond their own share in the lost investment.¹⁴⁸ But this rationale – encouraging entrepreneurial spirit and risk-taking investment by natural persons – hardly may be seen as befitting the current context, where corporations routinely own shares in other corporations, and where the doctrine of limited liability allows them to shield certain operations behind multiple layers of limited liability.¹⁴⁹ Moreover, while the principle of limited liability of the corporation may be adequate in contractual relationships, since the parties to a contract involving a corporation may be seen as having accepted the allocation of risk and the protection of investors resulting from the doctrine, the system may be considered ‘inadequate in the tort context where only one party is forced to accept the protection of the entity with which it did not intend to contract’.¹⁵⁰ Despite this, the doctrine currently functions as a shield benefiting the parent company, which cannot be held liable for acts of its subsidiaries on the sole basis of the existence of this relationship.

2.2. Three avenues for overcoming the limited liability of the parent

In order to overcome the problem of the separation of legal entities – which in many cases will be in clear contrast with the integrated character, in fact, of the multinational corporation –, three paths may be explored. The classical ‘piercing the corporate veil’ approach requires a close examination of the factual relationship between the parent and the subsidiary in order to identify whether the nature of that relationship is not more akin to a principal-agent relationship or whether, for other motives, there are reasons to suspect that the separation of corporate personalities does not correspond to economic reality, and that in the circumstances the law should base its solutions on this reality rather than on mere forms. A second approach is based on the idea that multinational corporations are groups of formally separate entities, but whose interconnectedness is such that it may be justified to establish a presumption according to which any act committed by one subsidiary of the group should be treated as if it were adopted by the parent. In this perspective, the transnational corporation is seen as ‘a conglomeration of units of a single entity, each unit performing a specific function, the function of the

¹⁴⁶ Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publ., Oxford – Portland Oregon, 2004, at p. 129.

¹⁴⁷ *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (‘Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception’ (citations omitted)); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (‘A corporation and its stockholders are generally to be treated as separate entities’).

¹⁴⁸ In the United States, at the time when the doctrine of limited liability matured during the second half of the nineteenth century when it became generally accepted, it was still generally unlawful for corporations to hold stocks in other corporations : this development took place in the United States only after 1890. See Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, cited above, at 301-303.

¹⁴⁹ As noted by Phillip Blumberg : ‘Unlike the investors in the parent corporation itself who were solely investors, the parent corporation was instead part of the business enterprise engaged along with its subsidiary in the collective conduct of the business under the parent’s control. Further, it provided a second layer of limited liability with the parent insulated from the debts of the subsidiaries as well as the ultimate investors in the enterprise insulated from the debts of the parent corporation and the enterprise’ (Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, cited above, at 303).

¹⁵⁰ Scott Coye-Huhn, ‘No More Hiding behind Forms, Factors and Flying Hats: A Proposal for a per se Piercing of the Corporate Veil for Corporations that Violate the Law of Nations under the Alien Tort Claims Statute’, 72 *U. Cin. L. Rev.* 743, 755 (2003) (referring to Frank H. Easterbrook and Daniel R. Fischel, ‘Limited Liability and the Corporation’, 52 *U. Chi. L. Rev.* 89, 112 (1985)).

parent company being to provide expertise, technology, supervision and finance. Insofar as injuries result from negligence in respect of any of the parent company functions, then the parent should be liable'.¹⁵¹ Finally, a third avenue would be to abandon the idea of linking the behavior of the subsidiaries to that of the parent altogether, and to focus instead on the direct liability of the parent company – although of course, such direct liability of the parent could arise from the failure to exercise due diligence in controlling the acts of the subsidiaries it may exercise control upon, and thus relate not only to the action of parent firm, but also to its omissions.

a) The indirect liability of the parent corporation for the acts of the subsidiary : the 'piercing the veil' approach

Under the common law, the classical approach has been to seek to lift the corporate veil by demonstrating that the parent company should be liable for the acts of the subsidiary, because the corporate form has been somehow abused, or because treating both entities as separate would be so clearly in contrast with the reality of their relationships that it would cause injustice. This requires establishing, *as a matter of fact*, that the parent company exercises such a control on the subsidiary company that it may be held liable for the acts of the subsidiary, despite the existence of two separate legal personalities. Thus, in exceptional circumstances, the United States courts will allow claimants to establish that the parent company exercises such a degree of control on the operations of the subsidiary that the latter cannot be said to have any will or existence of its own,¹⁵² and that treating the two entities as separate (and thus allowing the parent to shield itself behind its subsidiary) would sanction fraud or lead to an inequitable result.¹⁵³ In such cases, the 'piercing of the corporate veil' will be admitted, on the basis that the subsidiary has been a mere instrument in the hands of the parent company¹⁵⁴ or that the parent and the subsidiary are 'alter egos'. In a case concerning the question whether, under the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹⁵⁵ a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable as an operator of a polluting facility owned or operated by the subsidiary, the United States Supreme Court confirmed that

the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.¹⁵⁶

Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company.¹⁵⁷ This will be allowed, again in exceptional cases, where the parent company controls the subsidiary and where both parties agree that the subsidiary is acting for the agent : in such a case, 'the acts of a subsidiary acting as an agent are, from the legal point of view, the acts of its

¹⁵¹ Richard Meeran, 'The Unveiling of Transnational Corporations', in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, cited above, at p. 161, p. 170.

¹⁵² Taken alone, neither majority or even complete stock control, nor common identity of the parent's and the subsidiary's officers and directors, are sufficient to establish the degree of control of required. What is required is 'control (...) of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction has at the time no separate mind, will or existence of its own' (*Lowenthal v. Baltimore & Ohio R.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div.), *aff'd*, 6 N.E.2d 56 (1936), cited by Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', cited above, at 304).

¹⁵³ See *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939) ('the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice').

¹⁵⁴ *Chicago, M. & St. P. R. Co. v. Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 501 (1918) (principles of corporate separateness 'have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose (...) of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company').

¹⁵⁵ 94 Stat. 2767, as amended, 42 U. S. C. §9601 et seq.

¹⁵⁶ *United States v. Betterfoods*, 524 U.S. 51 (1998).

¹⁵⁷ As Justice (then Judge) Cardozo summarized in *Berkey v. Third Avenue R. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 61 : 'Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent'.

parent corporation, and it is the parent that is liable'.¹⁵⁸ An example is the reasoning followed in the case of *Bowoto v. Chevron Texaco*, where Judge Illston concluded that CNL, the subsidiary of Chevron in Nigeria, which allegedly had acted in concert with the Nigerian military in order to violently suppress protests against Chevron's activities in the region, could be considered as the agent of Chevron, in view in particular of the volume, content and timing of communications between Chevron and CNL, notably on the day of a protest when 'an oil platform was taken over by local people'.¹⁵⁹ These and other indicia showed that Chevron 'exercised more than the usual degree of direction and control which a parent exercises over its subsidiary'.

In order to establish either that the corporate form has been abused – by a parent artificially seeking to shield itself from liability by establishing a subsidiary which has in fact no existence of its own – or that the subsidiary has been acting in fact as the agent of the parent corporation, it will be required to bring forward a number of circumstances, which will serve to demonstrate that the separation of legal personalities is a mere legal fiction to which the economic reality does not correspond and which should not be admitted, as this might sanction fraud. The approach of the United States Supreme Court in *Labor Board v. Deena Artware* is typical, insofar as it provides a (non-exhaustive) list of indicia which could point towards the conclusion that 'in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another ; one may be only a shell, inadequately financed ; the affairs of the group may be so intermingled that no distinct corporate lines are maintained'.¹⁶⁰ This approach thus may constitute a source of legal insecurity, since the criteria allowing the 'piercing of the veil' are many, without either the list of admissible criteria or their hierarchization being authoritatively identified. And it imposes a heavy burden on complainants seeking to invoke the indirect liability of the parent corporation for the acts of its subsidiary. This results in a situation where, in fact, very few such attempts to 'pierce the veil' end up succeeding. Since the New Deal period, therefore, an alternative line of cases has emerged, which has led a number of United States state and federal courts to set aside the classical tests for allowing the piercing of the corporate veil in order to ensure that the legislative policy will not be defeated by the choice of corporate forms.¹⁶¹ But the overriding of the common law doctrines of limited liability has been piecemeal rather than systematic ; and it would seem that the most recent jurisprudential evolution, in the United States at least, consists in returning to the classical approach outlined above.

The European Court of Justice has taken a view quite similar in antitrust cases.¹⁶² In the leading case of *Imperial Chemical Industries*,¹⁶³ the Court considered that where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the Community, orders them to carry out a decision amounting to a practice prohibited under the competition rules of the EC, the conduct of the subsidiaries must be imputed to the parent company. The separation of legal

¹⁵⁸ Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', cited above, at 307.

¹⁵⁹ *Bowoto v. Chevron Texaco*, No C 99-2506 SI, 2004 US Dis LEXIS 4603 (ND, Cal 2004). The case is discussed by Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, cited above, at pp. 132-133.

¹⁶⁰ *Labor Board v. Deena Artware*, 361 U.S. 398, 402 (1960).

¹⁶¹ See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944) ('It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement'); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 713 (1974) ('the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy'); *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) ('the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies').

¹⁶² See generally on the approach followed in European Courts, Cohn & S. Simitis, 'Lifting the Veil' in the Company Laws of the European Continent', 12 *Int'l & Comp. L. Q.* 189 (1963); Hadari, 'The Structure of the Private Multinational Enterprise', 71 *Mich. L. Rev.* 729, 771, n. 260 (1973); Dobson, 'Lifting the veil' in four countries : the law of Argentina, England, France and the United States', 35 *Int'l & Comp. L. Q.* 839 (1986); Karl Hofstetter, 'Parent responsibility for subsidiary corporations: evaluating European trends', 39 *Int'l & Comp. L. Q.* 576 (1990); L. Bergkamp et W.-Q. Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts', *Maastricht Journ. of European and Comparative Law*, vol. 8, n°2, 2001, pp. 167-188.

¹⁶³ Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619 (judgment of the Court of 14 July 1972).

personalities should not shield the parent company from liability for the acts of its subsidiaries, ‘in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company’.¹⁶⁴ The parent company and the subsidiary will be considered to form one single ‘economic unit’, it would seem – allowing for the acts of the subsidiary to be imputed to the parent company –, where two cumulative conditions are fulfilled : first, the parent has the power to influence decisively the behavior of the subsidiary ;¹⁶⁵ second, it has in fact used this power on the occasion of the adoption of the contested acts.¹⁶⁶ In such circumstances, ‘the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition’.¹⁶⁷

b) The presumption of control in the integrated enterprise

The difficulties raised with the classical approach to piercing the veil may reward corporations seeking to circumvent certain legislative provisions by insulating certain operations from the reach of such provisions through the creation of separate corporate entities. The risk of such abuses has occasionally led the legislator to specify that it intended its prescriptions to apply also to corporations controlled by the economic entities which were the immediate addressees of the law. This technique is a second avenue for overcoming the problem created by the doctrine of limited liability. It has been used in the United States not only in New Deal legislation and by courts and agencies seeking to ensure that legislation protecting employees would not be outplayed by the abuse of the corporate form, but also in order to define the conditions under which certain legislations protecting employees from discrimination could extend to the operations of subsidiaries of American undertakings operating overseas.¹⁶⁸ The 1990 American with Disabilities Act is an example. The Act prohibits discrimination against persons with disabilities, as committed by any employer, employment agency, labor organization, or joint labor-management committee. It provides for the extraterritorial scope of the prohibition, by establishing a presumption according to which ‘If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer’.¹⁶⁹ However, in order to remain within the boundaries of extraterritorial jurisdiction as defined by the principle of active personality, this section does not apply with respect to ‘the foreign operations of an employer that is a foreign person not controlled by an American employer’.¹⁷⁰ This is equivalent to imposing on all American employers covered by the Act an obligation to monitor the compliance of all the corporations they control in foreign countries with the prohibition of discrimination on grounds of disability. The Act also provides that

the determination of whether an employer controls a corporation shall be based on—
(i) the interrelation of operations;
(ii) the common management;
(iii) the centralized control of labor relations; and
(iv) the common ownership or financial control,
of the employer and the corporation.¹⁷¹

¹⁶⁴ At para. 133.

¹⁶⁵ Thus, the Court remarks that ‘at the time the applicant held all or at any rate the majority of the shares in those subsidiaries’ (para. 136) and ‘was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the common market’ (para. 137).

¹⁶⁶ At para. 137-139.

¹⁶⁷ At para. 140.

¹⁶⁸ Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, cited above, at 313-315.

¹⁶⁹ Pub. L. 101-336, title I, § 102, July 26, 1990, 104 Stat. 331; amended by Pub. L. 102-166, title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; codified as 42 U.S.C. § 12112 (c)(2)(A) (1994).

¹⁷⁰ 42 U.S.C. § 12112 (c)(2)(B) (1994).

¹⁷¹ 42 U.S.C. § 12112 (c)(2)(C) (1994).

Similar provisions may be found, for instance, in Title VII of the Civil Rights Act of 1964.¹⁷² Although the amendments made to the Civil Rights Act in 1991 seriously restricted the extraterritorial reach of this statute – following those amendments, only employees who are citizens of the United States are covered by the protection afforded under Title VII of the Civil Rights Act¹⁷³ –, American employers are presumed, under this statute, to engage in any discriminatory practice engaged in by a corporation whose place of incorporation is a foreign country, if they control such foreign corporation. The modalities of determining the existence of such control are identical to that provided for in the American with Disabilities Act.¹⁷⁴

In the *Amoco Cadiz Oil Spill Case*, it is such an ‘enterprise’ approach which the District Court of Illinois has adopted, even in the absence of any legislative mandate, in order to conclude that the parent corporation should be held liable for environmental damage caused by an oil spill from a tanker off the coast of France : the close degree of control of the parent corporation over its subsidiaries allowed the court to overcome the separation of legal personalities.¹⁷⁵ It has also been proposed to adopt a similar approach in the Alien Tort Claims Act, where, it has been argued, the fact that the subsidiary has allegedly violated the law of nations should be sufficient to allow for piercing the veil, and impose a liability on the parent (controlling) company unless it is proven by the latter that ‘no reasonable effort would have discovered evidence from documents of any applicable government, non-governmental organizational documents and reports, employee information, or anecdotal information in the state that would have moved a reasonable person to inquire further’.¹⁷⁶

Insofar as it is based on the presumption that the ‘controlling’ parent company may effectively influence the behavior of the subsidiary – which justifies attributing to the parent company the acts of the subsidiary –, the ‘integrated enterprise’ approach is in line with the contemporary evolution of multinational firms. The ability of the multinational firm to move important volumes of goods swiftly and at relatively low cost, as well as the standardization of products across the globe, has transformed the classical understanding of the relationship between the parent and the subsidiary. In many cases, the multinational appears as a coordinator of the activities of its subsidiaries, which function as a network of organisations working along functional lines rather than according to geographical specialization. This process of ‘divisionalization’¹⁷⁷ has been described thus : ‘In the past, parent companies typically made little effort to coordinate strategically the activities of their foreign subsidiaries. Foreign affiliates were treated as distant appendages – as ‘stand-alone fiefdoms’ that operated independently and merely paid a dividend to the home office. Today, (...) some multinationals are integrating their previously nationally focused and autonomous production and distribution operations in various countries along regional and global lines. Thus foreign subsidiaries that in the past produced and marketed products only in the country in which they were based, are now supplying regional or worldwide markets, including in many cases the parent company's home market’.¹⁷⁸ In this process, the new organizational structures ‘give global corporate managers authority over country and regional managers’; incentive systems are devised to ‘encourage cooperation among employees working for different affiliates’ ; and ‘programs and practices [are] designed to instill in diverse groups of employees scattered around the globe a common sense of purpose and common

¹⁷² Pub. L. 88-352 (Title VII), 42 U.S.C. § 2000e and ff., as amended by the Civil Rights Act of 1991 (Pub. L. 102-166).

¹⁷³ 42 U.S.C. § 2000e, (f), and § 2000e-1, (a).

¹⁷⁴ 42 U.S.C. § 2000e-1, (b) and (c).

¹⁷⁵ See *Amoco Cadiz Oil Spill*, 1984 A.M.C. 2123, 2 Lloyd’s Rep 304 (N.D. Ill. 1984): ‘As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, standard [the American parent corporation] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities AIC and Transport’.

¹⁷⁶ Scott Coye-Huhn, ‘No More Hiding behind Forms, Factors and Flying Hats: A Proposal for a per se Piercing of the Corporate Veil for Corporations that Violate the Law of Nations under the Alien Tort Claims Statute’, cited above, at p. 758. In contrast with this proposal, however, the presumption established under statutes such as the Civil Rights Act or the American With Disabilities Act is non-rebuttable.

¹⁷⁷ Peter Muchlinski, *Multinational Enterprises and the Law*, Blackwell Publ., 1995.

¹⁷⁸ Linda A. Mabry, ‘Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality’, 87 *Geo. L. J.* 563, 565 (1999).

methods of operation'¹⁷⁹: in sum, the head office reasserts its role, as the integration of the group is deepened.

c) Direct liability of the parent corporation

A third path may finally be explored. This consists in holding the parent company directly liable for certain actions which it has itself – not via its subsidiary alone – taken, in violation of its legal obligations. The crucial factor connecting this to the previous scenarii is that, among those legal obligations, there may exist, *as a matter of law*, an obligation to exercise control over the activities of the subsidiary. Indeed, the ability of the direct liability approach to overcome the barriers resulting from the separation of legal personalities between the parent and the subsidiary will depend on whether or not the parent corporation is under such a legal obligation to control the acts of its subsidiaries, in order to ensure that they will not commit certain acts, for instance, acts amounting to violations of human rights. Conversely, where no such obligation is imposed, there is a risk that an attempt to substitute a direct liability approach to an indirect liability approach will result in creating a disincentive on parent companies to monitor the behavior of their subsidiaries, because any amount of ‘excessive’ control might allow to conclude either that the subsidiary is merely acting as an agent of the parent, or that the implication of the parent in the operations is such that it should be held liable alongside the subsidiary. In that sense, where direct liability attaches to parent companies only in cases of actions rather than omissions, ‘parents will be discouraged from intervening in their subsidiary’s operations, even though they may have superior knowledge and technical expertise. Alternatively, parent companies might maintain ‘strategic control’ but avoid responsibility by delegating operational matters, which are more likely to give rise to tortious consequences’.¹⁸⁰

The case of *Connelly v. RTZ Corporation plc and Others* may serve as an illustration.¹⁸¹ The claimant in that case was a former employee for Rossing Uranium Ltd. (R.U.L.), a Namibian subsidiary of the defendant corporation (RTZ Corporation plc, incorporated in the United Kingdom). He had been employed by R.U.L. in an uranium mine, following which it was discovered, three years after his return, that he was suffering from cancer of the larynx, allegedly due to exposure to radioactive material in the mine. According to the description by the House of Lords, the claim was based on the allegation that ‘R.T.Z. had devised R.U.L.’s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy’, and that ‘an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine’. The argument was therefore not (as in classical piercing-the-veil analysis) that separation between the parent and the subsidiary should be treated as a mere fiction, a fraudulent means of limiting the liability of the parent corporation, without any correspondance in economic reality : it was that R.T.Z. corporation had itself contributed, by its acts, in causing the damage for which the victim sought compensation. Such an argument would have had no chance to succeed if, instead of being involved in defining the policy of its subsidiary on health and safety or environmental issues, R.T.Z. corporation had simply ignored any risks associated with the mining of uranium, and had acted merely as a shareholder, monitoring the financial performances of its subsidiary, but without seeking to be informed about, let alone participate in, the definition of its everyday policies in such areas.

In *Connelly*, the direct liability of the parent corporation was asserted on the basis of the *actions* it had taken in defining the policies of its subsidiary. By contrast, the *omissions* of the parent corporation were at stake in *Lubbe and 4 Others v. Cape plc*, which the House of Lords was presented with again

¹⁷⁹ *Id.*

¹⁸⁰ Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, cited above, at p. 134 (citing A.J. Natale, ‘Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine: A Parent Corporation’s Duty to Provide a Safe Workplace for Employees of its Subsidiary’, 57 *Univ. of Cincinnati L. Rev.* 717, 736 (1988); and J. Cassels, ‘Outlaws: Multinational Corporations and Catastrophic Law’, 31 *Cumberland L. Rev.* 311, 326 (2000)).

¹⁸¹ *Connelly v. RTZ Corporation plc and Others* [1997] UKHL 30; [1998] AC 854; [1997] 4 All ER 335; [1997] 3 WLR 373 (24th July, 1997).

only three years later.¹⁸² Over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries.¹⁸³ As noted by the leading opinion of Lord Bingham of Cornhill :

... the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group*. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss).¹⁸⁴

Central to the *Cape plc* case was, therefore, the question ‘whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company’.¹⁸⁵

2.3. The implications of the different avenues

Two important consequences follow from this distinction between the derivative liability of the parent corporation for the acts of its subsidiary, where the corporate veil could be lifted ; the ‘integrated enterprise’ approach, which is an intermediate approach predicated on the understanding that the multinational enterprise is organized as a single economic unit, allowing for a presumption that the acts committed by the subsidiary will be imputed to the parent ; and the direct liability of the parent corporation for its own actions or omissions, including the omission to exercise due diligence in controlling the subsidiary. First, the ‘derivative liability’ approach creates a disincentive on the parent company to exercise a strict control over the activities of the subsidiary, even in situations where it could exercise such control in fact. Indeed, to the extent that the relationships between the parent and the subsidiary remain fully consistent with the norms of corporate behaviour, i.e., do not lead to the suspicion that the parent-subsidiary separation has been misused in order to artificially insulate the parent from liability for the behaviour of the subsidiary, the corporate veil will not be pierced : only where it has been established that the control by the parent company is such that the subsidiary has no existence of its own (has no ‘separate mind’), will the separation of legal personalities be overcome. Thus, insofar as this serves to limit its potential legal liability, it will be in the interest of the parent company, not to monitor closely the everyday operations of the subsidiary, but on the contrary to abandon broad discretion to the subsidiary as to how to implement the general policies set for the multinational group. A similar consequence would follow an approach based on the potential direct liability of the parent corporation, under legal systems which do not impose due diligence duties, i.e., where liability may not be engaged for *omissions*. By contrast, if – under the ‘integrated enterprise’ approach – we establish a presumption that the parent is liable for all the acts adopted by the subsidiaries within the multinational group, or if we seek to engage the ‘direct liability’ of the company not only for its actions but also for its omissions – imposing on the parent company an

¹⁸² *Lubbe and 4 Others v. Cape plc*, [2000] 1 W.L.R. 1545 (H.L.).

¹⁸³ On 14 December 1998, the House of Lords had already refused to allow leave to the defendants for filing a further appeal against an initial decision by the Court of Appeal. Following this, over 3,000 new plaintiffs emerged, fundamentally transforming the nature of the litigation presented before the United Kingdom courts.

¹⁸⁴ Emphasis added.

¹⁸⁵ As indicated by the opinion of Lord Bingham of Cornhill, this is the issue as reformulated during the first Court of Appeal hearing in the case.

obligation to exercise due diligence in controlling the activities of its subsidiary – close monitoring of the subsidiary will be in the interest of the parent : instead of making it vulnerable to attempts to pierce the corporate veil, it may be seen as a way to avoid liability or as an insurance against the risk of being accused of being negligent in exercising oversight over the subsidiary’s activities.

The second consequence of these distinctions is related to the question of State jurisdiction. The *ICI* case of the European Court of Justice presents us with a rather unfamiliar situation where the applicability of the law of the forum was extended to the acts of a parent company, incorporated in a foreign country, because of the acts committed by the subsidiaries of that company on the territory of the forum (more precisely in the *ICI* case, the behavior of the subsidiaries produced effects on the common market of the European Economic Community).¹⁸⁶ In general however, the situation is exactly the reverse : the extraterritorial application of the law of the forum is sought to be justified by the fact that the subsidiaries, though established in foreign States, in fact are controlled by the parent company, domiciled in the forum State. In this scenario, direct liability of the multinational corporation or the adoption of the ‘integrated enterprise’ approach¹⁸⁷ present over derivative liability the advantage that they can be based on the territoriality principle, combined with the criminal law doctrine of ubiquity where the extraterritorial legislation is of a criminal nature, or at least on the active personality principle. In addition, in litigation before jurisdictions of common law countries – including litigation before the United States federal courts based on the Alien Tort Claims Act¹⁸⁸ –, the adoption of the ‘direct liability’ or the ‘integrated enterprise’ approaches would facilitate overcoming the barrier represented by the *forum non conveniens* doctrine, since the connection to the forum will be stronger if the parent company is sued directly for its own actions, rather than for those of its subsidiaries.¹⁸⁹

By contrast, under the indirect liability approach, it may be more difficult from the viewpoint of international law to justify imposing on foreign subsidiaries the law of the forum State, even if the objective is to reach, via the direct liability of the subsidiaries, the parent corporation itself to which the behavior of the subsidiaries would be imputed. The *Barcelona Traction* Case of the International Court of Justice did seem to exclude, at least as regards the determination of nationality for the purposes of the exercise by a State of its right to diplomatic protection, determining the nationality of the corporation on the basis of the nationality of its shareholders. As we have seen, a number of arguments can be made both against this position regarding the determination of the nationality of the company and in favor of allowing the imposition of a form of foreign direct liability where the foreign subsidiary is in fact controlled by a parent company domiciled in the forum State.¹⁹⁰ Nevertheless, as a mode of exercising extraterritorial jurisdiction, foreign direct liability – the direct imposition by the home State of the parent of obligations on its foreign subsidiaries – is perceived as constituting a more severe threat to the sovereignty of the territorial (host) State than parent-based extraterritorial

¹⁸⁶ A situation presenting certain similarities presented itself in the *Doe v. Unocal* case, in which the U.S. District Court for the Central District of California considered that it has no personal jurisdiction over Total, the French partner in the Yadana pipeline project in Burma of the Californian company Unocal (*Doe v. Unocal*, 27 F Supp 2d 1174 (CD Cal 1998), aff’d 248 F 3d 915 (2001)). Under the ATCA, in order for the United States federal courts to be able to exercise ‘personal jurisdiction’, the defendant must have ‘minimum contacts’ with the forum, and this in principle requires ‘systematic’ and ‘continuous’ contacts with the forum (see *International Shoe v. Washington*, 326 U.S. 310 (1945); of *Hanson v. Deckel*, 357 U.S. 235 (1958), and their progeny). The U.S. District Court for the Central District of California took the view that it had no ‘personal jurisdiction’ over Total, since the Californian subsidiaries of Total were not its ‘alter egos’ in the classical ‘piercing the veil’ approach.

¹⁸⁷ Under the ‘integrated enterprise’ approach, the law of the forum State is extended to foreign corporations on the basis that they are part of one single economic group, coordinated by the parent corporation : indeed, as illustrated by the examples of the Civil Rights Act and the American Disabilities Act mentioned above, this approach has been adopted precisely in order to justify the extraterritorial reach of the concerned statutes.

¹⁸⁸ However, to the extent that litigation would be brought before courts in Ireland or the United Kingdom on the grounds provided by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the doctrine may not apply, since the jurisdiction exercised on that basis is mandatory under European Community law. See above, text corresponding to notes 27-31.

¹⁸⁹ Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, cited above, at p. 134 (citing M. J. Rogge, ‘Towards Transnational Corporate Liability in the Global Economy: Challenging the Doctrine of *Forum non Conveniens* in *Re: Union Carbide, Alfaro, Sequihua, and Aguinda*’, 26 *Texas International Law Journal* 299, 313-314 (2001)).

¹⁹⁰ See above, IV, 1., b) (text corresponding to notes 128-134).

regulation.

2.4. Conclusion

For the reasons which have been indicated above, the most advisable solution to avoid the parent corporation from shielding itself behind the subsidiary where it would have been able to control the subsidiary more effectively, would seem to consist in imposing directly on the parent corporation an obligation, defined by statute, to effectively monitor the behavior of the subsidiaries which it 'controls'. The notion of control, for the purposes of the application of such a statutory obligation, should be defined on the basis of the stock ownership,¹⁹¹ without there being a need to identify, on a case-to-case basis, whether the parent company has in fact been involved in the policies of the subsidiary or whether the latter has a 'mind of its own'. Only where the parent company could demonstrate that it was unable to effectively avoid the contested behavior of the subsidiary company from occurring, despite having exercised due diligence and despite its best efforts to seek information about such behavior and to react accordingly, should its liability be excluded. Just like in the 'integrated enterprise' approach above, a presumption should therefore be established that the acts committed by the subsidiaries which it 'controls' may be attributed to the parent company as such, although such a presumption could conceivably be rebutted in certain instances where, despite the safeguards in place, the parent company failed to prevent certain tortious or otherwise illegal acts from being adopted.

The conclusion which has been reached as regards the imputability to the parent company of the acts of its subsidiary may easily be extended to the contractual relationships a corporation has with its business partners. May the transnational corporation be held liable for human rights abuses committed directly by its suppliers or sub-contractors? Reasoning by analogy with the different approaches to the parent-subsidiary relationship outlined above, we may address the question whether there should exist such a 'supply chain responsibility' in three distinct ways. We could ask, first, whether the contractual relationship is not merely obfuscating the actual control exercised by one partner over another, for instance where a task previously performed within the single firm has been externalized and another entity set up for that specific purpose, upon the initiative or with the help of the controlling corporation. This would constitute the equivalent of the 'piercing the veil' approach adopted in the presence of an investment nexus between the two legal entities. Second, we could establish a presumption according to which all (tortious or illegal) acts of the contractor are to be imputed to the business partner, insofar as there exists such a relationship of dependency of the former on the latter that it may be presumed that the 'controlling' party knew or should have known about these acts, and therefore should have acted in order to prevent them from occurring. Such a degree of dependency may exist, for instance, in certain situations where suppliers depend on the orders of the global retailing company for their economic survival, or in franchising contracts. Third, we could impose a due diligence obligation on the transnational corporation to monitor the behavior of its business partners in order to ensure that they will not violate certain basic norms which, therefore, will be diffused within the network of organizations on which this corporation draws. For the home State of the transnational corporation, this third option consists in refraining from imposing directly obligations on the business partners of this corporation, but in imposing on this corporation itself an obligation to monitor the behavior of its sub-contractors (whether these are franchisees, suppliers, or other) and, at a minimum, to include a provision relating to the respect for human rights in the agreements entered into by the transnational corporation.

Among the general measures of implementation the UN Sub-Commission on the promotion and protection of human rights envisaged for the Norms on the human rights responsibilities of transnational corporations and other business enterprises,¹⁹² was the following: 'Each transnational

¹⁹¹ For instance, sections 747 to 756 and Schedules 24 to 26 of the United Kingdom Income and Corporation Taxes Act 1988, rely on the notion of the 'controlled foreign company', defined as a foreign company in which the resident company owns a holding of more than 50%.

¹⁹² UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, which the Preamble of the draft Norms states is 'a useful interpretation and elaboration of the standards contained in the Norms', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2

corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms'.¹⁹³ The commentary states : 'Transnational corporations and other business enterprises shall ensure that they only do business with (including purchasing from and selling to) contractors, subcontractors, suppliers, licensees, distributors, and natural or other legal persons that follow these or substantially similar Norms. Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them.'¹⁹⁴

By imposing on the transnational corporation an obligation to monitor its business partners, such monitoring thereby becoming an integral aspect of the business relationship, this solution overcomes the problems linked to the exercise of extraterritorial jurisdiction by the home State of the transnational corporation. It also avoids the problem the imputability of the acts adopted by its business partners to the transnational corporation itself, since any liability of the corporation would be engaged not indirectly for the acts of its business partners which would have to be traced back to actions or omissions of the transnational corporation, but rather (directly) for the failure of this corporation to have effectively monitored the compliance of its business partners with certain human rights requirements. In addition, this procedural solution presents the advantage of defining the 'sphere of influence' of transnational corporations – i.e., the range of situations to which their human rights responsibilities may extend – not by reference of any ability of the corporation to influence the behavior of others *in fact*, whether these are the government of the country where it operates or its business partners, but instead by reference of the initiatives of the corporation itself. Under this approach, the degree of influence exercised by the transnational corporation on its business partners should not matter – and indeed, such influence, which depends essentially on the alternatives available to the partner, in many cases will be very difficult to measure. All that should matter is that the transnational corporation has decided to enter into a contractual relationships, to enter into an agreement with the host government, or to enter into a joint venture with a commercial partner, whether public or private. The reality of the activities it conducts, and not some abstract understanding of the respective roles of transnational corporations and States in the protection and promotion of human rights, should determine the scope of the obligations imposed on the corporation.

3. Extraterritorial jurisdiction and positive conflicts of jurisdiction

The exercise of extraterritorial jurisdiction may result in conflicts of jurisdiction not only between the State exercising such extraterritorial jurisdiction and the territorial State, but also between multiple States other than the territorial State, all intending to exercise jurisdiction over the same situation. The problems caused by such positive conflicts of jurisdiction may be ranged in two categories. First, the interests of States may be in conflict. The territorial State may consider that the extraterritorial jurisdiction exercised by another State, which seeks to extend the reach of its national legislation to situations arising on the territory of the first State, violates its sovereignty or constitutes an intervention in its internal affairs. Moreover, conflicts may arise between different States seeking to exercise extraterritorial jurisdiction over the same situations, to which they intend to attach diverging

(2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt & Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt & Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, 2005, pp. 315-350. And see, for a presentation of the debate following the adoption of the draft Norms by the Sub-Commission on Human Rights, O. De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors', in O. De Schutter (ed.), *Transnational Corporations and Human Rights*, Hart Publ., 2006, pp. 1-37.

¹⁹³ Principle 15, third sentence.

¹⁹⁴ Commentary to Principle 15, c).

solutions.¹⁹⁵ Second, the addressee of different State legislations – in particular, the multinational enterprise having to comply simultaneously with different prescriptions – may encounter certain difficulties in the face of extraterritorial legislations. Where the criteria for the extraterritorial application of any State legislation are not defined with the required precision, for example, as regards the determination of the nationality of the corporation or as regards the conditions under which a foreign corporation is considered to be ‘controlled’ by a corporation considered to possess the ‘nationality’ of the forum State, a problem may arise as regards the principle of legality, especially where criminal extraterritorial jurisdiction is concerned. Moreover, the simultaneous application of more than one national legislation to a same situation may lead to the multinational corporation facing conflicting requirements.

The risks of positive conflicts of jurisdiction arising from the extension of extraterritorial legislation may be attenuated either by an attitude of the forum State aimed at limiting the risks involved, or by measures adopted in a bilateral or multilateral framework. Each of these options is considered in turn.

3.1. The role of the forum State in limiting the risk of positive conflicts of jurisdiction

The Annex appended in 1991 to the OECD Declaration on International Investment and Multinational Enterprises¹⁹⁶ contains a series of general considerations and practical approaches aimed at avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments. Under the ‘general considerations’, the OECD governments recommend that

In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

- a) Have regard to relevant principles of international law;
- b) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries [¹⁹⁷];
- c) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries (...)

In line with the general philosophy thus advocated within the OECD, the State seeking to exercise extraterritorial jurisdiction may envisage a number of measures in order to minimize positive conflicts of jurisdiction with other States. It may avoid legislating unless where there is a clear basis, recognized under international law, for doing so (effects doctrine, active or passive personality principle, principle of protection, or principle of universality), and provided the principle of reasonableness is complied with. To the extent the State authorities have a certain discretion whether or not to exercise extraterritorial jurisdiction in specific instances under extraterritorial legislation allowing for this possibility, they may use this discretion in order to accommodate the interests of other States : this could guide, for instance, the prosecuting authorities under the principle of expediency ; or it could guide the courts in deciding whether or not to accept jurisdiction, under a doctrine such as the *forum*

¹⁹⁵ In the extraterritorial application of their antitrust legislation for instance, the policy choices of the EU, of Canada, of Japan and of the United States may differ, and there is a risk, where the respective antitrust legislations of these States all are applicable to the same anticompetitive arrangements concluded by undertakings, that these choices be undermined – as when a settlement negotiated under the relevant competition rules of the European Community would be threatened by the availability of a remedy before United States courts, for competitors of the undertakings concerned, on the basis of the United States Sherman Act. This question was at the heart of the *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* case, discussed hereunder.

¹⁹⁶ On the OECD Declaration containing the Guidelines for Multinational Enterprises, see above, n. 19.

¹⁹⁷ In a footnote, the ‘general considerations’ explain that this is in accordance with ‘the principle of comity, as it is understood in some Member countries, which includes following an approach of this nature in exercising one’s jurisdiction’.

non conveniens doctrine relied upon by common law jurisdictions, or equivalent doctrines of subsidiarity. Finally, where the exercise of criminal extraterritorial jurisdiction is concerned, the forum State may consider extending respect for the *non bis in idem* rule to situations where a criminal defendant has already been prosecuted for the same acts, when the said acts are offences under the laws of another State having exercised jurisdiction. It may also only apply a criminal statute to extraterritorial situations under the condition of double criminality ; or, at a minimum, it may decide that a particular conduct will not constitute unlawful behavior when such behavior is prescribed by the territorial State, thus avoiding to impose on the addressee conflicting obligations.

Most of the measures which a State may adopt in order to avoid positive conflicts of jurisdiction out of respect for the sovereignty of other States, in accordance with the principle of comity between nations,¹⁹⁸ will simultaneously benefit the addressee of the extraterritorial legislation concerned, by relieving it for certain obligations which it might otherwise have been imposed. In general, the attitude of restraint in the adoption of extraterritorial legislation, in particular where the legislature avoids to regulate on extraterritorial situations unless there exists a clear connecting factor to the forum State and unless the criterion of reasonableness is complied with, thus will risk respecting other States' interests at the expense of combating certain forms of unacceptable behavior.

Although it is, of course, unrelated to human rights abuses, the recent case-law of the United States Supreme Court concerning the extraterritorial application of the Sherman Act offers an example. This case-law demonstrates a willingness to take into account the principle of comity between nations, which not only will ensure that the policy aims guiding antitrust legislation of other nations will not be frustrated by an 'imperialistic' extension of United States antitrust law, but also that the corporations whose anticompetitive behavior is at stake will not be facing a multiplicity of suits in different countries, filed by consumers against practices which may have affected the claimants only on certain national markets other than the market of the forum. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,¹⁹⁹ the Supreme Court unanimously held that where anticompetitive behavior, such as a price-fixing agreement,²⁰⁰ 'significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect', plaintiffs who allege that they have been injured by the 'foreign effect' cannot invoke the jurisdiction of U.S. antitrust laws or courts. The dispute presented to the Supreme Court concerned the interpretation to be given to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). This statute excludes from the reach of the Sherman Act much anticompetitive conduct that causes only foreign injury, by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce (...) with foreign nations'.²⁰¹ There are a number of exceptions to this rule, however, where the conduct significantly harms imports, domestic commerce, or American exporters. In particular, under one of these exceptions, the Sherman Act will be applicable where the conduct (1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim'.²⁰² In order to conclude that this exception does not apply where the plaintiff's claim rests solely on the independent foreign harm, the Court applied the rule of interpretation according to which ambiguous statutes should be construed in order to avoid unreasonable interference with the sovereign authority of other nations.²⁰³ This rule, in

¹⁹⁸ On this principle, see J. Paul, 'Comity in International Law', 32 *Harvard International Law Journal* 1 (1991).

¹⁹⁹ 123 S.Ct. 2359 (2004).

²⁰⁰ Producers of vitamin products from various countries had joined in a price-fixing conspiracy by fixing their prices worldwide over a period of several years.

²⁰¹ 96 Stat. 1246, 15 U. S. C. §6a.

²⁰² §§6a(1)(A), (2).

²⁰³ The Court cites the following precedents : *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 20–22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 382–383 (1959) (application of Jones Act in maritime case); *Lauritzen v. Larsen*, 345 U. S. 571, 578 (1953) (same).

the view of the Court, ‘reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow’.²⁰⁴ It explained its position thus :

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world. No one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs.

While recognizing that ‘our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic antitrust injury* that foreign anticompetitive conduct has caused’,²⁰⁵ the Court declined to see how it could be equally reasonable to ‘apply those laws to foreign conduct insofar as that conduct causes *independent foreign harm* and that foreign harm alone gives rise to the plaintiff’s claim’,²⁰⁶ since:

Like the former case, application of those laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement §403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation’s interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

The Court was apparently also convinced to adopt this position by the *amici curiae* briefs submitted by a number of governments, including those of the United States, Belgium, Canada, Germany, Ireland, Japan, and the United Kingdom, and by other non-governmental groups, such as the International Chamber of Commerce. Foreign governments in particular argued that, despite the existence of certain superficial analogies between the requirements of United States antitrust law and other equivalent statutes, to apply the remedies provided for under United States law (especially treble damages) ‘would unjustifiably permit their citizens to bypass their own less generous remedial schemes [by filing direct claims before United States courts for anticompetitive behavior], thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody’. Moreover, ‘a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty’. The Supreme Court concludes in the following terms :

Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Of course, national legislation whose objective it is to protect internationally recognized human rights cannot be assimilated to antitrust legislation or to the kind of legislation envisaged under the OECD

²⁰⁴ The Court refers to the *Restatement (Third) of Foreign Relations Law of the United States* §§403(1), 403(2) (1986) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State).

²⁰⁵ Emphasis added.

²⁰⁶ Emphasis added.

recommendations aimed at avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments, such as those included in Annex 2 of the OECD Declaration on International Investment and Multinational Enterprises : the balance between the need to avoid positive conflicts of jurisdiction, on the one hand, and the need to combat impunity for behavior which one jurisdiction deems unlawful, on the other hand, may be fundamentally transformed where serious human rights violations are concerned and where, in effect, by exercising extraterritorial jurisdiction, a State seeks to contribute to the implementation of values shared by the international community.

At a more fundamental level however, it is doubtful that we necessarily should see this situation as presenting us with an unsurmountable dilemma between respecting other States' interests or contributing to the fight against impunity for certain human rights abuses by the use of extraterritorial legislations. Certain doctrines aimed at ensuring self-restraint in the exercise of extraterritorial jurisdiction, while justified by the principle of comity towards foreign nations, will not fundamentally modify the legal situation of the addressee of such extraterritorial legislations, insofar as such doctrines will affect not the very *possibility* of extraterritorial jurisdiction being exercised, but only the *exercise*, in any individual case, of extraterritorial jurisdiction. Thus, the rule of reason in the exercise of criminal extraterritorial jurisdiction is essentially used in order to guide the decision whether or not to prosecute, in accordance with the principle of expediency or of opportunity. Similarly, the doctrine of *forum non conveniens*, as applied by the United States and other common law jurisdictions,²⁰⁷ shows a certain degree of deference to foreign jurisdictions, without depriving the applicable extraterritorial legislation of its deterrent effect, and allowing extraterritorial jurisdiction to be exercised where, in its absence, certain forms of behavior would remain unpunished or the victims left without remedies. It is true that the rule of reason, when determinative of the question whether or not to exercise extraterritorial criminal jurisdiction, or the *forum non conveniens* doctrine, when a court has to decide whether another forum more closely connected to the dispute provides an alternative avenue for the claimants, present certain disadvantages : these doctrines imply that a balancing of the interests involved shall be performed within the forum State, by the prosecuting authorities or by the courts, which may impair the objectivity of the exercise ; and the case-to-case approach they imply makes the outcome essentially unpredictable. However, the very flexibility of these doctrines also constitutes their strength : they allow to escape the dilemma between not taking into account the interests of the other States in exercising extraterritorial jurisdiction, on the one hand, and leaving certain violations unpunished or certain victims without remedies, on the other hand, since the exercise of extraterritorial jurisdiction will be considered justified to the extent that the balancing of the interests clearly weighs in favor of such exercise, rather than in favor of deferring to the choices of the territorial State in the face of human rights violations committed by transnational corporations or in which such corporations are complicit.

Similarly, the exercise of criminal extraterritorial jurisdiction, when combined with the requirement of double criminality, may be seen not as inimical to other States' interests, and in particular to the interests of the territorial State concerned, but on the contrary as a gesture by which the forum State puts its institutions at the disposal of the effective enforcement of the territorial State's laws ; and to the extent that those laws are not in fact enforced by the territorial State concerned, because of the inability or the unwillingness of the national authorities to do so, the enforcement of their requirements through the machinery of another State asserting jurisdiction may be beneficial to transparency, obliging each State to behave consistently with its own laws.

This complementarity between the accommodation of the interests of the territorial State and the fight against impunity (to which all States who could exercise a form of extraterritorial jurisdiction over a given situation may contribute) may also be ensured by other techniques mentioned above. In particular, a State adopting extraterritorial legislation may exempt from the obligation to comply with such legislation addressees whose conduct, while in violation of that legislation, might be obligatory

²⁰⁷ Although not by the United Kingdom or Ireland courts when their jurisdiction is based, in civil cases (in particular where a suit is filed alleging tortious behavior by the defendant company domiciled in the United Kingdom or in Ireland), on the 'Brussels I' Regulation.

under conflicting requirements imposed under the territorial legislation applicable. For instance, while it extends its prohibitions to all corporations controlled in foreign countries by the employers covered under the Act, the 1990 American with Disabilities Act²⁰⁸ provides that '[i]t shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located'. Similarly, under the 1964 Civil Rights Act as amended in 1991, although foreign corporations controlled by an American employer and established abroad are prohibited from engaging into certain unlawful employment practices as defined by sections 703 and 704 of the Act, as regards at least American employees, such entities may 'take any action otherwise prohibited (...), with respect to an employee in a workplace in a foreign country if compliance with [the prohibition of unlawful employment practices as defined under the Act] would cause such [entity] to violate the law of the foreign country in which such workplace is located'.²⁰⁹

3.2. The role of bilateral or multilateral cooperation in limiting the risk of positive conflicts of jurisdiction

In many cases, bilateral or multilateral measures for the limitation of the risks of positive conflicts of jurisdiction may be preferred over unilateral measures of the kind envisaged in the above paragraph. Of course, the adoption of a multilateral instrument containing provisions on the jurisdiction to be exercised on transnational corporations, respectively, by the home State (of which the parent company has the nationality) and by the host (territorial) State, might constitute the most desirable solution to ensure that adequate solutions will be found to potential positive conflicts of jurisdiction. Such a multilateral instrument could provide, for instance, that the home State is obliged to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for certain serious violations of human rights, unless the host State has acted in order to protect these rights under its jurisdiction and victims have access to effective remedies in that State. In addition, it could provide for consultations between both States where the home State intends to exercise extraterritorial jurisdiction in order to ensure that the transnational corporation which it may control will not commit human rights abuses or be complicit in such abuses. It could also include provisions allowing a State on whose territory certain violations have taken place in which a transnational corporation is implicated, to request the home State of the parent company to file proceedings against this company.²¹⁰

Even in the absence of such a multilateral instrument, a declaration concerning the obligations of States to ensure an effective protection of human rights by controlling the activities of transnational corporations could contain, at a minimum, a statement encouraging consultations between States

²⁰⁸ 42 U.S.C. § 12112 (c)(1)(1994).

²⁰⁹ 42 U.S.C. § 2000e-1, (b) (1991).

²¹⁰ Inspiration could be sought from the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, opened for signature on 15 May 1972, and which entered into force on 30 March 1978 (C.E.T.S. n° 73). The principle of this convention is that when a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings against that person, inter alia, if the suspected person is ordinarily resident in the requested State; if the suspected person is a national of the requested State or if that State is his State of origin; if proceedings for the same or other offences are being taken against the suspected person in the requested State; if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State; or if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so. The requested State may refuse the request for the transfer of proceedings only in limited circumstances (see Articles 6, 8(1), and 11). Although the European Convention on the Transfer of Proceedings in Criminal Matters was intended to apply only to natural and not to legal persons, a number of the reasons why the transfer of criminal proceedings to another Contracting State may be justified as regards natural persons could be considered applicable, *mutatis mutandis*, to legal persons. In particular, the fact that legal persons may not as such be extradited; that the execution of sanctions against legal persons may require that jurisdiction be exercised over assets of that legal person located on the territory of another State than the forum State; and that the proof of unlawful behavior by corporate entities may require that evidence be collected in the head offices of the parent company, even though the unlawful behavior will manifest itself in the acts of the subsidiary, all may justify the extension of such mechanism consisting in the transfer of proceedings to unlawful acts adopted by transnational corporations.

where the exercise of extraterritorial jurisdiction might result in positive conflicts of jurisdiction. Thus, the Annex to the OECD Declaration on International Investment and Multinational Enterprises containing a series of general considerations and practical approaches aimed at avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments recommend the OECD Member States to ‘develop mutually beneficial, practical and appropriately safeguarded bilateral arrangements, formal or informal, for notification to and consultation with other Member countries’; to ‘give prompt and sympathetic consideration to requests for notification and bilateral consultation on an ad hoc basis made by any Member country which considers that its interests may be affected by a measure [implying the exercise of jurisdiction which may conflict with the legal requirements or established policies of another OECD country and lead to conflicting requirements being imposed on multinational enterprises], taken by another Member country with which it does not have such bilateral arrangements’; and to ‘inform the other concerned Member countries as soon as practicable of new legislation or regulations proposed by their Governments for adoption which have significant potential for conflict with the legal requirements or established policies of other Member countries and for giving rise to conflicting requirements being imposed on multinational enterprises’.

Such obligations of consultation could be generalized where a State intends to exercise extraterritorial jurisdiction, in order to minimize the risks of positive conflicts of jurisdiction arising. The very fact that the home State of a transnational corporation would be requesting to hold such consultations could constitute a powerful incentive on the host State to adopt the necessary measures ensuring that the human rights violations be remedied and, if necessary and in compliance with the legal principles of its national legal system, sanctioned. Moreover, as noted by the *Extraterritorial Criminal Jurisdiction* study prepared by the Council of Europe in 1990, ‘consultations may reveal whether the proposed legislation will miss its mark and thereby have intended harmful effects which cannot be repaired without considerable loss of face’.²¹¹

VI. Conclusion

The considerations above converge to point at the need for the the adoption of a new international instrument, aimed at clarifying, and where necessary at extending, the obligations of States to protect human rights against any violations of these rights originating in the activities of transnational corporations. In particular, this instrument should impose an obligation on the home States of transnational corporations to provide an effective remedy for victims of human rights abuses committed abroad by these entities, where no such remedy is available before the national jurisdictions of the host country ; and to ensure that corporations who commit human rights abuses directly, are complicit in such abuses, or do not effectively control their subsidiaries, affiliates or business partners, face the threat of sanctions.²¹² While this would build on current developments in the international law of human rights, it would also go beyond them in obliging the home State to exercise a form of extraterritorial jurisdiction over the corporations which have its nationality for their operations overseas.

²¹¹ *Extraterritorial Criminal Jurisdiction*, cited above, at p. 33. This study concludes on this point that ‘Unusual as such prior consultations are under certain circumstances, they nevertheless appear to be an important instrument in keeping conflicts between States within acceptable proportions’ (*id.*).

²¹² Although the convention could provide that the sanctions have to be effective, proportionate and dissuasive, the liabilities of the parent company could be criminal, civil, or administrative, in order to respect the different approaches States have to the question of the criminal liability of legal persons. See, for example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997 in force since 15 February 1999 (according to Article 2 of the Convention, ‘Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official’ ; this does not impose an obligation to establish the *criminal* liability of legal persons, since such liability may be civil or administrative : see para. 20 of the Commentaries to the OECD Anti-Bribery Convention, adopted by the Negotiating Conference on 21 November 1997); or the International Convention for the Suppression of the Financing of Terrorism, adopted by UN General Assembly resolution 54/109 of 25 February 2000 (providing in Article 5 that each State Party, ‘in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence’ as defined by the Convention by reference to the existing international treaties on combating terrorism; such liability may be criminal, civil or administrative).

In principle, this obligation could take the form either of *parent-based extraterritorial regulation*, the home State being imposed an obligation to effectively control the parent corporation, and to impose on the parent, in particular, an obligation to require from the entities it controls or does business with that they comply with certain human rights norms ; it could also result in a form of *foreign direct liability*, if the home State is required to impose certain prescriptions directly on the foreign subsidiaries of companies incorporated under its jurisdiction, on the grounds that these subsidiaries form with the parent company one single transnational group. However, because the exercise of extraterritorial jurisdiction will be easier to justify if the behavior abroad is regulated via the imposition by the home State of certain due diligence obligations on the parent company (which possesses its ‘nationality’), since this can rely on the principle of active personality, the former route is probably to be preferred.²¹³

The advantage of an approach based on the adoption of parent-based extraterritorial regulation is also that it would facilitate overcoming the problem of the ‘corporate veil’. The limited liability of the parent for the acts of its subsidiary results in a situation where, in principle, the parent company cannot be held liable for abuses committed by the subsidiary, unless it can be shown that the parent has been controlling the subsidiary to such a degree that the subsidiary was acting as a mere agent in the hands of the parent company, of which it was the ‘alter ego’ in the circumstances.²¹⁴ Under the proposed instrument however, the States parties would have to impose on the parent companies of transnational corporations which have their nationality that they respect internationally recognized human rights, over and above the locally applicable legislation, in all their activities, and that they monitor the behavior of their subsidiaries, affiliates and business partners, by including provisions imposing a similar obligation to respect internationally recognized human rights in the agreements they conclude with these partners. This would facilitate overcoming the ‘corporate veil’ problem by the imposition of due diligence obligations on the parent company, whose liability could potentially be engaged once it appears that the subsidiary, affiliate or business partner has committed human rights abuses or has been complicit in such abuses, and that the parent has not adopted all measures which could have prevented the risk from materializing.

The main value of such an instrument would consist in establishing a clear division of responsibilities between the host State and the home State in the regulation of transnational corporations. The primary responsibility of the host State, on the territory of which the transnational corporation conducts its activities, should be reaffirmed. But the home State of the transnational corporation should be imposed a subsidiary responsibility to exercise control on the transnational corporation over which it may have jurisdiction on the basis of the principle of active nationality. A clarification of the division of tasks would thereby be achieved. This would not only ensure that the transnational corporations committing human rights abuses will not be left unpunished, and that the victims will not be left without remedies. It would also meet the concern of the business community that the development of extraterritorial jurisdiction on an unilateral basis – exercised by the home State in the absence of any bilateral or multilateral framework – might be a source of legal uncertainty. And it would satisfy the desire of jurists in general for order, and that of public international lawyers more particularly for moving beyond anarchy and towards international cooperation.

²¹³ See above, text corresponding to notes 186-190.

²¹⁴ See above, text corresponding to notes 144-150.