

Extraterritorial Jurisdiction under the Active Nationality Principle
A Tool to Enhance Transnational Corporations' Accountability for Human Rights
Abuses?

The Right of States to Exercise Nationality-Based Extraterritorial Jurisdiction over Transnational
Corporations in the Field of Human Rights



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1 Introduction

1.1 Background and Research Question

With the ongoing liberalisation of international trade, the rise of ‘economic liberalism’ as a political philosophy and the turn of many former socialist systems to free market economy, transnational corporations (TNCs) have become extremely powerful actors in the current world order. This enormous economic (and also *de facto* political) power puts TNCs in the position to influence the enjoyment of internationally acknowledged human rights, for example the rights of their employees or of the people living in the area of their operation. The 1984 ‘Bhopal disaster’ (in which a lack of safety arrangements brought a TNC-pesticide-plant to accidentally release toxic gas causing the immediate death of over 2000 people)¹ is possibly the most prominent example of possible human rights abuses by TNCs.²

So far no generally applicable *definition for the ‘phenomenon’ TNC* exists. However, a TNC can either consist of only one corporate entity operating in more than one country, or it is a cluster of corporate entities operating in two or more countries. The states where TNCs (or in cases of a ‘cluster of entities’: the ‘parent companies’) are incorporated are often developed states. These states are referred to as ‘*home states*’ of the TNCs. As implied in their name TNCs operate transnational and, thus, conduct business also in other states than their home state. These ‘other states’ are referred to as ‘*host states*’. At an increasing rate developing states have become ‘*host states*’, be it because they are attractive regional markets for goods or services, or because they provide profitable conditions for the production of goods (such as low production costs, low wages, low mandatory safety standards, low taxes and a low level of regulation by the state).

¹ Joseph (2004), p. 2

² For a list of human rights which can be impaired by TNCs see: Paust (2002), p. 817f

In the last decades questions such as on ‘corporate human rights standards’ and accountability of TNCs for abuses of internationally acknowledged human rights have gained in importance. In this context the enforcement of internationally acknowledged ‘corporate human rights standards’ in host states has always been a central question. ‘Corporate human rights standards’ (i.e. standards that have to be observed by private corporations with respect to human rights) mainly derive from human rights treaties, to which also the majority of host states are party. The enforcement of these standards is, according to the allocation of international human rights law, first and foremost the duty of the host states. They are obliged to enforce the standards on their territory by controlling all business activities conducted within their territorial borders (‘positive obligations’). However, for different reasons many host states do not control the business activities on their territory sufficiently. This can be motivated by a lack of capacity, a lack of interest, or even by a lack of willingness of the host states (for example when a host state’s interest in foreign investment prevails over its interest in the protection of human rights).

In consequence of these shortcomings in the enforcement of ‘corporate human rights standards’ by the host states, alternative ways of enforcement have attracted attention. In this context it has often been discussed whether home states of TNCs could contribute to the enforcement of ‘corporate human rights standards’ in host states by exercising *extraterritorial jurisdiction* over the TNCs. This implies first and foremost that home states transfer internationally acknowledged ‘corporate human rights standards’ into domestic law which they then apply to the TNCs with respect to their business activities abroad.

Therefore, the research question of this thesis is: If and to what extent international law does international law allow home states to exercise extraterritorial jurisdiction over the TNCs in order to enforce internationally acknowledged ‘corporate human rights standards’ in host states. However, since extraterritorial jurisdiction covers a wider range of approaches and scenarios as this thesis is - due to its limited capacity - able to address, the thesis will be limited to extraterritorial jurisdiction which is based on the

internationally acknowledged '*active nationality principle*'. According to this principle a state may regulate the activities, interests, status or relations of its *nationals*, not only inside but also outside its territory. Other internationally acknowledged bases for extraterritorial jurisdiction (such as for example the concept of 'universal jurisdiction') will not be discussed. Additionally, further limitations of the reasearch question are necessary und will be highlighted in the following sections of this introduction.

1.2 Definitions and Explanatory Notes

'TNCs'

For the purpose of this thesis TNCs are conceived widely, as 'economic entities operating in more than one country, or as a cluster of economic entities operating in two or more countries'.

Corporate Structures of TNCs

When TNCs consist of more than one corporate entity, they often have complex corporate structures including parent companies, subsidiaries, subcontractors, franchisees and licensees. Subcontractors, franchisees and licensees are autonomous corporations conducting business for TNCs solely on contractual basis. Though likewise an autonomous corporation, *subsidiaries* are additionally also a member of the TNC as 'multi-corporate enterprise'. The TNC parent companies hold shares in them, and, thus, own and control them. Usually an autonomous corporation is considered to be a 'subsidiary' of another company (the 'parent') if that other company holds more than 50 % of the shares.³ 'Full control' over the subsidiary is usually achieved by holding 100% of the shares, or by holding so many shares that no other shareholder can block or veto decisions and orders of the parent. This thesis will only consider scenarios in which a TNC conducts its business activities in a host state by a subsidiary, and in which the subsidiary is fully owned or fully controlled by a TNC parent company.

³ Alternative thresholds might be: 'more than 66,66%' or 'more than 75%'

Whereas TNC parent companies are usually incorporated and located in their home state, their subsidiaries can be incorporated either in the home state (where the parent is incorporated), or in the host state (where the business is conducted), or in a third state (where the law governing the incorporation might be more favourable). In practice TNC-subsiidiaries are often incorporated in the host state in which they conduct business. The main reason for this is that many host states require the incorporation of a subsidiary under their law if a TNC wants to conduct business on their territory.⁴ Another reason for an incorporation in the host state is that TNCs sometimes acquire corporations which already were incorporated in the host state.⁵ However, the thesis will be limited to scenarios in which the subsidiary conducting business for a TNC in a host state is incorporated under the laws of that host state.

‘Extraterritorial jurisdiction’

The term ‘extraterritorial jurisdiction’ is generally used to denote a wide variety of different issues. This thesis conceives ‘extraterritorial jurisdiction’ as summation of three different aspects of state power: ⁶

- Extraterritorial *legislative* jurisdiction
(= the power of a state to apply its laws to cases involving a foreign element)
- Extraterritorial *executive* jurisdiction
(= the power of a state to perform acts in the territory of another state)
- Extraterritorial *judicial* jurisdiction
(= the power of a state's courts to try cases involving a foreign element)

This thesis will be limited to ‘*legislative extraterritorial jurisdiction*’. Aspects of extraterritorial enforcement and judicial jurisdiction will not be discussed. The term ‘extraterritorial jurisdiction’ will therefore be used as equivalent to ‘extraterritorial *legislative* jurisdiction’.

⁴ Schreuer (2005), p. 4

⁵ Schreuer (2005), p. 4

⁶ Based on: Akehurst (1974), p. 25

'Thesis scenario'

The analysis provided in this thesis will be limited to a certain scenario, which will be always be referred to as 'thesis scenario'. It is defined as follows:

- A TNC conducts business in a host state *by a subsidiary*.
- The parent company *fully owns or fully controls* the subsidiary.
- The *parent company is incorporated in the home state*.
- The *subsidiary is incorporated in the host state* in which it is conducting business. It is therefore often referred to as '*foreign subsidiary*'.
- The 'corporate human rights standards' the home state enforces by extraterritorial jurisdiction are limited to such standards which the host state is (by international law) *obliged* to enforce on its territory.

1.3 Methodology and Structure of the Thesis

The thesis will be divided in two parts. In the first part the thesis will analyse which 'corporate human rights standards' derive from international law. This analysis will be limited to standards deriving from the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), customary law and *jus cogens* (for the purpose of this thesis conceived as being part of customary law). The analysis will be based on an interpretation of the two covenants, on the 'general comments' of the competent treaty committees, on literature, and (for the area of customary law) on state practice.

In the second part the thesis will analyse if and to what extent international law allows home states of TNCs to exercise extraterritorial jurisdiction over TNCs aiming at enforcement of internationally acknowledged 'corporate human rights standards' in a host state. The analysis will be strictly limited to the 'thesis scenario'. As the thesis considers only extraterritorial jurisdiction which is based on the 'active nationality

principle’, the second part of the thesis will start with an analysis of this principle. In this context the thesis will discuss under which circumstances a home state can assert ‘corporate nationality’ of a TNC entity. Subsequently, the thesis will identify which limitations international law provides for extraterritorial jurisdiction. Particular focus will be the limitations deriving from the sovereignty of the host states. In a second step the identified limitations will be applied to the ‘thesis scenario’. For this purpose the ‘thesis scenario’ will be split up in several sub-scenarios. The analysis of the limitations international law provides for extraterritorial jurisdiction in the ‘thesis scenario’ will be approached by two different perspectives: The perspective of the classical doctrine on international jurisdiction and a human rights perspective.

1.4 Scope of the Thesis and Limitations

The strictly limited scope of this thesis can be summarised as follows: TNCs conduct business in host states by subsidiaries, which are also incorporated in the host states and are fully owned or fully controlled by a TNC parent company, which itself is incorporated in the home state. The thesis considers only legislative extraterritorial jurisdiction, and only jurisdiction which is based on the active nationality principle and which aims at the enforcement of ‘corporate human rights standards’ deriving from the ICCPR, ICESCR, customary law and jus cogens. Further human rights standards, standards of international labour law and environmental aspects will not be considered. Furthermore home states solely enforce such ‘corporate human rights standards’ which the host state is obliged to enforce on its territory anyway. In addition, the thesis analysis only discusses the *right* of home states to exercise extraterritorial jurisdiction and will not discuss if home states might even be *obliged* to exercise extraterritorial jurisdiction in some cases. Finally it should be mentioned that the thesis is limited to legal aspects, i.e. to the question if home states *could* exercise extraterritorial jurisdiction. Political aspects, i.e. the question if they also *should* exercise extraterritorial jurisdiction, will not be considered.

2 TNCs and Human Rights - ‘Corporate Human Rights Standards’

Topic of the thesis is the enforcement of ‘corporate human rights standards’ (i.e. ‘human rights related obligations’ of TNCs) by extraterritorial jurisdiction exercised by home states of TNC. International law contains such ‘corporate human rights standards’ in two forms:

- Direct obligations of TNCs (to observe certain human rights)
- Indirect obligations of TNCs (to observe certain human rights), by imposing the *positive obligation on states* to control TNCs and prevent them from affecting the enjoyment of certain human rights.

The following sections will discuss the ‘corporate human rights standards’ deriving from the ICCPR, from the ICESCR and from universal customary human rights law. In addition, a short analysis will be given on host states’ capacity, willingness and interest with respect to the enforcement of such ‘corporate human rights standards’ on their territory.

2.1 Corporate Standards in ICCPR and ICESCR

For this thesis it is important to analyse which ‘corporate human rights standards’ derive from ICCPR and ICESCR, since these are the ‘corporate human rights standards’ which - in the ‘thesis scenario’ - are subject to the extraterritorial jurisdiction exercised by TNCs’ home states.

2.1.1 ICCPR and ICESCR and Direct Obligations of TNC

This section will discuss whether ICCPR and ICESCR contain ‘corporate human rights standards’ by imposing *direct* obligations on TNCs:

Recently, there has been the tendency amongst scholars to advocate the two covenants would contain direct obligations for TNCs.⁷ However, the more persuasive arguments support the assumption that the two covenants do not oblige TNCs *directly*:⁸

- Art. 2 (1) ICCPR/ICESCR, which formulate the obligations of the state parties in general terms, address exclusively ‘State Parties’ as duty holder. Likewise do the particular human rights in the ICESCR, which each explicitly address the ‘State Parties’.
- The 5th preambular paragraph of the ICCPR/ICESCR has sometimes been considered an explicit recognition of the existence of direct human rights obligations of non-state actors.⁹ However, it does not contain any textual indication for the assumption that *TNCs* would be duty bearers under the covenants, since it only refers to ‘*individuals*’. In addition, this preambular paragraph only states that individuals are under “the responsibility to *strive for* the promotion and observance of the rights [...]” (emphasis added), and, thus, does not contain textual indication that individuals (or even other non-state actors) were supposed to be legally bound by the covenants.
- Art. 5 (1) ICCPR/ICESCR is as well sometimes understood as impliedly affirming the existence of *direct* human rights obligations of non-state actors.¹⁰ This paragraph addresses that “nothing in this covenant shall be interpreted as implying for any [...] group or person any right to engage in any activity [...] aimed at the destruction of any of the rights or freedoms recognised herein [...]”. However, the provision clearly aims at preventing a certain “interpretation” of the covenants.

⁷ *Beyond Voluntarism* (2002), p. 85 for the ICSECR; Paust (2002), p. 813 and (1992), p. 55; *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), p. 265; Clapham (1993), p. 97ff

⁸ Clapham (2006), p. 195ff.; Zerk (2006), p. 76ff; Joseph (2004) p. 9; Tomuschat (2003), p 90f; *Beyond Voluntarism* (2002), p. 64f, 74ff;

⁹ Paust (2002), p. 813 and (1992), p. 55; Clapham (1993), p. 97ff

¹⁰ Paust (2002), p. 813

The assumption that TNCs are not duty bearers under two covenants is as well affirmed by findings of the covenant committees:

- For the ICCPR the UN Human Rights Committee found: “The Art. 2 par. 1 obligations are binding on states and do not, as such, have direct horizontal effect as a matter of international law”.¹¹ By explicitly excluding any “direct horizontal effect” the committee rejected the concept of direct obligations imposed on non-state actors such as TNCs . (A ‘*direct horizontal effect*’ implies that one non-state actor has a direct obligation towards another non-state actor, i.e. that rights exists which can be directly relied on between private parties.) The committee considers the ICCPR as having solely *direct vertical effects* between states and non-state actors under their jurisdiction.
- For the ICESCR the Committee on Economic, Social and Cultural Rights (CESCR) confirmed in several comments that “only States are parties to the Covenant and are thus ultimately accountable for compliance with it”.¹² With respect the right to work the committee finally even confirmed: “private enterprises - national and multinational - [are] not bound by the Covenant - [...]”.¹³

Conclusion: ICCPR and ICESCR do not contain direct obligations of TNCs.

2.1.2 ICCPR and ICESCR and Indirect Obligations of TNCs by Positive Obligations of State Parties

ICCPR and ICESCR contain ‘corporate human rights standards’, by imposing *indirect* obligations on TNCs by conferring the ‘positive obligation’ on the state parties to prevent (and if appropriate also investigate and punish) the impairment of covenants rights by private actors such as TNCs:

¹¹ Human Rights Committee; General Comment No. 31, par. 8

¹² CESCR, General Comment No. 12, par. 20; No. 14, par. 42; No. 18, par. 52

¹³ CESCR, General Comment No. 18, par. 52

- Art. 2 (1) ICCPR obliges states “to respect” and “to ensure” the covenant rights. That includes ‘negative’ as well as ‘positive’ obligations of states.¹⁴ In order to “respect” the covenant rights, states have to refrain from any violation of those rights (‘negative obligation’), “to ensure” the covenant rights states must take positive action, in particular with respect to private actor abuses: “The positive obligation on state parties to ensure covenant rights will only be fully discharged if individuals are protected by the state [...] also against acts committed by private persons and entities so far as they are amenable to application between private persons or entities”.¹⁵ Scope and content of positive obligations vary from right to right. Positive obligations can comprise measures to “prevent, punish, investigate or redress” private actor abuses.¹⁶ In order to determine what kind of measures a state is obliged to take, a ‘due diligence test’ is suggested according to which a state has to take ‘reasonable and serious steps’.¹⁷
- ICCPR rights, which have been identified by the Human Rights Committee as requiring positive action, are: The ‘right to life’ (Art. 6),¹⁸ ‘freedom from torture or cruel, inhuman or degrading treatment’ (Art. 7),¹⁹ ‘equality of rights between men and women’ (Art. 3),²⁰ ‘human treatment of persons deprived of liberty’ (Art. 10),²¹ ‘freedom of movement’ (Art. 12),²² privacy related guarantees (Art. 17),²³ ‘right to freedom of expression’ (Art. 19)²⁴ and the rights of the child (Art. 24)²⁵.

¹⁴ Human Rights Committee, General Comment No. 31 par. 6

¹⁵ Human Rights Committee, General Comment No. 31 par. 8

¹⁶ Human Rights Committee Comment Nr. 31 par. 8

¹⁷ *Beyond Voluntarism* (2002), p .52

¹⁸ Human Rights Committee General Comment No. 6 par. 2

¹⁹ Human Rights Committee General Comment No. 31 par. 8, No. 20 par. 2

²⁰ Human Rights Committee General Comment No. 28 par. 3

²¹ Human Rights Committee General Comment No. 21 par. 2

²² Human Rights Committee General Comment No. 27 par. 6

²³ Human Rights Committee General Comment No. 31 par. 8

²⁴ Human Rights Committee General Comment No. 10 par. 2

²⁵ Human Rights Committee General Comment No. 17 par. 6

- According to Art. 2 (1) ICESCR “Each state [...] undertakes to take steps [...] to the maximum of its available resources [...] to achieving progressively the full realisation of the rights recognised in the present covenant [...]”. The wording “to take steps” clearly marks the obligation to take positive action. According to the ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’, the ICESCR requires states “to *protect* the covenant rights”, which includes the “states’ responsibility to ensure that [...] transnational corporations over which they exercise jurisdiction, do not deprive individuals of their [covenant] rights”²⁶. Scope and content of the “positive obligations” vary from right to right, and additionally depend on the “available resources” of each state (Art. 2 (1) ICESCR). As for the ICCPR the ‘due diligence test’ applies.

- Areas in which the positive obligation of states to prevent the impairment of ICESCR rights by private actors has already been given special attention by the CESCR are: The ‘right to food’ (Art. 11),²⁷ the ‘right to work’ (Art. 6),²⁸ the ‘right to social security’ (Art. 9),²⁹ intellectual property related rights (Art. 15 (1) (c)),³⁰ family related rights (Art. 10)³¹ and the ‘right to adequate housing’ (Art. 11)³².

Conclusion: By obliging states to prevent (and if appropriate also punish) private actor abuses of covenant rights, ICCPR and ICESCR contain *indirect* human rights obligations for TNCs

²⁶ §§ 6 and 18 Maastricht Guidelines

²⁷ CESCR, General Comment No. 12, par. 19, 27

²⁸ CESCR, General Comment No. 18

²⁹ CESCR, General Comment No. 19, par. 46

³⁰ CESCR, General Comment No. 17, par. 55

³¹ CESCR, General Comment No. 16, par. 27

³² CESCR, General Comment No. 7, par. 9

2.2 Corporate Standards in Customary Human Rights Law and Jus Cogens

2.2.1 Direct Obligations of TNCs under Customary Human Rights Law and Jus Cogens

This thesis will distinguish between ‘ordinary customary human rights law’ and ‘jus cogens’.

‘Ordinary Customary Human Rights Law’:

Customary human rights rules have evolved primarily from norms which are universal in character and proclaimed in international instruments such as the ICCPR, ICESCR and the Universal Declaration of Human Rights (UDHR).³³ A growing consensus amongst scholars indicates that provisions which have entered into customary law are: The prohibitions on genocide, slavery, torture and cruel, inhuman and degrading treatment or punishment, piracy, crimes against humanity, war crimes, arbitrary killing, prolonged arbitrary detention, systematic racial and religious discrimination.³⁴ Additionally, prominent voices include as well ‘any consistent pattern of gross violations of internationally recognised human rights’.³⁵

It is subject to debate whether international customary human rights law contains *direct* obligations for TNCs. The preamble of the UDHR requiring “ [...] that every individual and *every organ of society* [...] shall *strive* by teaching and education to promote respect for these rights and freedoms [...] to secure their universal and effective recognition and observance [...]” (emphasis added) has often led to the interpretation the UDHR would apply directly to TNCs as ‘organs of society’.³⁶ However, so far there is no evidence available for *widespread and consistent state practice* suggesting that those provisions of the UDHR which have turned into customary law would directly bind TNCs. Likewise there is no state practice suggesting that other treaty provisions

³³ Clapham (2006), p. 86; *Beyond Voluntarism* (2002), p. 60

³⁴ U.S. Third Restatements (1987) sec. 702; Clapham (2006), p. 86; Cassese (2005), p. 393ff; Joseph (2004), p. 9; Tomuschat (2003), p. 35f; *Beyond Voluntarism* (2002), p. 60ff, Hannum (1995/1996), p. 317ff

³⁵ U.S. Third Restatements (1987) sec. 702; Cassese (2005), p. 394

³⁶ *Beyond Voluntarism* (2002), p. 58ff; Henkin (1999), p. 25

which have become binding customary law (such as provisions from the ICCPR or the ICESCR) would bind TNCs directly.³⁷

Conclusion: ‘Ordinary customary human rights law’ does not contain direct obligations for TNCs.

‘Jus Cogens’:

Direct obligations of TNCs could derive from ‘jus cogens’. The concept of jus cogens is implied in Art. 53 Vienna Convention on the Law of Treaties (VCLT) as “peremptory norm[s] of general international laws, which are “accepted and recognised by the international community of states as a whole as [a] norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law have the same character”. Today, the existence of jus cogens is increasingly accepted amongst states (the VCLT has been ratified by over 100 states), and affirmed also in jurisdiction and literature.³⁸ In the context of human rights a clear tendency exists to include into the corpus of jus cogens norms prohibitions on:³⁹

- genocide
- slavery
- torture and cruel inhuman and degrading treatment or punishment
- crimes against humanity
- war crimes
- arbitrary killing
- systematic racial and religious discrimination
- right to self-determination
- arbitrary deprivations of life and liberty.

³⁷ *Beyond Voluntarism* (2002), p. 74

³⁸ ICYT, *Furundzija*, 10.12.1998, par. 156 ; ICJ, *Nicaragua*, 27.06.1986, par. 190 ; Cassese (2005), p. 199ff; Shaw (2003), p. 117ff;

³⁹ ICTY, *Furundzija*, 10.12.1998, par. 154; UN Human Rights Committee, General Comment No. 29, par. 11; Commentary on the ILCs Draft Articles on State Responsibility, Art. 26 par. 5, Art. 40 par. 3ff (Report of the ILC, GAOR, Supp. No. 10 (A56/10); Clapham (2006), p. 88; Cassese (2005), p. 202f; *Beyond Voluntarism* (2002), p. 62;

Moreover, there is a consensus on the notion that jus cogens norms bind not only states but also non-state actors.⁴⁰ This assumption has mostly been referred to in the context of criminal responsibility of individuals.⁴¹ However, a growing majority advocates that *all subjects of international law* are directly bound by jus cogens norms.⁴² This notion finds support in reasoning and wording of the ICTY *Furundzija* case: “[...] the prohibition of torture is an *absolute value* from which *nobody* must deviate” (emphasis added).⁴³ The recognises ‘absolute’ values from which ‘nobody’ must deviate. This implies that, consequently, all subjects of international law which (by their nature) have the ability to “deviate from” these absolute values are *prohibited* to violate the values. TNCs as legal entities, having not only legal personality but also the capacity to make decisions and to act as entity, are in general capable of violating the above-mentioned jus cogens rules (especially since also states as abstract entities are considered as being able to violate those rules). Hence, it can be argued that TNCs - as subjects of international law and potential violators of jus cogens norms - are *directly* bound by the jus cogens law.

Moreover, the concept of jus cogens - though controversially debated in detail - is considered to imply that jus cogens norms:

- apply to all subjects of international law (see above)
- bind all states regardless if they are member to human right treaties⁴⁴
- cannot be derogated from⁴⁵
- make treaties with conflicting content void⁴⁶
- have erga-omnes character⁴⁷

⁴⁰ Clapham (2006), p. 90; Hobe/Kimminich (2004), p. 173; Ramasastry (2002), p. 94; *Liability of Multinational Corporations under International Law* (2000), p. 8; ICYT, *Furundzija*, 10.12.1998, par. 154 for the prohibition of torture

⁴¹ For example: ICTY, *Furundzija*, 10.12.1998, par. 153ff

⁴² Hobe/Kimminich (2004), p. 173; Explicitly for TNCs: Clapham (2006), p. 90; Ramasastry (2002), p. 94; *Liability of Multinational Corporations under International Law* (2000), p. 8

⁴³ ICTY, *Furundzija*, 10.12.1998, par. 154

⁴⁴ Hobe/Kimminich (2004), p. 173; Parker (1988/1989), p. 418

⁴⁵ Art. 53 VCLT; Cassese (2005), p. 205; Clapham (2006), p. 87ff, Parker (1988/1989), p. 416

⁴⁶ Art. 53 VCLT

⁴⁷ Hobe/Kimminich (2004), p. 174; Byers (1997), p. 236

- allow for universal jurisdiction⁴⁸

Conclusion: The rules having jus cogens character directly bind TNCs.

2.2.2 Indirect Obligations of TNCs by Positive Obligations of States under Customary Human Rights Law and Jus Cogens Law

Moreover, it needs to be discussed whether customary human rights law, in particular jus cogens, contains *indirect* obligations for TNCs by imposing the *positive obligation* on states to prevent private actor abuse. This question has neither in jurisprudence nor amongst scholars gotten much attention. Some scholars held that customary human rights law, in particular jus cogens law, would carry mainly negative obligations.⁴⁹ Others advocate a wider approach and point at the ‘need’ to include positive obligations into customary human rights law.⁵⁰

As far as ‘**ordinary customary human rights law**’ is concerned, the scope of ‘binding custom’ is not governed by factors like ‘needs’ or an ‘effet utile’ approach. It depends solely on (‘opinio juris’ based) state practice. However, it seems that presently no sufficient evidence is available in state practice for the firm assumption that customary obligations would extent to positive obligations.

For **jus cogens** rules it is as well very uncertain whether they extent to the positive the obligation of states to prevent private actor abuses. Neither Art. 53 VCLT, nor judicial decisions of international courts or literature on jus cogens clearly indicate that the concept of jus cogens would necessarily imply *positive* obligations for states: According to the commentators, jus cogens merely ‘allows’ for universal jurisdiction, however no indication exists for any *obligation* to exercise jurisdiction (such as implied in positive obligations).⁵¹ Likewise also the ICTY stated its *Furundzija* case: “[...] one

⁴⁸ Bassiouni (1996), p. 66; Parker (1989), p. 455; Randall (1988), p. 831, ICTY, *Furundzija*, 10.12.1998, par. 156 for cases where perpetrators are present in a states territory

⁴⁹ Simma/Alston (1992), p. 103

⁵⁰ Skogly (2006), p. 116ff

⁵¹ See footnote 48

of the consequences of the jus cogens character [...] is that every state *is entitled* to investigate, prosecute, punish or extradite individuals accused of [the violation of a jus cogens norm]” (emphasis added).⁵² Only *very few* attempts exist which explicitly advocate the jus cogens concept would also imply *particular* positive obligations of states, as for example ‘the obligation to contribute to the universal suppression’ of jus cogens prohibitions by not lending refuge on state territory to perpetrators who cannot be extradited,⁵³ or the obligation to not grant impunity to perpetrators if the violation was committed within a states territorial jurisdiction.⁵⁴

As demonstrated, it is at present nowhere advocated explicitly that jus cogens would imply positive obligations of states. However, when taking an ‘*effet utile*’ perspective into consideration, it seems nevertheless possible to derive positive obligations from the jus cogens concept (at least with respect to private actor abuses of such private actors that are under the jurisdiction of a state): Jus cogens rules are “absolute values”. However, a *sufficient* protection of such core values is only possible and effective (‘*effet utile*’) if states are obliged to also prevent private actor abuses. In addition positive obligations are necessary, since states also could, otherwise, easily escape their negative (jus cogens) obligations by delegation public tasks to private actors.

Conclusion: There is not enough evidence for the assumption ‘ordinary customary human rights law’ would contain positive obligation on states. Likewise it is uncertain whether jus cogens necessarily implies positive obligations of states. However, based on ‘*effet utile*’ considerations it seems possible to construct the positive obligation of states to prevent human rights abuses by such private actors which are subject to their jurisdiction.

⁵² ICYT, *Furundzija*, 10.12.1998, par. 156

⁵³ Schutter (2006), p. 13

⁵⁴ Bassiouni (1996), p. 66

2.3 Enforcement of ‘Corporate Human Rights Standards’ by Host States

The positive obligation’ of states ‘to prevent TNCs from abusing human rights (see section 2.1.2 and 2.2.2) applies first and foremost territorially (a possible additional extraterritorial scope of ‘positive obligations’ will be discussed in section 5.4.2). For the ‘thesis scenario’ that implies that host states have to control the business activities of TNCs conducted on their territory. However, for several reasons not all host states control TNC business activities on their territory sufficiently. For the purpose of this thesis, a distinction will be made between three categories:

‘Lacking capacity’ to control TNCs sufficiently:

- Lacking capacity to control TNCs sufficiently can have different origins, such as a lack of: financial means, knowledge, human resources, infrastructure or administrative and enforcement structures. In particular developing countries often lack the capacity to control TNCs.
- ‘Lacking capacity’ can result in a lack of binding corporate human rights standards (for example if even the capacity to set up legal standards is lacking). However, it can as well be that sufficient legal standards even exist, but that a host state lacks the capacity to enforce them.
- In cases of ‘lacking capacity’ host states have *not* made the political choice to *not* prevent human rights abuses by TNCs sufficiently (i.e. in a higher level). The ‘low level’ of efficient control of TNCs can, therefore, not be considered an ‘explicit policy’ of a host state.

‘Lacking willingness’ to control TNCs sufficiently:

- ‘Lacking willingness’ of host states to control TNCs can have different backgrounds: In particular developing states depend highly on foreign investments and compete with other (developing) states to attract foreign investors. This competitive pressure can result in a reluctance to set up (or

to enforce) corporate human rights standards.⁵⁵ Reluctance to set up corporate standards can also result from investment treaties host states are often bound to. These treaties (providing for ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investors) have sometimes been interpreted as protecting foreign investors also from losses resulting from certain political decisions of host states. Hence, host states might be afraid such treaty provisions could be invoked when they enforce such corporate human rights standards that cause profit losses for TNCs.⁵⁶

- Lacking willingness can result either in a lack of binding corporate human rights standards, or in a lack of enforcement of existing standards.
- In cases of ‘lacking willingness’ host states have usually made the political decision not to protect human rights on a higher level. Thus, the chosen level of human rights protection has to be considered as an ‘explicit policy’ of that state.

‘Lacking interest’ in controlling TNCs:

- In cases of simple ‘lacking interest’ in controlling TNCs, the lack of sufficient corporate human rights standards is neither a consequence of lacking capacities nor of an explicit political decision, but rather results from a complete lack of interest in dealing with corporate human rights issues. Indication for ‘lacking interest’ is that no evidence of any political discussion or decision is available, such as for example political statements, formulated political programs, or records of political decision making procedures.

2.4 Conclusion

International law contains ‘corporate human rights standards’ in form of direct obligations of TNCs only as far as jus cogens norms are concerned. However,

⁵⁵ Schutter (2007), p. 3; Zerk (2006), p.84

⁵⁶ Schutter (2007), p. 3

ICCPR and ICESCR contain 'corporate human rights standards' indirectly by imposing the positive obligation on states to prevent private actors from impairing the covenant rights. In addition, a positive obligation of states to prevent private actor abuse of human rights can also be constructed for the field of jus cogens. Sometimes host states do not enforce these 'corporate human rights standards' sufficiently. This thesis distinguished between cases of 'lacking capacity', 'lacking willingness' and 'lacking interest' of host states.

3 Extraterritorial Jurisdiction in International Law

Since host states often do not sufficiently enforce the ‘corporate human rights standards’ deriving from international human rights law, the possibility of enforcement of such standards by means of extraterritorial jurisdiction exercised by home states of TNCs has attracted attention. This section will give an overview over the ‘tool extraterritorial jurisdiction’.

3.1 The Extraterritorial Elements in the ‘Thesis Scenario’

As explained in the introduction this thesis is limited to ‘extraterritorial legislative jurisdiction’ (from now on referred to as ‘extraterritorial jurisdiction’). Legislative jurisdiction is ‘extraterritorial’ when states apply their domestic law on cases involving a *foreign element*. In the ‘thesis scenario’ home states apply their domestic law (which contains ‘corporate human rights standards’) to TNCs (be it to the foreign subsidiary or to the TNC parent company). *Foreign elements* first and foremost arise from these aspects:

- The place of incorporation of the TNC-subsiidiaries (whose business activities might impair human rights in the host state) is a *foreign* state (the host state).
- The business activities of the TNC-subsiidiaries and the individuals whose human rights are (potentially) impaired are located within the territory of a foreign state (the host state) and, thus, in general under the territorial supremacy of that state.

3.2 Bases for Jurisdiction in International Law

In international law the rules governing jurisdiction ('bases for jurisdiction') are traditionally identified in form of 'principles' on which jurisdiction is commonly based on.⁵⁷ They are as such not determined in a particular treaty, but derive from the principle of sovereignty and have evolved in state practice. Today, the principles are reflected in several treaties, and have been (with differences in extent and detail) confirmed by international tribunals. The base for territorial jurisdiction, i.e. the jurisdiction which states exercise with respect to their territory, is the '*territorial principle*'. For extraterritorial jurisdiction, international law acknowledges several additional bases such as the '*nationality principle*', the 'passive personality principle', the 'universality principle', the 'protective principle' and the 'effects doctrine'.

In scenarios as the 'thesis scenario' home states might be able to base extraterritorial jurisdiction over TNCs on several of the internationally acknowledged bases. However, the thesis will be strictly limited to such extraterritorial jurisdiction that is based on the 'active nationality principle' ('nationality-based jurisdiction'), i.e. on the assertion that the TNC (be it the parent company or the subsidiary) is a national of the home state and is, therefore, subject to its jurisdiction. This section will, therefore, not elaborate on other bases for extraterritorial jurisdiction than the active nationality principle. However, since *nationality-based extraterritorial jurisdiction* of home states potentially conflicts with the territorial supremacy of host states, and thus, with their *territorial jurisdiction*, the territorial principle will be discussed first.

3.2.1 The Territorial Principle

According to the 'territorial principle' each state has jurisdiction to regulate all things, events and individuals, corporations and other entities within the limits of its territory.⁵⁸ The principle applies to all fields of law.⁵⁹ It has its foundation in the principle of

⁵⁷ Bowett (1983), p. 4

⁵⁸ Higgins (1993), p. 89; Bowett (1983), p. 4 Akehurst (1974), p 152f; Mann (1964), p. 30; PCIJ, *Lotus*, 7.9.1927, p. 18ff

⁵⁹ Mann (1964), p. 30

sovereignty, and it reflects the global communities recognition that a state could not exist without the power to control acts, things and persons on its territory.⁶⁰ In addition, the ‘effects doctrine’ is often conceived as also belonging to the territorial principle. It asserts jurisdiction of a state over activities outside its territory which have, or are intended to have, substantial effects within its territory.⁶¹ However, though territorial jurisdiction is usually considered to be absolute, it is not necessarily exclusive, since other states can as well have jurisdiction over certain matters (extraterritorial jurisdiction) if they can invoke one of the above-mentioned internationally acknowledged bases. In the ‘thesis scenario’ the host states have territorial jurisdiction over the individuals, abstract entities and (business) activities on their territory. If and to what extent home states can exercise extraterritorial jurisdiction over business activities conducted in host states will be subject to the following sections.

3.2.2 Active Nationality Principle

The ‘active nationality principle’ (also: ‘nationality principle’) is the base for the so-called ‘nationality-based jurisdiction’. According to the nationality principle a state may regulate the activities, interests, status or relations of its *nationals* not only inside but also outside its territory.⁶² The principle is affirmed by consistent widespread state practice,⁶³ and is reflected in several treaties.⁶⁴ In practice it has often been invoked by civil law countries in order to hold their nationals criminally accountable for crimes committed abroad. Common law countries have never objected to that.⁶⁵

With the ‘thesis scenario’ in mind, it is important to highlight that the nationality principle is - though traditionally mostly invoked and debated with respect to *criminal*

⁶⁰ Buerghenthal/Murphy (2007), p. 215

⁶¹ Buerghenthal/Murphy (2007), p. 216;

⁶² Higgins (1993), p. 109, Bowett (1983), p. 243; E.g. U.S. Third Restatements (1987), sec. 402 (2)

⁶³ Akehurst (1974), p. 153; Mann (1964), p. 88;

⁶⁴ For example Art. 5 (1) (b) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; Art. 12 (2) (b) ICC Statute, Art. 15 (2) (b) UN Convention against Transnational Organized Crime, Art. 7 (1) (c) Convention for the Suppression of the Financing of Terrorism; Art. 5 (1) (b) Convention Against the Taking of Hostages

⁶⁵ Shaw (2003), p. 588; Akehurst (1974), p. 156

jurisdiction over *individuals* - is neither limited to criminal jurisdiction nor to jurisdiction over individuals.⁶⁶ It can be invoked in all fields of law and applies to jurisdiction over individuals as well as to jurisdiction over legal entities such as TNCs: So, states have claimed nationality-based jurisdiction in several other fields than criminal jurisdiction such as e.g. for issues of marriage, divorce, inheritance or tax.⁶⁷ Furthermore, there is no obstacle inherent in international law suggesting that nationality-based jurisdiction was necessarily limited to criminal law. In particular the notion underlying the nationality principle (that nationals owe certain duties to their home state regardless of their current residence)⁶⁸ applies to all fields of law. Likewise have states invoked the nationality principle also for jurisdiction over other subjects than individuals, such as over corporations in particular in tax law and trade control.⁶⁹ It is generally acknowledged in international law that not only individuals but also corporations can be 'nationals' of a state.⁷⁰ For further details on corporate nationality see section 4.

For the 'thesis scenario' the active nationality principle entails the following implications:

- A Home state is - in general - entitled to exercise extraterritorial jurisdiction over TNC entities, if the entities are nationals of that state. Under which circumstances home states can assert nationality of a corporation will be discussed in section 4.2.
- Home states can invoke the nationality principle in all fields of law, be it civil, criminal or - if existing as a separate field of law - public law.

However, international law does not allow for *unlimited* nationality-based extraterritorial jurisdiction. Limitations can derive from the sovereignty of states with

⁶⁶ Buergenthal/Murphy (2007), p. 216; Higgins (1993), p. 109

⁶⁷ Estey (1997/1988), p. 182ff, see also U.S. Third Restatements (1987), sec. 402 (2) for taxes

⁶⁸ Buergenthal/Murphy (2007), p. 215; Blakesley/Stigall (2004), p. 121

⁶⁹ Famous example: '1982 Soviet Pipeline Incident' in which the U.S. imposed export-embargo obligations on all U.S. corporations (including foreign subsidiaries of U.S. incorporated companies)

⁷⁰ Confirmed inter alia by ICJ, *Barcelona Traction*, 5.2.1970

respect to their territory. However, international law does not provide any ‘clear-cut-limitations’. Instead, limitations need to be discussed on case-by-case basis. This thesis will analyse potential limitations for the ‘thesis scenario’ in section 5.2.

3.3 Scenarios of Nationality-Based Extraterritorial Jurisdiction

In the cases as the ‘thesis scenario’ home states can exercise nationality-based jurisdiction either over the TNC parent company (‘parent approach’) or directly over its foreign subsidiary (‘direct approach’):

‘Parent approach’:

- Home states exercise extraterritorial jurisdiction over a TNC parent company. They invoke the nationality principle by considering the parent as their national. Under which circumstances international law permits such nationality-assertions will be discussed in section 4.2.
- The ‘foreign element’ in the ‘parent approach’ lies mainly in the fact that home states *indirectly* regulate the business activities of a foreign TNC subsidiary which conducts its business on the territory of a foreign state (the host state), and, thus, is subject to the territorial supremacy of that host state.
- Likewise are the (potential) human rights abuses (which are to be prevented or punished by the extraterritorial jurisdiction) committed on the territory of a foreign state (the host state).
- In the ‘parent approach’ TNC parent companies are held accountable first and foremost:⁷¹
 - by attributing human rights abuses of a foreign subsidiary to its parent company based on concepts such as *‘Piercing the*

⁷¹ Schutter (2006), p. 36ff; Joseph (2004), p. 129ff;

Corporate Veil, *Joint Liability* or *Multinational Group Liability*, which bypass the 'limited liability of parent companies' for activities and omissions of their subsidiaries (= *'Attribution Approach'*)

- for their own 'wrongdoing', i.e. = liability for non-compliance with particular human-rights-related due diligence obligations which were imposed on the TNC parents (= *'Direct Parent Liability Approach'*):

In this approach home states oblige TNC parents to control and direct the business activities of their foreign subsidiaries in host states with respect to human rights. The obligations imposed on the parent companies are based on the fact that TNC parents, as shareholders, are entitled to exercise control over their subsidiaries. Instead of attributing the human rights abuses of subsidiaries to the parent, TNC parents are held accountable for their own 'wrongdoing' (i.e. for non-compliance with their shareholder-based due diligence obligations).

'Direct approach':

- Home states exercise extraterritorial jurisdiction *directly* over foreign TNC subsidiaries. They invoke the nationality principle by considering the foreign subsidiaries (though incorporated in the host state) as their 'quasi-nationals' since they are owned and controlled by a company (the TNC parents) which the home state considers to be its national. Whether international law permits such nationality-assertions will be discussed in section 4.2.
- The 'foreign element' in the 'direct approach' lies mainly in the fact that home states directly apply their law on entities (the foreign subsidiaries)

which are incorporated under the laws of a foreign state (the host state) and conduct their business exclusively on the territory of that foreign state. This implies potential for conflicts between the extraterritorial jurisdiction of the home states and the territorial supremacy of the host states, which will be discussed in section 5.2.

Fields of Law:

Extraterritorial jurisdiction can in general be exercised in all fields of law:

- In the field of *criminal law*, possible approaches reach from direct criminal liability of TNC entities to liability of individuals who are endowed with responsibility and decision making competence within the TNC, such as chairmen, directors, other members of the corporate management or even shareholders.
- In the field of *civil law*, approaches are likely to focus on law of tort, conceived as enforcement of human rights standards by empowering victims (and if appropriate NGOs and other organisations acting on behalf of victims). Mechanisms enhancing the attractiveness of such approaches could be tools as class action or punitive damages. Civil action approaches are not necessarily limited to action for damages. They can also include other remedies, such as for example the filing for injunctive relief.
- In the field of *public law and other mandatory law*, approaches can cover a wide range of means from reporting obligations for activities of foreign subsidiaries to mandatory corporate standards whose non-observance entails legal consequences for the TNCs such as sanctions, announcement of the non-compliance to the public, criminal liability or the removal of corporate, tax or other advantages.

4 Corporate Nationality of TNCs

In order to base extraterritorial jurisdiction over TNC entities on the active nationality principle, a home state has to assert that the respective TNC entity is its national. This section analyses the circumstances under which international law allows such assertions of ‘corporate nationality’.

4.1 The Concept of Nationality in International Law

The concept of nationality is, *prima facie*, a matter to be determined by municipal law. The ICJ noted in the *Nottebohm* case that international law leaves it to every state to establish the rules necessary for the acquisition of its nationality.⁷² In absence of international harmonisation no coherent definition of nationality has come into being. There are rather various - often incoherent - regulations of nationality in the municipal laws of states.⁷³ However, though emphasising the discretion of states, the ICJ stated that, according to state practice, nationality is “a legal bond having as its basis a social fact of attachment, a ‘*genuine connection*’ of existence, interests and sentiments, together with the existence of reciprocal rights and duties” (emphasis added) and the recognition that a person is “more closely connected with that state than with any other.”⁷⁴ The ICJ distinguished between the domestic meaning of nationality, and the concept of nationality on the international plane: States are only under obligation to recognise the nationality granted or asserted by another state, when a *genuine connection* exists between a person and that state.⁷⁵

⁷² ICJ, *Nottebohm*, 6.4.1955, p. 23

⁷³ Shaw (2003), p. 585

⁷⁴ ICJ, *Nottebohm*, 6.4.1955, p. 23

⁷⁵ ICJ, *Nottebohm*, 6.4.1955, p. 23; Shaw (2003), p. 725f

4.2 Corporate Nationality in International Law

The ‘concept of nationality’ has evolved with respect to individuals. However, with the increase in transnational trade states began to allocate nationality also to corporations, for example for conflict-of-law purposes, to establish jurisdiction, or to determine whether a state can exercise diplomatic protection.⁷⁶ Corporate nationality is derived - but only to a limited extent - by analogy of nationality of individuals.⁷⁷

4.2.1 The ‘Incorporation Test’

The ICJ decided upon questions of ‘corporate nationality’ for the purpose of diplomatic protection in the *Barcelona Traction* case. It found that customary law had not established a *single* genuine link test for corporate nationality: “no absolute test of the ‘genuine connection’ has found general acceptance” (emphasis added). However, based on an analysis of the general principles of law the ICJ concluded that the “traditional rule attributes the [nationality-based] right of diplomatic protection of a corporate entity to the state under the laws of which it has been incorporated and in whose territory it has its registered office”. It considered these two criteria (which are often referred to as ‘incorporation test’)⁷⁸ to be confirmed “by long practice and by numerous international instruments”. Finally the ICJ affirmed the Canadian nationality of the corporation in question since due to the “close and permanent connection” between Canada and that corporation (including local incorporation and the presence of a registered office).⁷⁹ Thus, the ICJ confirmed the conformity of the ‘incorporations test’ (for asserting ‘corporate nationality’ on the international plane) with international law.

There is not much indication that the factual situation which the ICJ described 1970 in its *Barcelona Traction* judgement has changed much: Surveys on diplomatic protection indicate for example that state practice has still not developed a generally accepted ‘absolute test’ of ‘genuine connection’ between a corporation and the state asserting

⁷⁶ ICJ, *Barcelona Traction*, 5.2.1970, p. 42; Buergenthal/Murphy (2007), p. 218; Mabry (1999), p. 582ff

⁷⁷ ICJ, *Barcelona Traction*, 5.2.1970, p. 42; Bridge (1984), p. 11f

⁷⁸ Lee (2006), p. 252ff

⁷⁹ ICJ, *Barcelona Traction*, 5.2.1970, p. 4

‘corporate nationality’ (though many states require the incorporation of a corporation under their laws as *one* requirement for corporate nationality).⁸⁰ Therefore, it is very likely that the ‘incorporation test’ (= incorporation + registered office) is still applicable. Thus, international tribunals would, most likely, still affirm the conformity of the ‘incorporation test’ with international law.⁸¹

For the ‘thesis scenario’ this implies that a home state can, without much risk, assert ‘corporate nationality’ of a TNC entity, if that entity is incorporated under its laws and has its registered office (for example the headquarter) in that state.

4.2.2 ‘Different and Further Links’

However, as the ICJ also noticed in its *Barcelona Traction* decision, some states consider corporate entities only as their nationals when “different or further links” exist than incorporation and a registered office.⁸² Attention is to be given to the distinction the ICJ drew between states asserting nationality based on ‘*different*’ links (i.e. on a different ‘base’ than incorporation), and states requiring merely ‘*further*’ links (i.e. incorporation remains the ‘base’, but additional criteria exist). Surveys in the field of diplomatic protection indicate that many states use the ‘incorporation test’ as ‘base’ but require ‘*further* genuine links’ to their territory, such as for example the ‘seat of the management’ or the place of ‘economic control’.⁸³ Other states, however, assert corporate nationality (at least for the purpose of diplomatic protection) on ‘*different*’ bases than the ‘incorporation test’ such as other genuine links, for example the seat. (i.e. they assert ‘corporate nationality’ even when a corporation is not incorporated under their laws and/or has its registered seat not on its territory).⁸⁴

⁸⁰ Lee (2006), p. 252ff

⁸¹ Likewise: Bridge (1984), p. 11f, *Extraterritorial Applications of law and responses thereto*, p. 155

⁸² ICJ, *Barcelona Traction*, 5.2.1970, p. 42

⁸³ Lee (2006), p. 252ff with further details

⁸⁴ Lee (2006), p. 252ff

‘Further Links’:

The ICJ did not explicitly decide on the question whether it is in conformity with international law if states base ‘corporate nationality’ on the ‘incorporation test’ but require *further* links to the state. It found such state practice neither to be prohibited nor permitted by international law, but merely concluded that none of such approaches (‘tests’) gained general acceptance and could, thus, be considered as customary law. However, wording and reasoning used by the ICJ in the *Barcelona Traction* case suggest that local incorporation and registered office are - according to the ‘traditional rule’ - only the required minimum-criteria for nationality assertions on the international plane. There is no indication in the jurisdiction of the ICJ suggesting that state practice requiring further links than local incorporation and registered office would not comply with international law.

For the ‘thesis scenario’ this implies that there is every indication that international law allows home states to assert ‘corporate nationality’ based on further criteria than local incorporation and registered office (as long as these criteria are additional to the ‘incorporation’ test).

‘Different links’:

However, for the ‘thesis scenario’ it is very important whether international law permits nationality assertions based on ‘different links’ than the ‘incorporation test link’, such as the seat of a corporation (for example of a TNC parent company which is not registered in the same state), or on the fact that the majority or a substantial portion of the shares of a corporation are owned by nationals of a state (applicable for example to ‘foreign subsidiaries’ of a TNC). Presently it is very uncertain whether ‘corporate nationality’ based on such criteria is permitted under international law.⁸⁵ In its *Barcelona Traction* case the ICJ decided explicitly (at least for the purpose of diplomatic protection) that a state cannot base nationality assertions on the fact that its

⁸⁵ Buergenthal/Murphy (2007), p. 218

nationals own the majority or a substantial portion of the shares of a corporation.⁸⁶ In addition, it found that a deviation from the ‘incorporation test’ as a minimum-requirement was only permissible once another ‘test’ (i.e. ‘genuine link’) has found general acceptance on the international plane.

However, present state practice provides not much indication for the assumption that a generally accepted ‘test’ had occurred in the meantime according to which ‘corporate nationality’ is determined by criteria not including local incorporation and a local registered office. In particular, nationality assertions of foreign subsidiaries of nationals (i.e. based on the fact that the majority or a substantial portion of the shares of a corporation are owned by nationals of a state) have not found general acceptance in state practice, but have been controversial. Especially the practice of the U.S. to assert ‘corporate nationality’ of companies which are incorporated outside the U.S., but are owned by U.S. citizens or by a U.S. incorporated company, has caused strong diplomatic protests, in particular by European states.⁸⁷

Hence, due to the afore-mentioned circumstances there is every reason to doubt that international law would allow nationality assertions based on the fact that nationals of a state hold shares in a corporation.⁸⁸ There might be the tendency in Bilateral Investment Treaties (BIT) to allocate corporate nationality (for the purpose of giving access to ‘Foreign Direct Investment (FDI)’ arbitration) to that state in which entities or persons who control a corporation are located.⁸⁹ However, there is no indication that this tendency has already turned into a ‘generally accepted test’ of corporate nationality, or even into binding custom.⁹⁰ First, it seems that states often sign BITs in order to escape

⁸⁶ ICJ, *Barcelona Traction*, 5.2.1970, p. 46

⁸⁷ For respective U.S. practice: U.S. Third Restatements (1987), sec. § 414 [418] (2); 1979 (after the Teheran hostage affair) the U.S. froze all Iranian assets also in foreign subsidiaries of U.S. banks; 1982 ‘Soviet Pipeline Incident’; For respective diplomatic protests: Higgins (1993), p. 110; *Extraterritorial Subsidiary Jurisdiction* (1987), p. 71ff; *Extraterritorial Application of Laws and Responses Thereto* (1984), p. 217ff; Mann (1984), p. 57ff, Thompson (1983), p. 356ff, Akehurst (1974), p. 169

⁸⁸ Likewise: Bridge (1984), p. 11f

⁸⁹ Schutter (2006), p. 32; Schreuer (2005), p. 1ff, See also Art. 25 (2) (b) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, to which BIT often refer to

⁹⁰ Zerk (2006), p. 149; Lee (2006), p. 252

customary law, not to change or create it.⁹¹ And second, the nationality allocation based on the ‘place of control’ has remained limited to the particular issue of access to arbitration with regard to FDI, and has not extended to other fields where ‘corporate nationality’ is of crucial importance.

Given the fact that apparently no ‘genuine link test’ has found ‘general acceptance’ yet, it must also be doubted that international law would allow any other ‘test’ which does not include the ‘incorporation test’ as minimum requirement.⁹² However, a counter-argument might be that the Barcelona Traction jurisprudence (from which the ‘incorporation test dogma’ derives) was limited to (nationality based) diplomatic protection of a corporation, and, therefore, might not be necessarily be decisive for nationality assertions for the purpose of extraterritorial jurisdiction.⁹³

For the thesis scenario this implies that there is notable indication for the assumption that international law does not allow home states to assert ‘corporate nationality’ based on ‘tests’ that do not include the criteria: Incorporation and registered office. Thus, in particular, attempts to assert ‘corporate nationality’ (or ‘quasi-nationality’) of foreign subsidiaries are at risk of being not in conformity with international law.

4.2.3 ‘Dual Nationality’

‘Dual nationality’ (or ‘double nationality’) occurs when, at the same time, more than one state asserts nationality of an individual or a corporation. The concept of ‘dual nationality’ and its implications have been subject to many controversies on the international as well as on the domestic level. On the international level ‘dual nationality’ caused problems, has in particular in proceedings before international tribunals. In such proceedings the classical rule usually applies according to which the claimant (or the person or entity on whose behalf a state exercises diplomatic protection) may not possess the nationality of the state which is the defendant.⁹⁴ Thus,

⁹¹ Lee (2006), p. 252

⁹² Likewise: Bridge (1984), p. 11f

⁹³ Schutter (2006), p. 32

⁹⁴ Donner (1994), p. 86

problems have arisen when a claimant (or the protected person/entity) was a national of the defendant state and, at the same time, a national of another state. In such situations tribunals either rejected the claim or determined a predominant nationality by invoking concepts such as 'dominant' or 'effective' nationality.⁹⁵ However, neither tribunal decisions nor legal doctrine suggests that international law would generally prohibit 'dual nationality'. For the 'thesis scenario' this implies that in general more than one state can assert 'corporate nationality' of a TNC entity (provided they base their nationality assertions on an internationally acknowledged 'test'). However, such 'dual corporate nationality' can entail problems on the international plane, for example when the TNC entity (possessing 'dual nationality') becomes claimant (or subject to diplomatic protection) before an international tribunal, or when two home states exercise *conflicting* nationality-based extraterritorial jurisdiction with respect to the same activity of a TNC in a host state. In the latter case the right of one home state (or both) to exercise extraterritorial jurisdiction might be limited. However, due to restricted capacity this thesis will analyse only jurisdictional conflicts between the home state and the host state. Jurisdictional conflicts arising between two home states will not be discussed.

4.2.4 Conclusion

State practice, international judicature and views of scholars suggest, altogether, that international law allows a home state to assert nationality of TNC entities which are incorporated under its law and have their registered office on the territory of that home state. Thus, in the 'thesis scenario' home states can assert nationality of such *TNC parent companies* which are incorporated under their law and have their registered office on their territory. However, though still uncertain, there is severe doubts that international law allows a home states to assert nationality of *TNC parent companies* which are not incorporated and have no registered office in that home state. Likewise are home states at risk of acting in non-conformity with international law when they

⁹⁵ Donner, p. 94ff

assert nationality or 'quasi-nationality' of *foreign TNC subsidiaries* which are incorporated and 'business-active' in host states only.

5 The Right of Home States to Exercise Nationality-Based Extraterritorial Jurisdiction?

With focus on the ‘thesis scenario’ this section will analyse if and to what extent home states are allowed to exercise nationality-based extraterritorial jurisdiction over TNCs. Focus will be possible limitations deriving from the sovereignty of host states. The section will postulate that home states have asserted ‘corporate nationality’ of a TNC entity in accordance with international law. As elaborated in the previous section this applies first and foremost to *TNC parent companies* which are incorporated and have their registered office in a home state. However, the section will nevertheless often use the *general* terms ‘TNC’ and ‘TNC entity’ in order to underline that the section applies also to home states who have - though not likely to be in accordance with international law - asserted corporate nationality (or ‘quasi-nationality’) of a foreign TNC subsidiary.

5.1 ‘Activities of a National’

As elaborated in section 3.2.2, the ‘active nationality principle’ does entitle a state to regulate the activities, interests, status or relations of its nationals inside and *outside* of its territory. The main requirement for invoking the active nationality principle is the nationality of the person or corporation which is subject to the extraterritorial jurisdiction (section 3.2.2). However, a second requirement is that the particular activity, which is made subject to extraterritorial jurisdiction, is an activity of exactly *that* person or corporation.

International law does not specify the circumstances under which states can consider an activity as being the activity of exactly that corporate entity over which they want to exercise nationality-based extraterritorial jurisdiction. Therefore, the general rule applies, which already the PCIJ formulated in its *Lotus* case: With respect to

extraterritorial jurisdiction, states have “a wide measure of discretion which is only limited in certain cases by prohibitive rules [of international law]”.⁹⁶ Based hereupon, it can be concluded that home states are allowed to define (by municipal law) the circumstances under which they consider an activity to be the activity of a certain person or corporation. The only limitation deriving from the PCIJ Lotus decision is, that the concepts home states decide to use for this purpose do not conflict with *prohibitive rules of international law*, such as prohibitive rules deriving from the sovereignty of the host states. The limitations of extraterritorial jurisdiction by such ‘prohibitive rules’ will be analysed in detail in section 5.2. However, this thesis suggests, that - beside respecting prohibitive rules - states are also under the obligation to base extraterritorial jurisdiction on a ‘reasonable link’ between the activities which are subject to the extraterritorial jurisdiction and the ‘national’, over which they exercise jurisdiction in the particular case.

When home states choose the ‘direct approach’ (i.e. exercise jurisdiction directly over a foreign TNC subsidiary) the requirement of a ‘reasonable link’ is less of a problem, since subject to the jurisdiction are the business activities of exactly that foreign subsidiary. The same applies to the ‘direct parent liability approach’: Here jurisdiction is exercised over the TNC parent, and the activity subject to the jurisdiction is the conduct of exactly that parent (in its role as a shareholder who has certain due diligence obligations with respect to its subsidiaries’ activities). However, the situation is more unclear when home states pursue the ‘attribution approach’ (i.e. exercise extraterritorial jurisdiction over a TNC parent company and attribute conduct of the subsidiary to the parent). In this case the activities subject to the jurisdiction (exercised over the TNC parent) are *prima facie* activities of the subsidiary, which is a legally autonomous entity whose activities are not automatically activities of its parent company (doctrine of ‘limited liability of shareholders’). However, most concepts used within the ‘attribution approach’ (such as the ‘piercing the corporate veil approach’) are limited to situations in which the parent is exercising such extreme control over its

⁹⁶ PCIJ, *Lotus*, 7.9.1927, p. 19

subsidiary, that the latter cannot be said to have any will of existence of its own, and that treating the parent and the subsidiary as separate entities would cause inequitable results.⁹⁷ Those concepts are based on the notion that the activities which *seem* to be conducted by the subsidiary, actually are - due to the extraordinary level of control - activities of the parent. The high level of control serves as '*reasonable link*'. Thus, even for the 'attribution approach' it can be argued that the activities subject to the extraterritorial jurisdiction are actually activities of the TNC parent company over which the jurisdiction is exercised.

In addition, this thesis advocates a dynamic interpretation of the 'active nationality principle' when applied to TNCs: Whereas individual persons act usually 'in person', legal entities such as TNCs have various ways of acting. One (very common) way is setting up subsidiaries to conduct business in a certain sector or region. Even though such subsidiaries are legally autonomous corporate entities, they nevertheless conduct their business in the interest and under the control of their parent company. In addition, parent companies usually receive the profit gained by their subsidiaries. Hence, such subsidiaries are in fact not really acting independently and for their own account.

5.2 Limitations of Nationality-Based Extraterritorial Jurisdiction

5.2.1 Scenarios

For the purpose of determining the limitations of extraterritorial jurisdiction in the 'thesis scenario' three different sub-scenarios will be considered:

- 'Congruent standards': The legal standards applied extraterritorially are congruent with the host state's legal standards.
- 'Lower standards': The host state's legal standards are lower than the legal standards applied extraterritorially (but the standards do not conflict in such a way that only one of them can be met).

⁹⁷ Schutter (2006), p. 37

- *'Conflicting standards'*: The legal standards applied extraterritorially conflict, inevitably, with the host state's legal standards (i.e. meeting extraterritorially applied standards leads to a violation of host state standards).

With potential conflicts with the sovereignty of host states in mind, a further distinction in two categories seems advisable (for elaboration on the term 'political choice' and on the scenarios 'lacking capacity', 'lacking willingness' and 'lacking interest' see section 2.3):

- *The extraterritorially applied standards harmonise with the 'political choices' of the host state (i.e. with its law and policies):*

This category includes cases of 'congruent standards' in which the (congruent) standards are also enforced by the host state. In this case the extraterritorial jurisdiction is fully congruent with the law and policy of the home state, and thus, with its 'political choices'.

Likewise included are cases of 'lacking capacity', i.e. (1) 'congruent standards' exist (as expression of the 'political choice' of the host state) but the host state lacks the capacity to enforce them – or (2) 'lower standards' exist but are no expression of a 'political choice', on the contrary, the host state is politically motivated to require stricter standards (= 'congruent standards') but solely lacks the capacity to set up (and enforce) such standards. In these two cases the 'political motivation' (i.e. the 'political choices'; = the policies) of home and host state can be considered congruent.

This thesis suggests, furthermore, to include also cases in which either the non-enforcement of existing 'congruent standards' or the maintaining of 'lower standards' is motivated solely by 'lacking interest' of the host state in enforcing corporate human rights standards. In such cases the 'lacking

interest' does not express a 'political choice' (i.e. a policy) of the host state with which extraterritorial jurisdiction could be in disharmony.

This category of scenarios will be subject to section 5.3.

- *The extraterritorially applied standards **conflict** with the 'political choices' of the host state (i.e. with its law or policies):*

This includes cases of 'congruent standards' in which the host state does not enforce the existing (congruent) standards due to 'lacking willingness' (i.e. as expression of an explicit 'political choice' not to enforce them). Here any attempt of extraterritorial jurisdiction to enforce standards (which are congruent with the existing but not enforced standards of the host state) would thwart the 'political decision' of the host state not to enforce its legal standards, and thus, would conflict with its policy.

Likewise - and for the same reason - are cases of 'lower standards' included in which the host state has 'lacking willingness' to set up stricter corporate human rights standards (i.e. the host state chooses explicitly not to have stricter standards, for example in order to attract foreign investment).

Included are furthermore all cases of 'conflicting standards'. Legal standards are always an expression of a 'political choice', thus, extraterritorial jurisdiction which inevitably conflicts with the host state's legal standards always implies a conflict with the host state's explicit 'political choices' i.e. with its policy.

This category of scenarios will be subject to section 5.4.

5.2.2 ‘Prohibitive Rules’

Undisputed, the nationality principle does not allow unlimited extraterritorial jurisdiction, but is limited by international law.⁹⁸ However, there is less clarity on content and details of the limitations. The PCIJ stated in its *Lotus* case with respect to extraterritorial jurisdiction, that states have “a wide measure of discretion which is only limited in certain cases by prohibitive rules [of international law]”.⁹⁹ Two principles of international law which can amount to ‘prohibitive rules’ are:¹⁰⁰

- The ‘*principle of sovereign equality of states* (from here on referred to as ‘*sovereignty principle*’) as laid down in Art. 2 (1) UN Charta and in the 6th principle of the Friendly Relations Declaration. According to the latter it includes: “Each state has the right freely to choose and develop its political, social, economical and cultural systems”.
- The ‘*principle of non-intervention*’: It is part of customary international law and includes that “no state [...] has the right to intervene, directly or indirectly, for any reason whatever, in the internal [...] affairs of any other state [...]” and “every State has an inalienable right to choose its political, economic, social and cultural development without interference in any form by another State”.¹⁰¹

The content of the principles sovereignty and non-intervention has remained rather vague.¹⁰² The principles are closely linked with each other. With particular reference to their above-mentioned content (as it is formulated in the Friendly Relations Declaration and ICJ *Nicaragua* decision) the tentative conclusion can be drawn that *extraterritorial jurisdiction* must not:

⁹⁸ PCIJ, *Lotus*, 7.9.1927, p. 19; Buergenthal/Murphy (2007), p. 224f; Watson (1992), p. 67; *Extra-Territorial Application of Laws and Responses Thereto*, p. 6, Mann (1984), p. 59; Bowett (1983), p.7; 15ffb Akehurst (1974), p. 179; 188f, Mann (1964), p. 90

⁹⁹ PCIJ, *Lotus*, 7.9.1927, p. 19

¹⁰⁰ Bowett (1983), p. 15f

¹⁰¹ ICJ, *Nicaragua*, 27.6.1986, p. 108; 3rd Principle in the Friendly Relations Declaration

¹⁰² Bowett (1983), p. 17

- ‘interfere’¹⁰³
- with the ‘political choices’ a host state has made¹⁰⁴ with respect to its “political, social, economical or cultural systems and their development”.¹⁰⁵

‘Political choices’: ‘Political choices’ of a state are conscious political decisions of that state, they are made by the decisions makers in charge, and are based on a decision making process (which does not necessarily need to be democratic). They can find their expression in legal standards, but can also be expressed by other means such as in political statements or political programs. This thesis advocated that ‘lacking capacity’ and ‘lacking interest’ are no expression of political choices (see section 2.3).

‘Political, social, economical or cultural systems and their development’: The precise content of *‘political, social, economical or cultural systems and their development’* has remained very vague. However, this thesis suggests that binding corporate standards prescribed by a state, and other explicit ‘political choices’ of a state¹⁰⁶ which regard corporate standards (for example the choice not to prescribe or enforce any corporate standards), are *‘political choices’ with respect to the ‘political, social, economical or cultural system’ of that state*, because: Binding corporate standards are without doubt a determinant for the ‘economical system’ of a state. In addition, binding corporate standards (i.e. the ‘freedom’ granted to corporations) is also a determinant for the ‘political system’ of a state, since it is an expression of how ‘liberal’ a state’s system is. ‘Economic liberalism’ is, today, considered a political philosophy.

Interference: When exactly extraterritorial measures *‘interfere’* with the ‘political choices’ of a state, has likewise remained vague. According to the classical doctrine on

¹⁰³ Principle 6 Friendly Relations Declaration: *“freely to choose [...]”*; Principle 3 Friendly Relations Declaration: *“no state [...] has the right to intervene [...]”*

¹⁰⁴ Principle 6 Friendly Relations Declaration: *“the right freely to choose [...]”*; Principle 3 Friendly Relations Declaration: *“an inalienable right to choose [...]”*

¹⁰⁵ Principle 3 and 6 Friendly Relations Declaration; ICJ, *Nicaragua*, Judgement 27.6.1986, p. 108

¹⁰⁶ ‘Explicit political choices’ do not necessarily need to be expressed by law, but can also be expressed by other means such as political statements or formulated political programs

international jurisdiction, international law requires that legal standards which are applied extraterritorially on activities conducted on the territory of another state:

- do not inevitably conflict with the *legal standards* of that state¹⁰⁷
- do not thwart the *policy* of that state¹⁰⁸

Based hereupon, this thesis concludes with respect to possible ‘interferences’ in the ‘thesis scenario’:

- Extraterritorial measures of home states enforcing a situation (in a host state) which inevitably conflicts with the legal standards of that host state, ‘interfere’ with the host state’s ‘political choice’ contained in its legal standards. This applies to all ‘conflicting standards’ scenarios.
- Extraterritorial measures prohibiting activities (in a host state) which are - according to explicit policies of that host state - evidently conceived as permitted, or which are at least intentionally tolerated, ‘interfere’ with the host state’s ‘political choice’: In such cases extraterritorial jurisdiction thwarts the explicit policy of that host state not to have stricter corporate standards. This applies to all cases gathered in the category “extraterritorially applied standards *conflict* with the ‘political choices’ of the host state (i.e. with its law or policies)”. For a definition of the category see section 5.2.1).
- All scenarios of the category “extraterritorially applied standards *harmonise* with the ‘political choices’ of the host state (i.e. with its law and policies) do not ‘interfere’ with ‘political choices’ of the host state. For a definition of the category see section 5.2.1).

¹⁰⁷ *Extra-Territorial Application of Law and Responses Thereto*, p. 155; Mann (1984), p. 59; Bowett (1983), p. 8; Mann (1964), p. 90

¹⁰⁸ Akehurst (1974), p. 189

5.2.3 'Reasonableness'

Besides 'prohibitive rules', it is often suggested that extraterritorial jurisdiction would also be unlawful under international law if it is '*unreasonable*'.¹⁰⁹ However, it is unclear whether the advocates of this 'rule of reason' consider the 'unreasonableness of extraterritorial jurisdiction' to be the only limitation by international law,¹¹⁰ or whether the 'reasonableness' is supposed to be considered in addition to 'prohibitive rules'. Due to lacking capacity, this thesis will be based on the notion that the 'reasonableness' is a criterion which has to be considered in addition to possible 'prohibitive rules'

What factors exactly determine whether extraterritorial jurisdiction is '*reasonable*' is unclear. According to the U.S. Third Restatements (1987), sec. 403 [2] the relevant factors for determining 'reasonableness' include (amongst other factors):

- The connections (such as nationality) between the regulating state and the person responsible for the activity.
- The importance of the regulation to the international political, legal or economic system.

With respect to such kinds of extraterritorial jurisdiction over parent companies, which directly or indirectly, address activities of *foreign subsidiaries* of the parent companies, the U.S. Third Restatements (1987) state in sec. 414 [418] that extraterritorial jurisdiction is only in exceptional cases '*reasonable*', depending on (amongst several criteria):

- Whether the regulation is in potential or actual *conflict with the law or policy* of the state where the subsidiary is established.

¹⁰⁹ U.S. Third Restatements (1987), sec. 403 and 414[418]; Buergenthal/Murphy (2007), p. 224f; Mann (1984), p. 28; Bowett (1983), p. 18ff

¹¹⁰ As the U.S. Third Restatements (1987) seem to imply

5.2.4 Human Rights Context

Furthermore, when determining the limitations of extraterritorial jurisdiction in the ‘thesis scenario’, it is necessary to be aware of the human rights context: Home states aim at enforcement of internationally acknowledged ‘corporate human rights standards’ by extraterritorial jurisdiction. This human rights background needs to be taken into consideration when analysing the limitations deriving from international law (see particularly section 5.4.1 – 5.4.5).

5.3 The Extraterritorially Applied Standards *Harmonise* with the ‘Political Choices’ (i.e. Law and Policies) of the Host State

The application of ‘extraterritorial standards which *harmonise* with the ‘political choices of the host state’ (for elaboration of this category see section 5.2.1) can be limited if this kind of extraterritorial jurisdiction does not comply with the principles of sovereignty and non-intervention (‘prohibitive rules’), or is ‘unreasonable’.

As discussed in section 5.2.2, the principles of sovereignty and non-intervention imply that extraterritorial jurisdiction must not ‘interfere’ with the ‘political choices’ a host state has made with respect to its “political, social, economical or cultural systems and their development”. It was also already elaborated in section 5.2.2 that all *scenarios in which extraterritorial measures of home states harmonise with the ‘political choices’ (i.e. law and explicit policies) of the host state do not ‘interfere’ with ‘political choices’ the host state has made with respect to its “political, social, economical or cultural systems and their development”. Thus, these scenarios are in conformity with the principles of sovereignty and non-intervention. Furthermore, these scenarios of extraterritorial jurisdiction can also be considered as being ‘reasonable’: As already stated in section 5.2.3, two factors for determining the reasonableness of extraterritorial jurisdiction are ‘*the importance of the [extraterritorial] regulation to the international political, legal or economic system*’, and ‘*whether the regulation is in actual or potential conflict with the law or the policy of the state where a subsidiary is established*’. As already discussed, the scenarios subject to this section are not in ‘actual or potential conflict with the law or the policy’ of a host state. Moreover, it can be*

argued that the extraterritorial jurisdiction is of great importance to the ‘international political system’, since it aims at the enforcement of internationally acknowledged human rights standards whose values are considered to be universal and of major importance to the international community.

Conclusion: According to the interpretative approach of this thesis, all scenarios in which the extraterritorial application of corporate standards *harmonise* with the ‘political choices’ of the host state, can be considered to be in conformity with international law.

5.4 The Extraterritorially Applied Standards *Conflict* with the ‘Political Choices’ (i.e. Law and Policies) of the Host State

Limitations of those scenarios in which the extraterritorial application of legal standards *conflicts* with ‘political choices’ of a host state (for elaboration on this category see section 5.2.1) can as well derive from the principles of sovereignty and non-intervention, and from the ‘rule of reason’. As elaborated in section 5.2.2, the principles of sovereignty and non-intervention imply that extraterritorial jurisdiction must not ‘interfere’ with the ‘political choices’ a host state has made with respect to its “political, social, economical or cultural systems and their development”. It was also already elaborated in section 5.2.2 that all scenarios in which “*extraterritorially applied standards conflict with the ‘political choices’ of the host state (i.e. with its law or policies)*” - prima facie - ‘interfere’ with ‘political choices’ a host state has made with respect to its “political, social, economical or cultural systems and their development”, in particular with its choice not to establish (or not to enforce) stricter corporate standards. Hence, the classical doctrine on international jurisdiction would tend to consider the scenarios subject to this section to be - prima facie - a violation of international law and, thus, impermissible.

However, the classical doctrine on international jurisdiction applies to extraterritorial jurisdiction in general and does not take any particularities into consideration that arise from the human rights context of extraterritorial jurisdiction in the ‘thesis scenario’

(see section 5.2.4). Hence, it needs to be analysed if and to what extent host states can invoke the principles of sovereignty and non-intervention in cases where extraterritorial jurisdiction is *prima facie* illegal (because it conflicts with the host state's law or policy) but aims at enforcement of internationally acknowledged human rights standards. The following subsection will, therefore, discuss whether the question of 'permissibility of extraterritorial jurisdiction' needs to be reconsidered when extraterritorial jurisdiction aims at the enforcement of internationally acknowledged human rights standards. Due to the limited capacity of this thesis, the thesis will assume that the human rights standards which the home state enforces, are congruent with the human rights standards which the host state is obliged to protect within its territory. Such positive obligations of host states can either derive from human rights treaties the host state is party to (in this thesis limited to ICCPR and ICESCR) or from customary human rights law (in particular jus cogens), for details see section 2.1 and 2.2.

5.4.1 The Principles of Sovereignty and Non-Intervention in the Context of Human Rights

The principles of sovereignty and non-intervention are limited in their application to certain matters which - under international law - are considered 'internal affairs' of a state.¹¹¹ 'Internal affairs' are matters in which *a state is not bound to any rules of international law*,¹¹² and, thus, has exclusive jurisdiction, and no other state is allowed to intervene.¹¹³ The concept of 'internal affairs' is a relative one, since the crucial factor for determining the scope of 'internal affairs' is whether a matter is subject to international law. However, international law has changed enormously and has extended into many areas which in former times had been considered 'internal affairs'. In the last 60 years international law has also extended into the field of human rights. Hence, matters involving human rights are no longer purely internal matters.

¹¹¹ ICJ, *Nicaragua*, 27.6.1986, p. 108; 3rd Principle in the Friendly Relations Declaration

¹¹² Brownlie (2003), p. 291

¹¹³ Brownlie (2003), p. 290ff; Shaw (2003), p. 574ff

In the 'thesis scenario' extraterritorial jurisdiction aims at enforcement of such human rights standards which a host state is - by international law - obliged to assure within its territory. Hence, the extraterritorial jurisdiction does not address matters which are beyond reach of international law. Thus, the matters the extraterritorial jurisdiction addresses (corporate human rights standards in a host state) are not purely 'internal affairs', so that the host state can not fully invoke the principles of sovereignty and non-intervention. However, international law does not provide a clear-cut answer to the question to which extent host states nevertheless can invoke these two principles as 'prohibitive rules' limiting extraterritorial jurisdiction of home states.

This thesis suggests that the right of (host) states to invoke the principles of sovereignty and of non-intervention in matters that are not purely 'internal affairs', is not completely nullified, but limited. A complete deprivation of the right to invoke the principles of sovereignty and non-intervention would misconceive the utmost importance of the concept of sovereignty within the community of states, and furthermore undermine the elaborate concepts and mechanisms international law provides for cases in which states are in breach with international law. However, to which extent is the right of states to invoke the principles of sovereignty and non-intervention, in matters that are not purely 'internal affairs', limited? The thesis suggests two different approaches:

- Approach 1: In matters which are not purely 'internal affairs' but subject to international law, states have - according to approach 1 - to accept such 'interferences' which the international law (to which they have consented to - explicitly provides for (for example in human rights law or in the law on state responsibility). However, this approach strongly focuses on territorial sovereignty of the host states, and neglects other sovereignty-related interests such as the interest of home states in exercising jurisdiction over their nationals. Such a clear predominance of territorial sovereignty over other sovereignty-related aspects is not reflected in

international law. Hence, this thesis will suggest another approach ('approach 2'). The next sections will nevertheless - as required by 'approach 1' - analyse whether international human rights law, or the law on state responsibility, might allow home states to enforce internationally acknowledged human rights by nationality-based extraterritorial jurisdiction (see sections 5.4.2 – 5.4.4).

- Approach 2: This approach is likewise based on the general notion that the sovereignty of a state is limited to that extent to which the state has subordinated matters to international law. Thus, it can be argued, that by consenting to international rules on a particular matter states have subordinated their sovereignty (and, thus, also their right to exclusive jurisdiction on that matter) to the particular content of the international law governing this matter. Hence, it seems - at least as a 'thought experiment' - possible to argue that, as a consequence, states lose the right to invoke (on the international plane) any domestic law or policy on such a matter if the domestic law or policy is not in conformity with the human obligations standards the state has consented to. Thus, international standards can, on the international plane, 'override' domestic law and policies. This approach does neither turn the international standards into law directly applicable within that state, nor does it imply that the state has to tolerate any kind of intervention by other states. The effect the 'internationalisation' of a matter has, is solely limited to the deprivation of the right to invoke certain domestic laws or policies on the international plane, be it before an international tribunal, or with respect to extraterritorial jurisdiction other states are (according to internationally acknowledged 'bases' for extraterritorial jurisdiction) entitled to exercise. For the 'thesis scenario' (in particular for those scenarios in which the extraterritorial application of legal standards *conflicts* with the law or policy of a host state) this implies: When home states enforce exactly those human rights standards which a host is by international law obliged

to ensure, the host state cannot invoke any domestic law or policies which require, allow or tolerate lower human rights standards. I.e. with regard to nationality-based extraterritorial jurisdiction of home states, a host state's domestic law and policy which do not meet its international obligations (and therefore conflict with the extraterritorial jurisdiction of the home state) can be considered as if it would not exist. In these cases, scenarios of extraterritorial jurisdictions which *de facto conflict* with the law or policy of a host state, can - with respect to the principles of sovereignty and non-intervention - be treated the same way as the scenarios in which extraterritorial jurisdiction *harmonises* with the host state's law and policy (see section 5.3).

In conclusion: 'Corporate human rights standards' within the territory of host states are not purely 'internal affairs' of the host states, since host states are by international human rights law, obliged to ensure certain 'corporate human rights standards'. Therefore, host states cannot fully invoke the principles of sovereignty and non-intervention when extraterritorial jurisdiction of home states aims at enforcement of 'corporate human rights standards'. To which extent the right of host states to invoke the principles of sovereignty and non-intervention is limited is uncertain. One could argue that host states only have to tolerate nationality-based extraterritorial jurisdiction if this is provided for in international human rights law, or in the law on state responsibility. However, this thesis argues for another approach, according to which host states are deprived of their right to invoke (on the international plane) such domestic law and policy that are not in conformity with its international human rights obligations (and therefore conflict with the extraterritorial jurisdiction of the home state).

5.4.2 Rights of Home States under Human Rights Law

With a continued focus on the scenarios in which extraterritorial jurisdiction conflicts with the law or policy of a host state, and thus *primaefacie* disregards the principles of sovereignty and non-intervention: This section will discuss whether human rights law

contains a right of home states to protect the human rights of individuals in host states by means of nationality-based *extraterritorial* jurisdiction, *even in scenarios in which the extraterritorially applied standards conflict with the law or policy of host states*. The sources analysed will be (for the purpose of this thesis limited to):

- ICCPR
- ICESCR
- Customary human rights law

ICCPR and ICESCR:

None of the two covenants contains a particular provision explicitly providing or confirming a *right* of states parties to protect human rights of individuals outside their territory or jurisdiction. The covenants' conceptual approach is it to establish *rights of individuals and peoples* ('human rights') and set up corresponding *obligations for states*, in particular the (positive) obligation to prevent (and if appropriate punish) human rights abuses by private actors such as TNCs (see section 2.1). They do not formulate *rights of states*. However, if the mentioned positive *obligations* of (home) states would extend to human rights of individuals and people outside their territory (such as to individuals located in host states), this might imply their entitlement to take up extraterritorial measures such as extraterritorial jurisdiction. Hence, it needs to be analysed whether the positive obligations of (home) states contained in the two covenants extend extraterritorially:

- ICCPR: Art. 2 (1) ICCPR states: "Each State Party [...] undertakes to respect and to ensure to all *individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [...]" (emphasis added). The ordinary meaning of the words suggests that the obligation of each state is clearly limited to the rights of individuals which are located "within in its territory and are subject to its jurisdiction". What exactly that means has been debated much. An extraterritorial extension of a state's positive obligations has been

suggested for situations where a state exercises ‘effective control over foreign territory’ (for example in occupied territories), or when state agents or other state organs act abroad.¹¹⁴ However, the ‘thesis scenario’ is clearly different from these two cases: First, the individuals whose human rights are to be protected are located within the territory of the host state, which is not under any ‘effective control’ of any other state. Second, the home states have (usually) no jurisdiction over the individuals who are located in a host state, neither territorial nor nationality-based jurisdiction (the exceptional cases that nationals of the home state are located in the host state will not be discussed). The fact that a state party might have nationality-based jurisdiction over a potential perpetrator (such as TNCs) is not reflected in the ICCPR. Finally, the potential human rights abuses are also not committed by organs or agents of a home states, but by private actors over which the homes states has only very limited control.

In conclusion, in the ‘thesis scenario the ICCPR cannot be interpreted as extending the (positive) obligations of home states to the individuals located in host states.

- ICESCR: The ICESCR does not contain a jurisdictional provision. However, Art. 2 (1) ICESCR states: “Each State Party [...] undertakes to take steps, individually and through *international assistance and cooperation*, [...] to achieving progressively the full realization of the [covenants] rights [...]” (emphasis added). A literal interpretation of the ICESCR shows: Neither Art. 2 (1) nor any other provision of the ICESCR limits the “realization of the rights” (and the corresponding positive obligations of state parties) to individuals located within the

¹¹⁴ UN Human Rights Committee, General Comment No. 31, par. 10; *Extraterritorial Application of Human Rights Treaties* (2004), p. 49ff

territory of a state party.¹¹⁵ However, Art. 2 (1) ICESCR gives likewise no indication that states parties were obliged to ‘undertake steps’ for realising the ICESCR rights of individuals located outside their own territory. Hence, the ICESCR remains ambiguous with respect to the territorial scope of states’ obligations.

In case a treaty is ambiguous Art. 29 VCLT suggests a restrictive interpretation: “Unless a different intention appears from the treaty, or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” Following this suggestion, the state obligations under the ICESCR would not extend to individuals outside the territory of a state party.

However, the Committee on Economic, Social and Cultural Rights (CESCR) - though it did not address the territorial scope of the ICESCR in general - seems to suggest a broader interpretation of the covenant (at least with respect to certain rights). Regarding the right to health (Art. 12 ICESCR) it stated: “*States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law*”.¹¹⁶ A similar statement exists with respect to the right to water.¹¹⁷

In conclusion, It is uncertain whether the positive ICESCR-obligations of home states have extraterritorial scope.¹¹⁸ However, supported by the aforementioned views of the CESCR an extraterritorial scope can

¹¹⁵ *Extraterritorial Application of Human Rights Treaties* (2004), p. 203ff

¹¹⁶ CESCR, General Comment No. 14, par. 39

¹¹⁷ CESCR, General Comment No. 15, par. 31

¹¹⁸ Schutter (2006), p. 18ff; *Extraterritorial Application of Human Rights Treaties* (2004), p. 203ff

be constructed. But even when constructing an extraterritorial scope, any extraterritorial measures taken by a state party must be (as highlighted by the CESCR) “*in accordance with the Charter of the United Nations and applicable international law*”.

In Conclusion: The positive obligations of home states under the ICCPR do not extend extraterritorially. It can, therefore, not be argued that home states were allowed to exercise of nationality-based extraterritorial jurisdiction in order to meet extraterritorial obligations under the ICCPR. With regard to the positive ICESCR-obligations of home states an extraterritorial scope can be constructed. However, as the CESCR highlighted, the extraterritorial measures taken in order to meet the extraterritorial obligations must comply with the “applicable international law”. Hence, the extraterritorial scope of home states’ positive ICESCR-obligations cannot be used to redefine the limitations international law imposes on extraterritorial jurisdiction in scenarios in which the extraterritorially applied standards conflict with the law or policy of host states.

Customary Human Rights Law (in particular jus cogens law):

‘Ordinary customary law’: A ‘customary right’ of states to exercise nationality-based extraterritorial jurisdiction in order to protect the human rights in another state, would only exist if that would be subject to (‘*opinio juris*’ based) *widespread and consistent state practice*. However, presently there is no sufficient evidence for the existence of such state practice: States have in general remained rather reluctant to exercise nationality-based extraterritorial jurisdiction (common law states have for example been very reluctant to nationality-based extraterritorial criminal jurisdiction)¹¹⁹. And states have even been especially reluctant to apply legal standards extraterritorially if these would conflict with the law or policy of the other state concerned (a number of states which exercise extraterritorial criminal jurisdiction over nationals abroad even require proof that the committed act is also criminal under the ‘*lex loci*’)¹²⁰. Some treaties

¹¹⁹ See footnote 65

¹²⁰ Blakesley/Stigall (2004), p. 123; Akehurst (1974), p. 156

oblige the ‘states parties’ to exercise extraterritorial jurisdiction over their nationals with respect to certain crimes.¹²¹ However, there is no sufficient evidence, that this reflects (or has created) a rule of customary law allowing states to exercise nationality based extraterritorial jurisdiction even in cases where this would conflict with the law or policy of the other state.

Jus cogens: Several arguments support the assumption that home states always (even in scenarios where extraterritorial jurisdiction conflicts with the law or policy of a host state) have the right to exercise nationality-based extraterritorial jurisdiction when they enforce jus cogens rules by that (for a list of jus cogens rules see section 2.2.1). This is in particular the case when a TNC (potentially) violates jus cogens rules (for example the prohibition on slavery), but the host state explicitly allows or tolerates it by its law or policy (be it by not prohibiting it or by not enforcing existing prohibitions). In this situation it can be argued that the jus cogens character of the violated norm ‘overrides’ the law and policy of the host state (with which the extraterritorial jurisdiction would conflict). The main implication of the concept of jus cogens is its peremptory character.¹²² As highlighted by the ICTY, the peremptory character of jus cogens norms has also the effect to “de-legitimise any [domestic] legislative, administrative or judicial act authorising [violations of jus cogens norms]”. Such domestic acts are not “accorded international legal recognition”.¹²³ Applying this ‘de-legitimising’ effect to the ‘thesis scenario’ has the consequence that a host state’s domestic law or policy which directly or indirectly ‘authorises’ jus cogens violations by TNCs, is denied ‘international recognition’. This implies that the host state cannot invoke such domestic law and policies on the international plane.

An additional argument for the right to unlimitedly exercise nationality-based extraterritorial jurisdiction (enforcing jus cogens norms) derives from the jus cogens

¹²¹ For example Art. 5 (1) b Convention against Torture, Art. 7 (1) c Convention for the Suppression of Financing of Terrorism, Art. 5 (1) b Convention against the taking of hostages or Art. 15 (2) b UN Convention against Transnational Organized Crime

¹²² See footnote 45 and 46

¹²³ ICYT, *Furundzija*, 10.12.1998, par. 153ff

implication that the jus cogens character of a norm entails universal jurisdiction. Universal jurisdiction implies that all states are allowed to exercise jurisdiction with respect to jus cogens violations, irrespective of the place where a jus cogens rule was violated and irrespective of the nationality of perpetrator or victim.¹²⁴ Hence it can be argued, a fortiori, that states must be entitled to exercise *nationality-based* extraterritorial jurisdiction in cases where they would even be allowed to exercise *universal* jurisdiction (which does not even require a link such as nationality). However, this *a fortiori argument* is dependent on (and limited to) the exact scope of the universal jurisdiction the jus cogens character of a norm entails. Of particular relevance is the question: Does the jus cogens character of a norm entail universal jurisdiction only for punitive/repressive measures (in particular, in the field of criminal law and the law of tort) or also for preventive action. Since this ‘a fortiori argumentation’ is only of additional character (and since the capacity of this thesis is highly limited) a comprehensive analysis of the exact scope of universal jurisdiction cannot be provided. However, it is at least internationally acknowledged that universal jurisdiction is permitted in the field of criminal law.¹²⁵ However, international law provides only little indication for the assumption that the right to universal jurisdiction might also include other punitive/repressive measures of extraterritorial legislative jurisdiction, such as for example tort claims.¹²⁶ Likewise, there is almost no indication in international jurisprudence, state practice or legal doctrine, suggesting that the right to universal jurisdiction would extend to preventive measures. Hence, presently the additional a fortiori argument supports only a right of every (home) state to unlimited extraterritorial jurisdiction in the field of criminal law.

Conclusion: There is no evidence for ‘ordinary customary law’ allowing for unlimited nationality-based extraterritorial jurisdiction in the field of human rights. However, an unlimited right to nationality-based extraterritorial jurisdiction can be constructed under the concept of jus cogens. Accordingly, home states are allowed to enforce jus cogens

¹²⁴ ICYT, *Furundzija*, 10.12.1998, par. 156

¹²⁵ ICYT, *Furundzija*, 10.12.1998, par. 156

¹²⁶ Parker (1989), p. 456

rules by nationality-based extraterritorial jurisdiction even in scenarios where this would conflict with domestic law or policies of the host state.

5.4.3 Human Rights Obligations of Host States and the Law on State Responsibility

This section will analyse if the law on state responsibility gives home states the right to use nationality-based extraterritorial jurisdiction, in cases where a host state is not complying with its (positive) obligation to prevent private actor abuses on its territory. As discussed in sections 2.1.2 and 2.2.2, positive obligations of host states derive from the ICCPR, ICESCR, and (as advocated by this thesis) from jus cogens. In absentia of any special non-compliance mechanisms the consequences of non-compliance with these positive obligations are determined by the secondary rules on state responsibility, of whom many are codified in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (in this section all references to articles are referring to these ILC Draft Articles).

Beside the consequences of non-compliance listed in Art. 28 ff (duty of cessation, non-repetition and reparation), the non-complying state has to tolerate countermeasures by 'injured states' (Art. 49ff). Art. 42 defines 'injured states'. In the 'thesis scenario' a home state is very unlikely to be an 'injured state' since the positive obligations of the host state are not - as required by Art. 42 (a) - owed individually to the home state, but to a group of states (for example to the state parties of the ICCPR and ICESCR) or even to the community of states as a whole. According to Art. 42 (b) home states could, furthermore, be 'insured states' if they were 'specially affected' by the non-compliance of the host state, or if the non-compliance of the host state was of 'such a character as radically to change the position of all the other states to which the obligation is owed to with respect to the further performance of the obligation'. However, none of these two requirements seem to be fulfilled in the 'thesis scenario'. Therefore, home states are likely to be 'a state other than the injured state'. Which kind of 'reaction' the rules on state responsibility allow a 'state other than the injured state', is much debated. A 'state

other than the injured state' is allowed to invoke state responsibility (Art. 48), however, according to Art. 54 its reactions are limited to 'lawful measures', which would exclude extraterritorial jurisdiction conflicting with the principles of sovereignty and non-intervention.

However, applying the afore-mentioned considerations to the 'thesis scenario', the following conclusion can be drawn: In case a host state does not meet its positive human rights obligations the law on state responsibilities gives home states the right to take 'lawful measures' only. I.e. Home states are only allowed to exercise nationality-based extraterritorial jurisdiction which fully complies with international law. - However, even in the case that home states were (like an 'injured state') allowed to take 'countermeasures', it seems difficult (though not impossible) to argue that extraterritorial jurisdiction could be a 'countermeasure' within the meaning of Art. 49ff. Though there is no legal definition of 'countermeasures', their purpose is mainly to induce a state to comply with its obligations, Art. 49 (1). However, nationality-based extraterritorial jurisdiction over TNCs (i.e. over private entities) puts only very indirectly - if at all - pressure on the host state itself. Hence, it can be doubted that extraterritorial jurisdiction by its very nature can be characterized as a 'countermeasure'. But even if it was a 'countermeasure', it would be very difficult *in practice* to set up extraterritorial jurisdiction in a way meeting all the requirements the law on state responsibility provides for countermeasures (Art. 52f): Home states would be under obligation to: Notify host states of *any* decision to take countermeasures (i.e. exercise jurisdiction), to offer to negotiate with the host states, and to suspend the countermeasures (i.e. the jurisdiction) *immediately* when the host state meets its obligation. These requirements would make extraterritorial jurisdiction over nationals - which usually requires stability and predictability, and is supposed to be applied in an equal manner towards all nationals - almost infeasible.

Conclusion: In case the host states are not complying with their positive obligation to prevent private actor abuses of human rights, the law on state responsibility does limit home states to 'lawful measures' i.e. extraterritorial jurisdiction exercised as a tool of

‘invoking state responsibility’ must fully comply with the principles of sovereignty and non-intervention.

5.4.4 The Concept of ‘Obligations Erga Omnes’

This section analyses whether and to what extent the concept of ‘obligations erga omnes’ implies the capacity to ‘override’ the sovereignty of host states. The considerations of this section apply to situations in which home states (by extraterritorial jurisdictions) enforce human rights which are subject to erga omnes obligations of the host state.

The ICJ described ‘obligations erga omnes’ as: “obligations of a state towards the international community as a whole [...] By their very nature [they] are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection”.¹²⁷ The ILC Draft Articles on State Responsibility refer likewise to the concept of erga omnes in Art. 48 (1) (b). Which particular ‘human rights obligations’ have erga omnes character, is controversially debated: The ICJ considered the following norms as having erga omnes character: The ‘outlawing of genocide’, ‘the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination’ and ‘the obligation to respect the right to self-determination’.¹²⁸ Some commentators hold the opinion that *only* jus cogens obligations are erga omnes obligations, whereas other consider the concept of erga omnes rights as a wider concept than the jus cogens concept.¹²⁹ A detailed debate on the exact scope of obligations erga omnes cannot be provided due to the limited capacity of this thesis. However, there is an indication for the emerging consensus that (at least) all jus cogens obligations have erga omnes character.¹³⁰

¹²⁷ ICJ, *Barcelona Traction*, 5.2.1970, p. 32

¹²⁸ ICJ, *Barcelona Traction*, 5.2.1970, p. 32; ICJ, *East Timor*, 30.6.1995, p. 29

¹²⁹ Overview in Skogly (2006), p. 81

¹³⁰ See footnote 50

But what legal consequences are attached to the erga omnes character of an obligation? So far there is neither case law nor any state practice in which the erga omnes character of certain human rights obligations was invoked in order to ‘override’ the sovereignty of the state bearing the obligation. In practice states have invoked the erga omnes character of human rights obligations mainly in order to claim their right to call attention to cases where another state is not complying with its human rights obligations, and to call upon that state to cease the non-compliance.¹³¹ Moreover, in the ICJ *East Timor* case Portugal invoked the erga omnes character of Australia’s obligation to respect the ‘right to self determination of the people of East Timor’ in order to try Australia before the ICJ. But the ICJ rejected this attempt since it decided - even though it confirmed the erga omnes character of Australia’s obligation - to have no jurisdiction because it would have to evaluate the lawfulness of the conduct of a third state (Indonesia) which had not consented to the jurisdiction of the ICJ.¹³²

State practice, case law and legal doctrine on the legal effect of ‘erga omnes’ suggest that this legal effect is limited to the right of standing (‘jus standi’) in inter-state claims. “Erga omnes rules operate to expand the scope of possible claimants in those situations where traditional rules of standing do not suffice to ensure that all rules of international law are capable of supporting effective inter-state claims“.¹³³

In conclusion: At present the legal effect of the ‘erga omnes character’ of norms is limited to a purely procedural effect in inter-state claims. The ‘erga omnes character’ has therefore no capacity to ‘override’ the sovereignty of host states. However, the erga omnes concept might be refined in the future. There is no reason why the ‘legal interest’ states have in the ‘protection of the rights involved in obligations erga omnes’ should remain limited to the jus standi in inter-state claims.

¹³¹ Hobe/Kimminich (2004), p. 407

¹³² ICJ, *East Timor*, 30.6.1995, p. 29

¹³³ Byers (1997), p. 211

5.4.5 Conclusion

This section was analysing scenarios in which extraterritorial jurisdiction *primaefacie* are contra international law (because they conflict with the host state's law or policy) from a human rights perspective. It was assumed that home states (by extraterritorial jurisdiction) only enforce such 'corporate human rights standards' which a host state is obliged to ensure on its territory.

The thesis suggests for such cases that the host state is deprived of its right to invoke (on the international plane) such domestic law and policy that are not in conformity with its international human rights obligations (and therefore conflict with the extraterritorial jurisdiction of home states). That implies that even 'extraterritorial jurisdiction which conflicts with a host state's law or policy' is in conformity with international law, *if a conflict (between the extraterritorial jurisdiction and the law or policy of the host state) had not existed if the host state would have met its obligations under international human rights law*. In addition, this thesis suggests that 'extraterritorial jurisdiction conflicting with a host state's law or policy' is also permitted under international law *if the host state aims at preventing (or punishing) jus cogens violations of TNCs*. The crucial argument for the 'reasonableness' of extraterritorial jurisdiction in these scenarios is the importance of an effective protection of jus cogens and other international human rights standards to "the international political, legal or economic system" (for the requirement of 'reasonableness' see section 5.2.3).

The other human rights related aspects discussed in this chapter (extraterritorial scope of ICCPR and ICESCR, rights under customary human rights law, the law on state responsibility in cases of a host state's non-compliance with its human rights obligations and the concept of erga omnes) do not imply the capacity to redefine the limitations the principles of sovereignty and non-intervention impose on extraterritorial jurisdiction in the 'thesis scenario'.

6 Conclusion

Limited to an analysis of the ICCPR, ICESCR and universal customary law, this thesis has demonstrated that international law already provides for comprehensive ‘corporate human rights standards’. However, these standards are mainly of indirect nature, i.e. they are established by obliging the states to control TNCs, and to prevent and punish human rights abuses committed by them (‘positive obligations’). As this thesis has outlined, not all host states have the capacity, willingness or interest which is necessary to sufficiently control the business activities of TNCs on their territory. Therefore, the thesis has analysed the possibility that home states of TNCs contribute to the enforcement of the ‘corporate human rights standards’ in host states by exercising extraterritorial jurisdiction. In doing so, the analysis was limited to extraterritorial jurisdiction based on the ‘active nationality principle’, i.e. on the right of each state to exercise jurisdiction over its nationals.

In the thesis the view has been taken that the attempt of a home state to exercise *nationality-based* extraterritorial jurisdiction directly over foreign subsidiaries of TNCs (i.e. over corporations which are neither incorporated under the law of the home state nor have a registered office or conduct any business on its territory) is highly likely to be contra international law. The thesis has rather drawn the conclusion that a home state is most likely only allowed to assert ‘corporate nationality’ of a corporation if the company is registered under the law of that state and has a registered office there.

The further analysis of the ‘thesis scenario’ has revealed that - given a home state asserts ‘corporate nationality’ in accordance with international law - nationality-based extraterritorial jurisdiction is limited only by the principles of sovereignty and non-intervention (as ‘prohibitive rules’ of international law) and the ‘rule of reason’. It

could be demonstrated that the extraterritorial application of ‘corporate human rights standards’ to nationals (= TNCs) abroad (= in a host state) is in conformity with international law if the extraterritorially applied standards *harmonise* with the law and policies the host state has with respect to corporate standards on its territory. This category includes also cases in which a host state does not control TNCs sufficiently due to ‘lacking capacity’ or ‘lacking interest’. Furthermore, it was demonstrated in the thesis that all other scenarios (i.e. scenarios in which the extraterritorially applied standards *conflict* with the law and policy of a host state) are, *primaefacie*, not in accordance with the principles of sovereignty and non-intervention. However, the thesis could reveal the wrongness of this *primaefacie-result* by reassessing the ‘thesis scenario’ in special consideration of its ‘human rights context’ (i.e. the fact that the extraterritorial jurisdiction enforces ‘human rights standards’ the host state is obliged to ensure on its territory). In doing so, the thesis suggested and substantiated that host states are not allowed to defeat nationality-based extraterritorial jurisdiction by invoking a conflict with their domestic law or policy, if this conflict only exists because the law and policy are not in conformity with the host state’s international human rights obligations.

The thesis could demonstrate that nationality-based extraterritorial jurisdiction over TNCs exercised by home states is to a great extent permitted by international law. This allows the conclusion that the reluctance of states to exercise extraterritorial jurisdiction over TNCs is not so much a question of its permissibility. To a much greater degree it seems to be a political issue. Extraterritorial jurisdiction over TNCs’ activities abroad might be sometimes considered to be ‘modern day imperialism’. However, to an even greater extent states might be concerned that exercising extraterritorial jurisdiction over TNCs incorporated under their laws (and often having their headquarters or a major branch in the state) might motivate these TNCs to relocate to other states, which refrain from extraterritorial jurisdiction. Such a relocation would imply a loss of jobs, investment and tax income. This reasonable concern points at the need for extraterritorial jurisdiction to be exercised collectively (for example within the EU), or

internationally coordinated approach, i.e. that as many (potential) home states as possible exercise extraterritorial jurisdiction over TNCs, so that the number of 'safe havens' is minimised.

At the end this thesis wants to express the view that extraterritorial jurisdiction over TNCs is certainly not the 'panacea' as sometimes assumed. In the long run a sufficient and sustainable protection of 'human rights standards' in host states requires international cooperation that focuses on convincing host states of the necessity to enforce 'corporate human rights standards' on their territory, and on strengthening the capacities host states by financial and other aid.

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