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‘Home State Duty to Protect in Business and Human Rights Through the Prism of Extraterritorial Jurisdiction’

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1. Introduction

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

Despite their capacity to violate human rights, corporations do not have direct obligations under international human rights law. It is primarily states where human rights violations have occurred ("host-states") that must ensure their human rights compliance, for example, through domestic regulation. In practice, these are often developing states that are the least equipped to exert power against the more powerful corporations. Host states may lack governance capacities to address business-related human rights concerns. They may also be unwilling to regulate and control the human rights impacts of corporations, as a lenient legal and economic environment provides competitive advantages. This inability and unwillingness adversely impact people's universal enjoyment of human rights.

Because of the host states' inability and unwillingness to protect human rights, human rights bodies and scholars have begun placing a duty to protect on home states of corporations. This practice has two main advantages. Firstly, home states have the capacity to influence a parent company of a transnational corporation, the more powerful global player outside the host state's reach. Secondly, home states are usually developed countries and, as such, are more likely to have adequate means to regulate and control the activities of their corporate nationals even when they act extraterritorially.

2. Research Aim

In view of the above, this dissertation aims to address whether home states have the right and/or duty to assert influence over home-based corporations and their conduct abroad by means of home state regulation. While this dissertation is an academic project, not an activist one, its goal is to contribute further to the strengthening of corporate accountability for human rights violations. Thus, this dissertation is to be understood as a part of the overall effort to enhance international human rights law protections in the business and human rights sphere.

The study of a home state duty to protect from extraterritorial human rights violations of corporations is in its infancy, necessitating a further academic inquiry. In the absence of a legally binding instrument in the sphere of business and human rights, there is currently no consensus on the existence of such a duty with regard to corporations. While most human rights scholars and activists argue that such a duty may already be attributed as a matter of existing international human rights law, other prominent scholars firmly oppose such views. Problematically, most available studies on both sides of the spectrum are too narrow, outdated, or otherwise inaccurate. They are also driven by normative arguments rather than the legal *status quo.*

This dissertation seeks to rectify the unsatisfactory state of business and human rights scholarship, as described above. It aims to provide one of the most extensive studies of a home state duty to protect currently available. In doing so, it aims to systematically clarify the status of such a duty and provide a groundwork for future studies and mandatory business and human rights initiatives.

3. Methodology

In examining an extraterritorial home state duty to protect in the business and human rights sphere, this dissertation seeks to answer three main research questions. Firstly, does international human rights law assign a mandatory home state duty to protect from corporate, extraterritorial human rights violations? Secondly, do home states have the right to exercise human rights protections vis-à-vis such extraterritorial conduct, even without a mandatory duty? Thirdly, how can a recommended/mandatory extraterritorial home state duty to protect be attributed in the business and human rights sphere?

In answering these questions, this dissertation avails itself of the doctrinal method. It identifies, interprets, and applies existing law – both soft and hard. Occasionally, it also argues for desirable changes. Any reliance on the normative method is secondary because this dissertation aims to analyse the law as is, not as it ought to be. As referred to above, this is, in fact, one of the main contributions of this dissertation. Business and human rights scholars too frequently

overindulge in normative arguments and considerations without studying and clarifying the available law.

In addressing the meaning and scope of an extraterritorial home state duty to protect, its permissibility, and attribution, this dissertation relies primarily on international human rights jurisprudence. Human rights jurisprudence is currently the most authoritative primary source available in the business and human rights sphere. While treaty law is relied on throughout this dissertation as much as possible, this is usually only the case in regard to general considerations of international human rights law.

This dissertation focuses on home state regulation. Firstly, a home state duty to protect is realized by means of regulation. Secondly, business and human rights legislation is a measure of choice in the current state practice.

As reflected in the title, this dissertation addresses a home state duty to protect through the prism of extraterritorial *jurisdiction*. In substance, it is the exercise of jurisdiction that either permits or compels the exercise of extraterritorial protections by means of home state regulation. Thus, the importance of defining the term is fundamental.

This dissertation addresses jurisdiction as a concept of public international law and international human rights law. While international human rights law is a specialist system falling within the broader system of public international law, the meaning of jurisdiction differs in both systems. Problematically, this distinction is frequently disregarded in human rights jurisprudence and academic writings, leading to confusion in an already complex field of study.

The analysis of jurisdiction revolves around *extraterritoriality*. The issue of extraterritoriality is fundamental to this dissertation, as this dissertation examines a home state's right/duty to protect from corporate human rights abuse in host states, which is frequently realized by means of domestic regulation producing extraterritorial effects. This dissertation assesses the extent to which extraterritorial corporate conduct is subject to extraterritorial jurisdiction in public international law and international human rights law and how this affects the applicable jurisdictional rules and the resulting emergence of a right/duty to exercise extraterritorial protections.

As this dissertation is a research project in the field of international human rights law, it typically avoids reference to domestic law and international environmental law. Nevertheless, some references to it are included to the extent to which these are specifically relevant to the broader business and human rights debate. This dissertation likewise avoids the discussion of the obligation of international cooperation and assistance. While this obligation is generally relevant in the business and human rights sphere, it does not relate to the unilateral adoption of home state regulation examined in this dissertation.

4. Structure

Introduction
- Issue and Context
- Research Aim and Contribution
- Methodology
- Structure

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3. Chapter: Jurisdiction in International Human Rights Law

5. Main Findings

International human rights law has no horizontal effect. States, the main subjects of international law, are also the main duty-bearers in international human rights law. Corporations do not have direct obligations under international human rights law. Thus, it is states that must guarantee their human rights compliance. They are required to do so under the obligation to protect, referred to as a "duty to protect" in the business and human rights sphere.

The duty to protect is a core obligation in international human rights law. It originates in human rights treaty texts. Its meaning, scope, and applicability have been clarified in human rights jurisprudence. In the business and human rights sphere, the duty to protect has also been

interpreted in soft law instruments, including the United Nations Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

The duty to protect compels states to prevent, punish, prohibit, investigate, and redress human rights violations of all non-state actors, including corporations. The duty to protect arises vis-à-vis all internationally recognized human rights: civil, political, social, cultural, and economic. This is relevant in the business and human rights sphere, as corporations are likewise capable of violating all kinds of human rights.

The duty to protect is a standard of conduct. A successful discharge of a duty to protect is thus based on a state's tangible efforts to prevent human rights violations (i.e., the exercise of due diligence) rather than the actual success of such efforts. As a result, a state may only be held responsible for its own failure to address a corporate violation, not for the violation per se.

States realize their duty to protect by adopting appropriate regulatory measures, including political, administrative, and legislative measures. This is why a duty to protect is sometimes argued to be a duty to regulate. The relevance of regulation is also demonstrated in recent state practice. Several home states, including Germany, France, and Norway, have adopted legislation to prevent human rights violations of corporations in host states.

A duty to protect is predominantly territorial. This means that within the business and human rights sphere, it is primarily host states, as the states in which the human rights violations have occurred, that are responsible for ensuring human rights protections. However, when host states are unable or unwilling to do so, the question of a *home state* duty to protect arises. A home state duty to protect is extraterritorial, as it seeks to protect non-resident non-national victims of human rights violations from the extraterritorial conduct of corporations in host states.

Contrary to the territorial duty to protect, an extraterritorial duty to protect is disputed. The debate in human rights fora regarding the permissibility and existence of such an extraterritorial duty is ongoing. The majority opinion is in favour of a mandatory extraterritorial duty to protect.

An extraterritorial duty to protect has been most authoritatively recognized in human rights jurisprudence. United Nations human rights treaty interpreting bodies, including the Committee

on Economic, Social, and Cultural Rights ("CESCR"), the Human Rights Committee ("CCPR"), the Committee on the Rights of the Child ("CRC"), the Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), and the Committee on the Elimination of Racial Discrimination ("CERD"), as well as the Inter-American Court of Human Rights ("IACtHR"), have been the most influential in establishing an extraterritorial duty to protect. Most of these bodies already framed an extraterritorial duty to protect as a home state duty to protect from business-related human rights violations.

The African Commission on Human and Peoples' Rights ("ACmHPR") has likewise recognized an extraterritorial duty to protect, albeit outside the context of business and human rights. Pronouncements of the United Nations Security Council and the European Court of Human Rights ("ECtHR") have been more tacit and indicated merely a potential for a future attribution of such a duty. Other relevant views, including the United Nations Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations of States, have likewise contributed to the consolidation of an extraterritorial duty to protect from corporate human rights violations.

Human rights bodies based the extraterritorial exercise of a duty to protect on a state's *capacity* to influence the non-state actor in question through regulation. In the business and human rights sphere, most bodies found such capacity to exist when corporations are incorporated, domiciled, or registered within the home state's territory. Thereby, they equated an extraterritorial duty to protect with a home state duty to protect within the meaning of this dissertation. Because capacity is a question of jurisdiction, this aspect is addressed in more detail below.

To avoid an excessive reach of states' extraterritorial protections, human rights bodies limited the exercise of a duty to protect based on *reasonableness*. Despite the frequent reference to reasonableness, the criterion remained undefined. However, it has been argued that, at least in the business and human rights sphere, home state protections are reasonable if exercised vis-à-vis corporations incorporated, registered, or domiciled within the home state's territory. The CCPR, the ACmHPR, and the IACtHR also restricted the exercise of a duty to protect to the rights to life and integrity.

The analysed outputs of human rights bodies suggested that home states have a mandatory duty to protect from human rights violations of their corporate nationals in host states. Most scholarly

writings concluded that these outputs demonstrated the emergence of a mandatory home state duty. Nevertheless, this dissertation found these views to be incorrect.

A detailed analysis of normative significance revealed that a mandatory extraterritorial duty to protect may not yet be attributed to states. The identified jurisprudence is non-binding and, as such, may not create new legal obligations. As a mandatory, extraterritorial duty to protect is not provided for in binding sources of international human rights law, an exercise of extraterritorial protection is presently only *recommended*.

Nevertheless, the above jurisprudence is highly authoritative. Human rights bodies are significant global norm-setters, contributing to the conceptual evolution of international human rights law. While states' implementation of their views is voluntary, they may not simply ignore the views. In some cases, states must even consider them in good faith.

There is an indisputable trend in favour of a home state duty to protect from extraterritorial human rights violations of corporations incorporated, registered, or domiciled within the home state's territory. This trend is also reflected in the growing recognition by states that domestic legislation in the business and human rights sphere should be adopted to ensure corporate respect for human rights in host states. It is thus possible (and perhaps even likely) that an extraterritorial duty to protect by means of home state regulation will eventually solidify into a legal requirement through state practice, binding judgments of regional human rights courts, and treaty law.

The lack of a mandatory extraterritorial home state duty to protect raises the question of whether home states have the *right* to exercise extraterritorial protections by means of regulation. The right to regulate falls within the scope of jurisdiction in public international law. Because jurisdiction is linked to state sovereignty, public international law does not interfere with a domestic exercise of jurisdiction unless international crimes are committed and the duty to exercise jurisdiction under the *aut dedere aut judicare* principle arises. Because such a duty only arises with regard to the acts of natural- and not legal persons, as relevant to this dissertation, it is not further considered.

The exercise of jurisdiction in public international law may also be extraterritorial, i.e., with regard to entities and activities abroad. Because such an exercise of jurisdiction may encroach

on another state's sovereignty, it is subject to limitations in public international law. To establish whether such limitations also apply in the context of home state regulation in the business and human rights sphere, the extraterritoriality thereof must be determined.

Extraterritoriality of home state regulation is a contentious issue. Because home state regulation is adopted based on a state's territorial capacity, it is often argued not to be subject to extraterritorial jurisdiction despite producing extraterritorial effects. This dissertation found that the extraterritoriality of home state regulation is a question of degree. Home state regulation regulating conduct within the home state's territory, yet producing effects abroad, is *indirectly* extraterritorial. Home state regulation regulating conduct outside the state's territory is *directly* extraterritorial. As home state regulation may be both directly and indirectly extraterritorial, the permissive principles of both types of jurisdictions are relevant.

The exercise of indirect extraterritorial jurisdiction is permissible under the territoriality principle. This means that a state may regulate based on a territorial nexus. In the business and human rights sphere, such territorial nexus is met when a corporation, subject to the state's regulation, is located within the state's territory.

Because the extraterritorial effects of home state regulation may affect a host state's interests, an indirectly extraterritorial home state regulation is subject to public international law constraints. It may only pass muster if it is based on an internationally agreed-upon framework and adopted only temporarily until a global solution is implemented. Because home state regulation in the context of this dissertation aims to fill in the regulative void in the business and human rights sphere and does so based on the unanimously adopted UN Guiding Principles on Business and Human Rights, such regulation was determined permissible.

Home state regulation may also be directly extraterritorial. Thus, the permissive principles of direct extraterritorial jurisdiction are likewise relevant. Out of the five main permissive principles of jurisdiction (the active personality principle, the passive personality principle, the universality principle, the protective principle, and the effects principle), only the active personality principle and the civil jurisdiction equivalent are applicable with regard to home state regulation in the business and human rights sphere.

The active personality principle and the civil jurisdiction equivalent permit the adoption of extraterritorial home state regulation vis-à-vis the conduct of a home state's corporate nationals. Problematically, corporate nationality does not have a common definition in public international law. Nevertheless, the place of incorporation/registration as the basis of corporate nationality are widely accepted. Under the active personality principle, the exercise of extraterritorial prescriptive jurisdiction is thus permissible only when a corporation is incorporated, registered, or domiciled within the home state's territory – in line with human rights jurisprudence.

Despite the permissibility of a home state duty to protect in public international law, the attribution of a future mandatory home state duty to protect is only possible in conformity with the rules of extraterritorial jurisdiction in international human rights law. Human rights jurisdiction is the *threshold* criterion without which individuals cannot claim human rights protections, states cannot be found responsible for human rights violations, and treaty bodies cannot adjudicate vis-à-vis said violations. While jurisdiction in international human rights law is a question of responsibility, it is a human rights kind of responsibility, not responsibility for internationally wrongful acts.

The notion of extraterritorial jurisdiction is implied in jurisdiction clauses of human rights treaties. While not all human rights treaties have a jurisdiction clause, the necessity of jurisdiction was established also for those treaties. The analysis of human rights jurisdiction clauses further determined that the distinction between territoriality and extraterritoriality in international human rights law is based on the location of a *victim* of human rights violations. Territorial jurisdiction applies if a victim is located within a state's territory. Extraterritorial jurisdiction applies if a victim is located outside a state's territory while still under the state's control. Thus, home state regulation affecting non-resident non-nationals is subject to extraterritorial jurisdiction.

Similarly to public international law, international human rights law distinguishes between acts performed outside the state's territory and acts performed within a state's territory producing effects abroad. While both instances are explicitly recognized as subject to extraterritorial human rights jurisdiction, different principles of extraterritorial jurisdiction apply. Because home state regulation is an act performed within a state's territory producing effects abroad, the corresponding principles are relevant.

Equally to public international law, human rights jurisdiction cannot be claimed towards everyone. Jurisdiction arises only if a victim of human rights violations is under a state's *control*. The different understandings of control have been summed up in three jurisdictional models: the spatial, personal, and cause-and-effect models. The spatial and personal models are the two principal models of jurisdiction recognized across all human rights systems. The cause-and-effect model is a novel and relatively controversial approach to human rights jurisdiction.

Control under the spatial model was defined as *de facto* control over another state's territory, e.g., in the case of occupation. Control under the personal model was defined as a *de facto* state agent control, e.g., in the cases of arrest and detention. Both models were found applicable only with regard to acts performed outside the state's territory and only in military situations. In these situations, a state was found to exercise control due to its physical presence on foreign soil. Ergo, neither model was found applicable in the context of a home state duty to protect in the business and human rights sphere.

Because neither model applies vis-à-vis acts performed within a state's territory producing effects abroad, human rights bodies began developing the cause-and-effect model. Under the cause-and-effect model, a state exercises *contactless* control over a right-holder by controlling the *cause of harm* located within its territory. Such territorial control over the cause of harm is manifested through the state's exercise of public powers, most prominently through domestic regulation. A state may exercise control under the cause-and-effect model with regard to its own actions, as well as those of corporations. As a result, this jurisdictional model is specifically relevant in the business and human rights sphere.

The cause-and-effect model of extraterritorial jurisdiction has been consolidated in the jurisprudence of the CESCR, the CCPR, and the IACtHR. These bodies defined control as control over extraterritorial situations, the human rights of victims, and the cause of harm to human rights, respectively. While at first glance, all notions of control were formulated differently, this dissertation clarified them all to be a subtheme of the overlying cause-and-effect jurisdiction.

The cause-and-effect model of jurisdiction was explicitly used to attribute an extraterritorial duty to protect also to the home states of transnational corporations. It was established that home states have *de facto* control over a victim of human rights violations, based on a *de jure*

relationship between the state and the corporate perpetrator of human rights violation incorporated, registered, or domiciled in the state's territory. This is significant, as it demonstrates a "shift in the interpretation of human rights jurisdiction towards an approach more attuned to the realities of transnational State power wielded through and against global business enterprises."[1]

Other human rights bodies also supported the emergence of cause-and-effect jurisdiction, yet, only tacitly. The CRC established an extraterritorial duty to protect from business-related human rights violations based a state nexus to the extraterritorial human rights violation based on the place of incorporation, registration, or domicile of the corporate perpetrator of human rights violations. The ECtHR established an extraterritorial duty to respect the right to privacy of non-resident non-nationals in the context of mass surveillance and on the basis of a state's capacity to interfere with these individuals' rights. It was argued that the same reasoning may, in principle, also be applied in the context of a duty to protect and the business and human rights sphere.

To conclude, this dissertation found that the existing international human rights law does not attribute a mandatory extraterritorial duty to protect to home states. The exercise of such a duty is merely recommended. The exercise of a recommended home state duty to protect is permissible, when exercised vis-à-vis corporations incorporated, registered, or domiciled within the home state's territory. Such permissibility may further expedite a future consolidation of a mandatory home state duty to protect. The attribution of a future mandatory home state duty to protect has been determined as possible and even likely. The applicable jurisdictional mechanism for such attribution is the cause-and-effect jurisdictional model, as consolidated in human rights jurisprudence.

[1] Daniel Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' [2022] 40 Netherlands Quarterly of Human Rights 35, p. 52.

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7. Shrnutí v českém jazyce

Nadnárodní korporace se staly novými globálními mocenskými hráči. Jejich ekonomický vliv roste a spolu s ním i jejich schopnost, porušovat lidská práva. Žádná korporace však nemá přímé povinnosti v mezinárodním právu v oblasti lidských práv. Jsou to státy, především hostitelské státy, kde k porušování lidských práv dochází, a které musí dodržování lidských práv korporacemi v rámci své povinnosti chránit zajistit. V praxi se jedná převážně o rozvojové státy, které se vůči mocnějším korporacím často neumí/nechtějí prosadit, což má přímý negativní dopad na všeobecné uplatňování lidských práv.

V zájmu posílení ochrany lidských práv v oblasti byznysu a lidských práv proto začaly lidskoprávní orgány a odborníci povinnost chránit lidská práva ukládat *domovským státům* korporací působících v hostitelských státech. Výzkum povinnosti domovských států, chránit před extrateritoriálním porušováním lidských práv ze strany korporací, je teprve v počátcích. Zatím neexistuje právně závazný nástroj v oblasti podnikání a lidských práv, proto není ani ustanovení domovské povinnosti chránit jednoznačné. Zatímco většina odborníků na lidská práva zastává názor, že povinnost chránit lze domovským státům přisoudit již v rámci

stávajícího rámce mezinárodního práva lidských práv, jiní právní odborníci tomuto názoru silně oponují.

Ve snaze přispět k objasnění lidskoprávního *status quo* a celkovému posílení ochrany lidských práv v oblasti byznysu a lidských práv tato disertační práce povinnost domovských států chránit lidská práva zkoumá. Konkrétně se zabývá její existencí, přípustností a přičitatelností. Na základě analýzy lidskoprávní judikatury disertační práce zjišťuje, že ačkoli je trend ve prospěch povinnosti chránit nesporný, závazná povinnost domovského státu zatím nevzniká. Na základě institutu jurisdikce v mezinárodním právu veřejném práce dále zjišťuje, že podmíněné uplatňování ochrany domovského státu, je přípustné. Konečně, opírajíc se o institut jurisdikce v mezinárodním právu v oblasti lidských práv, tato disertační práce dospívá k závěru, že dle stávajícího práva, lze v budoucnu závaznou povinnost domovským státům přičíst, a to v rámci příčinného pojetí jurisdikce.