

HOME STATE RESPONSIBILITY FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS COMMITTED BY NON-STATE ACTORS



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1 Introduction

The past decades have been subject to a formidable development in the area of international law and international human rights law. Traditionally, only states were deemed as subjects of international law, but with the increasing globalization also non-state actors have proved to be of importance in the international sphere, especially in the context of human rights. Hence, the assumption that only the state itself and its agents are accountable for human rights abuses is frequently challenged¹. The question of whether non-state actors such as corporations have gained status as subjects of international law has created vigorous debates, although it is indisputable that multinational corporations may have a considerable impact on human rights, both as protectors and violators of internationally recognized rights. The aim of this article is, nevertheless, not to determine whether corporations are independent subjects of international law and if they thus hold legal duties and responsibilities. The purpose is to attempt to provide an overview of the current conditions of the doctrine of state responsibility as an instrument to address and protect human rights violations committed by non-state actors, particularly multinational corporations. Through the upcoming analysis it will be considered if this doctrine is adequate to effectively address breaches of international human rights law, or if supplementary instruments are required, for instance the preparation of legal frameworks which are directly applicable to non-state actors. In addition to the traditional doctrine also the principle of due diligence, which is one of the primary obligations of states in the area of human rights law, will be examined to determine if state responsibility can be invoked as a result of a state's omission to prevent internationally unlawful private conduct. Consequently, the central topic of discussion is the responsibilities of governments for unlawful corporate activity. In this context also a few fundamental principles of international law need to be explored, among others the general rules of state responsibility and the principles of jurisdiction.

2 State Responsibility for Breaches of International Obligations Committed by Non-State Actors

2.1 The International Rules on State Responsibility

In the current state of international law and international human rights law it is generally acknowledged that there are two broad principles from which state responsibility is derived, that is

¹ Engström, Viljam *Who is Responsible for Corporate Human Rights Violations?* p 5.

- a) the doctrine of attribution or imputability, which affirms that states are responsible for acts or omissions committed by individuals while exercising the state's power and authority. These actions are attributed to the state even if the acts exceeds the authority granted by the state (*ultra vires* acts), and
- b) the doctrine of due diligence, from which acts or omissions of non-state actors which are generally not attributable to the state, may nevertheless lead to state responsibility if the state fails to exercise the necessary due diligence in preventing or reacting to such acts or omissions.

The two different principles have been referred to as direct and indirect responsibility, however, such a description may be misleading, and a more correct definition are responsibility by attribution and responsibility due to failure to exercise due diligence. Both of these contemporary doctrines can be applied in regards to the question of when subjects of international law are to be held responsible for actions committed by non-state actors, such as individuals and corporations. In the next sections the traditional law of state responsibility will primarily be examined, followed by a discussion in regards to the doctrine of due diligence which is derived from a state's primary duty to protect to protect human rights, and the general rules of attribution of conduct to a state on the basis of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts (hereafter referred to as the ILC Articles).

2.1.1 The Doctrine of State Responsibility

The traditional law of state responsibility, a fundamental principle of international law, consisted primarily of customary rules, which developed out of state practice and the nature of the international legal system. These rules established responsibility for breaches of international obligations, and consequently the obligation of the state to make reparations for the breach. However, there is one major problem under this doctrine, which is that it for a long time has been under-developed under international law. The main reason being the conflicting interests between state responsibility and the doctrine of state sovereignty, which emphasizes the formal equality of states. In addition the problems of the voluntary character of international law that requires state consent to establish legally binding instruments, have limited and slowed the development of the doctrine of state responsibility. The current scope of state responsibility is mainly influenced by the works of the United Nations International Law Commission (ILC), which, after several years of research, in 2001 adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts. The articles, as the main legal source within this area of law, reflect both customary international law, and in some areas it has progressively developed the law of state responsibility.

On the other hand, it is not a treaty, and therefore not a binding instrument of law, which is binding upon states as such. Nevertheless, the articles have been quoted by the International Court of Justice in its jurisprudence; hence it can be regarded as an important source of law. The progressive development includes, among others, the now acknowledged distinction between primary and secondary rules of international law, and the clarification of the question of the fault requirement². The secondary rules of state responsibility is explained as “the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom”³, while the primary rules “defines the content of the international obligations breach of which gives rise to responsibility”. The ILC Articles consist of secondary rules of state responsibility.

A general issue within the doctrine of state responsibility is when, and on what conditions, responsibility accrues. Basically, the doctrine is based upon the connection between the state and the person or persons actually executing the wrongful act or omission. For responsibility to arise the connection has to be sufficiently strong so that the unlawful act may be imputed to the state. The question of imputability has been clarified by the ILC Articles. For a wrongful act to occur, two components have to be established. These components consist of both subjective and objective elements. The subjective element is the imputability to a state of action or omission - that the unlawful breach can be assigned to the state actor, while the objective element is the inconsistency of the particular conduct with an international obligation, which is binding upon that state, i.e. the execution of an unlawful act. In this context difficulties arise more often in regards to the requirement of imputability, which is often hard to establish. The question is basically whether the breach was committed by the state itself, or by other actors which were under the sufficient control, instruction or authority of the state.

A state as an abstract legal entity cannot act ‘itself’, but acts through individuals. For the state to be responsible for such acts, it is necessary to establish whether the act in question may be attributed to it. Traditionally the individual committing the acts had to be acting as a state official under the particular state. This was held by the International Court of Justice in *Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*⁴ where it stated that “according to a well-established rule of international law [of customary character] the conduct of any organ of a State must be regarded as an act of that State”⁵. On the other hand, also acts of individuals without

² Cassese, Antonio *International Law*, Second Edition, Oxford University Press, 2005, p 244.

³ Harris, DJ *International Human Rights in Context, Law, Politics, Morals*, Third Edition, Oxford University Press, 2007, p 504.

⁵ Cassese, Antonio p 246.

the formal status of state officials may be attributed to the state. Such attribution was recognized by the International Court of Justice in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*⁶ where it was confirmed that actions of individuals under ‘the effective control’ of a state could be imputed to the state, and thus incur state responsibility. The Court later upheld that article 8 of the ILC Articles envisaged that if individuals acted under the instruction, direction or control of a state, imputability to the state could be justified. The ICTY Appeals Chamber (International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991) also applied this test in its judgment in *Tadic*⁷. These standards were accepted by the ILC in the ILC Articles as means of imputability, which could hence establish state responsibility. Under these rules responsibility accrues for actions and omissions of state organs and officials, even when committed outside the scope of its apparent authority, in other words, also acts committed ultra vires may be attributed to the state. Hence, if the act or omission is imputable to the state and there has in fact been a violation of an international obligation, either of customary law or of a treaty obligation, the state is internationally responsible for those violations. In practice the test of attribution makes it hard to prove responsibility for acts committed by individuals, and some have argued that there is currently a too high threshold for establishing state responsibility. The rules of attribution will be further discussed under 2.2.1.

2.1.2 The Relationship between International Human Rights and State Responsibility

As already mentioned, state responsibility will incur under customary international law where an internationally unlawful act, either a positive act or an omission, can be attributed to the state. This position is recognized by various international tribunals, i.e. in the cases of *Caire Case (France v Mexico)*⁸ and *Thomas H. Youmans (USA) v United Mexican States*⁹. The applicability of these rules to international human rights law is generally accepted - a position, which is supported by the ILC Articles and its commentaries. Article 12 expressly states that the breach of an international obligation occurs where state action “is not in conformity with what is required of it by that obligation, regardless of its origin or character”¹⁰. The Commentary does not define the primary rules of international law, which is the contents of the obligations, but rather the secondary rules, which is on what conditions responsibility may arise. This distinction indicates that the law of state

⁶ I.C.J.Rep 1984.
⁷ Cassese, Antonio p 249.

⁸ (1929) 5 R.I.A.A 516.

⁹ Inter-American Court of Human Rights 1926.

¹⁰ Chirwa, Danwood Mzikenge *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, Section II C.

responsibility is applicable also to human rights law¹¹. The relationship between the primary and secondary rules of state responsibility may further entail that the ILC Articles applies to all international obligations of states, without regard to whether the obligation in question is owed to another state, private persons or towards the international community as a whole. Moreover, the Commentary to the Articles expressly specifies that the parts of the Articles concerning legal consequences and implementation are not applicable to human rights obligations. The Commentary affirms that “State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One [regarding the wrongful act and attribution] applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope”¹². This statement implicates that the doctrine of state responsibility is applicable to international human rights law. The International Court of Justice has also adopted a similar point of view in its judgments. In *Rainbow Warrior (New Zealand v France)*¹³ the Court held that “any violation by a state of any obligation, of whatever origin, gives rise to state responsibility”, a statement which was subsequently repeated in *Gabcikovo-Nagymoros Project (Hungary v Slovenia)*¹⁴. As well jurisprudence from the European Court on Human Rights (ECHR) is in conformity with this conception¹⁵. Hence, according to international jurisprudence and the ILC Articles, one can assert that a breach of international human rights obligations may give rise state responsibility. However, there is one important limitation of the applicability of state responsibility to human rights violations - that is the element of attribution of the unlawful act to the state. A connection between the state and the unlawful conduct has to be proven, which, in this particular area of law, may give rise to major difficulties because of the emergence of non-state actors. Traditionally, if human rights violations cannot be said to constitute state action and hence cannot be attributed to the state, international responsibility will not occur. Yet, as also omissions of state organs may invoke state responsibility, one may ask if the omission of a state to protect human rights can additionally give rise to such responsibility.

2.1.2.1 The Duty to Protect Human Rights

It is generally recognized that international human rights law imposes certain obligations which states are bound to respect. Through the ratification of international human rights treaties, state

¹¹ Engström, Viljam p 16.

¹² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Part Two, article 28, note 3.

¹³ (1990) 20 R.I.A.A. 217.

¹⁴ I.C.J.Rep 1997.

¹⁵ Engström, Viljam p 15.

parties agree upon three important levels of duties. Those are the duties to respect, protect and fulfill human rights. In this context focus will be upon the duty to protect. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR) the duty to protect “requires States to protect individuals and groups against human rights abuses”¹⁶. It additionally indicates the necessity of state parties taking positive measures to give effect to the treaty rights. An important question is how wide the scope of this duty should be defined, and whether or not it covers the conduct of non-state entities. By virtue of becoming member states to the International Covenant on Civil and Political Rights (ICCPR), state parties are according to article 2 obliged to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant”. The provisions of the ICCPR suggest that the duty to ensure imposes on states an obligation to take positive steps to guarantee the enjoyment of human rights, and thus, to take measures to prevent human rights violations committed by private actors. In addition, the Committee on Economic, Social and Cultural Rights indicated that the duty to protect is also applicable to the International Covenant on Economic and Social Rights, and hence that state parties are obliged to preclude violations of treaty rights by non-state actors. Consequently, one may say that the duty to protect implicitly encompasses a state obligation to control and regulate non-state actors; the Human Rights Committee for instance asserts this¹⁷. Moreover, this position is supported and adopted by other international human rights instruments, for example by the European¹⁸ and the American Conventions on Human Rights¹⁹. Also the Commentary to the ILC Articles may clarify this question, while it says that “a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects”²⁰. Accordingly, the conclusion is that there is a well established notion in international law that it is an obligation of states to protect individuals within their jurisdictions from human rights violations by private actors, and that this duty applies both to civil and political, as well as economic, social and cultural rights. It is therefore the omission of protection which, on this ground, will invoke responsibility for private acts, and, as already established under 1.1.1., article 2 of the ILC Articles covers both positive acts and omissions as grounds for state responsibility.

Nevertheless, the obligation to protect human rights must be seen in the context of the so-called due diligence test, as a legally binding obligation on a state to protect the human rights of all individuals

¹⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

¹⁷ Chirwa, Danwood Mzikenge, Section III A, note 73.

¹⁸ Article 1 states that state parties “shall secure to everyone within its jurisdiction...”.

¹⁹ Article 1 requires states “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”.

²⁰ ILC *Draft Articles, with commentaries*, Part One, Chapter II, section 4.

within its jurisdiction would clearly be too extensive²¹. If a general duty to protect human rights was established, the state would be responsible for all human rights violations which occurred within its private sphere, a position which would take the doctrine of state responsibility too far. The due diligence test was first articulated in *Velasquez Rodriguez v Honduras*²², a judgment by the Inter-American Court of Human Rights. The Court here confirmed that “an illegal act which violates human rights and which is initially not directly imputable to a State”, i.e. because it was committed by a non-state actor, “can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”. Ergo, the Court saw it as its task to determine whether violations were the result of the state’s failure to fulfill its duty to respect and guarantee convention rights. Yet the mere existence of a violation was not adequate to prove the failure to take preventive measures and accordingly invoke state responsibility, but the state is obliged to ‘take reasonable steps to prevent human rights violations’. The due diligence test was later adopted by the African Commission on Human Rights, while it has expressly referred to *Velasquez Rodriguez v Honduras* and the requirement of a state taking positive action in fulfilling human rights obligations. It is further argued that also the European Court of Human Rights has emphasized the concept of due diligence, for example in *X and Y v Netherlands*, where the Court proclaimed that state authorities were obliged to take steps to ensure that the enjoyment of rights were not interfered with by any other private person²³. Additionally, in *Osman v United Kingdom* the Court held that article 2 (1) of the European Convention on Human Rights (regarding the right to life) had to be interpreted as to impose on the state “to take appropriate steps to safeguard the lives of those within its jurisdiction”²⁴. The key issue in this jurisprudence is the ‘reasonableness’ of the measures taken to prevent human rights abuses. The measures taken have to be reasonable according to the alleged risk and the difficulties regarding the prevention of them. Thus, if the state has undertaken reasonable preventive measures to avoid possible human rights abuses, state responsibility will not accrue. The due diligence test has subsequently been increasingly recognized in the international sphere. Article 4 (c) of the Declaration on the Elimination of Violence against Women recommends states to ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’, while the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights²⁵

²¹ A traditional definition of the term due diligence is “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation”.

²² Series C no. 4 (1998).

²³ ECHR 1985, Application No 8978/80, section 23.

²⁴ Application No 23452/94 [1999] 1 F.L.R. 193, ECHR, note 115.

²⁵ G.A.Res 48/104, 48 UN GAOR, Supp. (No. 49), Chapter III, Article 18.

insists that ‘failure to exercise due diligence in controlling the behavior of such non-state actors’ leads to state responsibility.

Consequently, the scope of the duty to protect cannot be interpreted so broadly as to hold a state responsible for all human rights violations within its jurisdiction. International responsibility will thus occur when a state has failed to exercise reasonable due diligence to prevent human rights violations committed by non-state actors. Here state responsibility accrue for conduct initially not attributable to the state, on the ground of the lack of due diligence to prevent the violating acts. The omission of protecting individuals and regulating other non-state actors will accordingly constitute the breach of an international obligation, a breach that is committed by the state and therefore attributable to it. This position was emphasized and supported in *D. Earnshaw and Others (Great Britain) v United States (Zafiro case)*²⁶ where it was implied that responsibility will not incur for wholly private acts, but the failure to prevent such acts may entail international responsibility of the state.

2.2 State Responsibility for Private Acts or Omissions

As already established under 2.1.2., the doctrine of state responsibility is applicable to international human rights law, thus, the breach of a human rights obligation of a state may entail the international responsibility of that state. Furthermore, as the duty to protect encompasses an obligation to prevent abuses within the state’s jurisdiction by non-state actors, the conclusion is that the miscarriage of such an obligation can result in the state being held indirectly responsible for private acts. In traditional international law, as alleged above, and also in human rights law which cannot be said to impose the duty to protect, there has to be proof of state action for state responsibility to occur, that is, the particular violating act must be attributable to the state.

2.2.1 Attribution of Conduct to a State

According to the current traditional regulation of state responsibility two essential conditions have to be established for such responsibility to arise; that is the objective element of a breach of a formal legal obligation by one state owed to another state, and secondly, the subjective element of imputability to the first state of the unlawful conduct, as codified in article 2 of the ILC Articles. The proposition found in article 2 is one of the fundamental structures of the general law of state responsibility, and several judgments of international tribunals have implicitly provided support for

²⁶ (1925) 6 R.I.A.A. 160.

this principle. The Tribunal of the International Centre for Settlement of Investment Disputes expressly referred to the two conditions of imputability in *Total S.A v Argentine Republic*²⁷ and it accordingly observed that “as held by the ILC these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages”. Also the International Court of Justice has adopted article 2 as means of imputability. In its decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* it clearly approves of the two conditions set out in the ILC Articles by referring to “the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State”²⁸.

Chapter II of the ILC Articles further determines on which conditions attribution is justified. Its commentary declares that “in theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State”, although this approach is avoided because the recognition of the autonomy of individuals is desirable. Ergo, “the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs”²⁹. Consequently, private actions or omissions are generally not attributable to the state. The question of imputability is in reality an empirical problem, where it has to be considered whether the breach actually was committed by the state “itself”. As the state is an abstract entity, which cannot act itself, there are two options; the unlawful act was performed by official state organs, or by non-state actors (i.e. individuals, enterprises and non-governmental organizations). In *Yeager v Islamic Republic of Iran* that concerned activities of state organs, the Court stated that it is “generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State”³⁰. Furthermore, it is acknowledged that international law is of importance when deciding what constitutes an organ of a state. For instance, a state cannot avoid international responsibility by simply claiming that a department is a separate legal entity according to domestic law. *Yeager v Islamic Republic of Iran* emphasized this while stating that “attributability of acts to the State is not limited to acts of organs formally recognized under international law. Otherwise a State could avoid

²⁷ ICSID Case No. ARB/04/01.

²⁸ I.C.J. Rep (1996), note 385.

²⁹ ILC *Draft articles, with commentaries*, Part One, Chapter II, section 2.

³⁰ Harris, *DJ Cases and Materials on International Law*, Sixth Edition, Sweet & Maxwell, 2004, p 503.

responsibility under international law merely by invoking its internal law”³¹. The Commentary to the ILC Articles (Chapter II) supports this point of view in saying that state responsibility can arise “for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law”³². However, as stated by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*³³, “to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particular great degree of State control over them, [...] expressly described as ‘complete dependence’”.

The ILC Articles Chapter II defines under which circumstances conduct may be attributed to the state. It consists of eight different articles where articles 4 to 7 deals with general rules of attribution, while articles 8 to 11 consist of additional rules where actions committed by non-state organs or entities may nonetheless be imputed to the state. Circumstances which are not covered by this chapter are in general not attributable to the state, and thus, do not lead to responsibility. Anyhow, the duty to protect human rights and the responsibility, which may accrue by failure to do so, can be regarded as an exception to the traditional rules of imputability. The first principle of attribution is found in article 4, which also may be regarded as the basic rule in this area of law. It confirms that any conduct of the organs of a state shall be considered an act of that state. Moreover, the International Court of Justice held in *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*³⁴ that this rule can be considered as customary international law. The following seven articles impose responsibility for conduct of persons or entities exercising elements of governmental authority (article 5), conduct of organs placed at the disposal of a state by another state (article 6), ultra vires act by state organs (article 7), conduct directed or controlled by a state (Article 8), conduct carried out in the absence or default of the official authorities (article 9), conduct of an insurrectional or other movement (article 10), and conduct acknowledged and adopted by a state as its own (article 11). One of the relevant articles for this purpose - attribution of acts committed by non-state actors - is article 8 and conduct directed or controlled by a state. It has been argued that even if conduct is not attributable to a state because the actor did not constitute a state organ according to article 4, then conduct may nonetheless be imputed to the state if the actor acted under the instruction, authority or control of that state under article 8.

³¹ (1987) 17 Iran-U.S.C.T.R 104.

³² ILC *Draft articles, with commentaries*, Part One, Chapter II, section 7.

³³ I.C.J. Rep (1996), p 140, note 392.

³⁴ I.C.J. Rep (1999), p 29, note 62.

Non-state actors are traditionally not bound by international legal obligations, such as international treaties, customary international law or general principles of law. In the international sphere states are the primary subjects, but also non-state actors can violate international obligations, especially human rights. Because non-state actors generally cannot be held directly responsible for breaches of international law, there must be an effective system of attributing such unlawful acts to their home states. Article 8, which according to the International Court of Justice must be regarded as customary international law (in *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*), says that ‘the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’. The conduct of private persons and enterprises may under this article be imputed to the state. For responsibility to arise there must however be a factual link between the actor and the state³⁵. This link can be established in two different circumstances; a) where the actor acted on the instructions of the state, and b) where it acted under the state’s direction or control. International jurisprudence has also widely accepted the first option, that is, authorized conduct as a basis for imputability. It is not important whether the actor was a private individual or if the conduct involved governmental activity - conduct may still be attributed to the state if the factual relationship is verified. The second option, whether the non-state entity acted under the state’s direction or control, is more difficult to determine. Here the factual link has to be stronger and more evident³⁶, and attribution of wrongful acts is only justified where the state directed or controlled the specific operation in question. It has been argued that it is currently too difficult to establish the degree of control required. Two different tests have been emphasized. The first test was put forward by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* where the Court concluded that for state responsibility to arise “it would in principle have to be proved that that State had effective control”³⁷ of the abusive operations committed. The ICTY Chamber on the other hand, laid down the second test in its judgment in *Tadic*, that is, the “overall control” test. The Chamber in *Tadic* accentuated that the degree of control could vary according to the specific circumstances of different cases, and that it could not “see why in each and every circumstance international law should require a high threshold for the test of control”³⁸, hence, it criticized the judgment of the International Court of Justice in *Nicaragua* and the effective control test. But also the ‘overall control’ test has been criticized, although recent state practice has provided support for

³⁵ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, section 1.

³⁶ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, section 3.

³⁷ I.C.J. Rep 1984, section VII, note 5.

³⁸ ICTY Appeals Chamber, CC/PIO/190-E

the *Tadic* decision³⁹. It was for instance noted in *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* that the test had “the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility ... a State’s responsibility can be incurred for acts committed by persons or groups of persons - neither State organs nor to be equated with such organs - only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 ... In this regard the ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility”⁴⁰. Thus, the Court adopted the “effective control” test, and it further determined that it also could be regarded as customary international law⁴¹. As aforementioned under 2.1.1 the test of “effective control” has been criticized for upholding an overly high threshold for recognizing sufficient state control of the non-state actor. In its judgment in *Ilascu v Moldova and Russia*, the European Court of Human Rights applied a less strict test for establishing the sufficient control. The Court found that a Moldovan separatist regime was “under the effective authority, or at the very least the decisive influence, of the Russian Federation”⁴², and this was considered an adequate degree of control even though it was not determined whether the Russian Federation was in effective control of the region in question. The conduct of the separatist regime was attributable to Russia. It is argued that the Court hereby indicated that neither a high degree of effective control or general control of the territory in question are required to attribute actions committed by non-state actors outside a state’s territory to the state. Hence, a state party to the European Convention on Human Rights may also have extraterritorial obligations under the Convention⁴³.

Nonetheless, as stated in the ILC Commentary, the conclusion is that where a non-state actor (i.e. individual or corporation) is acting under the instructions, directions or control of a state and simultaneously violate international law, its actions may be imputed to the state. Ergo, state responsibility for breaches of international law committed by a non-state actor may be established, provided the necessary factual link between the state and the non-state actor. But, as will be discussed later, also additional rules under the ILC Articles may be utilized as means to invoke state responsibility due to private acts.

³⁹ Hessbruegge, Jan Arno *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, p 41.

⁴⁰ I.C.J. Rep (1996), page 144, note 406.

⁴¹ I.C.J. Rep (1996), page 143, note 401.

⁴² ECHR 2004-VII (2004), Application No 48787/99, note 392.

⁴³ McCorquodale, Robert & Simons, Penelope p 12.

3 Home State Responsibility and Extraterritorial Human Rights Violations Committed by Multinational Corporations

3.1 The Meanings of Extraterritorial Jurisdiction

It is a defining feature of international law that it aims to protect the territorial integrity of the sovereign state⁴⁴. Thus, one of the fundamental principles of international law is the principle of state sovereignty. The principle provides for the rule that a state cannot exercise jurisdiction over another state's territory unless international rules have established an exception. This doctrine of sovereignty is closely linked to the principle of non-intervention, which says that a state does not have the right to intervene in the internal or external affairs of other states. Both of these principles are enshrined in the Charter of the United Nations, the former in Article 2.1 and the latter in Article 2.7. They are both well-established essential principles of traditional international law, and they confirm that the general basis for jurisdiction is domestic and limited to territorial boundaries; the so-called territoriality principle or the principle of domestic jurisdiction. In the domestic legal sphere jurisdiction is defined as the power of a state to govern persons, property and events by its municipal law and through its legal instruments⁴⁵, that is, territorial jurisdiction. The leading case affirming the principle of territorial jurisdiction is *The Lotus Case (France v Turkey)*⁴⁶. In this judgment the Court asserted that "the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"⁴⁷. The definition of extraterritorial jurisdiction is consequently the exercise by a state of public functions over individuals located outside its own jurisdiction and beyond the traditional basis of domestic jurisdiction. In other words, the state tries to control the behavior of persons, acts or property outside its own territory. Extraterritorial jurisdiction can occur in various situations. The most relevant versions to this purpose, are adjudicative and prescriptive extraterritorial jurisdiction. The former concerns situations where for example municipal criminal procedures add up to convictions for

⁴⁴ Cassese, Antonio p 68.

⁴⁵ Harris, DJ p 265.

⁴⁶ P.C.I.J., Series A, No. 10 (1927).

⁴⁷ Harris, DJ p 269.

extraterritorial unlawful acts, while the latter involves the adoption of legislation with the intention of giving it an extraterritorial effect⁴⁸.

3.1.1 Extraterritorial Jurisdiction and International Law

Under international law there are a few bases generally recognized for the exercise of extraterritorial jurisdiction. These bases consist of a combination of the prescriptive and the adjudicative theories, and the most important ones are the ‘effects’ doctrine of the ‘objective territoriality’ principle, the active and the passive personality principle (also known as the nationality principle), and the principle of universal jurisdiction⁴⁹. The most relevant principles in this context are the principles of personality and universality.

As maintained by the effects doctrine, states may enforce their jurisdiction over any action occurring anywhere provided that the said action possesses a negative effect upon the enforcing state. Due to the exercise of this jurisdiction municipal law will operate extraterritorially, often applied against foreign nationals. This principle has been subject to considerable criticism, and is not as widely acknowledged as the principle of personality. Respectively, according to the personality principle the nationality of the non-state actor in question can legitimize the exercise of extraterritorial jurisdiction, both where the actor is the offender and where it is the victim. Under the principle of active personality a state can pass legislation, which applies, to its nationals and their conduct outside of its territory, while the passive personality principle enables a state to have jurisdiction over acts committed against its nationals, even when the act occurred abroad. In both situations the state implements its jurisdiction beyond its domestic territory and beyond the traditional scope of jurisdiction. In general the active personality principle is the one most acknowledged in the international sphere, although also the passive personality principle has gained a certain acceptance, especially where there is an adequate nationality link⁵⁰. Nevertheless, such extraterritorial jurisdiction should be exercised in conformity with the principle of reasonableness, if not, it may be regarded as a violation of the sovereignty of the territorial state. In particular, the active personality principle has been used as a justification for states to regulate the conduct of its national non-state actors abroad, and to ensure that they do not act in discrepancy with, for instance, fundamental human rights. Such regulation is applicable to both individuals and corporations operating abroad.

⁴⁸ De Schutter, Olivier *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, Chapter III.

⁴⁹ De Schutter, Olivier, Chapter IV, section 2.1.

⁵⁰ De Schutter, Olivier, Chapter IV, section 2.1.

The principle of universal jurisdiction recognizes that some values are of so fundamental character that it is in the interest of the international community as a whole to protect them. This principle is of particular importance in regards to international criminal law and jus cogens crimes, but in recent times also certain customary norms have evolved under international human rights law and some of them have even gained status as peremptory norms of jus cogens⁵¹. Violations of such customary human rights law and jus cogens are violations of obligations erga omnes - to all other states and the international community as a whole - and accordingly any state may attempt to remedy the violation, even if the individual victim was not a national of that state and no other link between the state and the violation was proven⁵². In preventing violations of jus cogens norms a state is not regarded as pursuing its own interests, but rather as protecting the international community, thus, extraterritorial jurisdiction is justified.

However, the exercise of extraterritorial jurisdiction is subject to additional limitations. The first limitation which is imposed by international law is that the aforementioned acknowledged principles of extraterritorial jurisdiction (the “effects” doctrine, the personality principle and the principle of universality) must be practiced in accordance with the principle of reasonableness, as already stated above - in other words, it has to be determined if the state has applied one of the recognized principles in an acceptable manner. One important factor in determining the reasonableness of the extraterritorial jurisdiction is whether it primarily benefits the state, which exercises the jurisdiction by extending the range of its municipal legislation. If this is the case, then the conduct will not be regarded as “reasonable”. Secondly, the factual link between the state and the situation concerned must be sufficiently strong - the lack of a connecting link will make the extraterritorial jurisdiction unacceptable according to the principle of sovereignty and non-intervention (except where extraterritorial jurisdiction is exercised on the basis of the universality principle). The last limitation generally imposed is that such jurisdiction is to be avoided where it would lead to interference with the internal affairs of the territorial state. As these limitations are of prevalent importance in general international law, the situation may nonetheless be somewhat different in the area of international human rights law. While exercising extraterritorial jurisdiction one should take into account the specific character of the situation one attempts to regulate. In a situation where a state attempts to secure the protection of human rights beyond its territorial borders, the conflicting arguments of state sovereignty and non-intervention is not as prominent as in general international law. Thus, extraterritorial jurisdiction may be justified; both on the basis of

⁵¹ Cassese, Antonio p 394. for instance rules banning slavery, genocide, racial discrimination and torture.

⁵² Harris, DJ p 777.

the principle of active personality and universality, where a state attempts to protect internationally recognized human rights, whatever reason the territorial state may have to not effectively protect those rights itself. On this ground jurisdiction can neither be said to constitute an unlawful intervention in the exclusive domestic jurisdiction of the territorial state. Besides, it is generally acknowledged that fundamental human rights, for instance those rights codified in the UDHR and the ICCPR, restrict the doctrine of state sovereignty and widen the scope of human rights obligations (this will be discussed under 3.1.2.)

3.1.2 Expansion of the Territorial Scope of Human Rights Obligations

The emergence of human rights law has challenged the traditional point of view reflected in the principles of state sovereignty and non-intervention. One can say that the international law of human rights is competing with these principles, and they are thus difficult to co-ordinate with each other⁵³. Initially also the scope of human rights obligations was territorially defined, that is, that a state could be held responsible for breaches mainly within its own territory. Individuals were traditionally regarded as under the exclusive jurisdiction of the state of which they were inhabitants and nationals, and other states did not have the right to interfere with the authority of that state, even if it was unquestionable that human rights abuses occurred⁵⁴. Nevertheless, a new conception slowly emerged, much because of the cruel and inhuman treatment of individuals and the gross human rights abuses which took place during the Second World War., Article 2 (7) of the UN Charter⁵⁵, which mirrors the principles of non-intervention and sovereignty of states, has been subject to reinterpretation in the area of international human rights law, so that such issues are no longer acknowledged as being merely within a state's domestic jurisdiction. The United Nations also adopted a tendency to overrule the objection of state sovereignty and domestic jurisdiction in cases concerning human rights⁵⁶, and accordingly also overruled the principle of non-intervention. Gradually, and as a consequence of the expanding number of international human rights instruments, the UN member states accepted the concept that intervention could be justified when serious and large-scale human rights violations allegedly had been committed. International human rights treaty monitoring bodies have to an increasing extent interpreted treaty obligations to having an extraterritorial scope, for instance Article 2 of the UN Covenant on Civil and Political Rights under where a state party are to respect and ensure the covenant rights "to all individuals within its

⁵³ Cassese, Antonio p 59.

⁵⁴ Cassese, Antonio p 376.

⁵⁵ Article 2 (7) provides that "nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state".

⁵⁶ Cassese, Antonio p 383.

territory and subject to its jurisdiction”. Additionally, the UN Human Rights Committee noted that under the ICCPR “persons may fall under the subject matter jurisdiction of a State party even when outside that State territory”⁵⁷.

Thus, a state’s human rights obligations are not limited to its territory, but are extended to be applicable to all individuals who are subject to its jurisdiction. Such an expansion is expressly stated in both ACHR Article 1(1) and ECHR Article 1. It is also assumed that the ICESCR applies to a state’s jurisdiction even though it lacks a jurisdictional clause⁵⁸. In *Victor Saldano v Argentina* the Inter-American Commission on Human Rights held that according to Article 1 (1) of the ACHR a state party could “be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s territory”⁵⁹. A similar statement was made by the European Court of Human Rights in *Drozdz and Janousek v France and Spain*, where it confirmed that “the term “jurisdiction” is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory”⁶⁰. Accordingly, if jurisdiction can be established, extraterritorial human rights obligations may potentially arise⁶¹. To establish jurisdiction it has to be proved that the violating acts were in fact within the power, authority or effective control of the state. In the judgment of *Loizidou v Turkey* the ECHR found that “the respondent Government have acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the “TRNC” ... It follows that such acts are capable of falling within Turkish “jurisdiction” within the meaning of Article 1 (1) of the Convention”⁶². The Court, thus, held Turkey responsible on the ground that Turkey had effective or overall control over the armed forces outside its domestic territory. Also subsequent jurisprudence of the ECHR and the ICJ have adopted a similar wide understanding of the scope of jurisdiction⁶³. For instance, in *Advisory Opinion on the Wall* the ICJ found the ICCPR to be applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”⁶⁴, a statement which was later confirmed in its judgment in *Democratic Republic of Congo v Uganda* where Ugandan military forces violated human rights within the territory of the Democratic Republic of Congo⁶⁵.

⁵⁷ Cassese, Antonio p 385.

⁵⁸ McCorquodale, Robert & Simons, Penelope p 5, note 22.

⁵⁹ IACHR, Report No. 38/99, OEA/Ser.LV/II.95 Doc 7, rev. at 289 (1998), section IV, note 17.

⁶⁰ ECHR, Application No 12747/87, 1992, chapter I, note 91.

⁶¹ McCorquodale, Robert & Simons, Penelope p 603.

⁶² 20 E.H.R.R. 99, Rep. A310, ECHR, part II, note A.

⁶³ McCorquodale, Robert & Simons, Penelope p 604.

⁶⁴ I.C.J. 2004, p 48, note 111.

⁶⁵ I.C.J. Rep. 2005, p 243, note 216.

The jurisprudence cited above is in conformity with the objects and purposes of a state's human rights obligations. The international law of human rights is developed with the intention of protecting individuals against arbitrary violence and abuse, without regard to the location where the abusive conduct occurs⁶⁶. Consequently, extraterritorial acts can be found to lay within the jurisdiction of a state if they were exercised by someone within the power, control or authority of the state. A state is, hence, under the obligation to respect and protect human rights both within and outside of its domestic territory - the protection of human rights does not merely relate to the exclusive domestic jurisdiction of the territorial state. Additionally, in regards to the principles of extraterritorial jurisdiction cited above under 2.1.2, the territorial scope of a state's jurisdiction is broadened under international human rights law compared to general international law, so that extraterritorial jurisdiction may be justified where it was exercised in order to protect human rights beyond domestic borders. It has also been perceived that as the protection of human rights is of interest to all states and the whole international community, the factual link between the state and the particular human rights violation do not have to be as obvious as under general international law for the state to be allowed to exercise extraterritorial jurisdiction according to the active personality principle. The exercise of extraterritorial jurisdiction in order to protect recognized human rights can neither be considered as not being in conformity with the principle of non-intervention, as human rights law cannot be understood as being an exclusive matter of the domestic jurisdiction of the territorial state.

3.2. State Responsibility and the Extraterritorial Acts of Corporate Nationals

As already established above, a state may under the general law of state responsibility be held responsible for actions committed by non-state actors. Such responsibility can arise when the non-state actor acted under the instructions, directions or control of the state, or when the state has failed to exercise the reasonable due diligence required in accordance with the state's duty to protect international human rights. Furthermore, responsibility may occur as a result of conduct outside of the state's domestic jurisdiction as the scope of international obligations is not restricted to its domestic territory, especially in regards to the international law on human rights. Hence, the following question is whether or not the conduct of non-state actors operating abroad may add up to state responsibility, and on what grounds this responsibility is justified. This is a question of growing importance, in particular because of the increase of extraterritorial activities of multinational corporations and their ability to violate human rights. Usually a state does not

⁶⁶ Cassese, Antonio p 386.

intentionally allow its corporate nationals to violate international human rights standards in their activities abroad, but the state may nevertheless unconsciously contribute to such abuses, for instance by the lack of effectively exercising the duty to protect human rights.

In the following sections focus will primarily be upon the principle of due diligence in regards to a state's duty to protect its human rights obligations, and whether this doctrine can be used as an instrument to establish state responsibility for possible extraterritorial human rights violations committed by multinational corporations. Secondly, it will also be examined whether the traditional law of state responsibility as codified in the ILC Articles can justify the attribution of extraterritorial acts of corporate nationals to the home state, and thus invoke home state responsibility.

3.2.1. Home State Responsibility

In this further discussion it is necessary to differentiate between the home state and the host state in which the multinational corporation is operating. In the era of globalization there has been a great expansion and growth within the area of corporations acting transnationally, and this has been and still is a considerable challenge and threat to the protection of internationally recognized human rights. One important aspect of this is the problem regarding the nationality of the corporation operating abroad, that is, whether it is to be seen as a national of its host state or its home state and accordingly which one of those states that are to be held responsible for eventual internationally unlawful acts. In this context the host state is the state in which the multinational corporation actually operates, while the home state is defined as the state in which its headquarters or parent company are based. Traditionally, as already noted above, state responsibility only accrued where the unlawful act occurred within the state's jurisdiction. In addition the duty to protect human rights was held to be governed by the principle of territoriality, so that the duty only was applied within a state's domestic boundaries. Hence, the question is if, and on what conditions, the home state of the multinational corporation can be held responsible for human rights violations which occurred in the host state, and which additionally were committed by the corporate national's foreign subsidiary. If such unlawful acts committed by non-state actors outside the state's territory are imputed to the state and thus responsibility is confirmed, then the doctrine of state responsibility is stretched far beyond its traditional scope.

3.2.1.1 The Recognition of Home State Responsibility in International Law

Article 2 (1) of the ICCPR, which contains the state duty to protect human rights, provides that this duty is to be applied by the state to all individuals “within its territory and subject to its jurisdiction”, and similar statements are present in several regional and international human rights conventions. However, it has been argued that this conventional view is no longer supreme in this area of law, and thus that states are obliged not only to protect human rights within its domestic territory, but also outside territorial boundaries. The doctrine of home state responsibility is essential in this context, much because of the current lack of regulatory regimes to hold multinational corporations directly responsible for human rights violations. On the other hand, an efficient doctrine of home state responsibility is also desirable on the grounds that it may compensate for the deficient, and in some cases the total lack of, host state regulation and protection of human rights. Host state regulation is in many circumstances ineffective, both because of the power of the corporation and the state’s lack of resources and capabilities to regulate it.

There are in current international law two options which have to be considered regarding the question whether or not home state responsibility may arise. Primarily, one has to examine whether extraterritorial acts of non-state actors may be imputed to the state on the basis of the ILC Articles, particularly article 5, article 8 and article 16. Secondly, it must be considered if the principle of due diligence in accordance with the duty to protect human rights is applicable to such situations, and if it is a sufficient base for home state responsibility to accrue. The enactment of home state responsibility is a controversial topic under international law, mainly because of the predominant roles of the doctrines of state sovereignty and non-intervention, and the unwillingness of states to decrease the scope of these doctrines. Moreover, a common argument by states to deny responsibility for violations abroad by their corporate nationals is that these matters primarily concerns the host state, that is on the territory where the corporation operates⁶⁷. However, the principle of home state responsibility may prove to play a significant role in ensuring that private actors such as multinational corporations do not violate human rights in the country where they operate, in particular developing countries.

According to the general law of state responsibility, home states are mainly not held liable for the misconduct of their corporate nationals operating abroad. A reason for this may be that a state’s domestic boundaries are seen as a limitation to the establishment of state responsibility in the context of private violations of international human rights standards. It has been argued that a state is not obliged through the current international human rights conventions to control the activities of

⁶⁷ Danailov, Silvia *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*, p 23.

its nationals outside its domestic territory, this in compliance with the principle of territorial jurisdiction. The territorial location is thus considered to be the main approach to invoke state responsibility, but also alternative approaches have eventually gained certain recognition⁶⁸. As a consequence violations of private actors occurring outside the traditional territorial jurisdiction may give rise to international responsibility. Such responsibility is, however, possible only where the international obligation of the state is to control a specific activity, and not where the obligation is to control a certain territorial area. An additional condition is that the state has the sufficient competence and capabilities to exercise the control required even when the violations are occurring outside its domestic jurisdiction, this is in accordance both with the principle of due diligence and the interpretations of the ILC Articles. As a result, the argument commonly used by states regarding the legal supremacy of the territorial state as a shield to invoke home state responsibility, is not one of crucial substance. This is largely because the decisive factor in establishing state responsibility on this basis is whether or not the state really was or was able to exercise effective control of the corporate activities, and it is therefore irrelevant where the unlawful acts actually took place. Because of the complexity of many multinational corporations, the home state is often more capable of effectively controlling their operations than the host states, for instance by implementing regulatory regimes within its own legislation and hence influencing and directing the conduct of the multinational corporation abroad. Consequently, as host state responsibility has its legal foundation in the principle of territoriality, which is fundamental in the international law of state responsibility, home state responsibility must on its part be based on an alternative jurisdictional ground. There are two possible foundations, that is, the principle of active personality and the principle of universality. Moreover, these jurisdictional foundations have to be regarded in connection with the aforementioned principle of due diligence and the ILC Articles.

3.2.1.2 Home State Responsibility and the Principle of Due Diligence

The principle of due diligence is, as stated above, derived from the state's duty to protect human rights. Furthermore, the duty to protect is interpreted into several both regional and international human rights conventions. Accordingly, the principle of due diligence and the state responsibility which may accrue from the failure to exercise such reasonable due diligence, is well acknowledged in international human rights law. However, the applicability of this doctrine to extraterritorial acts has proven to be rather controversial, and the opinions on this topic are diverse. It has for instance been argued that the only possibility for home state responsibility to arise is on the ground of the ILC Articles, and that the principle of due diligence is applicable exclusively to situations which

⁶⁸ Danailov, Silvia p 22.

take place within a state's own domestic territory⁶⁹. On the other hand, analysis of jurisprudence in the European human rights context have demonstrated that "the evolution of the doctrine in the field of State responsibility leads to the conclusion that even if the principle of territoriality is still implicit for the notion of due diligence, there is a certain "delocation" of the infraction that can entail the responsibility of the State"⁷⁰. Thus, it is claimed that the principle of due diligence is not entirely dependent on the actual territorial location, and that extraterritorial application may, on reasonable grounds, be acceptable.

Before any further specific discussion on whether the principle of due diligence can be used as a means to invoke state responsibility for extraterritorial acts of multinational corporations, it is necessary to examine the explicit state obligations which this principle entails. In the light of the ILC Articles and the clarifications of the law of state responsibility, it is suggested that the nature of the due diligence obligation is to be determined by the basic primary rules of international law, and not the secondary rules of state responsibility. The central characteristic of the duty to protect, which is a primary obligation of human rights law, is that it is a standard of conduct, and not a standard of result. Accordingly, state responsibility is not invoked because of the human rights abuse as such. Instead responsibility arises because of the state's failure to take appropriate and reasonable steps to the prevention and protection of the specific violation, which is in itself a breach of an international obligation. Ergo, the breach is not a consequence of a positive act, but rather the consequence of an omission. How to fulfill the duty within the parameters of reasonable and appropriate prevention and protection, is generally subject to the state's discretion. Anyhow, the treaty monitoring bodies under the central United Nations human rights conventions ordinarily recommend state parties to adopt all necessary measures to protect and prevent against abuse by non-state actors. A common conception is nonetheless that the exact requirements of how to properly exercise due diligence may vary depending on the primary obligation in question⁷¹, and also according to the specific state and its abilities to actually prevent the particular abuse. Unlike where state responsibility is invoked as a result of the imputability of non-state behavior to the state (as in compliance with the ILC Articles and its rules on attribution), responsibility as a result of the failure to exercise due diligence is only dependent on the state's separate delict or omission - the state is not responsible for the actions of the individual as if they were the state's own, and there is no question of imputability of the unlawful act to the state. As a result, responsibility does not occur every time there has been an infringement of a human right, but it is rather invoked by the omission to prevent the infringement where the state reasonably could have prevented it. The European Court

⁶⁹ Chirwa, Danwood Mzikenge, section III A.

⁷⁰ Danailov, Silvia p 23.

⁷¹ Johnstone, Rachael Lorna *State Responsibility: A Concerto for Court, Council and Committee*, p 54.

of Human Rights in Case of *Mastromatteo v Italy* illustrates this point of view. In this case the alleged violation concerned Article 2 and the right to life, and the applicant claimed that the state had failed to take appropriate steps to safeguard this right. The Court rejected the complaint and hence affirmed that “not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise, the Court has held, where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”⁷². This articulation of the Court is furthermore in conformity with the judgment in *Velasquez Rodriguez v Honduras* which, as mentioned under 2.1.2, was the first case to emphasize the existence and importance of the principle of due diligence. The European Court has addressed the question of positive obligations of states in various contexts, and it has declared that the treaty obligations includes “the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*”⁷³. Also the African Commission on Human Rights has adopted the due diligence test. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, which concerned Article 1 of the African Charter, the Commission examined the scope of the principle and when it could be applied to invoke state responsibility. One important aspect of the test was if the state could have foreseen the violations and thus if it was reasonable to expect the state to prevent them. Accordingly, the question that had to be addressed was whether “the state took the necessary measures to prevent violations from happening at all, or having realised violations had taken place, took steps to ensure the protection of the rights of the victims”⁷⁴. In determining whether the state action met the due diligence requirements the Commission also considered the seriousness of the efforts the state undertook to protect the rights. Additionally, the Commission held, for the first time, that the duty to protect applies to the protection against abuse committed by all non-state actors, including corporations. The Commission also discussed the extent of a state’s responsibility. It was argued that the extent was to be determined on the grounds of the specific circumstances of the case and the rights violated, and that the test of due diligence can not be regulated by abstract and generalized rules. The Commission thus referred to the International Court of Justice and that it had previously determined due diligence “in terms of “means of disposal” of the state”. Nonetheless, the Commission maintained, “this need not be inconsistent with maintaining some minimum requirements. It could well be assumed that for non-

⁷² ECHR (2002), Application No 37703/97, section 2, note 68.

⁷³ Clapham, Andrew & Rubio, Mariano Garcia *The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health* p 12.

⁷⁴ AHRLR 128 (ACHPR 2006), note 157.

derogable⁷⁵ human rights the positive obligations of states would go further than in other areas”⁷⁶. One may presume, from these positions adopted by the Commission, that where a state is accused of not sufficiently preventing human rights violations, it must be shown that the state could have anticipated the harm. Moreover, if the state in a serious manner attempted to fulfill its duties, it is likely to pass the due diligence test. Another aspect of substantial significance in deciding whether the requirements of due diligence is met, is the nature of the rights of the alleged violation. The test of state compliance with the duty to protect is more stringent with reference to the most fundamental, and as stated by the African Commission, the non-derogable, human rights (which among others includes the right to freedom from torture). It is therefore more likely that state responsibility because of the failure to exercise the reasonable due diligence is invoked as a result of violations of such fundamental, non-derogable human rights. Anyhow, the leading conception is that the reasonableness or the seriousness of the measures adopted by the state is crucial in determining compliance by the state with the duty to protect human rights, a point of view which is supported by the jurisprudence of both the Inter-American and the European Court of Human Rights. Ergo, state responsibility may be invoked by non-state actors when they violate human rights, if the state has failed to take reasonable or serious measures to prevent or respond to the violations, a theory which is in conformity with the definition of due diligence as “a flexible reasonableness standard adaptable to particular facts and circumstances”⁷⁷. Additionally, where the primary rules of international law impose a due diligence standard of conduct upon the state, “then the nature of the rights and interests at issue, as well as a number of other factors, will determine whether the conduct breaches the state’s international obligation”⁷⁸.

The analysis above shows that state responsibility can accrue as a result of international human rights violations committed by non-state actors within the state’s domestic jurisdiction, and that the state is obliged to control such private entities so that violations do not occur, both under regional and universal human rights treaties. Ergo, it is not disputed that the host state of a multinational corporation is under the obligation to exercise due diligence to protect human rights in the municipal sphere by controlling and regulating corporate conduct. On the other side, as the home state of a multinational corporation often is in a better position to regulate its activities and operations abroad than the host state, then the failure to control these activities may give rise to the international responsibility of the home state where the activities result in violations of human rights. If such home state regulation of private entities operating outside the state’s territory can be

⁷⁵ Non-derogable rights are rights of peremptory norms from which no derogation is permissible, even in times of war or other public emergency.

⁷⁶ AHRLR 128 (ACHPR 2006), note 155.

⁷⁷ Barnidge, Robert P. *The Due Diligence Principle Under International Law*, p 59.

⁷⁸ Barnidge, Robert P. p 9.

regarded as a binding obligation upon the state, a legal basis for state responsibility for extraterritorial human rights violations is established. Traditionally the assumption was that the principle of due diligence was territorially confined, and that international human rights law did not impose any general obligations on states to exercise extraterritorial jurisdiction to protect and promote human rights outside their domestic territories⁷⁹. It has been argued that state responsibility invoked by an omission to regulate acts of non-state actors which resulted in deficient protection of other private persons, has only been accepted in situations falling under the jurisdiction of the state, that is, where the state actually exercises effective control. As it is normally not assumed that a state exercises such control outside its domestic boundaries, it may prove difficult to justify a broadening of the scope of the positive obligations, which are derived from international human rights treaties. Thus, it is argued, that “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 human rights of others, has not crystallized yet”.

But, as pointed to above, the recognition of the extraterritorial dimension of the principle is increasing⁸⁰, much because of the aforementioned problems regarding the regulation of multinational corporations, and the classical view of territoriality may be changing. It is for instance acknowledged that state parties to the ICESCR have extraterritorial obligations, and this extraterritorial obligation may in some circumstances include an obligation to regulate the operations of their corporate nationals⁸¹. The UN Committee on Economic, Social and Cultural Rights indicated that “State parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries, if they are able to influence third parties by way of legal or political means”⁸². The duty to protect under the ICESCR has also been interpreted as to include “an obligation for the state to ensure that all other bodies subject to its control (such as transnational corporations based in that state) respect the enjoyment of rights in other countries”⁸³ (p 22). Hence, if any of the rights under the ICESCR are violated by a state’s corporate national in another state, or by the eventual corporate national’s foreign subsidiary, the home state may be considered to be ‘under an obligation to regulate, investigate and even bring before the courts conduct of a transnational corporation under its home state jurisdiction where a ‘threshold of gravity’ of human rights violations is at stake’. Similarly, where the home state has adequate knowledge of the extraterritorial activities of its corporate nationals and foreign subsidiaries and, thus, knowledge of the possible human rights impact in the host state, the home

⁷⁹ De Schutter, Olivier, Chapter IV, section 2.1.

⁸⁰ McCorquodale, Robert & Simons, Penelope p 21.

⁸¹ McCorquodale, Robert & Simons, Penelope p 22.

⁸² UN General Comment No. 14 (2000).

⁸³ McCorquodale, Robert & Simons, Penelope p 22.

state may be obliged ‘to prevent and mitigate the risk by adopting legislation to this end. A failure to do so would amount to a breach of the international obligation to exercise due diligence, for which international responsibility arises’. This assumption is supported by the jurisdictional principle of active personality, of where a state has the competence to exercise jurisdiction and pass legislation, which applies, to its nationals even when they are operating abroad. The home state of where the parent company is based is for this reason authorized under international law to indirectly regulate a foreign subsidiary which the parent company owns or controls, by implementing municipal legislation which binds the parent company and accordingly requires it to impose an express course of action on its subsidiaries. On the other hand, a common problem in regards to the multinational corporation is the separation of legal personalities and the internationalized organization of their activities, and the restrictions of extraterritorial jurisdiction. Usually the parent company and the subsidiary are considered as two separate legal entities⁸⁴, and the home state of the parent company will typically be incompetent or reluctant to regulate corporate activity abroad and thus exercising a form of jurisdiction, which is generally not acknowledged under international law. Nonetheless, as the parent corporation is considered to be a national of the home state, the regulation of that company or any subsidiaries which the company controls is in principle also justified under the active personality principle, in particular where the regulation “addresses the parent company, rather than its foreign subsidiaries directly”⁸⁵. Anyhow, as mentioned, a state’s constructive knowledge of potential human rights violations may additionally engage an obligation upon the state to exercise reasonable due diligence to prevent abuses, and not just the liberty to do so. There is also a tendency within the area of human rights law to acknowledge the need of binding obligations so that states may exercise its jurisdiction in extraterritorial situations, and, consequently, “to align the scope of their international responsibility on the degree of their effective power to control”⁸⁶.

It has been contended that there are at least two different circumstances in which the constructive knowledge of the state entails an obligation to exercise due diligence⁸⁷. Primarily, the obligation is engaged where a corporate national invests in conflict zones, failed states or repressive regimes. Under such circumstances the host state itself is often incapable of or unwilling to protect international human rights standards, and, thus, it is more likely for the multinational corporation to be complicit in abuses. In these situations the home state cannot in good faith claim that it was unaware of the potential risks, and that it consequently was under no obligation to protect human

⁸⁴ De Schutter, Olivier, Chapter V, section 2.1.

⁸⁵ De Schutter, Olivier, Chapter IV, section 3.

⁸⁶ De Schutter, Olivier, Chapter IV, section 1.2.

⁸⁷ McCorquodale, Robert & Simons, Penelope p 23.

rights. Such an omission to fulfill its international duties will potentially invoke state responsibility on the basis of the failure to exercise reasonable due diligence. Secondly, an obligation to exercise due diligence engaged by the constructive knowledge of the state, may be invoked where the home state can be regarded as assisting the progress of extraterritorial abuse committed by a corporate national or through its subsidiaries. This situation will include the case of bilateral investment treaties between a multinational corporation and a developing state. A general problem of these agreements is that they ordinarily constitute great protections for the corporate national's investors, and that they additionally may restrict the host state's abilities to regulate the subsidiaries to ensure that their operations are in conformity with the state's human rights obligations. The agreements do usually neither impose any obligations on the foreign investors to respect the human rights in the host state. It is therefore argued that, "in restricting the host state's capacity to regulate foreign investment through such agreements, home states cannot then maintain that it is the obligation of the host state to ensure that subsidiaries of foreign TNCs [multinational corporations] do not violate international human rights standards"⁸⁸. In regards to these two situations, even though the unlawful acts are not directly imputable to the home state, it is argued that the home state "exercises sufficient control over the parent company and has constructive knowledge of the potential of the subsidiary to violate human rights law to justify the imposition of an obligation to exercise due diligence in relation to the human rights impacts of such activity"⁸⁹. As admitted above, state responsibility may accrue on the ground of violations of international human rights obligations committed by non-state actors within the domestic jurisdiction, and under some circumstances the state is obliged to regulate the operations of private entities outside its territory. The result of these two conclusions is that a multinational corporation may, although operating outside the territory of its home state, invoke state responsibility if the outcome of these operations is human rights violations. State responsibility may thus be invoked if the the state did not attempt to prevent the activities or if the measures were inadequate or contrary to its human rights obligations, and the state is accordingly in breach of its due diligence obligation, although the outcome is dependent on the requirement of effective or sufficient control and knowledge. This duty to exercise due diligence would necessarily require the home state to take all reasonable measures to ensure that its corporate nationals do not violate international human rights law, even when the unlawful activities are administered by a foreign subsidiary, for example by implementing domestic legislation which directly regulates corporate activity.

⁸⁸ McCorquodale, Robert & Simons, Penelope p 26.

⁸⁹ McCorquodale, Robert & Simons, Penelope p 26.

Even though the theoretical conclusion is that state responsibility may be invoked by extraterritorial acts of private entities, the implementation of it in practice can prove to be problematic as several limitations to the doctrine of home state responsibility are imposed by general international law. A great deal of these problems is derived from the prevailing and fundamental principles of state sovereignty and non-intervention, and the efficacy of the principle of home state responsibility is thus constrained. Such difficulties can become apparent in a number of ways, and many factors are involved. For instance, most states are ordinarily unwilling to exercise extraterritorial jurisdiction in order to regulate and control the activities of their corporate nationals. Home states, in particular, do often hesitate to regulate corporate activity because it can place the corporation in a situation of disadvantage in the host state, especially where there is a lack of similar regulatory regimes imposed on competing corporations. Also, with regards to multinational corporations, the identification of the parent company or the corporation's nationality may be difficult as the organization of such corporations is often complex. Hence, identifying the correct home state is not always unproblematic. One can neither ignore the powerful role of many multinational corporations and the obstacles this may constitute. The most apparent and sensitive controversy is, nonetheless, the conflict and discrepancy between the principle of home state responsibility and the doctrine of state sovereignty. All states are obliged to respect the sovereignty of other states by not intervening in their internal affairs, for example by respecting the restrictions of the general rules of jurisdiction. Accordingly, "subjecting private actors operating abroad to legislation of the home state often meets with resistance from host states alleging infringement of the principle of state sovereignty"⁹⁰. This objection is however easily repudiated due to the notion that extraterritoriality is justified under the jurisdictional principle of active personality as referred to above, of which a state is entitled to implement legislation which binds its nationals in their activities outside of the state's domestic boundaries.

Whether or not there currently exists an obligation of a state to exercise due diligence to protect human rights threatened by non-state actors outside of its domestic territory and how wide the scope of the obligation is, is not yet unanimously settled in international law, but the potential risks and abuse which are imposed by the activities of transnational actors can in any case not be ignored. Also, the international community is in lack of an effective legal regime to regulate and address such activities, and the need of such an efficient system is growing. Within the municipal legal sphere there has been a tendency of increasing extraterritorial application of domestic legislation in order to attempt to regulate the operations of corporations abroad⁹¹. Anyhow, as stated by the

⁹⁰ Chirwa, Danwood Mzikenge, Chapter VI, section D.

⁹¹ Danailov, Silvia p 24.

Special Rapporteur of the UN Commission of Human Rights regarding economic, social and cultural rights, “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”⁹². Under the law of state responsibility one may consider the principle of due diligence to be of significant importance as it can be applied to various facts and circumstances, and also to different areas of international law (for instance international humanitarian law and international environmental law). It has also been referred to as a “basic principle of international law”⁹³. However, the scope of the principle of due diligence in relation to state responsibility and international human rights law, is still not settled when it comes to extraterritorial human rights violations by non-state actors, and it remains a question of major importance for the international community to determine.

3.2.1.3 Home State Responsibility and the ILC Articles on State Responsibility

As confirmed above in the analysis under 2.2.1, the actions of non-state actors are, under certain circumstances, imputable to the state, and the law of state responsibility is also relevant in the context of international human rights law. According to the rules of state responsibility laid down in the ILC Articles there are three possibilities for the attribution of acts committed by a state’s corporate nationals so as to give rise to international responsibility of that state. Article 5 affirms that responsibility may arise where a state empowers a corporation to exercise elements of public authority, while attribution of conduct is justified under article 8 where a corporation acts on the instructions of, or under the direction or control of, a state. Distinction is thus made between responsibility for empowered bodies and bodies under state control. It has been claimed that acts falling under these categories are imputable to the state also when they were committed outside of the state’s territorial boundaries⁹⁴. In addition, it is contended, also article 16 which concerns state complicity in an unlawful act committed by a corporation, can invoke such state responsibility.

At first, responsibility on the basis of article 5 will be examined. The position expressed in article 5 is that “the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be

⁹² De Schutter, Olivier, Chapter IV, section 1.2.

⁹³ Barnidge, Robert P. p 64.

⁹⁴ McCorquodale, Robert & Simons, Penelope p 9,

considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”⁹⁵. The Commentary explains that the intention of the article is, among others, to attempt to regulate situations “where former State corporations have been privatized but retain certain public or regulatory functions”⁹⁶. For attribution of conduct to take place it must be proved that “the conduct of the entity relates to the exercise of the governmental authority concerned”, and not to private or commercial activities. The decisive criteria is therefore whether or not the corporation is in fact empowered by the government, no matter if it is limited to a particular extent or context. The degree of ownership of the corporation by the state, for instance, is not crucial for the purpose of attribution of conduct. The scope of governmental authority is not finally settled, although it is maintained that article 5 covers situations where the corporation’s ‘exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State’ - in other words; article 5 is ⁹⁷also applicable to acts committed ultra vires. According to the General Assembly and statements from various governments it is apparent that the rule derived from this article is considered “as reflecting the current approach of international law to this topic”⁹⁸. Consequently, imputability of extraterritorial acts is justified because of the actual authorized conduct.

Article 8, on the other hand, affirms that private conduct is to be imputed to the state if it was carried out “on the instructions of, or under the direction or control of, that State”, a category, which is said to be less narrow than the one of article 5⁹⁹. In the Commentary the general principle of the law of state responsibility is repeated, namely that private conduct is usually not imputable to the state. However, under certain circumstances “conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State”¹⁰⁰. The two circumstances involve, accordingly, acts by non-state actors under the instructions of the state, and activities committed under the state’s direction or control. While responsibility as a result of authorized conduct has gained broad recognition under international law, imputability on the basis of the second option; direction or control, is still more controversial and difficult to confirm. It is claimed that attribution on this ground is justified “only if it [the state] directed or controlled the specific operation and the conduct complained of was an integral part of that operation”¹⁰¹, attribution is thus dependent “on the extent of the state’s control

⁹⁵ ILC Articles, article 5.

⁹⁶ ILC *Draft articles, with commentaries*, Part One, Chapter II, article 5, note 1.

⁹⁷ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 5, note 2.

⁹⁸ Clapham, Andrew & Rubio, Mariano Garcia p 5.

⁹⁹ Clapham, Andrew & Rubio, Mariano Garcia p 7.

¹⁰⁰ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, note 1.

¹⁰¹ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, note 3.

over the corporation's extraterritorial activities"¹⁰². As referred to above under section 2.2.1., the degree of control necessary to justify attribution of conduct to the state was explicitly reviewed in the case of *Military and Paramilitary Activities in and against Nicaragua*, where a test for control was articulated. According to this test a situation of ordinary dependence and support would be inadequate to legitimize attribution, however, the judgment has subsequently been subject to considerable criticism because of its strict requirements and high threshold. For instance, it has been assumed that the explicit degree of control is subject to the circumstances and interests of the particular case, and that a less strict threshold is to be applied in the case of violations of fundamental human rights. The Commentary furthermore explicitly addresses the question of attribution of corporate conduct to the state. It finds that, even though a corporation is considered as a separate legal entity under international law, "a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct"¹⁰³. With the increasing international tendency of which states use corporations in their extraterritorial activities, such as military operations and international trade, there is also a growing possibility of corporations breaching international law and hence an extended chance of attribution of private conduct to the state. Thus, it is asserted, that "where such activities violate international human rights law, the state will incur international responsibility, including those situations where the corporation contravenes instructions"¹⁰⁴. This assertion is in conformity with the opinion of the Commentary of which "the condition for attribution will still be met even if particular instructions may have been ignored"¹⁰⁵. The conduct will nevertheless have been committed under the state's control, and is therefore imputable to the state under article 8.

Eventually, the option of state complicity in internationally unlawful acts as means of attribution is explored. Under Chapter IV of Part One the ILC Articles, which covers article 16, state responsibility is invoked for the unlawful act committed by another state. This kind of responsibility can be regarded as an exception from the basic principles of where each state is responsible for its own conduct, and the Commentary defines such situations as extraordinary and "exceptions to the principle of independent responsibility"¹⁰⁶. The proposition in article 16 is that any state "which aids or assists another State in the commission of an internationally wrongful by the latter is internationally responsible for doing so if: a) that State does so with knowledge of the circumstances of the internationally wrongful act; and b) the act would be internationally wrongful

¹⁰² McCorquodale, Robert & Simons, Penelope p 11.

¹⁰³ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, note 7.

¹⁰⁴ McCorquodale, Robert & Simons, Penelope p 14.

¹⁰⁵ ILC *Draft articles, with commentaries*, Part One, Chapter II, Article 8, note 8.

¹⁰⁶ ILC *Draft articles, with commentaries*, Part One, Chapter IV, note 8.

if committed by that State”. Although the direct application of article 16 merely affects situations where the state itself through its state organs is aiding or assisting an unlawful act which is committed by another state, the proposition that only states may invoke responsibility is not exclusive. A home state may be complicit in the extraterritorial operations of its corporate nationals by aiding and assisting the corporate activity, and if the operations result in breaches of international law home state responsibility could be incurred. Consequently, “where a home state aids or assists a corporation in the commission of, or in the latter’s complicity in, acts that, if committed by that home state would constitute internationally wrongful acts, that state will incur international responsibility, at least where the aid or assistance “contributed significantly to that act”¹⁰⁷, and the aid or assistance do not necessarily have to “have been essential to the performance of the internationally wrongful act”¹⁰⁸. Nonetheless, it is expressed in the Commentary that for a state to be held responsible for facilitating violations of human rights, it must be determined that the state “by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct”¹⁰⁹.

It is thus, on the basis of the ILC Articles, assumed that home state responsibility may be invoked as a result of a corporate national’s extraterritorial operations where such operations violate international human rights. Home state responsibility can arise where, in its extraterritorial acts, the corporation exercised elements of governmental authority, and where it was acting under the instructions, direction or control of the home state. Additionally, home state responsibility can occur where the home state was aiding or assisting an unlawful act committed by the host state in relation to the operations of the home state’s corporate national or its subsidiary, and where home state complicity in extraterritorial breaches of international law committed by a corporate national or its subsidiary can be proved. Under these circumstances the internationally unlawful conduct of the corporation is attributed to the home state. Such rules of attribution are for the most part theoretically assessed, and actual situations have so far mainly arisen before the European Court of Human Rights in cases regarding corporal punishment in private schools and airport noise. But still it is contended that these principles of imputability are “likely to become a primary means for determining the responsibility of states for the behavior of non-state actors”¹¹⁰.

Attribution of conduct founded on these rules is, along with the principle of due diligence, in conformity with the jurisdictional principle of active personality. Where the nationality of the

¹⁰⁷ McCorquodale, Robert & Simons, Penelope p 17.

¹⁰⁸ ILC *Draft articles, with commentaries*, Part One, Chapter IV, Article 16, note 5.

¹⁰⁹ ILC *Draft articles, with commentaries*, Part One, Chapter IV, Article 16, note 9.

¹¹⁰ Clapham, Andrew & Rubio, Mariano Garcia p 7.

corporation is identified the home state is accordingly legitimized to control its extraterritorial operations by implementing municipal regulation, which is binding upon it. Anyhow, another question is whether human rights violations committed by a corporate national's foreign subsidiary abroad can invoke home state responsibility. This question may, however, be answered in the affirmative on the ground of a state's obligation to exercise reasonable due diligence in order to protect human rights and regulate the activities of the foreign subsidiaries, and it can also be justified in situations where the state was complicit in the violating acts by offering aids or assistance.

4 Concluding Observations

One of the principal aims of this article was to examine how the system of international law and international human rights law can effectively address challenges, which are imposed by the transnational activities of non-state actors. It is not disputed that the primary obligation of states under human rights law to protect human rights can incur state responsibility, and the reliance on the responsibility to respect, protect and fulfill human rights has increased correspondingly¹¹¹. Additionally, it is considered that these three types of state obligations are applicable to all internationally recognized human rights, and that they are not restricted to the rights protected by the ICESCR. The position that human rights obligations can arouse state responsibility is widely acknowledged in regard to the omission of a state to protect human rights within its domestic territory, both by regional and international human rights treaty bodies, but it is also asserted that the duty has extraterritorial effects. Besides, also some of the rules deduced from the ILC Articles can be interpreted as to justify the attribution of extraterritorial private conduct to a state. Yet the topic is one of controversy and the international legal framework in regard to the regulation of private actors is not sufficiently developed, nor is the content satisfactorily settled. It is for instance asserted "current guidance from the [Human Rights] Committees suggests that the treaties do not require States to exercise extraterritorial jurisdiction over business abuse. But nor are they prohibited from doing so. International law permits a State to exercise such jurisdiction provided there is a recognized basis: where the actor or victim is a national, where the acts have substantial adverse effects on the State, or where specific international crimes are involved"¹¹².

Legal mechanisms for imputing human rights responsibilities to non-state actors are still developing. For an effective international protection of human rights it is necessary to develop a

¹¹¹ Johnstone, Rachael Lorna p 34.

¹¹² Steiner, Alston & Goodman *International Human Rights in Context, Law, Politics, Morals*, Third Edition, Oxford University Press, 2007, p 1407.

legal regime, which directly imposes clear obligations and responsibilities on the multinational corporations themselves, as a system exclusively addressed to states has proven to be inadequate in the current state of international law. But until multinational corporations can be held directly legally accountable for their human rights violations, the principles of state responsibility and due diligence are useful instruments when attempting to address extraterritorial human rights impacts.

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