

# Beyond Territorial Sovereignty

## Public-Private Partnerships in the Management of Indonesian Migrant Labour in Hong Kong

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This thesis is my own original work. To the best of my knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

Signed.....

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## **Abstract**

Based on international legal understandings of sovereignty, states can and do gate-keep their territory in an attempt to thwart other states' attempts to establish extraterritorial authority structures within their borders. In response, states have developed alternate mechanisms which serve to allow them to intervene in other states' territory with varying degrees of authority. Partnerships between states and the private sector of other countries are one such mechanism. By partnering with the private sector in order to extend their authority into the territory of other states, sending-states can effectively avoid diplomatic negotiations with host states concerning the extent to which these states' authority may be established within a host state's territory. Moreover, these partnerships have the potential to manage issues of interest to sending-states, but which host states have proven unable – or unwilling – to regulate.

This thesis examines these questions using the example of a public-private partnership between the Indonesian government and Hong Kong-based migrant labour recruitment agencies. Through these agencies, the government of Indonesia effectively extends its authority into Hong Kong territory in an attempt to manage conditions and conduct directly and indirectly related to the mechanisms of its labour export program within Hong Kong's borders. At the same time, the Hong Kong Administration assigns limited and issue-specific sovereignty to Indonesia and other sending-states over these states' citizens as part of its immigration control regime. Together, the practices of these two governments underscore the fact that state sovereignty is not always absolute and total within state territory; but that it can also be limited, issue-specific and extraterritorial.

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*Matur nuwun sadaya.*

## Introduction

Labour sending states such as Indonesia and the Philippines are limited in their ability to directly regulate issues related to their labour export programs in destination countries largely because of international, legal understandings of sovereignty, which require them to formally observe the exclusive right of other states to make rules within their territory. At the same time, the governments of Indonesia and the Philippines – both states that export large numbers of workers – have enacted legislation that articulates their formal right and responsibility to assist and support their citizens in employment-related matters while overseas. These measures challenge international legal understandings of sovereignty which view the limit of state authority as coterminous with states' territorial borders and bring into question the assumption that state sovereignty is invariably exclusive and absolute within state territory.

Labour sending states have a long history of attempting to assert control over their migrant worker citizens while overseas – a phenomenon that is particularly well-documented in the case of the Philippines. In 1982, the Philippines government issued a policy which required its migrant workers to remit at least 50 percent of their wages through official channels. It was able to enforce this policy in host countries by passing regulations under which Filipino migrant workers who were unable to evidence receipts for remittances of their wages were not permitted to extend their passports, thus making it impossible for them to remain overseas legally (Government of the Philippines 1982: section 3). Two and a half decades later, the Philippines government retracted the right of its citizens to negotiate contracts with overseas employers without using a recruitment agency (Government of the Philippines 2007b). The first example shows how the Philippines used its citizenship and the issuance of passports to harness the earnings of Filipino migrant workers in an attempt to regularise the flow of foreign currency into its economy for fiscal and monetary reasons. The second example shows how a state may try to regulate the employment conditions of its citizens in another country.

Conventionally, industrial relations matters are considered to be a domestic concern of receiving state governments, not that of sending states. By intervening in this arena, these sending states have demonstrated that a state's jurisdiction is not always exclusively defined by territory. This thesis argues that labour sending states offer a particularly useful case for examining the ways in which a state's jurisdiction may be expanded beyond its territorial boundaries. Twelve percent of the Philippine labour force works outside Philippine borders on such contracts (Asian Development Bank 2008b; Government of the Philippines 2007b). Similarly, the government of Indonesia has facilitated the placement of over six million of its citizens in temporary employment in destination countries such as Saudi Arabia, Malaysia and Hong Kong (Government of Indonesia 2008e). Large numbers of these temporary labour migrants work in a few major destination countries, and experience similar conditions during their deployment. As a result, sending states have been compelled to develop mechanisms that allow them to manage, assist and support their citizens in those countries. As suggested above, this involves the extraterritorial application of policies and legislation.

This thesis shows how the labour sending state of Indonesia can and does enforce authority over its citizens extraterritorially in Hong Kong. It explains how the Indonesian government works with private local recruitment agencies in an attempt to manage its labour export program, arguing that these agencies effectively act to extend Indonesia's jurisdiction into Hong Kong's borders – a phenomenon that raises interesting and important questions about the assumption that state sovereignty is always about territory. As the following chapters demonstrate, this case suggests that sovereignty can be as much about governing conditions and conduct as about governing space. In short, the boundaries of sovereignty can be spatially structured around citizens rather than around the physical boundaries of state territory.

## Public-private partnerships and extraterritorial authority

Public-private partnerships between the Indonesian government and Hong Kong-based placement agencies are a key part of this system. This perhaps reflects the fact that more broadly public-private partnerships have become a popular mode of governance through which states share authority with non-state actors both within national boundaries and across them. The United Nations Office for Partnerships, for example, fosters a set of formal and informal partnerships with companies, corporations and non-state organisations in an attempt to improve the quality of international governance.<sup>1</sup> In 2007, the United Nations considered almost 500 non-state bodies, including international NGOs, for ‘possible collaboration with the United Nations system’ (United Nations 2007:15). The International Commission of Jurists, as an example of this, occupies an advisory position on the board of the United Nations Democracy Fund, which funds projects that concern human rights and other issue areas (United Nations 2007:13).<sup>2</sup>

Similarly, the United Nations Charter gives non-state actors a role in the formation and enforcement of international governance.<sup>3</sup> For example, Amnesty International played a central role in the drafting phase of the United Nations Convention against Torture alongside states (Burgers and Danelius 1988:13, 19-20, 24-26).<sup>4</sup> Transparency International is another such body, which, as Amnesty International is a

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<sup>1</sup> These non-state bodies include, for example, the American Red Cross, Centre for Disease and Control (USA), Arzu, Citizens International, Conservation International, Education Development Centre, Inc., Equal Access, International Red Cross and Red Crescent Society, The Nature of Conservancy, Right to Play, Rotary International, World Economic Forum and World Wildlife Fund. See United Nations Office for Partnerships (United Nations 2008).

<sup>2</sup> For other projects supported by this fund, see the report of the UN secretary-general (2007:12-13).

<sup>3</sup> Article 71: ‘The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned’ (United Nations 1945).

<sup>4</sup> As a result of this convention – and in part as a result of Amnesty’s participation in the drafting of this convention, signatory states are required to prevent acts of torture within their borders and are denied the right to return non-citizens to their home countries if there is reason to believe that they will be tortured by members of their governments.

source of these types of information for states on human rights, is a source of this type of information on corruption. These non-state bodies can provide epistemic knowledge on specific issues and empirical data about these issues in multiple localities, which can assist in the development of international frameworks for the governance of global issues. By participating in this way, non-state bodies not only participate in the setting of international standards for governance by states, they also participate in international relations, widely understood to be the domain of states (Sassen 2006:299).

While some scholars see the ascendance of non-state actors in the international arena as heralding the demise of states, others argue that these kinds of partnerships have the potential to solve a set of international governance questions (Börzel and Risse 2005). Sassen (2006:317-318), for example, argues that the formalisation of roles for non-state bodies in international governance translates to the ‘partial relinquishing of components of state authority.’ Others still have explored how non-state actors can facilitate governance across borders rather than viewing the ascendance of non-state actors in international relations as a phenomenon that connotes a trade-off for the state. International and regional organisations, of which the membership is entirely made up of states such as the United Nations and the European Union, interact with non-state bodies because they offer opportunities to strengthen rather than weaken state authority.

Partnerships with non-state bodies can also provide a conduit through which states may address the practices of other states without engaging in bilateral dialogue. For example, 153 countries use the mechanisms of the World Trade Organization to enforce their trade rights in the international market.<sup>5</sup> As a member, the Australian government has used this instrument to contest trade policies of states in Asia, Europe

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<sup>5</sup> As of September 11, 2008, there were 153 members according to the World Trade Organization (World Trade Organization 2008b). The Australian government claims that ‘the system provides a binding and enforceable mechanism through which member countries can enforce their trade rights’ (Government of Australia 2008a).

and North America which adversely affect the demand for Australian exports.<sup>6</sup> The costs of this type of partnership can be significant for member states in the event that they are forced to amend national laws and act against the interests of national actors. However, the benefits they offer may outweigh those costs (Bradley and Kelley 2007:2). For example, Krasner (1999:14) has argued in support of this position that states agree to the establishment of external authority structures over cross-border flows as this allows states to exert control over uncontrollable spaces.

As states are limited in their ability to act beyond their own borders, some governments also enter into partnerships with private actors in order to manage situations in which state-to-state negotiations are not possible. Andonova (2005:7) argues that, in this way, 'public-private partnerships step in where states and international institutions fail.' For example, in 1997, there was a worldwide breakdown of dialogue between governments and other stakeholders on the issue of dam construction (World Commission on Dams 2000a). In cases where rivers flow through the territory of more than one state, such as the Mekong in Southeast Asia, the construction of dams by one country has the potential to affect other countries. Because of political considerations, national, regional and international organisations were constrained in their ability to resolve this issue. As a result, the World Commission on Dams, a public-private partnership, was established to develop a framework for the construction of dams on shared rivers (World Commission on Dams 2000c, 2000b). Although not all states use this framework, international financial institutions, such as the World Bank, refer to the work of the Commission when deciding which dam projects to finance (World Bank 2001:1). In this way, public-private partnerships help to fill 'governance gaps' which can not be bridged using diplomatic channels (Andonova 2005:7).

The body of literature on these types of partnerships focuses on the legitimacy of their contribution to international governance (e.g. Risse 2004; Pattberg 2005; Wolf

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<sup>6</sup> Against Hungary in 1996; India in 1997; South Korea in 1999; the United States of America in 1999 and 2000; and the European Communities in 2002 and 2003 (World Trade Organization 2008a).

2006). Little attention has been paid to the contribution of these types of partnerships to states' ability to exercise extraterritorial jurisdiction by extending their regulatory frameworks into the territory of other states. One exception is Granne (2008), who uses a United States example to show that some public-private partnerships have been granted immunity to American laws if they are deemed to be an 'organ of a foreign state.'<sup>7</sup> For instance, the US Foreign Sovereign Immunities Act of 1976 granted the Korean Deposit Insurance Corporation the same level of immunity as it does to consulates and embassies (Eclavea et al. 2008:§ 101). Through this company, whose directors are appointed by the Korean Ministry of Finance and Economy and whose President is appointed by the President of Korea, the Korean state plays a role in global commerce.

There are also examples of public-private partnerships between foreign states and private companies that are not formally recognised by the host states where the private partner is incorporated as a legal entity. In some cases, the private partners involved in these arrangements are required to engage in public activity on behalf of their foreign partner states. In this way, this type of partnership legitimately and effectively extends the reach of the partner state's authority into the territory of another state, which in turn shows that diplomatic instruments such as bilateral and multilateral agreements are not the only means of achieving this objective. This thesis will explicate the possibilities of these kinds of relationships by painting a picture of the arrangements between the government of Indonesia and certain Hong Kong labour recruitment agencies, which allow the government of Indonesia to manage Indonesian citizens working temporarily in Hong Kong.

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<sup>7</sup> Under the US Foreign Sovereign Immunities Act of 1976, agencies, instrumentalities and subdivisions of foreign sovereign states can be afforded immunity to American laws. As a result of protection by this legislation, American courts may not claim jurisdiction over practices by these entities (Government of the United States 2006).

## **Methodology**

This thesis uses three key methodologies to show how the management of labour migration challenges internationally-accepted understandings of jurisdiction, and through it, our understanding of sovereignty. Interviews were conducted with informants from the Indonesian Consulate in Hong Kong in order to map out the various interventions by the government of Indonesia in regard to Indonesian migrant labour in Hong Kong. This approach complemented the insights gained through participant observation while working for a migrant labour non-government organisation prior to beginning the formal process of research for the thesis. These observations and interviews helped to generate a picture about how these regulatory frameworks worked within Hong Kong's territory.

Data collected through these methods was complemented by an analysis of Indonesian and Hong Kong government documents related to the management of structured, temporary, labour migration. A detailed analysis of government decrees, policies, regulations and statutes spanning the life of Indonesia's labour export program shed light both on why and how this regulatory framework was designed, and why the Hong Kong Administration creates spaces for the consulates of labour sending states to play a role in the management of temporary labour migration. It also indicated that this type of regulatory framework was designed for implementation in all major destination countries, suggesting that the findings of this thesis are not entirely unique to the setting of Hong Kong.

## **Thesis Outline**

Chapter One explores varied modalities of sovereignty in order to demonstrate that *de facto* practices of sovereignty were not, and are not, always strictly territorial. The following section of this chapter demonstrates how, despite the fact that the international system espouses territoriality as the organising principle of sovereignty,

states can exert jurisdiction over their citizens. These first two sections clear a space for a discussion of the informal, extraterritorial mechanisms established by sending states in order to deal with temporary labour migration. The discussion that follows argues that one way in which states can extend the reach of their regulatory frameworks into the territory of other states is through close cooperation with the private sector.

Chapter Two explores why and how receiving state and sending state frameworks for the management of labour migration evolved along territorial lines, and why sending states in particular have more recently attempted to develop an extraterritorial dimension to those frameworks. The first section looks at the economic and social impacts that labour migrants have had within Hong Kong's borders as well as the government's response to labour migration. In this way, this section underscores the territorial focus of Hong Kong's framework for the regulation of labour migration to – and labour migrants in – its territory. In the following section, the focus shifts from receiving states to sending states, explaining how the Philippines and Indonesia have incorporated extraterritorial mechanisms in the systems they have developed in an attempt to manage the overseas phase of their labour export programs. This section then explores how the Indonesian government uses territorial controls to not only regulate the conditions under which its citizens are recruited and deployed from its territory, but to also negotiate control over individuals and companies involved in that process within the borders of destination countries.

Chapter Three explains how the extraterritorial dimension of Indonesia's regulatory framework operates and is upheld within Hong Kong territory. The first section of the chapter demonstrates how the government of Indonesia interacts with host state laws, policies and regulations in an attempt to establish its authority within Hong Kong's borders, and through this extend its jurisdiction into this state's territory. It shows how this framework uses commercial rather than legal disciplinary action in an attempt to 'guide' the activities and conduct of these actors. Yet, as the following section illustrates, this unilateral, extraterritorial framework is shaped by Indonesia in

ways that ensure that it complements, rather than conflicts with, Hong Kong laws and regulations. The final section analyses the benefits and challenges of Indonesia's partnership with private labour recruitment agencies in Hong Kong, with a particular focus on how this extraterritorial marriage of the public and private can assist partnered governments in their attempt to achieve national objectives in the territory of other states.

The thesis concludes that sovereignty is neither always exclusive nor total within state territory. Moreover, states can and do assign limited and issue-specific sovereignty to other states over those states' citizens in an attempt to manage issues, like temporary labour migration, that have a distinctly transnational character.

## **Chapter One – The theoretical framework**

This chapter explores the evolution of territorial sovereignty, as it is understood in the international system. In addition to showing that state authority has not always been organised around the principle of territoriality, it identifies a number of ways in which the boundaries of state authority have been set around alternative markers in contemporary times. It argues that, in some situations, states can use extraterritorial mechanisms to regulate conditions and conduct outside state territory, especially when they involve legal members of the state. As this suggests, although territorially sovereign, states do not view their borders as the absolute limit of their jurisdiction. Measures that involve citizens provide particularly useful examples for a discussion of this type of jurisdiction because they remain bound to their home states through the tie of citizenship even after they cross international boundaries. Yet, as this chapter shows, while states can and do claim extraterritorial jurisdiction over matters related to their citizens, the importance accorded to territory as a marker of sovereignty remains an obstacle to states' attempts to enforce their authority beyond their borders.

### **The evolution of territorial sovereignty**

International legal understandings of sovereignty focus on the exclusive right of states to regulate activity within their territory. Moreover, membership in the international community of states requires states to respect the territorial integrity of other member states by abstaining from intervening in these states' internal affairs (Clapham 1999:523-525). While some states use this understanding of sovereignty to claim autonomy over spaces within their borders (Clapham 1999:525), scholars such as Krasner (1999) argue that others use sovereignty to claim control over activity across their borders.<sup>8</sup> Borders, in one way, can allow states to be 'hermitic' (Perkmann and Sum 2002:1); however, in other ways, they represent a boundary

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<sup>8</sup> See Krasner's concept of 'interdependence sovereignty' and especially his discussion of what a loss of this type of sovereignty means for the quality of state sovereignty (1999:12-14).

between two distinct spaces. Cross-border movement, therefore, entails departure from one sovereign space to another, across such a boundary (Heddebaut 2001; Newman 2006:178-179). States design mechanisms to manage the movement of diseases, goods, money and people – but also of ideas – across borders. For example, China uses a firewall to limit the ability of its citizens, and others within its territory, to access ‘politically sensitive’ information about contemporary and historical events through the internet.<sup>9</sup> As this example illustrates, states can and do use territory as an organising principle of their authority.

Territoriality is the *de jure* organising principle of the international system that ensures that the spatial sovereignty of states is exclusive.<sup>10</sup> Practitioners, and many theorists, assume that territorial sovereignty is ‘an historical and political fact’ (Bull and Watson 1984) whose origins lie in the Western European context. However, the temporal origins of territoriality, as a concept in international relations, are hotly debated. While many scholars cite the 1648 Treaty of Westphalia as the point of departure for the evolution of territorial sovereignty, other scholars have identified other moments or periods in history as the origins of this concept. De Mesquita (2000:93) and Caporaso (2000:3), for example, claim that this concept entered into the vocabulary of international relations 500 years before the 1648 Treaty of Westphalia through the Concordat of Worms.<sup>11</sup> In contrast, Hinsley (1986:195-208), Spruyt (1994:94) and Thomson (1994) claim that the contemporary form of territorial

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<sup>9</sup> For example, the Chinese government restricts access to Web sites that discuss the Tiananmen Square Incident and Taiwanese sovereignty. However, less than one week before the Opening Ceremony of the 2008 Olympics, China agreed to temporarily relax its restrictions on the internet to facilitate coverage of this international sporting event by foreign journalists and reporters. As a result, the Web sites of organisations such as Amnesty International and Human Rights were unblocked (Jacobs 2008). This type of control, however, is not unique to China. In fact, the flow of information across borders is of concern to many states. A draft of UNESCO’s Mass Media Declaration, for example, demonstrates this in a section where it states that ‘states are responsible for the activities... of all mass media under their jurisdiction’ (United Nations Educational Scientific and Cultural Organization (UNESCO) 1976:12). This item, however, was not included in the final declaration because of protests by Western states which ascribe to liberal political ideologies (Sussman and Sussman 1986:348-349).

<sup>10</sup> Agnew (2005:437) defines territoriality as ‘the use of territory for political, social, and economic ends.’ In the international system, territoriality is nominally exclusive.

<sup>11</sup> Both the Treaty of Westphalia and the Concordat of Worms were attempts to ‘schedule’ the authority of European Kings and the Catholic Church in kingdoms across Western Europe rather than territorialise the sovereignty of states.

sovereignty did not emerge until much later. For example, Thomson (1994:7, 148-149) argues that contemporary territorial sovereignty took its form in the middle of the nineteenth-century when states succeeded in securing a 'monopoly of the legitimate use of physical force' after five centuries of competition with non-state actors, such as mercenaries and pirates.

Up until this point, territorial sovereignty was not exclusive to states: non-state entities, such as the United East Indies Company of the Netherlands, established colonies, governed them and waged wars to expand their territories (Ames 2008:102-103). For example, as Vickers (2005: 10) explains, the United East Indies Company was 'founded on business, not Dutch national expansionism' yet acted like a territorial state in that it fought wars to 'enlarge and consolidate its possessions' in Southeast Asia. Furthermore, this company, and others like it 'concluded treaties with each other and with foreign governments, governed subjects of their home states... and even coined their own money' (Thomson 1994:11). Based on these facts, Thomson (1994:10) argues that, 'in the modern sense,' these companies 'were not private organisations,' but rather an alternative genre of states.<sup>12</sup>

As this suggests, in earlier times, the Westphalian system of territorially sovereign states operated parallel to alternative systems. In addition to private companies, the territorial system of Europe evolved alongside the Ottoman and Chinese systems. These alternative systems did not view states as exclusive, territorial units of equal standing, as they are in the Westphalian system. The Ottoman system organised inter-state relations according to an Islamic paradigm. Instead of organising states into territory, it organised them into one of two houses: the House of Peace and the House of War (Naff 1984:144). Dar-al-Salam, or the House of Peace, was the domain where Muslims could practise their religion freely whereas Dar-al-Harb, or the House of

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<sup>12</sup> These private states operated for around 300 years until their possessions were merged into the territorially sovereign spaces of European, Westphalian states. The possessions of the United East Indies Company, for example, were incorporated into the Kingdom of the Netherlands after this company went bankrupt (Ricklefs 1993:110). Similarly, the possessions of the Honourable East India Company, which practically ruled the area now known as the Subcontinent, were absorbed by the British Crown in 1858.

War, was the domain where Muslims were limited in their ability to practise their religion freely (Sikand 2004:8).<sup>13</sup> States grouped within the House of Peace were considered to be ‘morally superior’ to those within the House of War, which in turn influenced the way in which these states viewed and related with each other. Similarly, Gong (1984:174) explains that the Chinese tributary system organised states into a hierarchy according to a set of principles derived from the philosophy of Confucianism. In this system, tributary states were positioned as vassals of China, which, in the terminology of this system, was referred to as the Middle Kingdom. In return for the ‘respect’ of tributary states, the Chinese Middle Kingdom offered its patronage to these states.

These and other alternative forms of sovereignty were disrupted by the expansion of European empires through colonialism and semi-colonialism. Thongchai (1994) uses the example of Thailand to show how indigenous concepts of sovereignty changed as relations with European states intensified. Traditionally, Thailand’s sovereign boundaries were not demarcated by territorial borders. In fact, Thongchai argues that the boundaries of Thai sovereignty were represented by ‘areas, districts, or frontiers’ wherein the local inhabitants could choose the state to which they pledged their ‘allegiance’ (1994:73, 75). As a result of this, Thailand shared sovereignty over its borderlands with neighbouring states. In an illustration of this, Thongchai uses the examples of the Malay states and Cambodia which show how state sovereignties can not only overlap, they can coexist within the same space (1994:92-94).

Like the Chinese system, the Southeast Asian system was a tributary system where more powerful states asserted their ‘overlordship’ over their peripheral yet sovereign neighbours (Thongchai 1994:88-94). While Western observers saw this as implying complete submission of tributary states to patron states, tributary states were in fact considered to be autonomous and self-governing. This resulted in ‘multiply sovereign’ towns, regions and states (Thongchai 1994:94, 99-100). However, this

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<sup>13</sup> Classically, Dar-al-Harb referred to domains where Islamic law was not in force (Bennett 2005:179).

practice of ‘multiple submissions’ came to an end when Thailand signed over its claim to sovereignty over Cambodia to France in exchange for control over shared cultural sites on the Thai-Cambodia frontier<sup>14</sup> and signed treaties with the British in an attempt to clearly define clear cut boundaries between Thai Lanna and British Tenasserim provinces. Political agreements such as these forged new boundaries of authority in the region by territorialising the sovereignty of indigenous states. In short, the aggressive expansion of European empires, particularly during the nineteenth century, marked the beginning of the end for alternative regimes of sovereignty.

### ***Beyond territorially-based sovereignty***

In the contemporary international system, the legitimacy of state sovereignty hinges primarily on the decision by other states to recognise state authority over territory. However, there are examples of spaces where states assert their authority without this recognition. For example, Australia claims sovereignty over large tracts of Antarctica and its adjacent waters although only France, the United Kingdom, New Zealand and Norway recognise this claim.<sup>15</sup> The rest of the international community regard Antarctica as a *terra nullius* and its adjacent waters as the ‘high seas’ over which no state may exercise formal or *de facto* sovereignty.<sup>16</sup> In spite of this, the Federal Court of Australia uses domestic legislation to adjudicate activity and practices that occur within this space. For example, Honourable Justice Aslope ruled in 2008 that a Japanese flagged vessel had contravened the Australian Environment Protection Act by whaling in these waters.<sup>17</sup> However, while this Australian court claimed jurisdiction over its claims on and surrounding Antarctica, it explained that the

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<sup>14</sup> Although these sites were ceded to the Cambodians in a subsequent treaty, they remain an obstacle in bilateral relations between these countries as both states claim sovereignty over them. For example, see (Mydans 2008a, 2008b, 2008c).

<sup>15</sup> Each of these states has a contested territorial claim on Antarctica which is only recognised by a limited number of members of the international community of states.

<sup>16</sup> According to articles 56, 58 and 87 of the United Nations Convention of the Seas, no state can legitimately subject any part of the ‘high seas’ to its sovereignty (United Nations 1982).

<sup>17</sup> See *Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd* (Government of Australia 2008b). The Australian Whale Sanctuary is protected by the Environment Protection and Biodiversity Conservation Act (Government of Australia 1999).

Australian state did not have the ‘practical mechanisms’ necessary to enforce its courts’ orders in these spaces (Government of Australia 2008b). This example shows how states can and do claim jurisdiction over spaces outside their ‘territory proper’ while demonstrating that state bureaucracies have territorial limits.

Similarly, the United States of America claims jurisdiction over overseas conduct that has an ‘intended’ impact on American commerce.<sup>18</sup> For example, in 1980, an American District Court ruled that nine foreign companies had broken a United States competition law which prohibits agreements designed to restrict trade.<sup>19</sup> These companies, with the support of their home governments, formed a cartel to raise the price of uranium for export to the United States and other countries.<sup>20</sup> Westinghouse Electric Corporation challenged the legality of this overseas cartel through the United States legal system, which in turn ruled that the cartel fell within the jurisdiction of its courts because it had an ‘intended’ impact on national commerce. In admitting this case, the United States has shown that states can and do claim jurisdiction over practices outside their borders if these practices affect a legal member of the state. Lowe (1985:740) argues that this is an example of economic sovereignty, which he defines as a component of sovereignty that ‘flows from state sovereignty over its territory.’<sup>21</sup> Arguments and practices such as these have led other scholars like Dorsett (2005:15) to argue that jurisdiction is ‘a legal concept, not a spatial concept.’

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<sup>18</sup> United States courts use an ‘intended effects test’ in order to assess whether an overseas practice falls within this state’s jurisdiction. The precedent for this test lies in *United States v. Aluminum Co. of America* (Alcoa) (Government of the United States 1945).

<sup>19</sup> See the United States Anti Trust Laws (Government of the United States 2008a).

<sup>20</sup> The United States was the largest importer of this commodity. Lowe (1985:725) argues that the governments of Australia, Canada, South Africa and the United Kingdom of Great Britain and Northern Ireland approved the formation of this cartel. Furthermore, the ruling, *Westinghouse Electric Corporation v. Rio Algom Limited et al.* (Government of the United States 1980:I. Jurisdiction), argues that the governments of involved companies were ‘actively and admittedly sympathetic’ to this agreement. As a result of this agreement, the price of uranium rose from USD \$5 per pound to USD \$40 per pound. See *United States v. Westinghouse Electric Corporation* (Government of the United States 1977:2).

<sup>21</sup> Quiggin (2001) and Vernon (1968) use similar examples to illustrate the concept of economic sovereignty. Cases such as these have led some scholars, like Raustiala (2005:518-519), to argue that extraterritorial legislation is becoming more attractive to states in an interdependent world because of the complexity involved in negotiated multilateral agreements.

Dorsett's point that jurisdiction is about enunciating legal authority over practices rather than spaces is a useful one. The Ker-Frisbie Doctrine, for example, illustrates this non-spatial understanding of jurisdiction.<sup>22</sup> This tenet of the United States legal system supports articulations of jurisdiction over criminal defendants, who were abducted from outside state territory in order to deliver these defendants to United States courts. The United States, and other states such as Israel, have used this form of jurisdiction to try individuals forcibly removed from the territory of other states *without* the consent of those states. This form of jurisdiction emerged out of the frustration that states experience with the inability of extradition treaties and other international legal instruments to deliver suspects of criminal activity to their courts.

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However, while this case demonstrates how territorial limits of jurisdiction limit the ability of states to summon and subsequently try individuals outside state territory, other examples show that not all states use the principle of territoriality to define the boundary of their courts' jurisdiction. In fact, for reasons similar to the United States' justification for their employment of the Ker-Frisbie Doctrine, other states use the principle of universality to define the boundary of their courts' jurisdiction.<sup>24</sup> Spanish courts, for example, claim jurisdiction over crimes committed by citizens and non-citizens outside state territory in cases of counterfeiting, piracy, terrorism, genitalia mutilation of females and, *inter alia*, genocide (Government of Spain 1985:section 23(4)). Practices such as these contravene international legal understandings of sovereignty, which espouse the right to non-interference by other states within their territory.<sup>25</sup> At the same time, however, they demonstrate that states do not always

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<sup>22</sup> See *Ker v. Illinois* (Government of the United States 1886) and *Frisbie v. Collins* (Government of the United States 1952). For a discussion of the Ker-Friesbie Doctrine, see Sakellar (1978).

<sup>23</sup> For the United States abduction of a criminal defendant from Mexico, see *United States v. Alvarez-Machain* (Government of the United States 1992). For a discussion of the Israeli abduction of Adolf Eichmann, a suspected war criminal of Nazi Germany, from Argentina, see Baade (1961).

<sup>24</sup> For a discussion of a case for universal jurisdiction, see Roth (2001). For a discussion of its 'pitfalls,' see Kissinger (2001).

<sup>25</sup> For a discussion of Argentina's objection to Israel's abduction of Adolf Eichmann from within its territory and the 'Security Council Debate' on this matter, see Lippman (1982). In this case, at least, the UN Security Council resolved that Eichmann's transfer from Argentine to Israeli

view their borders as the limit of their authority. In fact, these examples show that while states are defensive of their territorial rights, they sometimes commit themselves to governing practices rather than just spaces.

The concept of practice is also salient to more permanent forms of non-territorially based sovereignty. Caporaso (2000:7) argues that the international system ‘delimits the spatial scope of public authority’ based on the principle of territoriality in an attempt to remove the possibility of overlapping sovereignties – a condition which can cause conflicts between states. However, not all sovereign states have territory. The Order of Malta is an example of a non-territorial state that enjoys recognition by the United Nations and maintains diplomatic relations with over 100 countries (Sovereign Order of Malta 2008b, 2008a). Formally seated in Rome, this state is ‘divided throughout the world’ and is afforded extraterritorial rights over property that it owns within the borders of host states (Sovereign Order of Malta 2008c). This example illustrates how non-territorial states can exist within and across the borders of territorial states. It also shows how the sovereignties of states do not necessarily overlap or conflict just because they exist in the same spaces. In short, this example shows that territoriality does not always imply ‘total control’ over territory.

Caporaso (2000:9-10) proposes a useful theory which helps to explain why this may be the case. Using the concept of authority, he argues that ‘separate authority structures’ need not overlap if these structures are ‘scheduled’ – or, in other words, are either organised into a clear hierarchy or around specific issue areas. In this way, ‘no question need arise as to which [authority structure] is supreme’ (Caporaso 2000:9). The extraterritorial rights of embassies, consulates and consuls are an example of sovereign authority which has been ‘scheduled’ by emissary states and their hosts in an attempt to demarcate the domain of each state’s authority within host state territory. In particular, emissary states are given sovereign rights over some territory and certain subjects within host state borders. Commonly referred to as

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territory was an ‘isolated violation’ of Argentina’s territorial sovereignty because the abductors were not (officially recognised) Israeli agents but private individuals (Lippman 1982:9-10).

diplomatic immunity, this ‘scheduled’ authority is clarified and supported by the Vienna Convention on Diplomatic Relations (United Nations 1961:31). As a result, diplomatic agents who violate host laws by smuggling and committing other deliberate unlawful acts, for example, cannot be tried without the consent of their home government (United Nations 1961:9).

Ong (2000) uses the concept of ‘graduated sovereignty’ to illustrate a different kind of relationship between state authority and state territory, noting that states compromise on the exclusiveness of sovereignty over their territory, depending on how global markets interact with it. In particular, Ong argues that, in countries such as Indonesia, state sovereignty is ‘dispersed’ (2000:72). She uses the examples of highly militarised industrial zones in Java and Sumatra to illustrate how the concentration of sovereignty can be denser in some places while sparser in others (Ong 2000:63-64).<sup>26</sup> Furthermore, Ong (2000:72) claims that the practice of state sovereignty in this region is not ‘congruent with national space’.<sup>27</sup> As Rosenau (1997:3-4) argues, although the separation of national and international affairs is a logical dichotomy for political scientists, ‘phenomena, problems, and processes’ of interest to states are not dichotomised in the same way (Rosenau 1997:4). As a result, the exercise of sovereignty is not only unequally ‘dispersed’ throughout state territory (2000), but may also be extended beyond national boundaries.

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<sup>26</sup> Ong (2000:58) defines sovereignty as the ‘condition of order and stability,’ a state which can be maintained by the military. News reports show that Indonesia’s frontiers are relatively porous, especially those Indonesia shares with Malaysia and the Philippines. Furthermore, the Indonesian borderlands of these countries are sites of smuggling and piracy (Mogato 2008), suggesting a lack of order and stability. When compared with the highly militarised zones of industrial estates, this example shows that Indonesian sovereignty may be more concentrated internally rather than at its frontiers. This contrasts with Rosenau’s (1997) argument that state sovereignty is usually disproportionately concentrated and therefore most visible at state frontiers.

<sup>27</sup> Ford and Lyons (2006) use the example of the Indonesia-Malaysia-Singapore Growth Triangle to illustrate a similar argument. They contend that the commercial interests of Singaporean capital on Bintan Island, an Indonesian island that is situated within this growth triangle and in close proximity to Singapore, has reconfigured the relationship between this space and the rest of Indonesian territory. Furthermore, they argue that the creation of the Indonesia-Malaysia-Singapore Growth Triangle has limited the mobility of local Indonesians in insular Riau by creating new ‘borders’ within this area to protect the interests of global capital.

## Sovereignty, jurisdiction and citizenship

Although territory is the primary organising principle of state authority within the international system, international mechanisms for recognising statehood also require states to have citizens. For example, the Convention on Rights and Duties of States requires states to have a ‘defined territory’ and a ‘permanent population’ for recognition by the international community.<sup>28</sup> Despite this plural definition of statehood, international law emphasises territorial integrity over other components of statehood, such as citizenship (Eggers 2007:214-217). As a result of this spatial understanding of sovereignty, states are limited in their ability to enforce authority over their citizens beyond their borders.

While most states make claims for recognition based on their right to govern territory, some states have based their claims for recognition on their right to govern subjects. In the international system, states can earn formal recognition of their sovereignty over territory by establishing authority over communities of people. For example, the Chinese Communist Party (CCP) seized control of Mainland China from the internationally recognised Republic of China after decades of civil war. In its place, the CCP proclaimed the establishment of the People’s Republic of China in 1949. Over the next 20 years, member states of the international community retracted their recognition of the Republic’s sovereignty over China in favour of the People’s Republic.<sup>29</sup> In 1971, this state was recognised by the United Nations when the international community of states formally transferred to it sovereignty over China

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<sup>28</sup> See article 1 of this convention (1933). This convention forms part of a constitutive theory on statehood, which defines the state as a person of international law. Not all states, however, accept mutual recognition as a *modus operandi* for granting statehood to states. The Swiss government, for example, advocates ‘the widest possible recognition of states’ and emphasises that international law does not require a state to be recognised in order to claim statehood. The Swiss government subscribes to a ‘three-element doctrine’ when recognising other states, that is, state power, state territory and state people (Government of Switzerland 2008).

<sup>29</sup> For example, South Korea switched recognition in 1949; the United Kingdom in 1950; France in 1964; Australia in 1972; and the United States in 1979.

from the Republic (United Nations 1971).<sup>30</sup> In contrast, the example of Palestine illustrates how claims to sovereignty over a group of people do not guarantee international recognition of statehood. The Palestinian National Authority, which is a sub-organisation of the Palestinian Liberation Organisation, was established to govern territory occupied by mainly ethnic Palestinians. However, this public authority is not recognised as a state even though it functions in a state-like manner, governing the people who reside within the territory of the West Bank and the Gaza Strip (Crawford 2007:308-309). This *de facto* state's authority is not strictly territorial, but rather spatially organised around subjects. Because the Palestinian National Authority does not have internationally recognised state territory, its capacity to claim state sovereignty and the rights that come with it from the international community is limited. In spite of this, *de facto* states like Palestine – and others like Somaliland and Taiwan, which have state territory but are not widely recognised – still interact *as states* in the international community.<sup>31</sup>

In recent decades, there has also been a shift in the international community's view of inviolability of territorial sovereignty as a result of an increasing international focus on human rights. Foreign intervention within the territories of Indonesia and Serbia show that sovereignty is, to some extent, contingent on how states treat their citizens. Indonesia lost its territorial rights over East Timor in 1999, at least partly because of the way in which it handled the internal conflict between the Indonesian government and certain groups of citizens in what was then Indonesian East Timor. Recognition of Indonesian sovereignty over this territory was then formally retracted after the people of East Timor voted in favour of independence through a 'popular consultation' (United Nations 1999b).<sup>32</sup> Serbian sovereignty over Kosovo was suspended after the Serbian government was proven that same year to have

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<sup>30</sup> At the time of writing, the Republic of China had 23 'diplomatic allies' who recognised this state's claim to sovereignty not only over Taiwan, but also over Mainland China and Mongolia (Government of the Republic of China (Taiwan) 2008b).

<sup>31</sup> For a discussion of Palestinian Statehood, see Crawford (2007); for Taiwan, see Davis (1990); for Somaliland, see Eggers (2007). For a comparative discussion of Taiwan and Somaliland as *de facto* states, see Wallace-Bruce (1996).

<sup>32</sup> East Timor became an independent state in 2002 after it was administered by a transition administration appointed by the United Nations.

committed gross human rights violations against its ethnically Albanian citizens in Serbian Kosovo (North Atlantic Treaty Organization 1999).<sup>33</sup> Organisations such as the International Crisis Group (ICG) have been instrumental in this conceptualisation of the limits of state sovereignty. They argue that the international community of states has a responsibility to protect individuals whose human rights are violated by their own governments. In fact, ICG argues that sovereignty is not a right, but rather a responsibility for which states are accountable to the international community (International Commission on Intervention and State Sovereignty 2001). As the examples of Kosovo and East Timor suggest, states do not have supreme authority over their people since the exclusivity of state authority is contingent on governments' behaviour toward, and their relationship with, their citizens.<sup>34</sup>

Citizenship begins to challenge territoriality as an organising principle of sovereignty most clearly in cases where states assert jurisdiction over the activities of their citizens outside state territory. For example, the Australian Crimes Act claims jurisdiction over acts of paedophilia committed overseas by Australian citizens and permanent residents.<sup>35</sup> The legislation also claims jurisdiction over such acts committed by other legal members of the state, such as companies incorporated under Australian law (Government of Australia 1914:50AD). In another example, citizens and permanent residents of the United States of America are subject to United States tax laws regardless of where they reside and work.<sup>36</sup> In order to enforce this extraterritorial assertion of jurisdiction, the United States use a worldwide criminal

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<sup>33</sup> The treaty between Serbia and NATO stipulates that NATO peace keeping missions must have the authority to 'operate without hindrance within Kosovo and... take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission' (North Atlantic Treaty Organization 1999:1(2)).

<sup>34</sup> See the UN Secretary General's Annual Report to the General Assembly for an account of how states are expected to 'serve' their people and how this has defined the concept of sovereignty to encompass people as well as territory. According to the United Nations (1999a), 'sovereign impunity' can no longer be used as a 'protective shield' from external intervention.

<sup>35</sup> See Division 2 – Sexual Offences Against Children Overseas Crimes Act (1914). The punishment for an Australian who has sexual intercourse with a child aged under 16, is 17 years imprisonment.

<sup>36</sup> See chapter 4 of the Tax Guide for United States Citizens and Resident Aliens Abroad (Government of the United States 2007). In some cases, the United States government allows citizens to exclude all or part of their foreign earned income from being taxed in the United States. However, United States citizens are 'generally subject to U.S. tax on total worldwide income' (Government of the United States 2008c).

investigation unit to help their courts maintain legal authority over cases of tax evasion by American citizens working overseas.<sup>37</sup> In countries that are not party to bilateral agreements on extraterritorial taxation with the United States, American citizens are subject to a regime of double taxation where they pay tax to their host state as well as the United States.<sup>38</sup> As a result, some Americans give up their citizenship and adopt the citizenship of another country to avoid this obligation (Carvajal 2006; de Witt 1995).

Gow (2000a, 2000b) claims that unilateral legislation of this kind allows governments to assert their authority over practices and spaces outside their borders without negotiating bilateral agreements with host states. Similarly, Hinsley (1986:223) argues that sovereignty over subjects is a 'precondition' for states to act 'in and for' communities of their citizens abroad.<sup>39</sup> As these examples have demonstrated, states can and do articulate a right to authority over their citizens regardless of their positionality in respect to state territory. In particular, states which assert extraterritorial jurisdiction over their citizens – and practices and conditions related to their citizens – show that 'the spatial organisation of rule-making' is not always organised around territory (Hudson 1998:89).<sup>40</sup> While these states show that citizenship is a concrete marker of state authority, they also demonstrate the territorial

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<sup>37</sup> The Internal Revenue Service - Criminal Investigation agency has over 4,400 employees worldwide. 2,800 of these employees are special agents whose investigative jurisdiction includes tax evasion by United States citizens (Government of the United States 2008b).

<sup>38</sup> The United States has negotiated bilateral agreements with host states, such as the United Kingdom, which protect its citizens from regimes of double taxation (Government of the United Kingdom and Government of the United States of America 2001).

<sup>39</sup> There are also examples of states that use citizenship as a tool to leverage control over territories of other states. The Russian government grants citizenship to the citizens of some neighbouring states, a practice which is particularly problematic in the Caucasus where some states, such as Azerbaijan, Moldova, Ukraine and Georgia, are host to separatist movements which aspire to secede to Russia. In the case of Georgia, most of its citizens living in the autonomous regions of Georgian borderlands, such as Abkhazia and South Ossetia, hold Russian citizenship. In fact, by August, 2008, seventy percent of South Ossetians were Russian citizens. Based on this, Russia argues that it has a right to intervene militarily in South Ossetia because the inhabitants of this space, despite being Georgian citizens within Georgian borders, are legal members of the Russian state (Government of Russia). In a 2008 conflict, the Russian military moved into South Ossetia to 'protect its citizens' against a Georgian military operation which was designed to tighten this state's territorial control over the region (Government of Russia 2008).

<sup>40</sup> Hudson (1998) presents an alternative model for the organisation of decision making. In this model, authority is vertically organised around issue areas rather than horizontally organised around territory.

limitation of such organisations of authority. As the American example demonstrates, however, states can use *ad hoc* mechanisms as part of a wider strategy to enforce authority over their citizens beyond their borders – without the assistance of bilateral or multilateral instruments.

## **Conclusion**

This chapter has demonstrated that states have not and do not always consider clear cut territorial borders as the limit of their authority. In fact, states may set the boundary of their authority around alternative markers, such as citizenship. However, states remain limited in their ability to directly enforce national laws and regulations in respect to their citizens outside state territory, where they lack the ‘practical mechanisms’ necessary to effectively regulate them. International relations doctrines dictate that states can negotiate bilateral and multilateral agreements with other states in order to extend their reach beyond their borders. In theory, these mechanisms should support recognised, extraterritorial assertions of jurisdiction, but they are not binding in practice. In fact, states can and do exercise discretion in regard to whether or not they assist other states in their attempts to reach beyond their borders. This chapter used the example of extradition treaties to illustrate this point and show how some states have attempted to deal with it.

In response to these limits, states have developed unilateral means through which they facilitate the enforcement of their authority beyond their borders. The United States’ extraterritorial mechanisms for monitoring tax evasion by its citizens helps to ensure that American citizens abide by national laws in spite of the fact that they live and work outside state borders. Similarly, the Ker-Frisbie Doctrine demonstrates that states are prepared to explicitly condone unrecognised – and sometimes illegal – conduct within another state’s territory in order to enforce their authority over individuals beyond their borders.

Some labour sending states, especially those with government-sponsored labour export programs, also use such extraterritorial mechanisms. In part, these states do

this in response to the inability of host states to adequately guard the welfare of this category of their citizens. However, they also may do this in an attempt to achieve national objectives in relation to their labour export programs. Using the examples of Indonesia and Hong Kong, the following chapters will illustrate how states may interact and even partner with members of the private sector within the borders of other states in an attempt to extend their authority beyond their own territory.

## **Chapter Two – (Extra)territorial management of migration**

Most labour migration between Northeast and Southeast Asian countries involves low-skilled, temporary workers. Receiving-countries use temporary labour migration to address chronic labour shortages in specific sectors of their economies while sending-countries encourage the temporary out-migration of their citizens to generate flows of foreign currency through remittances. This chapter shows that receiving-states deal with temporary labour migration primarily within their sovereign territorial boundaries. These states develop labour market structures and employ other national strategies and mechanisms in order to manage and accommodate labour migrants. In contrast, sending-states have developed frameworks that reflect the transnational character of temporary labour migration. They attempt to manage practices such as recruitment and deployment, which require a degree of cross-border regulation. However, the need for cross-border structures poses a conundrum: territorial practices of sovereignty limit the ability of sending states to effect cross-border regulation. This chapter argues that, in response to this conundrum, sending-states such as Indonesia have developed strategies for the management of migration that incorporate a clear extraterritorial dimension.

### **Territorial management of labour migration**

The newly industrialised economies of Northeast Asia have encouraged temporary labour migration in an attempt to address demands for low-skilled labour in their national economies. Taiwan, Korea and Hong Kong, for example, admit low-skilled migrants under labour importation schemes, which are designed to supply labour to sectors of the economy experiencing chronic labour shortages (Athukorala and Manning 1999).<sup>41</sup> While their motivations for importing labour are the same, these

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<sup>41</sup> For further information on the Taiwanese labour importation schemes, see the Bureau of Employment and Vocational Training (Government of the Republic of China (Taiwan) 2008a). For further information on the South Korean labour importation schemes, see the Ministry of Labor (Government of South Korea 2008, 2007). For further information on the Hong Kong

countries deploy temporary migrant labour in different ways. For example, Taiwan and Korea use this form of labour to maintain the competitive advantage of their manufacturing sectors.<sup>42</sup> In comparison, Hong Kong uses temporary migrant labour in the informal sector. In all three cases, however, the majority of labour migrants come from outside the region.<sup>43</sup> In this way, Northeast Asia is similar to other regions which import labour, such as Europe and the Middle East.

Before the 1990s, most of Hong Kong's economic growth was fuelled by the manufacturing sector, which grew rapidly under a policy of export-led industrialisation.<sup>44</sup> Economic expansion created demand for workers in the secondary labour market, which provides workers for construction, manufacturing, agriculture and domestic work. This began to change with the introduction of the Mainland's 'Open Door Policy' in 1979, which allowed many Hong Kong manufacturers to relocate their operations to the Pearl River Delta, where labour was cheaper (Tuan 1995). As a result, the proportion of the labour force employed in manufacturing decreased. In the place of manufacturing, the services sector emerged as the new driving force of economic growth.<sup>45</sup> As in other countries, such as the United Kingdom, this shift in the economy has given rise to a 'service class' of residents with employment in the private sector (Butler 1995:27).<sup>46</sup> As Gregson and Lowe (1994:83-84) have argued, dual income households are characteristic of the 'service class' and their existence creates demand for domestic labour.<sup>47</sup> In the case of Hong Kong, households that employ full-time live-in domestic labour are twice as likely to

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labour importation schemes, see the Immigration Department, Hong Kong (Government of Hong Kong 2008f:sections 20-29).

<sup>42</sup> For a discussion of how these labour shortages developed in key Northeast Asian economies, see Manning (2002) and Athukorala (2006). For a detailed discussion of Taiwan's main labour importation schemes, see Tierney (2007) and for South Korea, see Gray (2007).

<sup>43</sup> The majority of imported workers in Hong Kong and Taiwan come from the Philippines, Indonesia and Thailand (Government of Hong Kong 2008i; Tierney 2007:210). Imported workers in Korea come from these same countries as well as others (Gray 2007:297).

<sup>44</sup> Athukorala and Manning (1999:119) show that the manufacturing sector accounted for nearly 40 percent of national GDP and 30 percent of the employed labour force in the 1980s. For a comparison of the Hong Kong and Singapore experiences, see Krause (1988).

<sup>45</sup> Since 2003, the services sector has been responsible for more than 87 percent of Hong Kong's GDP (Asian Development Bank 2008a).

<sup>46</sup> For a detailed discussion of the concept of the 'service class,' see Butler (1995:27-28).

<sup>47</sup> However, Bittman, Matheson, and Meagher (1999) use the example of Australia to show that this is not always the case.

have two or more economically active household members than those that do not (Government of Hong Kong 2003c:2.30).<sup>48</sup>

Hong Kong uses internal mechanisms to manage the flow of labour migration into – and some conditions of labour migrants in – its territory. Traditionally, labour migrants to Hong Kong were sourced from the Chinese hinterlands because of shared ethnic, cultural and linguistic ties. Successive upheavals on the Mainland contributed to the high volume of both documented and undocumented migration into Hong Kong between 1946 and 1980.<sup>49</sup> Destexhe (1995:28) remarks that, during this period, Hong Kong used a ‘discretionary’ model of immigration control, which ‘provided a reservoir of cheap unskilled labour necessary’ for the labour intensive industrialisation of Hong Kong’s economy (Law and Lee 2006:231). The ‘Touch Base’ migration policy illustrates how the colonial government used discretion in its control of undocumented migration from the Mainland. Under this policy, undocumented migrants from China ‘who evaded capture and subsequently established a home’ were permitted to remain in Hong Kong (Law and Lee 2006:220; Lam and Liu 1998:13). However, as China’s Open Door Policy increased mobility on the Mainland, the volume of illegal migration into Hong Kong rose dramatically (Law and Lee 2006:220). In response, the colonial Administration tightened its border controls and repatriated all illegal immigrants from the Mainland (Government

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<sup>48</sup> For a discussion of the impact that full-time, live-in domestic workers have had on Hong Kong households, and in particular the ‘service class,’ see Chan (2005). For a similar discussion of how this type of labour has impacted on the participation rate of women in Hong Kong’s economy, see Chan (2006). Statistics show that the participation rate of women in the workforce doubled during the 1980s (Government of Hong Kong 2003c, 2008k). The participation rate of women in 1982 was 47.5 percent whereas the participation rate in 2007 was 53.2 percent (Government of Hong Kong 2008k). According to official statistics, 61 percent of households which employed foreign domestic workers in 2003 had two economically active household members in comparison to only 32 percent of households where a foreign domestic worker was not employed (Government of Hong Kong 2003c).

<sup>49</sup> Between 1946 and 1980, there were a number of Mainland-based political developments which resulted in large influxes of non-procedural migrants. For example, the civil war between the Nationalists and the Communists in 1946-1949 caused large numbers of Mainland Chinese to cross the border into Hong Kong, which was then a British colony. Furthermore, the Great Leap Forward in 1958-1960, and the Cultural Proletarian Revolution in 1966-1976, also motivated Mainland residents to cross the border into Hong Kong in search of greater economic, social and political stability. For a detailed discussion of these events see Gray (1990).

of Hong Kong 1999b:2). These policy shifts cut off the Mainland as a source of cheap labour for Hong Kong employers, forcing them to seek sources further afield.<sup>50</sup>

Since 1990, the Hong Kong Administration has allowed industries to recruit labour from overseas under a series of foreign labour programs.<sup>51</sup> The oldest and largest of these schemes is the Foreign Domestic Helpers Importation Scheme.<sup>52</sup> Before 1974, the Administration only allowed expatriate workers to hire foreign domestic workers. However, since moving to stem the flow of migration from the Mainland, the Administration has permitted local residents to import domestic workers from other countries. In 1975, the Administration turned its sights on the Philippines as a source of domestic labour. The Marcos government and the British embassy agreed on a standard employment contract for foreign domestic workers in Hong Kong, which continues to set minimum standards for these workers (Lau 1999; Wong 2002). As a result of this, households were given access to a cheap source of domestic labour, enabling women to enter the formal labour market. As early as 1982, foreign domestic workers accounted for one percent of the workforce. In the years leading up to 1987, their share increased by 71 percent (Government of Hong Kong 2003c). In spite of economic crises, the demand for foreign domestic workers has continued to increase (Government of Hong Kong 2008i, 2008j). In 1997, the year of the Asian Financial Crisis, there were 170,971 foreign domestic workers in Hong Kong (Government of Hong Kong 2008i). In May 2008, the number of foreign domestic

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<sup>50</sup> According to the criteria for Hong Kong's labour importation schemes, Mainland, Mecedese and Taiwanese nationals are ineligible. Other ineligible nationalities include citizens of Afghanistan, Albania, Cambodia, Cuba, Laos, Korea (Democratic People's Republic of), Nepal and Vietnam (Government of Hong Kong 2008e:sections 21, 25).

<sup>51</sup> In 1990, the Administration introduced its Special Labour Importation Scheme for the New Airport and Related Projects, and in 1995, it replaced the General Labour Importation Scheme – initiated in 1989 – with the Supplementary Labour Scheme (Wong 2002:14-15, 21).

<sup>52</sup> The importation of foreign domestic workers was formalised as a scheme in 2003. Labour importation schemes require employers of imported labour to pay a levy which the Administration uses to correct structural failures within the labour market by subsidising the training of local workers (1997a:section 2). In 1995, the Secretary for Education and Manpower asserted that there was no 'demonstrably clear' indication that the importation of foreign domestic workers was reducing the employment prospects of local workers. On the basis of this, the Administration considered it 'inappropriate' to impose the retraining levy on the employment of this category of workers (Government of Hong Kong 1995). In 2003, however, the Secretary for Education and Manpower argued that the levy was necessary because of the high rate of unemployment prevailing in the economy (Government of Hong Kong 2003a).

workers had increased to 251,356, including 124,723 Filipinos and 119,200 Indonesians (Government of Hong Kong 2008i).<sup>53</sup>

To protect local workers against competition from imported labour, the Administration limited the sectors in which foreign workers could be employed. In the process, it created a niche market for foreign domestic workers. In 1987, the Administration made it compulsory for foreign domestic workers to reside with their employers. The Immigration Department also implemented a 'Two Week Rule,' which was aimed at curbing a practice of 'job hopping.'<sup>54</sup> This practice, the Administration argues, was having a negative impact on the employers of foreign domestic workers and local domestic workers. According to this policy, any foreign domestic worker whose employment contract was terminated before completion by either the worker or employer was required to leave Hong Kong within two weeks (Government of Hong Kong 2003d:54). This measure restricted the mobility of foreign domestic workers in the labour market by ensuring that they remain with one employer during their stay in Hong Kong. In addition, this policy shift also succeeded in curbing the practice of 'moonlighting' whereby workers would seek additional, part-time employment to supplement their incomes. Measures such as this have succeeded in safeguarding part-time and casual domestic work for local workers. In another example, the Administration prohibited foreign domestic workers from

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<sup>53</sup> The number of foreign domestic workers in the territory decreased in 2003 for the first – and last – time to date since the scheme began. Two factors may have contributed substantially to this inconsistent development: the SARS (Severe Acute Respiratory Syndrome) epidemic and Philippines foreign policy. Some have claimed that the outbreak of SARS, and the public panic it caused, sharpened the impact of the economic crisis, resulting in a decrease in the number of foreign domestic workers employed in Hong Kong (Benitez 2003). However, the Immigration Department issued more entry permits for foreign domestic workers in 2003 than it had in the previous year, suggesting that causes for the drop were external to Hong Kong. A more likely cause was the Philippines' moratorium on the extension of work contracts in protest against a decision by the Administration to cut the wages of foreign domestic workers by 11 percent. As a result, the number of Philippine domestic workers in Hong Kong dropped by over 20,000 – the same number by which the number of foreign domestic workers decreased in that year.

<sup>54</sup> The Administration defines 'job hopping' as 'a practice... whereby [foreign domestic workers] deliberately terminated their contracts in order to change employers and stay on indefinitely in Hong Kong' (United Kingdom of Great Britain 1996:section 267; Government of Hong Kong 2003d:54). See the following court case which describes this practice: *Vergara et al. v. the Attorney General* (Government of Hong Kong 1987). Wong (2002:22) claims that the market rate for domestic work is between HK\$30 and HK\$70, a level which would have proved difficult to maintain under competition with foreign domestic workers.

engaging in driving duties for their employers at the behest of local labour unions (Government of Hong Kong 1999a). Local drivers, according to these unions, had complained that foreign domestic workers were being deployed as full-time chauffeurs, a development that was affecting their ability to negotiate a living wage.

Despite the generally non-interventionist policy of the Administration, a number of conditions are imposed on the employer-employee relationship once foreign workers are in Hong Kong.<sup>55</sup> Employers of foreign domestic workers are required to prove that their income is at least HK\$15,000 per month and to agree to the Schedule of Accommodation and Domestic Duties. In addition to this, employers are required to enter into a standard contract with foreign domestic labour and cover this category of workers with employees' compensation insurance (Government of Hong Kong 2008e). In this way, the Administration has sought to ensure minimum work conditions for this category of labour. Significantly, foreign domestic work is the only job category for which the Administration enforces a minimum wage – a condition that is not provided for local workers. As these conditions suggest, foreign domestic work is one of the most regulated job categories within Hong Kong's borders.

These examples illustrate that the Administration manages the aspects and issues of labour migration that are immediately relevant at its borders and within its territory. Furthermore, Hong Kong views temporary labour migration as a function of 'local demand' (Government of Hong Kong 1995:4728). This territorial view of labour migration is expressed lexically as 'labour importation' (into, from outside state territory) – not just in Hong Kong, but also in other newly industrialised countries across Asia. Moreover, this territorial style of labour migration management assumes that imported labour will, if minimum standards are ensured, have similar experiences to local workers in the labour market. However, as governments of

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<sup>55</sup> Hong Kong ranked number one on the 2008 Index of Economic Freedom (Holmes, Feulner, and O'Grady 2008:206-207). The index assesses national economies based on ten 'freedom components' which can influence economic activity. Labour freedom is one of these key components. The index is a joint initiative by The Heritage Foundation and The Wall Street Journal.

sending countries and migrant labour NGOs claim, labour migration has a clear transnational dimension often ignored by host states. As a result, they can and do experience labour-related problems, which are unique to their status as imported migrant labour. The next section will demonstrate how the strategies employed by labour sending-states recognise the transnationality of temporary labour migration.

### **An extraterritorial dimension**

As is the case with labour receiving-states, labour sending-states use territorial mechanisms to manage temporary labour migration. However, unlike receiving-states, the regulatory frameworks of prominent labour sending-states have clear extraterritorial dimensions. These states use national instruments to regulate the conditions under which their citizens may be first recruited within their territory, and then deployed from it. They also use these frameworks to manage certain conditions, related to the deployment of their citizens in destination countries. The Philippines and Indonesia have attempted to extend their regulatory frameworks into the territory of destination countries in similar ways. The Philippines uses the so-called ‘accreditation system’ as a means to identify overseas partners for its labour export program while Indonesia uses an ‘approval system’ in order to achieve the same objective. Although these systems are national constructions, designed by the governments of the Philippines and Indonesia, they apply to foreign recruitment agencies operating outside these states’ territory. Furthermore, these systems, and the agencies to which they apply, are instrumental to these states’ management of practices and processes related to the deployment phase of their labour export programs.

The Philippines and Indonesia have applied tight controls on outflows of labour migration. In order to migrate for work legally, candidate labour migrants are required to use the services of government-approved recruitment agencies, which then take responsibility for ensuring that these candidates fulfil eligibility criteria and follow these programs’ procedures. Both the Philippines and Indonesia require

candidate migrant workers to be of a minimum age and to undergo work skills and language training in preparation for their deployment (e.g. Government of Indonesia 2004:sections 35, 41-47). Moreover, it is obligatory for migrant worker candidates to partake in pre-departure training, which aims to impart crucial information about procedures, obligations and rights as workers and citizens of Indonesia in destination countries.<sup>56</sup> These states also use memoranda of understanding and bilateral labour agreements to set out their responsibilities and rights and those of their workers overseas (e.g. Government of the Philippines and Government of the United Arab Emirates 2007).

Waddington (2003:3-4) uses the term ‘regulated system’ to describe the character of these programs. The Philippines government is the recognised pioneer of regulated migration systems. In the case of the Philippines, this requires Filipinos to use the services of approved recruitment agencies in the search for overseas employment. These agencies, in turn, are required to report each overseas deployment of labour to the Philippine Overseas Employment Administration (POEA), which facilitates the government’s attempt to maintain more accurate statistics on the number of its citizens working overseas. In addition to this, the Philippines also requires citizens who secure overseas employment and the necessary work visas to report to POEA for processing. According to the Government of the Philippines (2006), a work visa ‘merely allows entry into another country’ and ‘does not specify the terms and conditions of work.’ In some cases, Filipinos choose not to use procedural channels for obtaining employment overseas; instead, they ‘leave the country as tourist [sic]’ with the intention of seeking employment abroad (Government of the Philippines 2006). According to the Philippines, this practice is illegal.

The Philippine model of labour migration management is often regarded as a ‘success’ by both labour scholars and governments of sending-states. Some sending-

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<sup>56</sup> For example, Indonesia’s preparatory program, *Pembekalan Akhir Pemberangkatan* (Final Preparations for Departure), is ‘intended to give [departing migrant workers] depth of understanding about laws and regulations in destination countries’ (Government of Indonesia 2004:section 69(2a)).

states, including Indonesia, have emulated aspects of the Philippines' approach in order to enhance their own labour export programs. In 1970, the Indonesian government developed a program called *Antar Kerja Antar Daerah Antar Kerja Antar Negara (AKAN)*, which was designed to move Indonesian labour into labour shortage areas, both in Indonesia and overseas (Government of Indonesia 1970: explanatory note).<sup>57</sup> Closely following the establishment of POEA in the Philippines in 1982, the Department of Manpower established the *Pusat AKAN* (the Office for Overseas Employment) to coordinate the recruitment and deployment of labour in 1983.<sup>58</sup> Following the establishment of this centre, the quantity of deployments overseas increased. This in turn led the Indonesian government to begin emphasising the role of its labour export program in its strategy for national development.<sup>59</sup> By 2007, over six million workers had been deployed in destinations across the Middle East and Asia as well as to Europe and the Americas (Government of Indonesia 2008e).

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<sup>57</sup> Government-sanctioned labour migration from what is now known as Indonesia dates back to the colonial period when the East Indies government allowed foreign governments and private companies to recruit Indonesians for deployment as indentured labour on plantations in British, French and other Dutch colonies (Lockard 1971). The colonial legal framework continued to be used for at least the first decade and a half of this program, demonstrated by a set of guidelines, published in 1982, which identifies laws of 1936 and 1938 as well as 1969 and 1970 as its legal building blocks (Government of Indonesia 1982:2). It was not until the 1990s that the Indonesian government applied post-independence regulation to replace these laws: *Antar Kerja Antar Negara* (1991a), *Petunjuk Pelaksanaan Antar Kerja Antar Negara* (1991b) and *Teknis Pengerahan Tenaga Kerja Indonesia ke Arab Saudi* (1991c). For information on which laws are and are not used in respect to Indonesia's labour export program, see the International Labour Organization (2008).

<sup>58</sup> From 1969 to 1981 this program facilitated around 90,000 deployments overseas (Hugo and Bohning 2000:12). In 1982, the government requested assistance from its consulates and embassies to promote Indonesian labour overseas in an attempt to increase the volume of labour migration through this government-sanctioned program. With this request, the government sent a handbook, intended to increase the knowledge of Indonesian officials in destination countries about the program, to its consuls overseas (Government of Indonesia 1982:i). In this year, however, less than 10,000 workers were deployed. Yet, in the year that the Centre for Overseas Employment (*Pusat AKAN*) was established, deployments increased to almost 20,000 workers. Moreover, in the following year, the number of deployments reached 35,000 (Hugo and Bohning 2000:12).

<sup>59</sup> In the third plan, 1979/80-1983/84, the government aimed to export 'roughly' 100,000 workers (Government of Indonesia 1979:292). From 1994/95-1998/99, the target was raised to 1,250,000 (Government of Indonesia 1994:129); however, the government succeeded in exceeding this target by exporting 1,887,732 workers during this period (Government of Indonesia 2008e).

By tightening control over the ability of its citizens to apply for work overseas, the Indonesian government can indirectly decide which foreign companies or individuals can recruit its citizens.<sup>60</sup> Indonesian law requires Indonesian citizens to use the services of licensed recruiters (Government of Indonesia 2004:section 24). This policy restricts the size of the legal recruitment industry. At the same time, it confers on these agencies wider administrative and operative responsibilities of the government's labour export program. In order to secure the necessary documentation for the departure of recruited labour, these agencies liaise with relevant government departments, including the Department of Health (for medical clearance) and the General-Directorate of Immigration (for travel documents) (Government of Indonesia 2004: paragraph 4, 5). Agents also play a significant, independent role in deciding which regions of Indonesia will be sources of labour for which labour receiving-countries. For example, a respondent from a provincial government office in Mataram explained that the majority of migrant workers from this region were sent to Malaysia and Saudi Arabia because these are the destinations offered to citizens in this area by licensed agencies (Interview K 2007). In short, agencies play a central role in the operation, management and success of this program.

As this suggests, the Indonesian government formally partners with the private sector primarily in an attempt to recruit and prepare labour for deployment. While this is the case, the government of Indonesia holds these agencies accountable for the welfare of its citizens when recruited and deployed. The Indonesian government incorporated a role for the private sector into its labour management program as early as the 1970s – a development it identifies as the origins of a public-private partnership between the government and private recruitment agencies (Government of Indonesia 2008a,

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<sup>60</sup> While labour NGOs and some scholars argue that the Indonesian government has created an exclusive market for the benefit of 'favoured' recruitment industries, there is evidence which suggests that this order is more strategic than just profit oriented. These agencies have, however, played a key role in the formation of government sanctioned policies which enable these agencies to charge fees for services which were not provided. For example, the 1999 cost structure for placements to Hong Kong, designed by an association of recruitment agencies and then approved by the Indonesian government, contained an item for the transportation of migrant workers to Hong Kong although this cost was – and still is – covered by Hong Kong employers (Government of Indonesia 1999; Asosiasi Perusahaan Jasa Tenaga Kerja Indonesia (APJATI) 1999).

2008c). After its establishment and well into the 1990s, the Centre for Overseas Employment was responsible for managing the system of licensing for these agencies (Government of Indonesia n.d.:9-10). Since that time, agencies have been required to ‘guarantee’ the welfare of deployed workers by depositing a bond with the government (Government of Indonesia n.d.:8, 2004:13(c)). According to the government of Indonesia, the welfare of its deployed citizens also entails the fulfilment of their contractual rights while abroad.

In 1991, the Minister for Manpower decreed a concrete role for partner agencies in the management of labour relations, which involve Indonesian citizens overseas under *AKAN*, Indonesia’s formal labour export program (1991a: sections 31-32). At its inception, this piece of regulation was designed to manage conditions specific to the deployment of labour in Saudi Arabia. However, legislation passed in 2004 requires partner agencies in *all* destination countries to provide these and other services.<sup>61</sup> Under this system, agencies in Indonesia were required to seek partnerships with agencies in destination countries to assist the government in the marketing of Indonesian labour (Government of Indonesia n.d.:9). In addition, these representatives were assigned the responsibility of collecting job orders from prospective employers, hitherto the responsibility of the Indonesian consulate or embassy overseas (Government of Indonesia 1982:10). In this way, overseas partners of Indonesia-based agencies also play formalised roles in the quotidian management of Indonesia’s labour export program.

Under this system, representatives in destination countries provide a set of services to overseas Indonesian workers on behalf of their Indonesia-based partners and the

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<sup>61</sup> 1991 regulation and 2004 legislation stipulate that recruitment agencies are responsible for organising the settlement of disputes between Indonesian workers and their employers in destination countries (Government of Indonesia 2004: section 52(2i), 1991a: section 32). Moreover, the 2004 legislation stipulates obligations of recruitment agencies, such as taking responsibility for instances where employers of Indonesian labour do not fulfil their contractual obligations. In order to clarify these responsibilities, the Indonesian government requires both sides of the partnership, Indonesia and overseas-based agencies, to sign an ‘agreement of cooperation on placements,’ which outlines this obligation and other ‘rights and responsibilities of both parties in the placement and protection of Indonesian workers in destination countries’ (Government of Indonesia 2004: section 1(8)).

Indonesian government.<sup>62</sup> While agencies in Indonesia provide services to prepare workers for departure, partner agencies in destination countries support workers throughout the deployment phase. For example, agencies are required to meet workers at their ports of entry and deliver them to their employers (Government of Indonesia n.d.:9). In addition, these agencies are required to play a role in the mediation of workplace relations. For example, if disputes arise between employers and their Indonesian workers, the overseas representative is required to facilitate the settlement of the dispute (Government of Indonesia n.d.:9). As this provision suggests, host frameworks for mediating and settling disputes involving foreign workers can be ineffective, unsuited to migrant labour issues or may simply not be the preferred means for dispute resolution by the Indonesian government.

Throughout the history of this program, Indonesia has constricted the size of the recruitment industry by limiting the number of recruiters. In 1986, the year in which labour exports increased by 23 percent, the government imposed tighter criteria for recruitment licences, reducing the number of licensed agencies from 228 to 50. In preparation for this, the Centre of Overseas Employment appointed a special team to evaluate compliance of these agencies with the new regulation (Government of Indonesia n.d.:10).<sup>63</sup> This was necessary because, while Indonesia can prosecute unlicensed companies or individuals in Indonesia and from overseas for human trafficking, the Indonesian government does not have the legal right to repeal licences granted by host governments.<sup>64</sup> In order to circumvent this, the Indonesian government approached governments of destination countries about setting up

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<sup>62</sup> Section 9 requires overseas partners to monitor workplace relations in destination countries to ensure that all items of the employment contract are honoured (Government of Indonesia 1991a:section 9(1)(d)). Section 32 stipulates that recruitment agencies must organize the settlement of disputes between Indonesian workers and their employers in destination countries (Government of Indonesia 1991a).

<sup>63</sup> Although it is not stated explicitly in this publication, the dramatic reduction in the number of licensed agencies implies that the majority of these agencies could not comply with the government's new regulations.

<sup>64</sup> According to the Indonesian government, unlicensed recruitment, otherwise referred to as non-procedural recruitment by this government, bears some semblance to human trafficking (Government of Indonesia 2008d).

mechanisms that allow the Indonesian government to exercise a degree of control over the issuance of work permits for its citizens in these countries.<sup>65</sup>

One of these mechanisms, which parallels the licensing system and is used to regulate Indonesian recruiters, is the Indonesian government's approval system for foreign agents.<sup>66</sup> While early legislation did not outline a specific set of criteria for these licences, more recent legislation does.<sup>67</sup> For example, the law of 1970 stipulated that the Department of Manpower may decide on criteria that are 'seen as needed' (Government of Indonesia 1970:2(2)).<sup>68</sup> In contrast, laws passed in 1991 and 2004 detail specific criteria for recruitment licences, which contain a mechanism that enables the government to hold these agencies responsible for the action – or inaction – of their partners overseas. For example, the 2004 legislation requires agencies to deposit a bond with the government, which can be used to fulfil disputed or neglected obligations of Indonesia-based agencies or their partners in destination countries.<sup>69</sup> In

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<sup>65</sup> In confidential correspondence with its consuls, Indonesia asked these officials to contact host governments to make sure they do not issue work visas to Indonesian citizens who do not have permission from the Indonesian Department of Manpower to work overseas (Government of Indonesia 1982:4). Reportedly, the government of Jordan 'is considering drafting a law for combating human trafficking' following accusations by the government of Indonesia that Jordan-based labour recruitment agencies had attempted to recruit Indonesian citizens for employment in Jordan. As a result, the government of Jordan may require Jordan-based agencies to 'liaise with the embassies' of major sending-countries in an attempt to ensure that labour migrants move through procedural channels set up by their home states (Mustafa 2008).

<sup>66</sup> The Department of Manpower has historically held the right to issue and revoke licences for agencies to recruit labour in Indonesia (e.g.:Government of Indonesia 2004:section 13, 1991b: sections 4, 73, 1991c: sections 3, 37, 1991a: sections 4, 40, 1970: section 2).

<sup>67</sup> See sections 12 and 13 of a relevant 2004 piece of legislation, which sets out the criteria for a recruitment licence (Government of Indonesia 2004). This legislation has been criticised by several groups. Associations of recruitment agencies claim that this legislation has placed financial strain on actors within the industry by making them accountable for the welfare of Indonesian workers overseas. Human rights groups claim that the legislation focuses squarely on recruitment practices and does not provide adequate protection for migrant workers. The Indonesian government, however, claims that the legislation is designed to protect migrant workers by closely regulating the recruitment industry. There are items in this legislation, however, which have the potential to encourage 'placements' over 'protection.' Section 14(2b), for example, requires licensed agencies to achieve at least 75 percent of their placement targets, as detailed in their three year plans if they wish to renew their licences. These licences are valid for five years (Government of Indonesia 2004: section 14(1)).

<sup>68</sup> In section 3 of this legislation, the government stipulates conditions for these licences, such as 'the method of recruitment' and the responsibility of agencies to 'underwrite various incidences' involving exported labour (1970). These conditions, however, are more about the operational questions of recruitment rather than qualifying criteria for a recruitment licence.

<sup>69</sup> Section 13(c) stipulates that agencies are required to deposit Rp. 500,000,000 in a bank for the government, which the government may use as a form of guarantee (Government of Indonesia

destination countries, the Indonesian government's criteria for approval vary. However, in all settings, partner agencies must be established according to host country laws and regulations – a condition that ensures that partners of Indonesia-based agents are permitted to operate legally within the borders of destination countries.<sup>70</sup> In Saudi Arabia, for example, partner agencies must have permission to recruit labour from the Saudi Arabian Ministry of Labor and Social Prosperity and also be registered with the Saudi Chamber of Commerce. Furthermore, in Saudi Arabia, each employment contract must be reported to these agencies and the Indonesian embassy (Government of Indonesia 1991c: sections 3, 6).<sup>71</sup> While the Indonesian government does not have the same ability to impose punishments and legal sanctions on overseas agents as it does for Indonesia-based agencies, it can impose other kinds of sanctions on these agents, such as blacklisting.<sup>72</sup> Since Indonesian agencies are forbidden to cooperate with blacklisted agencies, these agencies' access to Indonesian workers for recruitment is effectively limited.

Thus, Indonesia's labour export program not only has a territorial dimension – it also has an extraterritorial one. In an attempt to recruit and then deliver this labour to receiving states, such as Hong Kong and Saudi Arabia, the government of Indonesia has partnered with private recruitment agencies within its territory and within that of destination countries. Through these partners, Indonesia not only provides additional services to Indonesian migrant workers on the other side of international borders, it also attempts to ensure that these workers receive their contractual entitlements. In

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2004). Section 16 stipulates that this bond can be used by the government to honour the 'obligations' of private recruitment agencies to their clients.

<sup>70</sup> Section 1(6) requires overseas partners to have a 'legal identity' in host countries which means that these agencies must be companies established according to host laws and regulations (Government of Indonesia 2004). This ensures that these actors are legally permitted to recruit Indonesian workers from overseas. It was also the case in 1991 and 2004 (Government of Indonesia 1991b: section 9(1a); 2004: 20(2), 24(2)). Section 25(1) commits the government of Indonesia to monitoring the status of these agencies in host countries (2004). Sections 25(2) and 25(3) require that these agencies abide by host laws and regulations (Government of Indonesia 2004).

<sup>71</sup> The Philippines also requires that employment contracts, involving certain categories of its citizens, are reported to relevant consulates and embassies overseas (Government of the Philippines 2008, 2005).

<sup>72</sup> Section 25(3) stipulates the right of the government to blacklist partner agencies (Government of Indonesia 2004).

addition, this partnership between public and private allows Indonesia to play a role in the mediation of labour disputes between its deployed citizens and their employers in destination countries. Generally referred to as protection, these efforts by the government of Indonesia demonstrate how a state may instrumentalise the private sector at home and abroad in an attempt to extend its regulatory framework into the territory of other states.

## **Conclusion**

This chapter has demonstrated that while labour receiving-states overwhelmingly use national, regulatory instruments in an attempt to determine the conditions under which migrant labour is deployed in their territory, labour sending-states use national frameworks in conjunction with extraterritorial mechanisms to influence the ways in which their citizens are dealt with in receiving-country contexts. As shown in this discussion, labour sending-states can and do intervene to manage issues related to the deployment phase of their labour export programs. The following chapter will show how Indonesia uses extraterritorial regulation to ‘guide’ Hong Kong-based recruitment agencies in their management of its migrant worker citizens. Moreover, this final chapter will demonstrate how the government of Indonesia uses this ‘guidance’ in an attempt to solve a set of issues, directly related to its labour export program, within Hong Kong’s borders.

## Chapter Three – The context in Hong Kong

International legal constructs of sovereignty are primarily concerned with rights of states within defined territorial units. They largely ignore the non-territorial relationship that can exist between states and their citizens. Under international law the extraterritorial responsibility of states towards their citizens while abroad is limited to ‘helping and assisting nationals.’<sup>73</sup> Aside from this exception, neither national nor international law recognises the right of states to intervene unilaterally on behalf of their own citizens in the territory of other states (United Nations 1963:section 5(e); Government of Hong Kong 2000:schedule, section 5(e)).<sup>74</sup> However, as the previous chapter suggested, government-sponsored temporary labour migration programs can and do create situations in which receiving-states compromise on their exclusive rights to jurisdiction within their territory. The fact that Indonesia has secured the right to limited and issue-specific authority over its temporary labour migrants in Hong Kong offers one such case. This chapter provides evidence for this assertion as it discusses a series of *ad hoc* mechanisms established by the Indonesian government in Hong Kong. These mechanisms function to allow the government of Indonesia to exercise a form of extraterritorial jurisdiction which challenges assumptions of territorially-based, absolute sovereignty.

Riding on the back of a Hong Kong migration policy, the Indonesian government has created a condition within Hong Kong territory which allows it to enforce authority over some local Hong Kong-based recruitment agencies. The government of Indonesia has used this authority to forge a closer working relationship with these agencies. This allows the government of Indonesia to achieve certain policy

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<sup>73</sup> The Vienna Convention on Consular Relations (1963:36(c)) stipulates that states have the right to arrange legal representation for their nationals imprisoned in other states.

<sup>74</sup> Another example is the United Nations Convention Against Corruption (2003:4(2)), which has been ratified by Hong Kong. It stipulates that this international convention – like other conventions of this type – does not ‘entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law’ (Government of Hong Kong 2007a:schedule 1: 4(2)).

objectives regarding the deployment phase of its labour export program within Hong Kong territory. Indonesia's Hong Kong-based partners not only help to enhance the provision of some *ad hoc* consular services for Indonesian migrant labour, they also serve as an extension of the Indonesian bureaucracy in that they help to implement this government's policies. This chapter seeks to discuss the form of an enforceable, Indonesian, regulatory framework within Hong Kong territory. Furthermore, it demonstrates how this extraterritorial framework operates in relation to the territorial framework of its host.

### **Public-private partnerships as an extension of authority**

Conventionally, states negotiate cross-border regulatory frameworks through bilateral and multilateral agreements. However, public-private partnerships are now emerging as an alternative means through which one state can extend its regulatory framework into another state's territory. Foreign states are limited in their ability to establish official offices in the territory of host states. They are required to seek the 'express consent' of host governments before they attempt to establish a consular post, related agency or office within these states' territory (United Nations 1963: section 4). The Vienna Convention on Consular Relations, furthermore, not only imposes strict logistical conditions on the consular posts of sending-states, such as requiring them to request permission to change address, it also limits the performative functions of these posts. While sending-states are subject to this convention in Hong Kong, private corporations, established and operated by citizens or non-citizens, are not.

The example of the Indonesian government's relationship with Hong Kong-based recruitment agencies, through its consulate, shows how public-private partnerships can allow states to extend their regulatory frameworks beyond their borders. The particular context of Hong Kong's labour migration policies has facilitated the development of these public-private partnerships. The Hong Kong Administration requires home consulates of foreign domestic workers to endorse employment contracts of their citizens before they are submitted to the Immigration Department

for processing (Government of Hong Kong 2008f:23(g)). This notarisation policy makes it possible for sending-states to decide which of their citizens may or may not apply for employment as foreign domestic workers in Hong Kong. The fact that notarisation is required of all sending-states whose nationals are permitted to work in Hong Kong as foreign domestic workers – including countries such as Australia and the United States, as well as countries like Liberia and East Timor – suggests that this mechanism was not developed specifically in response to state-sponsored labour export programs. However, the fact that the policy does not apply to the importation of highly skilled categories of workers, such as professionals or executives, suggests that it may, in part, have been a concession to labour export countries. In short, this mechanism allows these countries to regulate their labour export industries outside their borders.

The notarisation policy, a mechanism that effectively requires sending-states to endorse potential labour migrants, also serves as a tool designed to curb the incidence of human trafficking and forced labour within Hong Kong's borders. Through this policy, the Hong Kong Administration outsources a portion of its responsibility to monitor labour migrants for signs of human trafficking to sending-states. As a result, these states, which can also be the source of human trafficking, can effectively monitor and control the movement of their citizens into legal employment as foreign domestic workers in Hong Kong. This policy complements 22 agreements which Hong Kong has negotiated with foreign states in order to coordinate efforts with these states to investigate, prosecute and convict people for transnational crimes (Government of Hong Kong 1997c).<sup>75</sup>

What is important here is the fact that the role given to sending-state governments requires the consular representations of these countries to exercise a limited and issue-specific form of extraterritorial jurisdiction over their citizens in Hong Kong.

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<sup>75</sup> The U.S. Department of State claims in its report on human trafficking that Hong Kong uses its Immigration Ordinance, and other bodies of legislation, such as the Crimes Ordinance, to 'prohibit trafficking offenses and prosecute traffickers' in place of using *ad hoc* anti-trafficking laws (Government of the United States 2008d:137).

The Indonesian government, represented by its consulate, has made use of this policy in order to establish an approval system, which it uses to decide which of the 1,000 or so Hong Kong-licensed agencies may recruit Indonesian workers (Interview A 2008; Interview B 2008; Government of Hong Kong 2008a).<sup>76</sup> This system parallels the licensing system used in Indonesia and is supported by relevant Indonesian legal frameworks (Interview A 2008).<sup>77</sup> Under this system, 253 of those 1,000 agencies have consular approval to place Indonesian workers in employment as foreign domestic workers (Interview B 2008).<sup>78</sup> To be eligible for this approval, agencies must be founded according to Hong Kong laws and regulations in addition to other conditions, as required by the government of Indonesia. In 2008, the consulate had not yet established a formal set of criteria for approval. However at that time, the *de facto* set of criteria required agencies to have a permanent office, a boarding house and an Indonesian-speaking staff member (Interview A 2008).<sup>79</sup> As Indonesian workers were first introduced into Hong Kong by agencies whose staff had family connections in Indonesia (Interview A 2008; Interview C 2008), some of these agencies were established by family members of individuals who operate Indonesia-based agencies.<sup>80</sup> Others are entirely ‘professional’ endeavours (Interview A 2008).

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<sup>76</sup> Procedures for applying for a recruitment licence in Hong Kong are relatively simple (Government of Hong Kong 2008b, 2008c). These licences are valid for 12 months and can be renewed simply by signing a declaration to the effect that the agent has not been ‘convicted of an offence against the person of a child, young person or woman or of an offence involving membership of a triad society, fraud, dishonesty or extortion’ in the preceding five years (Government of Hong Kong 2008d).

<sup>77</sup> The Philippines uses a similar system in Singapore; however, this system is not enforceable (Gonzalez 1998:132-133). As of December, 2007, there were 58 accredited Singapore-based agencies permitted to recruit Filipinos (Government of the Philippines 2007a). However, the Philippines is unable to enforce its ‘accreditation system’ because the Singaporean government does not recognise the authority of the Philippines to accredit recruitment agencies within its borders. As a result, most Filipinos working in Singapore are not placed in employment by accredited agencies (Gonzalez 1998:132).

<sup>78</sup> In 2006, there were 992 agencies that actively recruited foreign domestic workers in Hong Kong (Government of Hong Kong 2008a).

<sup>79</sup> Indonesian legislation requires overseas partners to ‘have an office with office facilities that are sufficient (telephone, facsimile or telex)’ and to ‘have an address and accountability structure that is clear’ (Government of Indonesia 1991a: section 9(b-c)).

<sup>80</sup> Hong Kong is host to a sizable population of Chinese Indonesians who were granted permanent residence during and after incidences of racial violence against ethnic Chinese in Indonesia in the mid-late 1960s and in 1998. The ease of setting up a recruitment agency has facilitated attempts by Indonesian-based agencies to establish Hong Kong-based agencies to act as their overseas representatives.

However, in spite of these differences, both kinds of agencies are required to be partnered with a registered recruitment agent in Indonesia.

Approved agencies are required to become members of APPIH (Asosiasi PPTKI Hong Kong) – the association of partner agencies in Hong Kong, which was established in 2004 (Interview A 2008; Asosiasi PPTKI Hong Kong (APPIH) 2008a). Each of the 253 partner agencies recognised by the consulate is a member of this association, which, in its mission statement, claims to facilitate communication between partner agencies as well as communication between partner agencies and the Indonesian government (Asosiasi PPTKI Hong Kong (APPIH) 2008d). APPIH serves as a platform for partner agencies to collectively raise issues with the Indonesian consulate and through the consulate with the Indonesian Department of Manpower (Asosiasi PPTKI Hong Kong (APPIH) 2008d:B(2)). It is also an effective instrument which allows the consulate to communicate changes in Indonesian policy to partner agencies in Hong Kong (Asosiasi PPTKI Hong Kong (APPIH) 2008d; Interview A 2008). For example, the Indonesian consulate uses the communication mechanisms of this association to deliver ‘letters’ *en masse* to approved agencies in place of communicating with them directly.<sup>81</sup> According to sources in the consulate, the Indonesian government cultivates a close relationship with this association as it has proved to be a ‘useful’ tool with which to deal with common problems experienced by Indonesian migrant workers in Hong Kong (Interview A 2008).<sup>82</sup> In addition to giving the Indonesian government a degree of control over partner agencies, this system ensures that those agencies are protected from competition with other legally registered agencies in Hong Kong. In return for this protection, partner agencies are expected to engage in a range of activities on behalf of the Indonesian government.

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<sup>81</sup> The Indonesian government maintains a list of approved recruitment agencies but does not maintain an accurate database of their contact details. Similarly, addresses, telephone numbers and other details are incomplete or incorrect on the list of blacklisted agencies (Government of Indonesia 2007c). Furthermore, although there are 253 partner agencies in Hong Kong, the consulate’s Web site displays a list of only 193 (Government of Indonesia 2008f). For an accurate list of partner agencies in 2008, see APPIH (2008c).

<sup>82</sup> In the first term of its operation, the organisation’s board of directors was made up of representatives from partner agencies alone; however, in the second term, the Indonesian consulate was allocated a position on the board as the primary advisor (Asosiasi PPTKI Hong Kong (APPIH) 2008b).

Although the Indonesian government officially has no jurisdiction over these Hong Kong-based organisations, the notarisation policy makes it possible for the Indonesian government to enforce its approval system. In addition to the threat of sanctions against their partners in Indonesia, which can be held accountable for the actions of their Hong Kong representatives (Government of Indonesia 1991a), the consulate has created a system through which it directly disciplines errant agencies. Known as *skorsing* – an industrial relations term used in Indonesia to describe the initial stages of the disciplinary process applied to unsatisfactory workers – this system gives Hong Kong-based agencies three warnings before they are blacklisted by the consulate for illegal or otherwise ‘unacceptable’ behaviour (Interview B 2008).<sup>83</sup> Once blacklisted, these agents are not only unable to recruit workers from Indonesia, but they are unable to secure work permits for Indonesian workers in Hong Kong. Requests for endorsements of applications for work visas by blacklisted or unapproved agencies, or by approved agencies for workers who have not used government-sponsored migration channels, are rejected by the Indonesian consulate (Interview A 2008; Interview B 2008). As a result, these applications are not registrable under Hong Kong law. Since this policy has the potential to reduce the profitability of approved agencies by denying them access to Indonesian workers, Hong Kong-based agencies are eager to cooperate with the Indonesian consulate (Interview A 2008).<sup>84</sup>

This does not suggest that Indonesian and Hong Kong law are considered equal. The government of Indonesia recognises the supremacy of Hong Kong law within Hong Kong territory, and frames its regulations accordingly in an attempt to avert negative diplomatic repercussions. Through its territorial articulation of jurisdiction, the Hong

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<sup>83</sup> The regulation which details administrative sanctions for recruitment agencies defines *skorsing* as ‘temporary or complete cessation of agencies’ activities to place Indonesian labour’ in work overseas (Government of Indonesia 2005: section 1(b)).

<sup>84</sup> Interestingly, Indonesian law requires its consular representations to notarise extensions as well (Government of Indonesia 2004:section 58(1)). In 1999, APJATI submitted a request to the Indonesian government to approve an ‘extension fee’ of HK \$7,500, which would have been applicable to Indonesian migrant workers in Hong Kong (Asosiasi Perusahaan Jasa Tenaga Kerja Indonesia (APJATI) 1999). At this time, however, the Hong Kong Administration only permitted agencies to charge fees worth less than HK \$500 for this service.

Kong Administration can enforce final authority over the practices of these actors within its territory. Nevertheless, under Indonesia's 'approval system,' partner agencies are subject to a dual system of regulation. While the government of Indonesia uses these partnerships to achieve objectives that also meet Hong Kong's needs, it uses these partnerships primarily to achieve its own objectives in Hong Kong, such as increasing the quantity of deployed labour through promotion and direct marketing (Interview C 2008). This demonstrates that overseas, private partners of states may be expected to perform roles in conjunction with, or on behalf of, their state partners.

### **Benefits and challenges of an extraterritorial framework**

In accordance with national and international laws which define the scope of Indonesia's consular activities, the government of Indonesia only provides a limited set of services directly from within its consular post. However, through its partnership with Hong Kong-based agencies, the government of Indonesia ensures that other more *ad hoc* services are provided to its migrant worker citizens. As these agencies are expected to represent the interests of their partner agencies in Indonesia – in particular by managing the repayment of recruitment debts held by deployed workers – the capacity of the Indonesian government to use these agencies solely as a regulatory instrument is not without limits. In spite of this, Indonesia can and does use these agencies as a means through which it extends its regulatory framework to govern the overseas phase of its labour export program into Hong Kong territory. This allows the government of Indonesia to manage, and in some cases solve, specific issues related to Indonesian migrant workers.

Because the consulate does not have enough financial and organisational capacity to provide necessary consular services to the almost 120,000 Indonesian citizens working in Hong Kong as foreign domestic workers, it outsources some of these functions to partner agencies (Interview A 2008; Interview B 2008). Through the Labor Attaché, the consulate mediates, and in some cases facilitates, the settlement of

some labour disputes within the consular premises (Interview B 2008). In these cases, typically, the employers of Indonesian migrant workers are represented by agencies (Interview B 2008). However, the vast majority of labour disputes between Indonesian migrant workers and their employers are mediated by agencies in their own office space and without direct assistance from the consulate (Interview B 2008). For this purpose, Hong Kong-based agencies are required to have Indonesian-speaking staff in order that Indonesian migrant workers do not encounter language barriers in their attempts to communicate their problems (Interview B 2008; Government of Indonesia 1991a: section 20(2)). In allowing recruitment agencies to act as a 'front office' of the consulate for some matters, the government of Indonesia can provide a greater volume and higher quality of services to its migrant worker citizens (Interview A 2008; Interview B 2008).<sup>85</sup> As a result of this arrangement, the consulate is freer to focus on providing conventional, consular services – that is, services not related to employment – to these and other categories of its citizens in Hong Kong.

Agents are also required to participate in the registration of Indonesian workers. The Indonesian government requires all citizens to register their personal details and immigration status with its consular representatives upon arrival in and before leaving a foreign country (Government of Indonesia 2006:4).<sup>86</sup> This requirement allows the Indonesian government to maintain an accurate database of its citizens' biodata, which is not always reflected accurately in their passports.<sup>87</sup> The consulate's records constitute an alternate database of details, which can facilitate efforts to repatriate

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<sup>85</sup> Moreover, Indonesian legislation requires partner organisations to provide protection to Indonesian migrant workers in accordance with their placement agreements (Government of Indonesia 2004: section 82).

<sup>86</sup> Indonesian citizens, who do not register in a timely manner risk a fine of Rp. 1,000,000 (Government of Indonesia 2006: section 89(1)). Other countries, such as Australia, merely 'encourage' their citizens to do this (Government of Australia 2008c).

<sup>87</sup> There are cases where Indonesian migrant workers have travelled on passports which do not contain their actual names, dates of birth or places of origin. See the section on faking of personal information in a publication by the Asian Migrant Centre (2006:27-28). In destination countries, Indonesian migrant workers have been prosecuted for 'false representation' by host governments. This causes difficulties for Indonesian consulates and embassies overseas. For example, in 2004, the Indonesian government was unable to determine the actual identities of two workers kidnapped in Iraq (Sijabat 2004; n.d. 2004).

citizens if the need arises (Interview B 2008). For example, in 2007, an Indonesian domestic worker was jailed for ‘false representation’ after submitting two passports, each with a different date of birth, to the Immigration Department in an application for a Hong Kong identification card.<sup>88</sup> In an attempt to ensure that migrant workers comply with their legal obligation to report, the Indonesian government requires agencies to bring migrant workers to the consulate within one week of arrival in Hong Kong. Indonesian migrant workers are then expected to participate in a compulsory ‘Welcoming Program’ at the consulate. This occasion provides the consulate with an opportunity to meet new migrant workers and collect their personal information. In addition, the ‘Welcoming Program’ allows the consulate to explain the role of the consulate and their approved agencies in the protection of these workers’ rights in Hong Kong (Interview A 2008; Interview B 2008). As the nature of some categories of work makes it difficult for Indonesian migrant workers to report to the consular representations of their home government during business hours, Indonesian legislation stipulates that, ultimately, it is the responsibility of agencies to ensure that these workers are registered (Government of Indonesia 2004:explanatory note for 71(1)).

Furthermore, partner agencies are expected to train Indonesian workers to the expected standards of employers. In Hong Kong, the Indonesian government also requires partner agencies to discourage employers from terminating their Indonesian workers’ contracts due to dissatisfaction with their performance at work (Interview B 2008). It is for this reason that the Indonesian government requires partner agencies to have a boarding house and spaces to educate and train Indonesian workers. As a respondent at the Indonesian consulate explained, some Indonesian workers are not

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<sup>88</sup> Sri Hartatik was in possession of three authentic passports issued by the Indonesian government. While the first and third passports had the same dates of birth, issued in 2000 and 2007, the second passport, issued in 2005, contained a different date of birth (Government of Hong Kong 2007b). Archives of Hong Kong court cases show that, between 2004 and 2005, there were at least three similar, but unrelated, cases of ‘false representation’ by migrant workers in Hong Kong. The ruling *HKSAR v. Darsono Tiani* (2004a) declares that Darso Tiani received 12 months for this offence; *HKSAR v. Lastuti* (2004b) declares that that Lastuti received 10 months and *HKSAR v. Warniati* (2005) declares that Warniati received 9 months. Warniati, however, was released from prison prematurely after hearing how a broker in Indonesia had helped her to obtain a passport which misstated her date of birth.

familiar with the technologies of modern, Hong Kong households (Interview B 2008).<sup>89</sup> In an attempt to address this, the Indonesian government offers limited training opportunities in cooking, cleaning, language and childcare at its consular premises. However, in order to provide ongoing and other *ad hoc* training to Indonesian workers, partner agencies are expected to provide these services on the Indonesian government's behalf (Interview B 2008). This function of partner agencies is part of the government of Indonesia's wider strategy to protect the employment of its citizens in Hong Kong. Furthermore, agencies which are negligent in this duty risk being blacklisted by the Indonesian government.

Notwithstanding, the Indonesian government's capacity to maintain these frameworks through which it manages its citizens, is limited, as demonstrated by negotiations around the repayment of migration-related fees. Indonesian migrant workers begin their deployments in Hong Kong with substantial debts, which they incur during the recruitment phase of Indonesia's labour export program in Indonesia.<sup>90</sup> Agencies in Indonesia have the discretion to decide how the recruitment fee may be repaid, and are therefore responsible for its payment. Since Indonesian migrant workers are expected to pay for their recruitment fees once they are deployed in Hong Kong, Indonesia-based agencies have limited ability to ensure that these fees are paid. Therefore, these agencies require their partner agencies in Hong Kong to 'manage' these payments on their behalf, for which Hong Kong-based agencies receive a substantial 'management fee' (Government of Indonesia et al. 2003). The cost of management, in fact, accounts for 25 percent of the total recruitment fee (Government of Indonesia et al. 2003).

Problems arose when it became clear that the Hong Kong-based agencies also had a limited capacity to 'manage' the payment of these fees. Due to inadequate support

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<sup>89</sup> Moreover, a spokesperson from an association of Hong Kong employers of domestic workers explained that Indonesian workers, in comparison to their Philippine counterparts, are, in general, particularly ill-prepared for deployment in Hong Kong households (Interview C 2008).

<sup>90</sup> Although the government of Indonesia has expressed sympathy for domestic workers in regard to their financial situation, it insists that its citizens should honour these debts according to the loan agreements, which these workers have signed (Interview A 2008).

from Hong Kong regulatory frameworks, they and other creditors have resorted to ‘harassment and threat’ in their attempts to ensure that debtors repay their loans (Government of Hong Kong 2008g; Interview A 2008; Interview C 2008). In response, the Indonesian government issued a policy which tied its citizens to these agencies for the first two years of their deployment in order that agents are not compelled to resort to these sorts of methods (Government of Indonesia 2007d; Interview A 2008). In a further attempt to address this situation, the government of Indonesia approved repayment schedules which require that these fees were repaid in the shortest possible period of time, namely through seven months of full wage deductions (Interview A 2008; Interview C 2008; Interview D 2008; Interview E 2008; Interview F 2008; Interview G 2008; Interview H 2008; Interview I 2008; Interview J 2008). This measure was in contravention of Hong Kong legislation, which limits the proportion by which an employee’s wage can be deducted by an employer to fifty percent of any one month’s wage (Government of Hong Kong 1997b:section 32(3)).

In 2007, the Hong Kong Administration released a policy which explicitly prohibited the practice of deducting 100 percent of a domestic workers’ wage. In particular, it warned Hong Kong-based agencies to ‘not get involved in the financial matters between the foreign domestic helper and overseas employment agency [sic]’ (Government of Hong Kong 2008h: answer 6). In response, the government of Indonesia issued a policy which ordered agencies to comply with the Hong Kong regulation while ensuring that they continue to operate in a way that is ‘consistent’ with the stipulations of relevant Indonesian legislation (Government of Indonesia 2008b; Interview A 2008). In an earlier attempt, the government of Indonesia had already ordered Hong Kong-based agencies to reduce the proportion of deductions to an amount consistent with Hong Kong regulations (Government of Indonesia 2007b).

Although there is evidence that illegal practices still occur, in principle, Indonesia’s extraterritorial framework for the regulation of these agencies has been adjusted in order to accommodate Hong Kong law. As suggested above, the management of this

recruitment fee is still problematic. In order to settle this debt upon Indonesian workers' arrival in Hong Kong rather than 'manage' it directly throughout their deployment, Hong Kong-based agencies have engineered alternative finance methods. Largely, these agencies facilitate the negotiation of loans for these workers from public finance companies. In this way, the ownership of these debts shifts from Hong Kong and Indonesian agencies to Hong Kong-based public finance companies. The government of Indonesia recognises that this arrangement, which is closely associated with its labour export program, is damaging its reputation in Hong Kong and has taken measures to address this issue (Interview A 2008). In particular, the consulate has invited Indonesia-based banks to Hong Kong in an attempt to encourage them to open branches locally for the purpose of providing similar loans.

In a related issue, the government of Indonesia instructed APPIH to inform its members of a key Indonesian policy shift regarding the confiscation of Indonesian migrant workers' passports. Although illegal in Hong Kong, this has long been a *de facto* practice by Indonesia's Hong Kong-based recruitment agencies. It ensures that Indonesian migrant workers repay their recruitment fees according to the government-approved repayment schedule, to which these workers agreed before deployment in Hong Kong (Interview A 2008; Interview D 2008; Interview E 2008). To deal with this and other serious issues that affect foreign domestic workers within its territory, the Hong Kong Administration set up an Inter-Departmental Task Group, comprised of the Immigration Department, Labour Department and the police (Government of Hong Kong 2003b:3131, 3135-3136). However, this initiative was ineffective (Interview D 2008). The Hong Kong Administration then put pressure on the government of Indonesia to help manage this practice. Through APPIH, the Indonesian consulate instructed Hong Kong-based agencies to desist from confiscating the documents of Indonesian migrant workers or otherwise risk losing their 'approval' to recruit Indonesian citizens (Government of Indonesia 2007a). An informant at the Indonesian consulate confirmed that Hong Kong-based agencies were 'very responsive' to this threat of sanction, and that the incidence of passport confiscation was reduced as a result (Interview A 2008).

The Hong Kong government has made provisions for external intervention like this because it is incapable of dealing with a number of concerns relating to migrant labour. While the Hong Kong regulatory framework is recognised as one of the most comprehensive in the region, it has proven to be ineffective in the management of some labour-related issues pertaining to migrant worker communities. It is precisely in these ‘regulatory gaps’ that the government of Indonesia seeks to exercise extraterritorial jurisdiction through APPIH. However, while the government of Indonesia is aware of its regulatory authority in this respect, it is also aware that it should not ‘abuse’ this authority (Interview A 2008). As a respondent from the Indonesian consulate emphasised, while partner agencies are bound to the Indonesian consulate, they are Hong Kong-based organisations which are subject to, and protected by, Hong Kong laws (Interview A 2008). This suggests that although the notarisation policy, through its assignment of limited and issue-specific sovereignty to sending states, gives the government of Indonesia direct authority over its citizens and ‘approved’ recruitment agencies, the exercise of this sovereignty depends on political discretion. These governments’ sovereignty over their citizens hinges on the grace of their host which, through its territorial exercise of sovereignty, may retract the assignment of sovereignty by these states over their citizens.

## **Conclusion**

The Indonesian government’s partnership with Hong Kong-based recruitment agencies has demonstrated how public-private partnerships may be used by states in order to act beyond their sovereign borders – thus subjecting private agencies to a dual system of regulation. This case study has shown how the Hong Kong Administration uses legal sanctions while the government of Indonesia uses commercial sanctions to shape codes of conduct for certain Hong Kong recruitment agents. In this way, such actors may be forced to negotiate a workable space within and between multiple, enforceable frameworks of regulation.

This chapter has demonstrated the practical ways in which public-private partnerships can serve as an instrument through which sending-states may articulate jurisdiction extraterritorially, harnessing host state policies in an attempt to maintain and enforce their regulatory frameworks. The examples described here show how these kinds of arrangements may serve to allow partnered states to circumvent more conventional avenues, such as bilateral and multilateral agreements, by relating with, and even acting through, the private sector. In this way, the Indonesian government effectively extended a national, regulatory framework into Hong Kong territory in an attempt to manage a set of issues related to its labour export program within the borders of this state. Importantly, however, this chapter has also shown that – in this example at least – the government of Indonesia recognises the superior status of host country legislation and regulation and customises its extraterritorial mechanisms accordingly. This suggests that Hong Kong still holds the right to final adjudication of practices and conduct by actors within its borders.

## Conclusion

This thesis has explored how attempts by labour sending-states to assist and support their citizens working overseas challenge the assumption that sovereignty is always about territory. As the preceding chapters have demonstrated, sending-states can and do assert authority over conditions and conduct outside their national borders in relation to temporary labour migration. In the Asian context, the governments of Indonesia and the Philippines have demonstrated that it is possible to articulate jurisdiction over matters related to the deployment phase of their labour export programs. These governments base expressions of extraterritorial jurisdiction on claims that they have the right to protect their citizens overseas, especially those deployed through government-sanctioned channels.

The fact that a state like Indonesia can and does exercise limited and issue-specific sovereignty over its citizens in Hong Kong challenges common understandings of the Westphalian system by suggesting that sovereignty does not always imply ‘total control’ over territory. Conventionally, receiving-states have used national, territorially based mechanisms to manage the flow of citizens and non-citizens across their borders. However, as demonstrated in this thesis, Hong Kong’s system of immigration control assigns a clear responsibility to sending-states to control the conditions under which these states’ citizens arrive at Hong Kong’s borders. The government of Indonesia is then able to do so by ‘piggybacking’ on a Hong Kong migration policy, which assigns sending-states limited jurisdiction over their citizens within Hong Kong’s borders – a provision that has allowed the government of Indonesia to establish a degree of authority over those agents it approves to recruit and deploy Indonesian citizens for employment as foreign domestic workers in Hong Kong.

This is not to say that sending-states’ capacity to manage their citizens within Hong Kong’s borders is unlimited, since host states gate-keep, attempting to control other states’ ability to establish authority structures within their national spaces. As

demonstrated here, it has been possible for labour sending-states such as Indonesia to assume a degree of responsibility for the management of temporary labour migrants once within Hong Kong's borders through cooperation with the private sector. Private labour recruitment agents in Hong Kong serve as an extension of Indonesia's government-sponsored labour export program within Hong Kong's borders – not only by promoting Indonesian labour on behalf of the Indonesian government, but also by providing consular services and managing aspects of Indonesia's deployment mechanisms overseas. In this way, the government of Indonesia has effectively established an extraterritorial structure through which it can enforce its authority within the sovereign territory of the Hong Kong Special Administrative Region (China).

As this case study has suggested, in practice sovereignty and jurisdiction are not always total and synonymous with territory. Jurisdiction can also be issue-specific and be exercised over citizens, regardless of their physical location. This extraterritorial relationship is most visible when states assume responsibility for the management of the conditions and conduct of their citizens overseas. Indonesia's extraterritorial assertions of jurisdiction, described here, serve to illustrate this. In an attempt to manage the movement of labour migrants to and across its borders more effectively, the Hong Kong Administration accommodates these limited claims to extraterritorial jurisdiction by sending-states within its territory. In doing so, it adds another dimension to this citizenship-focussed understanding of jurisdiction and sovereignty. The actions of Indonesia and Hong Kong thus both serve to decentre the territorially-based concept of sovereignty that currently defines our understandings of the ways in which states control the ability of people to legally move out of one state's territory and into another's in search of work.

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