

A HOME STATE DUTY TO PROTECT IN BUSINESS AND HUMAN RIGHTS THROUGH THE PRISM OF EXTRATERRITORIAL JURISDICTION

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Abstract: *Host states of transnational corporations are often unwilling and unable to exercise their duty to protect individuals from business-related human rights violations. Attributing an extraterritorial duty to protect to the home states of transnational corporations could realistically contribute towards a more robust system of human rights protections. This paper discusses the permissibility of an extraterritorial duty to protect under public international law and the potential emergence of such an obligation under international human rights law. It relies on the concept of extraterritorial jurisdiction to address both. In view thereof, it also introduces a novel basis of extraterritorial jurisdiction, a so-called cause-and-effect jurisdiction, under which an extraterritorial home state duty to protect is tenable.*

Keywords: *business, human rights, duty to protect, extraterritorial jurisdiction*

INTRODUCTION

Globalization has paved the way for transnational corporations (“TNCs”) to become the new global power players. The economic power of some TNCs is said to have exceeded the power of most states.¹ While contributing to an increase in the standard of living and a decrease in poverty worldwide, TNCs also cause serious human rights violations.²

Despite their capacity to violate human rights, TNCs do not have direct obligations under international human rights law (“IHRL”). It is primarily states in which human rights violations have occurred (“host-states”) that must ensure human rights compliance of TNCs within the scope of their duty to protect. In practice, these are often developing states that are the least equipped to exert influence against the more powerful TNCs.³ Host states may lack governance capacities to address business-related human rights concerns. They may also be unwilling to regulate and control the human rights impacts of TNCs, as a lenient legal and economic environment provides competitive advantages.⁴ This inability and unwillingness lead to a ‘race-to-the-bottom’, adversely impacting people’s universal enjoyment of human rights.⁵

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¹ BABIC, M., FICHTNER, J., HEEMSKERK, E. M. States versus Corporations: Rethinking the Power of Business in International Politics. *The International Spectator*. 2017, Vol. 52, No. 4, p. 20.

² SHERMAN, J. F. Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights. *Corporate Responsibility Initiative Working Paper*. 2020, Vol. 71, p. 5. In: [hks.harvard.edu](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf) [online]. [2024-02-01]. Available at: <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf>.

³ KRAJEWSKI, M. The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities. *Deakin Law Review*. 2018, Vol. 23, pp. 13–14.

⁴ BERKES, A. Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights. In: Yannick Radi (ed.). *Research Handbook on Human Rights and Investment*. Cheltenham: Edward Elgar Publishing, 2018, p. 307.

⁵ KRAJEWSKI, M. The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities, p. 23.

To contribute towards a more robust system of human rights protections in business and human rights (“B&HRs”), this paper explores the possibility of a home state duty to protect against human rights violations of TNCs under existing IHRL. Home states of TNCs are mainly developed countries and, as such, are arguably better equipped to regulate the extraterritorial activities of their corporate nationals.⁶ Thus, the attribution of an extraterritorial duty to protect home states may realistically compensate for the host state’s unwillingness and inability to prevent and redress human rights violations.

The scope of an extraterritorial duty to protect is notoriously ambiguous. There is currently no legally binding instrument on B&HRs that would establish and clarify such a duty.⁷ While a draft treaty on B&HRs is “negotiation-ready”,⁸ the adoption of a treaty is currently unlikely due to the lack of consensus among states.⁹ The most authoritative instrument thus remains the non-binding UN Guiding Principles on Business and Human Rights.¹⁰ While the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct are also frequently relied on in the B&HRs sphere, they are not discussed in this paper because they provide recommendations to corporations, not states.¹¹

In attributing an extraterritorial home state duty to protect, we must thus rely on interpretations by human rights bodies and scholars. Because the available studies are frequently incomplete, outdated, or unfounded, this paper aims to bring clarity to the B&HRs debate. It first addresses the permissibility of extraterritorial jurisdiction under public international law (“PIL”), then explores the potential emergence of a home state duty to protect under the cause-and-effect jurisdiction in IHRL.

I. PERMISSIBILITY OF EXTRATERRITORIAL JURISDICTION IN PUBLIC INTERNATIONAL LAW

Jurisdiction in PIL is the authority of a state to regulate the conduct of persons, both natural and legal, through domestic law. Jurisdiction is an emanation of state sovereignty and, as such, a reflection of a state’s right to regulate its public order.¹² The exercise of jurisdiction is primarily territorial, yet a state may also exercise jurisdiction extraterritorially, i.e., “in respect of persons, property or events beyond its territory.”¹³

⁶ BERKES, A. Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights. p. 307.

⁷ MALLORY, C. A second coming of extraterritorial jurisdiction at the European Court of Human Rights. *QIL*. 2021, Vol. 82. In: *qil-qdi.org* [online]. [2024-01-01]. Available at: <<http://www.qil-qdi.org/a-second-coming-of-extraterritorial-jurisdiction-at-the-european-court-of-human-rights/>>.

⁸ DEVA, S. BHR Symposium: The Business and Human Rights Treaty in 2020-The Draft is “Negotiation-Ready”, but are States Ready? 2020. In: *Opinio Juris* [online]. [2024-06-15]. Available at: <<http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>>.

⁹ HUMAN RIGHTS COUNCIL (HRC). Report on the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. (2023). UN Doc. A/HRC/55/59, para. 28.

¹⁰ HRC. Guiding Principles on Business and Human Rights. (2011).

¹¹ OECD. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. (2023).

¹² MILANOVIC, M. *Extraterritorial Application of Human Rights Treaties*. Oxford: Oxford University Press, 2011, pp. 23-27.

¹³ KAMINGA, M. T. Extraterritoriality. In: *Max Planck Encyclopaedia of International Law* [online]. September 2020 [2024-01-01]. Available at: <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040?prd=MPIL>>.

As the exercise of jurisdiction beyond a state's territory may infringe upon the sovereign rights of other states, the exercise of extraterritorial jurisdiction is subject to limitations. The potentially affected state must consent to the exercise of jurisdiction, or there must be a recognized link between the state exercising jurisdiction and the target of its power.¹⁴ In PIL, such a link arises based on nationality, either that of a victim ('passive personality principle') or a perpetrator ('active personality principle'); when a state's national security is threatened ('protective principle'); and when serious international crimes threaten the international community as a whole ('universality principle').¹⁵

Cases of business-related human rights violations in host states rarely involve home-state nationals, threats to national security, or international crimes. However, they frequently involve human rights violations committed extraterritorially by home state nationals, i.e., TNCs domiciled or incorporated in a home state's territory. This makes the active personality principle fundamentally relevant for the B&HRs sphere. Incidentally, the active personality principle is also the firmest basis for justifying the exercise of extraterritorial jurisdiction.¹⁶

According to the active personality principle, a state is entitled to exercise jurisdiction in regard to the conduct of its nationals even if they are located abroad and the conduct was committed outside the state's territory.¹⁷ A national may be a natural person, a ship, an aircraft, or a company.¹⁸ While the rules on the nationality of natural persons, ships, and aircraft are clear, the determination of a TNC's nationality is ambiguous.

There is no single test for corporate nationality in international law.¹⁹ The choice of defining a corporation as one's national is left to the state's discretion. While the factors determining corporate nationality differ within domestic contexts, they usually include the place of incorporation or the principal place of business. Nevertheless, the lack of an internationally accepted definition enables states to shape the mode of determination of corporate nationality to further expand extraterritorial jurisdiction.²⁰

However, even if a state establishes a TNC as its national, the home state's capacity to exercise extraterritorial jurisdiction is uncertain. Due to the separate legal entity theory, wrongdoings of foreign subsidiaries are typically unimputable to parent companies and may not trigger a jurisdictional link. However, this may be overcome through parent-based

¹⁴ MILANOVIC, M. *Extraterritorial Application of Human Rights Treaties*. p. 24; O'BRIEN, C. M. *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*. Copenhagen: The Danish Institute for Human Rights Denmark's National Human Rights Institution, p. 52.

¹⁵ RYNGAERT, C. *Jurisdiction in International Law*. 2nd revised edition. Oxford: Oxford University Press, 2015, pp. 104–120.

¹⁶ DE SCHUTTER, O. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations. p. 1. In: *media.business-humanrights.org* [online]. [2024-01-01]. [2024-07-04]. Available at: <<https://media.business-humanrights.org/media/documents/d31ea6e492084e26ac4c08affcf51389695fead.pdf>>.

¹⁷ RYNGAERT, C. *Jurisdiction in International Law*, p. 104.

¹⁸ KAMINGA, M. T. *Extraterritoriality*, para. 11.

¹⁹ ZERK, J. A. Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. *Corporate Social Initiative Working Paper*. 2010, Vol. 59, p. 22. In: *hks.harvard.edu* [online]. [2024-02-01]. Available at: <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/working-paper_59_zerk.pdf>.

²⁰ DE SCHUTTER, O. Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, p. 31.

regulation.²¹ In fact, Germany, Norway, and France already rely on this approach to prevent harmful extraterritorial conduct of subsidiaries as well as other direct and indirect business partners.²²

It follows from the above that international law permits the exercise of extraterritorial jurisdiction vis-à-vis a TNC that is a home state's national. This also suggests that a state is not allowed to exercise jurisdiction with regard to its non-nationals. This is intriguing, especially in view of the 2023 German Supply Chain Due Diligence Act ("SCDDA").

The SCDDA imposes extraterritorial obligations also on foreign entities. These so-called branch offices ("*Zweigniederlassungen*") are governed by the SCDDA²³ despite being formally subject to the laws of the country of incorporation of their parent.²⁴ While controversial, the impermissibility of such regulation is somewhat softened by the fact that the SCDDA was adopted in line with an internationally recognized framework: the United Nations Guiding Principles on Business and Human Rights.²⁵

To conclude, home states are generally not precluded under PIL from protecting non-resident non-nationals from human rights violations of their nationals, e.g., through regulation. However, they are not subjected to the obligation to exercise extraterritorial protections. In view thereof, this paper will now examine the potential emergence of a legally binding duty to protect under IHRL.

II. EXTRATERRITORIAL JURISDICTION IN INTERNATIONAL HUMAN RIGHTS LAW

Contrary to PIL, jurisdiction under IHRL does attribute obligations to states. It is a threshold under which human rights obligations arise.²⁶ These obligations include the obligation to respect, protect, and fulfil human rights.²⁷ The requirement of jurisdiction for the emergence of human rights obligations is established in jurisdiction clauses of almost all core human rights treaties.²⁸ While not all human rights treaties contain a ju-

²¹ *Ibid.*

²² GERMANY. Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021, BGBl. I S. 2959; NORWAY. Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99; FRANCE. LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

²³ GERMANY. Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021. Section 1 para. 1 (1) 1.

²⁴ GERMANY. Handelsgesetzbuch, BGBl. 2023 I Nr. 411, para. 13e; Handelskammer Hamburg, Errichtung von Zweigniederlassungen und Betriebsstätten. In: *ihk.de* [online]. [2024-02-02]. Available at: <<https://www.ihk.de/hamburg/produktmarken/beratung-service/recht-und-steuern/wirtschaftsrecht/unternehmensgruendung-und-fuehrung/zweigniederlassung-1156842>>.

²⁵ ZERK, J. A. Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. p. 12, RYNGAERT, C. *Jurisdiction in International Law*, p. 99.

²⁶ MALLORY, C. A second coming of extraterritorial jurisdiction at the European Court of Human Rights. p. 31.

²⁷ E.g., EIDE, A. Report on the right to adequate food as a human right/submitted by Asbjorn Eide, Special Rapporteur. Geneva: United Nations, 1987, E/CN.4/Sub.2/1987/23, paras 170-181; COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR). General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. (2017). UN Doc. E/C.12/GC/24.

²⁸ E.g., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 2.1; UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Art. 2.1;

isdiction clause,²⁹ it is undisputed that the threshold criterion of jurisdiction must be satisfied.³⁰

Relevantly to the subject matter of this paper, jurisdiction in IHRL may also arise extraterritorially. Human rights courts and bodies have reaffirmed this in their interpretations of human rights jurisdiction clauses.³¹ Similarly to PIL, the extraterritorial exercise of jurisdiction in IHRL cannot be claimed towards everyone but requires the existence of a link connecting the state exercising jurisdiction and the conduct concerned. Contrary to PIL, it is a *de facto* link and not a *de jure* one that is decisive.³² However, the exact scope of a jurisdictional link in IHRL is unclear and controversial.³³

The two most widely accepted jurisdictional links for the attribution of extraterritorial obligations in IHRL are summed up under the spatial and personal models of jurisdiction. Both models have been jointly developed in the jurisprudence of the European Court of Human Rights (“ECtHR”), the Inter-American Court of Human Rights (“IACtHR”), regional human rights commissions, and UN treaty interpreting bodies. Both apply mainly in military situations.³⁴

According to the spatial model, extraterritorial jurisdiction arises whenever a state exercises *de facto* control over foreign territory, such as in the case of occupation. According to the personal model, a state exercises jurisdiction whenever its state agents exercise control over foreign nationals in a foreign territory outside the state’s *de facto* control.³⁵ Control under this model arises primarily when a victim is detained or otherwise deprived of liberty.³⁶

While fundamental to the demonstration of the permissibility of extraterritorial jurisdiction in IHRL in general, neither model is applicable within the context of this paper. A home state of a TNC generally does not exercise *de facto* control over a host state’s territory or the host state’s nationals. Moreover, both models relate to states’ actions, attributing a duty to respect rather than a duty to protect as relevant here.

For some scholars, the examination of extraterritorial obligations and potential jurisdictional bases ends with the spatial and personal models. They conclude that states do

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Art. 2.1; CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (European Convention on Human Rights, as amended) (ECHR), Art. 1.

²⁹ E.g., INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (adopted 16 December 1996, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (adopted 18 December 1979, entered into force 3 September 1981) 1248 UNTS 13 (CEDAW).

³⁰ BULTO, T. S. Patching the ‘Legal Black Hole’: The Extraterritorial Reach of States’ Human Rights Duties in the African Human Rights System. *South African Journal on Human Rights*. 2011, Vol. 27, pp. 257–259.

³¹ E.g., CESCR. General comment No. 24.

³² GIUFFRÉ, M. A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights. *QIL*. 2021, Vol. 82, p. 54. In: *qil-qdi.org* [online]. [2024-02-01]. Available at: <<http://www.qil-qdi.org/extraterritorial-jurisdiction-a-dialogue-between-international-human-rights-bodies-forthcoming/>>.

³³ MALLORY, C. A second coming of extraterritorial jurisdiction at the European Court of Human Rights. p. 31.

³⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR) *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights* (2017) OC-23/17, para. 80.

³⁵ IACtHR. *Advisory Opinion OC-23/17*, para. 79.

³⁶ MILANOVIC, M. *Extraterritorial Application of Human Rights Treaties*, p. 187.

not have an obligation to protect because there is no jurisdictional basis that would link states to transnational corporate conduct.³⁷ Interestingly, other scholars claim that an extraterritorial duty to protect is already established *de lege lata*.³⁸

III. EXTRATERRITORIAL ATTRIBUTION OF A DUTY TO PROTECT

UN human rights treaty bodies assumed authority in expanding extraterritorial jurisdiction to include a duty to protect. The ECtHR, once a leader in the evolving notion of extraterritorial jurisdiction, is notably silent about the extraterritorial dimension of this obligation.³⁹ While not an exhaustive list of sources, this paper has identified general comments of the Committee on the Rights of the Child (“CRC”), the Committee on Economic, Social and Cultural Rights (“CESCR”), the Human Rights Committee (“CCPR”), and an advisory opinion of the IACtHR to be the most relevant for the discussion of a home state duty to protect.

According to CRC’s *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, states have a duty to protect against infringements of the Covenant rights by businesses within their jurisdiction.⁴⁰ Because jurisdiction under the Covenant is not limited to a state’s territory, the duty to protect also includes extraterritorial human rights guarantees.⁴¹ The CRC explicitly attributed an extraterritorial duty to protect also to home states. Accordingly, they exercise jurisdiction when a “business enterprise has its center of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned,” i.e., when a “reasonable link” exists.⁴² While the CRC has established a duty to protect based on a reasonable link between a state and a TNC domiciled within its territory, it did not explicitly refer to jurisdiction.

The CESCR recognized the extraterritorial dimension of the duty to protect for the first time in 1999.⁴³ It reaffirmed it in its subsequent general comments,⁴⁴ most recently in 2017. In its *General Comment No. 24 (2017) on State obligations in the context of business activities*, the Committee established that a duty to protect arises “outside the national territory in situations over which States parties may exercise control.”⁴⁵

³⁷ E.g., O’BRIEN, C. M. The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal, p. 60.

³⁸ E.g., ETO CONSORTIUM. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. In: *fidh.org* [online]. [2024-02-02] Available at: <https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf>; DE SCHUTTER, O. Towards a New Treaty on Business and Human Rights. *Business and Human Rights Journal*. 2015, Vol. 1, No. 1, p. 4.

³⁹ MALLORY, C. A second coming of extraterritorial jurisdiction at the European Court of Human Rights, p. 48.

⁴⁰ COMMITTEE ON THE RIGHTS OF THE CHILD (CRC). General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. (2013). UN Doc. CRC/C/GC/16, para. 28.

⁴¹ CRC. General comment No. 16. para. 39.

⁴² CRC. General comment No. 16. para. 43.

⁴³ CESCR. General comment No. 12 (Twentieth session, 1999) The right to adequate food (art.11). (1999). UN Doc. E/C.12/1999/5, para. 36.

⁴⁴ CESCR. General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant). (2003). UN Doc. E/C.12/2002/11, paras 31, 33; CESCR. General Comment No. 19: The right to social security (Art. 9 of the Covenant). (2008). UN Doc. E/C.12/GC/19, para. 54; CESCR. General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights). (2016). E/C.12/GC/23, para. 70.

The CESCR confirmed that home states exercise a duty to protect because they exercise control, i.e., jurisdiction, vis-à-vis extraterritorial conduct of corporations “domiciled in their territory.” This includes “corporations incorporated under their laws” or corporations having “their statutory seat, central administration or principal place of business on their national territory.”⁴⁶ The Committee noted that if states fail to adopt “reasonable measures” to prevent and redress business-related extraterritorial infringements of Covenant rights, they will have violated their obligations under the Covenant.⁴⁷

Finally, the CCPR commented on the emergence of an extraterritorial duty to protect in its *General Comment No. 36 on article 6: the right to life* in 2019. The CCPR stated that the duty to protect under the International Covenant on Civil and Political Rights arises vis-à-vis all persons within a state’s territory and jurisdiction. The CCPR then noted that this includes “all persons over whose enjoyment of the right to life it exercises power or effective control - [including] persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”⁴⁸

While the CCPR did not issue its General Comment No. 16 within the specific context of B&HRs, it has considered the issue of corporations. The CCPR emphasized that states have a duty to protect individuals against deprivation of life by corporations operating in “areas subject to their jurisdiction.”⁴⁹ Such a duty to protect entails “an obligation for State parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats.”⁵⁰

Outside the UN human rights treaty system, the IACtHR’s Advisory Opinion OC – 23 / 17 is significant. The IACtHR established that states have a duty to protect the “human rights of all persons subject to their jurisdiction, even though such persons are not within their territory.”⁵¹ The Court expressed that such an extraterritorial obligation encompasses the “duty to prevent third parties from violating the protected rights in the private sphere.”⁵²

The IACtHR recognized extraterritorial jurisdiction within the specific context of transboundary damage. Accordingly, “the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.”⁵³ Such exercise of jurisdiction involves the taking of “all appropriate steps,”⁵⁴ including the adoption of domestic laws;⁵⁵ and is limited to the protection of the rights to life and integrity.⁵⁶

⁴⁵ CESCR. General comment No. 24, para. 10.

⁴⁶ CESCR. General comment No. 24, para. 31.

⁴⁷ CESCR. General comment No. 24, para. 32.

⁴⁸ HUMAN RIGHTS COMMITTEE (CCPR). General comment no. 36, Article 6 (Right to Life). (2019). UN Doc. CCPR/C/GC/35, para. 63.

⁴⁹ CCPR. General comment No. 36, para. 22.

⁵⁰ CCPR. General comment No. 36, para. 18.

⁵¹ IACtHR. *Advisory Opinion OC-23/17*, para. 104 (c).

⁵² IACtHR. *Advisory Opinion OC-23/17*, para. 118.

⁵³ IACtHR. *Advisory Opinion OC-23/17*, para. 102.

⁵⁴ IACtHR. *Advisory Opinion OC-23/17*, para. 118.

⁵⁵ IACtHR. *Advisory Opinion OC-23/17*, p. 58.

⁵⁶ IACtHR. *Advisory Opinion OC-23/17*, paras 102, 118.

IV. EMERGENCE OF CAUSE-AND-EFFECT JURISDICTION DE LEGE LATA?

According to the above human rights jurisprudence, home states have an extraterritorial duty to protect from the harmful conduct of TNCs domiciled within their territories. This calls into question the applicable jurisdictional basis. As emphasized above, states only incur human rights obligations if the threshold of jurisdiction is met. However, jurisdiction under the spatial and personal models was found inapplicable within the context of B&HRs, necessitating a novel jurisdictional approach.

This paper demonstrated that in IHRL, jurisdiction is synonymous with control. Thus, when human rights bodies refer to a state's exercise of "control," they ultimately refer to the exercise of jurisdiction. According to the human rights bodies cited above, the emergence of extraterritorial jurisdiction depends on a state's exercise of control over extraterritorial situations,⁵⁷ the human rights of victims,⁵⁸ and the cause of harm to human rights.⁵⁹ While all notions of control are formulated differently, this paper argues that they are all subthemes of the overlying cause-and-effect jurisdiction.

In academia, cause-and-effect jurisdiction is also referred to as functional jurisdiction,⁶⁰ capacity-impact model,⁶¹ functional-impact model,⁶² or control over rights doctrine.⁶³ However, the term "cause-and-effect"⁶⁴ is arguably the most accurate. Cause-and-effect jurisdiction signifies that there is a causal relationship between the source of harmful conduct within a state's territory (the "cause") and the consequences of such conduct outside of a state's territory (the "effect"). A jurisdictional link is thus established based on the fact that a state has the capacity to influence, through its exercise of public powers, extraterritorial human rights violations. Whether the perpetrator is the state or a private actor appears irrelevant. The exercise of jurisdiction is manifested through legislative, executive, and adjudicative activity.⁶⁵

Because this novel expansion of jurisdiction arises out of human rights jurisprudence, this paper must consider its legal significance. It is commonly acknowledged that neither general comments of UN treaty bodies⁶⁶ nor advisory opinions of regional human rights

⁵⁷ CESCR. General comment No. 24.

⁵⁸ CCPR. General comment No. 36.

⁵⁹ IACtHR. *Advisory Opinion OC-23/17*.

⁶⁰ VANDENHOLE, W. Introduction. In: Mark Gibney – Gamze Erdem Türkelli – Markus Krajewski – Wouter Vandenhole (eds.). *The Routledge Handbook on Extraterritorial Human Rights Obligations*. London, New York: Routledge, 2022, p. 4.

⁶¹ OLLINO, A. The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations. *QIL*. 2022, p. 81.

⁶² GIUFFRÉ, M. A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights. p. 53.

⁶³ ÇALI, B. Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn. In: *EJIL Talk* [online] 21. 7.2020 [2024-02-01]. Available at: <<https://www.ejil-talk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/>>.

⁶⁴ EUROPEAN COURT OF HUMAN RIGHTS (ECtHR) *Banković and Others v. Belgium and Others* (2001) App. No. 52207/99, para. 75.

⁶⁵ GIUFFRÉ, M. A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights, pp. 63–65.

⁶⁶ KELLER, H., GROVER, L. General Comments of the Human Rights Committee and their legitimacy. In: Helen Keller – Geir Ulfstein (eds.). *UN human rights treaty bodies: law and legitimacy*. Cambridge: Cambridge University Press, 2012, p. 138.

courts are legally binding.⁶⁷ There is no enforcement mechanism attached to either, and their implementation by states is voluntary.⁶⁸ Moreover, they do not create either intra or inter-systemic binding precedents.⁶⁹ Thus, the assertion that an extraterritorial duty to protect based on cause-and-effect jurisdiction arises from these views *de lege lata* is incorrect.

Nevertheless, it would likewise be incorrect to disregard these views. Despite their non-binding status, they are authoritative statements of human rights obligations under the respective human rights treaties.⁷⁰ They are norm-filling,⁷¹ carry considerable weight,⁷² and constitute “important contribution[s] to the conceptual evolution of the international law of human rights.”⁷³ Some even argue that general comments of UN treaty bodies are subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.⁷⁴

Despite the absence of inter-systemic precedent, human rights bodies also tend to coordinate their approaches in practice.⁷⁵ Thus, it is likely that the above views on extraterritorial jurisdiction and the duty to protect will be consolidated further also in binding court judgments. Eventually, these views may contribute to the emergence of customary international legal norms. Nevertheless, in the current form, they may only be perceived as “aspirational penumbra” or *lex ferenda*.⁷⁶

CONCLUSION

This paper examined the principle of extraterritorial jurisdiction as a potential solution to the argued inefficiency of host state protections against business-related human rights violations. Based on the notion of extraterritorial jurisdiction, it addressed the permissibility of extraterritorial human rights protections of home states under PIL and the emergence of a home state duty to protect under IHRL. While an obligation to exercise a home state duty to protect could not be found *de lege lata*, strong arguments exist in favor of such a ‘duty’ *de lege ferenda*.

In reference to the ‘active personality’ principle of extraterritorial jurisdiction in PIL, this paper demonstrated that the exercise of jurisdiction is permissible to the extent to which it concerns the extraterritorial conduct of home states’ nationals. In fact, several

⁶⁷ BAILLIET, C. M. The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion. *Brazilian Journal of International Law*. 2018, Vol. 15, p. 256.

⁶⁸ KELLER, H.; GROVER, L. General Comments of the Human Rights Committee and their legitimacy.

⁶⁹ FARNELLI, G. M., FERRI, F., GATTI, M., VILANNI, S. Introduction: Judicial Precedent in International and European Law. *The Italian Review of International and Comparative Law*. 2022, Vol. 2, p. 263.

⁷⁰ KELLER, H., GROVER, L. General Comments of the Human Rights Committee and their legitimacy. p. 132; BAILLIET, C. M. The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion. p. 263.

⁷¹ MCCALL-SMITH, K. L. Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts. *University of Edinburgh School of Law Research Paper Series*. 2015, No. 3, pp. 1–2.

⁷² LANDAU, I. Human Rights Due Diligence and the Risk of Cosmetic Compliance. *Melbourne Journal of International Law*. 2019, Vol. 9, p. 229.

⁷³ BUERGENTHAL, T. The Advisory Practice of the Inter-American Human Rights Court. *The American Journal of International Law*. 1985, Vol. 79, p. 18.

⁷⁴ KELLER, H., GROVER, L. General Comments of the Human Rights Committee and their legitimacy, pp. 128–129.

⁷⁵ BULTO, T. S. Patching the ‘Legal Black Hole’: The Extraterritorial Reach of States’ Human Rights Duties in the African Human Rights System, p. 264.

⁷⁶ KELLER, H., GROVER, L. General Comments of the Human Rights Committee and their legitimacy, pp. 129, 145.

European states have already exercised this right by means of domestic legislation. Because the emergence of a state's right to exercise extraterritorial protection under PIL does not imply the emergence of a duty to protect, this paper referred to the body of IHRL.

The concept of extraterritorial jurisdiction in IHRL differs from that in PIL, as it actually attributes obligations to states. In the absence of treaty law, the meaning of extraterritorial jurisdiction and the scope of extraterritorial obligations in IHRL were clarified in human rights jurisprudence. In the past, only the spatial and personal models of jurisdiction attributing an extraterritorial duty to respect were recognized. However, this paper revealed that in a recent shift of opinion, both universal and regional human rights bodies have recognized an extraterritorial (home state) duty to protect children's rights; economic-, social-, and cultural rights; and the rights to life and dignity against the harmful conduct of their corporate nationals.

As argued in this paper, such recognition has occurred based on cause-and-effect jurisdiction. While the underlying idea of cause-and-effect jurisdiction is not new, the reliance thereon to establish extraterritorial jurisdiction is. Cause-and-effect jurisdiction operates on the premise that a state has the capacity to affect harmful conduct carried out of the state's territory (be it the state's own conduct or that of a corporate national) and, therefore, exercises control not only vis-à-vis the cause of harm but also the potentially affected human rights. The availability of this jurisdictional basis is conditional on reasonableness and a state's exercise of public powers, as manifested through legislative, executive, and adjudicatory activity.

The mandatory language used by human rights bodies as well as relevant commentaries in academia suggest that an extraterritorial duty to protect is, in fact, already a legal requirement. This paper found the contrary to be true at present. The majority of the relied-on views have an advisory, interpretative function. They are not legally binding and do not, in itself, contribute to the emergence of new legal obligations. However, they may not be ignored, as they are highly authoritative and, at the very least, constitute *lex ferenda*.

It is to be expected that because of the current governance gap in B&HRs and the principles of legal certainty and foreseeability, human rights bodies will further consolidate the rules concerning an extraterritorial duty to protect. However, it is advisable for them to clearly ascertain the jurisdictional basis on which an extraterritorial duty to protect rests in line with the existing rules of IHRL. Human rights bodies should also clearly outline the necessary limitations to avoid the perception of an excessively broad application of extraterritorial jurisdiction. However, it is likely that only the adoption of a legally binding instrument in B&HRs will finally settle the ongoing and contentious debate on home states' exercise of extraterritorial jurisdiction in IHRL.