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The Legal Obligations with Respect to Human Rights and Export Credit Agencies

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THE LEGAL OBLIGATIONS WITH RESPECT TO HUMAN RIGHTS AND EXPORT CREDIT AGENCIES

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For ECA-Watch, Halifax Initiative Coalition and ESCR-Net

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This discussion paper substantially revises and updates an earlier discussion paper prepared by Özgür Can for ESCR-Net and ECA-Watch. Özgür Can is a PhD candidate at Lancaster University Law School, England, specializing in the links between foreign direct investment and the protection and promotion of human rights. The original paper was prepared for an international conference on Export Credit Agencies and Human Rights Accountability, held in Brussels, Belgium, in September 2005, and organized by ESCR-Net and ECA-Watch (through the Halifax Initiative Coalition). Sara Seck was commissioned to rework the paper. She is a PhD candidate at Osgoode Hall Law School, York University, Canada, and is specializing in the regulation of Canadian mining corporations abroad. The reworked paper was initially submitted as a Working Draft to the civil society consultation with the Export Credit Group of the Organization for Economic Cooperation and Development in May 2006. This final discussion paper revises that initial Working Draft.

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ESCR-Net is the International Network for Economic, Social and Cultural Rights, a collaborative initiative of organizations and activists from around the world working together to advance economic and social justice through human rights.
http://www.escr-net.org

ECA-Watch is an international network of policy, environmental, human rights, and grassroots organizations working together to reform Export Credit Agencies
http://www.eca-watch.org

The Halifax Initiative is a Coalition of development, environment, faith-based, human rights and labour groups, and the Canadian presence for public interest advocacy and education on international financial institutions and export credit agencies.
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INTRODUCTION

International human rights law has traditionally focused on establishing the obligations owed by states to individuals. Much recent attention has been given to the question of whether non-state actors, such as transnational corporations (**TNCs**), can be considered subjects of international law and as such duty bearers of international human rights obligations.[1] However, less attention has been given to the equally significant question of whether financiers of transnational corporate activities have an obligation to ensure that the activities they support comply with international human rights norms. This paper will explore the international human rights obligations of one type of financial institution: officially supported export credit and investment insurance agencies (Export Credit Agencies or **ECAs**). ECAs are primarily public or publicly mandated institutions that support and subsidise national trade and investment activities, particularly in developing and emerging markets.[2]

The need to focus attention on ECAs and human rights is underscored by the significant contribution that ECAs make to international trade and investment flows. The capital that industrial country ECAs provide to exporters and investors eclipses the contribution of overseas development agencies, other bilateral agencies and multilateral organisations.[3] Indeed, ECAs have been described as the "unsung giants of international trade and finance".[4] Significantly, the recent *Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* singled out "home countries providing investment guarantees and export credits" for frequently not taking "adequate regard for the human rights practices of the companies receiving the benefits".[5]

The structure of this paper is as follows. Part I will provide an overview of ECAs and how their activities impact human rights. Part II will outline the legal nexus between ECAs and states and explore the international law of state responsibility as applied to ECAs. This section concludes that ECAs, as organs or agents of the state, must comply with the international obligations of the state. Part III will turn to the question of state responsibility for human rights. Specifically, Part III will explore the content of international human rights law applicable to ECAs including whether the obligations engaged are subject to any extraterritorial limitations. Finally, Part IV will explore the legal implications of the conclusion that ECAs are under a legal obligation to ensure that the activities they support comply with international human rights norms.

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[1] See generally Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford University Press, 2005).
[2] Malcolm Stephens, *The Changing Role of Export Credit Agencies* (Washington, D.C.: International Monetary Fund, 1999), p.xi.
[3] D. E. Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance*, (Westport, Conn.: Quorum Books, 2001), p.69.
[4] *Ibid.*, p.1.
[5] *Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, E/CN.4/2006/97, p.20, para.79. The Report notes that "the repertoire of policy instruments available to States to improve the human rights performance of firms is far greater than most States currently employ."

Part I

1. ECAs – an Overview

Governments establish ECAs in order to promote their domestic economies.[6] The provision of government-backed loans and insurance by ECAs provides national corporations with the support necessary to do business abroad, particularly in risky developing and emerging markets. This special access to funds and/or guarantees through ECAs is justified from a policy standpoint on two grounds. First, there is a public interest in promoting trade to create employment at home. Second, there is insufficient private sector provision of these financial services. For high-risk investments including large-scale projects or investments in countries with political, financial or legal instability, private financial institutions are often unable or unwilling to provide adequate credit and insurance. Thus, both a public good and a market failure argument are made to justify government involvement.

Typically, ECAs carry on two types of business: finance and insurance for both export activities and foreign direct investment. When financing export credits, the ECA provides a loan either directly to the exporter or to an intermediary bank who in turn loans to the exporter. Financing import credits involves the provision of a loan to foreign buyers of goods and services that originate in the ECA's home country. Support for foreign direct investment takes the form of project financing through loans, guarantees and insurance, most commonly political risk insurance. In most cases of foreign direct investment supported by an ECA, a home state company will be substantially involved in the project.[7]

There is no such thing as a typical ECA. While historically ECAs were public organisations, today an increasing number of private and mixed public/private organisations offer export credit and investment insurance programs. For the purpose of this paper, an ECA is defined as an institution engaged in export credit and investment insurance activities usually with official government support and always in accordance with a government mandate. Wholly private finance companies doing the same business as ECAs, but without any government mandate or support are excluded from the analysis.[8]

2. ECAs and Human Rights – An Overview

Many of the services that ECAs provide are ultimately for large-scale projects with serious environmental and social impacts that may also be the sites of intense human rights struggles.[9] These types of projects include infrastructure (road and port building), industrial facilities, extractive industries (mining, oil and gas), energy projects (power plants and dams), forestry and plantations. ECAs also lend for technologies that are commonly identified with potential human rights abuses, such as the sale of aircraft and weapons to repressive military

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[6] The information in this section is derived from Gianturco, *supra* note 3; and the Berne Union web-site, http://www.berneunion.org.uk/ accessed 22 May, 2006.

[7] Berne Union web-site, *ibid.*; C. Maurer and R. Bhandari, *The Climate of Export Credit Agencies* (Climate Protection Initiative, May 2000), online: http://pdf.wri.org/eca.pdf, accessed 22 May, 2006.

[8] Stephens, *supra* note 2 at p.xi notes that there are an increasing number of private sector insurers and re-insurers willing to undertake this type of business.

[9] M. Likosky, "Human Rights Risk, Infrastructure Projects and Developing Countries" Global Jurist – Advances, Volume 2, Issue 1; Gabrielle Watson, ed., "Race to the Bottom, Take II: An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years After OECD Common Approaches Rev. 6", ECA Watch, September 2003.

regimes,[10] and the sale of surveillance technology to countries with questionable human rights records.[11] Negative human rights impacts may thus be associated with some ECA activities, and often give rise to violations of international human rights norms.

A wide range of negative human rights impacts have been documented in connection with ECA supported activities.[12] These impacts include violations, for example, of:

- civil and political rights: rights of freedom of expression and association, the right to personal bodily integrity and the right to life, the right to a fair trial;
- social and economic rights: the right to an adequate standard of living, the right to health, labour rights;
- collective rights: the rights of indigenous peoples, the rights of women; and
- procedural rights: rights to information, consultation and participation in decision-making; rights of access to justice.

Human rights impacts have also been identified in connection with international investment agreements between the host state and the investor. For example, while less immediate than the impacts noted above, human rights violations may arise due to the inclusion of stabilisation clauses in these agreements[13]. Stabilisation clauses are designed to create a more predictable investment climate in countries with high political risk. However, these agreements seriously undermine the ability of host states to enact legislation necessary to protect the human rights of host state citizens.[14]

The human rights norms referred to above are derived from various sources of international law, most significantly international treaties. The nature and content of human rights obligations will be discussed later in this paper, along with the question of whether human rights obligations extend extraterritorially. However, at this point, it is important to signal the link between human rights, ECAs and states.

International human rights treaties primarily create rights for people and duties for governments. One obligation that governments undertake is to respect human rights. If ECAs are organs or agents of the state, then ECAs must ensure that the financing and insurance they provide respects human rights. Furthermore, a primary duty falls upon the

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[10] See for example Campaign Against the Arms Trade, *Submission by the Campaign Against the Arms Trade in response to the Export Credits Guarantee Department Review of its Mission and Status*, October 1999.
[11] See for example Rights & Democracy, "Nortel Technology Threatens Human Rights in China", Press Release, October 18, 2001.
[12] The impacts and violations listed are drawn from case studies presented in Watson, *supra* note 9.
[13] "A stabilization clause states that the law in force in the state at a given date—typically, the time the concession takes effect—is the law that will apply to supplement the terms of the contract, regardless of future legislation, decrees, or regulations is sued by the government." This helps create a stable and predictable environment for investors. However, it also means that changes to future legislation, decress or regulations, even if such legislation improves the provisions of the law included in the stabilization clause, will not apply to the project. This effectively freezes the ability of the state to change its laws. Paul E. Comeaux and N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance, New York Law School Journal of International and Comparative Law, 2004*.
[14] For concerns over the international investment agreement signed in connection with the BTC pipeline in Turkey and the Chad-Cameroon pipeline, see Amnesty International, "Human Rights on the Line", online: http://www.amnestyusa.org/business/humanrightsontheline.pdf and "Contracting out of Human Rights", online: http://web.amnesty.org/library/pdf/POL340122005ENGLISH/$File/POL3401205.pdf, accessed June 15, 2006.

state to regulate the activities of private actors such as TNCs to ensure that they do not violate international human rights norms. A failure to regulate – a failure to protect rights – results in a violation of human rights law by the state itself.[15] As ECA financing and insurance supports the international activities of home state TNCs, ECAs, as organs or agents of the state, are under an obligation to regulate the activities of private actor TNCs for compliance with human rights norms. The direct obligations of private actors with regard to human rights will not be covered in this paper. This paper will also not explore the question of whether home state obligations to protect human rights extend to the regulation of private financial institutions that provide export credits and investment guarantees but are not considered officially supported ECAs. Instead, this paper argues that ECAs, as organs or agents of the state, are bound by the primary obligation of states to respect, protect and fulfill human rights. It is thus essential to clarify the legal relationship between ECAs and states.

Part II

3. The Legal Nexus Between ECAs and States

The legal nexus between ECAs and home states may be illustrated by applying both a structural and a functional test.[16] The structural test involves an examination of issues of ownership and control, while the functional test involves an examination of the mandate, specifically, the nature and purpose of ECA activities. In addition, how official international entities perceive officially supported ECAs is relevant to the question of legal nexus.

In terms of structure, officially supported ECAs may be classified as either public or quasi-public. Some public ECAs are set up as an agency or department of the state. These ECAs are both wholly owned by the state and operate under state control. They can most clearly be classified as public authorities or state organs. For example, the UK's official ECA, the Export Credits Guarantee Department (ECGD) is a distinct government department reporting to the Secretary of State for Trade and Industry. Finland's Finnvera and the United States' Export-Import Bank are other examples.

Other public ECAs are structured as wholly owned corporations of the state, and operate under independent management. As a government department, ministry or committee ultimately oversees the activities of these wholly owned corporations, they may still be viewed as coming under state control for the purpose of a structural analysis. Export Development Canada, Belgium's Delcredere/Decroire and Australia's Export Finance and Insurance Corporation are examples of this type of ECA.

Other ECAs may be described as quasi-public ECAs, with either private or mixed ownership and control. These ECAs may be structured as a consortium of (i) private sector companies and/or (ii) private and public companies. For example, the Austrian ECA, Oesterreichische Kontrollbank Aktiengesellschaft (OeKB), is a private entity, owned by the

[15] M. Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*"* (2001) 23 *Human Rights Quarterly* 1062-1097 at p.1067-8. See further discussion below in Part III.

[16] This test is derived from the work of Marcos Orellana of the Center for International Environmental Law in "Export Credit Agencies and the Aarhus Convention" (Draft Issue Brief, June 2004). The material in this section is derived from Stephens, *supra* note 2 and Gianturco, *supra* note 3, as well as the web-sites of the cited ECAs.

major commercial banks. However, OeKB receives its operating authorisation through a contract with the Ministry of Finance, which stipulates the standards and procedures it must follow. Furthermore, OeKB is subject to periodic reviews by the State's audit division. Germany's ECA, Euler Hermes Kreditversicherungs-AG (Hermes), a private company, must have its large disbursements reviewed and approved by an inter-ministerial committee composed of representatives from the Ministry of Finance, the Ministry of Foreign Affairs, and the Ministry of Economic Cooperation and Development. Thus, while the ownership structure of these ECAs varies considerably, the state still exercises control through some form of oversight.

The above analysis of the structure of officially-supported ECAs reveals much variation. However, an analysis of the functional characteristics of these ECAs as measured by their mandates reveals a common purpose. Whether public or quasi-public, all officially-supported ECAs are regulated under national laws, regulations or charters that give the ECA the authority to perform their functions. These regulated functions must be in accordance with a mandate to provide export and investment support which furthers the trade and investment interests of the home state. This regulated mandate most clearly distinguishes ECAs from private financial institutions that provide export credits and investment guarantees without a legal nexus to the home state beyond ordinary commercial legislation.

Finally, the international institutions and organisations in which ECAs are members also distinguishes between officially supported ECAs and private institutions. For example, the Berne Union, the worldwide organisation of national export credit and investment insurance agencies, does not limit its membership to officially supported ECAs.[17] Thus, private financial institutions, such as Sovereign Risk Insurance Ltd., established in Bermuda as a private political risk insurer, are members of the Berne Union. On the other hand, private financial institutions are precluded from membership in the Organisation for Economic Cooperation and Development's (OECD) Export Credit Group and Participant's group (ECG), which gives official status to all officially supported ECAs from OECD countries, regardless of structure, alongside ministerial representatives.[18] Some agreements reached by the OECD ECG are then recognised and sanctioned by other inter-governmental bodies like the World Trade Organisation (WTO), as well as implemented into national laws. This recognition of agreements reached by ECAs and ministries within the context of the OECD suggests that ECAs are attributed all the structural and functional characteristics of state agencies. Indeed, public and quasi-public ECAs are referred to as "officially supported export credits and investment insurance" agencies by the OECD, thus being distinguished from private financial institutions by the functional characteristic of state support.

A final confirmation of the public character of officially supported ECAs, regardless of actual structure, is found in the context of the Aarhus Convention.[19] Directive (2003/4/EC) clarifies the definition of public authorities subject to the Aarhus Convention in the following language: "person[s] or bodies acting under their control and having public responsibilities or functions in relation to the environment."[20] The Legal Affairs and

[17] See web-site of the Berne Union, *supra* note 6.
[18] OECD web-site, online: http://www.oecd.org, accessed 22 May, 2006.
[19] Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 25 June 1998, in force 30 October 2001, 38 I.L.M. 517 (1999).
[20] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, online: http://europa.eu.int/eurlex/pri/en/oj/dat/2003/1_041/1_04120030214en00260032.pdf, accessed 20 June 2005.

Governance unit of the European Commission has stated that while "there are many different types of Export Credit Agencies […ECAs], whether or not belonging to the public administration, qualify as public authorities within the meaning of Directive 2003/4/EC and are obliged to observe the rules laid down in that directive."[21]

4. State Responsibility and ECAs

We have concluded above that ECAs, as organs or agents of the state, are theoretically subject to the same international obligations of the state. This conclusion may be premature, however, without exploring these conclusions in the context of the international law of state responsibility. The central question to explore here is whether the international law of state responsibility places a duty upon ECAs as state organs or agents to comply with the international legal obligations of the home state.[22] The analysis will draw upon the attribution rules of state responsibility in order to establish that officially-supported ECAs, whether public or quasi-public, and regardless of legal structure, are state organs or agents of the state. The implications of this conclusion will then be explored under the rules of state responsibility, including an examination of host state responsibility for violations of its international legal obligations in this context. In addition, the question of direct responsibility for non-state actors such as TNCs and the implications for the state responsibility analysis will be considered.

The starting point for the state responsibility analysis is the *Draft articles on Responsibility of States for internationally wrongful acts* adopted by the International Law Commission in 2001[ILC Framework].[23] The work of the ILC on state responsibility is generally considered to reflect existing customary international law, as opposed to being a progressive statement of what the law should be.[24] As customary international law, it is binding upon all states. The 2001 ILC Framework and previous versions of the ILC's draft Articles on State Responsibility have been favourably cited by international courts and tribunals, including the International Court of Justice and both the Arbitral Panels and the Appellate Body of the World Trade Organisation.[25]

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[21] Correspondence between Judith Neyer, FERN, and D. Grant Lawrence, Acting Head of Unit, European Commission, Directorate General Environment – Legal Affairs & Governance, July 7, 2005.

[22] The analysis of the ILC Frameworks draws upon the work of Sara L. Seck, Osgoode Hall Law School, York University, entitled "Home State Obligations for the Human Rights Violations of Multinational Corporations" (Paper presentation to Osgoode Hall Law School Graduate Conference "Scholars and Advocates: Changing the Face of Law", May 2006).

[23] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002). The ILC Framework was recommended to the United Nations General Assembly , which has deferred until 2007 any decision on the final form of the ILC Framework, including consideration of whether a Convention should be adopted on the topic. See James Crawford & Simon Olleson, "The Continuing Debate on a UN Convention on State Responsibility" (2005) 54 I.C.L.Q. 959.

[24] The value of the 2001 ILC Framework has been described as lying "less in their legal innovation than in their consolidation and clarification of many traditional secondary rules of state responsibility." Daniel Bodansky & John R. Crook, "Symposium: The ILC's State Responsibility Articles: Introduction and Overview" (2002) 96 *American Journal of International Law* p.773 at p.790. Indeed, the "growing importance of non-state actors as holders of international rights and obligations" is not addressed in the ILC Framework. *Ibid.* p.775. See also Crawford & Olleson, *ibid.*. Crawford & Olleson canvas the opinions of states towards the ILC Framework in the context of the UN General Assembly discussions. They note that the articles on attribution (which are the focus of this paper) are considered to reflect customary international law. *Ibid.* p.968.

[25] Crawford & Olleson, *ibid.* p.966-968.

Article 2 of the ILC Framework lists the essential elements of an internationally wrongful act of a state that would give rise to the international responsibility of that state.[26] There are three significant aspects to this Article. First, the conduct in question may consist of either an action or an omission. Secondly, the conduct must be attributable to the state. Third, the conduct must constitute a breach of an international legal obligation. This last element, the content of the legal obligations arising under international human rights law, will be the subject of the following section.

The core rule for determining what conduct is attributable to a state under the ILC Framework is Article 4.[27] According to Article 4, the "conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State…".[28] The Commentaries to the ILC Framework note that it is common for states to be subdivided into a series of distinct legal entities including ministries, departments and state corporations all of which may have separate legal personality under internal law, with separate accounts and separate liabilities. Despite this, "international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision."[29] According to the principle of the unity of the state, "the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility."[30] The International Court of Justice has confirmed this principle.[31]

Thus, public ECAs, whether agencies or departments of the state, or crown corporations set up by the state, are organs of the state under Article 4 of the ILC Framework.

The position of quasi-public ECAs is addressed by Article 5, according to which the conduct of "a person or entity which is not an organ of the State under article 4, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law."[32] According to the Commentaries, the term "entity" is used here to reflect a wide variety of bodies, including "public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies."[33] The key is that in each case the entity is "empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned."[34]

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[26] ILC Framework, Article 2.
[27] ILC Framework, Article 4.
[28] Article 4 continues: "and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."
[29] Commentaries in Crawford at p.92-93. See also S. Bottomly & D. Kinley, *Commercial Law and Human Rights* (Ashgate Publishing, 2002) p.39, who state that all organs and agencies of the state have equal responsibility within their individual and combined spheres of operation to implement the terms of international treaties to which the given state is a party.
[30] Commentaries in Crawford p.95.
[31] See for example *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *I.C.J. Reports 1999*, p.62 at p.87, para.62.
[32] ILC Framework, Article 5. Article 5 continues: "provided that the person or entity is acting in that capacity in the particular instance."
[33] Commentaries in Crawford at p.100. The Commentaries give as an example the delegation to private or state-owned airlines certain powers in relation to immigration control or quarantine.
[34] Commentaries in Crawford at p.100. Moreover:

As discussed above, the mandate given by the state to both public and quasi-public ECAs creates a functional nexus with the state, regardless of the legal structure of the individual ECA. For the purposes of Article 5, the mandate given to a quasi-public ECA by the state empowers the ECA to exercise elements of governmental authority.[35] Accordingly, under the ILC Framework the actions and omissions of quasi-public ECAs as an agent of the state are attributed to the state.

Given that the actions and omissions of both public and quasi-public ECAs are attributed to the state, what implications flow from this attribution? One significant consideration is that the host state must also comply with its own international human rights obligations. The ILC Framework recognises that internationally wrongful conduct often results from the collaboration of several states. Collaboration may manifest itself in several ways: the independent conduct of several states, each playing a role in carrying out the wrongful acts;[36] the wrongfulness of one state's actions may depend on the independent action of another state;[37] or a state may be required by its own international obligations to either prevent certain conduct by another state, or to prevent harm flowing from that conduct.[38] However, each state has the responsibility for its own wrongful acts under the principle of independent responsibility.[39] Thus, the independent responsibility of the host state does not preclude the independent responsibility of the home state, although the exact nature of the responsibility will depend on the particular circumstances, as well as the applicable international human rights rule. For example, there may be different implications where an ECA finances the export of equipment that is then used by the importing state to commit human rights abuses, as compared to the provision of political risk insurance to an extractive industries project that is conducted in a manner that violates human rights. In each case, the responsibility of the home state for its own wrongful acts is independent, rather than secondary to the primary responsibility of the host state.

There are exceptional cases where it is appropriate for one state to assume the internationally wrongful acts of another state, even though the wrongfulness of the conduct lies primarily with the second state.[40] For example, under Article 16 of the ILC framework, a state that "aids or assists another state in the commission of an internationally wrongful act by the latter" is internationally responsible if it did so with "knowledge of the circumstances"

"The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of the attribution of the entity's conduct to the State."

[35] The Commentaries note that Article 5 does not attempt to define precisely the scope of "governmental authority", as "what is regarded as 'governmental' depends on the particular society, its history and traditions." (p.101). However, the Commentaries note that it is not just the content of the powers that is important, but also "the way they are conferred on any entity, the purposes for which they are to be exercised and the extent to which the entity is to be accountable to government for their exercise." (p.101)

[36] Commentaries in Crawford at p.145, para. 2.

[37] Commentaries in Crawford at p.145-146, para. 4, citing especially *Soering v. United Kingdom, E.C.H.R., Series A., No. 161* (1989), at pp. 33-36, paras. 85-91.

[38] Commentaries in Crawford at p.146, para. 4, citing *Corfu Channel, Merits, I.C.J. Reports 1949,* p.4, at p.22.

[39] Commentaries in Crawford at p.145, paras. 1 & 2.

[40] Commentaries in Crawford at p.146, para. 5. See generally Articles 16-18 of the ILC Framework and related Commentaries. Article 17 concerns the exercise of powers of direction or control by one state over another state; while Article 18 concerns the coercion by one state of another state.

of the wrongful act.[41] This Article applies where the state provides an "essential facility or finances" the activity in question.[42] In this situation, the assisting state plays a supporting role, while the acting state is primarily responsible. The Commentaries specifically contemplate the application of this Article to human rights violations.[43] However, the Commentaries to Article 16 note, "the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful act."[44] This intent requirement has been criticised, on the basis that the "export of human rights violations" is not usually done with intent, but with "deliberative indifference".[45] Article 16 suggests that the home state of an ECA that, for example, finances the export of torture equipment to a state that is known to practice torture, would be held responsible for the wrongful act of torture itself, rather than being responsible for the wrongful act of financing torture.[46]

A final issue to consider is whether under the ILC Framework the conduct of private actors, such as transnational corporations or private ECAs, can be attributed to the home state for the purpose of state responsibility, even if acting independently of the state without ECA or other state support. While the ILC Framework does outline the circumstances in which private actor conduct can be attributed to the state,[47] the relevant Articles are designed such that the direct attribution of private conduct to the state is the rare exception rather than the rule.[48] Despite this, the ILC Framework does provide that a state may be responsible for the effects of private actor conduct "if it failed to take necessary measures to prevent those effects."[49] The social and environmental impact assessments that ECAs conduct of TNC activities and the resulting conditions that are applied in loan agreements may represent an implicit acknowledgement of ECA's due diligence obligations. The due diligence obligation to prevent

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[41] ILC Framework, Article 16. The act must also be internationally wrongful if committed by the assisting state. Article 16. However, a state providing financial or other aid to a state would not assume the risk that the second state would divert the aid to an internationally wrongful act unless a specific causal link has been established between the wrongful act and the conduct of aiding or assisting. Commentaries in Crawford at p. 147, para. 8. Indeed, a state providing financial assistance "does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act." Thus, it must be aware of the circumstances in which the aid or assistance is intended to be used. Commentaries in Crawford at p.149, para. 4.

[42] Commentaries in Crawford at p.148, para. 1.

[43] Commentaries in Crawford at p.150-151, para. 9. This paragraph specifically refers to situations where the United Nations General Assembly has called on member states to refrain from supplying arms and other military assistance to countries committing serious human rights violations.

[44] Commentaries in Crawford at 151, para.9.

[45] M. Gibney *et al.* "Transnational State Responsibility for Violations of Human Rights" (1999) 12 *Harvard Human Rights Journal* 273 at 293-294. However, as Article 16 speaks of knowledge only, it is unclear why intent is the measure in the Commentaries.

[46] The home state responsibility would be secondary to the host state responsibility, thus the extent of reparations owed by the home state would likely be less than that of the host state.

[47] See ILC Framework, Articles 5-11. The most promising Article is Article 8, which attributes the conduct of a person "in fact acting on the instructions of, or under the direction and control of" the state.

[48] See Commentaries at p.90, paras. 2-3. "… the conduct of private parties is not as such attributable to the State." Para. 3. See also Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen – Oxford – New York: Intersentia, 2002) at p. 144-145. Jägers analyses the implications of the "negative attribution" rule found in former drafts of the ILC Framework. The public/private distinction evident in the ILC Framework has been much criticised. See for example Christine Chinkin, "A Critique of the Public/Private Dimension" (1999) 10 E.J.I.L. 387; Brian Smith, *State Responsibility and the Marine Environment, The Rules of Decision* (Oxford: Clarendon Press, 1988).

[49] Commentaries in Crawford at p.92, para. 4, citing *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p.3.

harm caused by private actors found in the ILC Framework provides support for the international human rights law obligation to protect rights. This obligation to protect rights includes within it a duty to regulate private actor conduct. This *arguably* creates a duty for home states to regulate private financial institutions including those providing export credits and investment guarantees as well as TNC conduct generally. That said, the full implications of the duty to regulate private actors such as TNCs and financial institutions is an area that requires further research. Even so, the duty to regulate the activities of third parties is clearly established under international human rights law as will become evident in the next section.

Part III

5. International Human Rights Law

International human rights law forms part of the general regime of public international law. The sources of international human rights law include treaty law and customary international law.[50] However, unlike other areas of international law, the implementation of the norms found in these sources of law is done domestically.[51]

A consensus has emerged that certain parts of international human rights law have gained the status of customary international law. These obligations are binding upon all states, regardless of whether individual states have ratified the instrument containing the specific obligation.[52] However, the precise content of customary international human rights law is disputed.[53]

Treaty sources of international human rights law include both international and regional treaties.[54] The two most widely recognised international human rights treaties are the International Covenant on Civil and Political Rights (ICCPR)[55] and the International Covenant on Economic and Social Rights (ICESCR),[56] which together codify the basic norms set out in the Universal Declaration of Human Rights (UDHR).[57] The ICCPR requires states

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[50] S. Skogly & M. Gibney, "Transnational Human Rights Obligations" (2002) 24 *Human Rights Quarterly* 781 at p.782.
[51] *Ibid*. This is often described as creating a "vertical relationship between a state and its subjects, rather than a horizontal relationship among states".
[52] *Ibid.* at p.787.
[53] *Ibid.*
[54] Regional human rights treaties with implementation mechanisms are found under the Council of Europe, the Organization of American States, and the Organization of African Unity/African Union. For a general survey of international human rights mechanisms at both the international and regional levels, including protected rights and implementation, see Rhona K M. Smith, *Textbook on International Human Rights*, 2nd ed. (Oxford: OUP Blackstone, 2005). See also Ghandi, P.R., *International Human Rights Documents*, 3rd ed. (Oxford: OUP Blackstone, 2002).
[55] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 171, adopted 16.12.1966, entry into force 23.3.1976. Ratified by 154 countries as of June 2005 (http://www.unhchr.ch/pdf/report.pdf)
[56] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, adopted 16.12.1966, entry into force 3.1.1976. Ratified by 151 countries as of June 2005 (http://www.unhchr.ch/pdf/report.pdf).
[57] Universal Declaration of Human Rights (UDHR), *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt.1) at 71, U.N. Doc. A/810 (1948). Other significant international human rights treaties address the rights of the child, the rights of women, racial discrimination, and torture. See discussion in Green, *supra* note 15 at p.1067, and treaty texts in Ghandi, *supra* note 54 .

to respect and ensure a range of civil and political rights including the right to personal bodily integrity; the right to a fair trial; the right to life; and rights to freedom of expression, religion and association. The ICESCR requires states to progressively realise a range of substantive economic, social and cultural rights that establish the basic minimum conditions for a dignified life, including rights to health; education; adequate standard of living; housing; and food. The ICESCR also protects procedural rights that are not subject to progressive realisation, including the "right to legal remedies if one's rights are violated", and the "right to participation in the making of policies or laws that affect one's rights".[58]

International human rights treaties are often said to create rights for people, and duties for state governments, including both positive and negative constraints on state action.[59] International human rights conventions have developed a framework that imposes three kinds of duties on state parties:[60] 1) to respect rights by not violating them; 2) to protect rights by taking positive action to ensure that third parties do not violate those rights; and 3) to fulfil rights by employing governmental means to afford individuals the full benefit of human rights.[61] The universal, indivisible, interdependent and interrelated nature of human rights was emphasised in the 1993 Vienna Declaration and Programme of Action. The Vienna Declaration also noted that it is the duty of states, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.[62]

One of the most important tools employed to ensure the protection of human rights is state regulation or legislation.[63] Indeed, widely accepted UN Conventions and other UN documents have stated that states have a duty to regulate – that is, to take legislative means to comply with the undertakings they sign on to in international conventions.[64] This duty to regulate includes a duty to regulate private actors. For instance, if a private employer is holding workers in slavery-like conditions, a lack of intervention by government is a violation of human rights by the government itself where the government is under a duty to protect the right to decent working conditions.[65] The duty towards private actors also includes the duty to oversee any private company that provides basic infrastructure support to ensure the service provided is adequate and available to all without discrimination, thus complying with the state's obligation to fulfil.[66]

Based on this brief overview of international human rights law, and the conclusions reached up to this point, we can say that home states have an obligation to regulate ECAs to

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[58] See discussion in Green, *ibid.* at p.1071.
[59] *Ibid.* at p.1067.
[60] *Ibid.* at p.1071. Green notes that while these duties are usually referred to in the context of economic, social and cultural rights, they in fact apply to all human rights, including civil and political. See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997. For text see http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html, accessed 22 May, 2006.
[61] *Ibid.*
[62] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, Adopted by GA 14-25 June 1993, U.N. Doc. A/CONF.157/24.
[63] S. Skogly, *Extra-national Obligations Towards Economic and Social Rights* (International Council on Human Rights Policy, 2002).
[64] See for example Article 2(1) of the ICESCR, *supra* note 56; Committee on Economic, Social and Cultural Rights, General Comment 3 "The nature of States parties obligations (Art.2, para.1): 14/12/90" (Fifth session, 1990). Many other examples exist.
[65] Green, *supra* note 15 at p.1068.
[66] *Ibid.* at p. 1072.

ensure that the activities they support, including those conducted by private actors such as TNCs, are conducted in a manner that complies with international human rights norms.[67] There are various means for a home state to regulate its ECA: a) regulating the forms of trade and investment support given, for example, by prohibiting support to the arms trade; b) ensuring that the legal agreements, for example, host government agreements, which underpin projects that ECAs support do not undermine human rights obligations; c) mandating transparency in ECA operations so that access to information is guaranteed; d) requiring the completion of a human rights impact assessment by project proponents before support is given;[68] e) including human rights performance requirements as part of the export credit or investment insurance contract, with continued support made conditional upon compliance;[69] and f) setting up enforcement mechanisms for the performance requirements that are accessible by those potentially impacted by human rights violations.[70]

6. Extraterritorial Limitations

Thus far, this paper has established that ECAs are organs or agents of the home state, and as such must comply with home state international human rights obligations. If extraterritoriality is viewed as a question of state responsibility, it is significant to note that the "ILC has taken the position that the attribution to the State of the acts of its organs is not subject to any territorial limitation."[71] The possible legal implications of this position and the differing approaches to extraterritoriality surveyed in this section will be addressed in Part IV of this paper.

One assumption behind the imposition of ECA regulations outlined above is that the home state obligations apply extraterritorially. Some human rights treaties extend extraterritorially without question, such as the 1949 Genocide Convention.[72] However, generally speaking, the extraterritorial application of human rights norms is at present contested. This is in part because it is an evolving area of law that has only recently become the subject of extensive scholarly scrutiny.[73]

Three different approaches can be taken to the extraterritoriality question. The first is to see it as an issue of state responsibility generally. For example, the principle is often stated

[67] The significance of any discrepancies between the international human rights obligations of the ECA state as compared to the host state will be addressed in the following section.
[68] Human rights impact assessments are being or have been developed at several sources, including Rights and Democracy; the Danish Human Rights Center; and the International Finance Corporation of the World Bank.
[69] Project documents could include covenants that commit the project proponent to ensuring respect for human rights in the project's sphere of influence. This proposal is supported by the Maastricht Guidelines which recognize that a failure of a state to take into account its international legal obligations when entering into agreements with multinational enterprises constitutes a violation of human rights. See Article 15(j) of the Maastricht Guidelines, *supra* note 60.
[70] For further ideas, see: Amnesty International http://web.amnesty.org/library/Index/engpol340122005, accessed 22 May, 2006.
[71] Jägers, *supra* note 48 at p.168, citing UN Doc. A/CN.4/Ser.A/1975, *YBIL*, Vol. II, 1975, p. 83, para.1. See also Rick Lawson, "Life After *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights" in F. Coomans & M.T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp – Oxford: Intersentia, 2004) 83 at p.85-86.
[72] F. Coomans & M.T. Kamminga, *ibid.* at p.2. Treaties in the field of international humanitarian law are also not limited by extraterritoriality concerns.
[73] See for example M. Gibney *et al.* "Transnational State Responsibility for Violations of Human Rights" (1999) 12 *Harvard Human Rights Journal* 273; S. Skogly & M. Gibney, *supra* note 50; F. Coomans & M. T. Kamminga, *ibid.*; Skogly, *supra* note 63.

that no state has the right to use or permit the use of its territory so as to cause harm to the territory of another state.[74] By extension, it has been argued in the context of responsibility for TNC activities that a state has "the obligation to prevent harm caused by its corporate citizens within the territory of another state."[75] Thus, a state has an obligation to regulate the international activities of home state TNCs. Applied to the ECA context, this approach to extraterritoriality places home states under an obligation to regulate ECAs to ensure that TNC activities supported by ECAs do not harm the host state. Applying similar reasoning, others have claimed that the issuance of permits and licenses that allow for the export of hazardous industrial and technological activities may be considered a human rights violation,[76] as would the export of torture equipment.[77] If applied to the ECA context, the home state can then be seen to be under an obligation to ensure that all decisions made by its ECA, including those that relate exclusively to the financing of export and import credits as opposed to support for foreign direct investment, do not contribute to harm in the host state.

A second approach to the extraterritoriality question is to see it as an issue to be addressed through the sources of international human rights law.[78] An examination of extraterritoriality in the sources of international human rights law reveals both inconsistency and underdevelopment of applicable principles. For example, customary international law in the area of economic and social rights creates an obligation such that states should "refrain from actions in their international or transnational operations that will fail to respect the human rights of people in other states."[79] No territorial limitation on economic, social and cultural rights is found under the ICESCR, which provides in Article 2(1) that State parties undertake to take steps both "individually and through international assistance and cooperation" to achieve progressive realisation of the rights in the ICESCR.[80] Thus the question under the ICESCR is not whether parties have extraterritorial obligations, but the "precise nature and content of those obligations."[81] Some scholars suggest that obligations under the ICESCR could be categorised as internal, external and international. The most relevant to ECAs are external obligations, which are those that a state owes to victims outside its territory through its own national

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[74] *Trail Smelter Case*, (U.S. v. Can.), 3 R.I.A.A. 1905 (1941) para. 1165; *Corfu Channel Case* (United Kingdom v. Albania) I.C.J. Rep., 9 April 1949 p.4 para.22. See I. Brownlie, *Systems of the Law of Nations: State Responsibility* (Oxford: Clarendon Press, 1983) at p.165.

[75] Jägers, *supra* note 48 at 167. Reliance in this context is often placed on a link of actual or effective control. See also Shinya Murase, "Perspectives from International Economic Law on Transnational Environmental Issues" (1995) 253 Receuil des Course 287.

[76] Francesco Francioni and Tullio Scovazzi, *International Responsibility for Environmental Harm* (London: Graham & Trotman/Martin Nijhoff, 1991) p.296.

[77] Gibney *et al.*, *supra* note 73 at p.272.

[78] Compare Dominic McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights" in Coomans & Kamminga, *supra* note 71, 41 at p.42-43; with Martin Sheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights" in Coomans & Kamminga, *ibid.* 73 at p.76.

[79] Skogly & Gibney, *supra* note 50 at p.788. The example given is that there may be an obligation not to supply a foreign state with torture equipment, but there is no obligation to send personnel to train the police in a foreign state in non-torturous practices, although this could be done with the consent of the foreign state.

[80] ICESCR, *supra* note 56.

[81] Fons Coomans & Menno T. Kamminga, "Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties", in Coomans & Kamminga, *supra* note 72, p.1 at p.2. On the nature and content of these obligations, see Fons Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Coomans & Kamminga p.183-199, including discussion of the obligations to respect, protect and fulfil; and Rolf Künnemann, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Coomans & Kamminga p.201-231.

authorities.[82] An "external respect-bound obligation" would encompass situations where a foreign state agency provides active support in the violation of human rights in a foreign state.[83] An "external obligation to protect and to co-operate in protection" would arise for the home state where transnational corporations commit abuses.[84] Both would apply to ECAs, depending on the specific context. By contrast, the ICCPR limits the undertakings of State parties to "respect and to ensure [ICCPR rights] to all individuals within its territory and subject to its jurisdiction".[85] An analysis of the case law on point and the opinions of experts reveals that while what constitutes a state's "territory" is clear, the meaning of "jurisdiction" in this context continues to be a topic of debate, although the experts do agree that it means something other than "territory".[86] It is unclear whether ECA activities would fall within the scope of the terms "territory" or "jurisdiction" under the ICCPR. That said, for the ICCPR existing case law does support the inclusion of measures taken within one state's territory that have an extraterritorial effect in another state.[87] This position is supported by the text of the ICCPR in Article 5(1) which states that nothing in the ICCPR may be interpreted to imply a right to engage in activity destructive of the rights and freedoms in the Convention. The Human Rights Committee reasoned in that perspective that "it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[88]

A third approach to the extraterritoriality question is to view it through the lens of the public international law of jurisdiction. This approach focuses on the circumstances under which the exercise of extraterritorial jurisdiction is considered permissible, as opposed to mandatory as is the case under the first two approaches.[89] Addressing the permissibility of an exercise of jurisdiction is important in that it highlights the situations where states can regulate, even where they believe they are under no obligation to do so. This is significant as many states believe that an exercise of extraterritorial jurisdiction is in

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[82] Künnemann, *ibid.* at p.213. Internal obligations would be those owed by a state towards victims in its own territory, while international obligations would be those owed to victims both inside and outside its territory through an international agreement or international authority.

[83] Künnemann, *ibid.* at p.216-127. The example given is of CIDA, the Canadian International Development Agency.

[84] *Ibid.* at p.219-220.

[85] ICCPR Article 2(1). Similar language is found in the Inter-American and European Conventions on human rights. Coomans & Kamminga, *supra* note 81, p.2.

[86] Coomans & Kamminga, *ibid.* p.3. The text *Extraterritorial Application of Human Rights Treaties*, edited by Coomans & Kamminga, *ibid.* is the outcome of an experts seminar held in January 2003 at the Maastricht Centre for Human Rights. The experts agreed that jurisdiction includes situations of effective control over a foreign territory, and where power and authority is exercised over persons on foreign soil. However, they disagreed over whether other situations, such as extraterritorial killings where there has been no arrest, come within the scope of the term jurisdiction, in light of differing approaches taken to this issue by the different regional bodies that use similar language. Much of the discussion centered around the European Court's decision in *Bankovic and Others v. Belgium and 16 Other Contracting States* (Appl. No. 52207/99), ECtHR 12 December 2001, 41 ILM (2002) 517.

[87] See for example *Liozidou v. Turkey (Preliminary Objections)* ECtHR 23 March 1995, Series A vol.310; and *Soering v. United Kingdom*, ECtHR 7 July 1989, Series A vol.161. See for example analysis in Skogly & Gibney, *supra* note 50 at p.794; Jägers, *supra* note 48 at p.167-168; Lawson, *supra* note 71 at p.92, p.96-99; McGoldrick, *supra* note 78 at p.52-53. Another issue is whether there is an extraterritorial limit to the "legal space" of regional human rights treaties. If applied to the ICCPR, this doctrine would limit complaints to those that involve conduct within the territory of state parties. Coomans & Kamminga, *supra* note 80 at p.5. However, the Human Rights Committee has not subscribed to this doctrine.

[88] *López Burgos v. Uruguay*, HRC 6 June 1979, UN Doc. A/36/40, 176, §12.3. See also Lawson, *ibid.* at p.93-94.

[89] See Scheinin, *supra* note 78, at p.79 for this distinction.

principle illicit or illegal under jurisdictional principles of international law due to the principle of non-intervention or non-interference.[90] However, state practice is often cited as providing evidence of an emerging norm whereby states use their authority and capacity to exercise their jurisdiction to prescribe and adjudicate laws that regulate the extraterritorial activities of their national corporations.[91] State practice in the ECA context demonstrates that jurisdiction can be exercised to ensure that the social and environmental impacts of financing and insurance activities are taken into account in decision-making.[92] Indeed, state practice also reveals that some ECAs do currently require that the international obligations of the home state, including in the human rights realm, are considered in ECA decision-making.[93] Accordingly, consideration of international human rights norms in ECA financing and insurance decisions is at a minimum permissible under jurisdictional principles of public international law.[94]

Ultimately, the question of extraterritoriality and home state obligations for the human rights impacts of ECA activities is an area that requires further study.[95] While the laws of state responsibility are not limited by extraterritoriality concerns, the extraterritoriality limitations that may be built into some – but not all – international human rights norms needs to be further examined. The permissibility of the exercise of jurisdiction in this area, however, is not in doubt. This is particularly the case where the obligations of both the home and host state correspond, as would be the case with universal international human rights norms. However, obligations need not correspond, as both home state and host state can agree to extraterritorial jurisdiction. There is also room for permissive home state jurisdiction even in the absence of agreement, where the exercise of jurisdiction does not come into conflict with the jurisdiction exercised by the host state.

Part IV

7. Legal Implications

The approach to extraterritoriality that is adopted can lead to different conclusions about the legal obligations of home states to regulate the human rights impacts of ECA decisions. For example, if viewed purely as an issue of state responsibility, home states are

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[90] See generally Ian Brownlie, *Principles of Public International Law*, 6h ed. (Oxford University Press, 2003), at Chapter 15 "Jurisdictional Competence", especially p.308-310.

[91] See for example G. Gagnon, A. Macklin, & P. Simons, *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Foreign Policy* (Relationships in Transition, January 2003); M. Sornarajah, *International Law of Foreign Direct Investment* (Cambridge University Press, 2004) at p.182-183.

[92] The justification for this exercise of jurisdiction could be territorial, in that the decisions are made within the territorial jurisdiction of the home state. See generally August Reinisch, "The Changing International Legal Framework for Dealing With Non-State Actors" in Alston, *supra* note 1, p.37 at 53-61 for an overview of current considerations in connection with extraterritoriality, international law and human rights.

[93] See for example Belguim's Delcredere/Decroire (Article 16 of the Law of 1939) and Finland's Finnvere (Export Guarantee Act,§7, in force 2001)

[94] However, Reinisch, *supra* note 92 at p.59-61 notes that the substance or content of the legislation may have an impact on the legality of an exercise of extraterritorial jurisdiction.

[95] Indeed, the experts meeting that led to the publication of the Coomans & Kamminga text noted several issues in need of further study, including: the issue of whether home states of transnational corporations have a duty to exercise due diligence to protect citizens of third states; and the nature of the involvement of a donor state through acts of commission or omission, financial and otherwise, with due attention given to the conduct of the recipient state, including its inability or unwillingness to act. Coomans & Kamminga, *supra* note 81 at p.6.

clearly under a legal obligation to regulate ECAs. If viewed as an issue of international human rights law, the existence of an extraterritorial legal obligation may depend upon the source of the obligation, although support arguably exists for the extraterritoriality of human rights obligations in the ECA context. If the approach taken is that of the public international law of jurisdiction, the issue is not whether home states are under a legal obligation to regulate ECAs, but whether it is permissible for them to do so in the first place under principles of public international law. This is not an insignificant consideration given that many home state governments claim that their ability to regulate ECAs and the international activities of home state TNCs is limited due to extraterritoriality concerns. However, in the ECA context at least, this belief may be unfounded.

If it is accepted that an obligation does exist for home states to regulate ECAs, the question is how this legal obligation could be enforced. Several avenues could be pursued, although further research is required to determine which options would be the most useful.

One avenue is through the international law of state responsibility. However, the ILC Framework is concerned exclusively with the obligations owed by states to other states, and does not deal with the enforcement of obligations owed to individuals as may be necessary in the human rights context.[96] While the host state could be viewed as an injured state entitled to seek reparations and cessation, it could also be argued in the ECA context that the host state has consented to the actions or omissions of the home state. This would preclude the host state from seeking recourse against the home state,[97] although the obligation of reparation would not disappear as this obligation arises automatically upon the commission of the wrongful act.[98] Significantly, while an obligation of reparation in the human rights context may exist towards all other parties to the treaty, the reparation does not necessarily accrue to the benefit of the state, as the ultimate beneficiaries are the individual rights holder.[99] However, the ILC Framework does not address the question of how individuals who have been harmed may get the benefit.

Assuming that the host state is not precluded from seeking recourse against the home state due to the argument of host state consent, it is conceivable that a host state that has experienced gross human rights violations arising out of an ECA-funded project could bring suit against the home state. However, host states may be reticent to bring this type of suit even though there may be no other recourse available, for fear of discouraging foreign direct investment. The ILC Framework does provide that the international responsibility of one state may be implemented by the invocation of responsibility by states other than the injured state where the breached obligation is owed to a group of states or to the international community as a whole.[100] However, in the unlikely event that a state other than the injured

[96] See generally Article 33 and Commentaries in Crawford at 209-210. Indeed, some scholars have taken the position that the ILC Articles on State Responsibility are not relevant to international human rights law, and that international human rights law is an example of *lex specialis* that allows for a departure from general principles. Others have taken a contrary view. Jägers, *supra* note 48, p.146. See also Albrecht Randelzhofer and Christian Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, London, Boston: Martin Nijhoff Publishers, 1999); Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford University Press, 2005) at p.97-102.
[97] ILC Framework, Article 20.
[98] Commentary to Article 31, para. 4 in Crawford at p.202.
[99] ILC Framework, Article 33; Commentaries in Crawford at p.209, para. 3.
[100] ILC Framework, Articles 42 and 48; Commentaries in Crawford at p.276-278.

state commenced proceedings before an international court or tribunal, practical difficulties would arise in establishing the responsibility of an aiding or assisting state. The International Court of Justice has taken the position that it will not decide a case of international state responsibility if to do so requires it to rule on the lawfulness of the conduct of the aided or assisted state in its absence or without its consent.[101]

A second possibility would be to seek enforcement through human rights treaty mechanisms.[102] For example, while individuals cannot bring claims before the International Court of Justice, they can bring claims before the regional human rights courts. However, the uncertainty surrounding extraterritoriality discussed in the previous section may mean that some regional courts, in particular the European Court of Human Rights, may limit their application to exclude the extraterritorial impacts of ECA activities.[103] Human rights treaty complaints and reporting mechanisms offer an alternate method of bringing attention to human rights violations by home state ECAs. For example, states are asked to report on their progress in achieving the observance of rights recognised in the ICESCR in their periodic report submitted to the UN Committee on Economic, Social and Cultural Rights. NGOs could submit shadow reports setting out how the activities of the country's official ECA has impacted the enjoyment of human rights both domestically and in other states. This would both draw attention to the issue and encourage systematic recognition of extraterritorial obligations within the Committee.[104]

A third approach would be to use national courts to impose direct responsibility on ECAs for the harm they cause through tort or specific injury lawsuits, or to use national courts for litigation or judicial review seeking preventative measures such as access to information. There are many challenges and unanswered questions here. First, home state ECAs may be subject to sovereign immunity in host state courts, so home state courts may be the preferred forum. Secondly, it is necessary to have clear legal grounds for bringing a case. Problems related to preventative measures arise where ECAs have been created so as to be immune from legal process, including, for example, not being subject to access to information legislation and having their decision-making excluded from the oversight of judicial review. With regard to accountability litigation, problems are likely to be encountered due to questions relating to whether or not an ECA can be said to owe a duty of care, or whether other defendants, such as TNCs or the host state, may be said to bear a greater responsibility for the harm caused.

It was noted earlier in this paper that the implementation of human rights obligations often involves an exercise of legislative power – the power to regulate. Some home states have already made their ECAs subject to legislation that requires them to ensure the activities they support are conducted in compliance with the international legal obligations of the home state, including international human rights law.[105] Effective enforcement of ECA human rights obligations through national courts may depend upon the existence and structure of

[101] Commentaries in Crawford at p.151 para. 11. However, this does not preclude diplomatic protests. Standing at the International Court of Justice is limited to states. Shelton, *supra* note 96.
[102] See generally Shelton, *ibid.* at p.189-226 for an overview of the regional systems.
[103] Shelton, *ibid.* at p.159.
[104] This would be justified under ICESCR Article 2(1) which provides that the rights in the Covenant shall be realised through "international assistance and cooperation, especially economic and technical …".
[105] See for example Belguim's Delcredere/Decroire (Article 16 of the Law of 1939) and Finland's Finnvere (Export Guarantee Act,§7, in force 2001)

such legislation. Home states subject to the ICESCR are also under an obligation to provide access to legal remedies for the victims of human rights violations. In addition, while some ECAs have set up compliance officer positions, this is not an adequate substitute for access to legal remedies, as compliance mechanisms generally only test internal policy and project compliance, not compliance with international human rights norms.[106]

It is often argued that a victim of a human rights abuse involving a transnational corporation has a right to a remedy in the home state, especially if the host state fails to provide a remedy and compensation.[107] It can clearly be argued that a victim of a human rights abuse involving an ECA should have a right to a remedy in the home state in similar circumstances. This remedy could be a right to sue the ECA in home state courts, and a right to judicial review over ECA decisions. The issue of access to justice is also addressed under the Aarhus Convention, which, as has been noted earlier in this paper, does apply to the activities of ECAs. Accordingly, ECAs subject to the Aarhus Convention are under an obligation to provide access to information, public participation in environmental decision-making, and access to justice in environmental matters.[108] The human right to a legal remedy should involve similar elements.

CONCLUSION

This paper has established that officially supported ECAs are organs or agents of the home state under the international law of state responsibility. Assuming that the extraterritoriality of human rights obligations is accepted, home states are then under an obligation to regulate ECAs to ensure that the activities they support, including those conducted by private actors, are conducted in a manner that complies with the home state's obligations to respect, protect, and fulfil as provided by international human rights law. These obligations require home states to both make the provision of ECA support conditional upon compliance with international human rights norms and to ensure access to a legal remedy is available in home state courts for the victims of human rights abuses arising from ECA activities.

There remain many unanswered questions and areas for future research. These include further examination of extraterritoriality and international human rights law, and a more detailed study of potential legal mechanisms for ECA accountability. Another topic of study may be the legal implications of the relationship between the direct responsibility of transnational corporations and the responsibility of ECAs for human rights violations arising out of the same facts.

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[106] Japan, Canada and the United States all have compliance officer positions.

[107] Künnemann in Coomans & Kamminga, *supra* note 81 at p.217, 219-220; Sornarajah, *supra* note 91 at p.200; M. Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", in Craig Scott, editor, *Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford - Portland Oregon, 2001) 491; Brian Smith, *supra* note 48, p.36 regarding the obligation of diligent pursuit, apprehension and punishment of offenders.

[108] Aarhus Convention, *supra* note 19.

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