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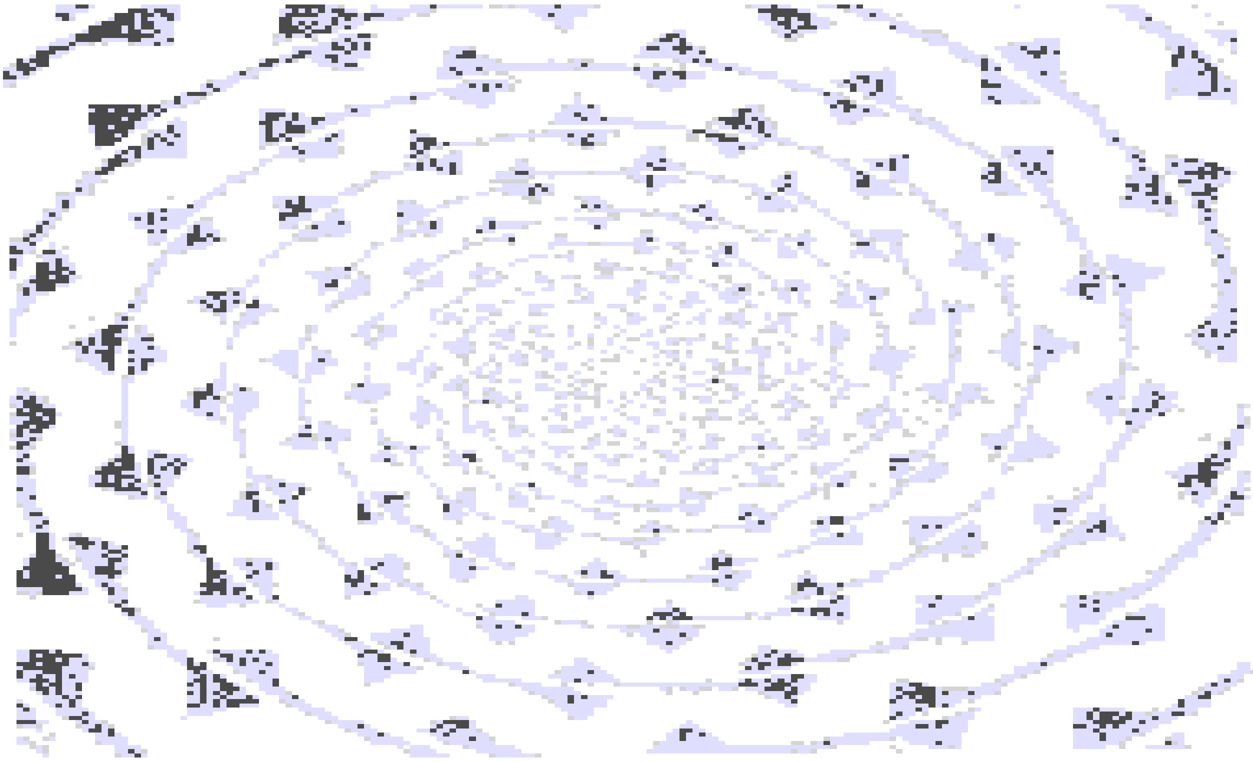

Sovereignty-plus in the Era of Interdependence : Towards an International Convention on Combating Human Rights Violations by Transnational Corporations

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La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, Institut extra-facultaire de l'Université catholique de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

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ABSTRACT

This paper argues that the classical rules that restrain the exercise by States of their extraterritorial jurisdiction may have to be reinterpreted in the light of the growing interdependency between States, which results from increased trade and investment flows. The traditional understanding is that, when a State adopts regulations that seek to influence situations located outside its national territory, it competes with the sovereignty of the territorially competent State, and that such regulations therefore should only be allowed in the most exceptional circumstances, since they may run counter to the principle of sovereign equality of States. However, if the adoption by the State of origin of the investor of extra-territorial regulations in fact facilitates the role of the host State in regulating that investor, thus ensuring that the investment will contribute to human development and will benefit local communities, this enhances, rather than restricts, the exercise by the host State of its sovereignty. To the extent that it serves universal values, unilateral action may thus contribute to the achievement of the goals set by the international community: the regulation of transnational corporations becomes a global public good, to which each State should contribute in accordance with its ability.

Against this background, this paper examines the question of the jurisdiction of States over the activities of transnational corporations. It argues that the duty of the host State to regulate corporations operating on its territory could be more easily discharged if home States of transnational corporations made a more principled use of extraterritorial regulation. These two sovereignties are not as much competing with each other than they are mutually supportive: the adoption of a new international instrument allocating responsibilities to control transnational corporations could codify in treaty form what is already, arguably, emerging customary international law. The paper also argues that, until a consensus emerges about the desirable division of tasks between the host State and the home State in controlling investors, the adoption by the home State of extraterritorial legislation addressed directly to the parent company, but imposing on that company to exercise control on its subsidiaries, may be the best route forward.

KEYWORDS

Extraterritorial jurisdiction - Transnational corporations - Global public goods.

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Communications today are faster and less expensive than before. Barriers to the movement of capital, goods and services are fewer. The tastes of consumers have become largely homogenous, shaped by the same advertising practices. As a result, the sphere of activity of most corporations typically reaches beyond national borders. They source their supplies from abroad, and they serve clients overseas. They invest and establish subsidiaries outside their State of origin. Sometimes, they are directly present abroad, by creating an agency in another State. The wedge increases between the jurisdiction of the State, which is primarily territorial, and the activity of the corporation, which is increasingly without borders.

In this context, State sovereignty must redefine itself. The assertion by each State of its exclusive competence to regulate activities on its national territory, will result in a situation in which States compete with one another to attract companies, whether as buyers or as investors. As buyers of goods, companies act as gatekeepers to global markets: for developing countries' producers, they guarantee access to the high-value markets of industrialised nations, whose purchasing power is many times more significant than that of consumers in developing countries ; or they may have unique processing capabilities, allowing raw commodities to be transformed for sale to the final consumer. As investors, companies bring in much-needed capital. Their presence can be a source of local employment opportunities. It can lead to transfers of technologies and know-how to local entrepreneurs. It can produce a multiplier effect on the local economy, as foreign investors source many inputs locally. Unsurprisingly, States change their domestic regulations in order to become more hospitable to foreign capital, for example by abstaining from imposing performance requirements, by offering tax incentives, by guaranteeing to the investor a right to repatriate profits, or by entering into investment agreements that ensure 'fair and equitable treatment' to the investor.[1] And they aim at improving the competitiveness of the undertakings established on their territory, thus facilitating their ability to expand their market share.

This results in a prisoner's dilemma situation in which the choices made individually by each State may be less optimal than if States were to cooperate in controlling transnational corporations, to ensure that globalization works for the benefit of the full realization of human rights and human development. The most obvious implication is that States should join their efforts and agree on common frameworks regulating investment. In the absence of such collective action, certain groups of States could be caught into a race to the bottom, with few incentives to impose strong obligations on foreign investors, and with such concessions being made to foreign investors that the very benefits of their presence may be increasingly elusive.[2] But another implication is that the classical rules that restrain the exercise by States of their extraterritorial jurisdiction may have to be reinterpreted in the

[1] The fact that States compete in order to attract foreign direct investment is well illustrate by figures indicating that the regulatory changes adopted by countries overwhelmingly are favourable to FDI, rather than less favourable to imposing restrictions. According to the 2004 World Investment Report for instance, (UNCTAD, *World Investment Report 2004 : The Shift toward Services*, p. 8) :

	1991	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
Regulatory changes favourable to FDI	80	79	101	108	106	98	135	136	131	147	194	236	220
Regulatory changes less favourable to FDI	2	-	1	2	6	16	16	9	9	3	14	12	24

[2] B. Simmons, Z. Elkins and A. Guzman, 'Competing for Capital : the Diffusion of Bilateral Investment Treaties, 1960-2000', *International Organization* 60, no. 4 (October 2006), pp. 811-846.

light of this interdependency. The traditional understanding is that, when a State adopts regulations that seek to influence situations located outside its national territory, it competes with the sovereignty of the territorially competent State, and that such regulations therefore should only be allowed in the most exceptional circumstances, since they may run counter to the principle of sovereign equality of States. However, if the adoption by the State of origin of the investor of extra-territorial regulations in fact facilitates the role of the host State in regulating that investor, thus ensuring that the investment will contribute to human development and will benefit local communities, this enhances, rather than restricts, the exercise by the host State of its sovereignty. To the extent that it serves universal values, unilateral action may thus contribute to the achievement of multilaterally set goals, such as the Millennium Development Goals: the regulation of transnational corporations becomes a global public good, to which each State should contribute in accordance with its ability.[3]

By putting forward the need to move towards a duty of the home State of the transnational corporation to regulate that corporation, this chapter seeks to ground existing legal practice on international law principles. National courts increasingly accept jurisdiction over cases that concern activities of corporations abroad, provided these corporations present sufficiently strong links to the forum. 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.[4] 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 law[5] 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.[6]

This is not an isolated example. Under Council Regulation (EC) No 44/2001of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[7] – which ensures the integration in European Community law of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[8] –, the Member States of the European Union are obliged to recognise the jurisdiction of their national courts when civil claims are filed against persons (whether natural or legal persons) domiciled on their territory,[9] 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 appropriate[10] : 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.[11]

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[3] The notion of global public good has been revived since the 1990s. *See in particular* W. D. Nordhaus, *Managing the Global Commons* (Cambridge, MA: MIT Press, 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 University Press, 1999); Office of Development Studies, *Global Public Goods : Taking the Concept Forward*, Discussion Paper 17 (New York: UNDP, 2001); and I. Kaul, P. Conceicão, K. Le Goulven and R. U. Mendoza (eds), *Providing Global Public Goods : Managing Globalization* (Oxford University Press, 2003).

[4] 28 U.S.C. §1350.

[5] See on this notion *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[6] 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).

[7] OJ L 12 of 16.01.2001, p. 1.

[8] OJ L 299, 31.12.1972, p. 32.

[9] 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'.

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

[11] 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), para. 50.

This chapter examines the questions of international law raised by these developments. It focuses on the question of the jurisdiction of States over the activities of transnational corporations, emphasising how the duty of the host State to regulate corporations operating on its territory could be more easily discharged if home States of transnational corporations made a more principled use of extraterritorial regulation. These two sovereignties are not as much competing with each other than they are mutually supportive: the adoption of a new international instrument allocating responsibilities to control transnational corporations could codify in treaty form what is already, arguably, emerging customary international law. This contribution also argues that, until a consensus emerges about the desirable division of tasks between the host State and the home State in controlling investors, the adoption by the home State of extraterritorial legislation addressed directly to the parent company, but imposing on that company to exercise control on its subsidiaries, may be the best route forward.

The home State of transnational corporations could best fulfil its role in protecting human rights threatened by the activities of such corporations, I argue, by providing remedies to victims before their domestic courts, where the victims are unable to obtain redress before the courts of the State where the damage occurred. This chapter examines the conditions under which home States of transnational corporations may be justified in providing such remedies (II). Because it argues in favor of the exercise of 'indirect' extraterritorial jurisdiction by the home State, by imposing on the parent company domiciled in the home State a due diligence obligation to control its subsidiaries or business partners, it discusses in greater detail the obstacle resulting from the corporate veil to remedies exercised by victims before the courts of the home State (III). It then places these questions against the background of international law, explaining why the exercise by States of their duty to protect human rights in transnational situations should be guided by the adoption of a multilateral instrument allocating the respective tasks of different States concerned (IV). The chapter ends with a brief conclusion (V).

II. The jurisdiction of States over the activities of transnational corporations

1. The problem

Where a transnational corporation[12] operates in a country other than its country of origin, either directly or through the establishment of subsidiaries or by contractual relationships, both the State or incorporation of the leading (parent) company, referred to as the 'home State', and the State where the transnational corporation conducts its activities, or 'host State', may potentially assert jurisdiction over the corporation's activities. 'Positive conflicts of jurisdiction' may occur as a result, where both the 'home State' and the 'host State' seek to control the activities of the transnational corporation, thus running the risk of imposing conflicting requirements on the corporation.[13] Conversely, where neither the home State, nor the host (territorial) State, effectively control the activities of the transnational corporation, this may result in a situation of effective impunity for human rights violations.

Positive conflicts of jurisdiction take different forms, depending on the choices made between various types of extraterritorial jurisdiction. Home States may impose on parent corporations an obligation to comply with certain norms wherever they operate (i.e., even if they operate in other countries), or an obligation to impose compliance with such norms on the different entities it controls (its subsidiaries, or even in certain cases its business partners). This form of extraterritoriality may be referred to as *parent-based extraterritorial regulation*. Home States may also seek to impose certain prescriptions directly on the foreign subsidiaries of companies incorporated under their jurisdiction, either by targeting such foreign subsidiaries directly, or by addressing the regulation they adopt to the transnational corporation as such, i.e., the group composed of the parent company and its subsidiaries

[12] Peter Muchlinski has defined the multinational corporation as an entity that 'owns (in whole or in part), controls and manages income generating assets in more than one country' (P. Muchlinski, *Multinational Enterprises and the Law* (Oxford : Blackwell, 1995), p. 12). The notion is used here in a broader sense, as including corporations that have suppliers, sub-contractors, or franchisees in countries other than in their country of origin.
[13] It is this risk in particular which the Declaration on International Investment and Multinational Enterprises adopted within the Organization for Economic Cooperation and Development (OECD) sought to address, when it was adopted on 21 June 1976.

or affiliates. This form of extraterritoriality may be referred to as *foreign direct liability*. Similarly, host States may seek to regulate the activities of transnational corporations operating on their territory, either by imposing certain obligations on the subsidiaries incorporated under their jurisdiction – which does not raise a question of extraterritoriality –, or by seeking to impose a liability directly on the parent company 'controlling' such a subsidiary or, when the prescriptions are addressed to the group (the transnational corporation considered in its economic unity), on the transnational corporation as such. In these latter two cases, host States resort to forms of extraterritorial jurisdiction in order to control entities whose activities have an impact on their territory, even though these entities either are not incorporated under their jurisdiction (when the foreign parent company is targeted), or are not corporate bodies at all (when the group is targeted).

International law imposes limits to the exercise of extraterritorial jurisdiction that vary depending on the type of extraterritoriality concerned. The risk of the home State interfering with the sovereignty of the territorial State is greatest as regards the imposition of a form of foreign direct liability since, here, the home State seeks to regulate entities (the subsidiaries of the parent company domiciled under the home State's jurisdiction) incorporated under another State's jurisdiction, for activities performed by those entities in the territory of that State. However, the precise restrictions that are imposed by international law to these various instances of extraterritorial jurisdiction remain contested.

2. The general question of extraterritorial jurisdiction

There is no general agreement within legal scholarship as to the circumstances in which extraterritorial jurisdiction is admissible.[14] As noted by Rosalyn Higgins in 1984, '...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?'[15] Some authors take the view that States remains free in principle to exercise extraterritorial jurisdiction, in the absence of an explicit prohibition. This position is based on the *Lotus* Case of the International Court of Justice.[16] In this approach, the only restriction on the acceptability of extraterritorial jurisdiction being exercised by a State resides in the prohibition to interfere with the internal affairs of another State. However, it seems unlikely that the adoption by a State of an extraterritorial statute imposing human rights obligations on a transnational corporation could be described as falling under this prohibition. 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 mush remain free ones'.[17] But it has long been acknowledged that internationally recognised 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 State remains free to legislate upon activities on its national territory.[18]

[14] See generally Cedric Ryngaert, *Jurisdiction in international law* (Oxford Univ. Press, 2008).
[15] 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.
[16] 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.
[17] 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.
[18] 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.

More generally, while the restrictions that international law imposes on extraterritorial jurisdiction remain debated, the interpretation of existing rules should take into account the specific nature of State regulations that seek to impose compliance with human rights or that seek to contribute to multilaterally agreed goals such as the MDGs. 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 person'[19] has been widely debated – and its consequences probably exaggerated by some commentators[20] –,the *erga omnes* character of at least a handful of internationally recognised 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. Similarly, the realization of the MDGs is of interest to all States. Therefore, extraterritorial jurisdiction seeking to promote human rights or the achievement of the MDGs is positive, since this is not a case where one State seeks to impose its values on another State, as in other cases of extraterritorial jurisdiction.

3. Specific bases for extraterritorial jurisdiction

Quite apart of how this controversy shall develop in the future – and whether or not States will be authorised to resort to forms of extraterritorial jurisdiction in order to extent the protection of human rights to all situations which they may influence –, their competence to legislate extraterritorially is generally accepted in at least five situations.[21]

1. *The 'effects' doctrine*. 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.[22] 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'.[23] The *Restatement of Foreign Relations Law* prepared under the auspices of the American Law Institute and to which Detlev Vagts made such an important contribution stipulates therefore that, while 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', such jurisdiction is not unlimited, since 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'.[24] Despite these notes of caution, and the occasional criticisms it has

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[19] 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 internaitonal 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.

[20] 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.

[21] 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).

[22] See F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', *Recueil des cours*, 1984-III, vol. 186, pp. 30-31; A. F. Lowenfeld, *International Litigation and the Quest for Reasonableness* (Oxford : Clarendon Press, 1996), pp. 20-28. See, *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') and *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S. Ct. 2359 (2004).

[23] P.M. Roth, 'Reasonable Extraterritoriality : Correcting the 'Balance of Interests', *I.C.L.Q.*, 41 (1992), pp. 245-286 p. 285.

[24] Section 402(1)(c) and Section 403(1) of the *Restatement (Third) of the Foreign Relations Law of the United States*, 2 vol. (St Paul, American Law Institute, 1987).

been subjected to,[25] this basis for the exercise of extraterritorial jurisdiction has never been formally abandoned.[26] Some authors even consider 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 internal market.[27] A result similar to that obtained by the 'effects' doctrine may be achieved where a corporation is subjected to criminal liability, 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.[28]

2. *The fundamental interests of the State*. 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. Although there is no clear consensus about what such fundamental interests may be,[29] it is clear that, while these interests may include the security and creditworthiness of the State, they do not extend to the protection of its wider economic interests,[30] or to its foreign policy objectives. It would therefore not be acceptable for a State to justify exercising extraterritorial jurisdiction over a foreign entity, for the activities of such an entity abroad, simply because certain human rights abuses committed by that entity – for instance, violations of basic labor rights – would place the undertakings conducting their activities on the territory of that State at a competitive disadvantage, or as a means to exercise pressure on the host State in order to bring about a change of that State's policies.[31]

3. *The principle of universality*. 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

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[25] The 'effects' doctrine was explicitly referred to by the United States Congress when it adopted the Helms-Burton Act in 1996 (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). Most remarkably, 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 (…)'. Among the findings on which Congress based its adoption of Title III of the Helms-Burton Act 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 A. F. Löwenfeld, 'Congress and Cuba : The Helms-Burton Act', *American Journal of International Law*, 90 (1996), pp. 419-434, at pp. 430-432 ; and Brigitte Stern, 'Vers la mondialisation juridique ? Les lois Helms-Burton et D'Amato-Kennedy', *Revue générale de droit international public*, 1996, pp. 979-1003, at pp. 992-995.

[26] 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.*, XXXVIII (1992), pp. 251-252.

[27] Famous examples include Case 22/71, *Béguelin Import / G.L. Import Export*, [1971] ECR 949, para. 11 ; Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619, paras. 125-130; Case 36/74, *Walrave and Koch / Association Union Cycliste Internationale and others*, [1974] ECR 1405, para. 28 ; and Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 128, 129 and 185/85, *Wood Pulp Cartel Case*, [1988] ECR 5193. See Lowenfeld, Reasonableness, supra note 22, pp. 33-41 ; D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', *British Yearbook of International Law*, 53 (1982), pp. 1-26, at 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.

[28] *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. 24.

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

[30] 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).

[31] In addition, this may constitute a form of economic sanctions prohibited under international law.

for which treaties impose the principle *aut dedere, aut judicare*, or which are recognised as international crimes requiring that all States contribute to their prevention and repression by investigating and prosecuting such crimes where the author is found on their territory unless the suspected author is extradited, also belong to this list.[32] International crimes justifying the exercise of universal jurisdiction are war crimes,[33] crimes against humanity,[34] genocide,[35] torture,[36] and forced disappearances.[37] In prosecuting these crimes, States are not seen to act in their interest; they act as agents of the international community.

4. *The principle of passive personality*. A State may be justified in legislating extraterritorially if the person directly affected (the victim) has its nationality. The invocation of this 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 jurisdiction[38]; 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.[39]

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[32] See the joint separate opinion by Judges Higgins, Kooijmans, and Buergenthal, *Arrest Warrant Case*, supra note 27, at para. 46 (citing Cherif Bassiouni, *International Criminal Law, Vol III: Enforcement*, 2nd edn, (1999), p. 228; T. Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law*, 89 (1995), at 576.).

[33] 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 ; Article 146 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 ; and Article 85(1) of the 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.

[34] The *jus cogens* character of the prohibition of crimes against humanity is generally considered to imply an obligation to contribute to their universal repression : see C. Bassiouni, 'Crimes against Humanity : The need for a specialized Convention', *Columbia Journal of Transnational Law*, 1994, (please provide start and end pages of journal article) pp. 457-494, at pp. 480-481; K.C. Randall, 'Universal Jurisdiction Under International Law', *Texas L. Rev.*, 66 (1988), pp. 785-832, at pp. 829-830; and the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity adopted by the UN General Assembly resolution 3074 (XXVIII) of 3 December 1973 (G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973)).

[35] See the Advisory Opinion delivered on 28 May 1951 by the International Court of Justice relating to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep.*, 1951, p. 23 (noting that 'the principles underlying the 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] 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). On the *erga omnes* character of the obligations imposed by the Convention, implying that 'the obligation each State (...) has to prevent and to punish the crime of genocide is not territorially limited by the Convention', see the 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-Hezegovina v. Yugoslavia)*, Preliminary objections, *ICJ Rep.*, 1996, pp. 615-616, para. 31.

[36] Article 5(2) of the 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.

[37] Article 9(2) of the 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).

[38] 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)).

[39] See *Extraterritorial Criminal Jurisdiction*, cited above, at p. 12. 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,

5. *The principle of active personality*. Under the principle of active personality, a State may regulate the conduct of its nationals abroad. However, in the absence of any particular mode of determination of the nationality under international law, there is a risk that the modes of determination of the nationality of the corporation will be manipulated in order to allow a State, relying on the principle of active personality, to extend its jurisdiction to extraterritorial situations – including acts adopted by companies incorporated abroad – which it might otherwise be prohibited under international law to reach.[40] In particular, doubts have sometimes been expressed as to whether it should be considered allowable for States to treat as their 'nationals' legal persons incorporated under the laws of another country, but which are managed, controlled, or owned, by natural or legal persons of the State concerned. The *Barcelona Traction* Case of the International Court of Justice did seem to exclude, at least in the context of diplomatic protection, basing nationality of the corporate entity on the nationality of its shareholders. In finding 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 recalled that, in municipal law, a distinction is made between the rights of the company and those of the shareholders, and that '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'.[41]

However, this ruling does not necessarily prohibit a State from treating a company incorporated in another State but controlled by a parent company incorporated in the State seeking to exercise extraterritorial jurisdiction, as having the nationality of that State for the purposes of exercising such jurisdiction. Already in its *Barcelona Traction* judgment of 5 February 1970, the International Court of Justice noted that the veil of the company may be lifted in order to prevent the misuse of the privileges of legal personality, both in municipal and in international law.[42] Therefore, where the separation of legal personalities is used as a device by the parent company to limit the scope of its legal liability, the lifting of the veil may be justified. In addition, the recent proliferation of bilateral investment treaties under which States seek 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, has shed further doubt on the validity of the classical rule enunciated by the *Barcelona Traction* judgment, according to which a State may not claim a legal interest in the situation of foreign companies, even where its nationals are in control.[43] 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 the OECD between 1995 and 1998, the investments made in each Contracting Party by investors from another Contracting Party comprised 'Every 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

1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned' (at para. 47).

[40] Y. Hadari, 'The Choice of National Law Applicable to the Multinational Enterprises', *Duke L.J.* (1974), pp. 1-57, at p. 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 to foreign countries).

[41] 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.

[42] Id., at 38-39.

[43] Doubts were raised at an early stage concerning the relevance of the *Barcelona Traction* case beyond the exercise of diplomatic protection : see S. D. Metzger, 'Nationality of Corporate Investment Under Investment Guaranty Schemes-The Relevance of Barcelona Traction', *American Journal of International Law*, 65 (1971), pp. 532-543.

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 practice of determining the nationality of the corporation on the basis of the nationality of its shareholders, particularly of the nationality of a controlling parent company, while not usual, is not unknown. For instance, while the practice of the United States has generally been to determine the nationality of the corporation on the basis of the company's place of incorporation,[44] it is occasionally defined 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[45] ; but there seems to be no reason why this could not also justify the exercise of foreign direct liability regulation in other domains. It is therefore not come as a surprise if the *Third Restatement on Foreign Relations Law* of the American Law Institute does not exclude the regulation of foreign corporations, i.e., corporations organised under the laws of a foreign State, 'on the basis that they are owned or controlled by nationals of the regulating state'.[46]

The *Restatement* adds, however, that in the exceptional cases where this may be justified in principle, 'the burden of establishing reasonableness if heavier (...) than when [the direction] is issued to the parent corporation'.[47] Indeed, parent-based extraterritorial regulation as described above will by definition be easier to justify, since it raises no question of extraterritoriality : the parent corporation is imposed certain obligations by the State of which it has the 'nationality' (or where it is domiciled). The impacts on situations located outside the national territory are merely indirect: any such impacts would result from the parent company being imposed an obligation to control its subsidiaries, or to monitor the supply chain. Indeed, the most promising avenue is one that imposes such an obligation on the parent company (or, mutatis mutandis, on the buyer). The advantages of this solution are also apparent once we examine another major obstacle to ensuring the protection of human rights throughout the corporation's activities, even when such activities span across different jurisdictions.

III. The question of the 'corporate veil'

While disagreements about the existence of a 'genuine link' between the State seeking to legislate extra-territorially and the corporation whose conduct is seeks to influence may, in certain cases, constitute an obstacle to the exercise of extraterritorial jurisdiction, in practice, it is the problem of piercing the corporate veil that is the most acute, and it is this hurdle that is the most difficult for the victims to overcome. Within the multinational corporation as a group of companies, the parent (controlling) corporation on the one hand, its (controlled) subsidiary on the other, form two distinct legal entities, each with their own juridical personalities. In addition, according to the doctrine of limited liability, the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment.[48] These doctrines combined make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent

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[44] *Restatement (Third) of the Foreign Relations of the United States* (1987), at 213, n. 5. On this question, see generally L. A. Mabry, 'Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality', *Geo. L. J.*, 87 (1999), pp. 563-631.

[45] As noted by Marby, supra note 44,, 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 world-wide income of all of the corporate components of the enterprise'. 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.

[46] *Restatement (Third) of the Foreign Relations of the United States* (1987), § 414.

[47] *Ibid.*

[48] *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').

company, before the national jurisdictions of the home State of that company. Three paths may be explored in order to overcome the problem of the separation of legal entities.

1. Three ways of overcoming the problem of the corporate veil

The first approach : piercing the corporate veil

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 the relationship between a principal (the parent) and an agent (the subsidiary), or whether, for other motives, there are reasons to suspect that the separation of corporate personalities does not correspond to economic reality. 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,[49] 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.[50] 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 company[51] or that the parent and the subsidiary are 'alter egos'.[52]

Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company.[53] 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 parent corporation, and it is the parent that is liable'.[54] 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'.[55] 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

[49] Taken alone, neither majority or even complete stock control, nor common identity of the parent's and the subsidiary's officiers 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', *Hastings Int'l & Comp. L. Rev.*, 24 (2001), pp. 297-330, at p. 304)..

[50] 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').

[51] *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').

[52] See, eg, *United States v. Betterfoods*, 524 U.S. 51 (1998).

[53] 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'.

[54] Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', supra note 49, at 307.

[55] *Bowoto v. Chevron Texaco*, No C 99-2506 SI, 2004 US Dis LEXIS 4603 (ND, Cal 2004). The case is discussed by S. Joseph, *Corporations and Transnational Human Rights Litigation(*Oxford – Portland, OR : Hart Publishing, , 2004), at pp. 132-133.

should not be admitted, as this might sanction fraud.[56] 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 hierarchisation 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, which results in a situation where, in fact, very few such attempts to 'pierce the veil' end up succeeding.[57]

The European Court of Justice has taken a quite similar view in antitrust cases.[58] In the leading case of *Imperial Chemical Industries*,[59] 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 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'.[60] The parent company and the subsidiary will be considered to form one single 'economic unit' – 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 behaviour of the subsidiary;[61] second, it has in fact used this power on the occasion of the adoption of the contested acts.[62] 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'.[63]

The second approach : the presumption of control in the integrated enterprise

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 parent company

[56] See, e.g., *Labor Board v. Deena Artware*, 361 U.S. 398, 402 (1960).

[57] Since the New Deal period, therefore, an alternative line of cases has emerged in the United States courts, which has led a number of these 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. 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'). However, the abandonment of the classical 'piercing the corporate veil' test has been piecemeal rather than systematic, and this has not contributed to legal certainty.

[58] See generally on the approach followed in European Courts, E.J. Cohn & C. Simitis, ''Lifting the Veil' in the Company Laws of the European Continent', *I. C. L. Q.*, 12 (1963), pp. 189-225; Y. Hadari, 'The Structure of the Private Multinational Enterprise', *Mich. L. Rev.*, 71 (1973), pp. 729-806, at p. 771, n. 260; J.M. Dobson, ''Lifting the veil' in four countries : the law of Argentina, England, France and the United States', *I. C. L. Q.* ., 35 (1986), pp. 839-863 ; K. Hofstetter, 'Parent responsibility for subsidiary corporations: evaluating European trends', *I. C. L. Q.*, 39 (1990), pp. 576-598 ; L. Bergkamp and W.-Q. Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts', *Maastricht Journal of European and Comparative Law*, 8/2 (2001), pp. 167-188.

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

[60] Ibid, para. 133.

[61] 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).

[62] Id., at para. 137-139.

[63] Id., at para. 140.

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'.[64]

This technique 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.[65] The 1990 American with Disabilities Act is an example. The Act prohibits discrimination against persons with disabilities, as committed by any employer, employment agency, labour organization, or joint labour-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'.[66] 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'.[67] 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.[68]

Similar provisions may be found, for instance, in Title VII of the Civil Rights Act of 1964.[69] 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 Act[70] –, 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.[71]

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.[72] It has also been proposed in legal doctrine 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

[64] R. Meeran, 'The Unveiling of Transnational Corporations', in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague : Kluwer Law International, 1999), at p. 170.
[65] Blumberg, Accountability supra note 49, at 313-315.
[66] 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).
[67] 42 U.S.C. § 12112 (c)(2)(B) (1994).
[68] 42 U.S.C. § 12112 (c)(2)(C) (1994).
[69] 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).
[70] 42 U.S.C. § 2000e, (f), and § 2000e-1, (a).
[71] 42 U.S.C. § 2000e-1, (b) and (c).
[72] 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 instrumentalies AIC and Transport'.

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'.[73]

Insofar as it is based on the presumption that the 'controlling' parent company may effectively influence the behaviour 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 large volumes of goods swiftly and cost-effectively, 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: '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'.[74] 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 designed to instill in diverse groups of employees scattered around the globe a common sense of purpose and common methods of operation'[75]: in sum, the head office reasserts its role, as the integration of the group is deepened.

The third approach : the direct liability of the parent corporation for failure to exercise due diligence

Finally, a third avenue consists in abandoning the idea of linking the behaviour of the subsidiaries to that of the parent altogether, and to focus instead on the direct liability of the parent company arising from the failure to exercise due diligence in controlling the acts of the subsidiaries it may exercise control upon. The liability of the parent corporation thus relates not only to the action of parent firm, but also to its omissions. Indeed, in the absence of an obligation to exercise control over the activities of the subsidiary, there would be 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 behaviour 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'.[76]

[73] S. 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', *U. Cin. L. Rev.*, 72 (2003), pp. 743-770, 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.
[74] Marby, supra note 44, at p. 565.
[75] *Ibid*.
[76] S.Joseph, supra note 55, 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', *Univ. of Cincinnati L. Rev.*, 57 (1988), pp. 717-750, at p. 736 ; and J. Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', *Cumberland L. Rev.*, 31 (2000), pp. 311-335, at p. 326).

The case of *Connelly v. RTZ Corporation plc and Others* may serve as an illustration.[77] 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, apparently 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 correspondence 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 only three years later.[78] 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. As noted by the leading opinion of Lord Bingham of Cornhill, '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)'.[79]

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'.[80]

2. The choice between these approaches

To summarise, the obstacles created by the separation of legal personalities within the corporate group might be overcome in three ways : first, we may seek to affirm the derivative liability of the parent corporation for the acts of its subsidiary, where the corporate veil could be lifted because it has been abused ; second, the 'integrated enterprise' approach could be adopted, which is an intermediate approach predicated on the understanding that the multinational enterprise is organised as an integrated group, allowing for a presumption that the acts committed by the subsidiary will be imputed

[77] *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).
[78] 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.
[79] Emphasis added.
[80] 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.

to the parent; third, the direct liability of the parent corporation could be affirmed for its own actions or omissions, including the omission to exercise due diligence in controlling the subsidiary. Two important consequences follow from this distinction.

First, the first approach, based on 'derivative liability' of the parent corporation, 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. 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 for failing 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 this distinction 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 behaviour of the subsidiaries produced effects on the common market of the European Economic Community).[81] In general however, the situation is exactly the reverse: the extraterritorial application of the law of the forum State 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' approach[82] 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 the United States federal courts based on the Alien Tort Claims Act, 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.[83]

[81] 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.

[82] 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.

[83] S. Joseph, supra note 55, , 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*', *Texas International Law Journal*, 26 (2001), pp. 299-330, at pp. 313-314).

By contrast, under the first approach based on the derivative liability of the parent for the acts of its subsidiaries, it may be more difficult 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 the exercise of jurisdiction over which will be easier to justify.

For both these reasons, 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 behaviour 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,[84] 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 behaviour of the subsidiary company from occurring, despite having exercised due diligence and despite its best efforts to seek information about such behaviour 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.

IV. Transforming international law

1. Extraterritorial obligations

While the adoption of legislation imposing on the parent company of the transnational corporation certain due diligence obligations to control compliance with human rights in the group or down the supply chain may be desirable, it is not a requirement under the existing international law of human rights. In principle, the international responsibility of a State may in principle 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.[85] 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 recognised 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.[86] Thus, in the current state of development of international law, a clear obligation for States to control private actors such as corporations, operating outside their national territory, in order to ensure that these actors will not violate the human rights of

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[84] 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%.

[85] 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'.

[86] 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*, (Antwerp-Oxford: Intersentia,, 2004); and M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, 99 (2005) pp. 119-141; Th. Meron, 'Extraterritoriality of Human Rights Treaties', *American Journal of International Law*, 89 (1995) pp. 78-82.

others, has not crystallised 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. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights refers to international assistance and cooperation as an instrument to ensure the realization of economic, social and cultural rights, and Article 23 specifies the different forms international action for the achievement of the rights recognised 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 organised 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.[87] 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'.[88] The Committee on Economic, Social and Cultural Rights derives from this provision an obligation to protect the rights that would be threatened by the activities of private actors whose behaviour a State may decisively influence, even outside the national territory.[89] There is also 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.[90] M. Sornarajah has argued 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'.[91] 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.[92]

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[87] 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.

[88] *Ibid.*, at p. 191. Alston and Quinn 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'.

[89] See 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 ; and 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. For comments, see W. 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 M. Craven, *The International Covenant on Economic, Social and Cultural Rights : A Perspective on Its Development* (Oxford University Press, 1995), at pp. 147-150.

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

[91] M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn (Cambridge University Press, 2004), chap. 4., at p. 169.

[92] 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 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.

2. From unilateralism to multilateralism

Whether or not, in the current state of international law, there exists an 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. [93]

The preparation of a new International Convention on Combating Human Rights Violations by Transnational Corporations would therefore not move into entirely unchartered territory. 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 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 meet the concern of the business community that the development of extraterritorial jurisdiction on a unilateral basis – exercised by the home State in the absence of any bilateral or multilateral framework – might be a source of legal uncertainty. The International Chamber of Commerce in particular encourages governments to 'consider greater use of intergovernmental organizations (...) as vehicles for discussion and resolving disputes related to the extraterritorial application of national laws. In this regard, the ICC further encourages governments to explore the feasibility of an international convention on the extraterritorial application of national laws providing for means of resolving extraterritoriality disputes, where appropriate, by way of consultation, cooperation, conciliation, or arbitration'.[94] In order to understand the sources of the potential uncertainties linked to an anarchic use of extraterritorial jurisdiction, it is useful to briefly examine this problem, before turning to other issues raised by the adoption of an International Convention on Combating Human Rights Violations by Transnational Corporations.

It is clear that the exercise of extraterritorial jurisdiction may result also in positive conflicts of jurisdiction between the host State and the home State concerned, even though it may be well-intended, and be defended as an instrument through which the impunity of transnational corporations for human rights violations may be combated, The problems caused by such positive conflicts of jurisdiction fall into two categories. First, the interests of States may diverge. 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 solutions.[95] Second, the addressee of different domestic laws – in particular,

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[93] *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.

[94] *Extraterritoriality and business,* prepared by the Task Force on Extraterritoriality of the International Chamber of Commerce, 13 July 2006 (doc. 103-33/5 final), para. 7 of the recommendations.

[95] 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

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 State legislation to a same situation may lead to situations where the multinational corporation will face 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. The Annex appended in 1991 to the OECD Declaration on International Investment and Multinational Enterprises[96] 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 the forum State seeking to exercise extraterritorial jurisdiction do so within the confines of the principle of reasonableness :

> 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 [[97]];
>
> 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 minimise positive conflicts of jurisdiction with other States. It may avoid legislating unless where there is a clear basis, recognised 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

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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 *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S.Ct. 2359 (2004). In this case, the Supreme Court unanimously held that where anticompetitive behaviour, such as a price-fixing agreement '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. In the case presented to the Court, 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. The Court was moved to interpret restrictively the extraterritorial reach of the Sherman Act under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) by noting that it should 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. [This statutory construction] 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'.

[96] 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).

[97] 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'.

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 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 behaviour when such behaviour is prescribed by the territorial State, thus avoiding to impose conflicting obligations on the addressee.

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, will simultaneously benefit the addressee of the extraterritorial legislation concerned, by relieving him for certain obligations which might otherwise have been imposed upon him. In general, the attitude of restraint in the adoption of extraterritorial legislation, in particular where the legislature avoids to regulate 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 behaviour. This apparent dilemma, however, is not unavoidable. On the contrary, a number of 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,[98] 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 behaviour would remain unpunished or the victims left without remedies.

It is true that reliance on such doctrines presents certain disadvantages: they 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, it is also the flexibility of these doctrines which 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 favour of such exercise, rather than 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 as compatible with 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.

[98] Although not by the United Kingdom or Ireland courts when their jurisdiction is based, in civil cases (in particuler 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.

This complementarity between the accommodation of the interests of the territorial State and the fight against impunity 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 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 Act[99] provides that 'It 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'.[100]

The measures cited above are unilateral measures adopted by a State seeking to exercise extraterritorial jurisdiction, the aim of which is to limit the risks of positive conflicts of jurisdiction and infringements on the sovereignty of the territorial State which this potentially implies. The adoption of an International Convention on Combating Human Rights Violations by Transnational Corporations would go beyond such unilateral measures. It would seek to minimise positive conflicts of jurisdiction by clarifying the conditions under which, where the host State authorities remain passive, the home State should compensate for such passivity by exercising extraterritorial jurisdiction over corporations of its nationality.[101] This 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 effective remedies are available in that State to victims. In addition, in order to minimise the risks of positive conflicts of jurisdiction, it could provide for consultations between both States where the home State intends to exercise extraterritorial jurisdiction.[102] 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'.[103] Finally, the instrument 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

[99] 42 U.S.C. § 12112 (c)(1)(1994).
[100] 42 U.S.C. § 2000e-1, (b) (1991).
[101] By defining such conditions, such an instrument would also protect the interests of the host State against unreasonable attempts by the home State concerned to exercise extraterritorial jurisdiction over activities conducted on its national territory. This would constitute an incentive for States joining the instrument, since, if they are not parties, the general regime of public international would apply to the relations between both States, implying that the home State may exercise extraterritorial jurisdiction over transnational corporations controlled by companies incorporated under their jurisdiction in a wide variety of situations, without being obliged to respect a condition of subsidiarity.
[102] This would be in line with 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.
[103] *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.*).

State of the parent company to file proceedings against this company, international cooperation thus being put in the service of the effective implementation of the host country's legislation.[104]

V. Conclusion

There is general agreement that States have an obligation to protect human rights which could be threatened by the activities of corporations. But the territorially competent State, where the violation takes place, may be unwilling or unable to effectively regulate the conduct of the corporation concerned, particularly when the corporation is in the hands of foreign investors and may be protected by investment agreements, or when imposing too far-reaching obligations on the corporation would create the impression that the host State is not a hospitable destination for foreign investment.

One solution to overcome this difficulty is to strengthen the obligation imposed on the home State of the transnational corporation under international law, to discharge its obligation to protect human rights by regulating that corporation, preferably by imposing on the parent company an obligation to control its subsidiaries operating overseas. But because of the risks of positive conflicts of jurisdiction and because of the potential sensitivity of the host State towards such exercise of extraterritorial jurisdiction, another and more promising approach would be to work towards a Convention on Combating Human Rights Violations by Transnational Corporations. Such a convention could impose on the home States of transnational corporations an obligation to adopt parent-based extraterritorial regulation, allowing the home State to exercise extraterritorial jurisdiction where this appears necessary to avoid impunity, or where victims would have no effective remedy before the national courts of the host State. Thus, the States parties to this convention would impose on the parent companies of transnational corporations which have their nationality that they respect internationally recognised human rights, over and above the locally applicable legislation, in all their activities, and that they monitor the behaviour 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.

The advantages of such a multilateral approach would be considerable. In the law of the sea, States which agree to register vessels accept certain obligations to control them, because it was realised that a purely territorial understanding of jurisdiction would not be effective. Similarly, in the high seas of economic globalization, certain powerful actors seem to escape any effective regulation of their activities as long as we remain wedded to the classical concept of jurisdiction. In an interdependent world, only sovereignty that is shared can be exercised effectively.

[104] 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).